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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

**MEASURES TO IMPROVE
THE DEMOCRATIC CHARACTER OF ELECTIONS
IN COUNCIL OF EUROPE MEMBER STATES**

REVISED MEMORANDUM

drawn up by the Secretariat

**This document has been classified restricted at the date of issue. Unless the Venice Commission decides otherwise, it will be declassified a year after its issue according to the rules set out in Resolution CM/Res(2001)6 on access to Council of Europe documents.*

I. Introduction

1. This document is a follow-up to the report on “measures to improve the democratic nature of elections in Council of Europe member states” (CDL-AD(2012)005), adopted by the Council for Democratic Elections at its 40th meeting and the Venice Commission at its 90th session (March 2012). It has been revised on the basis of proposals made at the 41st Meeting of the Council for Democratic Elections which took place in Venice on 14 June 2012. The aim of this revised document is to identify more precisely the type of general activities which the Commission could carry out in the electoral field in the future.

2. The reference document for the Venice Commission, and indeed the Council of Europe, for defining the “European Electoral Heritage” is the Code of Good Practice in Electoral Matters (CDL-AD(2002)023rev). In addition, the Commission has looked in greater detail at a number of election-related topics. It will be noted that studies and reports have been undertaken on the following major issues: the election process, electoral systems, voting rights, gender issues, national minorities, referendums, political parties and election observation and evaluation.

3. The report cited above (CDL-AD(2012)005) identified the following topics which are currently being addressed or which could be further developed (paragraph 18 et seq):

- the use of administrative resources;
- the limitation of parliamentary terms of office (limiting the duration of terms of office and concurrent offices);
- state neutrality and administration in the electoral process;
- the independence of electoral commissions, the logical follow-on from the previous point;
- the question of the rules applying to the media, both public and private, in ordinary times and particularly during election campaigns;
- the question of election campaign funding, and especially the rules applying to funding from legal entities (limitation, publication, prohibition);
- the effectiveness of appeals in electoral matters and the guarantees they offer;
- the methods adopted by political parties in the selection process of candidates presented for election on a particular party's ticket;
- representation of women in parliaments;
- representation of minorities in parliaments.

4. It should, however, be noted that work has already been or is currently being carried out on these topics. Nevertheless, there are a number of avenues to explore for taking this work further. These will be discussed below, and accordingly, we shall be revisiting the various topics identified in the report referred to above and completing them by other issues and suggestions for work or study.

5. This revised memorandum takes into account the conference held in Tirana on 2 and 3 July 2012, under the Albanian Chairmanship of the Committee of Ministers of the Council of Europe, on “The European electoral heritage: ten years of the Code of Good Practice in Electoral Matters” (synopsis CDL-UD(2012)001syn). This offered an opportunity to look in greater depth at some of the issues identified in document CDL-AD(2012)005.

II. Election-relation themes which will or could be addressed by the Venice Commission in the future

6. The issues of the use of administrative resources and limitation of parliamentary terms of office, which are the subject of studies currently in progress, are mentioned here simply for the record. In addition, the Congress of Local and Regional Authorities has asked for a study

to be carried out on eligibility criteria for local and regional elections. The study will begin once we have received the documents on national legislation produced by the Congress. In addition, during the Conference in Tirana on 2-3 July 2012, the Congress underlined its interest in the publication of the study on the use of administrative resources during the electoral period. This problem is regularly raised in its reports on the observation of local and regional election.

7. As a general document, the consolidated document on “Electoral law and electoral administration in Europe” (CDL-AD(2006)018) covered the Commission’s opinions and studies up to 2006. However, as it is now a little old, it would be useful to have a revised version, given that numerous opinions and studies have been adopted since then, and a number of observation reports have also been written. A report on this topic was presented to the Conference held in Tirana on 2-3 July 2012.

8. Concerning the questions of electoral systems and representation; the question of electoral systems and in particular the size of constituencies could be developed, mainly regarding the limited choice offered to electors by certain systems. The issue of territorial representation, regardless of the representation of populations, could also be developed.

9. There have been no Venice Commission studies or reports on the independence of electoral commissions. However, in November 2004, it organised a seminar on “the organisation of elections by an impartial body” which led to a publication in the *Science and Technique of Democracy* series (No. 41). In addition to looking at national examples, this seminar addressed the issues of transparency and impartiality in connection with the role of the electoral administration bodies during pre-election periods, and electoral disputes. Since then, practice in various member states has repeatedly shown that there are problems regarding the impartiality and independence of the bodies responsible for organising elections. It would therefore be worthwhile for the Commission to look once again at this question in the future, perhaps by focusing on the composition and internal decision-making system of these bodies. A report on this question was presented at the Tirana conference. The report thus stated that to ensure the impartiality of electoral commissions, their members should not be dismissed solely for political reasons. In the same way they should not consider themselves to represent political interests even if their nomination was political. This is currently the most widely used way of composing electoral administrations in Europe. It is in the general interest that political considerations should not enter into the functioning or decisions of electoral administration so as to guarantee, *in fine*, citizens’ confidence in elections. These issues are without doubt matter for study. Furthermore, and as mentioned in the report cited above (CDL-AD(2012)005), it could be useful to look at the question of state neutrality and the neutrality of the administrative authorities in the electoral process; this refers to the bodies and ministries – other than the electoral commissions themselves – which are generally also involved in the electoral process through the assistance they provide to the electoral administration bodies (logistics, security, budget, etc.).

10. With regard to the question of the rules applying to the media, both public and private, in ordinary times and particularly during election campaigns, in 2009, the Commission produced a report on “media analysis during election observation measures” and, subsequently, guidelines (CDL-AD(2009)031), which focused on three aspects: consistency of the legal framework with international standards in the field of freedom of expression; media regulations during election campaigns; and supervisory bodies. While there are codes of good practice drawn up by other international election observation organisations, good practice applies above all to the public media. It would be interesting to carry out a similar study in relation to private media, looking at ownership of such media by senior political figures and leaders of political groups. Similarly, as mentioned in the report cited above, it would also be interesting to look in greater detail at the audiovisual media, in view of their impact, and to focus thought on the Internet, covering websites, blogs and social networks which now play a part in election campaigns, with or

without national legal provisions which regulate them, insofar as the Internet can be regulated. Clearly, freedom of expression must lie at the heart of this reflection, but it is also necessary to look at how to avoid having national regulations excessively limit such freedom by providing for equal opportunities. However, work on the media is multidimensional and must be carried out in co-operation with the departments dealing with this sector.

11. With regard to the question of the participation of citizens in elections, it might be interesting to develop a more sociological and not solely legal approach to elections, especially in the light of practical policies, even, as suggested by the OSCE/ODIHR in its comments submitted to the Venice Commission Secretariat, to think more broadly about the perception of a widening gap between elected officials and citizens. Based on this assumption, it is proposed to debate on how to promote the importance of elections and the impact of voting, as well as addressing the ethics of representative democracy and its elected officials. The question could thus focus on the content of the discussions and the analysis of the quality of exchanges, which could discourage the electorate. A greater transparency of the electoral processes, monitoring of public action by the electorate and possible new forms of democratic practice could also be developed. During the Tirana Conference the questions of boosting turnout and engaging young people by the introduction of electronic voting tools were raised as well as the training members of electoral commissions and observers. The problem of the organisation of elections by local and regional authorities during periods of economic crisis was also raised.

12. With regard to the question of access to political parties and candidates, the issue of the internal functioning of parties could be developed in particular : especially the primaries, or more broadly the internal selection process; the possibility for administrative and jurisdictional independent bodies responsible for monitoring the party statutes, and the possibilities of judicial appeal. In addition, it was recommended to develop the issue of access for small political parties to political life and the way in which this access can easily be granted. Moreover, the Congress of Local and Regional Authorities of the Council of Europe has indicated its interest for a possible study on the direct or indirect election of Mayors.

13. With regard to the question of election campaign funding, in 2001, the Commission wrote a report and guidelines on this issue (CDL-INF(2001)008). In 2006, the Commission published a report on the "prohibition of financial contributions to political parties from foreign sources" (CDL-AD(2006)014). Lastly, and with the aim of assessing the need for such a document, in 2011 the Commission adopted an "Opinion on the need for a code of good practice in the field of funding of electoral campaigns" (CDL-AD(2011)020), concluding that "the adoption of a Code of good practice in the field of funding of electoral campaigns would not add much, compared with existing documents". Moreover, as already stated, the Commission is currently preparing a comparative study on the use and misuse of administrative resources during election campaigns. However, this does not mean that it would not be worthwhile for the Commission to look at certain topics relating to this issue, such as the question of capping the funding of campaigns and parties, the transparency of such funding, whether public or private, the issue of equal opportunities for candidates, or the prohibition of funding, for example from legal entities. The report cited above also raises the seldom addressed question of the ratio applied between parties and candidates.

14. The Commission has not issued any reports or undertaken any studies on the effectiveness of appeals in electoral matters and the guarantees they offer, although this issue has been addressed at several conferences and seminars. However, certain specific questions could be looked into. Reports by international election observation missions regularly raise the following problems: the criteria for the admissibility of appeals before, during and after elections; the way such appeals are dealt with; and lastly, the implementation of decisions taken on such appeals. In addition, the question of judicial control of the electoral process and the deadlines for dealing with appeals could be developed. At the Conference held in Tirana on 2-3 July

2012, it was underlined that the main challenge is the establishment of a system of electoral appeals in Europe which is both accessible and effective.

15. The Code of Good Practice in the field of Political Parties already addresses the issue of the methods adopted by political parties in the selection process of candidates presented for election on a particular party's ticket (CDL-AD(2009)021, point II.B.3). Consideration could be given to updating how the principles of Europe's electoral heritage in this field are applied by parties, particularly as regards gender parity and the representation of national minorities (on these two issues, see the following two paragraphs).

16. With regard to the representation of women in parliaments, the Commission produced an interpretation of the Code of Good Practice in Electoral Matters in 2006 ("Women's participation in elections" (CDL-AD(2006)020)) and a report in 2010 ("Impact of Electoral Systems on Women's Representation in Politics" (CDL-AD(2009)029)). Although today, few European countries have legislation which is intrinsically unfavourable to women, they remain nevertheless considerably and unjustifiably under-represented. There is no doubt a need to give thought to new methods and solutions, perhaps by combining mechanisms relating to both electoral systems and the internal functioning of political parties. The fact remains that electors may be reluctant to choose women from among a large number of candidates in a given constituency. There too some thought needs to be given so as to come up with guidelines for member states to raise awareness of this problem among not only the electorate but also the leaders of political parties. Such guidelines should take into account external factors of a socio-economic, cultural and political nature. The question was addressed at the above-mentioned Tirana conference, under the title "Representation of women in elected bodies".

17. Between 2000 and 2008, the Commission produced three reports relating to the question of the representation of minorities in parliaments ("Electoral law and national minorities" (CDL-INF(2000)004); "Electoral Rules and Affirmative Action for National Minorities' Participation in decision-making process in European countries" (CDL-AD(2005)009) and "Dual Voting for Persons belonging to National Minorities" (CDL-AD(2008)013)). While there is no absolute rule in this area, an electoral system can encourage the participation of national minorities in politics, as studied by the Commission in 2000. However, this may not be a sufficient criterion, especially if the system is a proportional one in a country in which the minorities are dispersed. Accordingly, thought needs to be given to other additional measures which will help boost the participation of national minorities in public and political life. Affirmative action, as underlined by the Commission in the 2005 report referred to above, also has limited scope. As stated in its 2008 report, the Commission could give further thought to the representation of minorities in view of their situation in Europe. It might be appropriate to adopt legal and practical measures to foster the representation of minorities in view not only of their position in each country, but also of their presence and distribution in Europe. This question was dealt with at the Tirana conference, under the title "Electoral law and representation of minorities", stating the importance of favouring the representation of minorities as a means of preserving inter-ethnic peace and stability. The Conference also underlined the importance of positive measures to favour the participation of minorities in public debate by reiterating the conclusions of the Venice Commission report on "electoral rules and affirmative action for national minorities' participation in the decision-making process in European countries" (CDL-AD(2009)009):

- "a) Parties representing national minorities must be permitted. Yet the participation of national minorities in political parties is not and shall not be restricted to the so-called ethnic based parties.
- b) Special rules guaranteeing national minorities reserved seats or providing for exceptions to the normal seat allocation criteria for parties representing national minorities (for instance, exemption from a quorum requirement) do not in principle run counter to equal suffrage.

- c) Neither candidates nor voters must find themselves obliged to reveal their membership of a national minority.
- d) Electoral thresholds should not affect the chances of national minorities to be represented.
- e) Electoral districts (their number, the size and form, the magnitude) may be designed with the purpose to enhance the minorities' participation in the decision-making processes." These measures are still relevant but they must be part of a broader debate about the representation of national minorities in political life, as previously suggested.

III. Conclusion

18. Some of the topics identified in the report adopted in March 2012 by the Council for Democratic Elections and the Venice Commission on "measures to improve the democratic nature of elections in Council of Europe member states" (CDL-AD(2012)005) are currently being studied or will be further developed at the conference to be held in Tirana on 2 and 3 July 2012 on "The European electoral heritage: Ten years of the Code of Good Practice in Electoral Matters". It should be underlined, as was done at the above-mentioned Tirana Conference, that legal reforms are not a panacea and that over-regulation of the legislative electoral framework could have a negative effect on the transparency of the electoral process and its effectiveness. It is therefore important to examine whether "practical" solutions – such as for example informing citizens or training administrative staff – would not be more efficient than legal reform. It was also underlined at the above-mentioned Conference that repeated irregularities in the electoral process are not so much due to inadequate rules but rather to a lack of political will among the key actors in the electoral process to enable a balanced political game for all candidates and parties by the sincere implementation of the existing legal framework. This issue should regularly be examined, observation missions remaining in all cases a significant element for improving electoral practice throughout Europe.

19. In its comments on the revised draft memorandum, the OSCE/ODIHR proposes that the Commission work on the issue of voter registration and more specifically on identifying measures to improve practice in the field of voter registration and more broadly to improve the quality of electoral lists, which could be a subject for a future conference or study. On the issue of voters' lists, the Secretariat would like to point out the OSCE/ODIHR's recent publication concerning the observation of the voter registration process.¹

20. Furthermore the OSCE/ODIHR proposes that the Commission should further consider the way to use its four Plenary Sessions as well as its other meetings in order to improve the follow-up to recommendations made, on the basis of Codes of good practice and other reference documents. The Council for Democratic Elections could in fact reflect on this important aspect of follow-up to its opinions and studies in a more systematic manner than currently and also reflect on a way of proceeding with regard to reference texts.

21. Other topics, even though they have already been addressed, could be further explored. However, not all the ideas set out above can be taken up, at least at the same time. Priorities will have to be assessed as matters progress, bearing in mind the Commission's human and financial resources, and the readiness of its members and those of the Council to participate.

22. In addition, it would seem appropriate to emphasise in future studies the comparative aspect of national practices, the effect of the different measures adopted on the issue and to give examples of good practices as suggested quite rightly by the OSCE/ODIHR in its comments on the draft revised memorandum.

¹ *Handbook for the Observation of Voter Registration*, 13 July 2012.
Source : <http://www.osce.org/odihr/elections/92058>.

23. In addition, more specific guidelines could be drawn up on the basis of the report currently being drafted by the Parliamentary Assembly on “measures to improve the democratic nature of elections in Council of Europe member states”.