Strasbourg, 17 October 2011

CDL-AD(2011)027

Opinion No. 640 / 2011

Or. Engl.

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

AND

OSCE OFFICE FOR DEMOCRATIC INSTITUTIONS AND HUMAN RIGHTS

(OSCE/ODIHR)

JOINT OPINION

ON

THE REVISED ELECTORAL CODE

OF "THE FORMER YUGOSLAV REPUBLIC OF MACEDONIA"

Adopted by the Council for Democratic Elections
at its 38th meeting
(Venice, 13 October 2011)
and by the Venice Commission
at its 88th Plenary Session
(Venice, 14-15 October 2011)

on the basis of comments by
Mr Oliver KASK (Member, Estonia)
Ms Maria Teresa MAURO (Expert, Italy)
Mr Kåre VOLLAN (Expert, Norway)
Mr Donald BISSON (Expert, OSCE/ODIHR)

Table of contents

I. Introduction

A. Mandate

1. On 15 December 2010, the Ministry of Justice of "the former Yugoslav Republic of Macedonia" requested the OSCE Office for Democratic Institutions and Human Rights (OSCE/ODIHR) to prepare an opinion on amendments to the Electoral Code ("the Code"). At the time of the request, the Code was still a draft. As the Ministry of Justice requested a response within a short timeframe, OSCE/ODIHR and the Venice Commission initially prepared a set of informal comments on 11 January 2011.

2. On 5 and 13 April 2011, the parliament of "the former Yugoslav Republic of Macedonia" adopted an amended Code (CDL-REF(2011)039). OSCE/ODIHR and the Venice Commission convened to provide a Joint Opinion on the adopted Code, based on the initial set of informal comments on the draft Code.

3. The Code was amended two months before the 5 June 2011 early parliamentary elections. Although the amendments were the result of a consultative process that included representatives from the government, parliament, civil society, and the OSCE Mission to Skopje, not all political parties participated in the drafting process.[1] Amendments to the Code were passed with a slim majority (68 of 120 MPs),[2] with all opposition parties boycotting the vote. Altering the legal framework so close to an election is not consistent with good electoral practice.[3]

4. The Joint Opinion is based on an unofficial English translation of the Code and without possibilities for further clarifications. It should be noted that any legal review based on translated laws may be affected by issues of interpretation resulting from translation.

5. The present opinion was adopted by the Council for Democratic Elections at its 38t meeting (Venice, 13 October 2011) and by the Venice Commission at its 88th plenary session (Venice, 14-15 October 2011).

B. Reference Documents

6. The Code was reviewed for compliance with international standards and good practices. This Joint Opinion should be read in conjunction with the following documents:

- Electoral Code, unofficial translation of the Code consolidated with the amendments passed on 5 and 13 April 2011 (Official Gazette No 44/2011 and 51/2011; CDL-REF(2011)039).
- Electoral Code, unofficial translation of the consolidated law as published in the official Gazette 40/2006, 136/2008, 148/2008 and 155/2008 (CDL(2009)006).
- Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE (29 June 1990).
- Document of the Moscow Meeting of the Conference on the Human Dimension of the CSCE (3 October 1991)

---

[1] See paragraph 18.1 of the Moscow 1991 Document which states an obligation "*to adopt legislation as the result of an open process reflecting the will of people*"; www.osce.org/odihr/elections/14310.

[2] Amendments to the Electoral Code were passed on 5 April 2011 by 68 of 120 Members of Parliament (MPs), with amendments passed on 13 April by 63 of 120 MPs.

[3] See Venice Commission Code of Good Practice in Electoral Matters. Guidelines and Explanatory Report (18-19 October 2002; CDL-AD(2002)023rev), II 2. b: "*The fundamental elements of electoral law… should not be open to amendment less than one year before an election.*"

- Code of Good Practice in Electoral Matters – Guidelines and Explanatory Report. Adopted by the Venice Commission at its 52nd session (18-19 October 2002; CDL-AD(2002)023rev).
- Joint Opinion on the Electoral Code of "the former Yugoslav Republic of Macedonia" as revised on 29 October 2008 by the Venice Commission and OSCE/ODIHR (5 August 2009; CDL-AD(2009)032).
- Opinion on the Electoral Code of "the former Yugoslav Republic of Macedonia" by the Venice Commission (15 December 2008; CDL-AD(2008)036).
- Joint Opinion on the Electoral Code of "the former Yugoslav Republic of Macedonia" by the Venice Commission and OSCE/ODIHR (21 March 2007; CDL-AD(2007)012).
- Joint Opinion on the Electoral Code of "the former Yugoslav Republic of Macedonia" by the Venice Commission and OSCE/ODIHR (10 July 2006; CDL-AD(2006)022).
- OSCE/ODIHR final report on the 5 June 2011 early parliamentary elections.[4]
- OSCE/ODIHR final report on the 22 March and 5 April 2009 presidential and municipal elections.
- OSCE/ODIHR final report on the 1 June 2008 early parliamentary elections.

II. Executive Summary

7. The amended Code represents a genuine attempt to address many of the previous recommendations and issues raised by OSCE/ODIHR and the Venice Commission. It is an improvement over the previous Code.

8. Positive changes in the Code that should improve the administration of elections include:

- Provisions on the right to vote and to stand for election have been clarified.
- The State Election Commission is required to produce a rulebook detailing the procedure for appointment and dismissal of members of lower-level election commissions and boards.
- Articles on media are positively amended and re-organised. The amendments strengthen the media provisions and address gaps and ambiguities.
- A requirement that an interim campaign finance report be filed has been added.
- Financial reports of candidates will be published on the websites of the State Audit Office and the State Commission for Prevention of Corruption, in addition to the website of the State Election Commission.
- Campaign regulations have been restructured and are more coherent.
- It is clarified that although a polling station may close early if all voters on the list have voted, the counting cannot commence prior to the closing of all polls at 19:00.
- Several articles are amended to require that the number of ill and incapacitated voters who voted are included in the results protocols.
- The number of voters who have voted will be determined according to the signatures on the voter lists and written down in the protocol before the ballot box is opened.
- Penal and misdemeanour provisions have been reorganised and clarified including the addition of several new offences, mostly relating to the activities of the media.
- Military personnel will now vote at their place of registered permanent residence or in the regular polling station where they are stationed instead of in their military posts.

9. However, a number of previous recommendations remain unaddressed even though the relevant articles were the subject of recent amendments. These issues include:

[4] OSCE/ODIHR reports on previous elections in "the former Yugoslav Republic of Macedonia" are available at: http://www.osce.org/odihr/elections/fyrom.

- The Code does not clearly define the reasons why a member of a lower-level election commission or board can be dismissed.
- There is no requirement for Election Boards to make a reconciliation of the numbers listed in the protocols if, for example, the number of ballots in the box does not match the number of voters who voted according to the voter lists.
- There is no requirement that a breakdown of results by polling station be published by the State Election Commission or Municipal Election Commissions.
- The Code could be interpreted as limiting regular political activities held prior to the start of the official campaign.
- There is an unreasonable prohibition on submitting a complaint or appeal by post.
- The time frame for the courts to hear and decide on complaints is too short.
- The allocation of mandates in out-of-country electoral districts may disproportionately affect the equality of the vote.
- The introduction of a different electoral system for out-of-country voting from the one used in-country does not seem to be justified.
- The different thresholds for campaign donations between individuals and legal entities is discriminatory and grants an unfair advantage to large entities.
- The threshold of 50 per cent registered voters (not of votes cast) to win the presidential election in the first round is disproportionate and could result in a second round even when one candidate defeats all other candidates by a large margin. The continuation of a voter turnout requirement for a second round could lead to cycles of failed elections.

10. OSCE/ODIHR and the Venice Commission stand ready to provide assistance to authorities in their efforts to improve the legal framework for elections and bring it more closely in line with OSCE commitments and international standards. Equally, it must be emphasised that full and effective implementation of the law is necessary to ensure elections are administered in line with international standards.

III. Specific Comments on the Electoral Code

A. Right to Vote

11. Article 7(2) guarantees the right to vote to citizens "*with full general capacity to act*", which likely refers to mental capacity. However, the provision should mention that a court decision has to attest a lack of capacity, depriving a citizen of his/her political rights, as long as this is not settled in another text.[5]

B. Right to Stand for Office

12. The adopted Code has removed the requirement in Articles 63 and 64 that the list of candidates includes their professions. This addresses previous concerns about whether such information is necessary and whether the absence or incorrect provision of the "profession" would be considered an irregularity that could deny a candidate the right to stand for office.[6]

13. Article 7(2) of the Code lists those citizens who do not have the right to stand for office. The recent amendments clarified that a person who is sentenced to imprisonment for more than six months, and has not yet started to serve his/her sentence, would be ineligible to stand for office.

14. Articles 6 and 7 do not allow foreigners to vote or stand for election to municipal councils and mayor. As recommended in the Venice Commission Code of Good Practice in Electoral

[5] See Venice Commission Code of Good Practice in Electoral Matters, I. 1.1 d. iv. See also European Court of Human Rights, case of *Alajos Kiss v. Hungary* (application no. 38832/06), Judgement, Strasbourg, 20 May 2010.
[6] See Joint Opinion CDL-AD(2009)032, paragraph 41.

Matters, it would be suitable for the right to vote and stand for local elections to be provided to long-standing foreign residents after a certain period of residence.[7]

15. Article 63(3) only allows voters to sign in support of one list. During the last Presidential and Municipal Elections (22 March and 5 April 2009), "several candidates or prospective candidates claimed to the OSCE/ODIHR EOM that the system disadvantaged opposition candidates, in part because many citizens were reportedly afraid to visit a government office to register their support for an opposition candidate".[8] The latter practice could therefore be reconsidered.

16. Article 64(2) provides "that candidates for Members of Parliament have to declare belonging to an ethnic community." This should not be compulsory.[9]

17. Article 67(2) regulates the right for the submitters "*to eliminate the irregularities within 48 hours from the receipt of the lists*" if "*the relevant EMB* [election management body] *determine[s] that there are irregularities in the list*. The provision should be modified as follows: "…within 48 hours from the relevant Electoral Commission notification". Indeed, the 48-hour deadline from the receipt of the list may lead to manipulation by the relevant EMB which could delay informing the submitter and consequently give him/her a limited margin of time to eliminate the irregularities, with the subsequent risk of invalidating the list of candidates (see also Article 140(2)).

C. Voter Lists

Citizens 18 years old on election day

18. As previously recommended, Article 43 of the Code is amended to clarify that the Ministry of Internal Affairs (MoIA) is obliged to provide information on those citizens who will turn eighteen by the day of elections and not just those who have turned 18 at the time of the data submission. This is a welcome amendment.

Military Vote

19. The requirement that special excerpts of the voter lists be prepared for administering elections in military places is deleted from the relevant articles of the Code. This allows military personnel to vote at their place of registered permanent residence or in the regular polling station where they are stationed, as previously recommended. This is a welcome amendment.

Data Protection

20. The issue of use or abuse of information from the voter lists is not sufficiently addressed by the amendments. Article 55(1) stipulates that the personal data contained in the voter lists must be protected in line with the law and cannot be used except for the purpose of "*exercising the citizens' right to vote.*" However, Article 55(2) requires the State Election Commission ("the SEC") to supply all of the data from the voter lists to any registered political party or independent candidate, upon request. The legal framework should clearly state the permitted usage of information obtained from the voter lists and whether the information can be used for the campaign activities of political parties and candidates. At a minimum, more guidance should

[7] See the Code of Good Practice in Electoral Matters, I, 1.1b. ii.
[8] For further details, please see the OSCE/ODIHR final report on the 22 March and 5 April 2009 presidential and municipal elections, page 9, Section VII. (http://www.osce.org/odihr/elections/fyrom/37851).
[9] Code of Good Practice in Electoral matters, I.2.4.c.

be provided to political parties and candidates by providing a concrete definition for the term "*exercising the citizen's right to vote.*"

21. In line with good practice,[10] Article 179-a makes it a violation of the Code to misuse the data from the voter lists, punishable by a fine of EUR 500 to 1,500. However, the lack of clarity on use of information from the voter lists diminishes the utility of this sanction.

D. Out-of-Country Voting

22. The Code significantly changes several aspects of out-of-country voting. Measures for allowing citizens abroad to vote have been implemented in a number of countries, but vary widely in scope and approach. No precise international standards exist for implementing such measures, but out-of-country procedures should generally meet the same standards for democratic elections as in-country procedures.

23. Out-of-country voting was implemented for the first time in the 2011 early parliamentary elections. Organising voting abroad is a complex exercise which has financial and administrative implications. Its implementation should be carefully considered by all electoral stakeholders in an inclusive and public process so that confidence in the electoral process is maintained. Arrangements for voting abroad must strike a balance between extending the franchise to eligible voters and ensuring the integrity and transparency of the vote. To this end, consideration could be given to reviewing the system for out-of-country voting based on the experiences learned from the 2011 early parliamentary elections and the following comments.

<u>The Electoral System</u>

24. Before the April 2011 amendments, there was an inconsistency in Article 4 regarding the MPs elected abroad because it was stipulated that those three MPs are elected in a proportional system but at the same time from single-member constituencies. This inconsistency has now been removed. However, two concerns persist.

25. The first is related to the principle of equal suffrage and, in particular, the equality of the vote.[11] This change does not address the issue that the three out-of-country districts are assigned one seat each, regardless of the number of registered voters. It will lead to a probable situation where the number of votes electing out-of-country MPs will differ significantly in comparison to the in-country districts. Moreover, the variation between the three out-of-country districts may also be large. While special circumstances, including geographical factors, are recognised as a permissible departure from the equality of the vote, any deviation should be minimal. The Code provides for a five per cent deviation among in-country districts. However, contrary to good electoral practice, out-of-country districts are excluded from any requirements.[12] This should be amended in order to respect the principle of the equality of the vote.

26. Secondly, the majoritarian system of the three out-of-country seats does not correspond with the proportional system of the in-country seats. Consequently, the three seats abroad may be won by the same party countrywide, which means that one party gets a bonus in these districts, which is not the case in the in-country districts. This inconsistency could have been avoided if all the three members were elected in one district for all out-of-country voters under a proportional system. Indeed, the need for the further breakdown in districts abroad does not

[10] See OSCE/ODIHR, Guidelines for Reviewing a Legal framework for Elections, 2001, p.14.
[11] The equality of the vote is guaranteed by Article 22 of the Constitution, Paragraph 7.3 of the OSCE 1990 Copenhagen Document, and the Venice Commission, Code of Good Practice in Electoral Matters, I, 2.2.
[12] See the Code of Good Practice in Electoral Matters, I, 2.2., which states: "Seats must be evenly distributed between the constituencies… The permissible departure from the norm should not be more than 10%, and should certainly not exceed 15% except in special circumstances."

appear convincing. It is difficult to see that voters temporarily living in Australia should have fundamental interests different from those living in the USA for example. There is also no requirement for the candidates to be residing abroad, which gives the provision of single-member districts even less value.

Right to Vote

27. Under the amended Article 2(17) of the Code, citizens who are abroad for any duration of time longer than three months would meet the definition of "temporarily abroad," allowing them to register to vote abroad. This is a welcome change, as this was previously restricted to those citizens temporarily abroad for a maximum of "up to one year." Nevertheless, concerns remain about the possible disenfranchisement of those citizens who are abroad on election day but have not met the minimum three month requirement.

Right to Stand for Office

28. Article 61(2) is amended to increase the number of supporting signatures needed for a group of voters, not a political party, to submit a list of candidates in parliamentary elections for the three out-of-country districts from 200 to 1,000. Although this change harmonises the required number of signatures for in-country and out-of-country districts, it does not address the issue that the number of signatures required for districts abroad is not linked to the number of citizens or registered voters residing abroad in each district. In addition, the logistics for collecting signatures in the much larger geographical districts (for example, in the 'Australia and Asia' District) is much more challenging than in the in-country districts. It would be therefore advisable to relate the number of signatures required to the percentage of voters abroad.

Out-of-Country Voter Lists

29. The new Article 50-a clarifies and consolidates the provisions on the formation of the special excerpts of the voter lists for out-of-country voting and the procedure for inspecting these voter lists. The provisions are more inclusive and give out-of-country voters similar rights concerning voter lists as in-country voters.

30. These provisions of Article 50-a are a positive step in that they improve the system of registration for out-of-country voting and allow for changes to be made in these voter lists. In general, it is good practice to allow those residing abroad to request registration and changes in the list by e-mail. However, the new articles require that requests for changes be accompanied by "adequate documentation," with no definition of what type of documentation would be adequate. This vagueness could cause problems in implementation and confusion among voters and election administrators as to what type of documentation is required to support a request for changes or registration in the voter lists. Moreover, the lack of details on which documents are necessary could lead to an uneven implementation of this requirement and to someone being excluded from the voter lists unlawfully or being added to a voter lists in a district he/she should not be in, due to a lack of full and verifiable information.

31. Article 48 of the Code is amended to allow voters to request changes to the out-of-country voter lists by sending an e-mail through the diplomatic-consular offices to the SEC or directly to the SEC. The Code should clearly specify that an applicant should refrain from addressing both simultaneously in order to avoid cases of double jurisdiction. Furthermore, the Code should indicate that upon receipt and once a decision is taken, the SEC shall inform the applicant by email. This would provide the required time for the applicant to lodge a potential appeal within the established time.

32. If the diplomatic or consular office is required to submit the requests for insertion of new names immediately and no later than "*two days after the completion of the public inspection*"

through the Ministry of Foreign Affairs to the SEC, this implies that those who have submitted an application for registering at an early stage will not be able to ascertain if their names have been inserted into the voter lists since the scrutiny period is over. Therefore, the deadline and procedure to present and check if the name of a voter has been inserted on the list should be set to avoid disenfranchising voters (see also Article 53).

Arrangements for Out-of-Country Voting

33. In a new provision under Article 38-a of the Code, composition of the Election Boards (EBs) for out-of-country voting is the same as those for in-country voting. While providing consistency with in-country procedures, this could result in considerable expense in deploying EB members to out-of-country polling stations. As such, other options could be considered. The 2007 Joint Opinion noted: "electoral board members could be recruited among citizens that are available in the particular country, either upon recommendations from mainstream parties, or on a case-by-case basis."[13]

Out-of-Country Complaints and Appeals

34. Complaints from the three out-of-country districts can be filed by the authorised representative of the electoral contestants. However, it is unclear whether or not this procedure will result in timely and effective resolution of complaints concerning out-of-country voting as there are still logistic issues and issues related to evidence that are not addressed. The provision should outline a clear timeline for complaints and appeals procedures for those citizens residing abroad, so as to ensure that they have the opportunity to file complaints and have access to an effective remedy. Moreover, provisions regarding the institutions responsible for the appeals against commissions' decisions should be harmonised (in particular Article 147(2) and Article 148(5)).

35. Article 149 does allow for the submission of a complaint by express mail when an out-of-country voter's right to vote has been violated. The complaint must be submitted within 24 hours of the violation. This would seem to conflict with the provisions of the law which do not allow for submission of complaints by post.

36. Article 68(1) stipulates: "*[t]he order of the candidates on the list of candidates, i.e. the lists of candidates, shall be determined by the competent election commission by drawing lots and this number shall be the same in all electoral districts, i.e. municipalities, and in the electoral district, i.e. municipality, where there is no own representative, the respective number of the list submitter shall be left out and in his place shall be written the ordinal number of the following head of the list without leaving an empty space.*" The meaning of the above quoted paragraph is unclear. The language should be corrected to clearly state the intention.

E. The Election Administration

37. The Code maintains a three-tiered election administration system which consists of the SEC, MECs and EBs. The title of deputy president of the SEC has been replaced with the title of vice-president and it has been clarified that the vice-president is also elected by parliament with a two-third majority in Articles 26 through 29.

38. The qualification of SEC members is changed from "high education and at least 8 years of legal experience (political/election systems)" to a law degree with at least eight years experience (Article 27(1)). It is difficult to see the justification for requiring by law that lawyers be members of the SEC. In many countries, other specialists work on electoral management bodies. The most important criterion is the experience in organisation of elections and a good

[13] See Joint Opinion CDL-AD(2007)012, paragraph 14.

mix of formal backgrounds; a few members should have a legal background, but it should not be a general and discriminating criterion.

39. Article 26(3) stipulates that the president, vice-president and the members of the State Election Commission "*… shall have the right to be re-elected*". Nevertheless, it does not define the number of mandates they can be elected for, though it specifies that their mandate lasts "*for a period of 4 years*" (Article 26(4)). This could be clarified.

40. Articles 34 and 38 of the Code make it clear that the MECs and EBs are composed of the president and four members. In line with previous recommendations, it clarifies that a deputy is only considered part of an EB when acting on behalf of a member.[14]

41. Changes to Article 31(19) require the SEC to adopt a rulebook outlining the manner and procedures for dismissal, as well as election, of members of MECs and EBs. This partially addresses a previous recommendation that the procedures by which members of MECs and EBs are dismissed for illegal activities be detailed.[15] However, the determination of whether or not the issue is sufficiently addressed can only be reviewed after the rulebook has been published. Care should be taken to assure that the rules comply with the procedural rules set out in relevant civil and criminal laws and comply with international standards. Consideration could be given to detailing in the reasons why a member of a MEC or EB can be dismissed to aid the transparency of the Code and to ensure that future SECs cannot change the rules for each election.

42. In line with a previous recommendation, Article 37(2) now specifies that the MECs and the Election Commission of the City of Skopje have the authority to dismiss members of the EBs prior to election day as well as on election day. However, as noted in respect of SEC competencies, the article does not address the procedures by which the MEC can dismiss EB members.

43. Article 26(10) requires the SEC to meet if it is required by a majority of the members. It is more common that a large minority, for example one-third of the members, may demand a meeting to be held. This should be reflected accordingly in this provision.

F. Campaign

44. Following the April 2011 amendments, the electoral campaign regulations have been restructured and are consequently more logical. Nevertheless, by replacing the definition of "campaign activities" in the previous Article 39 with the following new Article 69-a, the revised definition of what constitutes an election campaign remains very broad.

45. The new Article 69-a stipulates:

> "(1) As an election campaign is considered: public gathering and other public events organised by the campaign organiser, public display of posters, video presentations in public areas, electoral media and internet presentation, dissemination of printed materials and public presentation of confirmed candidates by official electoral bodies and their programmes.
> (2) The election campaign commences 20 days prior the Election Day and in the first and the second round of election cannot continue 24 hours before elections and on the Election Day."

[14] See Joint Opinion CDL-AD(2009)032, paragraph 32.
[15] Id., paragraphs 26 and 29.

46. This definition could be considered as limiting regular political activities held prior to the start of the official campaign period. The Code should specify what political activity is not permissible before the start of the official campaign period. It is recommended that early campaigning rules should only apply to special media regulations, such as free airtime or the allocation of designated free space for posting of campaign material.[16] Authorities are therefore encouraged to revisit the recommendation made in the 2007 and 2009 Joint Opinions.

47. The Joint Opinion of 2009 stated:

> "The definition of "election campaign" is very broad: "public presentation of candidates, confirmed by the authorised election management bodies, and their programs in the pre-election period of the respective election process". Regular political activities seem to fall under the term and it seems unreasonable to be subject to a fine if a party makes "public presentations" of their candidates prior to the start of the 20-day campaign. The Electoral Code should make clear exactly what political activity is and is not permissible before the start of the official campaign period. It is recommended that early campaigning rules should only apply to special media regulations, such as free airtime, the allocation of clearly designated free space for posting of campaign material and the provision of state funding."[17]

48. These comments remain relevant, especially in light of the broadening of the definition of campaign activities. Normal political activities and campaigning are fundamental rights and should be allowed and encouraged at all times. Article 70(1) seems to limit the right to organise election campaign to the submitter of candidate lists, which are defined as "*registered political parties or coalitions of political parties registered in the State Election Commission, group of voters and Members of Parliament*" (Article 2(5)). This makes the broad definition a serious matter of concern since the campaign includes regular activities which should be permitted in the freedom of speech.

49. The need for campaign regulations is mainly related to extra rights and access to media during campaign and special regulations of equitable access, and to special regulations of funding and spending by contestants. In addition, the free access to places for posters, *inter alia*, may be different during a campaign. Political activities as such should not be forbidden at any time, not even promoting candidates which are not formally nominated but which may be at a time closer to elections. This should be addressed in future amendments.

50. According to Article 81, a campaign organiser must inform the appropriate MoIA branch 48 hours in advance of holding a pre-election rally on public places or public transport places. Article 187 imposes a substantial fine for violating this provision. However, Article 187 implies that the fine can also be imposed for failing to notify the MoIA of any rally whether or not it is held in a public place. The first part of Article 187 states that a fine is imposed if there is a "*failure to report an election rally at least 48 hours prior to its holding*". This appears to be overly restrictive as there are few valid reasons to punish a campaign organiser for failing to inform the MoIA of rallies that do not impact public order.[18]

G. Campaign Finance

51. The Code provides improved provisions on campaign financing. Article 31(2)(43a) requires the SEC to publish the price lists for advertising in broadcast and print media on its web site.

[16] See Joint Opinion of the Draft Working Text Amending the Election Code of "the former Yugoslav Republic of Macedonia" (CDL-AD(2007)012), paragraph 27; and Joint Opinion on the Electoral Code of "the former Yugoslav Republic of Macedonia," as revised on 29 October 2008 (CDL-AD(2009)032), paragraph 44.
[17] See Joint Opinion on the Electoral Code of "the former Yugoslav Republic of Macedonia," as revised on 29 October 2008 (CDL-AD(2009)032), paragraph 44.
[18] See Joint opinion CDL-AD(2009)032, page 9, paragraphs 45-47.

Article 84-b requires that an interim campaign finance report be filed on the 11th day of the election campaign period. Furthermore, Article 85 requires the organiser of the election campaign, immediately and no later than 15 days after the end of the election campaign to submit a total financial report on the election campaign. These measures increase transparency and give voters relevant information before they cast their votes.

52. Article 85(4) includes a positive requirement that the reports of candidates be published on the websites of the State Audit Office and the State Commission for Prevention of Corruption in addition to the website of the SEC. However, the regulatory framework does not require these institutions to audit the reports before election day. The introduction of an auditing deadline before election day would enhance the Code.

53. Furthermore, Article 85 requires the organiser of the election campaign, immediately and no later than 15 days after the end of the election campaign to submit a total financial report on the election campaign. On a positive note the reports are now submitted to the State Election Commission, State Audit Office and the State Commission for Preventing Corruption, which are required to publish them on their web sites.

54. Article 85(6) adds the requirement that if the State Audit Office finds irregularities in the financial reports of the candidates which breach the provisions of the Code they should initiate a misdemeanour procedure or deliver a submission to the competent public prosecutor within a period of 30 days from the day of determining the irregularities.

55. Article 71(1) stipulates that "organisers of election campaign" must open a bank account for the purpose of campaign funding. With the definition given in Article 70(1) in mind, a more appropriate term would be "submitter of candidate lists", since the campaign activities will be carried out by citizens, media, and other stakeholders as well.

56. Article 84-b(3) requires that campaign finance reports be submitted on a template adopted by the Minister of Finance which should include information on the name or designation of the donor, type and amount of donations, dates when donations were received, expenditures for each donation, as well as incomes and expenditures throughout the election campaign. The Code should require that the template developed by the Minister of Finance provides for itemised expenditures so that it can be determined exactly how campaign funds are being spent.[19]

57. Article 83(2) details the ceiling of donations from legal entities. The allowable donation has been changed from EUR 20,000 to five per cent of total income from the previous year. This is a significant amendment which appears to unreasonably favour larger legal entities over smaller ones and should be revised.

58. Article 83(1) prohibits election campaign financing by funds from joint ventures where foreign capital is dominant. It could be clarified whether the notion of foreign capital entails also capital invested into those joint ventures from legal entities registered in the country but which are owned by foreign natural persons or legal entities. The same has been recommended in previous Joint Opinions.[20]

59. Article 86 of the Code provides for partial reimbursement of campaign expenses (MKD 15 per vote won) for elected candidates and non-elected candidates who receive at least 1.5 per cent of the total vote. This addresses a prior OSCE/ODIHR and Venice Commission

[19] The forms developed for the 5 June 2011 election only required that candidates report categories of expenditures with an amount spent for each category without a detailed breakdown. This made it difficult to determine exactly what the money is being spent on and does not allow for full scrutiny of the reports.

[20] See Joint Opinion on the Electoral Code of "the former Yugoslav Republic of Macedonia," as revised on 29 October 2008 (CDL-AD(2009)032), part J, c.

recommendation to extend reimbursement to some non-elected candidates. Such a percentage is high enough to discourage frivolous candidates, but low enough to provide an incentive for contestants, including women and members of smaller ethnic communities, who sometimes face difficulties in raising the funds required to mount a strong campaign.[21] However, the procedure and conditions for payment and denial of reimbursements to candidates based on Article 87 should be set out in more detail to avoid any appearance that a denial of reimbursement was politically motivated.

H. Media

60. Articles 75 to 77 of the Code on media are positively amended and re-organised. The new articles no longer limit the competences of the Broadcasting Council to regulate the campaign period and election day, with its mandate extended to additionally cover the period from the day elections are announced until the official campaign period begins. The Broadcasting Council is required to adopt a rulebook on the actions of the broadcasters in this pre-campaign period and broadcasters will be subject to misdemeanour proceedings if they violate the rulebook.

61. Although requirements for fair and equitable coverage of the candidates in the news and current affairs programmes were included in the rulebooks for the 2011 early parliamentary election, the Code is silent on this issue. Detailed campaign coverage rules for the media could be incorporated in the Law on Broadcasting Activity and the Code, rather than being adopted for each election.

62. The Code and the Law on Broadcasting Activity should be harmonised on the issue of the amount of paid political advertising which media are allowed to broadcast. The Code limits the amount to 15 minutes per hour while the Law on Broadcasting activity permits a maximum of 12 minutes per hour.

63. Article 76-a(2) states that "*during the election campaign the public broadcasting service is required to broadcast political presentation of participants in the election process free of charge and in accordance with the Rulebook on equitable access to media presentation during election campaign*", but it omits to define the meaning of equitable access. This opinion does not assess this Rulebook but considers that this provision should be clarified either in the Law or in the Rulebook.[22]

I. Complaints and Appeals

64. Article 147 of the Code has been reorganised and the language clarified in respect of the information required to be in the submission, as previously recommended. This includes a requirement that the complainant submit an email address for receiving correspondence. Any means of communication should be possible, providing that the deadline is respected. This should be clarified so that all voters have the same rights to access the complaints process. Moreover, if email is used as a means to file complaints, it should be clarified that the SEC has the duty of acknowledging receipt. Failure to do so could undermine the requirement to adhere to set deadlines, hampering the right to file a lawsuit at the Administrative Court.

---

[21] See Joint Opinion CDL-AD(2009)032, paragraph 56.

[22] See in this regard the Code of Good Practice in Electoral Matters, I. 2.3 e.; and the Recommendation of the Committee of Ministers to member states on measures concerning media coverage of election campaigns (Adopted by the Committee of Ministers on 7 November 2007 at the 1010th meeting of the Ministers' Deputies). In particular: "4. Free airtime and equivalent presence for political parties/candidates on public service media. Member states may examine the advisability of including in their regulatory frameworks provisions whereby public service media may make available free airtime on their broadcast and other linear audiovisual media services and/or an equivalent presence on their non-linear audiovisual media services to political parties/candidates during the election period. Wherever such airtime and/or equivalent presence is granted, this should be done in a fair and non-discriminatory manner, on the basis of transparent and objective criteria."

65. Article 31(2)35 states that the SEC shall "[d]*ecide upon complaints based on inspection of the election materials and other evidence if there are at least two complaints for the respective polling station*". Complaints should be handled based upon merits of the evidence, not up on the number of complaints. There should be no threshold on the number of complaints to be filed before they are considered. The requirements for two complaints should be deleted as it undermines the right to effective legal remedy. Moreover, Article 31(35) and 31(37) should be harmonised to clarify that the SEC acts upon the complaints, regardless of their number.

66. There is still a conflict between Article 37(2)16 and Article 100(5), which tasks the MECs to decide upon complaints and Article 148(1) which vests the power for deciding complaints with the SEC. These provisions should be harmonised to clearly indicate which of the commissions has jurisdiction over the complaints.

67. Prior concerns about the short time frame for the filing of complaints and for courts to hear and decide complaints are not addressed. In fact, the timeframe for the Administrative Court to decide on complaints on submissions of lists of candidates for members of council and mayor (Article 67(7)) and on submissions of lists of presidential candidates (Article 141(3)) have been shortened from 48 to 24 hours.[23] This places demands on judges to examine the evidence and provide a legal basis for the decision within this time frame, especially as the court has to decide on complaints collectively. As previously suggested, consideration could be given to extending the time-limit for the courts to decide on complaints, while ensuring it remains short enough to provide timely and effective remedy.

68. Article 151(1) details the situations in which the results in a polling station should be annulled by the SEC. Although these provisions are clear and should remove uncertainty, they do not allow the SEC to annul results in situations that are not foreseen in the Code (for example, a natural disaster). The SEC should have at least some discretion to annul results in other situations where violations and irregularities have happened during the electoral process.[24] In addition, Article 151 states that the SEC "shall" annul the results in a polling station if one of the listed irregularities has occurred. However, it should be stated that results will be annulled only if the irregularities were affected the outcome of the election. All voters in a polling station should not be disenfranchised because of irregularities that did not affect the outcome of the election.

69. Article 151(5) requires the Administrative Court to act on a complaint within 48 hours from its receipt. The wording is misleading as to act not necessarily means to decide. *Act* should be changed to *decide*, as in Article 150(2).

70. A new paragraph is added to Article 148 to allow SEC decisions on complaints to be submitted to the email inbox of the complainant (Article 148(4)). Such a decision would be deemed to have been received by the complainant within five hours from being sent to their email inbox. Although this is a welcome addition, as it will allow faster notification of complainants of decisions, a confirmation that complainants are duly notified, even if the complainant has no direct access to email, should be ensured by alternative means. Moreover, if email is used as a means to file complaints, it should be clarified that the SEC has the duty of acknowledging receipt. Failure to do so could undermine the requirement to adhere to set deadlines, hampering the right to file a lawsuit at the Administrative Court.

71. In a positive change, Article 150 of the Code requires that the authorised representative be notified by the Administrative Court of the hearing on complaints filed by them.

---

[23] See Joint Opinion CDL-AD(2009)032, paragraph 71. The time frame on complaints on annulment and repetition of voting (Article 151(5)) is still 48 hours.

[24] Id., paragraph 69.

72. The Code's articles on Penal and Misdemeanour Provisions are reorganised and clarified. Several provisions introduce new offenses mostly relating to the activity of media. These new provisions address shortcomings previously noted by OSCE/ODIHR and the Venice Commission.

73. Article 178-a requires that prior to instigating a misdemeanour procedure in court, a settlement procedure shall be conducted in accordance with the Law on Misdemeanours. This allows for settlement of election-related matters in compliance with the existing law. While this can be a welcome development, as mentioned earlier, consideration needs to be given to the short timeframe within which election disputes must be resolved.

74. Article 73 allows for the filing of campaign-related complaints by candidates if the rights of the candidate are violated "by preventing and disturbing the opponents' campaign." This qualifying phrase would appear to limit the right to file complaints to those situations where a candidate's campaign is prevented or disturbed by an opponent. This is overly restrictive and the qualifying phrase should be removed so that it is clear that candidates have the right to complain about all violations of their rights.

J. Termination of the mandate and additional elections for Members of Parliament

75. According to Article 152, the mandate of a member of parliament can be revoked if "*he/she is sentenced for a criminal offence for which a sentence of at least five years is prescribed*". In this document, the Criminal Code has not been analysed However, it should be noted that "*the deprivation must be based on … a criminal conviction for a serious offence*."[25]

K. The Voting Process

76. Article 101 of the Code has been amended to clarify that although a decision may be made to close a polling station early if all voters on the list have already voted, the counting cannot commence prior to the closing of all polls at 7pm. This is in line with a previous recommendation and ensures that observers have the possibility to be present at the count if they are unaware that polling has finished early. [26]

77. Article 108 describes the voting procedure. A voter is required to prove his/her personal identity with an identity card or a passport. It should be specified that the identification document should be valid, as stipulated in Article 41(4).

78. Article 101(2) states that the voters who are in the building where polling takes place at the closure (7pm) will be allowed to cast their vote. However, the buildings are often very small, especially in rural areas, and contain a very limited number of people; consequently, voters usually queue outside. To avoid disenfranchising voters, it would be recommendable to consider allowing voters queuing outside to vote.

79. Article 102(2) reiterates the duty of police to secure the building where the polling station is located upon their closure and during the counting of the votes, and to remove all unauthorised persons from the building. In order to avoid police abuses, it should be specified that their intervention in a polling station is subject to a request from the EB chairperson or the designated polling official. Moreover, the provision should be harmonised with Article 103(4).

---

[25] See the Code of Good Practice in Electoral Code, I. 1.1 d. iv. See also Case of Hirst v. the United Kingdom (No. 2); application no. 74025/01; Judgement, 6 October 2005.

[26] See Joint Opinion CDL-AD(2009)032, paragraph 60.

L. Tabulation of Results

80. In a positive change, the order of counting outlined in Article 114 has been changed to reflect previous recommendations. Now, the number of voters who have voted according to the signatures on the voters list will be counted and included in the result protocol before the ballot box is opened. This should reduce the possibility for manipulation at later stages of the counting process.[27] It is also very positive that the number of those needing assistance during the vote will be entered into the protocol, still for a better transparency. However, Article 114 still makes no reference to spoiled ballots and it is unclear if those are counted among the invalid, which could lead to discrepancies in tabulation.

81. A new Article 118-a outlines the procedure for the diplomatic and consular offices to transfer the results and protocols to the Ministry of Foreign Affairs and for the Ministry to transfer them to the SEC.

82. Several amendments are made in relation to tabulation, providing greater clarity. New provisions in Article 119 and a new Article 119-a introduce a format for preparation of the protocols prepared by the MECs for local elections, and the SEC for national elections, thereby addressing a prior recommendation.[28] Also, in a move that enhances transparency, the number of ill and incapacitated voters should now be included in the results protocols as prepared by the relevant electoral bodies.

83. Nevertheless, the Code still does not address the concern that there is no requirement for EBs to make any reconciliation of the numbers listed in protocols and, for example, conduct a recount if the number of ballots in the box does not match the number of voters who voted according to the voter lists. [29]

84. There is no clear obligation placed on the SEC in Articles 127, 128 and Article 31(2) to review the results from the lower-level commissions and boards in order to investigate anomalies in protocols and rectify mistakes. Only reported mistakes are to be investigated. Often there are clear mistakes or suspicious results which should provoke a review before results are finalised which are obvious even if not reported. The Code should be clear that the SEC is authorised to also investigate such cases. The same applies to the MECs and their obligations in local elections.

M. Announcement of Results

85. No requirement that a breakdown of results by polling station be published by the SEC or MECs has been included in the revised Code. This has been the subject of prior recommendations and would enhance transparency and increase the trust of the citizens in the electoral process.

86. As previously recommended, Articles 135 and 136 are amended to require that the SEC and MECs announce the final results immediately but no later than 24 hours from the day they become final, instead of within 24 hours from the day the results become final.[30]

N. The Voter Turnout Requirement in Presidential Elections

[27] Id., paragraph 62.
[28] Id., paragraph 64.
[29] Id., paragraph 63.
[30] Id., paragraph 67.

87. As previously noted, the threshold to win the election in the first round (50 per cent of registered voters) is unusually high and represents a departure from the more common rule of more than 50 per cent of the valid votes cast in the election. The provision is disproportionate and could result in a second round even when one candidate defeats all other candidates by a large margin.[31] The legal framework could be amended, for example, to stipulate that a candidate wins in the first round if the majority of all registered voters turn out (or even 40 per cent) and the candidate receives more than 50 per cent of valid votes cast. This would, however, imply a constitutional change.[32]

88. As previously recommended by OSCE/ODIHR and the Venice Commission, Article 121 has been amended to restate the constitutional threshold requirement of 40 per cent in a run-off in the presidential election. It also clarifies that the candidate must win the majority of the votes from the voters who voted. While it is understood that the invalid votes should be counted since they actually voted, it should also be stipulated clearly.

89. Previous reports[33] have recommended that this turnout requirement for the second round is removed outright, as it can lead to cycles of failed elections. The risk of a series of repeat elections should be avoided. In 2009, the turnout was 42.6 per cent in the runoff, but was 40.09 per cent if only valid votes were counted. If it had fallen slightly lower, it would have led to a repeat cycle. The problem of low turnouts in elections should be addressed by other means, in particular by making politics relevant to people at large. If a voter turnout threshold is considered beneficial to the credibility of the electoral process, it is recommended for the first round only.

90. An additional concern is more technical, regarding the requirement for winning in the second round (Article 121(3)): "*a candidate who received majority of the votes*…" is elected as President. It should be made clear that a relative majority is sufficient.

O. Election Observation

Authorised Persons, Accreditation, and Reporting

91. Article 118(4) stipulates that "*election materials shall be submitted to the Municipal Election Commission i.e. Election Commission of the City of Skopje by the president of the Election Board accompanied by interested Election Board members or representatives of the lists submitters and representatives of the police, if deemed necessary*". However, the Article omits to mention accredited observers, which by all means should be allowed to accompany the vehicle transporting the election material, should they decide doing so. Excluding observers from this right could undermine the transparency of the process.

92. Article 161 enlists the entities authorised to observe the election process. Authorised representatives are not among them. It is advisable they are inserted in the list. Seemingly, the Code never refers to the right of media to observe the election process. Additionally, Article 92(6) stipulates that "...*authorised observers*..." can be present at the transfer of election materials. Given that authorised representatives can also observe the whole electoral process, but considering that in the Code they are named differently from observers, it should be added "…*and authorised representatives*…".

[31] With a turnout of 58 per cent in the first round of the 2009 presidential elections, one candidate would have had to obtain 87 per cent of the votes cast to win outright in the first round. Even if the voter turnout was much higher, say 70 per cent, the candidate would still have to generate over 71 per cent of the votes cast to win outright in the first round.

[32] Article 81 of the Constitution states that in a first round of voting: "A candidate for President of the Republic is elected if voted by a majority of the total number of voters."

[33] See for instance in the last Joint Opinion (CDL-AD(2009)032), part D.

93. Article 162a stipulates that "*[o]nly accredited observers can report on the course of the electoral process and the related observation activities*". The intention is probably to avoid that somebody pretends to be an observation group without being accredited. However, the way the provision reads could prevent the public from discussing the electoral process. This restriction on freedom of speech should be removed.[34]

94. Article 105(4) allows accredited observers, who have any objection about the work of the EB, to enter them in the record book of the polling station. Authorised representatives enjoy the same right, and they are furthermore allowed to submit their claims to the MECs within five hours after the signing of the protocols, should this first right be disregarded (Article 105(3)). It could be considered to extend the same option to accredited observers. This might prevent abuse of power from EBs, especially in the absence of authorised representatives.

95. All Articles of the Code related to the determination of the results stipulate that a duplicated copy of the protocols shall be given to every representative of the list of submitters, but accredited observers are only entitled to get a sample of the tabular part of the protocol.[35] All observers should be entitled to obtain full copies of election-related documents from electoral bodies. It is therefore recommended that the provision be amended accordingly.

Representatives of the Submitters

96. Article 22 authorises the list of submitters to appoint official representatives and their deputies to follow the work of the election commissions during the election process. It further stipulates that representatives of the list of submitters shall inform the election commissions of the members they selected seven days before the election day, at the latest.

97. Given the role played by the representative of the list of submitters, who "*may point to irregularities in the work during sessions of the election management bodies and, if this is not accepted, the representative may ask for it to be entered in the protocol*", and to avoid possible misunderstanding on when the authorised representatives can begin their work of observation, it is suggested that the provision also specifies from when it is possible to start submitting the list of their representatives to the election commissions, and not only until when ("*seven days before election day, at the latest*"; Article 22(4)).

98. Additionally, it is not clear in Article 22(6) whether the election commission can reject some of the representatives of the list of submitters, on which basis, and if there is any right to object the decision (administratively/legally) of the election commission.

IV. Conclusions

99. Most amendments in the Code are in line with recommendations pointed out in previous Joint Opinions and OSCE/ODIHR election observation mission reports on "the former Yugoslav Republic of Macedonia". The amended Code is improved and provides a solid basis for democratic elections, mainly in accordance with international standards. Many previous recommendations by the Venice Commission and OSCE/ODIHR have been taken into account.

100. The most important amendments adopted after the last Joint Opinion touch upon the procedure of voting abroad, provisions on electoral campaign, reporting of campaign costs,

[34] See the Guidelines on an internationally recognised status of election observers of the Venice Commission (CDL-AD(2009)059), III, 1.7.
[35] See Articles 126, and 131 of the Code.

voting procedure for the military personnel, and clarifications on the right to vote and to be elected.

101. Still, there remain some issues which need further consideration. This is specifically the case with regard to thresholds for campaign donations, publication of election results, complaints and appeals procedures, and the system and arrangements for out-of-country voting.

102. To ensure the integrity of the electoral process, as well as to enhance public confidence, it is essential that the Code be implemented in good faith and with a high level of political maturity.

103. The Venice Commission and OSCE/ODIHR continue to stand ready to assist authorities in their efforts to create a legal framework for democratic elections in conformity with Council of Europe and OSCE commitments and other European and international standards.