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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

JOINT OPINION
ON THE DRAFT WORKING TEXT AMENDING
THE ELECTION CODE OF
“THE FORMER YUGOSLAV REPUBLIC OF MACEDONIA”

by
the Venice Commission
and the OSCE Office for Democratic Institutions and Human Rights
(OSCE/ODIHR)

adopted by the Venice Commission
at its 70th plenary session
(Venice, 16-17 March 2007)

on the basis of comments by
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and OSCE/ODIHR experts

INTRODUCTION

1. Following a request from the Ministry of Justice of “the former Yugoslav Republic of Macedonia”, the OSCE Office for Democratic Institutions and Human Rights (OSCE/ODIHR) and the Council of Europe’s Venice Commission have reviewed possible modifications to the election code currently under consideration (CDL-EL(2007)004; cf. CDL-EL(2006)021).¹ Most of these amendments concern the proposed introduction of voting abroad.

2. With a view to support the efforts of the authorities of “the former Yugoslav Republic of Macedonia” to further improve the legal framework for elections in line with OSCE commitments, Council of Europe standards and other international best practices for the conduct of democratic elections, the OSCE/ODIHR and the Venice Commission offer for consideration to the Government the following recommendations.

3. This document should be read together with the “Joint Opinion on the Electoral Code of the Former Yugoslav Republic of Macedonia”, provided by the OSCE/ODIHR and Venice Commission and adopted by the Council for Democratic Elections at its 17th meeting (8-9 June 2006) and the Venice Commission at its 67th plenary session (Venice, 9-10 June 2006; CDL-AD(2006)026).

4. The present document has been adopted by the Venice Commission at its 70th plenary session (Venice, 16-17 March 2007).

INTRODUCTION OF VOTING ABROAD

Voting Abroad – General Issues

5. Measures for allowing citizens abroad to vote have been implemented in a number of countries, but vary widely in scope and approach. No precise international standards exist for implementing such measures, but elections abroad should generally meet the same standards for democratic elections as in-country procedures. The design of a system for voting abroad depends on the particular circumstances of a country, including its administrative, infrastructure, budget constraints, in-country election arrangements and level of public confidence.

6. Organising voting abroad is a complex exercise requiring considerable resources. Its introduction should be carefully considered by all election stakeholders in an inclusive and public process so that confidence in the election process is maintained. Expert advice should also be sought to consider various alternative approaches.

7. Arrangements for voting abroad must strike a balance between extending the franchise to eligible voters and ensuring the integrity and transparency of the vote. In countries where there are concerns regarding basic electoral issues such as the accuracy of the voter register or the integrity of the voting process on election day, voting abroad has sometimes been a compounding factor, regardless of whether or not this is justified.

Financial and Administrative Aspects

8. Organising voting abroad has financial and administrative implications, which should be thoroughly considered. Implementing a program to vote abroad is generally costly and requires careful planning. As no reference is made in the proposed text to the budget, such a reference could be included. All agencies involved in voting abroad should be consulted during the budget

¹ This document has been drafted on the basis of an English translation of the draft amendments provided by the Ministry of Justice. Any legal analysis based on translated laws may be affected by issues of interpretation resulting from translation. The version of the submitted draft amendments is dated October 2006.

process, including the Ministry of Foreign Affairs, the State Election Commission and the Ministry of Justice.

9. The proposed text suggests that diplomatic staff and diplomatic offices will be used for voting abroad. "The former Yugoslav Republic of Macedonia" is limited to some 45 diplomatic offices abroad, which could cause difficulty for some voters who would like to take advantage of this opportunity. Some citizens abroad who live in a country without diplomatic representation or who live a long distance from a diplomatic office might feel that they are not afforded equal chances to participate. Consideration could therefore be given to establishing additional polling stations in locations where a certain qualified number of citizens make a request to set up a polling station, well in advance of election day, to the respective diplomatic office. In any country where voting abroad is implemented, formal permission should be requested well in advance of elections from the host authorities for conducting voting abroad.

Defining the Electorate Abroad

10. An important and sensitive question regarding voting abroad relates to exactly who will be enfranchised with the proposed changes. Article 22 of the Constitution affords all citizens over 18 who have not had their rights revoked by court the right to vote. If adopted, the proposed text would allow "citizens ... that are temporarily working or staying abroad on the election day and are registered in the voters' list according to the registers of the competent authority" the possibility of voting in diplomatic offices for the presidential and parliamentary elections (article 6²). Voting by citizens staying temporarily abroad has already been a feature of the current election system, but voters have had to return to the country on election day to vote. With the proposed changes, the possibility to vote from abroad is added to the possibility of voting in-country for presidential and parliamentary elections.

11. According to the definition offered in the proposed text, citizens that are "temporarily working or staying abroad" are those who "are citizens of Republic of Macedonia that have reported last residence in Republic of Macedonia, and on the election day are temporarily staying abroad from three months to one year or are temporarily working or staying abroad more than one year according to the registers of the competent authority" (article 2).

12. From this wording, it would seem clear that only those citizens who have been staying abroad less than one year or who are registered as temporarily abroad would be eligible to vote abroad. At the same time, any citizen abroad for less than three months would not be eligible. This could be seen as an arbitrary obstacle to enfranchisement for those citizens and should be reviewed.

Date for Voting Abroad

13. According to the draft amendments, voting abroad would be conducted in diplomatic offices seven days prior to the regular election day (article 113a (1)). Such a long advance period does not appear to be necessary and would require many arrangements, for instance the printing of ballots and other materials, to be completed much earlier. Consideration could be given to conducting voting abroad simultaneously with in-country voting. If counting is conducted in the diplomatic offices (see below), there should not be any undue delays in the process.

Administering the Vote Abroad

14. According to the draft text, the electoral boards for the voting abroad are composed of Foreign Ministry employees, who would include the regular staff of the diplomatic office and

² When referring to the draft amendments, references are to articles of the election code that would be changed rather than the articles in the proposal.

would often have pre-existing hierarchical relationships. While electoral board members for in-country voting are selected at random from among civil servants, this would not appear to be practical for voting abroad. However, consideration might be given to some exchange of staff between diplomatic offices and the Foreign Ministry so that the board members are less directly connected to each other. Furthermore, electoral board members could be recruited among citizens that are available in the particular country, either upon recommendations from mainstream parties, or on a case-by-case basis. With the proposed arrangements, facilitating the presence of list representatives and observers becomes increasingly important (see below).

Registering to Vote Abroad

15. Proposed changes would allow registered voters who are temporarily resident abroad to apply to a diplomatic office for being listed to vote in that particular location (articles 6 and 46). Those who do not register to vote abroad could still return to the country and vote on election day. Extracts from voter lists would be organized both by municipality and by diplomatic office (article 47). The extracts of the voter lists are to be published for general review in the diplomatic offices. Article 49 (2) should also require that the voter list extracts be published for inspection in the local offices of the regular registration authorities, together with the regular voter lists for the municipalities.

16. An alternative approach would be to compile voter lists for out-of-country polling stations on an *ad hoc* basis on election day. This would seem feasible at least for parliamentary elections, which do not have a turnout threshold. In this case, each citizen who comes to the polling station and presents a valid passport of the former Yugoslav Republic of Macedonia would be allowed to vote. His/her name, mother/father's name and family name, unique citizen number, date and place of birth, and last registered permanent residence (including name of municipality, village, street and street number) would be recorded in the voter list. *Post factum*, however, the relevant authority must check whether there had been attempts for abuse by comparing the in-country voter lists with the out-of-country ones, using the unique citizen numbers. Obviously such an approach would also broaden the number of eligible voters to all citizens outside of the country.

The Conduct of Voting Abroad

17. In the proposed text, voting would be conducted according to article 113-a at the diplomatic offices, but votes would not be counted there (article 40 (6)). A protocol would be filled out containing the total number of voters registered to vote there, the number having voted and the ballots used and not used (article 113-a (4)). Then the ballots would be put in sealed envelopes, one for each municipality (article 113-a (5)). If there is one ballot box and the ballots are sorted by municipality after the voting is over, strict procedures should be in place to secure the secrecy of the vote. Some municipalities may have very few – possibly only one – voters at a diplomatic office, and it may therefore be simple for the staff to identify individual votes by intention or by chance. Authorities could consider introducing secrecy envelopes or other measures in order to ensure the secrecy.

18. According to the proposed text, after the vote in the diplomatic offices, the voting material would be sent via the State Election Commission to the respective Municipal Election Commissions (article 31). According to article 37 paragraph 2 point 15 the Municipal Election Commissions would sum up the results from the diplomatic offices. There is, however, no procedure in article 118 (which covers the reception of voting material from the electoral boards) for how the votes would be recorded. Would there be a separate protocol for the out-of-country ballots and, in such case, is there a minimum number of votes that can be separately accounted for in order to maintain the secrecy of the vote? Procedures should be developed for cases where Municipal Election Commissions receive the ballots uncounted and where they

will have to produce protocols from actual counts. Consideration should also be given to assess whether such procedures might cause delay in announcing preliminary and final results.

19. Alternatively, the vote count could also be conducted at the polling station in the diplomatic office, in the same manner as in-country polling stations. In such a case, results protocols and other sensitive election material from all polling stations in a foreign country could be handed over to the Consul General. He/She would counter-sign the result protocols and fax them to the State Election Commission (or to the Ministry of Foreign Affairs to be forwarded to the State Election Commission). Faxed result protocols would be considered "official" for the purpose of announcement of official election results by the State Election Commission. The Consul General should keep the original protocols and other sensitive election materials and mail them to Skopje with the next diplomatic mail service. Such an approach would avoid any possible delays in returning uncounted ballots to the State Election Commission.

20. While the proposed text assumes that votes abroad would be distributed to the municipality of a voters' residence, alternative methods for distributing votes could also be considered – for example, (a) by creating a virtual district for voters abroad, in particular if initial experience indicates that such voters participate in large numbers, (b) by assigning votes abroad to a particular in-country district, or (3) distributing them, in some proportion, among the six election districts. Such an approach would be administratively easier than distributing ballots back to the original municipality of the voter's residence.

Presence of Observers in Voting Abroad

21. The presence of observers and accredited representatives of political parties or candidates are key elements for the transparency of the vote, and should also be present during voting abroad. In article 113-a the representatives are not mentioned as opposed to in article 113 which covers advance voting for military personnel and detained persons. Article 22 on accredited representatives is valid even for the polling stations abroad, but one should be careful not to make any unintended differences between the articles 113 and 113-a in this respect. The amendments should clearly authorise both political party representatives and domestic non-partisan observers to be present during the entire process of setting up and conducting voting abroad.

22. Even though it may be more difficult for parties to provide representatives abroad, it will not be impossible. Parties may have their supporters living abroad and these could be accredited as the list representatives. In the same way, domestic non-partisan observers could be organised by civil society groups that regularly carry out such efforts. All measures should be taken to include such representatives and observers.

OTHER ISSUES INCLUDED IN THE DRAFT PROPOSAL

The Election Commission of the City of Skopje

23. The Election Commission of the City of Skopje represents a level of commission between the Municipal Election Commissions (of the municipalities within the City of Skopje) and the State Election Commission, and its mandate only includes the elections of the members of the Council and the Mayor of the City of Skopje. The proposed changes to Article 37 outline the authorities of this commission. In order to make the rules fully consistent, authorities should consider adding to Paragraph (2) item 16 (previously 15) that in the case of elections to the Council and Mayor of the City of Skopje the election material is to be submitted to the Commission of the City of Skopje (not directly to the State Election Commission).

Penalties for Election Violations

24. Several provisions in the proposed text deal with penalties for election violations. The main change is to convert all fines from Denars to the equivalent amount in Euro, in order to be consistent with the penal code.

Campaign Donations

25. In article 83 some substantial changes are introduced: permission to fund a campaign by party membership fees has been included. In addition, a new paragraph (3) allows persons and legal entities to fund advertisement material within the amounts limiting campaign donations. The new paragraph (3) should clearly state "... and legal entities *other than those listed in paragraph (1) of this article...*"

26. The reporting of funds and their transparency has been strengthened with a new Article 83-a that would require each organiser of a campaign to keep a register of donations. The register includes the name of each donor and the register should be made public. However, the provisions does not clearly state that anonymous donations are prohibited. In addition, such registers should include a list of all campaign expenditures.

Early Campaigning

27. In article 181 a new paragraph (2) is introduced where a rather substantial fine is introduced for those not "respecting the timeframe for commencement and completion of the election campaign". The definition of "election campaign" is very broad: "public presentation of candidates, confirmed by the authorized election management bodies, and their programs in the pre-election period of the respective election process". Regular political activities seem to fall under the term and it seems unreasonable to be subject of a fine if a party makes "public presentations" of their candidates prior to the start of the 20-day campaign.

28. Early campaigning rules should only apply to special media regulations, such as free airtime, the allocation of clearly designated free space for posting of campaign material and the provision of state funding. The proposed text should therefore be reviewed.

Conclusive remarks

29. While the proposed text deals primarily with the issue of voting abroad, it includes several other issues, as detailed above. However, a more thorough review of the election code could be conducted and other additional issues could be considered for inclusion in the proposal. The Joint Opinion on the Electoral Code published by the Venice Commission and the OSCE/ODIHR in June 2006 (CDL-AD(2006)026) could be consulted in this regard, as well as the OSCE/ODIHR Final Report on the 5 July 2006 Parliamentary Elections.

30. Additional amendments could include measures to strengthen the complaints and appeals process. In particular, rules of evidence for the State Election Commission review of complaints should be specified, and all complaints should receive a response; the procedure for protection of candidate rights during an election campaign before the courts of first instance should be reviewed and clarified; and Supreme Court hearings to consider election-related appeals should be held in sessions open to the public.

31. In order to further increase transparency in the tabulation process, the election code should be amended to clearly task the State Election Commission with publishing all election results, including by polling station, electronically and in a timely manner.

32. In order to avoid a cycle of failed elections for President, the requirement to repeat the election from the outset if the 50%+1 turnout threshold fails to be met, should be removed from the election code following amendment of the Constitution in this regard.