



Strasbourg, 19 November 2015

Study No. 748 / 2013

CDL(2015)049*
Or. Engl.

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

DRAFT SUMMARY REPORT

ON

VOTERS RESIDING *DE FACTO* ABROAD

on the basis of comments by

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I. Introduction

1. At its 45th meeting (13 June 2013), the Council for Democratic Elections examined for the first time the issue of voters residing *de facto* abroad while being still registered as resident in-country, which had not been dealt with in the Report on out-of-country voting (CDL-AD(2011)022). This question was raised following suspicions of fraud by impersonation of voters residing *de facto* abroad; they were sometimes indicated as having voted whereas it is very doubtful that they were in the country on polling day. At its 46th meeting (20 December 2013), the Council for Democratic Elections discussed the issue on the basis of a secretariat memorandum (CDL-EL(2013)011). This document underlined the absence of a common definition of the concept of residence (or domicile); it pointed out other elements to be taken into account before deciding whether to study the management of electoral registers with regard to voters residing *de facto* abroad who remain registered as residents in their country of origin. The Council decided to proceed with its reflexion on the issue.
2. This first led to the preparation of “comments on security in elections when dealing with citizens living *de facto* abroad: the experience of Latin America” (CDL-EL(2015)002) by Ms Alanis Figueroa.
3. At its 49th meeting (13 December 2014), wishing to take the experience of other countries (including European ones) into account, the Council for Democratic Elections requested the Secretariat to prepare a paper on specific countries which had recently faced challenges on the accuracy of voters’ lists and organised elections for voters residing abroad.
4. Individual contributions were prepared by Mr Tanchev on Bulgaria (CDL-EL(2015)008), Mr Iure Ciocan (expert) and Mr Esanu on Moldova (CDL-EL(2005)005), and Mr Mohamed Krir (expert) on Tunisia (CDL-EL(2005)007). The issue of voters residing abroad is of particular interest in these countries since, even if exact figures are difficult to establish, the part of their population abroad is very high; a very conservative approach would consider it as superior to 10 %.
5. These contributions were summarised in an information report (CDL-PI(2015)003). The Council for Democratic Elections took note of this report at its 50th meeting (Venice, 19 March 2015).
6. In parallel, the Council for Democratic Elections, at its 49th meeting, requested Ms Alanis Figueroa and Ms Christina Binder (expert, Austria) to provide comments on the above-mentioned memorandum prepared by the Secretariat on electoral lists and voters residing abroad (CDL-EL(2013)011; see documents CDL-EL(2015)003 and 004). In particular, Ms Binder’s comments (CDL-EL(2015)003) underline the main problems in the field and possible next steps.
7. The present report is intended at summarising the findings of the various documents quoted above by focusing on the problems linked to voters *de facto* abroad and the solutions found to prevent fraud.
8. The Congress of Local and Regional Authorities of the Council of Europe addressed the issue in a report entitled “Electoral lists and voters residing *de facto* abroad”(CG/2015(28)6FINAL), which led to the adoption of Recommendation 369 (2015) and Resolution 378 (2015). This document was also taken into account.
9. *This report was adopted by the Council for Democratic Elections *** at its *** meeting (Venice, ***) and by the Venice Commission at its *** plenary session (Venice, ***).*

II. General remarks

10. Globalisation is one of the fundamental on-going phenomena of the first part of the 21st century. Travel in general and therefore migration have become easier, but not so much as virtual, instantaneous communication. Whereas in the past many emigrants lost contact with their country of origin, this is not anymore the case and they remain much more acquainted with the developments in this country, including in the field of politics. Moreover, double citizenship is admitted in a much larger way than before, and naturalisation very often does not mean the loss of the first citizenship. The issue of vote from abroad has to be addressed in this context.

11. There is no international standard providing for the right to vote of citizens residing abroad; nor is there any standard providing for the possibility to vote from abroad (rather than by coming back to the country of origin). The international trend is however favourable to out-of-country voting.¹

12. If out-of-country voting is allowed, it should not remain wishful thinking but the state has to take measures to ensure its effectiveness.²

13. States have a wide margin of appreciation with respect to the establishment of residence criteria. Still, the European Court of Human Rights considered this margin not to be unlimited. If residence requirements are contained in domestic legislation, they have to be applied in a non-arbitrary way, but there is no standard imposing to delete citizens *de facto* abroad from the in-country voters' lists.³

14. Citizens abroad on Election Day may be roughly divided into three categories: those permanently abroad, who may be double nationals; those staying temporarily abroad (for example for academic or employment purposes); and those who are just travelling abroad on Election Day (for business or personal reasons). The population registers and/or on the electoral lists – which are often derived from the latter – include of course the third category, but they include a number of citizens belonging to the second and even the first category (emigrants) too. The more or less high level of emigrants still on the in-country register may depend on a number of factors, such as the definition of residence by national law, incentives or disincentives to remain registered (such as social benefits on the one side and fiscal or military obligations on the other side), pro-activeness or inertia of the administration, or a legal obligation for all citizens to declare a residence in-country.

15. The presence of citizens residing abroad on the electoral lists could lead to impersonation on Election Day through the use of the name of a person who is out-of-country. This risk can be minimised by legal and administrative measures encouraging de-registration. However, these measures can have drawbacks (like exclusion from social rights) and will not settle the problem in its entirety. States have therefore found a number of other solutions. Some of them concern voters' registration, but others are more focused on controls on Election Day.

16. The report will refer to the main findings of the Venice Commission which can be inferred from its work on voters residing *de facto* abroad. As already said, the Venice Commission was provided specific information on the situation in Bulgaria, in Moldova, in Tunisia, as well as in a

¹ See report on out-of-country voting, CDL-AD(2011)022.

² It is true that, in *Sitaropoulos and Giakoumopoulos [GC] v. Greece* (42202/07, 15 March 2002), the Grand Chamber of the European Court of Human Rights (contrary to the Chamber) did not consider that the absence of out-of-country voting led to a violation of Article 3 Protocol 1. However, it based its reasoning on the fact that Article 51 § 4 of the Greek Constitution provided for a possibility and not an obligation to allow citizens abroad to vote.

³ ECtHR, *Melnychenko v. Ukraine*, 17707/02, 19 October 2004, para 56.

number of Latin American states. The present report is aimed at summarising the main findings detailed in the previous Venice Commission documents as well as in the Congress' report.⁴

III. Voters' registration

17. The three countries specifically examined (Bulgaria, Moldova and Tunisia), as well thirteen European countries mentioned in the Congress' report,⁵ provide for a system of passive voter registration – for residents. The United Kingdom is the only European country under consideration using a system of active registration. On the contrary, in Latin America, active registration prevails (e.g. Argentina, Colombia, Mexico), with some exceptions (Nicaragua, Panama). This is also the case in Tunisia since 2011.

18. However, a number of European countries⁶ (including Bulgaria and Moldova) as well as Panama provide for active voter registration of voters abroad.⁷ Passive registration appears as difficult to implement since many citizens abroad have no contact with the authorities of their country of origin, in particular when they are double nationals. Furthermore, registration may be limited to those legally in the host country (Argentina).

19. Other obstacles to registration of out-of-country voters may result from the need to go to a consular or diplomatic mission in order to register, or to be issued a voter's card in-country – as was previously the case in Mexico.

20. In order to make the access to the right to vote easier, national legislation may provide for no registration requirement prior to the vote (Estonia for the vote at diplomatic or consular missions, Romania) or make registration possible at the polling station on Election Day (Bulgaria, Moldova).

21. Systems with passive voter registration are much more open to (undue) inclusion of voters residing abroad than systems with active registration: in the latter, at least if registration has to be regularly confirmed, voters residing abroad will in general not (re-)register in-country and will therefore be excluded from the voter registers.

22. In countries which allow for out-of-country voting, citizens abroad could in theory be included in the general voters' list or in a specific list of voters abroad. The latter solution is however applied in all Latin American countries under consideration,⁸ as well as in the three countries examined in the case studies (Bulgaria, Moldova and Tunisia).

23. Such a solution efficiently prevents one aspect of fraud: double vote, in and out-of-country (subject of course to proper identity controls at polling stations). This problem is however rather marginal, except possibly in border regions. The existence of a specific register is also intended at addressing the main challenge – impersonation – but its efficiency is dependent on the systematic deletion of those registered from in-country lists.

24. This systematic deletion is on its turn difficult to implement in the absence of a centralised electoral register and is also dependent on the proper functioning of the registration system, in particular from a technological point of view. It is also very difficult to implement when out-of-country voters are allowed to register at the polling station on Election Day.

⁴CG/2015(28)6FINAL.

⁵Albania, Armenia, Austria (Vienna), Belgium, Bosnia and Herzegovina, Estonia, Finland, Georgia, Iceland, Netherlands, Spain, Sweden and "the former Yugoslav Republic of Macedonia".

⁶CDL-AD(2011)022, par. 34ff.

⁷Vote from abroad is not yet effective for citizens of Nicaragua.

⁸Argentina, Colombia, Dominican Republic, El Salvador, Mexico, Nicaragua, Panama.

25. Examining more in detail the different ways to ensure the reliability of the electoral registers would go beyond the scope of the present report. It is however useful to mention such measures as the continuous updating and revision of electoral registers; partnerships with civil registry authorities to ensure the integrity of the electoral list; and the obligation to periodically declare one's place of residence to the government.

IV. Voting methods

26. The 2011 study of the Venice Commission enumerated 19 European countries which provided for remote voting for citizens abroad.⁹ This is also the case in several Latin American countries (El Salvador, Mexico, Panama). Vote by post is still the main means of remote voting whereas a few countries allow for (some) internet voting (Estonia, Mexico, Switzerland).¹⁰

27. A number of countries under consideration do not provide for remote (postal or internet) voting. Voters have therefore to vote at polling stations. Whereas the exclusion of remote voting is now a minority in Europe (16 countries out of the 35 studied),¹¹ it appears to be still more frequent in Latin America than its admission.¹²

28. The requirement to vote in person may be an important limitation of the exercise of political rights. The opening of a sufficient number of polling stations, not too distant from the places where citizens stay abroad, is the first challenge. Another issue may be accessibility (polling stations may be too small, or not accessible to citizens with disabilities). Moreover, providing the regular equipment and documentation, including a sufficient number of ballot papers, is not always easy.

29. For example, till 2009, Moldovan electoral legislation expressly provided that polling stations could be opened only within the diplomatic missions and consular offices of the Republic of Moldova; thus, around 33 polling stations were opened. Since this number was insufficient - it did not cover all voters and the polling stations were too far from their residence – for the 2014 parliamentary elections, 95 polling stations were established (38 polling stations within the premises of diplomatic and consular missions and 57 extraterritorial polling stations). Tunisia has established a number of polling stations which goes much beyond the diplomatic and consular missions (more than 100 in France only).

30. Finally, a number of countries provide for proxy voting or advance voting (the latter is of interest only for citizens who are out-of-country for a very short time).¹³

V. Vote at the polling station: practical aspects

31. Even if a number of preventive measures may be taken beforehand, it is eventually at the polling station in the country that impersonation has to be avoided. Double vote of citizens residing in the country, but impersonating emigrants, is a more important risk than double vote by citizens abroad.

⁹ CDL-AD(2011)022, par. 58.

¹⁰ Internet voting, in particular from abroad, is still at its early stages and new developments occur regularly. Estonian voters abroad may vote by Internet : in the last elections (2014), 5.71% (more than 10.000 votes) of votes by Internet were given from abroad, more than 71% of them by those staying abroad only temporarily (not registered as voters abroad). Internet voting for Mexicans abroad is, for the time being, implemented to a limited extent at the local level. Internet voting was for the first time accessible to part of the Swiss electorate abroad for federal elections (and not only referendums) in October 2015.

¹¹ CDL-AD(2011)022, par. 57.

¹² Voting in person is required by the legislations of Argentina, Brazil, Colombia, Nicaragua and the Dominican Republic.

¹³ Examples are available CDL-AD(2011)022, par. 59-60.

32. Classical measures against double vote imply the control of the identity documents of the voter at the polling station. In order to make the right to vote effective, a number of countries recognise several documents as valid – for example, an identity card or a passport, since a number of people have only one of them. They may even admit that the same person holds two passports. Moreover, the validity of some documents can be unlimited or the use of expired documents be admitted: recognising voters through their photo is therefore not always easy. This makes the identity control insufficient to prevent fraud in case the electoral lists are not fully reliable. Identity control is a full guarantee against impersonation only if each voter is provided with a specific document, as is the case in Mexico or in the Dominican Republic. Fraud is made more difficult if supplementary measures are taken against the falsification of identity documents, for example by the use of biometrical data, or if two identity documents are requested (Argentina).

33. Another efficient measure against double vote is the use of indelible ink: its application on the same finger, as well as controls at the polling station, have of course to be systematic. Such ink is used for example in Tunisia as well as in most Latin American countries under consideration, as a supplementary measure to identity control.¹⁴ Marks on identity documents may be a further safeguard but make it possible to identify those who voted.

34. When a centralised electoral register is available (and reliable), an on-line verification of the identity of voters in this register also prevents double vote. This system, which is applied in Moldova, implies the introduction of the 13 digits personal identification number from the voters' ID in the on-line application. The check-in request is sent, through internet connection, to the CEC server in order to check if the respective voter voted or not.

VI. Conclusion

35. While there is no international standard yet on the right to vote of citizens abroad nor on the definition of residence, consistency and effectiveness of electoral legislation and practice have to be ensured. This implies respect for the “one person – one vote” principle: universal suffrage for all those admitted to vote but also the exclusion of impersonation and multiple voting. The latter aspect appears as the main concern when talking about voters *de facto* abroad.

36. Effective measures in favour of voters abroad imply making their registration and the exercise of their right to vote as easy as possible, if necessary by multiplying the number of polling stations and voting methods (including postal, internet and proxy voting). If no precautions are taken, there is however a risk of electoral fraud. This is typically the case if registration is possible at the polling station on Election Day or if the list of documents for voter identification is broad. The risk is actually much higher in-country, through impersonation, than abroad. Here again, the more extensive the list of admitted identity documents, the higher the risk of fraud.

37. These risks may be avoided by enhancing the level of security of both electoral registers and identity controls at the polling station. Such measures appear as in general stricter in Latin America than in Europe.

38. While active electoral registration is the rule for citizens abroad, many national systems provide for passive registration for residents. Reliability of these registers is ensured *inter alia* through: centralised lists of voters, under continuous updating and revision, with constantly updated addresses; exclusion from the list of voters of those citizens residing abroad; partnerships with civil registry authorities to ensure the integrity of the electoral list;

¹⁴ Colombia, El Salvador, Mexico, Panama, Dominican Republic.

rigid and publicised deadlines to make changes to the electoral register and obtain identity documents.

39. Identity controls at the polling station are made more efficient through the issuance of specific voters' ID documents; the use of biometric measures to identify duplication in records; the adoption of anti-counterfeiting measures for identity documents; the on-line verification of the identity of voters; controlled destruction of identification documents which remain unclaimed by citizens. The use of indelible ink is a good complement to such controls.

40. The previous developments show that the issue of citizens residing *de facto* abroad is quite complex: it cannot be isolated from other aspects of electoral law and practice and it is interrelated with areas outside the electoral process, such as accuracy of the population registry, as well as fiscal and social security legislation, which may include incentives or disincentives to deregistration from in-country lists. General measures ensuring at the same time the inclusiveness and the security of the vote appear as the most appropriate to tackle with this issue.