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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)
AND
OSCE OFFICE FOR DEMOCRATIC INSTITUTIONS AND HUMAN RIGHTS
(OSCE/ODIHR)

DRAFT JOINT OPINION
ON
THE ELECTORAL CODE
OF “THE FORMER YUGOSLAV REPUBLIC OF MACEDONIA”

on the basis of comments by
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I. Introduction

1. On 13 November 2012, the Monitoring Committee of the Parliamentary Assembly of the Council of Europe asked for the opinion of the Venice Commission on the Electoral Code adopted by the Parliament of “the former Yugoslav Republic of Macedonia” on 13 November 2012 (CDL-REF(2013)013).

2. On 17 August 2012, the OSCE/ODIHR and the Venice Commission had provided informal comments on the draft laws amending the Electoral Code and the Draft Law on Amending and Supplementing the Law on Political Party Financing of “the former Yugoslav Republic of Macedonia”, following the request of the Ministry of Justice of 10 July 2012. In addition, in October 2011, a previous Joint Opinion on the Electoral Code of April 2011 had been adopted by the OSCE/ODIHR and the Venice Commission (CDL-AD(2011)027) and another former Joint Opinion had been adopted on the 2008 amendments of the Electoral Code.¹

3. The November 2012 amendments of the Electoral Code were adopted against the background of lack of political consensus and cooperation between the government, the opposition, various other interested groups. The leading opposition party, the Social Democratic Union of Macedonia (SDSM) demanded, among other things, new amendments of the Electoral Code in December 2012 or they would boycott the local elections to be held on 24 March 2013. The Electoral Code was subsequently amended twice a few weeks before the local elections to extend the deadline for candidate registration. Altering the legal framework so close to an election is not consistent with good electoral practice.² However, the latter amendment enjoyed cross-party consensus.³ The Venice Commission and the OSCE/ODIHR would like to stress the importance of an inclusiveness process and a constructive dialogue among all political forces and stakeholders in any further amendments to the Electoral Code.

4. On 15 And 16 May 2013, a Delegation of the Venice Commission and OSCE/ODIHR conducted a joint visit to Skopje in light of the preparation of this opinion. Meetings were held with representatives of the Minister of Justice, the State Electoral Commission, main political parties from the ruling coalition and from the opposition (such as VMRO-DPMNE, SDSM, DUI and DPA), as well as civil society. The information and views shared with the experts during and after the visit have been taken into consideration in this opinion.

5. The Draft Joint Opinion is based on an unofficial English translation of the Electoral Code and without possibilities for further clarifications. It should be noted that any legal review based on translated laws may be affected by issues of interpretation resulting from translation.

6. *The present opinion was adopted by the Council for Democratic Elections at its *** meeting (Venice, ...) and by the Venice Commission at its ** plenary session (Venice, ...).*

II. Reference Documents

7. The Electoral Code was reviewed for compliance with international standards and good practices. This Joint Opinion should be read in conjunction with the following documents:

¹ CDL-AD(2009)032.

² See Venice Commission Code of Good Practice in Electoral Matters. Guidelines and Explanatory Report (18-19 October 2002; [CDL-AD\(2002\)023rev](#)), II.2.b: “*The fundamental elements of electoral law... should not be open to amendment less than one year before an election.*”

³ An analysis of the situation before and during the local elections of 24 March and 8 April 2013 can be found in the OSCE/ODIHR Election Observation Mission’s Statement of Preliminary Findings and Conclusions., <http://www.osce.org/odihr/elections/100311>.

- Electoral Code, unofficial translation of the Electoral Code consolidated with the amendments passed in November 2012 (Official Gazette No 142/2012; CDL-REF(2013)013).
- Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE (29 June 1990).
- Document of the Moscow Meeting of the Conference on the Human Dimension of the CSCE (3 October 1991).
- Code of Good Practice in Electoral Matters – Guidelines and Explanatory Report. Adopted by the Venice Commission at its 52nd session (18-19 October 2002; CDL-AD(2002)023rev).
- Joint Opinion on the revised Electoral Code of “the former Yugoslav Republic of Macedonia”, adopted by Venice Commission and OSCE/ODIHR (14-15 October 2011; CDL-AD(2011)027).
- Joint Opinion on the Electoral Code of “the former Yugoslav Republic of Macedonia” as revised on 29 October 2008 by the Venice Commission and OSCE/ODIHR (5 August 2009; CDL-AD(2009)032).
- Opinion on the Electoral Code of “the former Yugoslav Republic of Macedonia” by the Venice Commission (15 December 2008; CDL-AD(2008)036).
- Joint Opinion on the Electoral Code of “the former Yugoslav Republic of Macedonia” by the Venice Commission and OSCE/ODIHR (21 March 2007; CDL-AD(2007)012).
- Joint Opinion on the Electoral Code of “the former Yugoslav Republic of Macedonia” by the Venice Commission and OSCE/ODIHR (10 July 2006; CDL-AD(2006)022).
- OSCE/ODIHR final report on 24 March and 7 April 2013 municipal elections.⁴
- Parliamentary Assembly of the Council of Europe Report on the observation of the 5 June 2011 early parliamentary elections.
- OSCE/ODIHR final report on the 5 June 2011 early parliamentary elections.
- OSCE/ODIHR final report on the 22 March and 5 April 2009 presidential and municipal elections.
- OSCE/ODIHR final report on the 1 June 2008 early parliamentary elections.
- Parliamentary Assembly of the Council of Europe Report on the observation of 1 and 15 June 2008 Parliamentary elections.

III. Executive Summary

8. The amendments introduced to the Electoral Code follow some of the recommendations previously made by the Venice Commission and the OSCE/ODIHR, changing certain provisions which were not in accordance with democratic standards. The amended Code is therefore an improvement over the previous Code.

9. The main changes can be described as follows:

- A new Article 8(a) provides an additional safeguard to ensure the adequate separation of the state and political parties whereby members of the government and deputy ministers would be limited to performing the “technical” duties, necessary to perform their office once they become candidates.
- Provisions on political party and campaign finance reporting and auditing have been strengthened in respect of timeliness, transparency, instructions, and training. However, certain challenges remain in respect of (a) the discrepancy in the nature of thresholds for campaign donations between individuals and legal entities, (b) a lack of detail regarding the itemisation of campaign finance expenditures, (c) the lack of

⁴ OSCE/ODIHR reports on previous elections in “the former Yugoslav Republic of Macedonia” are available at: <http://www.osce.org/odihr/elections/fyrom>.

auditing of campaign finance reports prior to election day, and (d) the absence of a deadline for auditing annual political finance reports.

- Deadlines have been introduced in the Electoral Code for courts to decide on complaints against broadcasters as submitted by the Broadcasting Council.
- A requirement has been introduced that the minutes of State Election Commission (SEC) sessions be made public on their website, thereby enhancing transparency.
- The rights of voters under house arrest have been clarified, although the secrecy of the vote has to be preserved.

10. A number of previous recommendations of the Venice Commission and the OSCE/ODIHR 2011 Joint Opinion remain unaddressed, including:

- The review of the system and arrangement for out-of-country voting.
- Restrictive campaign regulations related to the length of the campaign, and to the broad definition of campaign activities that require further amendments.
- The need for a detailed campaign coverage rules for media.
- The different thresholds for campaign donations by individuals and legal entities; it is currently discriminatory and grants an unfair advantage to large entities.
- The current threshold of 50 per cent registered voters (not of votes cast) to win the presidential election in the first round remains disproportionate and could result in a second round even when one candidate defeats all other candidates by a large margin. The continuation of a voter turnout requirement for a second round (requiring a majority of votes with a threshold of 40 per cent of registered voters) could lead to cycles of failed elections.

11. The OSCE/ODIHR and the Venice Commission stand ready to provide assistance to the authorities in their efforts to improve the legal framework for elections and bring it more closely in line with OSCE commitments and international standards. Equally, it must be emphasised that the political will to fully and effectively implement the law is necessary to ensure that elections are administered in line with international standards.

IV. Comments on revised Electoral Code

A. On voters lists, right to vote, stand for office and registration of candidates

12. The new Article 8(a) of the Electoral Code, as amended in November 2012, states that from the day of their nomination as electoral candidates, members of the government or deputy ministers shall perform the office “technically” by undertaking the “necessary” activities for the operation of government. Those activities deemed to be necessary are described in the law. This Article is consistent with recommendations made by the Venice Commission and the OSCE/ODIHR concerning the development of safeguards to ensure sufficient separation between the state and party. In addition, the list of prohibited activities is now precise and well-defined. It includes: expenditures of state budgetary funds (exceptions are listed in the law which regulates the financing of political parties’ election campaigns, not subject of this joint opinion); initiation of public infrastructure reconstruction programmes and exceptional budgetary expenditure for salaries, pensions, state benefits, or other payments from the state budget or from the public funds; disposal of state capital; as well as signing of collective agreements.

13. Equality of opportunity must be guaranteed for parties and candidates alike in order to ensure a neutral attitude by state authorities.⁵ The new Article 8(a) is a welcome provision which should help to avoid the misuse of public resources for electoral campaigning. It should

⁵ Code of Good Practice in Electoral Matters, I.2.3.a.

still be noted that the use of public financial resources for campaigning of governing political parties quite often does not take place during the campaign period, but have been foreseen in the budget beforehand.

14. Article 8(a) should be further strengthened in order to be more effective in avoiding the misuse of public resources for the campaign, especially for limiting public spendings before election campaign. A further provision should be added to regulate the campaign activities of ministers during municipal elections and when they take up an active role in the campaign.

15. Article 65 is also amended adding in paragraph 5 that “for each nomination, the candidate needs to make a written, irrevocable consent”. There might be situations (e.g. unexpected health problems) which should at least for some period before the elections be a reasonable basis for the revocation of the consent. In addition, the Electoral Code is currently silent concerning the withdrawal of candidates and lists of candidates after they have been confirmed by the election administration. This could benefit from further regulation; in particular, safeguards should be established to ensure that conditions for such withdrawal are not used as a means of pressure on candidates to withdraw.

16. Several recommendations which were made in the 2011 Joint Opinion remain valid, as the Electoral Code has not been modified in this respect. These include:

- Article 7(2), guarantees the right to be elected to citizens s “*with active legal capacity*” and likely refers to mental capacity. It was recommended that “this provision should mention that a court decision has to attest a lack of capacity, depriving a citizen of his/her political rights, as long as this is not settled in another text”.⁶
- Articles 6 and 7 still do not allow foreigners to vote or stand for elections to municipal councils and mayor. As recommended in the Venice Commission Code of Good Practice in Electoral Matters, it would be suitable for the right to vote and stand for local elections to be provided to long-standing foreign residents after a certain period of residence.⁷
- The same is applicable to Article 64(2), which provides “that candidates for members of parliament have to declare belonging to an ethnic community.” This should not be compulsory.⁸
- Article 67.2 should also be modified as indicated in the previous opinion.⁹
- The issue of use or abuse of information from the voter lists remains insufficiently addressed by the Electoral Code. As previously stated, “the legal framework should clearly state the permitted usage of information obtained from the voter lists and whether the information can be used for the campaign activities of political parties and candidates”.¹⁰

B. Out-of-country voting

17. Out-of-country voting was implemented for the first time in the 2011 early parliamentary elections. Taking into account the complexity of this exercise and the type of arrangements needed, several recommendations were given in the previous opinion, mainly concerning the creation of a different system for out-of-country voting from the one used in-country, which did not seem justified.

18. Several remarks have not been addressed, including:

- The composition of the Electoral Boards (EBs) for out-of-country voting, which mirrors the composition of those for in-country voting, but which could result in considerable

⁶ CDL-AD(2011)027, paragraph 11. See Venice Commission Code of Good Practice in Electoral Matters, I.1.1.d.iv. See also European Court of Human Rights, case of *Alajos Kiss v. Hungary* (application no. 38832/06), Judgment, 20 May 2010.

⁷ CDL-AD(2011)027, paragraph 14. See the Code of Good Practice in Electoral Matters, I.1.1b.ii.

⁸ *Ibidem*, paragraph 16. Code of Good Practice in Electoral matters, I.2.4.c.

⁹ CDL-AD(2011)027, paragraph 17.

¹⁰ *Ibidem*, paragraph 20.

expense. The 2007 Joint Opinion suggested that “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”.¹¹

- The complaints and appeals provisions concerning out-of-country voting do not include a clear timeline and need further clarity.¹²
- Articles 147(2) and 148(5) regarding the responsible bodies for the appeals against commissions’ decisions should be harmonised.

C. Election administration

19. The Electoral Code maintains a three-tiered election administration system which consists of the State Election Commission (SEC), Municipal Election Commissions (MEC) and EB.

20. A new point 5(a) is added to paragraph 2 of Article 31, to mandate that the order of candidates and the lists of candidates in municipal elections are determined by the drawing of lots. This is a positive step so that all candidates are treated equally when it comes to the position on the ballot. Corresponding amendments are made to Articles 37 and 68 to harmonise these changes. Articles 37 and 68 are further amended to transfer this competence from the MECs to the SEC.

21. Article 31 is further amended by the addition of point 43(b), which directs the SEC to take minutes of its meetings and publish them on its website. This is a positive step in making the work of the SEC and the administration of elections more transparent and implements a recommendation from the OSCE/ODIHR Final Report on the 5 June 2011 early parliamentary elections. However, a further provision providing that the minutes should be posted on the website in a timely manner should be added.

22. In another positive step, Article 43 is clarified to ensure that those voters held under house arrest can exercise their right to vote. A new Article 113(6), specifies that a separate empty ballot box be provided for this purpose. This might be problematic, since it can lead to ballot boxes with only one ballot paper inside, potentially undermining the secrecy of the vote. It would be more suitable to use the same ballot box used for homebound voting under Article 111(4) or to ensure that all marked ballots are mixed with the ballots from the regular ballot box before counting.

23. Several other issues which were highlighted in the 2011 Joint Opinion remain still valid, as they have not been addressed:¹³

- SEC members are required to have a legal degree, although this could be a discriminating criterion.
- The need to specify the number of the mandates the president, vice-president and members of the SEC can serve.
- The need to adopt a detailed dismissal procedure in line with civil and criminal laws, as well as with international standards. The reasons why a member of an election administration can be dismissed should be detailed to provide transparency and to ensure that future SECs cannot change or abuse the rules.
- One third of the members of the SEC should be able to request that a meeting be called and not only the majority, as currently stated in the Electoral Code.

¹¹ See Joint Opinion CDL-AD(2007)012, paragraph 14.

¹² Joint Opinion CDL-AD(2011)027, paragraphs 33-36.

¹³ *Ibidem*, paragraphs 38-43.

D. Campaign

In general

24. The definition of electoral campaign, contained in Article 69(a) of the Electoral Code, amended in 2011, is too broad. Normal political activities and campaigning are fundamental rights and should be allowed and encouraged at all times. This broad definition is a serious matter of concern since the campaign includes regular activities that should be guaranteed by the freedom of speech. This broad definition has also resulted in many complaints by rival political parties that they have engaged in early campaigning. As previously stated,

“The need for campaign regulations is mainly related to extra rights and access to media during campaign and special regulations of equitable access, and to special regulations of funding and spending by contestants. In addition, the free access to places for posters, *inter alia*, may be different during a campaign. Political activities as such should not be forbidden at any time, not even promoting candidates which are not formally nominated but which may be at a time closer to elections. This should be addressed in future amendments”¹⁴.

25. The same applies to Article 81 and the request for a campaign organiser to inform the appropriate branch of the Minister of Internal Affairs (MoIA) 48 hours in advance of holding a pre-election rally on public places. The fact that Article 187 imposes a substantial fine for failing to notify the MoIA of any rally, whether or not it is held in a public place, remains overly restrictive.

Campaign finance

26. A revised Article 71 introduces the requirement that parties, coalitions, or independent candidates must obtain a unique tax number for the purposes of opening a bank account for the election campaign. The new Article also clarifies that all campaign finance contributions and expenditures must go through the election campaign account. These are positive developments in addressing gaps previously identified in the Electoral Code.

27. Article 83(b) is amended by the addition of a new paragraph 2 that clarifies that the registry of donations maintained by organisers of election campaigns must include data on donations from entities that are directly or indirectly related to the political party or under its control. While this should improve the transparency of campaign financing, further clarity on what constitutes indirect relation with a political party could be provided in the Electoral Code.

28. A new paragraph 4 is added to Article 84(b) to specify that Ministry of Finance instructions on how to complete campaign finance reports should form a part of the templates created by the Ministry. This is a positive step that should improve the information available to voters concerning the financing of campaigns and promote consistency in filling out financial disclosure forms. Although the Minister of Finance developed a template which required more detail on expenses it did not foresee the itemisation of all expenses as previously recommended by the OSCE/ODIHR. The Ministry of Finance is encouraged to take up this recommendation when developing templates and instructions for completing forms.

29. Paragraph 1 of Article 85 is amended to lengthen the deadline for submission of final campaign finance reports by electoral contestants from 15 to 30 days. In addition, a new paragraph 6 is added to Article 85 that mandates the State Audit Office to conduct an audit within 60 days of filing the financial report. This should strengthen the mechanism for auditing campaign financing as recommended in the 2011 OSCE/ODIHR Final Report. However,

¹⁴ See Joint opinion CDL-AD(2011)027, paragraph 49.

contrary to recommendations made in this Final Report, no deadlines have been introduced for auditing interim campaign finance reports.¹⁵ The disclosure of audited interim reports before election day would increase transparency and assist voters in making an informed choice before they cast their votes.

30. A new paragraph 8 is added to Article 85 that requires the SEC, State Audit Office, and the State Commission for Prevention of Corruption to enter into a memorandum of understanding to detail how they will share information on determined irregularities found in financial reports and what subsequent measures should be taken against the involved entity. In order to strengthen this provision and to improve the prosecution of those who violate campaign finance regulations, the memorandum should be made public and its provisions binding.

31. A new Article 177(a) establishes new sanctions, in addition to any misdemeanour liability, for infringement of provisions related to limitations on campaign expenditures and submission of campaign finance reports. An infringement can result in the suspension or, full or partial loss, of reimbursement for campaign expenses as provided by the state. The decision to impose this penalty rests with the SEC upon a proposal of the State Audit Office. The aggrieved party may file an administrative dispute against the SEC decision. This is a positive step in improving the compliance with campaign finance laws. Imposing a financial sanction for an infringement of campaign finance laws is logical and the proposed Article includes language that makes the sanction imposed proportional to the infringement committed.

32. Articles 187 and 189 are technical amendments that clarify that misdemeanour liability exist for coalitions or submitters of independent candidate lists, in addition to political parties, for infringement of campaign finance provisions.

33. The discrepancy in the nature of thresholds for campaign contributions between individuals and legal entities has not been revised. Paragraph 2 of Article 83 limits donations from private individuals to EUR 5,000, while the limit for legal entities is 5 per cent of their income from the previous year. The current provisions are discriminatory and grant an unfair advantage to large entities.

34. In addition, The Electoral Code would merit from detailed provisions for campaign finance reports should there be a second round of elections. Article 84 should clarify whether or not the MKD 180 per voter expenditure limit applies to expenditures made in both rounds of elections when they are held. In order to better enforce this limitation and determine if there are violations during municipal elections, the Minister of Finance should also develop a report template for municipal elections, breaking down expenditures by municipality.

E. Media

35. The 2011 OSCE/ODIHR Final Report on the early parliamentary elections remarked that detailed campaign coverage rules for the media were not incorporated into the Electoral Code. The 2011 Joint Opinion (paragraphs 61-63) made the same comments, which have not been addressed and are repeated here:

- Campaign coverage rules for the media should be incorporated in the Law on Broadcasting Activity and the Electoral Code, rather than being adopted for each election through rulebooks.

¹⁵ The templates developed for the 2011 early parliamentary elections only required electoral contestants to report categories of expenditures with an amount spent for each category but no detailed breakdown. This made it difficult to determine exactly what funds were spent on and does not allow for the full scrutiny of reports.

- The Electoral Code and the Law on Broadcasting Activity should be harmonised on the issue of the amount of paid political advertising which media are allowed to broadcast. The Electoral Code limits the amount to 15 minutes per hour while the Law on Broadcasting Activity permits a maximum of 12 minutes per hour.
- The meaning of “equitable access to media presentation during election campaign” should be clarified.

36. Three new paragraphs are added to Article 76(b) to establish deadlines for courts to resolve misdemeanour cases filed by the Broadcasting Council against media that breach the Electoral Code. In previous recommendations, it was considered that this Article established deadlines that were too lengthy and did not ensure timely remedies. This issue has been addressed to provide a timely complaint and appeal procedure. While the time-limit for submitting an appeal (48 hours) and deciding on it by the court (48 hours) is shorter than suggested in the *Code of Good Practice in Electoral Matters*, which in its point II.3.3.g refers to 3 days, this change can provide for a timely resolution of complaints.

V. Complaints and Appeals

37. Article 147 of the Electoral Code still includes a requirement that the complainant submit an email address for receiving correspondence. This should be clarified so that all voters have the same rights to access the complaints process. As previously recommended, any means of communication should be possible, providing that the deadline is respected.

38. Article 31(2)35 has not been amended to delete the requirement that two complaints be filed in a given polling station before the SEC examines the election material.¹⁶ This should be deleted as it undermines the right to effective legal remedy. Moreover, Article 31(2) 35 and 31(2) 37 should be harmonised to clarify that the SEC acts upon the complaints, regardless of their number. In addition, a detailed procedure for the SEC to resolve complaints should be developed.

39. There is still a conflict between Article 37(2)16 and Article 100(5), which tasks the MECs to decide upon complaints and Article 148(1) which vests the power for deciding complaints with the SEC. These provisions should be harmonized to clearly indicate which of the commissions has jurisdiction over the complaints.

40. The provisions of Article 151(1), which detail the situations in which the results in a polling station should be annulled by the SEC, should be amended as previously recommended in the 2011 Joint Opinion.¹⁷ The current version of Article 151 states that the SEC “shall” annul the results in a polling station if one of the listed irregularities has occurred, no matter how severe. This could result in the disenfranchisement of all of the voters in a given polling station even though the alleged irregularity was minimal and was not proven to have affected the results.

41. Article 73 still limits the filing of campaign-related complaints by candidates to situations where the rights of the candidate are violated “by preventing and disturbing the opponents’ campaign.” As previously stated in the 2011 Joint Opinion this is overly restrictive and the qualifying phrase should be removed so that it is clear that candidates have the right to complain about all violations of their rights.¹⁸

¹⁶ See Joint opinion CDL-AD(2011)027, paragraph 65.

¹⁷ *Ibidem*, paragraph 68.

¹⁸ *Ibidem*, paragraph 74.

V. Conclusions

42. The revised Electoral Code, as amended in November 2013, address some of the recommendations pointed out in previous Joint Opinions and OSCE/ODIHR election observation mission reports on “the former Yugoslav Republic of Macedonia”.

43. The most important amendments adopted after the last Joint Opinion touch upon the issue of the separation of the state and political parties, registration of candidates, media, political party and campaign finance reporting and auditing, clarifications on the right to vote and to be elected.

44. Still, there remain many issues which need further consideration, as recommendations issued in former opinions have not been followed. This is specifically the case with regard to thresholds for campaign donations, publication and tabulation of election results, complaints and appeals procedures, the turnout requirement in presidential elections and the system and arrangements for out-of-country voting.

45. To ensure the integrity of the electoral process, as well as to enhance public confidence, it is essential that the Electoral Code be implemented fully and effectively. The Venice Commission and the OSCE/ODIHR are aware of the reinstatement of the Working Group chaired by the Minister of Justice with participation of representatives from the government institutions, parliamentary groups, election administration, civil society and the international community. This group is charged with working on further amendments to the Electoral Code to implement previous recommendations. The importance of an inclusiveness process and a constructive dialogue among all political forces and stakeholders in any further amendments to the Electoral Code is key.

46. The Venice Commission and the OSCE/ODIHR continue to stand ready to assist authorities in their efforts to create a legal framework for democratic elections in conformity with Council of Europe and OSCE commitments and other European and international standards.