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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

**DRAFT OPINION ON
THE ISSUE OF THE RE-APPOINTMENT OF THE MEMBERS
OF THE STATE ELECTION COMMISSION
OF “the former Yugoslav Republic of Macedonia”**

on the basis of comments by

Mr Oliver KASK (Member, Estonia)

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

Introduction

1. In view of the preparation of the March 2009 presidential and local elections, the Monitoring Committee of the Parliamentary Assembly asked for advice from the Venice Commission on the appropriateness of reappointing all members of the State Election Commission in December 2008, some 3 months before the anticipated launch of the electoral campaign for presidential and local elections.

2. This Opinion was adopted by the Venice Commission at its ... plenary session (Venice, ...)

Background

3. The current State Election Commission was appointed in April 2006 for a 5-year term. In a Joint opinion on the Electoral Code of “the former Yugoslav Republic of Macedonia” (adopted by Venice Commission and OSCE/ODIHR at its 67th plenary session (Venice, 9-10 June 2006); CDL-AD(2006)022), it was suggested¹ that new appointments to election bodies under the Code should if possible be phased in (or “staggered”) so that an orderly rotation of membership will occur then and in the future. Members of election bodies should not be removed prior to the end of their terms, except for demonstrated cause established through appropriate proceedings.

4. In October 2008, the Electoral Code was amended and the rules on the composition of the State Election Commission were changed: the duration of the mandate of the members was reduced from 5 to 4 years and political parties were tasked to nominate all members of the Election Commission rather than only the president and the deputy. The amended Electoral Code stipulates that a new State Election Commission should be appointed within 60 days of the election of a new Parliament, although it is not clear whether the term of appointment (4 years) or the requirement to appoint a new Commission would take precedence in the case of early elections.

5. The appointment procedure is currently underway. Presidential and local elections are expected to be called for 29 March 2009.

The principles as stated in the European Electoral Heritage and in case-law

6. In its Code of Good Practice in Electoral Matters (CDL-AD(2002)023rev), the Venice Commission underlines in paragraph II. 2. b. that “*the fundamental elements of electoral law, in particular the electoral system proper, membership of electoral commissions and the drawing of constituency boundaries, should not be open to amendment less than one year before an election, or should be written in the constitution or at a level higher than ordinary law*”. In paragraph II. 3.1. f. of the Code of Good Practice, it is said that “*the bodies appointing members of electoral commissions must not be free to dismiss them at will*”. Paragraph II. 3.1. g. calls for standard training of the members of electoral commissions.²

7. The stability of fundamental elements in electoral law is, as underlined in the Explanatory Report of the Code of Good Practice in Electoral Matters, regarded as one of the factors in the credibility of the electoral process,³ and care must be taken to avoid not only manipulation to the advantage of the party in power, but even the mere semblance of manipulation. Even when no manipulation is intended, changes will seem to be dictated by immediate party political

¹ Par. 46.

² See also paragraph 84 of the Explanatory Report of the Code of Good Practice: *Members of electoral commissions have to receive standardised training at all levels of the election administration. Such training should also be made available to the members of commissions appointed by political parties. There have been several cases of commissions lacking qualified and trained election staff.*

³ CDL-AD(2002)023rev, paragraph 63.

interests. The principles stated in the Code of Good Practice were further clarified in the Interpretative Declaration on the stability of the Electoral Law adopted by the Venice Commission in December 2005 (CDL-AD(2005)043), where the stability of composition of electoral bodies was emphasised.⁴ The principle of stability of electoral law was affirmed by the European Court of Human Rights on 18th November 2008 in the case *Tănase and Chirtoacă v. Moldova* (paragraph 114 with reference to the Code of Good Practice in Electoral Matters).⁵

Conclusions

8. In the present case, the composition of the State Election Commission has not been criticised by the Venice Commission or other international organisations. The former regulation of the Electoral Code was generally in conformity with the principles of impartiality and efficiency. The changes made, however, do not appear to take into consideration those recommendations made by the Joint Opinion on the Electoral Code of “the former Yugoslav Republic of Macedonia” relating to the SEC.⁶ They seem more or less to be minor changes leading neither to better nor worse implementation of the principles governing the organisational mechanisms of the elections.

9. The results of new members to the State Election Commission at this time could lead to a body which is insufficiently trained before the anticipated presidential and local elections in spring 2009. Even those well trained will require time to develop a proper working procedure, which has the possibility to impact upon preparations for the upcoming elections.⁷ The appointment of new members to the State Election Commission would also remove any institutional memory and know-how. These important considerations for a well administered election process should be taken into account when appointing election commissioners.

10. Depending on the selection of members, the new appointments could also show the semblance of manipulation by leading parties, challenging legitimacy of the body. Especially in situations where new commissioners are less trained, inappropriate political arguments may arise in the decision-making of the State Election Commission.

11. It might be worth considering some of those on the current Election Commission for reappointment in the newly formed Commission to ensure stability and help promote the credibility of the process. Furthermore, the recommendations made in the Joint Opinion on the Electoral Code of the “Former Yugoslav Republic of Macedonia”,⁸ particularly those related to the staggering of appointments to the Election Commission, remain valid and could be considered during any future amendments. The law would also benefit from greater clarity on the term of the Election Commission, and if it is to stand for 4 years, or if it is to be replaced after each constitutive session of Parliament. Instability in the composition of the SEC would undermine the credibility of the electoral process.

⁴ Where it was clarified that it should not be invoked to maintain a situation contrary to the norms of the European Electoral Heritage, or to prevent the implementation of recommendations by international organisations.

⁵ European Court of Human Rights, Fourth Section, Case of *Tănase and Chirtoacă v. Moldova* (Application no. 7/08), Judgment, Strasbourg, 18 November 2008.

⁶ Opinion adopted by Venice Commission and OSCE/ODIHR at its 67th plenary session (Venice, 9-10 June 2006); CDL-AD(2006)022; see in particular par. 24-50.

⁷ See par. 5 of the Interpretative Declaration (CDL-AD(2005)043): “*In general any reform of electoral legislation to be applied during an election should occur early enough for it to be really applicable to the election*”.

⁸ Opinion adopted by Venice Commission and OSCE/ODIHR at its 67th plenary session (Venice, 9-10 June 2006); CDL-AD(2006)022.