



COUNCIL OF EUROPE
CONSEIL DE L'EUROPE

Strasbourg, 6 February 2006

Opinion no. 360 / 2005

Restricted
CDL-EL(2006)006
Engl. only

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

COMMENTS

**ON THE DRAFT LAW
ON THE STATE ELECTORAL COMMISSION
OF THE REPUBLIC OF CROATIA**

by

Mr Hjörtur TORFASON (Member, Iceland)

I. Introduction

1. The following comments are submitted to the Secretariat of the Venice Commission in response to a request from the Government of Croatia for providing an opinion, jointly with the OSCE/ODHIR, on a proposed Law on the State Electoral Commission of the Republic of Croatia.
2. The comments relate to a draft report on the subject prepared by the OSCE/ODHIR and dated 5 December 2005, entitled “*Draft law on the Croatian State Electoral Commission – OSCE/ODHIR Commentaries*” (hereinafter referred to as the “Report”) and are structured accordingly.
3. The proposed Law (“the Draft Law”) was furnished to the Venice Commission in English translation at the beginning of December 2005 (VC document *CDL-EL(2005)053*), together with brief commentaries on its constitutional basis and an assessment of the current situation in its field as well as brief explanations submitted with the Law Bill to the Croatian Parliament. The document also includes the report of the parliamentary Committee on the Constitution, Standing Orders and Political System on its adoption of the Law Bill for processing on 12 July 2005 (with a vote of 17:1).
4. The Draft Law is here reviewed under benefit from discussion thereof at a Roundtable held at the Parliament Building in Zagreb on 13 December 2005, co-organised by the Central State Administration Office (CSAO) and the OSCE Mission to Croatia, with participation of the OSCE/ODHIR and the Venice Commission. The Roundtable was attended by representatives of the Croatian Government, Parliament, Constitutional Court and Supreme Court as well as academicians and non-governmental organisations. The Prime Minister Dr. Ivo Sanader and the Speaker of the Parliament, Mr. Vladimir Seks, attended the opening session, and the governmental representatives included Mr. Branko Hrvatin, President of the Supreme Court and of the existing SEC, and Mr. Antun Palaric, State Secretary of the CSAO, which has been instrumental in the drafting of the Law Bill. - The discussion referred *inter alia* to an earlier Roundtable organised by the OSCE Mission in November 2004, which also was attended by the OSCE/ODHIR and the Venice Commission. It was there concluded that the adoption of a law on the SEC should be among the priorities in electoral reform.
5. The Draft Law and the December Roundtable were also discussed in the meeting of the Council for Democratic Elections and the plenary meeting of the Venice Commission on 15 and 17 December 2005 respectively.
6. In the Parliament of Croatia (*Sabor*) the Draft Law has already been subjected to a first reading, where it received the support of 96 out of 140 representatives, with no opposing votes. It is expected that the Draft Law will receive its second (and possibly final) reading in February - March 2006. According to the Constitution, its adoption will require approval by a majority vote of all parliamentary representatives.

II. General Remarks

7. The comments set forth below on the Draft Law will be rather brief, since the background, purpose and principal features of the Law are well described in the referred Report, and most of the specific comments on the Law in the various sections of the Report can be fully endorsed without extensive remarks.

8. As outlined in sections II and III of the Report, the adoption of a specific law on a State Electoral Commission in Croatia is a novelty, and the rules on the existing SEC are embodied within the general law on parliamentary elections and other election laws. The Draft Law is conceived as the first of several acts of legislation towards electoral reform to be developed over the next few years, including revisions of the laws on national, local and presidential elections. This gradual process of law reform may eventually result in the adoption of a general electoral code.

9. The proponents of the Draft Law regard the present time as the right time for adopting a new law on the SEC, the aim being to have a reorganised Commission with intended operating facilities fully established well in advance of the next election cycle, where parliamentary elections are due to be held in 2007. At the December Roundtable, there was a general consensus in favour of this aim, which deserves support. - It was also brought out at the Roundtable that the Croatian government has already agreed upon budgetary measures for the financing of the operations of the new SEC, which will be more extensive and continuous than those of the existing SEC.

10. In the introductory comments to the Law Bill, it is pointed out that the Draft law will permit the basic provisions on the composition and competences of the SEC to be assembled and coordinated within a single legal text. Otherwise, the main purpose of the Draft Law is described as that of meeting a basic need for the establishment of the SEC as a permanent, independent and professional body with a strictly defined composition and competences, able to stay in charge of all elections in the country and fulfil specific other basic tasks in relation to the electoral system. It is envisaged that the frequency and multiplicity of elections of all kinds, including referenda, will call for more or less continuous action by the supreme body in charge of the conduct of the various elections, and that further tasks relating to the monitoring and organisation of electoral processes will reinforce the need for such continuity. In that connection, it is particularly to be noted that the Draft Law proposes to assign to the SEC the highest administrative function in the keeping of voter lists in the country and the responsibility for the conclusion and confirmation of the voter lists. For this and other purposes, the SEC is to have an expert service at its disposal.

11. The Draft Law is generally clearly worded and reasonably comprehensive within its intended scope. A few of its specific provisions appear to be somewhat tentative at this stage, however, such as those concerning the conditions for possible removal from office of the SEC members. At the December Roundtable, it was indicated that the Draft Law is expected to undergo an in-depth examination and discussion in advance and in the course of its second reading.

III. Structure and Appointment of the State Election Commission

12. As outlined in section III.A of the Report, elections in Croatia are administered by a four-tier structure of independent bodies, namely the SEC, Constituency Election Commission (CECs), Municipal and City Election Commissions (MECs and CiECs), and Election Committees or polling boards (VCs).

13. The existing SEC has on the one hand a standing or permanent membership consisting of a president and four other members, and on the other hand an expanded membership appointed upon the call of elections and consisting of additional members of equal status appointed by political parties or groups. The permanent membership is required to be of professional standing, with the President of the Supreme Court serving ex officio as President of the SEC and the other members being selected from among Supreme Court judges or other distinguished lawyers. This clearly has contributed to an independence of the SEC according to past experience, but the solution of appointing sitting judges has disadvantages under a long-term view and also tends to disturb the regular work of the judges around election time. However, the resulting independence and professionalism expected of the permanent members clearly has influenced the choice of structure for a new SEC according to the Draft Law.

14. As related in section IV.A of the Report and noted in para. 10 above, the Draft Law proposes to establish the new SEC as a permanent, independent and professional body in charge of the conduct of all elections and fulfilling specific other basic tasks in relation to the election system. Specifically, it is to be a body of restricted membership consisting entirely of members appointed on the basis of professional capacity and having permanent or continuous tenure. As to the former, the members are required to have professional qualifications, be familiar with the political and electoral system and possessing practical knowledge of the conduct of elections. The professional qualifications of the President are to be in the field of the law, and those of the other members in law or political science (Articles 5 and 8). The members may not be members of any political party or candidates at elections.

15. The SEC is to have 5 members, i.e. a President, two Vice-Presidents and two ordinary members. They are all to be appointed by the Croatian Parliament, through election by a majority vote of all representatives (50%+). The President shall be elected from among candidates invited by public competitive announcement, while one Vice-President and one member shall be elected upon proposal by the majority party or coalition in the Parliament, and the other Vice President and member respectively upon proposal of opposition parties or coalitions (Articles 4 and 7). The term of appointment for each/all of them is to be 8 years.

16. As noted in the Report, the change in composition from the existing SEC may be said to imply a shift from a balanced, multi-partisan approach to a neutral-professional basis. It may be added that the establishment of an expert service of the SEC should tend to reinforce the change in emphasis.

17. The method of appointment is interesting in that along with the basic professionalism required of the members, it retains a certain partisan element by having candidates other than for President being proposed by the parliamentary majority and opposition respectively. This is positive in the general sense that election commissions need to enjoy the trust of actors in the political arena, and one way of promoting such trust is to let the actors have a say in their appointment. However, the method as stated may involve a restrictive effect in that it appears to presuppose that the members will all need to be elected at the same time (presumably the President first, followed by the Vice-Presidents and then the members or the latter two in unison). This is of course a quite normal and natural procedure for election commissions, but the degree of professionalism and the length of the membership tenure foreseen in this case may raise issues involving problematic aspects.

18. The proposed appointment term of 8 years for the SEC members is unusually long for election commissions, and may e.g. be compared with the tenure frequently assigned to members of constitutional courts or courts of law in countries where these are appointed for a definite term. However, it is to be recalled that the question of term here relates solely to the supreme body in the electoral administration system, and it would seem plausible to expect that the length of term should tend to increase its general independence. The problem aspect rather may be the combination of a long term and of appointment of the entire commission at the same time.

19. The method of having all members of the SEC elected by the Parliament involves in itself a valid approach. However, as noted in the Report, it would seem reasonable to ask whether means can be found to permit other State branches or institutions, in particular the Constitutional Court, to participate in the selection of SEC appointees, by means of exercising a consultative function as to the qualifications of the candidates or otherwise. It would *inter alia* seem logical to assume that a qualification assessment by another institution than the Parliament alone might be easily reconcilable with the basic call for professionalism and independence of the appointees.

20. All in all, the proposed structure and method of appointment of the SEC is acceptable in principle and consistent with the basic aim for an independent and objective electoral administration. However, there is reason to consider whether the specific means for realising this aim according to the Draft Law can be improved upon in its further processing. In addition to the issue noted in para. 19 above, this might involve consideration of the possibility for having the appointments to the SEC effected individually or by stages within the framework of the proposed 8-year term.

IV. Tenure and Removal of SEC Members

21. The Draft Law provides (in Article 12) that the SEC members will have the status of state officials, with a right to salary and other substantive rights. The Law also contains provisions restraining the members from performing another professional duty or a duty the performance of which could raise doubt as to their impartiality, integrity or public reputation, while permitting their engagement with scientific and professional work and research and humanitarian and cultural activities (Articles 13 and 14).

22. The Draft Law contains provisions (in Articles 15 and 16) describing the conditions which can lead to a cessation of the term of office of the SEC members, on objective grounds or by removal for cause. Although most of the objective grounds (status changes) are appropriately designated, the provisions on removal for cause are somewhat tentative and do not appear to afford to the members a sufficient security of tenure. The comments of the Report on this matter (in section IV.A.3) are generally to be endorsed, especially the suggestion that a procedure for adjudicating the eventual claims for removal of the members should be provided for in the Law. In fact, there seems reason to consider a solution whereby the conclusive removal of a member for cause could solely be effected by decision of the courts of law.

23. Also, the provisions for replacement of a member upon relief or removal from office (Article 16, para. 3) do not seem sufficiently clear or coordinated with the basic method of original appointment.

V. Other Issues

24. The scope of activities of the SEC beyond those of organising and supervising the conduct of elections and referenda is described in Article 11 of the Draft Law, in a progressive manner. In Article 21, it is further provided that the SEC will have authority to issue standing orders of regulatory nature relating to matters within its scope of activity.

25. In Section IV.B of the Report, it is suggested that the regulatory authority of the SEC under the Draft Law might be broadened in scope, so as to include expressly the ability to regulate aspects of the electoral process including campaigning, political finance and press coverage, as well as an ability to undertake administrative enforcement measures. Although this possibility certainly is worthy of consideration in the context of the Draft Law, there is reason to express reservations concerning the question of having the SEC deal with such matters as political financing and press coverage. This might tend to involve the Commission too heavily in issues of high political sensitivity and in risks to the neutrality of its overall position.

26. As related in para. 10 above, one of the novelties of the Draft Law are that the SEC with its expert service will be charged with the highest administrative responsibility for the maintenance of voter lists in the country, although the basic material of the voter lists will continue to be derived from other authorities responsible for national registration, i.e. mainly municipal authorities. The provisions of the Draft Law regarding this important subject matter are generally to be welcomed.

27. The provisions on the expert service and office facilities of the SEC are well designed and are to be welcomed.

VI. Conclusions

28. The conclusions and recommendations developed in the Report are summarised in its section VI. There is reason to endorse the various suggestions there set forth, with such reservations only as may emanate from the above comments, i.e. primarily concerning certain aspects of the method of appointment of the SEC and its scope of activity.