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ACCESS TO ELECTORAL RIGHTS *GERMANY*

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Access to Electoral Rights

Germany

Luicy Pedroza

1. Introduction

Presently, in Germany, only resident German citizens have the franchise in elections at all levels. EU citizens have and can exercise electoral rights on roughly equivalent conditions to German citizens in municipal and European Parliament elections. However, resident third-country nationals lack electoral rights of any kind. Time and again throughout the last 25 years politicians of several parties (usually centre to left) have proposed reforms and held debates in legislative forums at all levels to enfranchise third-country nationals. They have also experimented with several legal paths to do so. However, resistance from centre-right parties has consistently blocked changes in this direction. The political participation rights that resident third-country nationals enjoy in Germany are limited to participation in consultative ‘integration-’, ‘foreigner-’ or ‘migrant-’ councils and in trade union assemblies. Although the topic concerning the lack of participation of resident third-country nationals remains depoliticized, pressure from civil society associations, academic forums, churches, trade unions, and other organisations is mounting to reopen discussions on this matter. This is partly motivated by some judicial and constitutional developments in the last years. Two such developments are particularly worth noting. On the one hand, the transposition of Directive 94/80/EC into German law, which enfranchised EU citizens at the local level, made an unprecedented exception to the restriction of the franchise to German nationals only. On the other hand, the justifications included in the recent judgment of the Federal Constitutional Court regarding the franchise of German citizens living abroad called into question the rationality of the requirement that they should have resided in Germany at some point in the past in order to be able to vote from abroad.

In the last three decades important issues related to the voting rights of non-citizen residents and German citizens abroad have been discussed and passed in the German parliament (Bundestag) and the state (Länder) parliaments. However, the issues are ultimately decided by the Federal Constitutional Court. Recently, there have been two important parliamentary negotiations in Germany with regard to voting rights. The first concerns the electoral

formula.¹ The second is of greater significance for this study: the Federal Constitutional Court judged unconstitutional Art. 12, Paragraph 2, phrase 1 of the Federal Electoral Code according to which German citizens living abroad have to comply with a residence requirement of three uninterrupted months in German territory at some point of their lives.² According to the last version of the Federal Electoral Code, in force until 4 July 2012, Germans living abroad could vote in Bundestag and European Parliament elections. The judgment of the Court followed the spirit of three reforms that had consecutively reduced the residence requirement and facilitated the registry of Germans abroad. Mandated by this judgment to legislate anew on the voting rights of Germans abroad, the Bundestag party fractions decided unanimously on 31 January 2013 to change the Federal Electoral Law of Germany in order to further relax the requirements that German citizens living abroad must comply with in order to vote in federal elections.

2. Eligibility: Who has electoral rights under national law?

In German federal elections only those national citizens may vote (and be elected) who are over eighteen years of age, have resided at least three months in the Federal Republic of Germany, and have not been deprived of the right to vote by a judge's decision.³

2.1. Citizen residents

2.1.1. Age: The general age threshold for voting and running as a candidate is eighteen years.⁴ However, in the last two years Bremen and Brandenburg reduced the voting age to sixteen for their parliamentary elections. For passive voting rights all Länder keep the age threshold at eighteen. The reforms to reduce the voting age to sixteen for local elections in several Länder already started in the late 1990s with the latest occurring on 1 November 2012 (Brandenburg, Bremen, Mecklenburg-Vorpommern, Niedersachsen, Nordrhein-Westfalen, Sachsen-Anhalt, Schleswig-Holstein and, most recently, Baden-Württemberg). In the rest of the Länder the Social Democratic Party (SPD) and the Pirate Party, and other societal organisations, are also pressing for reforms to reduce the voting age to sixteen.

2.1.2. Mental disabilities: Persons with mental disabilities have the right to vote in Germany and may be assisted while voting by the person designated by a judge to assist them. A

¹ The composition of the German Parliament is normally fixed on 600 seats. Germany uses the Sainte-Laguë method combining single-member districts and proportional elements. According to this method, voters cast two ballots in a Bundestag election: the first one for a candidate running to represent a particular district (a constituency seat or “direct mandate”), the second one for a particular political party. However, if a party wins more constituency seats through the first votes than it is entitled to according to its share of the second votes, it keeps those additional seats, which are then known as 'overhang mandates' (*Überhangmandate* in German). In the last few decades the problem of overhang seats had the effect of enlarging the Bundestag by dozens of seats. In 2011 the Bundestag passed an electoral reform that seemed to have solved this problem of overrepresentation of majorities. However, on 25 July 2012 the Federal Constitutional Court found that such a solution (applying negative weights to direct-mandate votes) contradicted the spirit of direct, free elections and was thus unconstitutional and mandated the Bundestag to change the electoral formal as to secure that the principle of proportional representation has priority in the formula and that parties which obtain majorities through direct mandate-votes are not overrepresented in the Bundestag through overhang seats. After three months of discussions, on 20 February 2013 a majority in the Bundestag passed the 22nd reform to the Federal Electoral Law in order to ensure a fairer distribution of seats, giving priority to the principle of proportional representation over the direct, personal mandate.

² Residence is defined in quite general terms as “occupying an apartment or otherwise habitually residing”.

³ Bundeswahlgesetz, Art. 12, para. 1.

⁴ Grundgesetz, Art. 38, para. 1.

person can be disenfranchised on grounds of disability only if they have been found to require another persons' service to attend *all of their affairs* (i.e. physical and mental, which is seldom the case) and if this has been proclaimed by a judge. Persons who reside in psychiatric hospitals are disenfranchised⁵.

2.1.3. Persons convicted of criminal offences: In general, persons who have committed crimes keep their electoral rights. However, persons convicted for a crime punishable by imprisonment (by a minimum of one year) are automatically deprived of their electoral rights for five years. Only persons who have committed a crime related to politics (e.g. high treason, electoral fraud) can be disenfranchised on a case by case basis and when a judge has decided it and only for a determinate period. The court may deprive the convicted person of passive and/or active voting rights for a period of between two and five years if the law expressly so provides⁶.

2.2. Citizens abroad

German citizens who are temporarily abroad on election day can vote at all levels by postal vote, having applied for postal voting no later than three weeks prior to any election to the municipality where they are/were entitled to vote while being residents. The postal voting package includes the voting card, a ballot, instructions and two envelopes, one of which is to deposit the marked ballot. They may then send back their vote to their commune of residence or, if they are back in Germany, bring it personally to their assigned polling station before it closes on election day (in which case they are no longer allowed to cast a ballot at the polling station). In the postal voting procedure the voter is responsible for assuring that the vote reaches the commune. In countries where the postal service is unreliable German diplomatic representations may offer to send the postal votes through their courier service. No other methods (proxy voting, electronic voting) are allowed in Germany. Until 2008 it was necessary to provide a justification for postal voting and proofs of the veracity of that justification. A reform in December 2008 eliminated this requisite. Recently, many communes have allowed for postal voting applications to be sent through their websites or via email.

The history of the voting rights of Germans living abroad (labeled “*Auslandsdeutsche*”⁷ in Germany) is long and it has taken a curious turn in the last year. The enfranchisement of Germans living abroad has its origins in imperial rules designed for public servants, according to which bureaucrats who resided in the adjacent territories to the borders of the Empire kept their rights to vote. In 1949 and 1953 this rule was upheld and, when the Federal Electoral Code of 1956 was written, the franchise for Germans living abroad was extended to include all Germans, not only public servants and their household residents. Also, the requisite of residing in the vicinity of the borders was eliminated. When legislators revised the Federal Electoral Code in 1985, they included a *combination model* of conditions that would be applied to Germans living abroad so that such persons might exercise their franchise depending on their place of residence. On the one hand, the model included an unlimited-time franchise for Germans who resided within the borders of the countries of the Council of Europe with the only condition that they should have uninterruptedly resided for at least 3 months in the territory of the Federal Republic after 23 May 1949 (the European condition). On the other hand, the model determined that, for all

⁵ Bundeswahlgesetz, Art. 13.

⁶ Strafgesetzbuch, Art. 45, paras. 1-5.

⁷ German citizens generally enfranchised who live outside the Federal Republic of Germany and who are not registered as residents in Germany.

other places of residence, Germans living abroad were enfranchised with the same past residence requirement but with the further requisite that their date of emigration was within ten years prior to the election (the “period condition”).

The residence requirement of the “period condition” has been progressively relaxed over time through several reforms. For Germans living outside of Europe a reform in 1998 extended the period within which the requisite three months of residence in Germany should have taken place from ten years to 25 years prior to the election. Another reform in 2008 eliminated differentiations between Germans residing outside or inside Europe and eliminated all traces of a period where the three-month requirement should have taken place.

Finally, applied for the first time in the Bundestag elections of 2009, a new phrasing allowed all Germans living abroad who had resided at any point of their lives after 23 May 1949 in the territories of today’s Germany (also the former GDR) to vote. Also, for “returnees” of any kind the three month residence requirement would not apply.

On 4 July 2012⁸ the Federal Constitutional Court judged unconstitutional Art. 12, paragraph 2, phrase 1 of the Federal Electoral Code that regulated the requisites to vote for Germans who are not presently residents in Germany. According to this part of the Code, German citizens living outside European Member States must have resided *at any point in the past* in Germany for three uninterrupted months. The judgment of the Federal Constitutional Court that rejected this regulation responded to a lawsuit filed by two German citizens resident in Belgium (and supported by more than a hundred signatures of Germans living abroad) who had been denied their electoral card and ballot for the Bundestag elections of 2009 because they could not prove to have resided in Germany for three uninterrupted months at any point in their lives. The Court judged that linkage of franchise of Germans living abroad to the requirement of a previous three-month residence in Germany is to be measured against the principles of the universality of the vote and the equal treatment of all citizens regarding the capacity to vote and be elected, which are the foundations of the democratic form of government of the German state.

The judgment of the Court followed the path of developments regarding the electoral rights of Germans abroad by recognizing that the weight of the residence requirement does not justify compromising the principle of the universality of the vote. Because of its authority as interpreter of the principles of membership and participation enshrined in the Constitution, it is relevant here to elaborate further on that ruling. Among the several reasons it gave for its judgment the Court stated that:

- The principle of the universality of the vote does not preclude any differentiation: legislators may define it further, as it happens with the voting age, but they have little room for further restrictions. In any case, differentiations within electoral rights need to be justified with specific and objective reasons that are constitutionally legitimated and at least of equal weight as principle of the universality of the vote.⁹
- To define voting rights, legislators must orient themselves to the political reality, and not to their assessments of abstractly constructed situations.¹⁰
- The reasons that may justify a differentiation are the goals that democratic elections fulfil. Examples of this are: ensuring the safety of the character of the election as a

⁸ BVerfG, 2 BvC 1/11 from July 4 2012, http://www.bverfg.de/entscheidungen/cs20120704_2bvc000111.html consulted on November 2, 2012.

⁹ This is not an official translation, but a free translation by the author. For the original in German see *ibid.*, paras. 30-32.

¹⁰ *Ibid.*, para. 36.

process that integrates the will of the people or ensuring a functional legislature-to-be-elected.¹¹

- Against this background, an exclusion from the active voting rights can then be justified if it is supposed that a particular group of persons does not have the opportunity to participate to a sufficient degree in the communication process between people and state institutions.¹²
- The requirement of a previous uninterrupted three-month residence in Germany creates a differentiation within the voters living abroad which cannot reasonably be legitimised. Legislators have understandably, yet arguably, justified it in the past supposing that without a minimum of three month continuous residence a familiarity with political issues and conditions in Germany is lacking. Also, legislators suppose correctly that it is difficult that the communication between rulers and ruled essential for a vibrant democracy to succeed without a minimum of continuous referral. Yet, plausibility considerations militate against generalising such suppositions. The legislature may take particular account of the fact that the nationality law in Germany is essentially based on *jus sanguinis*. This means that citizenship is mediated by lineage and not lost through long stays abroad, which may result in individuals whose forefathers have not lived in Germany for generations and have no relationship to Germany beyond their German nationality.¹³ However, the requirement of residence addressed by this ruling may not be justified with the argument that, despite their German nationality, Germans living abroad have no relation to Germany since, as descendants of an emigrant family, they have no further connection to Germany but are rather integrated in their country of residence.¹⁴
- With this residence requirement legislators exceed the limits of discretion allowed by the search for balance between the principle of universal suffrage and the communicative function of the vote. The stated aim of the legislator in trying to ensure that there is familiarity with the political situation in the Federal Republic of Germany before voting, through the requirement of a prior three-month stay in Germany, is not necessarily reached by this requirement. The requirement is indeed likely to exclude German nationals without any other connection to Germany from participating in the elections, but it will also exclude those German citizens who are familiar with the political situation and who would like to vote in elections to the German Bundestag. The requirement of a previous stay in Germany simultaneously disenfranchises Germans living abroad who, although at no time having been residents for at least three months in the Federal Republic of Germany, are familiar with the political situation and are affected by it, perhaps because they are border dwellers or because of their involvement in associations, political parties and other organisations spend a considerable amount of their lives involved in the political and social life of the Federal Republic of Germany.¹⁵ In line with Art. 12, para. 2, phrase 2, Germans living abroad who, after their birth, resided three months in Germany but left shortly after that with their parents will have the right to vote when they turn eighteen years old. Similarly, many Germans living abroad may vote who left the Federal Republic of Germany so long ago that their own experiences in Germany are hardly comparable to the current political situation. Thus, a stay at any earlier date is

¹¹ Ibid., para. 39.

¹² Ibid., para. 41.

¹³ Ibid., para. 49.

¹⁴ Ibid., para. 54.

¹⁵ Ibid., para. 56.

not enough to suppose any ‘proximity’ to the political process in the sense of a concretely lived involvement in the democratic affairs of the country.¹⁶

Since Art. 12, paragraph 2, phrase 1 of the Federal Electoral Code¹⁷ was declared incompatible with Art. 38 paragraph 1 of the Basic Law and thus unconstitutional, the German Bundestag was mandated to legislate in order to address this loophole. Germans living abroad were disenfranchised for over six months, until the Bundestag decided on 31 January 2013 with the 21st reform to the Federal Electoral Law that Germans abroad may vote for Bundestag elections if they either a) after being fourteen of age resided at least three months uninterruptedly in Germany and this happened at any time within 25 years before elections, or b) if for other reasons are personally and directly familiar with the political situation in Germany and affected by it.

It should be noted that in Germany the residence requirements for voting from abroad have been progressively relaxed over time through several electoral reforms. Until 2013, there had been a general condition of at least three months of prior residence in Germany. For Germans living outside of Europe a reform in 1998 extended the period within which the three months of residence would qualify for the franchise from ten years to 25 years previous to the election. Another reform in 2008 eliminated not only the differentiations between Germans residing outside or inside of the European Union, but also all traces of a specific time period within which three months of residence were required. Then, applied for the first time in the Bundestag elections of 2009, a new phrasing of the law had allowed all Germans living abroad who had resided at any point of their lives after May 23, 1949 in the territory of today’s Germany (including thus also the former GDR) to vote. Also, for returnees of any kind the three-months residence requirement would not apply. Finally, the most recent reform from January 2013 became unavoidable after a ruling of the Federal Constitutional Court from 4 July 2012 which declared unconstitutional the article of the Federal Electoral Law that required from German citizens living outside the European Union to have resided for three uninterrupted months in Germany at any point in the past.

It is worth noting here that this interpretation of the Court of the voting rights of Germans living abroad without any residence requirement gave new impetus to the debate voting rights of resident immigrants in Germany.¹⁸

2.2.1. Residence in the country: residence in the country at least for three uninterrupted months anytime in the 25 years previous to election day is a condition to exercise electoral rights for citizens abroad, but since 3 May, 2013 the new Federal Electoral Law has entered into force, allowing German citizens who reside abroad and who have never resided in Germany for three uninterrupted months to exercise franchise for Bundestag elections as long as they can prove to have a direct, personal connection and familiarity with the German political situation. This must be accredited before a municipal authority to which they consider to have their closest connection.

¹⁶ Ibid., paras. 52-53.

¹⁷ The version of this Code in force was that of 23 July 1993, last reformed by Art. 1 of the Law to Reform the Electoral and Representative Laws from 17 March 2008.

¹⁸ See “Voting rights of transnational citizens moving forward in Germany” EUDO Observatory on Citizenship News, Published on Monday, 25 February 2013, <http://eudo-citizenship.eu/news/citizenship-news/810-voting-rights-of-transnational-citizens-moving-forward-in-germany>, accessed 14 June 2013.

2.2.2. Citizen residents who are temporarily absent on election day may send their votes via postal voting, having requested the voting materials in a timely fashion for elections at all levels.

2.2.3. Citizens who reside permanently abroad: as of 3 May, 2013 Germans abroad are eligible to vote either if they have resided uninterrupted for at least three months in Germany after age fourteen and if that residence occurred within the last 25 years or if they are otherwise acquainted personally and directly with the political situation in the Federal Republic and affected by it. This acquaintance with and affectedness by the political situation in Germany has to be personally proved and the voting right will have to be conferred upon individual application (i.e. not automatically). A merely passive acquaintance (for example, through the exposure to German media abroad) does not suffice. Germans who are abroad in virtue of their duties to German authorities and German cultural institutions (e.g. Goethe institutes and offices of German political foundations) are covered by this condition, but not only them: also border dwellers who reside along the German borders but work regularly in Germany, and Germans who, despite living abroad, participate in social and political life of Germany through their work for political parties, associations and other German organisations. For the postal electoral package to be sent it is required that Germans abroad formally request to be registered in the electoral roll that is prepared before each election and that this request reaches the municipal authority where they were last registered at least 21 days before election day. The application forms and detailed information for German nationals abroad are usually available already nine months before each election on the homepage of the Federal Electoral Office. Forms for the application to be registered in the electoral roll and to receive the electoral package through postal mail are generally available in diplomatic and consular representations of the Federal Republic of Germany abroad, the Federal Electoral Office, at the municipal electoral authority and on the Federal Electoral Office's website: www.bundeswahlleiter.de.

2.3. *Foreign residents:*

In Germany, resident third-country nationals, even if they have spent most of their lives in Germany, enjoy no electoral rights. This is, again, a terrain where political developments have been so far decided by the Federal Constitutional Court and by the lack of a supporting majority, mainly due to the sustained principled opposition of Christian-Democrat (CDU and CSU) politicians. In October 1990 the Federal Constitutional Court declared unconstitutional the Länder-level reforms¹⁹ which had been passed in Hamburg and Schleswig-Holstein to enfranchise foreign residents with different conditions in each case. In Hamburg, all foreign residents who had resided there for more than eight years were enfranchised, whereas in Schleswig-Holstein, foreign residents with five years of residence were given the right to vote subject to the condition of reciprocity (i.e. enfranchisement was only for citizens from countries where Germans living as foreign residents could vote in municipal elections). The Court's decision also froze similar developments which were under way in Bremen and Berlin.

Although it was never clear that it would have been constitutionally possible to enfranchise foreign residents without a federal constitutional reform, since it would have potentially been incompatible with the homogeneity principle in the federation, after long and cumbersome consultations with legal experts legislators of the four mentioned Länder

¹⁹ BVerfGE 83, 37, October 31, 1990.

decided to try different kinds of reforms short of a federal reform. The 1990 judgment of the Court ruled out the possibility to legislate to this effect at the Länder-level and through secondary laws. The Court clarified that the only ways to enfranchise resident non-citizens were either by facilitating their naturalisation by changing nationality laws, or through a constitutional amendment of the articles that identify the people who are to be governed democratically in Germany as German nationals (Arts. 20, 28 and possibly 116). The latter would require a qualified majority in the Bundestag and a broad ideological consensus.

Ever since that 1990 Court ruling, the cause for electoral rights of foreign residents has advanced and the debate has included different kinds of arguments. After the judgment of the Federal Constitutional Court on the Maastricht Treaty in 1993 (BVerfGE 89, 155), proponents of a universal foreign suffrage (i.e. also for ‘third-country nationals’) have argued that the dogma binding the franchise to German nationality has already been breached and that the distinction between European citizens and other citizens is illegitimate from a democratic point of view. Especially since 2007 the federal party fractions of the Green party (Die Grünen) and The Left (Die Linke) – intermittently supported by the Social Democratic (SPD) fraction – have repeatedly proposed reforms of Art. 20 of the Basic Law so as to allow third country nationals to vote in municipal elections. CDU-CSU, however, consistently opposed such reforms on constitutional grounds, despite the fact that the Federal Constitutional Court made clear in its judgment of 1990 that including long-term foreign residents is a legitimate goal to enhance democratic governance in Germany and that by changing the definition of ‘the people’ the realisation of this goal would become constitutional. Political arguments are seldom deployed by CDU/CSU although under Angela Merkel’s administration the governing parties and ministers have been forced to answer questions in Parliament regarding their rejection of voting rights for third-country nationals. They have argued that extending voting rights to foreign residents is contrary to their integration goals and strategies, which imply that the only path to acquiring voting rights is naturalisation. As for the Liberals, their position on the electoral rights of foreign residents has been fluctuating over time and falls short of a consensus within the party.

It is noteworthy that, despite the low politicisation of this issue and its relative absence from public debate, a variety of non-governmental organisations have supported the cause of voting rights and have organised symbolic elections for third-country nationals as well as protests at polling stations in local, regional and federal elections.

3. Electoral rights of EU citizens

Directive 94/80/EC was transposed into national, Länder and municipal law in the early 1990s, requiring substantive law-making: a federal constitutional reform, reforms to the Länder constitutions and to Länder and municipal electoral codes.

In Germany, the first steps towards transposing voting rights for EU citizens for the European Parliament occurred already in 1978²⁰, in June through the European Elections Law (*Europawahlgesetz*) and in August through the European Elections Regulations (*Europawahlordnung*).

3.1. Local elections:

²⁰ Bundeswahlleiter, http://www.bundeswahlleiter.de/de/europawahlen/rechtsgrundlagen/richtlinie_93_109_eg.html consulted on November 5, 2012.

Directive 94/80/EC was transposed in time for the 1 January 1996 deadline in regional and municipal legislation with the exception of Bremen. Because of its political structure as a city-state, Bremen does not differentiate between local and state-votes, so that the introduction of only communal voting rights for EU-citizens at the national level brought about a dilemma. Either the Bremen constitution would have to change in order to separate election levels or EU-citizens must be allowed to vote simultaneously for the Land parliament in just the same way as German citizens do.²¹ Since a decision of any kind involved constitutional controversies, a long political debate ensued about whether or not to Directive 94/80/EC should be applied. Unable to reach a compromise, the application of the EU directive was accepted, even though it was inconsistent with Bremen law. Furthermore, the Bremen parliament passed two contradictory proposals to solve the problem, one from the Greens and the other from the CDU, thereby obliging parties to negotiate a compromise.

An agreement to reform the Bremen constitution came only in October 1996 with the introduction of a special voting procedure that distinguishes city and state voting, including EU citizens in the first category only.²² Thus, in Bremen, the electoral rights of EU citizens are somewhat reduced relative to the other Länder. This is because the votes of EU citizens (marked by distinctive ballots) are counted differently to those of German citizens so that the former contribute only to the composition of the city-government and not also to the state (Land) government of Bremen. The votes of German citizens, by contrast, are valid for both city and Land elections. However, it must be pointed out that in the territory of Bremerhaven, which officially belongs to the state of Bremen, the participation of EU citizens is weighted equally as that of municipal residents. The exception of the city of Bremen has been accepted since there is a particular overlap of levels of government. Like Bremen, the other city-states in Germany (Berlin and Hamburg) hold no local elections, strictly speaking, but have given electoral rights to EU citizens in their organs of communal government that are equivalent to other Länder in terms of democratic representation in local elections. In Hamburg, this level of government is referred to as “district meetings” (*Bezirksversammlungen*) whereas, in Berlin, it is called the “district assembly” (*Bezirksverordnetenversammlungen*).

The first municipal elections under the Directive were held since it entered into force in 1996 in Bayern, Berlin, Hessen and Niedersachsen; 1997 in Hamburg; 1998 in Schleswig-Holstein, and 1999 in Baden-Württemberg, Bremen, Nordrhein-Westfalen, Rheinland-Pfalz, Saarland and Sachsen.²³

Directive 94/80/EC defined concretely what the Treaty of Maastricht required in order to implement the electoral rights of EU citizens without eliminating completely room for manoeuvre and adaptation in the electoral laws of each member state. In that line, in Germany, only Bayern and Sachsen introduced reservations as to the eligibility rights for certain municipal offices: mayor, councillor and District administrator and deputies. Even in these cases, EU citizens are eligible to become city and community representatives.

As to the procedure, EU citizens are registered automatically in the electoral roll when they register as residents, just as it occurs with German citizens. The exceptions are Bayern and Sachsen, where EU-citizens must declare their will to participate and request to be registered in the electoral roll for each election. There are no additional conditions imposed on EU citizens compared to national citizens.

²¹ The former option was defended by the CDU; the later by the Greens.

²² See the details of these political negotiations in Luicy Pedroza, “But Don't Mention Migration! Explaining the “Failed” Denizen Enfranchisement Reforms in Germany”, DISC Working Paper 15, Budapest, 2011, p. 44.

²³ Report from the European Commission to the European Parliament and the Council on the application of Directive 94/80/EC on the right to vote and to stand as a candidate in municipal elections.

3.2. EP elections for EU citizens residing in the country

In Germany, the most important legal basis for the electoral rights of Germans and of EU citizens in the European Parliament is Art. 6 European Election Law (*Europawahlgesetz*), in force since March 8, 1994 (Federal Gazette I pp. 423, 555, 852) and last reformed by Art. 2 of the Law from 17 March 2008 (Federal Gazette I p. 394)²⁴, transposing Directive 93/109/EC. EU citizens were enfranchised for the first time in the 1994 EP elections.

The same requirements apply for EU citizens residing in the country as for German citizens: they must be over eighteen years of age and registered in the electoral roll. EU citizens living in Germany must decide whether they want to vote in their place of residence in Germany or in their home country. EU citizens who want to vote for MEPs in their country of origin must contact the competent authorities of their home country. EU citizens are entitled to vote in Germany for elections to the European Parliament if they are registered in the electoral roll at least 35 days before election day. Just like German citizens, EU citizens receive an election notification indicating the polling station where they can vote. After a departure from Germany and a re-entry, EU citizens have to resubmit a request for registration in the electoral roll. EU citizens who have been automatically enrolled in the electoral registry while registering their residence in Germany, but want to exercise their electoral rights for the EP in their country of origin must request the municipal authority in Germany to cross them off of the electoral roll at least 21 days before election day. This request will be valid for all future EP elections, unless the EU citizen requests to be registered in the electoral roll again.

The application to register on the electoral roll in Germany for EU citizens is to be delivered through a special form at the community of residence no later than 21 days before election day. As part of their application, EU citizens must submit a solemn declaration that indicates: their nationality and address in the territory of the Federal Republic of Germany; the local authority or the constituency of his/her home Member State; the last electoral roll on which they were registered; that they exercise their right to vote in European Parliament elections only in the Federal Republic of Germany; that in their home Member State they are not excluded from the right to vote; that on election day they have resided at least three months in the Federal Republic of Germany or in another Member State of the European Community; and that they are over eighteen years of age. The applications for registration on the electoral roll for EU citizens, as well as the applications for EU citizens not to be included in the electoral roll, are available at the municipality offices around four months before the election and are usually also downloadable from the internet sites of municipalities.

3.3. EP elections for national citizens abroad.

The electoral rights for EP elections of national citizens residing abroad are generally the same as the electoral rights for the Bundestag, except that that they must also prove that they had a previous residence of three-months in Germany or in a country belonging to the Council of Europe at some point in their lives. The procedure to exercise these rights is through postal voting and the requisites to receive the postal electoral package are identical with the requisites to participate in Bundestag elections from abroad (see section 2.2.3). Ever

²⁴ Yet, this is by no means the only legal source defining the electoral rights of EU citizens. Their rights are defined by a complex system of laws that include, but are not exhausted by the EU Treaties (TEU and TFEU), the *Direkwlakt*, the *Europawahlgesetz* (EuWG), the *Europawahlordnung* (EuWO), the *Europaabgeordnetengesetz* (EuAbgG), the *Parteiengesetz* (PartG), and the *Wahlprüfungsgesetz* (WahlPrG).

since the transposition of voting rights for EU citizens for EP elections, the legislature specified that the residence requirement to qualify for voting rights for these elections could be granted to Germans abroad residing in countries belonging to the Council of Europe. The reason for this early introduction –in contrast to electoral rights for the Bundestag- was the generally “European character” of EP elections.

3.4. Regional and other elections:

EU citizens residing in Germany are not granted electoral rights beyond the communal level under national law.

Regarding other elections, all states, except Bayern, Saarland and the city-states (Hamburg, Berlin and Bremen) extended to EU citizens the right to participate in referenda.

4. Exercising electoral rights

4.1. National and regional elections

4.1.1. Voter registration

In Germany, eligible voters are automatically registered in the electoral roll when they register as residents of their municipality, which is mandatory. Under the legislation that was in force until 4 July 2012, German citizens abroad had to send their requests to be included in the electoral roll and be sent the electoral package via postal mail. Voter registration is the same for all elections, including petitions and referenda.

4.1.2. Casting the vote

The methods available for casting the vote are the same for all elections in Germany and there are only two: voting at the polling station in the district where the voter is registered and absentee voting through mail ballot.

4.1.3. Running as candidate

In principle, German citizens who are older than eighteen years of age are eligible to stand for both Länder and Bundestag elections, according to the German Basic Law. However, for some positions, such as *Bundespräsident* or *Bürgermeister* (local and regional executives) and other government organs, such as the Land parliaments, the age requirement is substantially higher and varies across Länder from 25 to 40 years. Although eligibility to stand as candidate presupposes the right to vote, some German citizens who did not have their permanent residence in Germany and did not obtain the right to vote as a German citizen living abroad could still be elected if they met all other requirements. Citizens can be deprived of their eligibility to stand for election either in case of imprisonment of more than a year (see section 2.1.3), or because a German Court has judged that, on the grounds of other “political” crimes, they must be disenfranchised. In any case, such deprivation of electoral rights may not exceed five years.

4.1.4. Assimilated or special representation of citizens residing abroad

Before the judgment of 4 July 2012, the votes of German citizens residing abroad were aggregated to the votes of the district from which they requested their ballot – a method referred to as ‘assimilated representation’.

4.2. Local elections

4.2.1. Voter registration

The registration procedure is the same for all elections: it is automatic upon registration of one’s residence, which is compulsory. In the municipalities of two Länder, EU citizens have to request to be included the electoral roll, but these are clearly exceptions.

4.2.2. Casting the vote

The methods available for casting the vote are the same for all elections in Germany and there are only two: voting at the polling station in the district where the voter is registered and absentee voting through mail ballot.

4.2.3. Running as candidate

German citizens who are older than eighteen years of age are eligible to stand as candidates in communal elections, according to the German Basic Law.

