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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

DRAFT JOINT OPINION ON THE DRAFT LAW ON THE STATE ELECTION COMMISSION OF THE REPUBLIC OF CROATIA

by
the Venice Commission
and
OSCE/ODIHR

on the basis of comments by

Mr Daniel FINN (Expert, OSCE/ODIHR)
Mr Hjörtur TORFASON (Member, Iceland)

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I. INTRODUCTION

a. Background.

1. The Croatian Parliament (Sabor) is considering a State Election Commission Bill ("Draft Law"). The Draft Law would provide for the establishment and operation of a permanent State Election Commission (SEC), and also transfer to it certain functions related to the Voter List.

2. International as well as national observers of Croatian elections have recommended the formation of a permanent electoral administration. The OSCE/ODIHR Election Observation Mission Report for the 2003 Parliamentary elections made a similar recommendation, by stating "…permanent election administration functions should be established."[1]

3. The Draft Law is here reviewed under benefit from discussion thereof at a Roundtable held at the Parliament Building in Zagreb on 13 December 2005, co-organised by the Central State Administration Office (CSAO) and the OSCE Mission to Croatia, with participation of the OSCE/ODHIR and the Venice Commission. The Roundtable was attended by representatives of the Croatian Government, Parliament, Constitutional Court and Supreme Court as well as academicians and non-governmental organisations. The Prime Minister Dr. Ivo Sanader and the Speaker of the Parliament, Mr Vladimir Seks, attended the opening session, and the governmental representatives included Mr Branko Hrvatin, President of the Supreme Court and of the existing SEC, and Mr Antun Palaric, State Secretary of the CSAO, which has been instrumental in the drafting of the Law Bill. - The discussion referred inter alia to an earlier Roundtable organised by the OSCE Mission in November 2004, which also was attended by the OSCE/ODHIR and the Venice Commission. It was there concluded that the adoption of a law on the SEC should be among the priorities in electoral reform.

4. The Draft Law and the results of the 13 December Roundtable were also discussed in the meeting of the Council for Democratic Elections and the plenary meeting of the Venice Commission on 15 and 17 December 2005 respectively.

5. This joint OSCE/ODIHR and Venice Commission opinion was adopted by the Venice Commission at its … Plenary Session (Venice, …- … 2006).

b. Reference documents.

6. This report is based on:

- *The draft law on the State Electoral Commission of the Republic of Croatia document (CDL-EL(2005)053);*
- *Draft law on the Croatian State Electoral Commission – OSCE/ODHIR Commentaries;*
- *Comments on the draft law on the State Electoral Commission of the Republic of Croatia by Mr Hjortur Torfason (CDL- EL(2006)006);*

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1 OSCE/ODIHR Election Observation Mission Report for the 2003 Parliamentary elections.

- *The OSCE/ODIHR Election Observation Mission Report for the 2003 Parliamentary elections;*
- *Constitution of the Republic of Croatia, consolidated text, 2002, reprinted in Committee on Constitution, Standing Rules and Political System, Croatian Parliament, A Collection of Legislation of the Republic of Croatia (M. Arlovic, ed.; Zagreb, May 2003);*
- *Republic of Croatia, Act on Election of Representatives to the Croatian Parliament, consolidated text, 2003, reprinted in Ibid.*
- *Republic of Croatia, Constitutional Act on the Constitutional Court of the Republic of Croatia, consolidated text, 2002, reprinted in Ibid;*
- *Republic of Croatia, Law on Lists of Voters, National Gazette Nos. 19/92 & 75/93 (10 April 1992), unofficial translation;*
- *Croatian Parliament, Extract from the Standing Rules of the Croatian Parliament (provisions related to the work of working bodies and scope of work of the Committee on Constitution, Standing Rules and Political System and another committee), reprinted in Ibid;*
- *OSCE/ODIHR Election Observation Mission, Republic of Croatia Parliamentary Elections – 23 November 2003, Final Report (Warsaw, 20 January 2004);*
- *OSCE/ODIHR Election Observation Mission, Republic of Croatia Parliamentary Elections – 23 November 2003, Statement of Preliminary Findings and Conclusions (Zagreb, 24 November 2003);*
- *OSCE/ODIHR, Existing Commitments for Democratic Elections in OSCE Participating States (Warsaw; October 2003);*
- *European Commission for Democracy Through Law ("Venice Commission"), Council of Europe, Code of Good Practice in Electoral Matters, Guidelines and Explanatory Report, adopted 18-19 October 2002.*

II. EXECUTIVE SUMMARY

7. The Draft Law would establish the State Election Commission (SEC) on a permanent basis, and enable the continuous and autonomous operation of various electoral programs. This is a positive development, and in accordance with international and national recommendations on electoral administration in Croatia, particularly in view of the short electoral period provided for under Croatian law, which poses challenges for all election participants (administrators, candidates and political parties, polling officials, and voters).

8. The SEC to be established through the Draft Law would consist of five members selected by Parliament. The members are to be well-qualified and not members of any political party. They would serve 8-year terms, renewable once.

9. SEC members would be selected directly by Parliament, without any formal coordination with other branches of the State. Broad consultations on this selection could considered to be a legal requirement. SEC members could be removed by parliamentary decision, but the specific grounds for removal and the detailed procedure for doing so are not described in the Draft Law. There is a need for developing a list of conditions that may lead to removal procedures

10. To the authority provided by existing election laws, the Draft Law would add a number of additional responsibilities related to permanent electoral administration. With respect to specific elections, however, the authority of the SEC would continue to derive mainly from the laws related to the different kinds of elections, particularly the Parliamentary Election Law.

11. The SEC would not receive additional regulatory authority, in the broad sense, under the Draft Law. Thus regulation of various aspects of the overall electoral process – including campaign issues, political financing and the role of the media – would remain with Parliament, including the relevant committees ("working bodies"); or other State agencies.

12. One major new responsibility of the SEC under the Draft Law would be for activities related to the Voter List. This transfer of authority could facilitate the movement, already observed, toward a more user-friendly approach by Voter List administrators. It could also enable the SEC to address the issue whether voting certificates are required for voters, such as refugees, who have been living abroad for an extended period.

13. However, other than focusing on individual complains on Voter List during the election period and deciding on the format of the Voter List, it might be more appropriate if responsibilities on current compilation of the Voter List remain with those bodies that are responsible for such activities.

14. In view of its new duties related to the Voter List and other continuing responsibilities, the Draft Law would provide the SEC with an "expert service", or secretariat, in the capital and also for counties and the City of Zagreb. The new SEC would act at sessions (meetings), which would be public. The SEC would receive a regular financial allocation through the State Budget.

15. The Draft Law is generally clearly worded and reasonably comprehensive within its intended scope. A few of its specific provisions appear to be somewhat tentative at this stage, however, such as those concerning the conditions for possible removal from office of the SEC members. At the December 2005 Roundtable, it was indicated that the Draft Law is expected to undergo an in-depth examination and discussion in advance and in the course of its second reading.

III. BACKGROUND

A. STRUCTURE AND APPOINTMENT OF THE ELECTION BODIES

16. Elections in Croatia are administered by a four-tier structure of independent bodies, including: the State Election Commission (SEC), Constituency Election Commissions (CECs), Municipal and City Election Commissions (MECs and CiECs), and Election Committees (VCs).

17. The composition of the SEC under existing law is described in the Act on Election of Representatives to the Croatian Parliament (hereinafter "Parliamentary Election Law", or "Election Law"). The main features of the current structure, and some of the issues related to it, were described in the following terms in the 2003 OSCE/ODIHR Election Observation Mission Report:

18. The current SEC is described in the Election Law as having a "standing", or "permanent", membership consists of a president and four other members.[2] In fact, however, the SEC does not function officially outside electoral periods. During elections, the composition of the SEC is expanded to include a number of additional members nominated by the ruling and opposition groups in Parliament.

19. The President of the Supreme Court serves *ex officio* as President of the SEC. The other core members and the deputies are appointed by the Constitutional Court from among the membership of the Supreme Court and other "distinguished lawyers who must not be members of political parties".[3] This clearly will contribute to an independence of the SEC according to past experience, but the solution of appointing sitting judges has disadvantages under a long-term view and also tends to disturb the regular work of the judges around election time. However, the resulting independence and professionalism expected of the permanent members clearly has influenced the choice of structure for a new SEC according to the Draft Law.

20. There is no provision in the Election Law concerning the timing of the appointment of the standing membership of the SEC, the terms of its members or their rotation, or the tenure of the members. This means that the membership could turn over shortly before an election. It also could permit members (except for the President) to be removed without cause.

21. The SEC has legal authority to "take care of the legal preparation and implementation" of parliamentary elections, including through issuing rules ("obligatory instructions") for election officials.[4] For each election, the SEC regularly promulgates a series of binding instructions to cover different aspects of the electoral process.

22. During an electoral period, after the publication of the candidates' lists, the membership of the SEC is "augmented" through designation of three representatives apiece of the majority (ruling) and opposition groups in Parliament. The pattern of core and expanded membership, including nomination of political party representatives (or, in the case of electoral committees, polling officials) by the parliamentary majority and opposition, is repeated at each of the lower levels of election administration.

23. Once they commence their service with the SEC, the party representatives have the same rights and duties as the standing members.[5] However, the fact that they are only able to join the SEC after constituencies have been determined reduces their effectiveness. This is especially the case in view of the potentially short electoral period provided for under Croatian law, between 30 and 60 days.

24. This method of appointment retains a certain partisan element by having candidates (other than for President) being proposed by the parliamentary majority and opposition respectively. This is positive in the general sense since election commissions need to enjoy the trust of actors in the political arena, and one way of promoting such trust is to let the actors have a say in their appointment. However, the method as stated, may involve a

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2 Parliamentary Election Law, Art. 45.

3 *Id.*

4 *Id.,* Art. 48.2-3.

5 *Id.,* Art. 46.2.

restrictive effect in that it appears to presuppose that the members will all need to be elected at the same time (presumably the President first, followed by the Vice-Presidents and then the members or the latter two in unison).

B. OTHER ISSUES

25. For the 2003 elections, as in previous national elections, the SEC issued both mandatory instructions and a "Reminder" for election officials. The legal status of the "Reminder" is unclear, so that the SEC's actions in this form remain subject to interpretation.

26. In particular, the legal basis of the procedures used for out-of-country voting (OCV) has remained complex, and the requirements were not well understood by voters and were potentially subject to non-uniform application. The main issue in this regard concerned which voters could cast their ballots at OCV sites without having to present a special certificate, which must be obtained from the relevant local officials.

(*Under the Parliamentary Election Law, Croatian citizens who are permanent residents abroad vote in a special constituency, number 11. Others, who are temporarily abroad, may cast their ballots in one of the ten regular geographical constituencies inside Croatia, or – if they are members of recognized national minority groups – in the special constituency for minorities, number 12. Voters temporarily located abroad are required to obtain a voting certificate.)*

27. Following a Supreme Court decision in 1999, a new category of "habitual" residence abroad was recognized. Under this decision, refugees from Croatia were permitted to vote without presenting a certificate, provided they had proof of citizenship, identity and residence abroad. While the problem of refugee voting was addressed by combining a SEC Instruction, the "Reminder", and the Court decision, the complexity of this situation created issues of transparency as well as more practical concerns.

28. The voting rights of refugees from Croatia, both in themselves and in comparison to the voting rights of other Croatian citizens abroad (including in neighbouring countries) has been of special interest to the International Community. For more information on this complex subject, kindly refer to the discussion contained in the 2003 OSCE/ODIHR EOM report.

IV. STATE ELECTION COMMISSION

A. METHOD AND TERM OF STATE ELECTION COMMISSION APPOINTMENT

29. Under the Draft Law, the SEC would be composed of five members – the President, two Vice Presidents, and two additional Members. All members of the SEC would be selected by Parliament based on an absolute majority vote. Members would receive an 8-year term, renewable once.

30. The proposed appointment term of 8 years for the SEC members is unusually long for election commissions, and may e.g. be compared with the tenure frequently assigned to members of constitutional courts or courts of law in countries where these are appointed for a definite term. However, it is to be recalled that the question of term here relates solely to the

supreme body in the electoral administration system, and it would seem plausible to expect that the length of term should tend to increase its general independence.

31. All members of the SEC are supposed to have professional qualifications, familiarity with the political and electoral system, and practical knowledge of elections. They could not be a candidate in an election, or a member of a political party. The President would also be required to have professional qualifications in law.

32. It can be said that the model of electoral administration at the SEC level in Croatia would shift from a "balanced, multi-partisan" approach to a "neutral, professional" basis under the Draft Law. The SEC as constituted under current law has a standing composition of judges and lawyers – the Presidency being filled *ex officio* by the President of the Supreme Court, and other members chosen by the Constitutional Court from Supreme Court judges and other distinguished legal practitioners.[6] But, during elections, the current SEC is expanded to include a larger number (6) of nominees of the governing and opposition groups in Parliament.[7]

33. Other electoral commissions – including the Constituency Election Commissions (CEC) and Municipal (MEC) and City (CiEC) Commissions – would continue to be constituted under other law, particularly the Parliamentary Election Law.[8] CECs for parliamentary elections are composed of three judges and/or lawyers, to which is added an expanded membership of four nominees of the governing and opposition groups in Parliament.[9] (The expanded membership of the SEC is appointed upon formation of the constituencies,[10] and that of the CECs upon the determination of candidate lists.)[11]

34. The structure of electoral administration proposed through the Draft Law would thus establish a nominally independent, neutral and professional SEC. Below that, the CECs and MEC/CiECs would continue to operate only during electoral periods, and to have a balanced, multi-partisan character. Election Committees (EC), which carry out operations at polling stations, would be mainly composed of political party representatives.

35. In principle, the structure described above can achieve the goal of independent and objective electoral administration.[12] In addition, it follows the recommendations of expert bodies favouring the formation of independent, impartial electoral commissions in newly established democracies in Central and Eastern Europe and the Commonwealth of Independent States.[13]

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6 Parliamentary Election Law, Art. 45.

7 *Id.,* Art. 47.

8 See *Id.*, Arts. 50-57.

9 *Id.,* Arts. 50, 52.

10 *Id.,* Art. 45.

11 *Id.,* Art. 51.

12 See OSCE/ODIHR, *Existing Commitments for Democratic Elections in the OSCE Participating States,* Part One, Par. 4.2, first sentence: "The impartiality of the election administration can be achieved through either a mainly professional or politically balanced composition." ***N.B.*** **–** Please see the references at the end for complete titles and particulars of cited materials.

13 See Venice Commission, *Code of Good Practice …, Guidelines on Elections,* Par. 3.31.

36. The following issues, however, should be considered in connection with the precise provisions contained in the Draft Law concerning the method and term of appointments to the proposed permanent SEC:

1. Method of Appointment

37. Under the Draft Law, the President and other members of the SEC would be selected by Parliament.[14] Under the Constitution, the Croatian Parliament has very broad powers.[15] Among these is the power to "carry out elections, appointments and relief of office, in conformity with the Constitution and law".[16] No other branch of the State, including the President or the Government, has explicit authority to appoint officials; except that these other branches can engage in activities which are not explicitly authorized by the Constitution if they are otherwise specified by it (*e.g.*, with respect to the powers of the Presidency)[17] or determined by it or through law (*e.g.*, the Government).[18]

38. It should be assumed that the governing group in Parliament would engage in broad consultations with political parties and others, including civil society, with respect to appointments to the new SEC. The Draft Law does not explicitly require such consultations, however – either because that could be viewed as an unconstitutional limitation on parliamentary authority, or since such consultations would be carried out informally or as part of the work of the Parliamentary Committee on the Constitution, Standing Rules and Political System.

39. Nonetheless, in the final analysis, selection of the members of the SEC under the Draft Law would be controlled by the majority in Parliament. While the Parliament would be ill-advised to choose poorly-qualified or partisan appointees, nevertheless the method of appointment could tend to diminish the perceived legitimacy of the new SEC.

40. Many countries have attempted to balance appointments to high-level electoral commissions by involving more than a single branch of the State. Despite the clear primary of the Croatian Parliament under the Constitution, the current review suggests that means be found to permit other branches to participate in the selection of SEC appointees. If it were decided to involve another State branch in appointments to the SEC, then that branch could provide a roster of the names of qualified individuals, or play another indirect role in the appointments. Or Parliament could create the roster, and leave the selection to the other body. Or again, Parliament could share its power over the selections, so that different branches of the State would designate different types of members (including the President, Vice Presidents and other Members), and Parliament could appoint them.

41. Another suitable body for participation in the appointment of SEC members might be the Constitutional Court, which under the Constitution has the responsibility to "supervise the

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14 Draft Law, Arts. 4 & 7.

15 Constitution, Part IV, Chap. 1.

16 *Id.*, Art. 80.

17 *Id.*, Art. 97.

18 *Id.*, Art. 112.

constitutionality and legality of elections …".[19] The Constitutional Act on the Constitutional Court further implements this Constitutional role.[20] Neither the Constitutional provision, nor the statutory chapter, specifically authorizes the Constitutional Court to play a role in appointments. But this could nevertheless be viewed as consistent with its Constitutional and statutory role in the electoral process.

2. Term of Appointment

42. The provision for an eight-year term for appointees to the SEC seems extraordinary. Perhaps the Proponent of the Draft Law recognized this, since the explanatory notes accompanying the Draft Law reflect this concern but argue that such a long term could make the proposed SEC "more permanent and more independent from the political situation and relations of political parties in Parliament."

43. But the extreme length proposed for the term of SEC members could in fact make Parliament, and the parties represented in it, even more desirous of achieving long-term advantage through the appointment of sympathetic commissioners. In addition, if all the members of the SEC were appointed at the same time after adoption of the Draft Law, it would normally be eight years before the membership would rotate – during which time the composition of Parliament itself might change.

44. Another issue should be pointed out with respect to the length of service of NEC appointees under the Draft Law. The Draft states, in translation, that: "The same person may be elected President, vice president and member of the Commission twice in a row at the most." As formulated, it seems unclear whether the two-term limit applies only to successive appointments to the same post on the SEC – *viz.*, President, Vice President or Member – or to any repeat appointment regardless of title.

3. Tenure and Removal from Office

45. The Draft Law provides (in Article 12) that the SEC members will have the status of state officials, with a right to salary and other substantive rights. The Law also contains provisions restraining the members from performing another professional duty or a duty the performance of which could raise doubt as to their impartiality, integrity or public reputation, while permitting their engagement with scientific and professional work and research and humanitarian and cultural activities (Articles 13 and 14).

46. One key safeguard of the independence of electoral administration is that administrators should not be removed from office prior to the end of their term except for cause.[21] On the other hand, there should be provision for removal for good reasons; otherwise electoral administration could be discredited by the presence of officials who are under suspicion.

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[19] *Id.*, Art. 128.

[20] Constitutional Act on the Constitutional Court, Part IX. See, *e.g.*, Art. 87 thereof: "The Constitutional Court … controls the constitutionality and legality of elections …".

[21] See OSCE/ODIHR *Existing Commitments for Democratic Elections in OSCE Participating States*, Part 1, Par.4.2, first sentence: "Appointments to election administration positions at all levels should be made in a transparent manner, and appointees should not be removed from their positions prior to the expiration of their term, except for legal cause."

47. It is not clear from the Draft Law how the members of the SEC would be protected from arbitrary removal. Specific grounds for accelerated expiration of term are contained in the relevant article, but it cannot be assumed that these are the only causes for removal. In addition, if these grounds were the only ones, then they would not be sufficient to enable the termination of certain individuals whose terms should be ended.

48. Article 15 of the Draft Law provides for early expiration of term for SEC members in several cases. Most of these pertain to changes in status, such as with respect to civil capacity, permanent residence, citizenship, or death. A member can also request relief from duty or submit a resignation. With respect to cause, however, the cases provided for reduce to two:

- The coming into force of a court verdict imposing a non-suspended prison sentence of over six months; and
- Loss of eligibility, as confirmed by a (Parliamentary) resolution concerning relief from duty.

49. It would appear that imprisonment for over six months is too specific to encompass all the grounds to remove a commissioner for cause. But loss of eligibility would be too general, since eligibility is normally viewed in terms of the statutory requirements applicable to the President and other members of the SEC, in this case under the relevant provisions of the Draft Law (Arts. 5 & 8). These eligibility requirements, which were described previously, pertain to professional qualifications and experience and other factors which do not usually change.

50. Furthermore, under the Constitution, Parliament has the power to "carry out … relief of office, in conformity with the Constitution and law".[22] Thus it must be assumed that the loss of eligibility for office of a SEC appointee could in fact refer to a broader determination of unsuitability by Parliament.

51. It is submitted that the substantive basis for removal from office in the case of a member of the highest independent electoral administration body should be laid out in more detail in the Draft Law. Further, consistent with the remarks above, consideration should be given to the involvement of other branches of the State in the removal process; so that removal would not be viewed as a political step taken by Parliament. Finally, a procedure for adjudicating the claims made against a SEC member should also be included in the Draft.

52. Finally, it should be noted that another provision of the Draft Law (Art. 16.3) describes action to remove a SEC member through a decision by the "competent body". That decision is also described as containing a further decision on the election of a replacement within 60 days. This provision could envision a decision taken by the Parliamentary Committee on Constitution, Standing Rules and Political System, especially during periods in which the Parliament is not in regular session.[23] While the Committee might normally have a role in such matters, it would appear more desirable to require a referral to the Committee by the Parliament in such a sensitive matter.

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22 Constitution, Art. 79.

23 See *Standing Rules of the Croatian Parliament,* Arts. 46, 57.

B. REGULATORY AUTHORITY

53. Under the Draft Law (Art. 11), the new SEC would be given several additional legal responsibilities consistent with its permanent status. Perhaps the most substantial of these is additional responsibilities related to the Voters List (see next section).

54. With minor exceptions, however, the SEC would not be given major new regulatory authority over the electoral process itself. Thus the issue of the scope of regulatory authority of the SEC, raised in connection with the ambiguity and complexity of the legal determinants in previous elections (including mandatory instructions, "Reminders", and court decisions) is not directly addressed.

55. The additional SEC responsibilities over the electoral process would include such matters as: Stipulating forms for electoral activities, and determining the mode of archiving and publishing electoral materials. (It should be noted that, perhaps due to short electoral timeframes, the SEC has regularly reused forms developed during previous elections.)

56. The mandatory instructions that the SEC is authorized to promulgate under current law apply only to election commissions and committees.[24] As noted previously, a series of such instructions has been issued during recent elections; and in addition an overall "Reminder" on electoral operations has been circulated each time.

57. The review notes that the new SEC should be granted greater regulatory authority. Specifically, the SEC should have the power to adopt regulations on the election-related activities of participants in the electoral process beyond those which are under the direct supervision of the SEC. This could include the ability to regulate aspects of the electoral process including the campaigning, political finance and press coverage. Based on these regulations, the SEC could also undertake administrative enforcement activities. Although these new possibility could be worthy of consideration in the context of the Draft Law, there is reason to express a degree of reservation concerning the question of having the SEC deal with such matters as political financing and press coverage. This might tend to involve the Commission too heavily in issues of high political sensitivity and in risks to the neutrality of its overall position.

58. In addition, the OSCE/ODIHR and the Venice Commission believe that, once the SEC is established on a permanent basis, it should be authorized to develop and promulgate decisions continuously. By so doing, the SEC could make improvements in the electoral process between elections, and also have a body of regulations and other materials (including instructions and operating manuals) already in place when an election is called, even on short notice.

59. It is true that the Croatian Parliament has a primary constitutional role to play in elections. The Parliament might, acting through the Committee on Constitution, Standing Rules and Political System, develop more specific election regulations through legislation. But a parliamentary body is not ideally suited to develop and implement regulations, even if – as in this case – its composition includes outside experts as well as parliamentarians.[25]

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[24] Parliamentary Election Law, Art. 48.3.

[25] *Standing Rules of the Croatian Parliament,* Art. 58.

Instead, it might be more consistent with the doctrines of Separation of Powers[26] and Delegation of Parliamentary Authority to devolve executive authority over the electoral process to the new SEC as an independent executive agency.

C. RESPONSIBILITY FOR THE VOTER LIST

60. The Draft Law would assign general legal responsibility over the Voter List to the new SEC.[27] Final provisions in the Draft also would transfer to the SEC the responsibilities for the Voter List currently exercised by the Central State Administration Office and municipal authorities.[28] Finally, the same provisions would result in the transfer of civil servants exercising these functions into the expert service of the SEC.[29] But the general responsibilities the SEC would obtain through the Draft Law would continue to derive from the basic authority created under other legislation, the Law on Lists of Voters ("Voter List Law").

Perhaps due to the often short electoral period, the Voter List is supposed to be maintained on a current basis by municipal authorities. Within three days after an election is called, those authorities must inform citizens that they can inspect the Voter List and request corrections. Thereafter, Voter List commissions are formed in the various municipalities to consider requests for correction of the Voter List and also to issue voting certificates for voters who are temporarily residing away from home.[30]

It is unclear to what extent the SEC would gain practical control of preparation of the List, or participate in or supervise technical operations related to compilation of data pertinent to the List. The raw data derives primarily from civil registry information collected by other agencies. Under the Voter List Law, the competent bodies (currently the municipalities) have discretion in what form to maintain the Voter List (*e.g.,* in electronic form or on card files); and even if they opt to maintain it electronically their systems may be incompatible with those of the agencies which supply the information.

Preparation of the Voters List, based mainly on civil records, has been subject to the general responsibility of the Central State Administration Office. While in the past, a certain volume of defects was noted in Voter Lists, by the time of the last parliamentary elections their quality had been improved. In addition, the Ministry of Justice, Administration and Local Self-Government (the former custodian of the List) after consultation with civil society made it much easier for voters to check their registration by telephone or fax.[31]

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26 Constitution, Art. 107; (Croatian Government to exercise executive powers.)

27 Draft Law, Art. 11 states in pertinent part: "[T]he Commission shall also … look after the legality and regularity of keeping and updating of the voters' list, as well as timely conclusion and confirmation of the voters' list, the preparation and compilation of excerpts from the voters' list, in compliance with the law which regulates the keeping of the voters' list."

28 Draft Law, Art. 28.1 would transfer to the SEC the competences attributed to municipal authorities by Art. 11 of the Voter List Law, and to the Ministry under Art. 34 of that law.

29 Draft Law, Art. 28.2-3 calls for incorporation of the civil servants into the SEC expert service after adoption of the SEC staff Rule Book; and Art. 28.4 would also require the transfer of equipment and other materials.

30 See generally Voter List Law.

31 See OSCE/ODIHR EOM Report, 2003.

While the accuracy of information concerning individual voters may have improved, new concerns about the overall quality of the Voter List have arisen in connection with the municipal elections earlier this year. The calculation of the number of minority voters in order to determine their special representation reflected a disparity with current demographic information. (Some of the disparity is explained by the absence of a systematic means to obtain information about voters who are residing abroad.) Ultimately, the Government was forced to issue a special ordinance to address the level of minority representation for the elections.

There does not appear to be a particular international standard on the assignment of various Voter Lists -related functions within government. What is important is the accuracy and integrity of the Voter List, and the ability of voters and others with legitimate interests to inspect it and, if necessary, request corrections. In order to preserve the autonomy of electoral administration, it is often required that the electoral body must make the final decision on individual corrections and especially on final adoption of the Voter List.

There has apparently been a trend toward assigning those Voter List functions involving contact with political parties, and especially voters, to electoral authorities. This development seems to be based on the belief that the latter authorities would evince a more open and helpful attitude toward election participants.

Finally, the transfer of legal and administrative authority over Voter List activities could help address a couple issues raised previously – the voting certificates issued to refugees and others for voting outside their areas of registered residence, and the complex structure of directives (mandatory instruction, "Reminder" and judicial decision) which has been relied upon to permit voters with longer-term residence abroad to vote without certificates. If the SEC were to take over direct responsibility for the Voter Lists commissions formed at the municipal level, then the SEC might be able to address this problem through the sole device of a mandatory instruction to its employees.

V. ADDITIONAL COMMENTS

A. OTHER STATE ELECTION COMMISSION RESPONSIBILITIES

The Draft Law would also assign other additional responsibilities to the new SEC. These would include various tasks related to improvement of the electoral process, including: Recommendations on legislative amendments; training of election commission and committee members; informing voters on their electoral rights; publishing professional works; reporting to competent bodies on elections; and cooperating with national and international organizations. These kinds of programs would certainly be of benefit in continuing to improve the electoral situation in the country.

In addition, the Draft Law would empower the new SEC to appoint members of county election commissions and the Election Commission of the City of Zagreb. (The existing provisions on this subject are outside the scope of this review.)

B. STATE ELECTION COMMISSION OPERATIONS, BUDGET AND STAFF

Under the Draft Law (Art. 17), the SEC would make decisions in session (meetings). Sessions would, "[a]s a rule," be public. The cases in which the public could be excluded from sessions would be stipulated in Standing Orders, to be promulgated by the SEC as part of its Standing Orders (Art. 21).

Funding of the new SEC would be through the State Budget, and the funds would be managed by the SEC President (Art. 26). Regular State funding would be consistent with international best practices in this area.[32]

Staff support to the SEC would be provided through the formation of an Expert Service. Members of the service would be civil servants – and therefore presumably subject to uniform civil service regulations – but the service would be organized under a special Rule Book to be adopted by the SEC. In implementing these provisions, attention should be paid to maintaining the autonomy of the service;[33] so that the staff is not subject to career interests that could diverge from those of their professional work.

A Secretary would be appointed to head the Expert Service (Art. 24), with rank equivalent to the head of similar services in other bodies of the state administration. The Secretary would be chosen by majority vote of the SEC after a public tender, in compliance with civil service admission standards.

VI. CONCLUSION AND RECOMMENDATIONS

The administration of democratic election requires that election commissions/bodies are independent and impartial. This is a critical area as the election administration makes and implements important decisions that can influence the outcome of the elections.

The administrative structure established by the legal framework should include a central or state election commission with authority and responsibility over subordinate election commission. It is critical to define clearly the relationship between the central election commission and lower election commissions, and the relationship between all election commissions and executive government authorities.

The state or central election commission should be a body that functions on an active basis and not for a limited time period before elections. That means that the central election commission should continually work to improve the voter register and take other actions that improve the election process. However, it is acceptable for lower election commissions, especially polling station committees, to be temporary bodies established before an election.

In general, election administration of Republic of Croatia should be credited for overseeing the election in a professional manner. However, the concerns have been raised about the

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[32] See OSCE/ODIHR, *Existing Commitments for Democratic Elections in the OSCE Participating States…*, Part One, Par. 4.4, sentence one (relevant part): "It is desirable for the election administration, especially the central election authority, to be … if possible, provided with a regular budgetary allocation, so that essential election-related functions and programmes can be carried out on a continuous basis."

[33] See *Id.*, Part One, Par. 4.3, first and second sentences (relevant part): "Election institutions … should be assisted by a professional secretariat, preferably also autonomous …".

difficulty of organizing effective temporary electoral administration within the short electoral timeframe.

The establishment of permanent election administration would enable electoral issues to be addressed on an ongoing basis, and help ensure that effects on the electoral system are considered in other government decision making. In addition, establishment of permanent election administration would permit the ongoing operation of the relevant programs to enhance the electoral process, such as through civic education, voter information and training of election workers and others.

With respect to the provisions of the Draft Law the following recommendations could be considered:

- Consideration should be given to balancing appointments to the SEC by Parliament, through involving additional branches of the State in the selection of members. In particular, the Government, Constitutional Court or President could be accorded a formal role in the selection process. Legal requirement for broad consultations on the selection process could be considered.

- It is suggested that the proposed length of term of SEC members be reduced from eight years, and if necessary that it be clarified that the limitation to two terms of service applies even if an individual member is nominated for a different type of appointment (*e.g.,* President, Vice President or regular Member). If the eight-year term is retained, then initial appointments should be phased in, or "staggered", so that a regular rotation of membership would occur thereafter.

- Removal of SEC members by Parliament should only be for good cause. The legitimate reasons for removal should be laid out in greater detail, and procedures should be devised for the resolution of issues related to the suitability of commissioners. All significant actions in this regard should be initiated by Parliament as a whole, although the relevant committee could play an advisory role.

- The legal power of the SEC, operating on a permanent basis, should be enhanced by clear authority to issue regulations with the force and effect of law – *i.e.,* mandatory not only with respect to the activities of election officials but also other participants in the electoral process. Subject to parliamentary oversight and additional legislation, this would enable the SEC to move into important areas of electoral reform, including campaign issues, financing and press coverage.

- In connection with the selection and management of the SEC's Expert Service, due attention should be given to ensuring the autonomy of the SEC and avoiding conflicts between the staff's professional responsibilities for the SEC and career interests within the civil service.