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**EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW**

**(VENICE COMMISSION)**

# DRAFT JOINT OPINION ON THE ELECTORAL CODE of "the former Yugoslav Republic of Macedonia" as revised on 29 October 2008

**by the Venice Commission and the OSCE Office for Democratic Institutions and Human Rights (OSCE/ODIHR)**

**on the basis of comments by**
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## *1. Introduction*

*1. The Council of Europe's Venice Commission and the OSCE Office for Democratic Institutions and Human Rights (OSCE/ODIHR) have reviewed the country's Electoral Code, as amended in October 2008.*

*2. The present opinion was elaborated following resolution 1320 (2003) of the Parliamentary Assembly of the Council of Europe, which invites the Venice Commission to formulate opinions concerning possible improvements to legislation and practices in particular member States or applicant countries.*

*3. The recent amendments address specific points, that is voter threshold in Presidential elections, out-of-country voting, voter registration, campaign finance and the complaints and appeals process. Some of the amendments are based on a draft working text amending the electoral code, which was reviewed by the Venice Commission and the OSCE/ODIHR in 2007 (CDL-AD(2007)012). This current review should be read together with this document and other relevant Joint Opinions (see par. 4). Many comments in previous texts have been taken into account, although others remain to be addressed. Not all are included in this document.*

*4. The present document has been adopted by the Council for Democratic Elections at its … meeting (Venice, …) and by the Venice Commission at its … plenary session (Venice, …).*

## 2. Reference Documents

5. This consolidated commentary is based upon:

- Unofficial translation of the Electoral Code of "the Former Yugoslav Republic of Macedonia" (as published in the official Gazette 40/2006, 136/2008, 148/2008 and 155/2008; CDL(2009)006).
- Electoral Code as of 29 March 2006 (CDL-EL(2006)021; unofficial translation).
- Opinion on the Electoral Code of "The Former Yugoslav Republic of Macedonia" by the Venice Commission (CDL-AD(2008)036; 15 December 2008).
- Joint Opinion on Draft Working Text Amending the Electoral Code of "The Former Yugoslav Republic of Macedonia" by the Venice Commission and the OSCE/ODIHR (CDL-AD(2007)012; 21 March 2007).
- Joint Opinion on the Electoral Code of "The Former Yugoslav Republic of Macedonia" by the Venice Commission and the OSCE/ODIHR (CDL-AD(2006)022; 10 July 2006).
- Joint Opinion on the Draft Amendments to the Electoral Code of "The Former Yugoslav Republic of Macedonia" by the Venice Commission and the OSCE/ODIHR (CDL-AD(2006)008; 21 March 2006).
- Code of Good Practice in Electoral Matters – Guidelines and Explanatory Report. Adopted by the Venice Commission at its 52nd session (Venice, 18-19 October 2002; CDL-AD(2002)023rev).
- Guidelines for Reviewing a Legal Framework for Elections of OSCE/ODIHR, January 2001.
- OSCE/ODIHR, Existing Commitments for Democratic Elections in OSCE Participating States (Warsaw, October 2003).
- Final Report of the OSCE/ODIHR Election Observation Mission to the 1 June 2008 Presidential Elections in "the former Yugoslav Republic of Macedonia".
- Statement of preliminary findings and conclusions on the 22 March 2009 presidential and municipal elections (first round) in "the former Yugoslav Republic of Macedonia".
- Statement of preliminary findings and conclusions on the second round of presidential and municipal elections in "the former Yugoslav Republic of Macedonia", 5 April 2009.

- Final Report on the 1 June 2008 Parliamentary Elections in "the Former Yugoslav Republic of Macedonia".
- Parliamentary Assembly of the Council of Europe, Report, Observation of the Parliamentary elections in "the former Yugoslav Republic of Macedonia" (1 and 15 June 2008) (23 June 2008; Doc. 11647).
- Parliamentary Assembly of the Council of Europe, Report, Observation of the presidential election in "the former Yugoslav Republic of Macedonia" (22 March and 5 April 2009) (27 April 2009; Doc. 11866).

## 3. The Right to Vote and Stand for Elections

6. **Article 7(2)** provides a restriction of the right to be elected for citizens who have been sentenced with a final court decision for unconditional imprisonment of at least 6 months. It is an extensive restriction; a penalty for a crime, once served, should not limit such fundamental rights as the right to elect and to be elected, as it would not be in compliance with the principle of proportionality and could thus violate the right stated in Article 3 of the 1st Protocol to the ECHR and Article 7(5) of the OSCE Copenhagen Document.[1]

7. **Articles 6 and 7** do not allow foreigners to vote or stand for election to municipal council and mayoral posts. It would be recommended to provide the right to vote and stand for elections to long-standing foreign residents to be *inter alia* in accordance with the Council of Europe Convention on the Participation of Foreigners in Public Life at Local Level (Article 6). It is accordingly recommended that the right to vote in local elections be granted after a certain period of residence, typically 5 years.[2]

## 4. The Voter Threshold in Presidential Elections

8. Under the Constitution, a candidate is elected to the Presidency in the first round if s/he obtains an absolute majority of the votes of all registered voters. If not, a second round is held between the two leading candidates, and the one who wins more votes is elected President, provided that more than 40% of the registered voters cast a ballot. Should the turnout be less than 40% in the second round, a repeat election must be held.

9. The voter turnout requirement for a valid second round of presidential elections has been lowered from 50% to 40% by a Constitutional amendment. Previous recommendations have recommended that this requirement be removed outright, as it can lead to cycles of failed elections. This could imply a constitutional change.

10. However, the unusually high threshold to win the election in the first round (50% of registered voters) is a departure from the more common rule of more than 50% of the valid votes cast in the election. With the turnout of 58% in the first round of the last presidential elections (2009) one candidate would have had to win 87% of the votes cast to win outright in the first round.[3] This seems to be an unnecessarily strong requirement and it would mean that a second round is necessary even when one candidate defeats all other candidates by a large margin. The legal framework could be amended, for example, to stipulate that a candidate would win in the first round if the majority of all registered voters turn out and the candidate receives more than 50% of valid votes cast. This would, however, require a constitutional change.

11. The Code should provide for the circumstance of a candidate's withdrawal from an election

[1] *See* the Venice Commission Code of Good Practice in Electoral Matters (CDL-AD(2002)023rev), I, 1.1 d.
[2] *See* the Code of Good Practice in Electoral Matters, I, 1.1 b. ii.
[3] Even if the voter turnout is much higher, say an enviable 70%, the candidate would still have to garner over 71% of the votes cast to win outright in round one.

between the two rounds of voting, both for mayorships and the presidency. Presumably, at least for presidential elections, in line with Article 81 of the Constitution, the second round election would continue and the remaining candidate would still be required to receive the requisite majority. The Code could be clarified on this point, including for mayoral elections.

12. Also, **Article 121** of the Code does not (re)state the constitutional provision concerning the threshold for the second round. The Constitution reads, "A candidate is elected President if s/he wins a majority of votes of those voted, provided that more than 40% of registered voters voted." Legally speaking it is not necessary to repeat what is already in the Constitution, but for clarity it would be better to have the comprehensive rule stated also in the Code. One may, in the Code, also be more precise and state that "those voted" means those having cast a ballot, therefore including the invalid ballots.

## 5. Out of Country Voting and New Parliamentary Districts

### a. The Arrangements for Voting Abroad

13. The recent changes to the Code open the possibility for voters who are temporarily abroad to register to vote in Diplomatic Consular Offices. **Article 2** of the Code defines citizens that are "temporarily abroad" as those who have

1. registered their last residence in the republic and on election day are staying temporarily abroad and that has lasted from three months to one year, or
2. been more than one year abroad and who have registered to stay temporarily abroad with the competent authority.

14. On this point, the concern from a previous Joint Opinion[4] remains relevant in that it would seem clear that only those citizens who have been staying abroad between three months and one year or who are registered as temporarily abroad would be eligible to vote abroad. This could be seen as an arbitrary obstacle to enfranchisement for other citizens and should be reviewed.

15. Similarly, there remains a concern regarding the composition of the Electoral Board (EB) in the Diplomatic Consular Offices. The 2007 Joint Opinion noted,

> "According to the draft text, the electoral boards for the voting abroad are composed of Foreign Ministry employees … consideration might be given to some exchange of staff between diplomatic offices and the Foreign Ministry so that the board members are less directly connected to each other. Furthermore, 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."[5]

### b. The Three New Districts

16. Under the Electoral Code, out-of-country voters form three single member constituencies for parliamentary elections: one covering Europe and Africa, one the Americas, and one covering Australia and Asia. While there is no legal standard for the measures to vote abroad, and the procedures vary widely in scope and approach, the election should generally meet the same standards for democratic elections as in-country procedures. It appears that the method outlined in the current legislation does not achieve such a standard and it is recommended that a new formula be considered.

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[4] *See* Joint Opinion of the Draft Working Text Amending the Election Code of "The Former Yugoslav Republic of Macedonia" (CDL-AD(2007)012, March 2007).
[5] *Id.*

17. First, in spite the Code provides a proportionally-based system for the parliamentary elections (with six districts of high magnitude, 20 seats each), the three single member constituencies will break with the principle otherwise used and they will most likely be won by the largest party. Even if all three were to be elected together under a proportional system, only the largest parties would have a chance of gaining seats; therefore, the system is actually a "first past the post" system.

18. Second, it should be noted that when the domestic districts are designed to produce approximately the same number of votes per seat, the three districts abroad are predefined to one seat each regardless of the number of registered voters.

19. Therefore, the number of voters electing each of these mandates will differ considerably amongst themselves, as well as from the in-country constituencies. This risks compromising the principle of equal suffrage, and more precisely the principle of equal voting power.[6]

20. While the creation of a virtual district is a viable option for voting abroad, assuming that a large enough number of voters would participate to allow for equal suffrage, mandates should be allocated in such a way as to allow for a proportional system to be effective (in this case by having more than a single mandate). In the absence of such, it is recommended that votes cast from abroad are counted in the domestic districts of the voters' last residence.

c. Other

21. The requirement in **Article 61** for 200 signatures to be gathered in support of a candidate for MP in an overseas district does not appear to be connected to population figures, nor number of registered voters, as is the case with domestic signatures. As the number of voters who have registered to vote in the newly created overseas voting district will be known, connecting the number of required signatures as a percentage of the known (registered voter) population could be considered.

22. The presence of observers and accredited representatives of political parties or candidates are key elements for the transparency of the vote, and should also be present during voting abroad. Although no text in the Code suggests they are not allowed, it could be made explicit that they are welcome, and indications of the procedure for their accreditation from abroad should be made. This is particularly important given the particularities of a Diplomatic Consular Office being used for polling.

## 6. The Election Administration

23. **Article 23(1)** sets out the quorum for election bodies as well as the number required to render a decision. The wording is unclear as to whether, for a valid decision to be taken, a majority of "members" (only) is required, or whether that majority may be achieved by counting also deputies, in cases when a member is absent. **Article 23(2)** would suggest that this is the case, but could be further clarified with the addition of, "with the same rights to work and vote as the member s/he is replacing."

24. According to **Article 27(5)** the President and the members of the State Election Commission (SEC) are elected by the Parliament with a two-third majority of the total number of Members of Parliament. Although this provision requires broad consensus on the membership of the SEC, it undoubtedly makes it more difficult to appoint the membership, and the procedure might easily be drawn out. It is also not provided whether the vote in Parliament will be on every member separately or all members and the President of the SEC together.

[6] *See* Copenhagen Document, Article 7.3 and *see* the Code of Good Practice in Electoral Matters, I, 2.2.

The provision would benefit from clarification.

25. **Article 31(2):** In a previous Joint Opinion on the draft Electoral Code[7] it was noted that the number of duties of the SEC appeared excessive. It was suggested that some duties could be vested in the Municipal Election Commissions (MEC), and that particularly during the election period duties of supervision should be left to them (duties on election day particularly being time-consuming). The Electoral Code now contains an apparent overlap of duties in controlling EBs[8] and it should be made clear whether the MEC or the SEC is the responsible body to control their work.

26. In its final Report on the 2008 early Parliamentary Election, ODIHR recommended that inconsistencies between the Election Code and Law on Misdemeanors be resolved so that the SEC can initiate proceedings against persons who commit the electoral misdemeanors listed in the Code. This issue appears to have been addressed in **Article 31(3)**. The same provision also imposes a duty on the SEC to dismiss members of an election management body in case of unlawful activities. However it does not specify the procedure to do so and the Code would benefit from having the procedure clearly outlined.

27. **Article 35(2)** states that the SEC "determines with an act the procedures for appointing the MEC President, deputy, members and their deputies," and in **Article 39(3)** the same applies for EBs. Both articles leave undefined whether the appointments are a standard or *ad hoc* act. The procedures for these appointments would benefit from further elaboration, particularly as previous recommendations from ODIHR suggested that the presidents and deputies of such bodies be selected – from among the randomly selected members – by either the body itself (by internal vote) or by the immediately higher election body (the MEC or the SEC, respectively).[9]

28. **Article 37(2)** dealing with the competencies of the Municipal Election Commission and the Election Commission of the City of Skopje remains unclear in spite of the recent amendments and would need further clarification.

29. More precisely, **Article 37(2) paragraph 2** vests the MECs with the authority "*to dismiss members of the Electoral Board […] on the day of elections*." The Article leaves unaddressed both the procedure with which the MEC can dismiss EB members and if the dismissal power applies also before election day.

30. Additionally, **Article 37(2) paragraph 10** states that the MEC "Register(s) the authorized representatives for monitoring the work of the Municipal Election." However, the Code should clarify whether parties and candidates must provide a list of their authorized representatives to MECs and, if so, what the deadline is, and what sanctions, if any, apply for failure to provide such a list.

31. Finally, **Article 37(2), paragraph 16** of the Code, tasking the MEC to "*decide upon complaints*" appears to conflict with **Article 148(1)** which vests the competency for deciding upon complaints on the SEC.

32. **Article 38** refers to the EB's composition. The manner in which the article reads is potentially misleading, for example: "Electoral Boards shall be composed of a president, 4 members and their deputies…*"*.The text appears to suggest that the EB is composed of 9

[7] CDL-AD(2006)008, paragraph 17 .
[8] Article 37(2) states that MECs must "control the legality of the work of the electoral boards and intervene in cases when violation of the legality has been determined in the … conduct of the elections" while Article 32(2) tasks the SEC to "Control the polling stations on the day of the elections where irregularities have been reported".
[9] *See* Recommendation No. 9 of the OSCE/ODIHR Election Observation Mission. Final Report for Early Parliamentary Elections, 1 June 2008, p. 26.

members, while in fact there are 5. The precise number must be clear for decision-making purposes. It may be advisable to specify first the total number of members that comprise the EB, and then elaborate the functions of each including the relationship, and any distinction, between members and deputies.

## 7. The Voter List

33. The SEC is given responsibility for the voter list, a change from the previous Code which vested this responsibility to the Ministry of Justice. Transferring this voter list to a body which is composed of both members of the government and the opposition should increase confidence in the process.

34. **Article 43** sets out the obligation of the Ministry of Internal Affairs to submit data for the voter list. The present text does not clearly indicate that data should be submitted also for persons who have not yet turned 18 at the time of data submission, but who will do so before election day.

35. **Article 46** provides that special excerpts of the voter list be prepared for carrying out elections in military posts, and **Article 47** clarifies that military personnel vote in the district/municipality where the military unit or post is located. The same can be concluded from **Article 113**. The Code of Good Practice in Electoral Matters counsels that these personnel should vote at their place of registered permanent residence whenever possible.[10] Although it is difficult or even impossible to allow all military personnel to vote at their domicile, voting at their domicile could be allowed to a portion of the military personnel who might be posted in their municipality.

36. **Article 55(1)** provides for the protection of personal data contained in the voter list, in line with the law on data protection. It further states that the data "*shall not be used for any purpose other than exercising the citizens' right to vote.*" However, the subsequent paragraph **(Article 55(2))** requires the SEC to supply the data – all of it – from the voter list to any registered political party or independent candidate upon their request. Council of Europe and OSCE standards[11] suggest that the legal framework clearly state the permitted uses of information obtained from the voter registers and whether the information can be used for purposes other than making challenges to the registration of a particular voter. In particular, the law should state whether the information might be used for the campaign activities of political parties and candidates. The legal framework should also state the sanctions for misuse of information obtained from voter registers.

## 8. The Electoral District Definition for Parliamentary Elections

37. According to the Code, the six districts for parliamentary elections should not vary more than 5% up or down from the average number of voters, and each district elects 20 members of parliament. While there are no standards on the method of defining districts, such a clause creates the need for regular re-districting as population shifts occur. As the process of redistricting has considerable political ramifications, other possible approaches might also be considered.[12] It is common to fix electoral districts and distribute mandates proportionally to the number of voters (i.e. – one mandate for every 20,000 voters). If such a method of using fixed electoral districts with varying numbers of mandates were adopted, the general rule for distribution of mandates to districts would then need to be included in the Electoral Code.

## 9. Candidates Lists

[10] *See* the Code of Good Practice in Electoral Matters, I. 3.2. xii.
[11] *See inter alia* Guidelines for Reviewing A Legal Framework for Elections, p. 14.
[12] *See* Venice Commission Code of Good Practice section I. 2.2, 17.

38. The transfer of duties for monitoring the collection of support signatures from the Ministry of Justice local offices to the SEC is a welcome development that should operate to decrease any pressure (perceived or real) on signatories to support the governing party. **Article 63(2)** of the Code should clarify the procedure for the collection of support signatures during the candidate registration process at local offices, presumably the MECs (as the SEC is not represented itself at the local level).

a. Ethnicity

39. **Article 64(3)** states that each candidate for parliament must include "*a statement for the belonging to an ethnic community.*" This is not required for other lists.[13] An indication of ethnicity is not printed on the ballot, nor are there quota rules for ethnic minorities in any of the electoral races covered by the law. As the declaration of ethnicity is connected only to decision-making within the elected body, the declaration of ethnicity could be done after the elections. According to the Code of Good Practice in Electoral Matters[14] and the Framework Convention for the Protection of National Minorities,[15] no one should be obliged to declare that they belong to a national minority. Such declaration should be a right, not a duty. Removing the ethnic declaration from article 64(2) should therefore be considered.

b. Gender

40. The provisions on gender representation in candidate lists remain among the *avant garde* in Europe. **Article 64(5)** states that on lists for the Parliament and for local councils need to have "*in every three places at least one will be reserved for the less represented gender.*" Earlier joint opinions[16] have pointed out that this language may have an unwanted side effect and that somewhat better wording would be:

> *"There shall be at least one candidate of each gender among the first three on the list, two of each gender among the first six on the list, three of each gender among the first nine on the list etc."*

c. Profession

41. According to **Article 63** the list of candidates must contain, among other things, information on candidates' professions. In line with repeated recommendations from previous joint opinions, it should be considered whether such information is necessary and whether the absence of, or incorrect provision of, the profession is considered an "irregularity". That would deny a candidate the right to stand for office.

## 10. The Campaign

a. Prior Recommendations

42. In its final report on the 2008 early parliamentary elections, the ODIHR suggested that **Article 73** of the Election Code – providing for campaign period violations to be litigated in the

[13] The only place the ethnicity is being used in the Election Code is in Article 93(3) about the ballots, where it is stated that for members of "other communities" the names of candidates and submitter are printed in their language and alphabet in addition to Macedonian and Cyrillic. This requirement exists for all lists and is therefore not connected to Article 64(3). It must be assumed that the right to have the ballot printed in minority languages is given to everybody who requests it.

[14] *See* the Code of Good Practice in Electoral Matters, I. 2.4 c.

[15] *Framework Convention for the Protection of National Minorities, Strasbourg, 1.II.1995, Article 5, par. 2.*

[16] First time in Venice Commission & OSCE/ODIHR, Joint Opinion on the Draft Electoral Code of "the Former Yugoslav Republic of Macedonia" (CDL-AD(2006)008).

Primary Courts – be elaborated to specify the subject of the complaint,[17] potential defendants, form(s) of action (civil, misdemeanor and/or criminal), and possible remedies.

43. The campaign procedure is not regulated for the second round elections – those of the President of the Republic or the mayors. **Article 74(1)**, states that campaigning must end "24 hours prior to election day," but there is no provision for it restarting for the second round. If campaigning is allowed to restart, and it should be allowed, it should be clarified, and presumably must end 24 hours prior to the voting day.

44. In the 2007 Joint Opinion, in paragraph 27,[18] the Venice Commission and the ODIHR noted that in **Article 181(2)** a new paragraph has been introduced imposing a substantial fine for those not "respecting the timeframe for commencement and completion of the election campaign". The definition of "election campaign" is very broad: "public presentation of candidates, confirmed by the authorized 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.

45. **Article 187** provides for a political party to be fined from 3,000 to 5,000 EUR for:
- failing to report an election rally at least 48 hours prior to its holding; and
- organising a rally contrary to **Articles 81 and 82** of this Code.

46. **Article 81** requires the campaign organiser to inform the appropriate Ministry of Internal Affairs branch in writing, 48 hours in advance, whenever the organiser will hold "a pre-election rally on public places and on public transport places…." While **Article 82** delimits the places where such rallies may and may not be held.

47. It is unclear whether a party and/or organiser would be fined if they fail to inform the Ministry of Internal Affairs of a rally that will not be held in a "public place" or on a "public transport" place (presumably roads, etc.). **Article 187** suggests that, to avoid a fine, every rally regardless of location must be reported to the Ministry of Internal Affairs; while **Articles 81 and 82** suggest that only those rallies that are held in "public" places require such an advisory. Article 187 appears overly restrictive as there are few valid reasons to punish a person or entity for failing to inform the Ministry of Internal Affairs of rallies that do not impact public locations or modes of transport.

b. Media Coverage of the Campaign

48. Many improvements have been made to the Code with respect to media coverage and monitoring. Particularly welcome is the adoption of a Rulebook governing timing, tariffs and equal access in broadcast media. Nevertheless, there are still no explicit requirements for a fair and equitable cover of the contestants also in the news and current affairs programmes in electronic media. There should be more precise requirements on the coverage of the incumbents.

49. **Article 74(2)** of the Electoral Code gives the Broadcasting Council a mandate to monitor

[17] Including providing a right to a candidate list submitter to complaint about actions taken with regard to other candidate list submitters.
[18] *See* Joint Opinion of the Draft Working Text Amending the Election Code of "The Former Yugoslav Republic of Macedonia (CDL-AD(2007)012), page 6, paragraph 27.

media coverage of the elections not only during the official campaign period, but from the day of the announcement of the elections until the end of voting on election day. However, the Broadcasting Council competencies to regulate the media during the pre-campaign period are not clear in the Law on Broadcasting Activity. The laws would benefit from harmonisation on this point. The laws could also be harmonised on the issue of the amount of paid advertising by private broadcasters. The Electoral Code limits the amount of paid political advertising which media are allowed to broadcast to 15 minutes per hour; the Law on Broadcasting Activity permits a maximum of 12 minutes.

c. Campaign Finance

50. The campaign finance provisions in **Articles 83-87** have been clarified and strengthened in line with previous recommendations; however concerns remain. The provisions on campaign financing should be fortified to ensure genuine oversight of financing rules and to establish effective limits on donations and expenditures, as well as to clarify reporting and auditing procedures.

51. **Articles 83 and 84** of the Electoral Code should be reconsidered, with a view to abolishing exceptions for limits on campaign donations, which appear to undermine the intention of the law. For example, **Article 83(2)** allows campaigns to be funded "by the membership fee of the political party," but no limit is provided. In order not to circumvent donation limits, the Code should prohibit such membership fees from exceeding the amounts allowed to individual or corporate contributors in that same paragraph, i.e. 5,000 and 20,000 Euro respectively.

52. The auditing procedure should be enhanced to ensure oversight of the finances of all candidates who participate in an election. Additionally, the provision of an interim financial report by a campaign organiser has not been made a requirement in the Code, despite previous recommendations to that effect.

53. **Article 83** does not allow expenditure from the general fund of political parties for the campaign. Thus, donations for the campaign appear to be allowed only after the giro account has been opened. Donations to political parties that occur before the campaign starts may not be used for the campaign. Such provisions are overly restrictive. With the proper control mechanisms for financing political parties, it would be possible to allow expenditures from donations to parties that take place before the start of the campaign, or to allow the party to deposit earlier-received donations and unspent funds from previous campaigns into the giro account.

54. **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 to those joint ventures from legal entities registered in the country but which are owned by foreign natural persons or legal entities. If such entities do not have the right for campaign activities, it is a problematic interference in the freedom of speech.

55. The regulation of financing does not allow expenditure before the submission of a candidates list. It could be difficult to organise the formation of candidates' lists, collect the signatures or plan the style or strategies for the campaign without expenditure before the registration of the candidates' lists. Consider allowing for expenditure a reasonable period prior to the date of submission of the list (for example one or two weeks), or perhaps exclude certain "preparatory" expenditures from the control provided by the code.

56. **Article 86** of the Code, which provides for reimbursement of campaign expenses for elected candidates (only), should be reconsidered and possibly replaced by a system under which all candidates who win a threshold percentage of votes are entitled to reimbursement. Such a percentage should be high enough to discourage "nuisance" candidates, but low

enough to provide more incentives for women and members of smaller ethnic communities, who sometimes face difficulties in raising the funds required to mount a strong campaign.

57. **Article 86(3)** provides that the reimbursement of the election expenses "be determined by a decision" of the Parliament and of the municipal council and the City of Skopje. At the same time, **Article 86(1)** provides the right to reimbursement in concrete cases and amounts. It seems to be contradictory – or at least unnecessary – to require a decision for something already prescribed by law. Also, amendments could be made to clarify whether the reimbursement shall be calculated based on first or second round elections for the Mayors.

58. The procedure and conditions for payment and denial of reimbursement to candidates, based on the **Article 87** of the Code, should be set out in more detail. The Electoral Code (or regulations) should specify the content and format of the financial reports to be submitted by contestants; in particular, the current form prescribed by the Ministry of Finance should be modified since it does not require contestants to submit information on expenditures, which undermines the transparency and usefulness of such reporting.

## 11. Conducting the Vote

59. **Article 89** indicates that EBs receive the same number of ballot papers as there are voters on the excerpt. Should there be 100% voter turnout there would not be enough ballots to allow for voters to have a replacement ballot. The system, therefore, does not contemplate that voters could make a mistake and seek to rectify it, as no additional ballots are available. A certain flexibility could be envisaged to provide a small percentage of additional ballots to each EB.

60. **Article 101(3)** states: "The electoral board may close the polling station before the end of the period set forth in paragraph 1 of this Article, in case all the voters registered on the excerpt of the Voters' List have cast their votes. The wording of the article may lead some EBs to understand that they can close and count the votes before the (7pm) official closure. If done, such early counting could undermine the possibility for observers to be present at the count, as they could not know in advance when it will take place. It is recommended that the article specify that only closure, but not counting, is allowed in the above instance.

61. **Article 106** refers to the obligation of polling officers and observers not to have marks or symbols of any political party or candidates while at the polling stations. However, the article does not mention the wearing of a badge or other identification to facilitate the recognition of authorised personnel at polling stations. Given the high number of unauthorised people recorded at the voting places during previous elections, it is advisable that authorised people be compelled to wear a badge while on duty at polling stations.

## 12. The Counting Procedure

62. **Article 114** sets out the procedure for the count. Earlier joint opinions have recommended that the process be changed so that the total number of ballots, the number of unused ballots and the number of voters having voted according to signatures or fingerprints on the voters' lists are entered into the protocols *before* opening the ballot box. This would prevent any creative bookkeeping at a later stage of the counting process.

63. **Article 116** specifies the numbers that need to be entered in the polling station protocol. There is, however, no requirement for the EB to make any reconciliation of the numbers and, for example, make a recount if the number of ballots in the box does not match the number of voters having voted according to the voter lists. In many countries there are particular rules in cases where the number of ballots in the box exceeds the number who voted, according to the voter lists (ballot stuffing), or also if it is lower than the number who has voted according to the

lists (ballot stealing).

64. **Article 119** requires the MEC to sum up the results of the voting in the presidential election, but it does not specify exactly which numbers are to be recorded in the protocol. For local elections the format is given in **Article 131** and for national elections the format for the SEC protocols is given in **Article 128**, but it would be useful if the format is also given for the MEC reports (even though these numbers, in national elections, would not be final).

65. **Article 126(5)** provides that, "[A]uthorized domestic observers shall receive a copy of the tabular section of the minutes," but it does not mention whether international observers are also entitled to this information. They should be given the same right.

66. Neither **Articles 127 and 128** nor **Article 31(2)** on the duties of the SEC place a clear obligation upon it to actively review the results from the subordinate commissions and boards in order to investigate anomalies in protocols and rectify mistakes. Only reported mistakes are to be investigated. It is of course not possible to verify all aspects of the work of lower bodies, particularly in light of the substantial list of duties the SEC must undertake (see comments above), but 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 law should be clear that the SEC is authorised to also investigate such cases. The same goes for the MECs and their obligations in local elections.

67. **Article 135** obliges the SEC to announce the MEC results as they receive them. This strengthens the transparency of the vote. Paragraph (2) states, however, that the results are to be published within 24 hours from the time they become final. It is difficult to conceive a reason why the final results should not be published immediately. **Article 135(2)** should be changed to that effect.

68. The law should also include an obligation for the SEC (and the MEC for local elections) to publish the full tabulation of results from polling station level to district or national level. Only by doing this, can observers and the general public check that their polling station results have been correctly added into the overall results.

### 13. Annulment of the Results

69. **Article 151(1)** provides in detail situations in which the results of elections should be annulled. From one side, the clear provisions in this matter remove any uncertainty and provide better predictability. Still, from the other side, situations might arise which are unforeseeable in the Electoral Code. The SEC should have at least some discretion to annul results in other situations as well if violations and irregularities have happened in the electoral process (e.g. electoral campaign or errors in voters' lists).[19]

### 14. Complaint Procedure

70. Decision-making on complaints to the Administrative Court is regulated only very generally and in places contradicts the general Law on Administrative Procedure. As the results must be rendered quickly, the process requires more detailed regulation so that disputes are avoided.

[19] For example, an election in a polling station shall be annulled according to Article 151(1) if there are a few more ballots in the ballot box than the number having turned up for voting according to the signatures and fingerprints on the voters' lists. The few votes extra may not have affected the results, but the election is still repeated if the number of voters registered is higher than a number of ballots what could have affected the results. This is an unusually strong criterion for repeat elections. Repeated elections are held under other circumstances that the original elections and should only be held if there is a doubt about who is to be allocated seats.
*See* the Code of Good Practice in Electorall Matters, II. 3.3 e.

71. The decision-making in the Administrative Court on the complaints is limited to 48 hours by **Articles 67(7), 141(3), 150(2) and 151(5).** It is one of the speediest procedures in the Council of Europe member States. It is demanding from the judges to examine the evidence and provide a legal basis for the decision, especially as the court has to decide on complaints collectively. In order to guarantee the effectiveness of the complaint procedure, the court should be equipped with the right to collect evidence itself. Further, it is suggested that the time-limit for deciding on the complaints for the courts be extended, but must remain short enough to provide for effective remedy in the election. The same recommendation applies also to the procedure for complaints and appeals of other legal bodies, provided in **Articles 73(2) and (4)**.

72. According to **Articles 67(8), 141(4) and 147(4)** submitting a complaint or appeal for the protection of the right to vote via the post is not permitted. It is recommended that where a complaint is submitted via post, it is disallowed for the current election, but accepted as "non-urgent" and resolved later, for subsequent elections. Otherwise a person who posts a complaint has to resolve the problem again prior to the next elections.

73. For out of country voting at the Diplomatic Consular Offices, the complaint and appeal procedures, for example those in place to "protect the right to vote" (**Articles 50-51**), for list submitters (**Article 67**) and for campaign organisers (**Article 73)** do not appear to have been addressed. With the current tight complaint deadlines, and with the fact that submitting complaints by post is not permitted, an overseas voter, list submitter or campaign organiser will have considerable difficulty availing themselves of court protection.

74. The Electoral Code could also be amended to provide the following:

1. A deadline for the SEC to propose officially the annulment of an election;
2. Clarity whether complaints can be submitted by fax;
3. Specific circumstances in which the SEC is obliged to inspect election material when reviewing complaints, to encourage a more investigative approach by the SEC. If the intention of the law was that election material should be inspected only if there is an objection registered in the EB or the MEC results protocol, this should be clearly stated in the Electoral Code;
4. A clear statement of who is allowed to submit lawsuits against SEC decisions;
5. The deadline by which parties or candidates who did not submit a complaint but who were negatively affected by a SEC decision on someone else's complaint can submit a lawsuit against that SEC decision. The Code should also require the SEC to notify all candidates or parties affected by its decisions; and
6. Details on how the SEC should address motions other than formal complaints which are submitted to the SEC on election day.

## 15. Early Elections

75. According to **Article 158(2)** early elections for mayor shall not be announced if there are less than six months until the regular elections. It could be suggested, in order to avoid having the post vacant for so long, to elect the mayor without delay, but provide his or her tenure longer, without holding the regular elections.

## 16. Conclusions

76. In spite of improvements with the October 2008 amendments, the revised Election Code of "the Former Yugoslav Republic of Macedonia" would require further improvements on the basis of the present opinion and of mentioned previous joint opinions of the Venice Commission and the OSCE/ODIHR, still valid.

77. Among other recommendations, OSCE/ODIHR and Venice Commission would strongly recommend implementation of the following:
- lowering or removal of the voter threshold in Presidential election;
- reviewing the procedures of appointment and dismissal of members of the election commissions, notably the municipal election commissions;
- reviewing the composition of the electoral board in the diplomatic consular offices;
- reviewing the method of defining districts, in particular the drawing of the districts;
- Removing the ethnic declaration from article 64(3);
- gender issue should be more ensured;
- reviewing the provisions on media coverage and more especially the paid advertising;
- concerns addressed regarding the campaign financing;
- the counting process still requires improvements;
- complaints and appeals process should be improved by the adoption of more detailed provisions.

78. Following the recommendations made in the present Opinion and those still valid from previous opinions, the Parliament should take benefit of a period without short or mid-term elections for taking into consideration the OSCE/ODIHR and Venice Commission recommendations.

79. Once revised, the Election Code should constitute a good basis for an improved electoral process, including the pre- and post-election periods. Additionally, the political willingness of all the stakeholders involved in the electoral process will be crucial for a fair implementation of the legislation in practice.