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**EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW**  
**(VENICE COMMISSION)**

**OSCE OFFICE FOR DEMOCRATIC INSTITUTIONS AND HUMAN RIGHTS**  
**(ODIHR)**

**MONTENEGRO**

**URGENT JOINT OPINION**  
**ON THE DRAFT LAW ON ELECTIONS OF MEMBERS OF**  
**PARLIAMENT AND COUNCILLORS**

**Endorsed by the Venice Commission on 8 October 2020**  
**at its**  
**124<sup>th</sup> online Plenary Session**

**on the basis of comments by**

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## **I. Introduction**

1. On 28 April and 11 June 2020, Mr Branimir Gvozdenovic, Vice President of the Parliament of Montenegro, requested the opinion respectively of the OSCE Office for Democratic Institutions and Human Rights (hereinafter "ODIHR") and the European Commission for Democracy through Law of the Council of Europe (hereinafter "Venice Commission") on the Draft Law on Elections of Members of Parliament (MPs) and Councillors of Montenegro (hereinafter "the draft law").<sup>1</sup> According to the established practice, the Joint Opinion has been prepared jointly by ODIHR and the Venice Commission.

2. Mr Don Bisson and Ms Elena Kovalyova were appointed as legal experts for ODIHR. Ms Katharina Pabel (Substitute member, Austria), Mr Oliver Kask (Member, Estonia) and Ms Tatyana Hilscher-Bogussevich (expert, Germany) were appointed as rapporteurs for the Venice Commission.

3. Due to COVID-19 and with a view to replace the usual expert visit to the country, the precited rapporteurs on the Joint Opinion and the secretariats of the Venice Commission and ODIHR held online meetings on 24, 25 and 26 June 2020. Meetings took place with the following Montenegrin stakeholders: ministry of Foreign Affairs and European Integration; ministry of Internal Affairs; Working Group on Comprehensive Electoral Reform; representatives of the ruling coalition and of opposition parties in parliament; Agency for Prevention of Corruption; OSCE Mission in Montenegro; European Union Delegation to Montenegro; Agency for Electronic Media; representatives of mass media; State Election Commission; and representatives of civil society organizations. This Joint Opinion takes into account a number of elements obtained during the above-mentioned meetings.

4. In 2010 and 2011, ODIHR and the Venice Commission jointly prepared opinions on draft amendments to the Law on Elections of Members of Parliament and Councillors, which are also taken into consideration in the context of the present Joint Opinion.<sup>2</sup>

5. This urgent Opinion was issued pursuant to the Venice Commission's Protocol on the preparation of urgent opinions ([CDL-AD\(2018\)019](#)). It was endorsed by the Venice Commission at its 124<sup>th</sup> Plenary Session (online, 8-9 October 2020).

## **II. Scope of the Joint Opinion**

6. The scope of this Joint Opinion covers only the draft law officially submitted for review. Thus limited, the Joint Opinion does not constitute a full and comprehensive review of the entire legal and institutional framework governing elections in Montenegro.<sup>3</sup>

7. The Joint Opinion takes note of positive developments but focuses on areas that require further attention or improvements in the draft law. The ensuing recommendations are based on relevant OSCE commitments, Council of Europe and other international human rights' norms and standards, such as the Code of good practice in electoral matters drafted by the Venice Commission,<sup>4</sup> as well as good practices. It takes into account ODIHR and the

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<sup>1</sup> [CDL-REF\(2020\)030](#).

<sup>2</sup> [2011 Venice Commission and OSCE/ODIHR Joint Opinion on the Draft Law on Amendments to the Law on Election of Councillors and Members of Parliament of Montenegro \(CDL-AD\(2011\)011\)](#) and [2010 Joint Opinion on the Draft Law on Amendments and Supplements to the Law on the Election of Councillors and Members of Parliament of Montenegro as amended through July 2006 \(CDL-AD\(2010\)023\)](#).

<sup>3</sup> This includes the related amendments/laws which were adopted by the Parliament on 27 December 2019 (the Criminal Code, the Laws on Voter Lists, on Territorial Division and on Financing of Political Subjects and Campaigns).

<sup>4</sup> [CDL-AD\(2002\)023rev-cor](#).

Parliamentary Assembly of the Council of Europe (PACE) reports on elections observed in Montenegro and previous recommendations where relevant.

8. This Joint Opinion is based on an unofficial English translation of the draft law provided by the Parliament of Montenegro on 28 April 2020. Errors from translation may result.

9. In view of the above, ODIHR and the Venice Commission would like to note that this Joint Opinion does not prevent them from formulating additional written or oral recommendations or comments on the respective legal acts or related legislation in Montenegro in the future.

10. ODIHR and the Venice Commission were informed by various stakeholders during online meetings which took place on 24-26 June, that the draft, if adopted, would not be applied to the elections which will take place in Montenegro on 30 August 2020. Under these conditions, the opinion will not address the issue of stability of electoral law.<sup>5</sup>

### **III. Executive Summary**

11. As a preliminary remark, it should be noted that successful electoral reform should be built on at least the following three elements:

- 1) a clear and comprehensive legislation that meets international obligations and standards and addresses prior recommendations;
- 2) the adoption of legislation by broad consensus after extensive public consultations with all relevant stakeholders; and
- 3) the political commitment to fully implement the electoral legislation in good faith.

12. In particular, ODIHR and the Venice Commission stress that an open and transparent process of consultation and preparation of the draft increases the confidence and trust in the adopted legislation and in the state institutions in general.<sup>6</sup>

13. At the outset, ODIHR and the Venice Commission welcome Montenegro's efforts to amend its legal and institutional framework relating to parliamentary elections and elections of councillors, to bring it into compliance with relevant OSCE commitments, Council of Europe and other international human rights' norms and standards as well as good practices. Overall, the draft represents an improvement in the legal framework governing elections and addresses a number of prior ODIHR, PACE and Venice Commission recommendations. Improvements relate *inter alia* to the dropping of legal competency requirements for suffrage rights; the lowering of the number of signatures required in support of lists of candidates; gender representation; information to be made accessible to persons with disabilities; banning persons with political responsibilities from applying to CEC membership; the requirement to adopt a Code of Ethics for election administration bodies.

14. Furthermore, given the impact that the draft law may have on human rights and fundamental freedoms, the relevant stakeholders are encouraged to ensure that the draft law undergoes extensive and inclusive consultation processes throughout the drafting and adoption procedures, to ensure an open and transparent process, and thereby increase confidence and trust in the adopted legislation, and in the relevant state institutions in general.

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<sup>5</sup> See in particular Code of good practice in electoral matters, II.2.b and [Interpretative Declaration on the Stability of the Electoral Law](#) (CDL-AD(2005)043).

<sup>6</sup> Paragraph. 5.8 of the [1990 OSCE Copenhagen Document](#) requires that "[l]egislation, [should be] adopted at the end of a public procedure..."; on transparency of the legislative process, see Rule of Law checklist ([CDL-AD\(2016\)007](#)), II.5.

15. In order to further improve the compliance of the draft law with international human rights standards and OSCE commitments, ODIHR and the Venice Commission make the following key recommendations:

- A. Cases and procedures for dismissal or replacement of members of election commissions – including polling boards - should be made more precise, and open to judicial review; consideration should be given to defining a dispute settlement mechanism in order to prevent and/or to counteract any abuse of the Parliament's right to dissolve the CEC;
- B. Adequate representation of national minorities in membership of election commissions should be ensured;
- C. The draft law should establish detailed rules for signature collection and verification. Clear liability rules and sanctions for violations, including for forgery of registration documents and breaches of voters' personal data integrity, need to be established in line with previous ODIHR recommendations;
- D. Repeat elections should only be required in case of gross violation of the law where the discrepancy could have affected the election results and subsequently the allocation of mandates.

16. Furthermore, ODIHR and the Venice Commission recommend to:

- A. Continue harmonising different election-related laws to avoid legal collisions and to address the remaining gaps and ideally to proceed to a codification of the whole election-related legislation;
- B. Ensure level playing field to all contestants, introducing a limit on the amount of paid political advertising;
- C. Consider prescribing obligatory online publication by all election commissions of their decisions on complaints immediately upon adoption of these decisions.

17. Moreover, the length of the residency requirement in national elections is not in line with good practice, but is provided by the Constitution. The ODIHR and the Venice Commission reiterate their recommendation to reconsider it.

18. Other recommendations may be found in the text below and will not be detailed here.

#### **IV. Analysis and Recommendations**

##### **A. National Legal Framework**

19. The legal framework regulating elections in Montenegro remains uncoded and consists in the Constitution, the Law on Elections of Councillors and Representatives, the Law on Financing of Political Entities and Election Campaigns, other relevant legislation and State Election Commission instructions and regulations.<sup>7</sup> Despite some positive changes introduced by related laws, the amendments adopted in December 2019 and others, which are proposed by this draft law, in line with previous recommendations by ODIHR and the Council of Europe, further harmonisation of the different election-related laws should be conducted to avoid legal collisions, to improve transparency and accessibility and to address the remaining gaps. A codification should ideally be conducted in order to avoid such gaps and risks of contradicting provisions and timelines.

20. As indicated earlier, a successful electoral reform should be built on, among other elements, the adoption of legislation by broad consensus after extensive public consultations with all relevant stakeholders. Such an inclusiveness contributes to the overall trust in the adopted legislation and in the relevant state institutions. **ODIHR and the Venice Commission therefore recall the importance of adopting electoral legislation based on**

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<sup>7</sup> The Law on Voter Register, the Law on Political Parties, the Law on Public Assemblies and Public Events, laws on media, the Law on Free Access to Information, the Law on the Constitutional Court, the Criminal Code, the Law on General Administrative Procedures, the Law on Administrative Disputes, the Law on Misdemeanours, etc.

**a broad consensus after extensive public consultations with all relevant stakeholders, in order to ensure that human rights organizations and the general public, including marginalized groups, are fully informed and able to submit their views prior to the adoption of the draft legislation.<sup>8</sup>**

## **B. Electoral System, including the Representation of National Minorities in Parliament and Gender Balance**

21. Regarding the electoral system used, the parliament consists of 81 members elected for four years in a nationwide constituency based on closed lists. The general threshold is 3%, with exceptions for national minorities, and the use of the d'Hondt system for the distribution of mandates. Elections are carried out only in Montenegro, not abroad.

22. Regarding the method of distribution of seats in general, the relevant provisions of the draft law do not differ from the existing law (Articles 120 and followings). The previous recommendations remain therefore valid. The importance of ensuring a fair representation of national minorities in Parliament, as guaranteed by the Constitution of Montenegro in its Preamble and in Article 79, para. 9, is recalled.<sup>9</sup>

23. The rules on the representation of minorities are made more favourable. Paragraph 2(1) of Article 121 provides that, if no electoral list of a minority reaches the 0,7% threshold, they should be counted as one single list and be admitted to the distribution of seats, if, considered as a single list, they would be entitled to three seats (the text, or at least its translation, is not crystal-clear however). This provision, would benefit from regulating the principles of such mergers (e.g. the sequence of candidates in the summary lists and distribution of the seats among them).<sup>10</sup>

24. Regarding the gender balance issue, as raised in the 2011 opinion, “each gender has to be ranked high enough on the list to have a realistic opportunity for being allocated a mandate. For example, the law could stipulate that every fifth candidate on the list of candidates should be of different gender” (para. 21). The present law already goes beyond this recommendation and Article 59 of the draft law still goes further, addressing Council of Europe recommendations by introducing changes into the electoral list gender quotas, raising them from 30 per cent to 40 per cent, while maintaining the zipper system<sup>11</sup> aiming to ensure equal gender representation. Article 59 requires that at least one candidate in each three positions on the list be from the less represented gender, as opposed to the current requirement of one in four. This formulation is welcome in that it will help further boost the representation of women on candidate lists, including in winnable positions, and in the elected parliament.

## **C. Right to Vote**

25. The draft law maintains the requirement that a Montenegrin citizen should be a permanent resident of Montenegro for not less than two years prior to the polling day in order to have the right to elect and be elected as a Member of Parliament (this is also provided for by Article 45 of the Constitution). For the elections of councillors, an additional six-month

<sup>8</sup> Paragraph 18.1 of the 1991 OSCE Moscow Document requires legislation to be adopted “as the result of an open process reflecting the will of the people, either directly or through their elected representatives”; see also Rule of Law checklist, II.5.iv.

<sup>9</sup> See [2011 Joint Opinion](#), Chapter II of the opinion.

<sup>10</sup> Under the current rule, only candidate lists that won at least 3 per cent of the total number of valid votes cast are entitled to participate in seats distribution.

<sup>11</sup> [The Council of Europe Parliamentary Assembly Resolution 1706 \(2010\)](#) and [Recommendation 1899\(2010\) on Increasing Women's Representation in Politics through the Electoral System](#) require “...a mandatory quota which provides not only for a high proportion of female candidates (ideally at least 40%), but also for strict rank-order rule (for example, a “zipper” system of alternating male/female candidates), and effective sanctions (preferably not financial, but rather the non-acceptance of candidatures/candidate lists) for non-compliance, ideally in combination with closed lists in a large constituency and/or a nationwide district.”

residency requirement in the municipality has to be met in order to be able to vote and to stand as a candidate. Although a residency requirement of six months is considered acceptable for local elections, the length of two years for national elections appears to be an unreasonable restriction, and is at odds with the Code of Good Practice in Electoral Matters and long-standing ODIHR and PACE recommendations.<sup>12</sup> **It is recommended that the provisions on the length of residency requirement in national elections be removed from the Constitution and the draft law.**

26. Though the right to vote and to stand as a candidate according to Article 14 of the draft law require a permanent residence in Montenegro, Article 115 of the draft law regulates the competent polling station inside the country for voters living abroad. This seems to be contradictory and should be clarified.

27. Positively, in line with past ODIHR recommendations, the draft law drops previous legal competency requirements for suffrage rights.<sup>13</sup> This brings provisions in line with international obligations. Deprivation of the right to vote on the basis of mental disability is inconsistent, among others, with Articles 12 and 29 of the UN Convention on the Rights of Persons with Disabilities (CRPD).

#### **D. Election Administration**

##### *Central Election Commission*

28. The draft law changes the name of the current State Election Commission to the Central Election Commission (CEC) and introduces a new procedure for electing members. The draft law shifts the membership of the CEC from one of members appointed by political parties to a “merit-based system”. It also reduces the number of members from eleven to seven. The term of office of both the CEC and the municipal election commissions (“the MECs”) is extended from four to five years. This term is thus longer than the term of office of the MPs (see Article 5 of the draft law), which may improve the independence of the CEC members.

29. The draft law provides that a Commission established by the Parliamentary Committee responsible for election and appointments shall administer the election of CEC members.<sup>14</sup> This Commission is composed of five members, representing respectively: the majority, the opposition that won the highest number of seats, the Association of Lawyers, the institution of the Protector of Human Rights and Freedoms of Montenegro and qualified non-governmental organizations.<sup>15</sup> The proposed composition of the Commission provides *prima facie* an overall adequate balance and representation of relevant institutions, key political forces, and of the civil society. The procedure and criteria for the selection process are outlined in the draft law in detail. At the same time the procedure appears to be burdensome and complicated. If some of the members have to be nominated in case of early termination of the mandate of a former member, the same complicated procedure has to be followed even in case the mandate of the new member is short and there will not be any elections until the new composition of the CEC is nominated (see Article 34.2). This could lead to a lack of interest of prospective candidates for CEC membership. Such a complicated procedure could also lead to errors while conducting the procedure. Furthermore, it seems more difficult than compared to the previous method of appointment to assess the neutrality

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<sup>12</sup> See for example [2018](#) and [2016](#) ODIHR Election Observation Mission (EOM) Final Reports and PACE election observation reports, and the [2013 ODIHR Limited Election Observation Mission \(LEOM\) Final Report](#). According to the Venice Commission [Code of Good Practice in Electoral Matters](#) CDL-AD(2002)023rev, I.1.1 c. iii and iv, a length of residence requirement may be imposed on nationals solely for local or regional elections; and the requisite period of residence should not exceed six months except in order to protect national minorities.

<sup>13</sup> In its final report on [2016 parliamentary elections](#), ODIHR recommended reviewing provisions on legal capacity (Article 11 in legacy law) to ensure compliance with the Constitution and international obligations.

<sup>14</sup> Articles 28, 29, 30 and 31 of the draft law.

<sup>15</sup> Such provision may pose a challenge in agreeing single nominees from civil society.



of the whole exercise, which could put into question the trust in the election administration as a whole.

30. The Parliamentary Committee issues an open competition call for CEC membership within three months before the term of different members of the existing CEC expires. Applications for CEC membership may be submitted during a 15-day period. Immediately after announcing the competition for CEC members, the Parliamentary Committee invites qualified bodies and non-governmental organizations to nominate members to the Commission, which will be set up to administer the selection process. However, the draft law does not regulate a situation when nominating subjects fail to nominate candidates to the Commission within the stipulated 7-day period, which may hinder the process.

31. The Commission checks the fulfilment of requirements by CEC candidates, compiles a list of eligible candidates, carries out interviews, and proposes a list of seven candidates to the Parliamentary Committee. However, the draft does not allow for appeals in connection with the Commission's work and its proposal of CEC members, at odds with international standards and good practice.<sup>16</sup> While a compilation of a report on the election of CEC members is envisaged by Article 31 of the draft law, there are no provisions regarding the report or other information about the recruitment and selection process to be made public. **To enhance transparency and public confidence, it is recommended that provisions be included in the draft law for the information about the recruitment of CEC members to be made public.**

32. The draft law states that the approval of the CEC candidates list must be by a majority of at least four votes of the Commission (Article 30.4) but contains no provisions covering the situation when Commission members do not come to an agreement or deliberately avoid voting for candidates, which may further complicate or even stall the process. **It is recommended that the law regulate the decision-making process regarding the appointment of CEC candidates and provide for an anti-deadlock mechanism.**

33. Article 31 provides that the “decision on the election of the members of the Central Election Commission” is carried out by the Parliament. However, this process cannot be considered as a proper election since the Parliament can only accept or refuse the whole list of candidates – with a simple majority (cf. Article 91 of the Constitution). Some ODIHR and Venice Commission interlocutors expressed their concern that the decision be taken by the political majority. As already said, the composition of the Commission established by the Parliamentary Committee responsible for election and appointments is aimed at representing an overall balance. This should, however, be confirmed by practice. Thus, good faith in the nomination procedure to avoid a politically biased composition of the CEC is required. Another risk would be that Parliament rejects the list. The law should address this case and in particular say whether the procedure should then be restarted, and how to avoid a deadlock.

34. In a positive change, Article 27 of the draft law introduces provisions banning from applying for the position of CEC members, persons who performed the duties of a member of the parliament or a local assembly, or served in the government, or as a president and vice-president of the municipality within a five-year period or still hold these positions.

35. Those who performed leadership duties in a political party within three years are banned from applying for CEC membership. Positively, the draft law maintains the prohibition on party affiliation for members of upper-level election commissions (CEC and MECs).<sup>17</sup>

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<sup>16</sup> Paragraph 5.10 of the OSCE [Copenhagen Document](#) provides that “everyone will have an effective means of redress against administrative decisions, so as to guarantee respect for fundamental rights and ensure legal integrity.” Article 2(3) of the [ICCPR](#) guarantees the right to effective legal remedies against decisions of persons acting in an official capacity. See also Rule of Law checklist ([CDL-AD\(2016\)007](#)), II.E.2.a.

<sup>17</sup> The current law bans persons who performed the function of member of a political party ruling body during the previous 10 years.



36. In the same provision, the draft law introduces a list of specific crimes which makes a person ineligible for membership in the CEC and MECs. The provision states that “a person who has been sentenced by a final decision for a criminal offense against official duty, corruption, fraud, theft or other criminal offense that makes him or her unworthy of public office or who has been sentenced by a final decision for a criminal offense against election rights, shall not be a member” of an election commission. **However, the draft law does not specify the severity of the crime or the period when this criterion ceases to apply (e.g. expunged conviction), at odds with international standards.**<sup>18</sup>

37. The draft law eliminates provisions that currently stipulate quotas for national minority membership in the CEC. At the same time, in line with past ODIHR and Venice Commission recommendations, a requirement is being introduced in Article 44 for the CEC to take into account the proportional representation of national minorities and minority communities when establishing MECs. **Consideration could be given to clarifying how this requirement is to be complied with in the context of an open merit-based recruitment. Previous recommendations of ensuring as a general principle, in line with international standards and obligations, adequate representation of national minorities in membership of election commissions are reiterated.**<sup>19</sup>

38. International good practice suggests that the composition of election commissions, regardless of the formation method used, should ensure pluralism and credibility of the election administration, which should function in an independent and professional manner.<sup>20</sup> While a shift is being made through this draft law away from a model of election administration that is based on political representation towards a more professionalized independent one, care needs to be taken that the new approach to the establishment of election commissions yields also in practice a neutral, impartial and balanced composition. Presently, the draft law does not in any way regulate who may nominate candidates for CEC membership, outlines criteria for a purely merit-based selection, and does not envisage review for other possible conflicts of interest or affiliation. **Additional checks and balances could be considered to help safeguard the neutrality, balance in composition, and independence of election commissions.**

39. The draft law abandons the concept of “extended composition” in the election administration, while preserving the possibility for the submitters of registered candidate lists<sup>21</sup> to appoint authorized representatives and their substitutes to election commissions at all levels and to polling boards. In addressing uncertainties related to the role of such

<sup>18</sup> Article 25 of the [ICCPR](#) establishes the right to have access, on general terms of equality, to public service while Paragraph 23 of the [General Comment 25 to Article 25 of the ICCPR](#) states that “Subparagraph (c) of article 25 deals with the right and the opportunity of citizens to have access on general terms of equality to public service positions. To ensure access on general terms of equality, the criteria and processes for appointment, promotion, suspension and dismissal must be objective and reasonable [...]” Paragraph 24 of the 1990 OSCE [Copenhagen Document](#) provides that restrictions on rights and freedoms must be “strictly proportionate to the aim of the law”. Paragraph 7.5 of the 1990 OSCE [Copenhagen Document](#) requires that the right of citizens to seek political or public office is implemented without discrimination.

<sup>19</sup> See Paragraph 31 of the OSCE [Copenhagen Document](#) that prohibits discrimination and obliges States Parties to adopt measures ensuring equal enjoyment of rights, and Paragraph 35 ensuring effective participation in public affairs. See also paragraph II.3.1.d.iv of the [Code of Good Practice in Electoral Matters](#) and paragraph 76 of the Explanatory Report which state that “the electoral commission may include... representatives of national minorities.”

<sup>20</sup> Paragraph II.3.1.d.ii of the [Code of Good Practice in Electoral Matters](#) states that “the commission should include... representatives of parties already in parliament or having scored at least a given percentage of the vote”, and paragraph 75 of the Explanatory Report states that “[p]olitical parties should be represented ...proportionally... and the representatives must be prohibited from campaigning”. The [2006 ODIHR Explanatory Note on Possible Additional Commitments for Democratic Elections](#) states that “elections should be administered by persons who represent various interests of the society, are capable of acting in a professional and an impartial manner, and are knowledgeable in election administration”.

<sup>21</sup> Submitters of the candidates lists are political parties, coalitions or groups of voters, see Article 57 of the draft law.

authorized representatives and their involvement in the decision-making processes during previous elections, the draft law explicitly states that these representatives participate in the work of commissions and polling boards without the right to decide. In addition, the previous requirement for authorized representatives to be lawyers has been dropped.

40. Article 19.1 of the draft law foresees accountability of the election administration bodies for their work to the body that elected them. Concerning the CEC, such accountability should be clarified and the independence of the CEC *vis-à-vis* the parliament be guaranteed.

41. Article 33 stipulates grounds for the dismissal of individual CEC members and authorizes the CEC to submit a proposal for dismissal to the Parliament specifically in connection with cases categorized as "negligent and unprofessional performance of duties". The latter is clarified to include acts contrary to the CEC's statutory powers and failures to fulfil the obligations prescribed by law. However, a clarification is needed on the procedure to be followed in connection with other envisaged grounds for dismissal. The ground for dismissal "public expression of political beliefs" is especially vague and may lead to misuse, as the line between politics and administration may in some instances be faint, e.g. in case the member of the CEC proposes publicly some amendments to the voting process, otherwise decided by the parliament. The same applies to the ground for dismissal of MEC members (see Article 46.3). **The principle of proportionality should be respected and, more generally, cases and procedures for dismissal or replacement of (members of) election commissions – including polling boards - should be made more precise. As the membership of the CEC is designed as a full-time job (see Article 37.1 of the draft law), the dismissal of members is disciplinary in nature and therefore should be subject to a judicial review.**

42. Article 35 of the draft law gives the Parliament the right to dissolve the CEC if the CEC fails to meet for more than six months without justification or if it fails to perform the activities within its responsibility as outlined in items 1-24 of Article 38 of the draft law. These new limits on the authority of the Parliament to dissolve the CEC are positive as they reference the specific activities of the CEC as grounds for dismissal, in line with international good practice.<sup>22</sup> However, one could wonder whether the margin of appreciation still given to Parliament is not too broad and could not be abused.

43. The draft law lacks provisions detailing the procedure for the Parliament when deciding to dismiss the CEC and the subsequent procedure. **Consideration should be given to defining a dispute settlement mechanism in order to prevent and/or to counteract any abuse of the Parliament's right to dissolve the CEC.** It could be envisaged to give each member of the dissolved CEC the right to appeal against this decision or to provide for a specific procedure dealing with the institutional conflict between the (dissolved) CEC and the Parliament.

#### *Municipal Election Commissions*

44. Similarly to the altered approach to the establishment of the CEC, the draft law revises the procedures for the formation of MECs. The number of MEC members is kept at five – like in present legislation. However, instead of being appointed by municipal assemblies based on nominations from parties, coalitions and voter groups represented in the assembly, the MECs are to be appointed by the CEC following an open competition. The procedures for the announcement of the recruitment, review of applications, selection of candidates and the adoption of decisions for MEC membership, including for a separate envisaged position of

<sup>22</sup> See the [Explanatory Comments on the Inventory of OSCE Commitments and Other Principles for Democratic Elections](#): "Election bodies should not be subordinate to other state agencies with respect to conducting election activities" (p. 31). See also paragraph 20 of the [Venice Commission Report on Electoral Law and Electoral Administration in Europe](#) which states that "...autonomous electoral commissions which are independent from other government institutions are increasingly viewed as the basis of impartial electoral management...".

MEC secretary,<sup>23</sup> are regulated, according to Articles 44 and 50 of the draft law as well as by the Law on Civil Servants and State Employees. Provisions of the latter law regarding disciplinary liability of civil servants and state employees are also applicable to the procedure for the dismissal of MEC members. The envisaged changes constitute a significant step in the direction of professionalization of election commissions. However, the above comments regarding the lack of general guarantees and of possible additional safeguards of impartiality and balance in CEC membership due to the envisaged open recruitment are also applicable here. **The law should therefore ensure stronger guarantees and additional safeguards in order to ensure the impartiality and neutrality of the MEC members and a balance of MEC membership.**

45. Article 46 of the draft law also lists “negligent and unprofessional performance of duties” as grounds for the dismissal of MEC members; however, no clarification is provided as to how to interpret this provision and what actions or omissions amount to such kind of conduct. Furthermore, the draft law does not outline procedures to be followed for the dismissal of MEC members and for MEC positions that become vacant due to early termination of term to be filled. **Similarly to the CEC, MEC membership should be reinforced in order to avoid misuse in the assessment of the performance of MEC members.**

#### *Polling Boards*

46. The draft law introduces substitutes to the polling board members, however it does not address their status or the procedure for replacing polling board members, at odds with international good practice.<sup>24</sup> **Consideration could be given to introducing such provisions.**

47. According to Article 52.5 of the draft law, one representative, and the substitute thereof, each from two opposition political parties, coalitions and/or groups of voters in the respective parliament/assembly, which received the highest number of seats in the previous elections, shall be appointed to the polling board, and in the event of the same number of seats, from the party which received the highest number of votes. Article 52.6 of the draft law provides that if there is only one opposition political party, coalition and/or group of voters in the respective municipal assembly, two representatives, and substitutes thereof, of that political party, coalition and/or group of voters shall be appointed to the polling board.

48. The draft law maintains the provisions of the current law<sup>25</sup> which give the right to those who nominate members of polling boards to replace them, increasing the time frame before the polls open from up to 12 to 24 hours. However, the draft law lacks clarity regarding the circumstances in which the nominating entity can submit a “substantial request” to the MECs to change the composition of the polling boards. Neither the procedure nor criteria for assessment of the request by the MEC are specified. This introduces an unnecessary level of uncertainty concerning the membership of polling boards a day before election day and should be addressed as it may impact the integrity of the process, which has been previously criticized in ODIHR election observation reports.<sup>26</sup> It is important to guarantee that any change in the composition of the polling boards be early enough to allow for training before the elections and more generally readiness of members of polling boards with regard to their role. Late changes in the composition of polling boards have to be restricted to the most exceptional circumstances. **The draft should be amended to allow the replacement of members of polling boards under strict conditions only.**

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<sup>23</sup> Procedures for the election by the CEC of a CEC Secretary based on open competition are also subject to provisions of the law on civil servants and state employees.

<sup>24</sup> Paragraph II.3.1.f of the [Code of Good Practice in Electoral Matters](#) states that the bodies appointing members of electoral commissions must not be free to dismiss them at will.

<sup>25</sup> [CDL-REF\(2020\)031](#); see now Article 52.8.

<sup>26</sup> [ODIHR Final report on 2018 Presidential Election](#) states that: “Many PB members were replaced closer to election day with mostly non-trained staff. This provision created challenges for the regular functioning of the MECs and the PBs and needs to be lifted”.

*Procedural issues regarding the election administration as a whole*

49. Contrary to international good practice, the draft law provides that election management bodies shall render decisions by majority vote of their members, posing a risk to the integrity of the electoral process by manipulation of the decision-making process. **Consideration should be given to revising decision-making procedures in line with international good practice.**<sup>27</sup>

50. Article 22.3 provides that “[m]embers of the election administration bodies shall be obliged to vote”. This provision is welcome but it is unclear whether sanctions apply in case it is violated.

51. It is unclear who the “person who monitors the work of the election administration body” according to Article 23.6 is. Is he or she an “authorized representative” in the sense of Article 20.3? The same term is used in Article 96.4.

52. ODIHR has previously criticized that the election law does not contain any provisions on impartiality and professionalism of the election administration.<sup>28</sup> Positively, the CEC is tasked in Article 38 of the draft law to adopt a Code of Ethics for election administration bodies and all election commissioners are required by Article 23 to sign a statement of its acceptance. These requirements are welcomed; however, mechanisms to detect breaches of professional and ethical rules and to address these breaches are lacking. Furthermore, notwithstanding the reference to the adoption of the Code of Ethics and the envisaged shift to professionalized election commissions at higher levels of the administration, **it is recommended that the draft law be revised to include general requirements of neutrality, impartiality and professionalism for members of the election administration.**

53. The draft commendably enhances the provisions regulating sessions of the CEC and MECs by obliging the president of the CEC or MEC to inform media representatives about the meetings and to ensure that they could follow the meetings. In addition, the draft contains a requirement for the CEC and the MECs to publish all election-related materials and data within a 24-hours deadline. These provisions contribute to the transparency of the election administration and address respective ODIHR recommendations.

## **E. Candidate Registration**

54. Voters are allowed to sign in support of several lists of candidates, in line with a previous ODIHR recommendation. The draft law lowers the signature requirements from 0.8 to 0.3 per cent of the voters in the constituency (Article 63). While the present law is already in conformity with international standards, this makes candidacy still more accessible, which is welcome.<sup>29</sup> In a further positive development, the newly established preferential treatment lowers the signature requirements for the parties representing national minorities. The number of signatures required in small municipalities (Article 63.4) could however be rather high.

<sup>27</sup> Paragraph II.3.1.h of the [Code of Good Practice in Electoral Matters](#) states that it is desirable that electoral commissions take decisions by a qualified majority or by consensus. Paragraph 80 of the [Code of Good Practice in Electoral Matters](#) Explanatory Report recommends that “decisions [are] to be taken by a qualified (e.g. 2/3) majority, so as to encourage debate between the majority and at least one minority party. Reaching decisions by consensus is preferable”.

<sup>28</sup> Section II.3.1 of the [Code of Good Practice](#) states that “only transparency, impartiality and independence from politically motivated manipulation will ensure proper administration of the election process, from the pre-election period to the end of the processing of results.”

<sup>29</sup> [Code of Good Practice in Electoral Matters](#), I.1.3.i: “The law should not require collection of the signatures of more than 1% of voters in the constituency concerned.”



55. The removal of the requirement that candidate lists contain at least 2/3 of candidates to be elected (Article 39 in the existing law) allows for individual nomination, thus addressing a long-standing ODIHR recommendation.<sup>30</sup> The draft law also addresses the 2011 Venice Commission and ODIHR recommendation on regulating the rules for dissolution of coalitions that submit joint election lists by requiring coalition agreements. **However, the draft would benefit from specific requirement of such dissolution provisions in the given coalition agreements.**<sup>31</sup> Alternatively, the election management bodies should be relieved from the task to assess the coalition agreements, especially as the draft foresees the registration of the candidate list of a coalition only if the CEC considers the agreement to contain “clearly defined” rights and responsibilities. Such a clause (Article 65.3) is too vague.

56. The recommendation in the 2011 ODIHR and Venice Commission Joint Opinion suggesting substituting the references to specific national minorities with a quantitative criterion (percentage of minority population established by the recent population census) is not addressed by the draft law, while a quantitative criterion is maintained in Article 63 in relation to supporting signatures.<sup>32</sup>

57. The draft law requires the nomination documentation to be verified by the CEC for national elections and respective MECs for local elections. The lists can be rejected in case of violations of the submission deadlines or if identified deficiencies are not addressed by the list submitters within a 48-hour deadline after the notification of the respective election commission (Article 66). The draft law assigns the CEC to regulate the signature collection process (Article 63) and does not determine procedures on the verification of support signatures. This approach is not in line with international standards, which recommend that significant elements of an electoral process should be regulated in the law.<sup>33</sup> It also does not establish the liability of candidates and their proxies for the authenticity of the candidacy registration documentation. **The draft law should establish detailed rules for signature collection and verification in order to provide clear and uniform procedures for all election commissions that can be evaluated objectively and observed by candidates and observers. Clear liability rules and sanctions for violations, including for forgery of registration documents and breaches of voters’ personal data integrity, need to be established in line with previous ODIHR and PACE recommendations.**<sup>34</sup> Overall, the signature collection and verification provisions proposed do not appear to be fully in line with international standards.<sup>35</sup>

58. Article 65.2 provides for a list of documents to be submitted for the registration of candidates. This list could be shortened. There seems to be no substantial difference

<sup>30</sup> This provision was criticized [in the 2016 ODIHR Final Report](#) for failing to allow the nomination of individual candidates. Paragraph 7.5 of the [1990 OSCE Copenhagen Document](#) states that the participating States will “respect the right of citizens to seek political or public office, individually or as representatives of political parties or organizations, without discrimination.”

<sup>31</sup> See paragraph 20 [the 2011 Venice Commission and OSCE/ODIHR Joint Opinion on the Draft Law on Amendments to the Law on Election of Councillors and Members of Parliament of Montenegro \(CDL-AD\(2011\)011\)](#) and paragraph 31 of [the 2010 Joint Opinion on the Draft Law on Amendments and Supplements to the Law on the Election of Councillors and Members of Parliament of Montenegro as amended through July 2006 \(CDL-AD\(2010\)023\)](#).

<sup>32</sup> In the [2011 Joint Opinion](#) ODIHR and the Venice Commission recommended “to maintain an objective, quantitative criterion in order not to stigmatise one specific group and, more importantly, not to create a possible basis for discrimination in the Constitution, should, in future censuses, the Croats reach a higher percentage or other minority groups reach lower percentages. Should the quantitative criterion be preferred, a reference to the census should also be added”.

<sup>33</sup> See paragraph II.2.a. of the [Code of Good Practice in Electoral Matters](#). See also [2018](#) presidential election and [2016](#) parliamentary elections ODIHR Final Reports.

<sup>34</sup> Priority recommendation no 5 from [2018 ODIHR EOM Final Report](#) states that “The law should be amended to include clear instructions for signature verification, reasonable timeframe for the review of signatures and adequate sanctions for violations.” See also paragraph 58 of the 2018 PACE observation report.

<sup>35</sup> See paragraph I.1.3.iii of the [Code of Good Practice in Electoral Matters](#), “Checking of signatures must be governed by clear rules, particularly concerning deadlines”; Paragraph 1 of the General Comment 25 to Article 25 to the [ICCPR](#) states that “[t]he Covenant requires States to adopt such legislative and other measures as may be necessary to ensure that citizens have an effective opportunity to enjoy the rights it protects.”

between the written statement of the candidates that they accept the nomination and the written consent of the persons, if their name and surname are included in the name of the list. Certificates of suffrages and permanent residence may be altered with the right of the CEC to check the public registers on the residence and other information on the individual candidates. The founding act and programme of a political party should be publicly available without need for further submission. Neither political parties nor coalitions should have the duty to present their programme objectives to the election management bodies in order for their candidate lists to be registered (Article 65.4).

## F. Media and Campaign Regulations

59. In response to previous ODIHR recommendations, the draft law introduces start and end dates for the election campaign. In supplementing previous regulations, which only addressed campaigning by registered contestants in media, the draft law now stipulates that the election campaign starts from the date of calling the elections and ends with the announcement of final election results. It also stipulates that “media presentation”, which is clarified to include both campaign events and campaigning in media, starts with the registration of candidate lists and ends 24 hours before election day. Clarity on the duration of the regulated campaign period is welcome as it provides a basis for ensuring the equality of conditions for contestants and for the oversight and enforcement of other regulations, including regarding campaign finance, restrictions on public officials to campaign, and access to paid advertising in media.<sup>36</sup> The definition of election campaign is aligned across the electoral legal framework, including the Law on Financing of Political Entities and Election Campaigns, as a result of amendments adopted in December 2019, and is extended to a wide range of activities within the electoral process, improving its integrity and accountability.<sup>37</sup> Both laws should also be harmonised concerning the length of the electoral campaign.

60. However, Article 8, paragraph 4, of the draft law allows media campaigns to begin from the day of the candidate list registration. This approach does not ensure equal length of campaigning and fails to encompass nomination-related campaign activities. **To ensure a level playing field for all contestants and clarity of the conditions for political reporting by the media, it is recommended that media campaigning be allowed from the same moment with respect to all contestants.**

61. Article 74 of the draft law provides that “[p]articipants in the media presentation shall respect the Constitution of Montenegro, the laws and codes of professional ethics and shall commit to fair conduct, which excludes insults and defamation, violation of the rules of decency or insulting public sentiment.” This provision may hinder the exercise of freedom of expression and entail self-censorship in election campaigns. It is therefore recommended to amend it in order to prevent possible abuses and to ensure compliance with international standards and in particular the case-law of European Court of Human Rights.<sup>38</sup> As Article 74

<sup>36</sup> See in this respect [Code of good practice in electoral matters](#), Guideline I.2.3.a, underlining the principle of the equality of opportunity for competing parties and candidates.

<sup>37</sup> Article 2 of the Law on Financing of Political Entities and Election Campaigns and Article 142(15b) of the Criminal Code.

<sup>38</sup> Paragraph 13 of the [General Comment No. 34](#) on Article 19 of the [ICCPR](#) states that “[a] free, uncensored and unhindered press or other media is essential in any society to ensure freedom of opinion and expression and the enjoyment of other Covenant rights. It constitutes one of the cornerstones of a democratic society. [...] The free communication of information and ideas about public and political issues between citizens, candidates and elected representatives is essential.” Paragraph 12 of the [General Comment No. 34](#) includes within the scope of the right to freedom of expression under Article 19 of the ICCPR “[...] expression that may be regarded as deeply offensive [...]”. See paras 41 and 42 of the ECtHR judgment on [Lindens v. Austria](#), no. 9815/82, 08 July 1986. See Paragraph 1.a.iii. of the [Joint Declaration on Freedom of Expression and Elections in Digital Age](#): “States should ensure that any restrictions on freedom of expression that apply during election periods comply with the international law three-part test requirements of legality, legitimacy of aim and necessity, which implies the following: [...] 2) Any limits on the right to disseminate electoral statements should conform to international standards, including that public figures should be required to tolerate a higher degree of criticism and scrutiny than ordinary citizens.”

is not linked to one of the penalty provisions of the draft law (Articles 150 – 152) it remains unclear what follows from a violation of this provision.<sup>39</sup>

62. Articles 80 and 81 of the draft law give submitters of the candidate list and candidates the right to organise conferences and other public meetings as well as the right to prepare propaganda material and to display and post it during the period of media presentation. As the right to freedom of assembly is guaranteed in Article 52 of the Constitution of Montenegro and the right to freedom of expression is guaranteed in Article 47 of the Constitution, the notion developed by these draft provisions remains unclear. With regard to the fundamental rights at stake, Articles 80 and 81 of the draft law can be understood only as a display of rights already guaranteed in the Constitution; or as limitations of the rights to freedom of expression and of assembly for all persons who are not “submitters” during the period of media presentation which would amount to a violation of these rights; or as imposing additional obligations on submitters when exercising their right to organise conferences and other public meetings as well as the right to prepare propaganda material and to display and post it during the period of media presentation, i.e. to provide translation into sign language and to provide propaganda material in a format accessible to disabled persons. As Articles 80 and 81 touch upon the exercise of political rights in pre-election time, their substance would benefit from further clarification.

**63. The draft contains fragmentary regulation of campaigning within print media and does not include any provisions regarding online campaigning. It would benefit from some guidelines in this regard.<sup>40</sup>**

64. The draft law obliges the media to apply the principle of equality consistently to all contestants. However, it is unclear what are the parameters for this principle to be ensured. To comply with international standards and good practice, as well as with national media legislation, the draft should be formulated and implemented in line with the principles of free, truthful, comprehensive, impartial and timely provision and access to political information, free from preferential treatment.<sup>41</sup> In accordance with the Code of good practice in electoral matters, the law should also define whether a strict or proportional equality is applied to contestants.<sup>42</sup>

<sup>39</sup> The same is true regarding the prohibition of the misuse of the media appearances of officials, see Article 73 paragraph 2 of the draft law.

<sup>40</sup> See paragraph 15 of the [General Comment No. 34](#): “States parties should take account of the extent to which developments in information and communication technologies, such as internet and mobile based electronic information dissemination systems, have substantially changed communication practices around the world. States parties should take all necessary steps to foster the independence of these new media and to ensure access of individuals thereto.” Paragraph 1.a.i. of the [Joint Declaration on Freedom of Expression and Elections in the Digital Age](#) recommends to “put in place a regulatory and institutional framework that promotes a free, independent and diverse media, in both the legacy and digital media sectors, which is able to provide voters with access to comprehensive, accurate and reliable information about parties, candidates and the wider electoral process”.

<sup>41</sup> Paragraph 7.8 of the [1990 Copenhagen Document](#) states “that no legal or administrative obstacle stands in the way of unimpeded access to the media on a non-discriminatory basis for all political groupings and individuals wishing to participate in the electoral process.” [Recommendation CM/Rec \(2007\)15](#) provides that “With due respect for the editorial independence of broadcasters, regulatory frameworks should also provide for the obligation to cover election campaigns in a fair, balanced and impartial manner in the overall programme services of broadcasters. Such an obligation should apply to both public service media and private broadcasters [...]”. With respect to the news coverage of election campaign, the 2011 Joint Opinion ([CDL-AD\(2011\)011](#)) recommended that “...journalists should enjoy editorial freedom in news reporting and it is therefore recommended that the notion of equality of coverage be understood not only as strict equality of time allocated to various parties in newscast but also as not offering preferential treatment to any parties and candidates.” See also paragraph 8.1.9. of the CoE PACE [Resolution 1897 \(2012\)](#) “Ensuring greater democracy in elections”. See also [Handbook on Media Monitoring for Election Observation Missions](#) (Warsaw: OSCE Office for Democratic Institutions and Human Rights, 2012), p. 14.

<sup>42</sup> [Code of good practice in electoral matters](#), Guideline I. 2.3. b: “Depending on the subject matter, equality may be strict or proportional. If it is strict, political parties are treated on an equal footing irrespective of their current parliamentary strength or support among the electorate. If it is proportional, political parties must be treated according to the results achieved in the elections. Equality of opportunity applies in particular to radio and television air-time, public funds and other forms of backing.”



65. In line with Article 85 of the draft law, campaigning in commercial and non-profit media shall be regulated by the respective broadcasters. Article 71 obliges commercial broadcasters to provide paid advertising to all registered contestants on equal terms. However, the draft law does not provide the guidance on how to ensure compliance with the requirement of equal and just campaigning. For example, previous ODIHR reports noted that election campaigning in the private media was marred by provision of preferential treatment of certain candidates that, in the absence of legal limits, resulted in “overwhelming amount of paid airtime on some private media” and advantageous presentation of some candidatures. The absence of clear rules on political advertisement in private media may undermine certainty, predictability and integrity of campaigning. **It is therefore recommended to define clear and predictable rules on political advertisement in the law. The difference between campaigning and sharing information about government activities should be regulated in a clear manner. To address these shortcomings and ensure a level playing field to all contestants, the previous ODIHR recommendation to introduce a limit on the amount of paid political advertising is reiterated.**<sup>43</sup>

66. In line with previous ODIHR recommendations, the draft law does not maintain the provisions on the *ad hoc* parliamentary committee responsible for overseeing media that was previously criticized by ODIHR for duplicating the jurisdiction of the Agency for Electronic Media (AEM) on overseeing media coverage of election campaign. However, the legal framework does not regulate the principles and scope of monitoring the media performance during election campaign. **It is recommended that the AEM monitors media performance in order to ensure a level playing field in campaigning in media.**<sup>44</sup>

67. Furthermore, the draft law does not comprehensively regulate sanctioning for campaign-related violations, leaving a number of potential violations unaddressed, save for penalizing the placement of campaign materials in the vicinity of polling stations and violations of rules on opinion polls.<sup>45</sup> Importantly, safeguards against the misuse of administrative resources in Articles 7 and 73 of the draft law related to prohibited campaigning by public officials and holders of other stipulated posts do not appear to be linked to any sanctions, detracting from effectiveness of regulation and enforcement. For this purpose and as underlined by the Venice Commission and ODIHR Joint Guidelines for preventing and responding to the misuse of administrative resources during electoral processes, “[a]n institution functionally independent from other authorities should be responsible for auditing political parties and candidates in their use of administrative resources during electoral processes. In this respect, such a body, regardless of its institutional form, should act impartially and effectively.” The Joint Guidelines also state that “[t]he legal framework should provide for an effective system of appeals before a competent, independent and impartial court, or an equivalent judicial body: an independent judiciary is a *sine qua non* condition for sanctioning the misuse of administrative resources.”<sup>46</sup>

<sup>43</sup> See [2018 presidential election ODIHR Final Report, Recommendation CM/Rec \(2007\)15](#) states that “regulatory frameworks should ensure that all contending parties have the possibility of buying advertising space on and according to equal conditions and rates of payment. Member states may consider introducing a provision in their regulatory frameworks to limit the amount of political advertising space and time which a given party or candidate can purchase”.

<sup>44</sup> In the current law, the timeframe for resolution of disputes regarding administrative measures imposed on broadcasters by the AEM is not adjusted to the electoral campaign deadlines, and thus does not provide for an effective legal remedy for an administrative decision. Under Article 140-142 of the Law on Electronic Media, the AEM is authorised to issue warnings or withdraw the licence of a broadcaster for violations of the law. The deadlines for deciding on appeals against the decisions on such measures by the AEM or its Council range from 15 to 30 days.

<sup>45</sup> See item I.2.3, para.19 of the [Explanatory Report to the Code of Good Practice in Electoral Matters](#): “All of these rights must be clearly regulated, with due respect for freedom of expression, and any failure to observe them, either by the authorities or by the campaign participants, should be subject to appropriate sanctions. Quick rights of appeal must be available in order to remedy the situation before the elections.” See also ODIHR [Handbook on Media Monitoring for Election Observation Missions](#), p. 27.

<sup>46</sup> [CDL-AD\(2016\)004](#), Guideline II. C. 1.1.

68. In a welcome development, and in line with international standards and good practice, the draft law includes a number of requirements for the information during the campaign period to be provided also in a format adapted to the needs of persons with disabilities.<sup>47</sup> This includes various provisions obliging public broadcasters to air campaign-related content in an accessible format. Articles 80 and 81 of the draft law also place similar obligations on election contestants requiring sign language interpretation to be provided during campaign events and for campaign materials such as leaflets and videos to be adjusted for persons with disabilities.

69. The draft law reflects a considerable change in approach to the publication of opinion polls by the media. The previous 15-day restriction in Article 63 of the current law has been significantly shortened to 48 hours before election day. This is a positive change. Extensive prohibitions on publication of opinion polls raise questions of compliance with the principle of freedom of expression and with the right to receive and impart information,<sup>48</sup> which may not achieve their aims as it is not possible in practice to restrict access to the results of these polls through websites registered abroad.

70. The terminology used in Chapter VII of the draft law lacks uniformity and would benefit from the introduction of additional definitions. For example, while the term 'political advertising' is defined in the Law on Electronic Media (Article 96a), the terms 'public advertising' (Article 44), 'political marketing', 'commercial marketing' and 'marketing promotion' (Chapter VII of the draft) are not defined in the context of election campaigns. **Overall, Chapter VII of the draft law contains a range of ambiguities, contradictions and regulatory gaps that require clarification and comprehensive revision of the media regulation section of the draft law.**

## G. Election Day Procedures

71. Positively, Article 86 of the draft requires polling stations to be accessible for persons with disabilities and places explicit responsibility on municipal election commissions for ensuring this. However, the draft law does not define or regulate this requirement, and an additional regulation is necessary to ensure protection and effective implementation of voting rights of persons with disabilities. Such regulation would require the introduction of a mechanism to ensure that the voting process is inclusive and fully accessible for persons with disabilities in order to establish the appropriate conditions for the voters with disabilities to form and express their choice independently and in line with international standards and national legislation.<sup>49</sup> The voting modalities should allow disabled persons to vote in person,

<sup>47</sup> ODIHR's [Handbook on Observing and Promoting the Electoral Participation of Persons with Disabilities](#) states that "key electoral information should be made available in multiple, accessible formats, which may include Braille, large print, audio, easy-to-understand versions and sign language. This includes information about how to participate in an election, how to lodge complaints and appeals, results and updates from the election administration" and that "the electoral campaign should be accessible for persons with all types of disabilities. Efforts should be made to ensure campaign events and electoral materials are available to all. Public media should ensure equal access to information and equal opportunities to deliver messages for persons with disabilities".

<sup>48</sup> Paragraph 8 of the Council of Europe Committee of Ministers' [Recommendation CM/Rec\(2007\)15](#) stipulates that "any restriction on [...] publication/broadcasting of opinion polls (on voting intentions) on voting day or a number of days before the election should comply with Article 10 of the European Convention on Human Rights (ECHR), as interpreted by the European Court of Human Rights." In its [Comparative Study of Laws and Regulations Restricting the Publication of Electoral Opinion Polls](#), Article 19 has concluded that "bans of longer than 24 hours will rarely, outside of special circumstances, [...] be able to be justified."

<sup>49</sup> Article 9 of the [CRPD](#) requires that, "to enable persons with disabilities to live independently and participate fully in all aspects of life, States parties shall take appropriate measures to ensure to persons with disabilities access, on an equal basis with others, to the physical environment [...], facilities and services open or provided to the public, both in urban and in rural areas". Article 4.1. obliges States Parties to "undertake to ensure and promote the full realization of all human rights and fundamental freedoms for all persons with disabilities without discrimination [...]". To this end, States Parties undertake: [...] (b) To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices that constitute discrimination against persons with disabilities." Paragraph 25 of the 2014 [General Comment no 2 to CRPD](#) provides that "[...]

not through proxies (Article 110.1 of the draft law). Positively, the draft law envisages voter notifications to be also available in a format accessible for persons with disabilities; however, it makes the delivery of such notifications conditional on a prior request by a voter or his/her authorized representative. The need for voters with disabilities to proactively seek to receive election-related information in a user-friendly manner is not fully in line with international standards.<sup>50</sup> **The legal framework should guarantee the inclusive participation of persons with disabilities in elections.**

72. Article 103 of the draft law maintains the right of candidate list submitters to photocopy election material. Positively, the provision prohibits copying voter register excerpts, although the possibility to access signed voter lists is maintained.<sup>51</sup> Within seven days from the election day, all election materials can be photocopied upon request. Although the law conditions copying of election material on compliance with the law on personal data protection, it remains unclear in the draft law how the MECs should ensure compliance with this law. Also, the deadline does not appear to constitute an effective tool to ensure personal data protection or to prevent its abuse, under the established electoral cycle when municipal elections closely follow national ones.

73. Article 109 of the draft law requires that after marking and folding the ballot, the voter shall provide the ballot to the polling board for separating a control coupon, and only after that shall proceed to cast the vote. **The voting procedure established by the draft law should be revised. It is not fully in line with international standards, as it provides for a member of the polling board to detach the control coupon from the ballot after the voter has marked it, potentially violating the secrecy and integrity of the vote.**<sup>52</sup>

74. Article 111 of the draft law regulates the conditions and the exercise of the right to vote by mail for voters who are – due to age, disability or similar reasons – not able to cast their vote at the polling station. The possibility for such groups of voters to exercise their right to vote is welcome; however, the procedural steps, which have to be followed, appear to be complicated and not transparent enough. Firstly, an authorized person must submit a personally-signed form with the request to vote by letter to the polling board. It is not noticeable that this can be done in advance, i.e. before election day, as only the time limit (1 p.m. on election day) is determined. Secondly, it is not clear what the term “household” in Article 111 para. 5 of the draft law means, especially if it is also applicable to rest homes, special-care homes and hospitals. Finally, the voter has to bring the identity card or passport to the person authorized in order to make the identity check in the polling station. Altogether, the necessary steps to be followed lay some burden on the voter who is not able to come to

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the duty to provide accessibility is an ex ante duty. State parties therefore have the duty to provide accessibility before receiving an individual request to enter or use a place or service.”

<sup>50</sup> Article 29 of the [CRPD](#) requires states to “guarantee to persons with disabilities political rights and the opportunity to enjoy them on an equal basis with others” and that “voting procedures, facilities and materials [shall be] appropriate, accessible and easy to understand and use”. See also ODIHR [Handbook on Observing and Promoting the Electoral Participation of Persons with Disabilities](#), pp. 46-48.

<sup>51</sup> Paragraph I of the Code of Good Practice in Electoral Matters states that secret suffrage is one of the principles of the Europe's electoral heritage. Paragraph 4.52 of its Explanatory Report states that “[s]ecrecy of the ballot is one aspect of voter freedom, its purpose being to shield voters from pressures they might face [...] [and] must apply to the entire procedure [...]”, while paragraph 55 prohibits publication of lists of persons voting. This issue has been addressed more in detail in the interpretative declaration of the Code of good practice in electoral matters on the publication of lists of voters having participated in elections ([CDL-AD\(2016\)028](#)). Paragraph 10 of the [General Comment no 16 to Article 17 of the ICCPR](#) (Right to Privacy) states that “[...] Effective measures have to be taken by States to ensure that information concerning a person's private life does not reach the hands of persons who are not authorized by law to receive, process and use it, and is never used for purposes incompatible with the Covenant. [...] Every individual should also be able to ascertain which public authorities or private individuals or bodies control or may control their files.”

<sup>52</sup> Paragraph 5.1 of the [1990 OSCE Copenhagen Document](#) states that: “free elections that will be held at reasonable intervals by secret ballot or by equivalent free voting procedure”. Cf. item I.3.2.2, paragraph 34 of the [Explanatory Report to the Code of Good Practice in Electoral Matters](#) and paragraph 50 of the 2011 Joint Opinion ([CDL-AD\(2011\)011](#)). See also OSCE ODIHR [Guidelines for Reviewing a Legal Framework for Elections](#) (Warsaw: OSCE Office for Democratic Institutions and Human Rights, 2013), pp. 54-55.

the polling station and might prevent him from exercising his right to vote. **It is recommended to simplify the exercise of the right to vote by mail; in particular, voting in hospitals and nursing homes should be organized by the election management bodies proactively.**

**75. The draft law could benefit from a regulation allowing the voter identity verification in case the electronic voter identification devices do not work** (see Article 90.2 of the draft law).

76. In a welcome development, the draft law specifies in Article 116 that ballot papers are valid if it is possible to establish the will of the voter. Moreover, in contested cases, the draft law obliges polling boards to determine the will of voters by voting on the validity of a ballot paper. However, the grounds for the invalidation of ballots were somewhat widened to include cases when the name of a candidate list is added in handwriting and when ballot papers are signed. The latter is a useful provision for eliminating the possibility for voters to be identified, as well as to prevent breaches of secrecy and potential voter pressure.

77. Despite repeated criticism by previous ODIHR and PACE election observation missions (EOMs), the draft law does not address the gaps in tabulation procedures at the levels of municipal election commissions and the CEC. There is an absence of rules on possible correction of results' protocols, opening of the election material for verification and recounts and transparency measures. Furthermore, the draft law does not require the MECs or the CEC to hold a session and to vote on final election results, which was previously used as a formal ground to prevent challenging the final results. **These gaps continue to create legal uncertainty, leave room for inconsistent interpretation, and necessitate additional regulation.**<sup>53</sup>

78. The draft law provides that in case of certain types of violations on election day, the voting process at the polling station shall be repeated, the polling board may (Articles 92, 108) or shall (Articles 93, 94, 106, 116.11) be dissolved and a new one appointed.<sup>54</sup> Similar provisions in the current law have been previously questioned by ODIHR and the Venice Commission as no margin of appreciation has been left to the election administration where a violation may not have affected the voting results, contrary to the principle of proportionality.<sup>55</sup> **Repeat polling should be governed by clear rules and only be required in case of gross violation of the law where the discrepancy may have affected partly or fully the outcome of the elections and consequently the allocation of mandates. Repeat polling in principle should not be held where a minor electoral irregularity or misdeed could not have affected the allocation of mandates.**<sup>56</sup>

79. Article 117 of the draft law requires that the minutes of the results from each polling station be prominently displayed outside the polling station. In addition, Articles 38 and 49 of

<sup>53</sup> See the [2018](#) and [2016 ODIHR EOM](#) Final Reports and the [2013 ODIHR LEOM Final Report](#), as well as the 2018 PACE report.

<sup>54</sup> The irregularities and inconsistencies leading to repeat elections concern, *inter alia*, failure to ensure the secrecy of the vote, irregularities in conducting election day procedures, arrangement of polling station premises, group voting, the failure of a voter to sign the voter list, absence of the polling boards members during voting, presence of unauthorized persons during voting, influencing the will of voters or interference with the process, irregularities established during the vote counting (absence of the control sheet in the ballot box or in cases when the control numbers do not reconcile).

<sup>55</sup> Paragraph II.3.3.e of the [Code of Good Practice in Electoral Matters](#) states that "The appeal body must have authority to annul elections where irregularities may have affected the outcome." See also item II.3.3, para.103 of the [Explanatory Report](#). See also Paragraph 49 of the [2010 ODIHR and Venice Commission Joint Opinion on the Draft Law on Amendments and Supplements to the Law on the Election of Councillors and Members of Parliament of Montenegro \(CDL-AD\(2010\)023\)](#).

<sup>56</sup> Guideline II.3.3.e. of the [Code of Good Practice in Electoral Matters and Explanatory Report](#). See also Paragraph 49 of the 2010 ODIHR and Venice Commission Joint Opinion on the Draft Law on Amendments and Supplements to the Law on the Election of Councillors and Members of Parliament of Montenegro ([CDL-AD\(2010\)023](#)). See also ODIHR [Guidelines for Reviewing a Legal Framework for Elections](#) (Warsaw: OSCE Office for Democratic Institutions and Human Rights, 2013), pp. 63-64.



the draft law require the MECs and the CEC to publish the election results online, broken down by polling station by adding the requirement that this information be made available within 24 hours for getting provisional and final results for the whole territory.<sup>57</sup> These new provisions substitute previous vague requirements for this information to be published "immediately". These measures contribute to increased transparency of the election process and the work of the election administration and address prior ODIHR recommendation.

## H. Electoral Dispute Resolution and Penalty Provisions

80. According to the 2018 ODIHR EOM report, "the electoral disputes resolution procedure is not fully regulated in the statutory legal framework, nor was it addressed adequately by the SEC regulations." Even if some amendments appear in the draft law, precisions and improvements are still appropriate.

81. The draft law does not provide for the right to challenge final election results, and the possibility to hold repeat elections is provided only in particular polling stations, but not for an entire municipality or in the whole country, at odds with international standards.<sup>58</sup> **It is recommended to reconsider the approach to contesting election results with respect to all types of elections, including by judicial review, as well as to legal standing in such disputes.<sup>59</sup> The law should allow the appeal body to annul elections where irregularities may have affected the outcome. It must be possible to annul the entire election or merely the results for one constituency or one polling station.**

82. Article 133 of the draft law states that "election procedure shall be special and urgent legal procedure", without further specification of the scope or effects on the performance of administrative bodies, besides the expedited deadlines prescribed by the draft law. The deadlines for revision of complaints by MECs and the CEC are extended from 24 to 48 hours. Although this is a positive development, the deadlines may benefit from further reconsideration and diversification in order to ensure an effective legal remedy, reflecting the nature of different categories of complaints and general electoral timeline. For example, election day's complaints on violations or irregularities affecting the realization of the right to vote would require immediate review, while allegations requiring verification of facts would benefit from extended deadlines in line with international standards and ODIHR recommendations.<sup>60</sup> **It is recommended that both the time limits for lodging complaints**

<sup>57</sup> This provision addresses priority recommendation no 6 in the 2018 ODIHR Final Report.

<sup>58</sup> Paragraph II.3.3.3.e. of the [Code of Good Practice in Electoral Matters](#) states that "[t]he appeal body must have authority to annul elections where irregularities may have affected the outcome. It must be possible to annul the entire election or merely the results for one constituency or one polling station". Paragraph II.3.3.3.f recommends direct legal standing in challenging election results: "All candidates and all voters ... must be entitled to appeal. A reasonable quorum may be imposed for appeals by voters on the results of elections". Item II.3.3 ; paragraph 92 of [the Explanatory Report to the Code of Good Practice in Electoral Matters](#) states that "...individual citizens may challenge [election results] on the grounds of irregularities in the voting procedures".

<sup>59</sup> Paragraph 49 of the Venice Commission Report on the Cancellation of Election Results ([CDL-AD\(2009\)054](#)) states that "[t]he answer to the question on who has the right to appeal the electoral results before judicial bodies and request cancellation of election results shows how open the way to the court is. The right to vote and the right to be elected are guaranteed by the possibility to apply to the competent court. In case the elections are carried out unlawfully the individual constitutional right to vote or to be elected is violated. Such right should be protected by individual complaint, though it might not always lead to the cancellation of election results. The cancellation of election results is not necessary if the violations of electoral law are at small scale and do not influence the electoral results (the list of members of the legislative body)."

<sup>60</sup> Paragraph 5.10 of the [OSCE Copenhagen Document](#) provides that "everyone will have an effective means of redress against administrative decisions, so as to guarantee respect for fundamental rights and ensure legal integrity." While the [Code of good practice in electoral matters](#) provides for three to five days at first instance (II.3.3.g), Paragraph 95 of its Explanatory Report states that "[t]ime limits must, however, be long enough to make an appeal possible, to guarantee the exercise of rights of defence and a reflected decision." See also Article 2.1 of the [ICCPR](#), paragraph 18.2 of the [1991 OSCE Moscow Document](#), and the CoE [Rec\(2004\)20](#) on judicial review of administrative acts. See recommendation no 17 of [the 2016 ODIHR EOM Final Report](#) and priority recommendation no 6 of the [2013 ODIHR LEOM Final Report](#). See also [OSCE ODIHR Handbook for the Observation of Election Dispute Resolution](#).

**– and later on for lodging appeals, if required – and the time limits for adjudicating complaints and appeals be clarified in the law.**

83. Article 137 of the draft law substitutes the principle of positive silence with regard to complaints that are not acted on by the relevant election body as provided by Article 109 of the current law and obliges the CEC to review complaints unresolved by MECs.<sup>61</sup> However, the draft law is silent about how the CEC triggers such review under the rule of Article 137, which needs to be addressed to ensure legal certainty and efficiency of the proposed legal remedy. Furthermore, while the right to object against inactions of polling boards and MECs is prescribed in Article 136, the draft law does not stipulate the consequences of the failure of the CEC to review complaints, which needs to be amended.<sup>62</sup> Consideration could also be given to how the 72-hour deadline in Article 135 of the draft law for lodging complaints against decisions and actions is to be calculated for inaction. In choosing the legal avenues, it should be ensured that the principle of expeditious procedures stipulated in the draft law for election dispute resolution is respected and no additional administrative burden imposed on the applicants in pursuit of restoration of their rights. In conformity with the Code of good practice in electoral matters, “[t]he procedure [for lodging as well as for adjudicating electoral disputes] must be simple and devoid of formalism, in particular concerning the admissibility of appeals.”<sup>63</sup> **The provisions of the draft law dealing with complaints that are not acted on would benefit from review to address these shortcomings, i.e. by ensuring election dispute resolution mechanisms devoid of formalism.**

84. Previous ODIHR and PACE EOM reports stated that election commissions did not always ensure the transparency of the election dispute resolution process, as decisions on complaints, in particular at MECs’ level, were not made public in a consistent or timely manner, and the complaints registers were not maintained. The specific mechanisms to ensure the transparency of election dispute resolution systems among election commissions should be guaranteed by the working methods of the election administrations, such as sessions open to public, the duty to publish sessions’ protocols on the web or streaming of the sessions. Therefore, in order to address long-standing issues and respond to the expectation of transparency of election dispute resolution procedures, **it is recommended to prescribe in the law rules aimed to ensure transparency and publicity of election commissions’ decisions on election dispute resolution, in particular by the publication by all election commissions of such decisions.**<sup>64</sup>

85. The consistency of the section dedicated to penalties and sanctions in the draft law is improved as it regulates only one category of criminal offences (misdemeanours), while the recently amended Criminal Code supplements the normative framework with sanctions for felonies, as opposed to the law currently in force that also sanctions several serious election-related crimes.<sup>65</sup> However, the draft law lacks clarity in defining the *corpus delicti* of the offences, affecting the qualification of the acts and failing to establish conditions for consistent and uniform determination of sanctions. Positively, penal provisions in the draft

<sup>61</sup> Previously, the activities of the SEC triggered the application of the rule under paragraph 3 Article 109 leading to automatic adoption of complaints (see [2018 ODIHR EOM Final Report](#)); and in case the capacity of the CEC is not enforced, the new provision may lead to a backlog of complaints.

<sup>62</sup> Paragraph 5.10 of the [1990 OSCE Copenhagen Document](#) provides that “everyone will have an effective means of redress against administrative decisions, so as to guarantee respect for fundamental rights and ensure legal integrity.” Article 2(3) of the [ICCPR](#) guarantees the right to effective legal remedies against decisions of persons acting in an official capacity. See also Rule of Law checklist ([CDL-AD\(2016\)007](#)), II.E.2.a.

<sup>63</sup> [Code of Good Practice in Electoral Matters](#), Guideline II. 3.3 b.

<sup>64</sup> The [Compilation of Venice Commission Opinions and Reports Concerning Election Dispute Resolution](#) cites that “the complaints and appeals system should be transparent, with the publication of complaints, responses, and decisions. Transparency provides assurance to complainants and voters that electoral malfeasance has been corrected as well as serving as a potential deterrence to future misconduct” (citing paragraph 100 of the CDL-AD(2013)016). Paragraph 121 of the Venice Commission Report on Figure Based Management of Possible Election Fraud ([CDL-AD\(2010\)043](#)) states that “Each act of the election administration should be formally published, broadly available for information to election stakeholders and appealable in a court of law. Publicity can be ensured through the public media and by immediate posting on the Internet.”

<sup>65</sup> The Criminal Code was last amended in December 2019 to outlaw some campaign finance violations.

law cover a wider range of electoral violations than the current law.<sup>66</sup> However, legal gaps remain with regard to the consequences of violations of certain provisions of the draft law, including media campaign rules and campaigning by public officials. **The penal provisions of the draft need to be further developed to ensure legal certainty and would benefit from revision.**

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<sup>66</sup> For example, the draft foresees penalties for holding voters accountable for identifying or keeping records of voters at polling stations and illegal use of electronic communication devices at polling stations (paragraphs 1,3, 6, 7 of Article 151); it establishes the responsibility of election administration for failing to inform the media about sessions, to allow access to polling stations for persons with disabilities, and to ensure the security of election materials (paragraphs 1-3 of Article 152).