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**DRAFT REPORT ON
THE COMPATIBILITY OF REMOTE VOTING
AND ELECTRONIC VOTING WITH THE DEMANDS
OF THE DOCUMENTS OF THE COUNCIL OF EUROPE**

on the basis of comments

by

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I. Introduction

1. *At the second meeting of the Multidisciplinary ad hoc Group of specialists on the legal, operational and technical standards for e-enabled elections (IP1-S-EE) on 18 and 19 September 2003, the Venice Commission expressed its willingness to render an opinion on remote voting, taking account of both the traditions of remote voting in member States and current developments in e-enabled voting.*

2. *Twenty-three countries replied to the questionnaire. The replies will be analysed below (see point III of this opinion). The analysis will also include the legal situation in Germany, a State which has not participated in the IP1-S-EE's deliberations.*

II. The requirements of Council of Europe documents

1. Article 3 of the Additional Protocol to the Convention

3. Under Article 3 of the Additional Protocol to the European Convention on Human Rights (hereafter, the "AP"), "The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature."

4. This obligation, together with the guarantee of freedom of expression under Article 10 and of freedom of association under Article 11 of the ECHR, are held to be the main guarantees of a democratic system. Without the last two freedoms, the right to free elections would be stripped of all effective meaning.

5. According to the established case-law of the European Court of Human Rights, Article 3 (AP) refers not only to the positive obligation on Contracting States to organise free elections using secret ballot, but also guarantees the individual right to vote and to stand for election, although this is not explicitly stated in Article 3. In the Court's opinion, universal and equal suffrage is included in this right (Cour EDH, judgment of 2 March 1987, *Mathieu-Mohin and Clerfayt*, series A 113, § 54). As holders of subjective rights, individuals may draw on this provision directly.

6. There are several aspects to the content of Article 3 (AP): its personal and substantive scope, the "legislature" and universal suffrage. In general, every person has the right to rely on the rights guaranteed by Article 3: nonetheless, the majority of Contracting States grant the right to vote only to nationals of the State in question. Article 3 refers to the "people" without clarifying the content of this term. However, in line with European constitutional tradition, "the people" is made up only of citizens of the State. The EurCourtHR has specified that the scope of Article 3 (AP) extends to equal treatment for all citizens (EurCourtHR, judgment of 2 March 1987, *Mathieu-Mohin and Clerfayt*, series A 113, §54).

7. In addition, Article 3 guarantees the individual right to vote and to stand for election, in addition to free and secret suffrage. Elections should be organised in such a way as to ensure free electoral choice. They should also take place in circumstances that ensure the secrecy of the ballot.

8. All the same, the Court has so far failed to clarify whether the guarantees in Article 3 also apply to the rights of political parties, since these are not expressly mentioned in the ECHR. They may, however, cite the rights and freedoms guaranteed to associations in the meaning of Article 11 of the ECHR (EurCourtHR, judgment of 30 January 1998, *Unified Communist Party of Turkey et al.*, RJD 1998-I, § 25). Given their roles in a democratic and pluralist society, it would be logical for political parties to be able to rely also on the right to be elected under Article 3 of the AP.

9. In giving tangible form to the ECHR's preamble concerning "an effective political democracy" in the High Contracting Parties, Article 3 of the AP guarantees "free elections" in particular, without obliging the contracting States to establish a certain political democracy. However, the ECHR obliges States to set up a "legislature" which is directly elected by the people. The ECHR does not define the concept of "legislature" explicitly, but in any case it does include national parliaments. The concept must be interpreted on the basis of the constitutional structure of the State in question (EurCourtHR, judgment of 2 March 1987, *Mathieu-Mohin and Clerfayt*, series A 113, §53). In federal States such as Germany, Austria, Belgium or Switzerland, the parliaments of the federated States (the Länder, regions and communities or cantons) are also considered as "legislatures" in the sense of Article 3 (Eur.Comm.H.R., decision of 11 September 1995, *Timke*, DR 82-A, pp. 158ff). In contrast, local authorities' deliberative assemblies are not considered legislators, since they are endowed only with statutory powers (Eur.Comm.H.R., decision of 5 July 1985, *Booth-Clibborn et al.*, DR 43, pp. 236, 247 and onward.). Equally, the scope of Article 3 does not extend to elections for the Head of State or participation in referendums (EurCourtHR, judgment of 7 September 1999, *Hilbe*, RJD 1999-VI).

10. The rights arising from Article 3 of the AP are not absolute, since they are subject to implicit limitations. The contracting States enjoy a wide margin of discretion in deciding the conditions for universal suffrage and the electoral system. However, these conditions and limitations should serve a legitimate purpose and should not be disproportionate (EurCourtHR, judgment of 2 March 1987, *Mathieu-Mohin and Clerfayt*, series A 113, § 52).

2. The Venice Commission's Code of Good Practice in Electoral Matters

11. The "Code of Good Practice in Electoral Matters" (hereafter, "the Code")¹ is a second source which serves to establish criteria. It is in two parts: firstly, the "guidelines" which are based on the principles of the European electoral heritage adopted by the Council for Democratic Elections on 3 July 2002 and by the European Commission for Democracy through Law ("the Venice Commission") on 5-6 July 2002, and, secondly, the "explanatory report" which expands on, defines and clarifies the principles set out in the guidelines, integrating, as necessary, recommendations on detailed points.

12. The Code defines the "European electoral heritage" through two aspects: the principles of the European electoral heritage (the "hard core") and the conditions for implementation of these principles. The principles of the European electoral heritage are universal, equal, free, secret and

¹Doc. CDL-AD (2002) 23rev, adopted by the Council for Democratic Elections on 16 October 2002 and by the Venice Commission on 18-19 October 2002. This text has been approved by the parliamentary Assembly and the Congress of Local and Regional Authorities of Europe, and the Committee of Ministers recommended its dissemination.

direct suffrage, as well as the organisation of elections at regular intervals. The conditions in which they are implemented concern respect for fundamental rights, regulatory levels and stability of electoral law, procedural guarantees and the electoral system.

13. The “hard core” of the European electoral heritage is primarily composed of international standards. At universal level, this refers to Article 21 of the Universal Declaration of Human Rights and, in particular, Article 25, section b. of the International Covenant on Civil and Political Rights, which expressly provides for all of these principles except direct suffrage, which is the implicit outcome. At European level, the common rule is Article 3 of the AP, which expressly sets out the right to regular elections with free and secret suffrage.

14. According to guideline I.3.2. of the Code of Good Practice in Electoral Matters, postal voting should be allowed only where the postal service is safe and reliable. It may be confined to people in hospital, prisoners, persons of reduced mobility or electors residing abroad. Fraud and intimidation must not be possible.

15. Paragraph 38 of the explanatory report deals with postal voting. According to the explanatory report, postal voting is frequently possible throughout the western world, although the arrangements differ widely from one country to another. Thus, postal voting may be very widely practiced in one country, and forbidden in another due to the likelihood of fraud. It may only be permitted where the postal service is safe – in other words, protected from deliberate manipulation – and reliable, in that it operates correctly. Proxy voting is permissible only if subject to very strict rules, again to avoid fraud; the number of proxies held by any one elector must be limited.

16. These practices should not be encouraged in the new democracies given the problems with their postal service, in addition to all the other difficulties inherent in this kind of voting, including the heightened risk of “family voting”. Subject to certain precautions, however, postal voting can be used to enable hospital patients, persons in custody, persons with restricted mobility and electors resident abroad to vote, in so far as there is no risk of fraud or intimidation. This would dispense with the need for a mobile ballot box, which often causes problems and risks of fraud. Postal voting would take place under a special procedure a few days before the election.

17. As for electronic voting, the Code states in section I.3.2. that this should only be used if it is safe and reliable. In particular, electors must be able to obtain confirmation of their votes and correct them, if necessary, respecting secret suffrage. The system’s transparency must be guaranteed.

18. According to paragraph 42 of the explanatory report, several countries already use mechanical and electronic voting methods or are preparing to do so. These techniques present a clear advantage when several elections are held simultaneously, even though certain precautions are needed to minimise the risk of fraud, for example by enabling the voter to check his or her vote immediately after casting it. Clearly, it is important to ensure that ballot papers are designed in such a way as to avoid confusion. In order to facilitate verification and a recount of votes in the event of an appeal, it may also be provided that a machine could print votes onto ballot papers; these would be placed in a sealed container where they cannot be viewed. There should also be some kind of device for mixing the ballot papers so that if it proves necessary to open the container for checking, papers cannot be linked to particular voters – for example, those turning out early or late in the day.

19. Paragraph 43 states that electronic voting methods must be secure and reliable. They are secure if the system can withstand deliberate attack; they are reliable if they can function on their own, irrespective of any shortcomings in the hardware or software. Furthermore, the elector must be able to obtain confirmation of his or her vote and, if necessary, correct it without the secrecy of the ballot being in any way violated.

20. Finally, the system's transparency must be guaranteed in the sense that it must be possible to check that it is functioning properly (§44 of the explanatory report).

III. A summary of comparative law, in order to define a “European standard”

21. The following analysis is based on the replies to a questionnaire prepared by the Multidisciplinary *ad hoc* Group of Specialists on the legal, operational and technical standards for e-enabled voting (IP1-S-EE).²

1. States which do not permit remote voting

22. Remote voting is categorically forbidden in the following eight countries, both for voting within the national territory or from abroad: Albania, Croatia, Cyprus (on account of constitutionality issues), the Czech Republic, Moldova, Poland, Slovakia and Turkey.

2. States which permit restricted remote voting (abroad)

23. In a few countries, remote voting is only possible for persons who are voting in another country: this is the case in Austria, Belgium, Greece, Italy, the Netherlands, Norway and Sweden. However, the conditions and arrangements for remote voting differ in certain respects.

24. In Austria, for example, votes cast abroad using an “electoral card” must be certified by an authority comparable to an Austrian public notary, by the Austrian official representation in the foreign country in question, or by an adult of Austrian nationality (§60 of the Federal Law on Elections to the National Council).

25. Belgians who are outside the country may vote in legislative and European elections by post, in consulates or embassies (personally or by proxy) or in a polling station in Belgium (personally or by proxy) (Article 180ff of the Electoral Code).

26. The Greek constitution states that for national elections, Greek citizens who are out of the country may vote using postal voting or other “appropriate means”. To date, however, there has been no specific law on this subject.

27. In Italy, postal voting abroad is permitted only for “political electoral consultations” and “constituent referendums”. There is no supervision of the vote (law n° 459 of 27 December 2001).

²IP1(2003) 54.

28. Dutch citizens who are abroad may vote by postal ballot for elections to the Lower Chamber of Parliament and to the European Parliament (electoral law, sections M 13 and onwards).

29. In Norway, all overseas electors who are unable to contact a returning officer may vote by post the day before the election date for parliamentary and municipal elections (law on the Representation of the People, 2002, § 8-2 [3]).

30. In Finland, remote voting from abroad is only permitted for participation in consultative municipal referendums (law on the procedure for consultative municipal referendums, 656/1990).

31. In France, remote voting has been made available on an experimental basis since 2003 in the North America constituency, for elections to the “Higher Council of French Citizens Abroad” (Order n° 2003-396).

32. In Slovakia, a draft law on parliamentary elections was recently submitted to Parliament, providing for remote voting from abroad. This law is scheduled to enter into force on 1st February 2004.

3. States which permit unrestricted remote voting

33. Remote voting is permitted in seven countries without restrictions, even within the national territory. These countries are Germany, Bosnia and Herzegovina, Denmark, Spain, Estonia, the United Kingdom and Switzerland.

34. Postal voting has long been recognised and accepted in Germany. Article 14 of the Federal Law on Elections (“Bundeswahlgesetz”) recognises postal voting as equivalent to traditional ballots. The procedure for postal voting is regulated in Article 36 of the law. The electoral authorities must first provide the elector with an “electoral card” (“Wahlschein”) which enables him or her to take advantage of postal voting. The elector must then send his or her ballot paper voting a special envelope, ensuring that the letter reaches the electoral commission by 6pm at the latest on election day. On the electoral card, the elector must make a solemn undertaking to the Chair of the constituency’s electoral commission, stating that he or she has personally filled in the ballot slip. Under Article 156 of the German Criminal Code, anyone making a false declaration is liable to a maximum of three years’ imprisonment or a fine.

35. In Bosnia and Herzegovina, remote voting is regulated by the Dayton Peace Agreement and the electoral law. Citizens of Bosnia and Herzegovina who are resident abroad or temporarily out of the country may vote by post (Articles 1.5 and 3.13 of the electoral law).

36. Some states – specifically, Denmark, Spain, Estonia and Sweden – even allow for an electoral procedure of “advance voting”, which usually includes postal voting prior to election day.

37. Since 1980, all Danish electors have been able to vote in advance in polling stations designated by the electoral law, or even at home. In the latter case, the law states that two election officials must be in attendance. Danes who are abroad may vote in advance in all Danish diplomatic or consular missions (the “Folketing” election law, 2001, part 8, articles

53 onwards). The situation in Sweden and Estonia is similar to the Danish model. In Estonia, advance voting is also permitted in special premises designated in the electoral law. Postal voting, however, is only permitted for electors who are out of the country.

38. In Spain, advance voting is permitted in all elections, for electors both within and outside the country, but is possible only by postal voting (implementing law 5/1985 on the general electoral system).

39. Since 1994, all Swiss citizens are entitled to vote by post in national elections and referendums. There are no particular preconditions for remote voting, merely the right to vote (Article 5, paragraph 3 of the federal law of 17 December 1976 on political rights).

40. In the United Kingdom, postal voting is available on request for all elections (see the “Representation of the People Act 2000”). It was introduced as early as 1918. The elector and a witness must sign a “statement of identity”, which must be included in the envelope containing the ballot paper. The elector then sends this to the returning officer. Electronic voting is only permitted in municipal elections, at the request of a local authority.

4. Summary

41. Based on the reports from the 23 Council of Europe member States participating in the group of experts for Integrated Project 1 “Making Democratic Institutions Work”, and taking into consideration the legal situation in Germany, we can define a “European standard” as follows: in eight member States, postal voting is categorically forbidden. In certain States, postal voting is only permitted for persons who are out of the country on the date of the election. However, seven member States have arrangements for remote voting or postal voting within the national territory. Of these, mention should be made of those systems which follow the “Nordic model”, where remote voting prior to the election date (advance voting) is an important element of the particular election systems.

42. It may be concluded that remote voting constitutes a common electoral procedure in a great number of Council of Europe member States. The diversity of constitutional systems in the member States demonstrates the impossibility of identifying a single form of remote voting as the “European rule”. Nonetheless, certain measures to promote personal and secret suffrage exist: they constitute a common European standard and are consequently contained in the Venice Commission’s Code of Good Practice in Electoral Matters.

IV. The compatibility of e-enabled voting with Article 3 of the Additional Protocol and with the “Venice Commission’s” Code of Good Practice in Electoral Matters

1. Compatibility with the “Venice Commission’s” Code of Good Practice in Electoral Matters

43. Although the “Code of Good Practice in Electoral Matters” is not a binding document, it does nonetheless set out a European standard which could influence the interpretation of treaty-based rules, in particular Article 3 of the Additional Protocol (see *infra* 2.).

44. Guideline I.3.2 of the Code states that electronic voting should be accepted only if it is secure and reliable. In particular, electors must be able to obtain confirmation of their vote and correct it if necessary, while respecting secret suffrage. The system's transparency must be guaranteed. Any violation of secret suffrage should be sanctioned (guideline I.4.d.).

45. In paragraph 42 onwards of the explanatory report, this guideline is clarified as follows:

Although mechanical and electronic voting methods present clear advantages when several elections are taking place at the same time, certain precautions are needed to minimise the risk of fraud, for example by enabling the voter to check his or her vote immediately after casting it. In order to facilitate verification and a recount of votes in the event of an appeal, it may also be provided that a machine could print votes onto ballot papers; these would be placed in a sealed container where they cannot be viewed. All the methods used should enable the confidentiality of the ballot to be guaranteed (see explanatory report, §42). Electronic voting methods are "secure" if the system can withstand deliberate attack; they are "reliable" if they can function on their own, irrespective of any shortcomings in the hardware or software (§ 43). The system's transparency must be guaranteed, in the sense that it must be possible to check that it is functioning properly (§ 43).

46. According to guideline II.1.a., democratic elections are not possible without respect for human rights, in particular freedom of expression and of the press, freedom of circulation inside the country, freedom of assembly and freedom of association for political purposes, including the creation of political parties. Restrictions of these freedoms must be in conformity with the ECHR and, more generally, have a basis in law, be in the public interest and comply with the principle of proportionality (cf. §60 of the explanatory report).

47. It may be concluded that, on the one hand, the institutionalisation of postal voting and e-enabled voting is, in principle, compatible with the Code of Good Practice. On the other hand, their compatibility depends primarily on adequate provision, through national legislation and legal practice, of the prescribed conditions, taking particular account of technical and social conditions.

2. Compatibility with Article 3 of the Additional Protocol

48. Article 3 of the Additional Protocol does not refer explicitly to the acceptability of remote voting and electronic voting. Nonetheless, it should be noted that elections which fail to respect the principle of secret suffrage cannot claim to be "free elections", since the voting methods mentioned may influence the vote. One may even note that, in constitutional discussions at national level, postal voting is discussed in connection with the principle of secret suffrage. While postal voting's compatibility with secret suffrage was rejected in Austria in 1982, it was found to be compatible with the German constitution as far back as 1967. Here, it should be added that the constitutional situation at issue in Austria and Germany was very similar. However, in countries such as Austria where the case-law has firmly and persistently come out against the acceptability of remote voting within the county until such time as the constitution specifically allows it, a similar system exists for remote voting outside the country, and no questions are raised about such a system's compatibility with Article 3 of the AP. Discussions are currently taking place on the introduction of postal voting into Austrian legislation, and the requirement of compatibility with the ECHR has not been raised.

49. At this point, it is appropriate to note that the right to free elections under Article 3 of the AP may have an impact on the acceptability of restrictions of the principles established by Article 3, but that it is not incompatible with the formal introduction of remote voting.

50. Even if one regarded this as imposing restrictions on the acceptability of remote voting, such restrictions could not be justified by invoking the discretion enjoyed by national legislation. In interpreting the tangible content of the rights and obligations arising from the ECHR, it is necessary to take account of the legal situation in the contracting States if homogeneous rules exist among them. The European Court of Human Rights has adopted a long line of decisions from which it emerges that national authorities have greater scope for discretion where it is impossible to identify a common point of view among the various member States (cf. J. CALLEWAERT, “Quel avenir pour la marge d’appréciation?”, *Mélanges à la mémoire de R. Ryssdal*, 2001, p. 147 [151]), EurCourtHR, judgment of 11 July 2002 [Grand Chamber], *I v. the United Kingdom*, Rec. n° 25680/94, §§ 51 onwards; judgment of 25 November 1994, *Stjerna v. Finland*, Series A, 299-B, § 29, judgment of 11 July 2002, *Christine Goodwin v. the United Kingdom*, Rec. n° 28958/95, §§ 74 onwards.). Where the contracting States share a common or homogenous standard on a question or subject related to the ECHR’s guarantees, this tends to favour acceptance of this standard at European level as well, in contrast to situations where no common standard exists. Where there is no common European rule, it would be necessary to deny that there a mandatory ECHR requirement existed a certain level.

51. With regard to remote voting, there is considerable diversity in the legal systems of the Council of Europe’s member States. Of the 24 legal systems analysed, however, 16 provided for remote voting by post in some way or another. Although in eight countries postal voting is only available to electors who are out of the country on the election date, it is generally accepted in these countries either that there is compatibility with the principle of secret suffrage or, in the event of interference with this principle, that there is at least compatibility with Article 3 of the AP. In this respect, it is of little consequence that seven countries allow postal voting even within the national territory.

52. In contrast, there are eight countries in which remote voting by post is not permitted. However, this should not lead to the conclusion that its unacceptability is the consequence of unconstitutionality, since it may also result from a political and legal decision.

53. In any event, the wide range of systems should also be taken into consideration; this does not facilitate the formal introduction of a European standard in comparable cases. Even if we assume that postal voting is not permitted in those countries which have not been analysed, it would be necessary, given the 15 to 20 countries where postal voting is allowed, to deny the existence of a standard which would mean that such a method of voting was incompatible with the ECHR.

54. However, certain restrictions implicit in Article 3 of the Additional Protocol must be respected, insofar as they impose a minimum standard for protecting the secrecy of the ballot. This minimum standard should be defined from the perspective of comparative law, which is itself reflected in the “Code of Good Practice in Electoral Matters”.

55. Some appropriate measures to protect the secrecy of the ballot in relation to postal voting should be taken as an example. Parliament must take measures in order to ensure that the principle of secret suffrage is protected. In this context, different systems require the elector to complete the ballot paper individually, ensuring that he/she is not being watched, place it in the

electoral envelope and make a solemn statement to the effect that the ballot paper was personally completed (see Federal Constitutional Court of Germany, BVerfGE 21, 200 [205]).

56. The Venice Commission's Code of Good Practice in Electoral Matters contains almost the same requirements. In accordance with guideline I.3.2. of the Code, postal voting should only be allowed if the postal service is safe and reliable.

57. Based on this analysis of postal voting, we can also develop similar standards for e-enabled voting. Consequently, electronic voting is neither generally permitted by human rights nor ruled out *à priori*. Instead, its acceptability depends on the legal, operational and technical standards implemented in the procedure. In order to establish specific standards, it will be necessary to compare the precautionary measures for e-enabled voting with those for postal voting. Insofar as a potential recommendation set out security measures comparable with those for postal voting, e-enabled voting could be compatible with the European standards in this area and with Article 3 of the Additional Protocol.³ In this context, it is necessary to ensure that the confidentiality of electronic voting is guaranteed by measures comparable with those applicable to postal voting, especially by preventing data manipulation, protecting anonymity to prevent possible disclosure of the elector's wishes, and by maintaining the authenticity and integrity of the votes cast.

58. The Venice Commission's Code of Good Practice contains a clarification that could serve as a guideline. According to the explanatory report (see § 42), certain precautions are needed to minimise the risk of fraud, for example by enabling the voter to check his or her vote immediately after casting it. It is important to ensure that ballot papers are designed in such a way as to avoid confusion. In order to facilitate verification and a recount of votes in the event of an appeal, it may also be provided that a machine could print votes onto ballot papers; these would be placed in a sealed container where they cannot be viewed. There should also be some kind of device for mixing the ballot papers so that if it proves necessary to open the container for checking, papers cannot be linked to particular voters – for example, those turning out early or late in the day.

V. Conclusion

59. In conclusion, remote voting is compatible with the Council of Europe's standards, provided that certain preventative measures are observed in the procedures for either postal voting or electronic voting.

60. In addition, for e-enabled voting, technical standards must overcome different threats to those which exist for postal voting. This form of voting must only be accepted if it is secure and reliable. In particular, the elector must be able to obtain confirmation of his or her vote and, if necessary, correct it without the secrecy of the ballot being in any way violated. The system's transparency must be guaranteed. Insofar as an e-enabled voting system meets these conditions, it is compatible with the European standards on electoral matters, and in particular with Art. 3 of the Additional Protocol to the European Convention on Human Rights.

³*On this question, see the erroneous conclusions reached by Bob WATT, Human Rights and Remote Voting by Electronic Means, Representation, Vol. 39, No. 3, 2003, pp. 197-208.*