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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

**DRAFT OPINION ON
THE CODE OF PRACTICE ON OBSERVING ELECTIONS
OF THE UNITED KINGDOM**

On the basis of comments by

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I. Introduction

1. The Electoral Commission of the United Kingdom invited the Venice Commission to provide comments on the revised *Code of Practice on Observing Elections of the United Kingdom* (hereinafter, the “*Code of Practice*”) that was presented to the United Kingdom’s Parliament on 10 February 2010. Under the Political Parties, Elections and Referendums Act of 2000 (PPERA), the Electoral Commission of the United Kingdom has the duty to prepare a Code of conduct for election observation and to administer an accreditation scheme for all observers at United Kingdom elections (except for Scottish local government elections).

2. This Opinion is based on the following references: the *Guidelines on an internationally recognised status of election observers*,¹ the *Code of good practice in electoral matters*,² the *Declaration of principles for International election observation and Code of conduct for international election observers*³ and several codes of conduct and handbooks for international election observers, as well the assessment mission reports from the OSCE/ODIHR.⁴

3. Election observation expresses the interest of the international community in the achievement of democratic elections, the respect for human rights, as well as the rule of law. Therefore, election observation missions – both national and international – have the potential to enhance the integrity of election processes by promoting public confidence, by deterring and exposing irregularities and fraud, and providing recommendations for the improvement of the aforementioned processes.⁵

4. This Opinion revises accreditation and authorised observers, their roles and duties, the scope of electoral observation and postal voting in the United Kingdom.

5. *The present Opinion was adopted by the Council for Democratic Elections at its ... meeting and by the Venice Commission at its ... session (Venice, ...).*

II. General Remarks, Structure of the Code of Practice

6. The Code of Practice is a comprehensive document that deals with rights and duties of both “individual observers” and “observer organisations” and which rightly distinguishes between these two categories. The limitations of the activity of an individual observer, who can only be present in one place at a time, do not of course apply to an organisation, which can cover elections much more effectively over space and time. Repetitions may easily be avoided in the Code of Practice. There are a number of similar provisions in Part A and B of the Code of Practice. Introducing a general chapter that would include these similar provisions on individual observers and observer organisations with respect to the process for applying, the contact details as well as the guidance would reduce the size of the Code of Practice and make it more accessible. For instance, there is no need to explain that the “*specified proceedings at relevant*

¹ *Guidelines on an internationally recognised status of election observers*, adopted by the Council for Democratic Elections at its 31st meeting (Venice, 10 December 2009) and by the Venice Commission at its 81st Plenary Session (Venice, 11-12 December 2009).

² *Code of good practice in electoral matters: Guidelines and explanatory report*, adopted by the Venice Commission at its 52nd Plenary Session (Venice, 18-19 October 2002; CDL-AD(2002)023rev).

³ The Declaration of Principles for International Election Observation as established by the United Nations and commemorated on 27 October 2005 at the United Nations, New York (CDL-AD(2005)036).

⁴ The European Commission, *Handbook for European Union election observation*, second edition, 2008; OSCE/ODIHR, *Election observation handbook*, fifth edition, Warsaw, Poland, 2007; Organization of American States (OAS), *Manual for election observation missions of the OAS*, Washington, D.C., United States of America, 2009.

⁵ *Declaration of principles for International election observation and Code of conduct for International election observers*, *op. cit.*, pp. 1-2.

electoral and referendum events throughout the United Kingdom” should be understood to be *the issue or receipt of postal ballot papers, the taking of the poll and the counting of votes*, twice in the same text. A number of “bureaucratic” repetitions were also noted in the “indicated” application process that can easily be unified to apply to both parts of the Code of Practice.

III. Accreditation

7. Assuring accreditation for all observers through a simple and non-discriminatory procedure, implemented by the host government, is a necessary condition for an effective observation.⁶ The requirements for accreditation considered in the Code of Practice are clearly specified by law and meet these criteria. These requirements include the following:

- a) completion of an accreditation form;
- b) the submission of contact details;
- c) a declaration stating that the applicant has read and understood the Electoral Commission’s *Code of Practice* for electoral observation organisations, as well as Section 66 of the Representation of the People Act 1983 (RPA) or its corresponding provision in order to keep the secrecy of the ballot;
- d) a photograph;
- e) a copy of the passport or identity card of each of them;
- f) the submission to the Commission of a list of members nominated to act as observers (for observer organisations).

8. The Code of Practice sets out that the Electoral Commission will accept applications at any time. It also suggests that potential observers are recommended not to wait until an election is imminent or underway before applying. The Commission can receive applications by e-mail or by post, at any of its offices during normal business hours. The Code establishes, as well, that the Electoral Commission will endeavour to process all applications within ten days. This contributes towards an open and flexible system of accreditation. Nevertheless, the Code of Practice may lack safeguards in referring to application deadlines. In Part A: *The Commission will accept applications at any time, however potential observers are recommended not to wait until an election is imminent or underway before applying*. Whilst in Part B: *The Commission will accept applications at any time, however potential observer organisations are recommended not to wait until an election is imminent or underway before applying*. Individual observers as well as most observer organisations can be expected to be prompted into showing an interest in observing an election or a referendum, when these are underway or even imminent. Permanent observer organisations (such as OSCE/ODIHR or well-known international NGOs) may have an interest in establishing a standing arrangement. Nevertheless, in order to avoid duplication and suspicions and to offer the possibility to appeal a possible refusal of accreditation, it would be advisable to fix a time-limit for applications, whilst providing for the admission of late applications in exceptional circumstances.

9. The Code of Practice stipulates that *“Officers are not required to proactively notify observers of the time and place of relevant proceedings; however this information should be supplied to accredited observers and the Commission on request.”* It might be suggested that a requirement be introduced to publish the time and place of these democratically vital proceedings in an official gazette or in newspapers as well as on the Internet, as it would not be adequate to wait for a request from observers.

10. Political affiliation does not prevent members, officers or employees of a UK registered political party from applying as observer, which is positive. The Code of Practice states that individuals who are likely to be politically active during their accreditation period must not apply

⁶ OSCE/ODIHR, *Election observation handbook*, *op. cit.*, p. 21.

for accreditation. It should be clarified how such assessment is to be made by the Electoral Commission and on what criteria. It might be useful to provide for clearer provisions regarding the implementation of such a provision of the Code of Practice in order to avoid systematic disqualification of *members, officers of employees* of a UK registered political party based on unclear and unwritten criteria.

11. The Introduction of the *Code of Practice* clearly states that the Electoral Commission is responsible for accrediting electoral observers, both international and domestic, except for electoral proceedings or practices concerned with local government elections in Scotland. A suggestion on this matter might be to provide further information in the *Code of Practice* about the reasons for limiting the observation of these elections, considering that the role of the Electoral Commission's office for Scotland includes elections to the Scottish Parliament, United Kingdom Parliament and European Parliament.

IV. Authorised observers

12. Changes brought about by the Electoral Administration Act of 2006 entitled individuals and organisations from within the United Kingdom and around the world to observe – for the first time at a general election – key electoral procedures under a system of accreditation by the Electoral Commission. As a result, in 2010, international electoral management bodies, human rights organisations, media corporations, education establishments, software providers, government departments and embassies were accredited as observers.⁷ Before 2006, the United Kingdom's legislation limited admission to polling stations to “voters, candidates and their election agents, polling officials and clerks appointed for that station, constables on duty, and the companions of voters with disabilities.”⁸ Hence, the 2006 Act significantly improved the former regulations, opening electoral observation to international and domestic groups as well as individuals.

13. The *Code of Practice* makes no distinctions between observers, as it grants the same freedoms and rights to both international and domestic election observers. The adaptation of the *Declaration of principles for international election observation and Code of conduct for international election observers* for use in the United Kingdom,⁹ has allowed the acquisition of the same rights and duties for both national and international observers in the United Kingdom. Countries such as Albania, Azerbaijan and Moldova also provide the same rights and obligations for national and international observers.¹⁰ In Azerbaijan, for example, the Election Code states that “international and domestic observers shall have the same rights and undertake the same duties.”¹¹ In these matters, the electoral codes mentioned before, as well as the *Code of Practice*, are an example to follow, at least if there is a willingness in implementing such provisions in good faith, as mentioned in several Venice Commission and OSCE/ODIHR joint opinions on those electoral codes. This is not only because observers can witness the same procedures in an election, which promotes equality between observers notwithstanding their nationality, but also because accreditation for observation in these states

⁷ The Electoral Commission of the United Kingdom, *Report on the administration of the 2010 UK general election*, United Kingdom, July 2010, p. 11.

⁸ OSCE/ODIHR, *Assessment mission report on the general election of 5 May 2005 of the United Kingdom of Great Britain and Northern Ireland*, Warsaw, Poland, 5 August 2005, p. 9.

⁹ The Electoral Commission of the United Kingdom, *Code of Practice on observing elections in the United Kingdom*, United Kingdom, February 2010, p. 1.

¹⁰ See Electoral Code of Moldova, article 63, Electoral Code of Albania, articles 18 and 19, and Election Code of Azerbaijan, article 42.

¹¹ Election Code of the Republic of Azerbaijan, article 42.1.

is made through a request for application. Therefore, invitation for potential observers is not needed, contributing to a simple and non-discriminatory accreditation system.¹²

14. Moreover, the Code of Practice rightly gives the Commission some discretion with respect to the use of the powers given under Section 6E of the Political Parties, Elections and Referendums Act 2000 (PPERA), which allows a Returning Officer, Counting Officer or Presiding Officer (relevant officers) to limit the number of individual observers or nominated observers. The Code very correctly emphasises that “*It is important to note that no officer is entitled to bar all observers from an entire proceeding, only to limit the number of observers present at any one time, who may be present at any one time during the conduct of the poll, the issue and receipt of postal ballot papers and the count*”. There seems to be a *lacuna* here: The Officers should be instructed to observe political balance. Care should be taken to see that in selecting those who should be allowed to continue observing whilst excluding others, no bias be observed to exist in favour or against some individual observer or observer organisation. If the Presiding Officer just includes or excludes at random, the resulting observation might be considered unbalanced. It is known that on certain occasions and under certain circumstances, party feeling might be too excited for calm reasoning and there are never enough safeguards. Therefore, if such a decision must be taken to avoid trouble at a polling station or due to overcrowded stations or for any other given reason, a wide and consensual agreement should be reached among the polling station’s officials when deciding on limiting the presence of some observers at the polling station. Such limitation does not necessarily have to apply to the whole process.

V. Roles and duties of observers

15. In the guidance for electoral observation included in the Code of Practice, for individuals, organisations, Returning Officers, Counting Officers, Presiding Officers and Commission representatives, the roles and duties of the observers are well-defined – but in a repetitive manner as underlined previously. For example, it clearly sets out the need to maintain strict political impartiality, the aid of observers in keeping the secrecy of the ballot, the fact that observers must note if regulations or actions of state and electoral officials unduly burden or obstruct the exercise of election rights and practices, the possibility of asking questions to election officials, political party representatives or other observers inside polling stations and to answer questions about their own activities as long as observers do not obstruct the election process. Lastly, the guidance for electoral observation emphasises the need for comprehensive and objective observations while presenting conclusions. Therefore, individual international and national observers are guaranteed the freedom to issue, without interference, public statements and reports in respect of findings and recommendations concerning election-related processes and developments.¹³ These provisions are welcome and in line with electoral European standards, such as the Venice Commission Guidelines on an internationally recognised status of election observers.

VI. Lack of provision for appeal from decisions of the Electoral Commission

16. The Code of Practice states that the election observer status may be revoked in cases of misconduct: breaching or attempting to breach the secrecy of the ballot, knowingly obstructing

¹² In Mexico observation of elections is encouraged and clearly specified by law. However, there are some distinctions made between national and international observers. For example, the specific agreement issued by the General Council of the Federal Electoral Institute (IFE) for the elections of 2008-2009 states that this General Council can extend invitations for accreditation as *international observers* to other international electoral bodies or international institutions that have a cooperation relationship with IFE. This could imply a potential exclusion of certain electoral bodies or organisations.

¹³ *Guidelines on an internationally recognised status of election observers, op. cit.*, III. 1.7. i.

the electoral proceeding, and/or asking electors about their voting preference while observing at polling stations.

17. Presiding Officers are only permitted to have an observer removed from a polling station for the remainder of the poll in the event of misconduct by the observer. This requires the Presiding Officer to notify observers in writing the reasons for their removal. Then, these officers are required to provide a record of the removal and the reasons that led to this event. A copy of this statement has to be supplied to the Electoral Commission. These can be considered objective grounds for removing the observers. Nevertheless, the cases for revoking an observer status, even with written justification, are very wide and put the onus of “justifying” such a measure on the Electoral Commission. When, however, the Commission is misguided by incorrect or unfounded information, there does not seem to be a way in which the individual observer or an organisation, aggrieved by such exclusion, can have recourse to an appeals procedure. Given that election and referendum observation is now considered as an essential component of the ways of ensuring that these consultations of the people’s will are “fair and free” and demonstrably so, it is a failure in an otherwise sound Code, that no provision for an appeal is included.

VII. Scope of electoral observation

18. The Code of Practice establishes that the Electoral Commission can accredit individuals and organisations to observe specified proceedings at relevant electoral and referendum events throughout the United Kingdom.¹⁴ These proceedings are:

- the issue or receipt of postal ballot papers;
- the taking of the poll;
- the counting of votes.

19. These provisions, as well as the Code of Practice as a whole, do not apply to electoral proceedings or working practices that are wholly concerned with a local government election in Scotland. The Code of Practice could provide further information about the reasons to limit the observation of local proceedings or working practices wholly concerned with local government elections in Scotland.

20. Observation of an election should ascertain whether irregularities occurred before or after election day as well as on election day itself¹⁵ and it should consist of a systematic and comprehensive gathering of information concerning the laws, processes and institutions related to the conduct of elections and other issues concerning the overall electoral environment.¹⁶ Election observers in the United Kingdom were granted the right to follow stages of the electoral process such as the issuance and receipt of postal ballots, voting and counting of votes. Whilst these are important issues, the quality of observation would be greatly enhanced if it could be expanded to other issues in the pre-voting and post-voting phases (i.e. before and after election day).

21. Both the Venice Commission’s Guidelines on an internationally recognised status of election observers and the Code of good practice in electoral matters consider that electoral observation should be able to cover areas of assessment corresponding to the whole electoral process. Article 3.2 of the Code of good practice in electoral matters provides:

¹⁴ Nevertheless, it does not apply for electoral proceedings or working practices that are wholly concerned with a local government election in Scotland; see the remarks in paragraph 19 in this regard.

¹⁵ *Guidelines on an internationally recognised status of election observers, op. cit.*, I. §12.

¹⁶ *Declaration of principles for International election observation and Code of conduct for International election observers, op. cit.*, p. 2.

a) "Observation of elections

[...]

b) Observation must not be confined to the election day itself, but must include the registration period of candidates and, if necessary, of electors, as well as the electoral campaign. It must make it possible to determine whether irregularities occurred before, during or after the elections. It must always be possible during vote counting."

22. Pre-voting day observation should also be undertaken in order to assure that there is equality of opportunity for all parties and candidates. In addition, the implementation of processes to verify and endorse candidates and political parties or coalitions who have been elected (post-voting phase) are also advisable.

23. The Venice Commission's Guidelines on an internationally recognised status of election observers consider the following areas of assessment for pre-voting and post-voting phases:

"The pre-voting phase covers the following areas of assessment:

- i) political context;
- ii) legal framework (including electoral system and delimitation of constituencies);
- iii) election administration;
- iv) registration of the voters and the maintenance of the voters list;
- v) registration of political parties and candidates;
- vi) funding of electoral campaigns;
- vii) electoral campaign activities;
- viii) adjudication of pre-election complaints;
- ix) both state and private media monitoring;
- x) freedom of expression and more widely all fundamental freedoms necessary to hold democratic elections;
- xi) human rights (including participation of women and minorities);
- xii) role of civil society."¹⁷

[...]

"The post-voting phase covers the following areas of assessment:

- i) counting process;
- ii) tabulation process;
- iii) transmission and publication of the preliminary results;
- iv) complaints and appeals procedures;
- v) publication of the final results;
- vi) taking up office of elected officials."¹⁸

24. Enlarging observation beyond the polling day and, specifically, to the pre-voting and post-voting days will contribute to bringing the United Kingdom Code of Practice in line with the Venice Commission's recommendations. Observing the aforementioned stages is crucial for the improvement of electoral processes and democratic practices. In particular, observation should be extended to the functions and responsibilities of the electoral management body whose main task is that all foreseeable electoral needs and voter requirements (e.g. the determination of voting and counting procedures, the identification of polling station locations, or the printing of materials) are efficiently met in a timely manner.¹⁹ Given that the Electoral Commission of the United Kingdom as an Electoral Management Body is in charge of political parties' registration, publishing details of political parties' financing and spending, setting the standards for running elections, and ensuring people register to vote and know how to exercise such right, the observation of these procedures would not only be helpful to enhance the

¹⁷ *Guidelines on an internationally recognised status of election observers, op. cit.*, II. 1. §17.

¹⁸ *Guidelines on an internationally recognised status of election observers, op. cit.*, II. 3. §21.

¹⁹ *Handbook for European Union election observation, op. cit.*, p. 36.

functions of the Commission, but would also reinforce public confidence and transparency of the electoral processes in the United Kingdom.

25. Some countries, such as Ukraine and the Russian Federation have extended the observation of elections to pre-voting stages. The Basic Guarantees of Electoral Rights and the Right of Citizens of the Russian Federation to Participate in a Referendum states that observers are entitled to inspect voters' lists and lists of referendum participants.²⁰ This corresponds to the assessment of the registration of the voters and the maintenance of the voters' list, as provided by the Venice Commission's Guidelines mentioned above. The Ukrainian Law on Elections of People's Deputies provides that, among others, an official observer from a foreign State or international organisation has the following rights:

- a) be present at meetings with voters or candidates for deputy and authorised persons of parties (blocs), at election campaign events, rallies and sessions of election commissions;
- b) familiar with election campaign materials.

26. This allows for the observation of electoral campaign activities, as stated in the Venice Commission's Guidelines on an internationally recognised status of election observers.²¹

27. The United Kingdom Code of Practice allows the witnessing of vote counting as a post-voting area of assessment. Even so, observation of post-voting electoral stages could also be helpful, including notably: complaints and appeal procedures, prolonged decision processes, guarantees of due process and the enforcement of court decisions, as well as the implementation of election results to grant further assurance of the duly installation in office of persons elected.²²

28. Pre-voting, voting, and post-voting phases of assessment are all taken into consideration in international electoral guides and manuals such as the *Handbook for European Union election observation*, the OSCE/ODIHR's *Election observation handbook*, and the *Manual for election observation missions of the OAS*. These references include all the assessment stages so that it is possible to ascertain whether any irregularities have occurred before the election (for example, an improper maintenance of voters' lists, obstacles to the registration of candidates and voters, restrictions on freedom of expression, or other violations of rules regarding access to the media or on public funding of electoral campaigns), during the election (through pressure exerted on voters, multiple voting, or violation of voting secrecy), and after polling (especially during the vote count and the announcement of the results).²³

VIII. Postal voting

29. Further policing tasks could be added to the Code of Practice on issuing and receiving postal ballots. It could be relevant to establish a partnership strategy of observation and threat assessment between Presiding Officers, Returning Officers, Counting Officers, Police Officers and electoral observers present during the issuance, receipt and transportation of postal ballots with other competent local authorities and with the Royal Mail. This could increase public assurance of the transparency of postal voting, throughout its whole process. Moreover, additional observation tasks during postal voting could help in enhancing public assurance and transparency during these electoral procedures.

²⁰ *Basic Guarantees of Electoral Rights and the Right of Citizens of the Russian Federation to Participate in a Referendum*, article 30.

²¹ *Law of Ukraine on Elections of People's Deputies of Ukraine* (2005, as amended in 2007), article 77.

²² OSCE/ODIHR, *Election observation handbook*, *op. cit.*, pp. 69-71.

²³ *Code of good practice in electoral matters*, *op. cit.*, p. 29.

30. In 2007, an opinion of the Venice Commission on the Electoral Law of the United Kingdom²⁴ concluded that the United Kingdom's legislation has gone a long way to try to defend the systems of absent voting, including postal voting, from fraud and manipulation. The improvements made in this sense, with the introduction of personal identifiers in the postal voting statement (signature of the elector and his/her date of birth), were positive. However, some effort is still pending with respect to the verification of the personal data provided through the postal voting statement.²⁵

IX. Conclusions

31. The existence of a *Code of Practice* on observing elections as an independent and specific legislation in the matter, instead of being part of a general electoral code, shows that the United Kingdom is at the forefront on this issue; it reflects the high level of democratic traditions of the country and widely meets modern European electoral standards. Attention is given to the basic values of secrecy of the ballot, freedom of the voter from any pressure, and complete openness (as well as impartiality by officials) during the whole string of procedures to be performed during elections.

32. These new provisions regarding electoral observation in the United Kingdom, especially the Electoral Administration Act of 2006, improved the legislation in this matter. One clear example is the entitlement of individuals and organisations from within the United Kingdom and around the world to observe, in 2010, key electoral procedures under a system of accreditation.

33. The fact that United Kingdom's legislation makes no distinction between national and international observers, regarding their rights, duties and accreditation, shows that these provisions are clear and non-discriminatory.

34. In general, legal requirements included in the Code of Practice are in compliance with international good practices, as provided by the different declarations, codes and handbooks of conduct for international election observers mentioned before. Nevertheless, a further extension of the period of observation would contribute in bringing the Code more in line with both the Guidelines on an internationally recognised status of election observers and the Code of good practice in electoral matters of the Venice Commission.

35. Moreover, simplification by avoiding repetitions would give more clarity to the Code of Practice, by compiling application processes, contact details and guidance into a single general part of the Code of Practice devoted both to individual observers and organisation observers.

36. In addition, the Code of Practice could provide further information about the reasons for limiting the observation of local proceedings or working practices wholly concerned with local government elections in Scotland.

37. Finally, further policing tasks could be added to the Code of Practice to implement a partnership strategy of observation and threat assessment, particularly during the issuance and

²⁴ Opinion on the electoral law of the United Kingdom, adopted by the Council for Democratic Elections at its 23rd meeting (Venice, 13 December 2007) and the Venice Commission at its 73rd plenary session (Venice, 14-15 December 2007; CDL-AD(2007)046).

²⁵ It is worth noticing that, according to the United Kingdom Electoral Commission's annual report 2009-2010, for the 2009 elections (European Parliamentary and English local elections) *most* Returning Officers followed the Commission's guidance and checked 100% of postal voting statements. Nonetheless, additional observation efforts could be beneficial to reinforce such practices. See, The Electoral Commission, *Annual report 2009-2010*, ordered by the House of Commons to be printed in 26 July 2010, p. 35.

receipt of postal ballots in order to enhance public confidence on transparency of postal voting, including its transportation.