

Statement by the Political Accountability Foundation on the conduct of the May 10th presidential election

1. Summary of information regarding the conduct of the election of the President of the Republic of Poland scheduled for May 10, 2020 (as of May 11, 2020)

- The voting scheduled for May 10 did not take place due to lack of legal and organizational preparation.
- On February 5, 2020 the Speaker of the *Sejm* (lower house of parliament) ordered the election of President of the Republic of Poland to be scheduled for May 10, 2020.
- Due to the coronavirus SARS-CoV-2 pandemic, on March 14 the government introduced in Poland a state of epidemic emergency, and few days later, on March 20 - the state of epidemic. The latter, according to provisions of Polish law, does not constitute a state of emergency recognized by the Constitution, therefore it does not have any implications on the scheduled date of election;
- In parallel to legislative amendments, adopted due to ongoing epidemic state and aiming to safeguard public health and protect the economy, the legislative began to introduce changes to electoral legal framework;
- As a result of the changes introduced to election law, while the preparation of election, as well as campaigning were already underway, the National Electoral Commission (NEC), institutional body in charge of administering the election, was partially deprived of its powers, becoming unable to successfully complete the election preparation process;
- The responsibility of NEC was automatically transferred to other bodies of government or municipal administration. Consequently, during the ongoing election preparation process for some time there were no institutional bodies in charge to perform activities necessary to successfully administer voting. This gap was finally filled in on May 9, 2020, i.e. one day before scheduled election day;
- Finally, amendments introduced to electoral legal framework resulted in failure to prepare legal and organizational conditions for voters to cast their votes on May 10 (no ballots, no method and place to cast the ballot, absence of municipal precinct election commission responsible for counting votes and preparing protocols).
- The summary of the current situation (as of May 11, 2020):
 - on May 7 NEC issues a communication informing about the inability to conduct voting on May 10,
 - on May 8 the Council of Ministers issues its position informing about the inability to conduct voting on May 10,
 - on May 10 NEC adopts a resolution stating the lack of possibility to vote for candidates on May 10, which means that within 14 days from the date of publication, in accordance with the Election Code, the Speaker of *Sejm* shall order new election to take place within 60 days from the announcement and on a day off, and
 - on May 11 the Supreme Court issues the communication indicating that it will examine electoral protests against the election of the president only once NEC discloses the election result to the public, and that the NEC's resolution of May 10 "*is not the equivalent of the resolution on the basis of which the voting results are disclosed to the public by National Electoral Commission*".

As a result, voters were deprived of their right to cast a vote in the presidential election on the date indicated in accordance with the Constitution of the Republic of Poland, which created uncertainty as for the interpretation of the law with respect to the conduct and completion of the election scheduled on February 5, as well as regarding the possibility, conditions and dates of scheduling a new election.

2. Introduction (explanation of unprecedented nature of the May 10 election)

On May 10, 2020 in Poland, voting in presidential election scheduled by the Speaker's decision of February 5, 2020¹ took place, although the voters were deprived of their right to cast a vote.

Unprecedented, not only for our country, but also for entire Europe, form of an election without a possibility to cast a vote was a direct consequence of the legal and organizational chaos in the electoral legal framework. The legislative changes, introduced subsequently during the 6-week period preceding the election day, raised considerable doubts in terms of conformity with the Constitution with regards to their form and content. The changes were related to, among others: method of voting, institutional bodies responsible for administering certain parts of the election process, introduction of a new structure of municipal precinct election commissions in charge of counting votes. Thus, raising doubts regarding the final date of the election and the electoral process itself.

The state of epidemic declared on March 20 due to the SARS-CoV-2 pandemic² (preceded by the state of epidemic emergency announced on March 14³), included a large scope of restrictions of civil rights and served as a particular background for the then-ongoing election process (limiting, among others, the possibility to collect signatures required for candidate registration, as well as to carry out the campaign) and for actions necessary to administer the election. The solution, which would legally postpone the election in compliance with the Constitution - announcing a state of natural disaster, as proposed by the opposition parties and many NGOs, did not find the approval of the ruling coalition. On the other hand, the opposition did not agree with the idea to introduce amendments to the Constitution in order to extend the term of the current president by 2 years, which was proposed by one of the junior members of the ruling coalition. Finally, amendments to the electoral legal framework were introduced shortly before the election day, and the voters were deprived of the possibility to express their support for their candidates on the voting day.

The legal status and the form of voting were changing up until the day before the election, i.e. May 9, when the Act on special rules for conducting the election of the President of the Republic of Poland ordered in 2020 entered into force (Act of April 6)⁴. The adopted Act provided for carrying out the election solely by means of postal voting and for appointing a new type of election commissions - municipal precinct election commissions.

Pursuant to the Article 102 of the Act of April 16, 2020 on special support instruments in connection with the spread of the SARS-CoV-2 virus (so called "Shield 2")⁵, the National Electoral Commission was deprived of the powers to, among others, determine the template of the ballot, print ballots and to inform voters about how to vote.

The amendments created a legal vacuum that lasted from the day of the adoption of the above-mentioned Shield 2 Act until the entering into force of the Act of April 6. In other words, from April 16 till May 9 there was no body responsible for such important parts of the election process as printing ballots or informing voters about rules and ways of casting ballots.

¹ Journal of Laws [Dz.U.] of February 5, 2020, item 184, decision of Marshal of *Sejm* on ordering the election of President of the Republic of Poland

² Journal of Laws [Dz.U.] of March 20, 2020, item 491, Regulation of Minister of Health on announcement of state of epidemic in the Republic of Poland

³ Journal of Laws [Dz.U.] of March 13, 2020, item 433, Regulation of Minister of Health on announcement of state of epidemic emergency in the Republic of Poland

⁴ Journal of Laws [Dz.U.] of May 8, 2020, item 827, the Draft Act of April 6, 2020 on special rules for conducting the election of the President of the Republic of Poland ordered in 2020

⁵ Journal of Laws [Dz.U.] of April 17, 2020, item 695, Act of April 16, 2020 on special support instruments in connection with the spread of the SARS-CoV-2 virus

The attempts to fill in that legal vacuum by the actions of the Polish Post (Poczta Polska) (preparing to deliver electoral packages) and by the Polish Security Printing Works (Polska Wytwórnia Papierów Wartościowych - PWPW) (printing ballots) were not based on any existing legal provisions in the existing laws or the Electoral Code on the day they were performed.

3. Current state (as at May 10)

a. Description of legal status

The election was ordered by the Speaker of the *Sejm* in accordance with Article 128, section 2 of the Constitution of the Republic of Poland on February 5, 2020⁶.

Taking into account the nature of this Statement, the most important legal actions undertaken between the date of ordering the election and the election day are specified in the Election Calendar attached to this document.

On May 10, 2020, the National Electoral Commission adopted a resolution (published on the NEC's website at 21:27) stating that there was no possibility to vote for candidates in the election of President of the Republic of Poland ordered for May 10, 2020. NEC declared also that the consequences of such a situation were the same as if there were no candidates running in the election, thus referring to Article 293 §3 of the Electoral Code.

The NEC's resolution is definitive. Once the NEC's resolution is published in Journal of Laws (it has not yet been done), the Speaker of the *Sejm* has 14 days to order a new election for the post of the President. This new election will be subject to the provisions of the Act of April 6, unless new legislation enters into force before election day.

b. Institutional bodies responsible for administering the election (as of May 10)

In accordance with the Electoral Code, in Poland the institution responsible for administering and conducting the election is the National Electoral Commission. The Act of April 6 which entered into force on May 9 granted powers to the Minister of state assets as the additional body responsible for preparing ballot templates, printing ballots, as well as for ballots' delivery to and retrieval from the voters.

4. Election preparation

a. Actions and statements of the National Election Commission

NEC has carried out activities necessary to administer the electoral process within the regulations set down in the Electoral Code from the date of ordering the election, i.e. February 5, 2020. On February 24, NEC adopted a resolution on adoption of the ballot template. Due to the outbreak of the SARS-CoV-2 epidemic in Poland followed by the declaration of a state of epidemic on March 20, including the adoption of certain restrictions regarding the functioning of citizens and institutions, it became problematic to find enough members for precinct election commissions (this stage should have been completed by April 19). Many commissions have not been appointed or were appointed partially, sometimes only with a single member⁷.

⁶ Journal of Laws [Dz.U.] of February 5, 2020, item 184, decision of Marshal of *Sejm* on ordering the election of President of the Republic of Poland

⁷ National Electoral Commission finds it difficult to meet statutory number of members, as many of them resigned. See: Resolution of NEC of 126/2020 PKW of May 4, 2020

The powers of the NEC were restricted by the amendments to the electoral legal framework. The Shield 2 Act of April 16 deprived the NEC of its powers in the field of, among others, preparing ballot template and supervising their printing⁸. Thus the NEC was unable to prepare voting on the designated day, i.e. May 10.

NEC, in its opinion on the Act of April 6 submitted to the Senate, has limited its responsibility only to the election preparation in line with applicable legislation and has not made any observations on the conformity of the proposed regulations with applicable laws and the Constitution.⁹

On the other hand, on May 7 NEC published a communication stating that conducting voting on May 10 is impossible due to legal obstacles adopted by Shield 2 Act, especially due to Article 102.

b. Preparation for the election

The SARS-CoV-2 epidemic, and the introduction of a state of epidemic on March 20, caused a series of complications in preparation and carrying out the election process. Legislative changes from March 31, in particular the Shield 2 Act and Article 102 thereof, have taken away some of the NEC's basic competencies, i.a. the right to determine ballot template, the right to supervise the printing of ballots and their distribution. As for the voting date, the Minister of state assets was in charge of preparation and distribution of electoral packages (in accordance with Act of April 6, adopted by *Sejm* on May 8), together with Polish Security Printing Works (PWPW), which was ordered to print ballots by the decision of the Prime Minister of April 16, 2020.¹⁰

As a part of preparation for postal voting PWPW has begun and probably has completed, being obliged by the above-mentioned Prime Minister's order, printing electoral packages including ballots, statements on in-person voting and postal voting instruction. Both PWPW and the Minister in charge of state assets did not disclose the number of ballots already printed out, the place of printing and storage, the design of the ballot template and if and what elements the template contains to prevent ballot fraud. The ballots template leaked to the public did not seem to meet the requirements set out by the NEC in regulation of February 24, 2020 on ballot template, and to include any elements assuring its security. It should be noted that PWPW obtained the right to print the electoral packages only after the Act of April 6 came into force on May 9, 2020, thus, it seems that the activities it has performed before that date were neither based on applicable laws nor on the Electoral Code.

Pursuant to Article 99 of the Shield 2 Act, the Polish Post took measures to obtain access to voters' personal data included in the electoral register held by local government institutions. This was aimed to prepare the delivery of electoral packages to the voters. It is worth mentioning that at the date of the adoption of the Shield 2 Act, Poczta Polska has not been yet legally included in the election preparation process, this only happened when the Act of April 6 entered into force, i.e. on May 9.

c. Actions and the position of the Council of Ministers

Prime Minister issued on April 16, in accordance with Act of March 2, 2020 (Shield-0)¹¹, an order for PWPW to begin printing ballots. It was motivated by the decision under the Act of April 16, 2020 (Shield-2) to transfer responsibility to print ballots away from the NEC. Although, the Shield-2 Act, depriving NEC of its powers in the field of printing ballots, was adopted 2 days after issuing the above-mentioned decision of Prime Minister, i.e. April 18. The same for Act of April 6 transferring right to print ballots to the body of Minister in

⁸ These powers were supposed to be transferred to Minister in charge of state assets in accordance with the Act of April 6 that has not been adopted till May 9, 2020.

⁹ Letter of NEC, April 24, 2020, reference number: ZPOW-421-10/20

¹⁰ Decision of the Prime Minister of April 16, 2020, reference number: BPRM.4820.2.4.2020

¹¹ Journal of Laws [Dz.U.] of May 7, 2020, item 374, Act of March 2, 2020 on special solutions related to the prevention, counteracting and combating of COVID-19, other infectious diseases and crisis situations caused by them

charge of state assets, that has not been adopted until May 8, i.e. two days before election day. Thus, it remains questionable if the order issued by the Prime Minister was legally binding.

As a consequence of amendments adopted to the electoral legal framework and attempts to introduce changes to the election administration, the Council of Ministers decided on May 8 that *"it is not possible to conduct the election of the President of the Republic of Poland on the date ordered by Speaker of Sejm of the Republic of Poland, i.e. on May 10, 2020"*¹².

d. State of preparation to conduct voting on May 10

The preparation to conduct voting on May 10 has not been completed.

- voters have not been informed about the place and method of voting.
- municipal precinct election commissions, responsible for counting votes and preparing protocols, have not been appointed.
- Ballots, along with electoral packages, have not been delivered to the voters.
- NEC and Council of Ministers stated the impossibility to conduct voting on May 10.

5. Election day (May 10, 2020)

The voting on May 10 did not take place.

6. Election observation mission - the activity of the Political Accountability Foundation

On the election day voting did not take place, and municipal precinct election commissions were not appointed, therefore PAF has decided to observe the activity of District Election Commissions (DEC).

The PAF's observers tried to come into contact with each of the 49 DECs, but only in four cases they have obtained information from members of delegate offices of the National Election Office (Krajowe Biuro Wyborcze). The obtained information has confirmed that none of the DECs worked on election day.

7. Possible course of events (as of May 11, 2020)

a. Position of NEC

Already in the evening of the election day, i.e. May 10, NEC has adopted a resolution stating the lack of possibility to cast a vote for candidates on May 10, stating moreover that this has the same consequences as the case described in Article 293, paragraph 3 of the Electoral Code which outlines that in the event of lack of candidates or if only one candidate is running in presidential election, the Speaker of the *Sejm* shall order (within 14 days) a new election to take place within 60 days since the announcement. The election day is to fall on a day off.

b. Position of Supreme Court

On May 11 the Supreme Court issued the communication regarding election protests indicating that it would examine the protests against the election of the president only after the NEC discloses the election result to the public; and that the NEC's resolution of May 10 (mentioned above) *"is not equivalent to the resolution on the basis of which the voting results are disclosed to the public by the National Election Commission"*¹³.

¹² Official Gazette of the Republic of Poland "Monitor Polski" of May 8, 2020, item 404, position of Council of Ministers of May 8, 2020 on the possibility of conducting the election of the President of the Republic of Poland on May 10, 2020

¹³ Communication of Supreme Court, May 11, 2020 (http://www.sn.pl/aktualnosci/SitePages/Wydarzenia.aspx?ItemSID=653-0dc69815-3ade-42fa-bbb8-549c3c6969c5&ListName=Wydarzenia&fbclid=IwAR3xNUWT9is59DZomm64XyfvMkROI2a8WYX9S4TdwQdesAaM_AKqqV0VgI8)

c. Position of Parliament

On May 11, a new draft act regarding *special rules on conducting the election of President of the Republic of Poland ordered in 2020 with the possibility of postal voting*¹⁴ was submitted to the *Sejm*, lower house of Parliament.

8. Plans of the Political Accountability Foundation

PAF is planning to continue observing the ongoing electoral process and the new presidential election, once it begins. We are also planning to issue an opinion on the new draft act on postal voting.

¹⁴ *Sejm*, paper No. 368 of May 11, 2020