COUNCIL OF EUROPE CONSEIL DE L'EUROPE

Strasbourg, 4 March 2004

Restricted
CDL-EL(2003)016rev
Or. fr.

Study no. 260/2003

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

DRAFT REPORT ON THE COMPATIBILITY OF REMOTE VOTING AND ELECTRONIC VOTING WITH THE REQUIREMENTS OF THE DOCUMENTS OF THE COUNCIL OF EUROPE

on the basis of comments

by

Mr Christoph GRABENWARTER (substitute member, Austria)

I. Introduction

1. At their 826th meeting (5 February 2003), the Ministers' Deputies of the Council of Europe approved the specific terms of reference of the Multidisciplinary Ad Hoc Group of Specialists on legal, operational and technical standards for e-enabled voting (IP1-S-EE), in the framework of Integrated Project 1 "Making Democratic Institutions work" . The task of the Committee is to develop an intergovernmentally agreed set of standards for e-enabled voting. The legal standards are intended to apply the principles of existing Council of Europe and other international instruments in the field of elections to the circumstances of e-enabled voting.. The Venice Commission, the Parliamentary Assembly and the Congress of Local and Regional Authorities of the Council of Europe, as well as the Council for Democratic Elections, are observers in this body. At the second meeting of the Multidisciplinary Ad Hoc Group of Specialists on legal, operational and technical standards for e-enabled voting (IP1-S-EE) (18 and 19 September 2003), the Venice Commission expressed its willingness to render an opinion on remote voting, taking account of both the traditions of remote voting in member States and current developments in e-enabled voting.

2. Twenty-nine countries replied to the questionnaire. The replies will be analysed below (see point III of this opinion)..

II. The requirements of Council of Europe documents

1. Article 3 of the Additional Protocol to the Convention

3. Under Article 3 of the Additional Protocol to the European Convention on Human Rights (hereafter, the "AP"), "The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature."

4. This obligation, together with the guarantee of freedom of expression under Article 10 and of freedom of association under Article 11 of the ECHR, are held to be the main guarantees of a democratic system. Without the last two freedoms, the right to free elections would be stripped of all effective meaning.

5. According to the established case-law of the European Court of Human Rights, Article 3 (AP) refers not only to the positive obligation on Contracting States to organise free elections using secret ballot, but also guarantees the individual right to vote and to stand for election, although this is not explicitly stated in Article 3. In the Court's opinion, universal and equal suffrage is included in this right (Cour EDH, judgment of 2 March 1987, *Mathieu-Mohin and Clerfayt*, series A 113, § 54). As holders of subjective rights, individuals may draw on this provision directly.

6. There are several aspects to the content of Article 3 (AP): its personal and substantive scope, the "legislature" and universal suffrage. In general, every person has the right to rely on the rights guaranteed by Article 3: nonetheless, the majority of Contracting States grant the right to vote only to nationals of the State in question. Article 3 refers to the "people" without clarifying the content of this term. However, in line with European constitutional tradition, "the people" is made up only of citizens of the State. The EurCourtHR has specified that the scope of Article 3 (AP) extends to equal treatment for all citizens (EurCourtHR, judgment of 2 March 1987, *Mathieu-Mohin and Clerfayt*, series A 113, §54).

7. In addition, Article 3 guarantees the individual right to vote and to stand for election, in addition to free and secret suffrage. Elections should be organised in such as way as to ensure free electoral choice. They should also take place in circumstances that ensure the secrecy of the ballot.

8. All the same, the Court has so far failed to clarify whether the guarantees in Article 3 also apply to the rights of political parties, since these are not expressly mentioned in the ECHR. They may, however, cite the rights and freedoms guaranteed to associations in the meaning of Article 11 of the ECHR (EurCourtHR, judgment of 30 January 1998, *Unified Communist Party of Turkey et al.*, RJD 1998-I, § 25). Given their roles in a democratic and pluralist society, it would be logical for political parties to be able to rely also on the right to be elected under Article 3 of the AP.

9. In giving tangible form to the ECHR's preamble concerning "an effective political democracy" in the High Contracting Parties, Article 3 of the AP guarantees "free elections" in particular, without obliging the contracting States to establish a certain political democracy. However, the ECHR obliges States to set up a "legislature" which is directly elected by the people. The ECHR does not define the concept of "legislature" explicitly, but in any case it does include national parliaments. The concept must be interpreted on the basis of the constitutional structure of the State in question (EurCourtHR, judgment of 2 March 1987, *Mathieu-Mohin and Clerfayt*, series A 113, §53). In federal States such as Germany, Austria, Belgium or Switzerland, the parliaments of the federated States (the Länder, regions and communities or cantons) are also considered as "legislatures" in the sense of Article 3 (Eur.Comm.H.R., decision of 11 September 1995, *Timke*, DR 82-A, pp. 158ff). In contrast, local authorities' deliberative assemblies are not considered legislators, since they are endowed only with statutory powers (Eur.Comm.H.R, decision of 5 July 1985, *Booth-Clibborn et al.*, DR 43, pp. 236, 247 and onward.). Equally, the scope of Article 3 does not extent to elections for the Head of State or participation in referendums (EurCourtHR, decision of 7 September 1999, *Hilbe*, RJD 1999-VI).

10. The rights arising from Article 3 of the AP are not absolute, since they are subject to implicit limitations. The contracting States enjoy a wide margin of discretion in deciding the conditions for universal suffrage and the electoral system. However, these conditions and limitations should serve a legitimate purpose and should not be disproportionate (EurCourtHR, judgment of 2 March 1987, *Mathieu-Mohin and Clerfayt*, series A 113, § 52).

2. The Venice Commission's Code of Good Practice in Electoral Matters

11. The "Code of Good Practice in Electoral Matters" (hereafter, "the Code")[1] is a second source which serves to establish criteria. It is in two parts: firstly, the "guidelines" which are based on the principles of the European electoral heritage adopted by the Council for Democratic Elections on 3 July 2002 and by the European Commission for Democracy through Law ("the Venice Commission") on 5-6 July 2002, and, secondly, the "explanatory report" which expands on, defines and clarifies the principles set out in the guidelines, integrating, as necessary, recommendations on detailed points.

12. The Code defines the "European electoral heritage" through two aspects: the principles of the European electoral heritage (the "hard core") and the conditions for implementation of these principles. The principles of the European electoral heritage are universal, equal, free, secret and direct suffrage, as well as the organisation of elections at regular intervals. The conditions in which they are implemented concern respect for fundamental rights, regulatory levels and stability of electoral law, procedural guarantees and the electoral system.

13. The "hard core" of the European electoral heritage is primarily composed of international standards. At universal level, this refers to Article 21 of the Universal Declaration of Human Rights and, in particular, Article 25, section b. of the International Covenant on Civil and Political Rights, which expressly provides for all of these principles except direct suffrage, which is the implicit outcome. At European level, the common rule is Article 3 of the AP, which expressly sets out the right to regular elections with free and secret suffrage.

14. According to guideline I.3.2. of the Code of Good Practice in Electoral Matters, postal voting should be allowed only where the postal service is safe and reliable. It may be confined to people in hospital, prisoners, persons of reduced mobility or electors residing abroad. Fraud and intimidation must not be possible.

15. Paragraph 38 of the explanatory report deals with postal voting. According to the explanatory report, postal voting is frequently possible throughout the western world, although the arrangements differ widely from one country to another. Thus, postal voting may be very widely practiced in one country, and forbidden in another due to the likelihood of fraud. It may only be permitted where the postal service is safe – in other words, protected from deliberate manipulation – and reliable, in that it operates correctly. Proxy voting is permissible only if subject to very strict rules, again to avoid fraud; the number of proxies held by any one elector must be limited.

---

[1] *Doc. CDL-AD (2002) 23rev, adopted by the Council for Democratic Elections on 16 October 2002 and by the Venice Commission on 18-19 October 2002. This text has been approved by the parliamentary Assembly and the Congress of Local and Regional Authorities of Europe, and the Committee of Ministers recommended its dissemination.*

16. These practices should not be encouraged in the new democracies given the problems with their postal service, in addition to all the other difficulties inherent in this kind of voting, including the heightened risk of "family voting". Subject to certain precautions, however, postal voting can be used to enable hospital patients, persons in custody, persons with restricted mobility and electors resident abroad to vote, in so far as there is no risk of fraud or intimidation. This would dispense with the need for a mobile ballot box, which often causes problems and risks of fraud. Postal voting would take place under a special procedure a few days before the election.

17. As for electronic voting, the Code states in section I.3.2. that this should only be used if it is safe and reliable. In particular, electors must be able to obtain confirmation of their votes and correct them, if necessary, respecting secret suffrage. The system's transparency must be guaranteed.

18. According to paragraph 42 of the explanatory report, several countries already use mechanical and electronic voting methods or are preparing to do so. These techniques present a clear advantage when several elections are held simultaneously, even though certain precautions are needed to minimise the risk of fraud, for example by enabling the voter to check his or her vote immediately after casting it. Clearly, it is important to ensure that ballot papers are designed in such a way as to avoid confusion. In order to facilitate verification and a recount of votes in the event of an appeal, it may also be provided that a machine could print votes onto ballot papers; these would be placed in a sealed container where they cannot be viewed. There should also be some kind of device for mixing the ballot papers so that if it proves necessary to open the container for checking, papers cannot be linked to particular voters – for example, those turning out early or late in the day.

19. Paragraph 43 states that electronic voting methods must be secure and reliable. They are secure if the system can withstand deliberate attack; they are reliable if they can function on their own, irrespective of any shortcomings in the hardware or software. Furthermore, the elector must be able to obtain confirmation of his or her vote and, if necessary, correct it without the secrecy of the ballot being in any way violated.

20. Finally, the system's transparency must be guaranteed in the sense that it must be possible to check that it is functioning properly (§44 of the explanatory report).

III. Remote voting from a comparative perspective

21. The following analysis is based on the replies to a questionnaire prepared by the Multidisciplinary *ad hoc* Group of Specialists on the legal, operational and technical standards for e-enabled voting (IP1-S-EE).[2]

[2] *IP1(2003) 54.*

22. Generally speaking, there are at least two different concepts of remote voting in Council of Europe Member States: remote voting in a controlled or supervised environment (e.g. voting in an embassy abroad or polling station outside a voter's polling district) and remote voting in an "uncontrolled" or non-supervised environment, i.e. there are no election officials present (e.g. sending your vote by mail).

23. For the purpose of the following analysis remote voting is defined as voting outside the premises where voting takes place in general. In this analysis, the two forms of remote voting will be distinguished. In the first place remote voting is understood as voting in any designated place different to the polling station but with supervision by election officials or other officials with similar function. Second, remote voting means any form of voting without supervision by election officials or other officials with similar function. Postal voting may be an example of the second form.

24. "Postal voting" is a (traditional) means of remote voting. It includes the transmission of the vote cast by ordinary mail. Where the word "postal voting" is used in domestic legal systems of Council of Europe member states for voting in Polling stations in a post office, this is in fact a form of remote voting in a supervised area. Therefore the term "supervised voting in post offices" is used for this form of "postal voting".

1. States which do not permit remote voting

25. According to the above mentioned answers to the questionnaire, remote voting is not authorised in the following eleven countries, both for voting within the national territory or from abroad: **Albania, Azerbaijan, Bulgaria, Croatia, Cyprus, the Czech Republic, Latvia, Moldova, Poland, San Marino** and **Turkey**.

2. States which permit remote voting in a supervised environment

26. In a number of countries, remote voting in a supervised environment is open to certain categories of voters or situations. This form of remote voting is comparable to traditional voting in polling stations. Many countries that allow remote voting in a non-supervised environment also provide for remote voting in a supervised environment (see beelow 3.). In a number of these states remote voting in a supervised environment is the general rule for voting in the country, whereas exceptions exist for voting from abroad. Austria, Sweden and Estonia are examples for this legal situation.

27. **Denmark** is an example for a general restriction of remote voting to supervised environment. Since 1980, all Danish electors have been able to vote in advance in polling stations designated by the electoral law, or even at home. In the latter case, the law states that two election officials must be in attendance. Danes who are abroad may vote in advance in all Danish diplomatic or consular missions (the "Folketing" election law, 2001, part 8, articles 53 onwards).

28. In **Finland,** in all general elections and consultative national referendums the voter has the possibility to vote in advance or on the election day in polling stations. The advance voting takes place in advance polling stations, which may be for example post offices in the country or embassies abroad. Voting is also possible in hospitals, prisons or at home for disabled people.

29. In **Hungary**, Hungarian citizens residing abroad now have the opportunity to vote from abroad in the parliamentary elections following the amendment of the Constitution last year. The right to remote voting, however, may only be exercised in a supervised environment, i.e. in the premises of Hungarian embassies under the supervision of "vote counting committees of three individuals each.

30. According to terminology used here, the use of the mobile ballot (which exists for example in **Azerbaijan**) is not considered as a form of remote voting in a supervised environment.

2. States which permit remote voting in a non-supervised environment

3.1. Remote voting abroad

31. In a third group of Council of Europe member states remote voting in a non-supervised environment is possible only certain conditions. Most of these countries persons who are voting in another country are allowed to this form of remote voting. This is the case in Austria, Belgium, Greece, Italy, the Netherlands, Norway and Sweden. However, the conditions and arrangements for remote voting differ in certain respects.

32. In **Austria**, for example, votes cast abroad using an "electoral card" must be certified by an authority comparable to an Austrian public notary, by the Austrian official representation in the foreign country in question, or by an adult of Austrian nationality (§ 60 of the Federal Law on Elections to the National Council).

33. **Belgians** who are outside the country may vote in legislative and European elections by post, in consulates or embassies (personally or by proxy) or in a polling station in Belgium (personally or by proxy) (Article 180ff of the Electoral Code).

34. In **Bosnia and Herzegovina**, remote voting is regulated by the Dayton Peace Agreement and the electoral law. Citizens of Bosnia and Herzegovina who are resident abroad or temporarily out of the country may vote by post (Articles 1.5 and 3.13 of the electoral law).

35. In **Estonia** advance voting within the country is permitted in special premises designated in the electoral law. Electors who are out of the country are allowed to unsupervised postal voting.

36. The **Greek** constitution states that for national elections, Greek citizens who are out of the country may vote using postal voting (i.e. in an unsupervised environment) or other "appropriate means". To date, however, there has been no specific law on this subject.

37. **Dutch** citizens who are abroad may vote by postal ballot for elections to the Lower Chamber of Parliament and to the European Parliament (electoral law, sections M 13 and onwards).

38. In **Norway**, all electors may vote in advance at parliamentary and municipal elections, both inland and abroad. Advance voting must take place no later than the last Friday before election day. Inland advance voting takes place in health and social welfare institutions, where the Electoral Committee in each municipality decides and on application by disabled people to the Electoral Committee at their homes. Abroad advance voting takes place at Norwegian Foreign Service missions and where the Ministry decides. In both cases, voting in advance is not possible but in the presence of an (sometimes two) official returning officer(s). If an elector who is abroad has no possibility of going to a returning officer, he may cast his or her vote by mail without the presence of a returning officer at the casting of the vote. In this case, the voter is personally responsible for voting in advance at such a time as makes it possible for his or her advance vote to reach the Electoral Committee by 8.00 p.m. on election day (law on the Representation of the People, 2002, § 8-2 [3]).

39. In **Sweden**, voters may cast their votes in advance before election day at any Swedish post office, at care facilities (hospitals, elderly homes), prisons etc. Disabled people who cannot go to the polling station or to any other vote reception place may vote by "messenger", where the voter him-/herself prepares his or her vote in secrecy in presence of a witness and a messenger (see Swedish Elections Act). Swedish citizens who are abroad may vote in advance at Swedish foreign missions or by mail. Mail voting from abroad is regulated in a special legal act and requires special material (Mail Voting in Certain Cases Act). The voter prepares the vote in secrecy in presence of two witnesses. The voter and both witnesses must all sign a special outer envelope (sealed) before the voter sends the vote in a special window envelope to the Election Authority in Sweden.

40. In **Slovakia**, a draft law on parliamentary elections was recently submitted to Parliament, providing for remote voting from abroad. This law was scheduled to enter into force on 1st February 2004.

41. In some countries unsupervised remote voting from abroad is restricted to specific types of elections and/or referenda. This is the case in Italy and in France. In **Italy**, postal voting abroad is permitted only for "political electoral consultations" and "constituent referendums". There is no supervision of the vote (law n° 459 of 27 December 2001). In **France**, remote voting has been made available on an experimental basis since 2003 in the North America constituency, for elections to the "Higher Council of French Citizens Abroad" (Order n° 2003-396).

3.2. Non-supervised remote voting without (local) restriction

42. Remote voting is permitted in four countries without restrictions, even within the national territory. These countries are Germany, Spain, the United Kingdom and Switzerland. In Finland, there exists a limited possibility for remote voting within the country.

43. Postal voting has long been recognised and accepted in **Germany**. § 14 of the Federal Law on Elections ("Bundeswahlgesetz") recognises postal voting as equivalent to traditional ballots. The procedure for postal voting is regulated in § 36 of the law in conjunction with the Federal Electoral Code (§ 25). The electoral authorities must first provide the elector with an "electoral card" ("Wahlschein") which enables him or her to take advantage of postal voting. However, there are specific requirements which need to be met for postal voting. Firstly, the

elector must lodge a special application for a ballot paper for postal voting.[3] Secondly, people may also be eligible for postal voting who have transferred their residence to another constituency and who have not yet been entered in the electoral register of the new constituency or people who for professional reasons or as a consequence of an illness, old age, physical disability or another bodily constitution cannot go to the polling booth or can only go there whilst facing difficulties which make it impossible to expect them to go to the polls. Finally those who are eligible to vote and live outside the federal territory and who must be entered in an electoral register upon application can obtain the relevant ballot paper. The elector must then send his or her ballot paper in a special envelope, ensuring that the letter reaches the electoral commission by 6pm at the latest on election day. On the electoral card, the elector must make a solemn undertaking to the Chair of the constituency's electoral commission, stating that he or she has personally filled in the ballot slip. Under Article 156 of the German Criminal Code, anyone making a false declaration is liable to a maximum of three years' imprisonment or a fine.

44. In **Spain**, advance voting is permitted in all elections, for electors both within and outside the country. It is possible only by means of postal voting (implementing law 5/1985 on the general electoral system).

45. Since 1994, all **Swiss** citizens are entitled to vote by post in national elections and referendums. There are no particular preconditions for postal voting – i.e. the voter does not have to especially request for it – merely the right to vote (Article 5, paragraph 3 of the federal law of 17 December 1976 on political rights).[4]

46. In the **United Kingdom**, postal voting was introduced as early as 1918 and is today available on request for all elections (see the "Representation of the People Act 2000"). Under the current general rules the voter must apply in advance for a postal vote. The elector and a witness must sign a "declaration of identity", which must be included in the envelope containing the ballot paper. The elector then sends this to the returning officer. Electronic voting is only permitted in local government elections, at the request of a local authority, for the purpose of conducting trials.

47. In **Finland,** unsupervised remote voting in the country is restricted to a specific type of referenda. As a general rule, in all general elections and consultative national referendums the voter has the possibility to vote in advance or on the election day in polling stations. The advance voting takes place in advance polling stations, which may be for example post offices in the country or embassies abroad. Voting is also possible in hospitals, prisons or at home for disabled people. Remote voting by mail is only permitted for participation in consultative municipal referendums (law on the procedure for consultative municipal referendums, 656/1990).

4. Summary

[3] *In the first place those people whose names have been entered in an electoral register and who stay outside their constituency at polling day for an important reason are entitled to lodge an application.*

[4] *With the exception of two cantons where the voter can use postal voting in cantonal elections and referenda only on request (canton of Ticino and canton of Valais; although in the canton of Valais this requirement is going to be abolished soon).*

48. Based on the reports from the 29 Council of Europe member States which participated to great majority in the group of experts for Integrated Project 1 "Making Democratic Institutions Work", we can define a "European standard" as follows. First of all, a distinction has to be made between remote voting in a supervised environment and remote voting in a non supervised environment, above all voting by mail. The first form of remote voting forms a common feature of a great majority of Council of Europe Member States. The second form is less common and subject to many national particularities subject to traditions in voting systems.

49. Under circumstances one may detect two systems of remote voting. In certain States, postal voting is only permitted for persons who are out of the country on the date of the election. However, some member States have arrangements for remote voting or postal voting within the national territory. Of these, mention should be made of those systems which follow the "Nordic model", where remote voting prior to the election date (advance voting) is an important element of the particular election systems.

50. It may be concluded that remote voting constitutes a common electoral procedure in a great number of Council of Europe member States. Remote voting in an unsupervised environment has also become a common practice in a number of Member States in recent years. However, only few countries do not restrict the conditions under which unsupervised remote voting is available. In a number of countries it is restricted to votes cast abroad, in some cases even it is explicitly subsidiary to voting in embassies etc. This diversity of constitutional systems in the Member States demonstrates the impossibility of identifying a *single* form of (non-supervised or supervised) remote voting as the "European rule". Nonetheless, even non-supervised remote voting is available today in one form or another in half of the countries considered in this analysis. There exist certain measures to promote personal and secret suffrage. They constitute a common European standard and are consequently contained in the Venice Commission's Code of Good Practice in Electoral Matters.

IV. The compatibility of e-enabled voting with Article 3 of the Additional Protocol and with the "Venice Commission's" Code of Good Practice in Electoral Matters

1. Compatibility with the "Venice Commission's" Code of Good Practice in Electoral Matters

51. Although the "Code of Good Practice in Electoral Matters" is not a binding document, it does nonetheless set out a European standard which could influence the interpretation of treaty-based rules, in particular Article 3 of the Additional Protocol (see *infra* 2.).

52. Guideline I.3.2 of the Code states that electronic voting should be accepted only if it is secure and reliable. In particular, electors must be able to obtain confirmation of their vote and correct it if necessary, while respecting secret suffrage. The system's transparency must be guaranteed. Any violation of secret suffrage should be sanctioned (guideline I.4.d.).

53. In paragraph 42 onwards of the explanatory report, this guideline is clarified as follows:

> Although mechanical and electronic voting methods present clear advantages when several elections are taking place at the same time, certain precautions are needed to minimise the risk of fraud, for example by enabling the voter to check his or her vote immediately after

casting it. In order to facilitate verification and a recount of votes in the event of an appeal, it may also be provided that a machine could print votes onto ballot papers; these would be placed in a sealed container where they cannot be viewed. All the methods used should enable the confidentiality of the ballot to be guaranteed (see explanatory report, §42). Electronic voting methods are "secure" if the system can withstand deliberate attack; they are "reliable" if they can function on their own, irrespective of any shortcomings in the hardware or software (§ 43). The system's transparency must be guaranteed, in the sense that it must be possible to check that it is functioning properly (§ 43).

54. According to guideline II.1.a., democratic elections are not possible without respect for human rights, in particular freedom of expression and of the press, freedom of circulation inside the country, freedom of assembly and freedom of association for political purposes, including the creation of political parties. Restrictions of these freedoms must be in conformity with the ECHR and, more generally, have a basis in law, be in the public interest and comply with the principle of proportionality (cf. §60 of the explanatory report).

55. It may be concluded that, on the one hand, the institutionalisation of postal voting and e-enabled voting is, in principle, compatible with the Code of Good Practice. On the other hand, their compatibility depends primarily on adequate provision, through national legislation and legal practice, of the prescribed conditions, taking particular account of technical and social conditions.

2. Compatibility with Article 3 of the Additional Protocol

56. Article 3 of the Additional Protocol does not refer explicitly to the acceptability of remote voting and electronic voting. Nonetheless, it should be noted that elections which fail to respect the principle of secret suffrage cannot claim to be "free elections", since the voting methods mentioned may influence the vote. One may even note that, in constitutional discussions at national level, postal voting is discussed in connection with the principle of secret suffrage. While postal voting's compatibility with secret suffrage was rejected in Austria in 1982, it was found to be compatible with the German constitution as far back as 1967. Here, it should be added that the constitutional situation at issue in Austria and Germany was very similar. However, in countries such as Austria where the case-law has firmly and persistently come out against the acceptability of remote voting within the county until such time as the constitution specifically allows it, a similar system exists for remote voting outside the country, and no questions are raised about such a system's compatibility with Article 3 of the AP. Discussions are currently taking place on the introduction of postal voting into Austrian legislation, and the requirement of compatibility with the ECHR has not been raised.

57. At this point, it is appropriate to note that the right to free elections under Article 3 of the AP may have an impact on the acceptability of restrictions of the principles established by Art.icle 3, but that it is not incompatible with the formal introduction of remote voting.

58. Even if one regarded this as imposing restrictions on the acceptability of remote voting, such restrictions could not be justified by invoking the discretion enjoyed by national legislation. In interpreting the tangible content of the rights and obligations arising from the ECHR, it is necessary to take account of the legal situation in the contracting States if homogeneous rules exist among them. The European Court of Human Rights has adopted a long line of decisions from which it emerges that national authorities have greater scope for discretion where it is impossible to identify a common point of view among the various member States (cf. J.

CALLEWAERT, "Quel avenir pour la marge d'appréciation?", *Mélanges à la mémoire de R. Ryssdal*, 2001, p. 147 [151]), EurCourtHR, judgment of 11 July 2002 [Grand Chamber], *I v. the United Kingdom*, Rec. n° 25680/94, §§ 51 onwards; judgment of 25 November 1994, *Stjerna v. Finland*, Series A, 299-B, § 29, judgment of 11 July 2002, *Christine Goodwin v. the United Kingdom*, Rec. n° 28958/95, §§ 74 onwards.). Where the contracting States share a common or homogenous standard on a question or subject related to the ECHR's guarantees, this tends to favour acceptance of this standard at European level as well, in contrast to situations where no common standard exists. Where there is no common European rule, it would be necessary to deny that there a mandatory ECHR requirement existed a certain level.

59. With regard to remote voting, there is considerable diversity in the legal systems of the Council of Europe's member States. Of the 24 legal systems analysed, however, 16 provided for remote voting by post in some way or another. Although in the majority of those countries postal voting is only available to electors who are out of the country on the election date, it is generally accepted in these countries either that there is compatibility with the principle of secret suffrage or, in the event of interference with this principle, that there is at least compatibility with Article 3 of the AP. In this respect, it is of little consequence that four countries allow postal voting without restriction even within the national territory.

60. In contrast, there are eight countries in which remote voting by post is not permitted. However, this should not lead to the conclusion that its unacceptability is the consequence of unconstitutionality, since it may also result from a political and legal decision.

61. In any event, the wide range of systems should also be taken into consideration; this does not facilitate the formal introduction of a European standard in comparable cases. Even if we assume that non-supervised postal voting is not permitted in all other countries which have not been analysed, it may not be concluded, given the 16 countries where non-supervised postal voting is allowed in some form or another, that there is no such standard which would mean that this method of voting was incompatible with the AP to the ECHR.

62. However, certain restrictions implicit in Article 3 of the Additional Protocol must be respected, insofar as they impose a minimum standard for protecting the secrecy of the ballot. This minimum standard should be defined from the perspective of comparative law, which is itself reflected in the "Code of Good Practice in Electoral Matters".

63. Some appropriate measures to protect the secrecy of the ballot in relation to postal voting should be taken as an example. Parliament must take measures in order to ensure that the principle of secret suffrage is protected. In this context, different systems require the elector to complete the ballot paper individually, ensuring that he/she is not being watched, place it in the electoral envelope and make a solemn statement to the effect that the ballot paper was personally completed (see Federal Constitutional Court of Germany, BVerfGE 21, 200 [205][5]).

64. The Venice Commission's Code of Good Practice in Electoral Matters contains almost the same requirements. In accordance with guideline I.3.2. of the Code, postal voting should only be allowed if the postal service is safe and reliable.

---

[5] *The legal prerequisites of postal voting in Germany as mentioned above are of crucial importance for the compatibility of the right to postal voting and the principles of electoral law as enshrined in the Fundamental Law.*

65. 2Based on this analysis of non-supervised postal voting, we can also develop similar standards for e-enabled voting. Consequently, electronic voting is neither generally permitted by human rights nor ruled out à priori. Instead, its acceptability depends on the legal, operational and technical standards implemented in the procedure. In order to establish specific standards, it will be necessary to compare the precautionary measures for e-enabled voting with those for postal voting. Insofar as a potential recommendation set out security measures comparable with those for postal voting, e-enabled voting could be compatible with the European standards in this area and with Art.icle 3 of the Additional Protocol.[6] In this context, it is necessary to ensure that the confidentiality of electronic voting is guaranteed by measures comparable with those applicable to postal voting, especially by preventing data manipulation, protecting anonymity to prevent possible disclosure of the elector's wishes, and by maintaining the authenticity and integrity of the votes cast.

66. The Venice Commission's Code of Good Practice contains a clarification that could serve as a guideline. According to the explanatory report (see § 42), certain precautions are needed to minimise the risk of fraud, for example by enabling the voter to check his or her vote immediately after casting it. It is important to ensure that ballot papers are designed in such a way as to avoid confusion. In order to facilitate verification and a recount of votes in the event of an appeal, it may also be provided that a machine could print votes onto ballot papers; these would be placed in a sealed container where they cannot be viewed. There should also be some kind of device for mixing the ballot papers so that if it proves necessary to open the container for checking, papers cannot be linked to particular voters – for example, those turning out early or late in the day.

V. Conclusion

67. In conclusion, remote voting is compatible with the Council of Europe's standards, provided that certain preventative measures are observed in the procedures for either non-supervised postal voting or electronic voting.

68. In addition, for non-supervised e-enabled voting, technical standards must overcome different threats to those which exist for postal voting. This form of voting must only be accepted if it is secure and reliable. In particular, the elector must be able to obtain confirmation of his or her vote and, if necessary, correct it without the secrecy of the ballot being in any way violated. The system's transparency must be guaranteed. Insofar as an e-enabled voting system meets these conditions, it is compatible with the European standards on electoral matters, and in particular with Article 3 of the Additional Protocol to the European Convention on Human Rights.

[6] *On this question, see the erroneous conclusions reached by Bob WATT, Human Rights and Remote Voting by Electronic Means, Representation, Vol. 39, No. 3, 2003, pp. 197-208.*