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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

**ELECTORAL LISTS
AND VOTERS RESIDING DE FACTO ABROAD**

SECRETARIAT MEMORANDUM

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1. At the 45th meeting (13 June 2013) of the Council for Democratic Elections consideration was given to producing a report on the management of electoral registers with regard to voters living *de facto* abroad, from where they may, if possible, exercise their right to vote in their country of origin and remain registered as residents in their country of origin.
2. This question was raised following suspicions of fraud: voters residing abroad are sometimes indicated as having voted whereas it is very doubtful that they were in their country of origin on polling day.
3. The subject is more complex than it first appears to be. To begin with, the concepts of residence and domicile vary according to national law. There is, to date, no common definition applied in all member states.
4. Domicile for the purposes of voting may differ from the place of residence for civil or tax purposes, for example.
5. An example of the implications of the ambiguity, if not the ambivalence, of the concept of domicile or residence in some member states was examined by the European Court of Human Rights in the *Melnitchenko v. Ukraine* case.¹ The question was whether the applicant could be disqualified from becoming a member of parliament on the grounds that he was not resident in Ukraine. In this context, the Court found that habitual residence and official residence could differ in Ukrainian law, the latter being the address that appeared in the applicant's internal passport. That implied, at least in the specific circumstances of the case, that the applicant could not be deprived of his right to stand for election.
6. National legislation may also distinguish between permanent and temporary residence thereby allowing persons who habitually reside abroad to maintain their permanent residence on national territory.
7. Apart from the question of the definition of residence and the effectiveness of the administration, the proportion of citizens residing *de facto* abroad without declaring their departure depends on a number of other factors. One of these is whether their stay abroad is of a lawful or unlawful nature in terms of the legislation of the country where they actually reside. However, it is particularly important to take into consideration the consequences of the declaration of departure or of the absence of such a declaration.
8. Indeed there may be rights and duties attached to residence. It is quite obvious that if there are mainly rights, the persons concerned may not be inclined to declare their departure, whereas they will do so in the opposite case. More specifically, people who risk tax penalties or at least taxation if they do not report that they reside in another country, may not maintain their official residence in their country of origin; on the other hand, if social security benefits depend on residence in the country, it is in their interest not to declare that they no longer reside in the country.
9. It therefore appears that the question cannot be dealt with in a satisfactory manner without firstly seeking to establish a common definition of the term residence and secondly considering ways of encouraging people to declare their departure from their country of origin. In concrete terms, that means placing emphasis on the obligations attached to residence and, on the contrary, restricting the rights deriving therefrom.

¹ ECtHR 9 October 2004, No. 17707/02, judgment of 19 October 2004.

10. It may also be in the interests of local and regional authorities to declare the largest possible number of inhabitants so as to benefit from public funds, which are allocated on the basis of the size of the local population. This may discourage them from removing the names of those who no longer habitually reside on their territory from electoral lists and/or population registers.

11. Such an approach concerns a number of aspects of law that have very little to do with electoral issues. In addition to the issues of taxation and social security already mentioned above, one could also mention military duties. It does not appear to be appropriate to recommend to member states that they should impose further duties on citizens who declare that they intend to emigrate.

12. In June 2011 the Venice Commission adopted a report on out-of-country voting (CDL-AD(2011)022). The report was deliberately not confined to the issue of voters living abroad on a permanent basis or of those who no longer have a place of residence in their country of origin. On the contrary, it dealt with three categories of citizens abroad: firstly, nationals of a country who are abroad on the day of the election for business or personal reasons; secondly, citizens, who, for academic or employment purposes, spend a clearly defined and temporary amount of time in another country, where they will reside for a given period; lastly, citizens residing abroad for a much longer period of time, who may sometimes have dual nationality and who settle down in the host country in a more permanent manner². As indicated by its title, the report concerns voting from abroad and not the right to vote of people who have their permanent residence abroad.

13. The fact that the report deals with out-of-country voting rather than the right to vote of those residing abroad was largely the consequence of the absence of a common definition of the concept of residence and the differing practices of the citizens of different member states, depending on the incentives they had to declare or not declare their permanent residence in another country.³ The report did not only consider whether or not the right to vote was subject to a condition of residence but was more broadly aimed at determining whether, in a world where people often move from one country to another for short periods of time, this prevented them from exercising their right to vote.

14. The Council for Democratic Elections and the Venice Commission should take account of the above elements – the absence of a common definition of the concept of residence, the need to consider the question of the incentives to declare departure from the country of origin and therefore make a very broad examination of the legal consequences of residence on the national territory, as well as the existence of a comparative study on out-of-country voting – before deciding, if appropriate, to study the management of electoral registers with regard to voters residing *de facto* abroad who remain registered as residents in their country of origin.

² CDL-AD(2011)022, para. 6.

³ Para. 93 of the report nevertheless clearly states that the concept of temporary residence varies greatly.