

**MARCH 2023**

What are the implications for the EU if elections in some of its member states are increasingly unfree or unfair? How does this relate to the EU's existing competences? How can the EU improve democratic conditionality, i.e., ensure adherence to the EU law principle of free and fair elections?

According to international observers of the Council of Europe and the OSCE Office for Democratic Institutions and Human Rights (ODIHR), manipulation of elections through media capture happens in a growing number of EU Member States, including Hungary, Poland, Malta, Romania, Greece, Slovenia, Cyprus, and Bulgaria. This negatively impacts the functioning of the EU and questions the democratic foundations of the Union as set forth in Articles 2 and 10 TEU.

Although the EU has a longstanding tradition of sending election observation missions to third countries, its involvement with and monitoring of elections within EU Member States is highly underdeveloped. European Parliament elections have not been internationally observed since 2009. Moreover, neither the European Parliament nor the European Commission routinely evaluate the fairness of national parliamentary or presidential elections, despite the outcome of such elections having serious implications for the functioning of the EU.

All of this does not originate in a lack of tools. Overall, the dense European legal and institutional structure, with important roles for both the Council of Europe and the OSCE/ODIHR, that governs the electoral process in EU Member States functions well. A key weakness in this international structure, however, concerns the underdeveloped and voluntary character of compliance mechanisms.

The EU is well situated to improve the overall effectiveness of the existing mechanisms. Most crucial is the embedding of democratic conditionality in the EU's rule of law framework. This implies that the EU should build on, and attach consequences to, the findings and recommendations on the electoral process made by OSCE/ODIHR and the various bodies of the Council of Europe (Parliamentary Assembly, Venice Commission, Congress of Local and Regional Authorities).

Of specific concern for the EU is the lack of member state-specific observation missions to both local elections and elections to European Parliament, as the participation of EU citizens in these elections are guaranteed by the EU treaties. In view of the upcoming elections for European Parliament in 2024, the EU should make permanent and transparent arrangements for independent election observation missions to these elections, including a robust system of review and follow up.

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## Recommendations for the EU

1. The EU should resume the practice whereby all EU member states invite OSCE/ODIHR to observe elections to European Parliament. ODIHR reports are based on a far more comprehensive and better methodology and more transparent than the Commission's evaluation reports. An obligation for all Member States to invite OSCE/ODIHR to observe elections for European Parliament should be included in the [Electoral Act of 1976](#). Until this amendment enters into force, the [Council of Ministers or the European Council](#) should coordinate the practice of sending out invitations, starting with the European Parliament elections planned for May 2024.
2. Pursuant to [Article 12 of the Electoral Act of 1976](#), European Parliament should refuse the credentials of the national delegation of parliamentarians from a Member State that was elected under unfree or unfair election conditions, as established in the final report of the mission observing the election in the Member State.
3. Any refusal of a Member State to invite observation missions for national parliamentary or presidential elections should have consequences at EU level. A refusal to cooperate in good faith with international observers is to be considered a clear risk of a serious breach of Union values in the meaning of [Art. 7, paragraph 2 TEU](#).

4. The European Commission and/or European Parliament should systematically recommend OSCE/ODIHR to carry out a full-scale election observation mission to member states in which the freedom of elections is reported to be under threat or which are subjected to the procedure of Art. 7 TEU, as 62 Members of European Parliament did for the 2022 parliamentary election in Hungary. This recommendation also applies to the upcoming European Parliament election of May 2024.

5. In respect of EU member states that are subjected to full-scale election observation missions and negative assessments by OSCE/ODIHR, the European Commission should ask the member state concerned to additionally invite OSCE/ODIHR and/or the Congress of Local and Regional Authorities to observe any upcoming local elections. A refusal to do so should be followed up in the rule of law-reporting.

6. The European Commission should systematically review and use, where appropriate, the findings of election observation missions to member states in its rule of law-related activities, in particular in the country chapters of its annual Rule of Law Report.

7. In its Rule of Law Reports, the European Commission should specifically address concerns about unlevel political playing fields in member states during the electoral process as a result of media bias and media capture, and the financing of campaigns and political parties.

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8. Any finding of election observation missions that national elections in a member state were overall unfair or unfree is to be regarded as a clear risk of a serious breach by a Member State of the values of the Union in the meaning of [Art. 7 TEU](#) as well as a breach of the principles of the rule of law in the meaning of the [Conditionality Regulation](#) (2020/2092) and should result in the activation of both mechanisms.

9. [Regulation 2020/2092](#) should be amended after its evaluation to specify that unfair or unfree elections are a threat to the sound financial management of the EU budget.

10. In view of the limited budget and capacity of OSCE/ODIHR, the EU should fully [compensate](#) the funding of election observation missions carried out by OSCE/ODIHR, especially those that feed into the rule of law-activities of the EU and those that are provided for in the Treaties. Such funding can be part of permanent working arrangements with OSCE/ODIHR that should also involve observation missions to elections for European Parliament.

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## Meijers Committee policy brief on free and fair elections in the EU

### 1. Introduction

The establishment of democracies throughout Europe is a key triumph of the European post-war supranational architecture. No less than six supranational bodies have been formally mandated to exercise supervision over electoral processes in European countries: the OSCE Office for Democratic Institutions and Human Rights (ODIHR), the Venice Commission, the Congress of Local and Regional Authorities, the Parliamentary Assembly of the Council of Europe (PACE), as well as the NATO Parliamentary Assembly, and the European Union. Supranational expertise, oversight and cooperation was highly instrumental in the formation of Western European democracies after the Second World War, including in Greece, Portugal, and Spain and for the post-Cold War transitions to democracy in Eastern Europe.

This supranational framework has however been unable to prevent democratic backsliding in several EU Member States. While well administered and competitive, Hungary's 2018 and 2022 parliamentary elections were characterized by international observers of the OSCE as suffering from a "a pervasive overlap between the ruling coalition and the government", creating an "unlevel playing field", and "falling short of international standards and obligations".<sup>1</sup> Likewise, the campaign for the 2022 Polish presidential elections was described by international observers as taking place "in an evidently polarized and biased media landscape, where the public broadcaster failed to ensure balanced and impartial coverage, and rather served as campaign tool for the incumbent."<sup>2</sup> Similar observations were made in respect of the 2019 Polish parliamentary elections.<sup>3</sup> Manipulation of elections through media capture is also reported to occur in Malta,<sup>4</sup> Romania,<sup>5</sup> Greece,<sup>6</sup> Slovenia,<sup>7</sup> Cyprus<sup>8</sup> and Bulgaria<sup>9</sup>. Although election observation missions routinely conclude that voting conditions on election day within EU Member States are overall free, the wider electoral process in multiple EU member states has become unfair. A key, well-documented, concern is the manipulation of electoral campaigns by incumbent governing parties through domination of the public and private media landscape.

This policy paper makes recommendations for improving European election monitoring and governance. Despite the large number of institutions involved in standard setting and election observation, not all elections in the EU are routinely or effectively monitored. Moreover, supranational oversight is based on voluntariness and lacks effective compliance mechanisms. Although both the European Court of Human Rights and the Court of Justice of the European Union play an important role in safeguarding the individual right to participate in free and fair elections, they

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<sup>1</sup> ODIHR Election Observation Mission [Final Report](#), Hungary, 3 April 2022; ODIHR Limited Election Observation Mission [Final Report](#), Hungary, 8 April 2018.

<sup>2</sup> ODIHR Special Election Assessment Mission [Final Report](#), Poland, 28 June and 12 July 2020.

<sup>3</sup> ODIHR Limited Election Observation Mission [Final Report](#), Poland, 13 October 2019.

<sup>4</sup> ODIHR Election Expert Team [Final Report](#), Malta, 26 March 2022.

<sup>5</sup> ODIHR Special Election Assessment Mission [Final Report](#), Romania, 6 December 2020.

<sup>6</sup> ODIHR Election Assessment Mission [Final Report](#), Greece, 7 July 2019.

<sup>7</sup> ODIHR Election Assessment Mission [Final Report](#), Slovenia, 24 April 2022.

<sup>8</sup> ODIHR Election Expert Team [Final Report](#), Cyprus, 30 May 2021.

<sup>9</sup> ODIHR Election Expert Team [Final Report](#), Czech Republic, 8-9 October 2021; ODIHR Limited Election Observation Mission [Final Report](#), Bulgaria, 4 April 2021.

are not well situated to address general trends of democratic backsliding, including governmental manipulations of the electoral process.

Our key recommendation is for the European Union to give free and fair elections a far more prominent place in its Rule of Law framework. Although the EU has a longstanding tradition of sending election observation missions to third countries, its involvement with and monitoring of elections within EU Member States is highly underdeveloped. The elections for European Parliament have since 2009 not been internationally observed. Moreover, neither the European Parliament nor the European Commission routinely evaluate the fairness of national parliamentary or presidential elections, despite the outcome of such elections having a major impact on the functioning of the European Union.

Below, our Committee first explains why it is important for the EU to take up a more prominent role in observing and evaluating elections in the Member States. It next describes the mandate and activities of the key international organisations involved in setting election standards and election observation: the Council of Europe, the Organization for Security and Co-operation in Europe (OSCE/ODIHR) and the EU. It concludes by listing several key gaps in election oversight and by making recommendations on how the EU can strengthen supranational governance in this area. This should occur in closer cooperation with, and without duplicating the work of, the Council of Europe and the OSCE.

## **2. Why the EU should take free and fair elections seriously**

It is a statement of the obvious that all elections that are organised within the domain of EU law and policy are to be free and fair. However, in this respect one may be tempted to focus exclusively on elections for the European Parliament (EP) and municipal elections as those elections are specifically mentioned in the treaties.<sup>10</sup>

Members of the European Parliament (MEPs) are directly elected by EU citizens (Article 10(2), first paragraph TEU). Even if the treaties contain a task for the EP and Council to establish rules for EP elections (Article 223 TFEU), legally the organisation of EP elections is based on the Electoral Act.<sup>11</sup> EP elections are currently still 27 simultaneously organised national elections running in parallel. Mobile EU citizens are also entitled to vote and stand as a candidate in municipal elections in the Member State of their residence (Article 20(2)(b) TFEU and in article 40 Charter). In Member States where municipal elections lead to the direct election of local officials such as mayors, these elections also affect the composition a part of the Committee of the Regions, an advisory body in the EU setting (Article 300(1) and 300(3) TFEU). As per the EU's founding treaties both European Parliament and municipal elections are directly covered by Union law.

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<sup>10</sup> Article 20(2)(b) TFEU, Article 22(1) TFEU and Articles 39 and 40 EU Charter of Fundamental Rights (EUCFR).

<sup>11</sup> Act concerning the election of the representatives of the Assembly by direct universal suffrage (Electoral Act). *OJ L 278, 8.10.1976, p. 5–11.*

Yet, when analysing how elections affect EU law and policymaking, and to what extent EU law requires a concern with ensuring they are free and fair, it is important to take a more comprehensive perspective. In fact, and perhaps surprisingly, a close analysis of the EU treaties makes it quite evident that (the results of) many more national elections have a direct bearing on the composition and functioning of EU institutions and bodies.

National parliamentary elections affect the composition of the Council of Ministers, the EU's co-legislator (Article 14(1) TEU) where national governments are represented (Article 10(2), second paragraph TEU). National parliamentary or presidential elections also predetermine the composition of the European Council (Article 10(2), second paragraph TEU), where heads of state and government establish the general political directions and priorities of the Union (Article 15(1) and 15(2) TEU). In a more indirect way, national parliamentary elections decide in what way national parliaments input into the EU decision-making process (Article 12 TEU). They also affect which persons are nominated by national governments to serve to lead the European Commission (Article 17 TEU) or as Commissioners, even if the directly elected European Parliament will need to approve such nominations. Moreover, nationally held regional or provincial elections affect who can be represented as regional politicians in the Committee of the Regions (Article 300(1) and 300(3) TFEU).

Clearly, the link between national elections and EU law and policymaking needs to be conceived of very widely. This wider perspective also explains why the EU has an interest in observing and evaluating every election held and organised in Member States, i.e., both those directly covered by EU law and those of which the outcome have a more indirect bearing on EU policy-making. This raises the question of quite which standards of free and fair elections exist, and how and to what extent EU law and policymaking is bound by them. It also raises the question as to what EU institutions should do to ensure that all these nationally organised elections comply with standards of free and fair elections. That is the focus of this paper.

### **3. Existing standards and obligations on free and fair elections**

#### **i. Council of Europe**

The preamble of the 1949 Council of Europe Statute states legal principles of 'individual freedom, political liberty and the rule of law', which 'form the basis of all genuine democracy'. The right to free elections is enshrined in Art 3 of the First Protocol to the European Convention on Human Rights (ECHR):

"The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature."

This right also constitutes a general principle of EU law in the meaning of Art. 6(3) TEU. The Council of Europe has also established soft law instruments as reference documents. These must be respected by the EU Member States, which are all members of the Council of Europe. The 2002 Code of good

practice in electoral matters is the most important one<sup>12</sup> and defines the fundamental standards of the European electoral heritage (i.e., universal, equal, free, secret and direct suffrage) and the framework conditions necessary for organising elections.<sup>13</sup> Equal suffrage, for instance, implies numerical vote equality, equality in terms of electoral strength and equality of chances. The latter concerns the public funding of parties and campaigns, as well as coverage by the (publicly owned) media. Since elections often fall short in providing impartial information about the election campaign and candidates, it is imperative to ensure that parties and candidates are accorded balanced amounts of airtime or advertising space.<sup>14</sup> The use of (mass) media also relates to the concept of free suffrage to the extent that equal media coverage facilitates the freedom of voters to form opinions.<sup>15</sup>

ii. Organization for Security and Co-operation in Europe

The OSCE has not adopted any legal norms safeguarding free and fair elections. It established soft law standards to which is frequently referred,<sup>16</sup> such as documents with basic electoral standards and Elections Monitoring Handbooks and Guidelines. The OSCE/ODIHR recently published a handbook and guidelines on election campaigns.<sup>17</sup> It also regularly develops election observation handbooks which set out ODIHR's election observation methodology and serve as practical guides for members of election observation missions.<sup>18</sup> The most prominent document, which contains basic electoral standards, is the 1990 CSCE/OSCE Copenhagen Document.<sup>19</sup> It stresses amongst others the importance of free and fair elections, similar to the Council of Europe fundamental standards of the European electoral heritage.<sup>20</sup> The document stipulates that participating States can invite foreign and domestic observers to improve the electoral process.<sup>21</sup>

iii. European Union

Articles 20 and 22 of the Treaty on the Functioning of the European Union (TFEU) provide for Union citizenship and the corresponding passive and active voting right in municipal and EP elections in the Member State of residence. These rights are also laid down in Articles 39 and 40 of the EU Charter of Fundamental Rights (EUCFR/Charter).

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<sup>12</sup> It is often referred to in Venice Commission opinions, European Court of Human Rights judgements, and reports of other international organisations.

<sup>13</sup> CDL-AD(2002)023rev2-cor-e. Code of Good Practice in Electoral Matters: [Guidelines and Explanatory Report](#), Venice Commission (5-6 July and 18-19 October 2002).

<sup>14</sup> CDL-STD(2003)034-e. Code of Good Practice in Electoral Matters - [Guidelines and Explanatory Report - Science and technique of democracy](#), No. 34 (2003).

<sup>15</sup> Ibid.

<sup>16</sup> Often used as source of reference, is the [Document of the Copenhagen Meeting](#) of the Conference on the Human Dimension of the CSCE, OSCE, 29 June 1990 (see paras 5-8).

<sup>17</sup> [Handbook for Observation](#) of Election Campaigns and Political Environments, OSCE/ODIHR, 2021; [Guidelines for Observation](#) of Election Campaigns on Social Networks, OSCE/ODIHR, 2021.

<sup>18</sup> [Election Observation Handbook](#) Sixth edition, OSCE/ODIHR, 2010.

<sup>19</sup> [Document of the Copenhagen Meeting](#) of the Conference on the Human Dimension of the CSCE, OSCE, 29 June 1990.

<sup>20</sup> Ibid., see paras 5-7.

<sup>21</sup> Ibid., see para 8.

The Electoral Act (initially adopted in 1976, but several times amended), sets out rules for the election of the Members of the Parliament (MEPs) by direct universal suffrage. Article 14 of the Treaty on the European Union and Articles 223 to 234 TFEU provide the rules on the role, competences, composition, mandate, and electoral procedure for the EP.

Since the 1960s, the EP has been trying to harmonize electoral law given the lack of a uniform procedure for election of the EP. The ambition to adopt a uniform procedure is given in Article 223 TFEU. However, until today, only partial harmonization has taken place and national election systems deviate considerably.

The Council adopted Directives 93/109/EC (amended in 2012) and 94/80/EC (annex amended lastly in 2013). The prior sets down the detailed rules for the exercise of electoral rights in EP elections in the Member States of residence, whereas the latter instrument deals with similar rules in municipal elections. In 2020, the European Commission has announced to update these directives and improve the electoral rights of mobile EU citizens.<sup>22</sup> The Commission also proposed legislation on paid political advertising and funding of European political parties to facilitate transparency and oversight.

The Court of Justice EU (CJEU) rendered several judgments on elections. These cases predominantly concerned the electoral rights of prisoners or suspects, the prohibition of discrimination, as well as voting on distance – based on the aforementioned Treaty and Charter provisions and directives. The Court has not touched on other, arguably more sensitive electoral issues, such as manipulation of election campaigns or media capture, which disturb the electoral level playing field.

In its decisions on voting rights in European elections, the Court initially decided that it is the competence of the Member State to determine the franchise – i.e., to define the persons entitled to vote – within the boundaries of EU law.<sup>23</sup> Yet, in *Delvigne*, the Court decided that the case fell within the scope of art 39(2) of the Charter and, hence, under its jurisdiction. Whereas the Court did not find a violation of Union law, it has been argued that the Court found in the Charter an enforceable right for Union citizens to participate in EP elections.<sup>24</sup>

#### 4. Compliance mechanisms

##### i. Council of Europe

###### *Venice Commission*

The European Commission for Democracy through Law (Venice Commission), Council of Europe's constitutional advisor on electoral legislation, adopts thematic reports on general electoral matters,

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<sup>22</sup> European Commission [EU Citizenship Report 2020](#).

<sup>23</sup> See Case [C-145/04](#), *Spain v. United Kingdom*; Case [C-300/04](#) *Eman and Sevinger*.

<sup>24</sup> Cf. Van Eijken, H. and Van Rossem, J. W. (2016). Prisoner Disenfranchisement and the Right to Vote in Elections to the European Parliament: Universal Suffrage Key to Unlocking Political Citizenship? *European Constitutional Law Review* 12 (1), pp. 114–132; Platon, S. (2020). "Chapter 14 The Right to Participate in the European Elections and the Vertical Division of Competences in the European Union". In *European Citizenship under Stress*. Leiden, The Netherlands: Brill, Nijhoff.

in which it assesses the situation in EU Member States relating to the theme being discussed. The reports include themes like restrictions in electoral systems on the right to vote and from access to parliament;<sup>25</sup> terms limits for Presidents, MEPs, and representatives;<sup>26</sup> method of nomination of candidates within political parties;<sup>27</sup> and the statute of election observers.<sup>28</sup>

The Venice Commission has also regularly adopted opinions regarding legislation on elections, referendums, and political parties.<sup>29</sup> Most opinions are prepared in collaboration with the OSCE/ODIHR. The Venice Commission emphasizes in these opinions that “successful electoral reform” is based on three elements: “1) clear and comprehensive legislation that meets international standards and addresses prior recommendations; 2) adoption of legislation by broad consensus after extensive public consultations with all relevant stakeholders; 3) political commitment to fully implement the electoral legislation in good faith.”

The Venice Commission has rendered some opinions on *general electoral matters* in EU Member States. It raised, for instance, concerns about the 2020 amendments to electoral legislation in Hungary. It considered the act in question, which was adopted during a state of emergency without public consultation, to be in violation with international and European law and standards.<sup>30</sup> The Venice Commission also adopted opinions with regards to amendments to the Bulgarian electoral code,<sup>31</sup> the Draft Act to regulate the formation, the inner structures, functioning and financing of political parties and their participation in elections of Malta,<sup>32</sup> as well as the Croatian draft laws on voters lists<sup>33</sup> and the state election commission.<sup>34</sup>

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<sup>25</sup> CDL-AD(2005)011-e. [Report](#) on the abolition of restrictions on the right to vote in general elections, Venice Commission (3-4 December 2004); CDL-AD(2008)037-e. [Comparative Report](#) on thresholds and other features of electoral systems which bar parties from access to Parliament, Council for Democratic Elections (18 October 2008), Venice Commission (12-13 December 2008); CDL-AD(2010)007-e. [Report](#) on Thresholds and other features of electoral systems which bar parties from access to Parliament (II), Council for Democratic Elections (11 March 2010), Venice Commission (12-13 March 2010).

<sup>26</sup> CDL-AD(2018)010-e. [Report](#) on Term Limits - Part I - Presidents, Venice Commission (16-17 March 2018); CDL-AD(2019)007-e. [Report](#) on Term Limits; Part II, Members of Parliament, and Part III, Representatives elected at Sub National and local level and executive officials elected at sub national and local level, Venice Commission (15-16 March 2019).

<sup>27</sup> CDL-AD(2015)020-e. [Report](#) on the method of nomination of candidates within political parties, Council for Democratic Elections (18 June 2015), Venice Commission (19-20 June 2015).

<sup>28</sup> CDL-AD(2009)059-e. [Guidelines](#) on an internationally recognised status of election observers, Council for Democratic Elections (10 December 2009), Venice Commission (11-12 December 2009).

<sup>29</sup> See opinions per country via [this link](#).

<sup>30</sup> CDL-AD(2021)039 (18 October 2021). [Hungary - Joint Opinion Venice Commission and OSCE/ODIHR on the 2020 amendments to electoral legislation.](#)

<sup>31</sup> CDL-AD(2017)016 (19 June 2017). [Bulgaria - Joint opinion on amendments to the electoral code](#); see also CDL-AD(2014)001 (24 maart 2014). [Joint Opinion on the draft Election Code of Bulgaria.](#)

<sup>32</sup> CDL-AD(2014)035 (14 October 2014). [Joint Opinion on the Draft Act to regulate the formation, the inner structures, functioning and financing of political parties and their participation in elections of Malta.](#)

<sup>33</sup> CDL-AD(2007)030 (16 July 2007). [Joint Opinion on the Draft Law on Voters Lists of Croatia.](#)

<sup>34</sup> CDL-AD(2006)012 (23 March 2006). [Joint Opinion on the Draft Law on the State Election Commission of the Republic of Croatia.](#)

The Venice Commission of the Council of Europe has also monitored *local and regional elections*. Besides its general studies and reports on electoral matters, it has adopted several country-specific opinions regarding legislation of EU Member States on local and regional elections.<sup>35</sup>

*Parliamentary elections* have also been monitored by the Venice Commission of the Council of Europe. It adopted reports on general electoral matters, as well as several country-specific opinions regarding legislation of EU Member States on parliamentary elections. It scrutinized the Act on the Elections of Members of Parliament of Hungary in 2012 in relation to the administration of elections.<sup>36</sup> The Venice Commission furthermore rendered an opinion on the constitutional amendments concerning legislative elections in Slovenia.<sup>37</sup>

#### *PACE*

The Parliamentary Assembly (PACE) observes parliamentary and presidential elections and reports on these observation missions and issues related to elections. Any Member State of the Council of Europe can be observed by the PACE on the latter's own initiative.<sup>38</sup> The PACE refers to this as its "inalienable right." It makes use of this right in respect of candidate member states and member states that under the monitoring procedure.<sup>39</sup> Upon invitation and in exceptional circumstances, elections in non-member states may also be observed.<sup>40</sup> The election observation reports deal with topics of election administration, voters lists, registration of parties and coalitions; election campaign environment and financing; media landscape and coverage; participation of women; participation of minorities; complaints and appeals; election observers; election day; results and post-election environment.<sup>41</sup> After the reports have been issued, commissions of the PACE provide for the normative work in form of resolutions and recommendations on different issues identified in the election observation reports. The PACE recently adopted a resolution in which it stressed the importance of media freedom and pluralism in democratic elections.<sup>42</sup> The Monitoring Committee of the PACE follows up on problems identified in observation reports in the framework of the monitoring procedures.<sup>43</sup>

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<sup>35</sup> It has rendered opinions on the conformity with international law and standards of, respectively, the [Provincial Electoral Law of the Autonomous Province of Trento \(Italy\)](#) (CDL-AD(2015)009, 23 June 2015), [the Law for the Election of Local Public Administration Authorities in Romania](#) (CDL-AD(2004)040, 4 January 2005), [the Law on the Election of Members of the Representative Bodies of Local and Regional Self-Government Units of Croatia](#) (CDL-AD(2002)003, 12 March 2003), and the [Act on Elections to Bodies of Self-Government Regions of Slovakia](#) (CDL-INF(2001)024, 17 December 2001).

<sup>36</sup> CDL-AD(2012)012 (18 June 2012). [Joint Opinion on the Act on the Elections of Members of Parliament of Hungary](#).

<sup>37</sup> CDL-INF(2000)013 (16 October 2000). [Opinion on the constitutional amendments concerning legislative elections in the Republic of Slovenia](#); see also CDL(2000)077 (29 November 2000). [Opinion of the rapporteurs on the Constitutional Amendments concerning Legislative Elections in Slovenia](#).

<sup>38</sup> Any state can be observed if it has applied for Council of Europe membership, it has requested special status/democracy status with the PACE, or it is subject to the monitoring procedure/post-monitoring dialogue. See AS/Elect (2019) 5 (20 August 2019). [Guidelines for the observation of elections by the Parliamentary Assembly](#).

<sup>39</sup> Ibid.

<sup>40</sup> Ibid.

<sup>41</sup> See e.g., the latest [election observation report](#) on the early parliamentary elections in Bulgaria (2 October 2022).

<sup>42</sup> PACE [Resolution 2254 \(2019\)](#).

<sup>43</sup> See this [work overview](#) of the Monitoring Committee. AS/Mon/Inf (2023) 01, 13 January 2022.

*Congress of Local and Regional Authorities*

Whereas the PACE deals with parliamentary and presidential elections, the Congress of Local and Regional Authorities (Congress) observes (upon invitation) local and regional elections in Council of Europe member states and beyond. It then renders election observation reports, which include recommendations, dealing with the general political situation (e.g., state of human rights and atmosphere during election campaign), and procedures and facts on election day. More generally, the Congress reports on “transversal recurring issues”, such as independence of candidates, elections in crisis situations, and voting as a means of integration.<sup>44</sup>

*ECtHR*

The case law of the former European Commission of Human Rights and the current European Court of Human Rights (ECtHR) has contributed to the development of the scope and interpretation of the right to free elections. Most case law is about the franchise, i.e., those entitled to vote.<sup>45</sup> There is also extensive law on the eligibility to stand in elections, voting irregularities and electoral laws.<sup>46</sup> There are comparatively fewer cases on the overall fairness of elections, including the role played by media during campaigns. In one such case, about media bias in the run-up to the Russian 2003 parliamentary election, the ECtHR considered the elections to be sufficiently fair,<sup>47</sup> despite OSCE-ODIHR having concluded that the favouritism towards United Russia by state media was in breach of the legal obligation to provide equal treatment to electoral participants.<sup>48</sup>

ii. OSCE

The origins of the OSCE trace back to the 1970s, when the Conference on Security and Co-operation in Europe (CSCE) was created, and the Helsinki Final Act was signed to facilitate negotiations and dialogue between the West and East. After the Cold War, it acquired permanent institutions and operational capabilities, and the name change to OSCE. Within the OSCE, the Office for Democratic Institutions and Human Rights (ODIHR) observes elections to assess the extent to which electoral processes of the participating 57 States respect fundamental freedoms and are characterized by equality, universality, political pluralism, confidence, transparency, and accountability.<sup>49</sup> All EU member states are also a member of the OSCE. Within the EU Member States observation missions deployed by ODIHR, the focus has been primarily on direct *national elections* (such as (early) parliamentary elections and presidential elections in some states). Only occasionally, it has observed *local, federal, or regional elections and referendums*.<sup>50</sup> After a team of ODIHR election experts got acquainted with the *EP election* process in 2004, the OSCE/ODIHR deployed a mission to observe the EP elections for the first – and only – time in 2009. It was not a full-scale observation mission, involving observations in 15 EU Member States, as that would have exceeded ODIHR’s capacity and resources.<sup>51</sup>

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<sup>44</sup> Note the various “transversal reports” on local and regional elections [here](#).

<sup>45</sup> CoE, most recent [Guide](#) on Article 3 Prot. 1 ECtHR.

<sup>46</sup> Most recent factsheets on [right to vote](#) and [prisoners’ right to vote](#).

<sup>47</sup> ECtHR judgment [Communist Party of Russia e.a. v. Russia](#), 29400/05, 19 June 2012.

<sup>48</sup> ODIHR Election Observation Mission [Final Report](#), Russia, 7 December 2003.

<sup>49</sup> ODIHR’s mandate to observe elections derives from Paragraph 8 of the 1990 [Document of the Copenhagen Meeting](#) and was confirmed by subsequent instruments; see generally, [OSCE/ODIHR website](#).

<sup>50</sup> See e.g., ODIHR election reports of [Belgium](#) and [the Netherlands](#).

<sup>51</sup> See ODIHR Expert [Group Report](#), Elections to the European Parliament, 11 – 30 May 2009.

ODIHR employs a particular election observation methodology, distinguishing several types of observation procedures. A needs assessment mission (NAM) is rendered a couple months before the election to analyse the pre-election environment. The NAM can determine that the election stakeholders have little trust in the election administration, the long-term process and election-day proceedings. In that case, a fully-fledged and comprehensive election observation mission (EOM) could be recommended. When there are concerns regarding the long-term process, but there is enough confidence in election-day activities, a limited observation mission (LEOM) might be more accurate. Another form of observation is the election assessment mission (EAM), in which the observers appraise specific issues that have been identified by the NAMs. Finally, when unique circumstances demand a different methodology, e.g., regarding EP elections or in some instances during the COVID-19 pandemic, ODIHR could send an election expert team (EET) or a Special Election Assessment Mission (SEAM) to observe the electoral environment.

Viewing the missions to the EU MSs, a broad variety of missions has been initiated. Most of the missions regards NAMs. Sometimes EAM and EET were used as method. On occasional basis, EOMs (Slovakia 1; Croatia 5; Bulgaria 5; Romania 2; Czech rep 2; Hungary 2; Latvia 1) and LEOMs (Croatia 3; Bulgaria 5; Romania 1; Hungary 2; Latvia 3) were deployed.

Apart from the special missions (such as EET and SEAM), the missions generally cover the same topics: political context; legal framework and election system; election administration; registration of candidates; voter registration; campaign environment; campaign financing; media; participation of minorities; domestic and international observers; complaints and appeals; election day; post-election election disputes.

When it comes to the topic of media, for instance, the missions investigate the legal framework for freedom of expression and media itself. The missions also aim to understand the media environment, looking at the role of public broadcasters and coverage of the election campaign (e.g., the allocation of free airtime) to ensure pluralism and objectivity.

In these missions, the ODIHR assesses compliance of the election process with OSCE commitments and other international standards for democratic elections, as well as with domestic legislation. The recommendations given in the reports are assessed in subsequent observation missions.<sup>52</sup>

### iii. European Union

The focus of the European Commission's supervisory activities is mainly on the implementation of Council Directives 93/109/EC (amended in 2012) and 94/80/EC (annex amended lastly in 2013) and the Electoral Act (initially adopted in 1976, but several times amended). It predominantly comes down to topics like electoral rights, voter registration<sup>53</sup> and other obstacles of mobile EU citizens, new voting methods and associated risks, and the fight against disinformation. The activity is primarily steered by citizens' complaints and the obligation to report periodically, for example, in the (pre-)EP election

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<sup>52</sup> See the [ODIHR database on electoral recommendations](#).

<sup>53</sup> [COM\(2018\) 44 final](#), pp. 5, 8.

reports<sup>54</sup> and the EU citizenship report ex art 25 TFEU.<sup>55</sup> These monitoring activities by the Commission in the field of *municipal elections*<sup>56</sup> and *European elections* are enshrined in the Treaties.<sup>57</sup>

To coordinate and exchange views on electoral matters with Member States, the Commission has created two groups: the *Expert group on electoral matters*<sup>58</sup> and the *European cooperation network on elections*.<sup>59</sup> The groups bring together representatives of Member States with competences in electoral matters and seek to address potential risks and identify solutions. This expertise can be used by the Commission when preparing implementing measures.

Whereas the *Expert group* has mainly touched on similar issues as the Commission in its supervisory activities, the *European cooperation network on elections* discussed a broader range of topics – for example also dealing with *national elections* in Member States. It included discussions on media regulation and the importance of media pluralism in free and fair elections.<sup>60</sup> Electoral observation has also been one of the discussed subjects, stressing the role and essential work of international organisations (including the Council of Europe), civil society (such as Election-watch.eu and Votewatch Europe), and formal and informal election networks. Additionally, citizens and other entities engage in the monitoring of political party financing. The meetings of the European cooperation network on elections also dealt with some administrative and registration issues.

## 5. Gaps and risks in election oversight

As a rule, observation missions of elections require an invitation of the state concerned and are, hence, voluntary. The voluntary character is to a degree unavoidable, as election observations can only function effectively if the state where the election takes place facilitates the mission and provides cooperation to the mission members. It is common practice among EU Member States to invite the OSCE/ODIHR for nation-wide elections (parliamentary and presidential). In 2021, Russia became the

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<sup>54</sup> [COM\(2014\) 196 final](#); [COM\(2015\) 206 final](#); [COM\(2020\) 252 final](#), the report was accompanied with a staff working document [SWD\(2020\) 113 final](#).

<sup>55</sup> The Commission reports periodically, in principle every four year, on certain aspects of participation in elections in its EU citizenship reports. Note [COM\(2010\) 602 final](#) and [COM\(2013\) 270 final](#); [COM\(2017\) 32 final](#); [COM\(2020\) 731 final](#).

<sup>56</sup> The European Commission has published three reports on the implementation of EU law in local and municipal elections and ways to promote electoral rights: [COM\(2002\) 260 final](#); [COM\(2012\) 99 final](#); [COM\(2018\) 44 final](#).

<sup>57</sup> Articles 20(2)(b) TFEU, 22(1) TFEU, 267 TFEU and Articles 39 and 40 EUCFR.

<sup>58</sup> European Commission, [Expert group on electoral matters](#) - Right to vote and to stand as a candidate in elections for the EP and in municipal elections (E00617).

<sup>59</sup> European Commission, [European cooperation network on elections](#).

<sup>60</sup> DG CNECT presented the latest developments regarding the proposal for the European Media Freedom Act. The European Regulators Group for Audio-visual Media Services (ERGA) – the advisory body on the Audiovisual Media Services Directive (AVMSD) – addressed the framework of media plurality and insights from their work. The so-called Rapid Alert System (RAS) was also presented by European External Action Service (EEAS). It enables all EU Member States and relevant EU Institutions to share information about disinformation campaigns and foreign interference in the information space.

first OSCE member to which the OSCE was unable to send an observation mission due to restrictions on the scope of the mission set by Russia.<sup>61</sup>

Only the Parliamentary Assembly of the Council of Europe can observe elections in Council of Europe Member States on its initiative. Moreover, it attaches consequences to a state's lack of cooperation or refusal to send an invitation. Such refusal to cooperate may give rise to a debate following the elections in question. It may also result in the freezing of the application procedure in respect of candidate countries, the withdrawal of special guest status or partner for democracy status or the challenging of the credentials of the national delegation concerned.<sup>62</sup> In so doing, PACE was the first institution to link membership of the Council of Europe to respect for the principles of free and fair elections (democratic conditionality).

The follow up of recommendations made by ODIHR election observation missions is also based on a willingness of states to cooperate. Monitoring of whether and how recommendations are followed up takes place during next observation missions. Findings of previous missions also inform the choice for either a comprehensive or limited observation mission.

Although parliamentary and presidential elections in all EU Member States are routinely observed by the OSCE, this is not the case for i) local and regional elections and ii) elections to European Parliament. The OSCE/ODIHR is not routinely invited by member states to observe regional or local elections. Such missions are quite rare. Neither does the Congress of Local and Regional Authorities structurally observe local elections. Since the entry into force of the European Charter of Local Self-Government, only 12 EU Member States have (sporadically) asked the Congress to observe local and/or regional elections.<sup>63</sup>

The OSCE/ODIHR deployed only in 2009 observation missions to EU member states for the elections to European Parliament. This was apparently coordinated in the Council of Ministers of the EU. All 27 member states formally invited ODIHR to observe the elections, resulting in the deployment of expert groups to 15 member states. The scale and nature of the electoral exercise required ODIHR to develop innovative activity beyond its ordinary capacity and methodology. The final report highlighted a range of risks shortcomings, including on political party and campaign financing, national and European electoral rules and the registration of Community voters, i.e. EU citizens who reside and vote and in another Member State.<sup>64</sup>

It has not been made public why EU member states stopped inviting ODIHR for observing elections to European Parliament since 2009. Instead of election observation, the European Commission evaluated the 2014 and 2019 elections by way of reports that were based on Commission questionnaires sent to Member States, exchanges with Member States in the European Cooperation Network on Elections

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<sup>61</sup> OSCE/ODIHR press release, '[No OSCE observers for Russian parliamentary elections following major limitations](#)', 4 August 2021.

<sup>62</sup> PACE [Guidelines for the observation of elections](#), par. 2. AS/Elect (2019)5, 20 August 2019.

<sup>63</sup> Bulgaria (1999, 2012), Croatia (1997, 2001), Czech Republic (1990), Denmark (2021), Finland (2008, 2017), Hungary (1990), Latvia (1994), the Netherlands (2014, 2018, 2022), Poland (1990, 2018), Romania (1992, 2004), Slovakia (1990, 2011), Slovenia (2018).

<sup>64</sup> ODIHR Expert [Group Report](#), Elections to the European Parliament, 11 – 30 May 2009.

and Eurobarometer and other surveys.<sup>65</sup> The methodology as well as the reports are far narrower in scope than ODIHR observation missions. The reports of the Commission do not name individual Member States (referring to them instead in terms of “dialogue with one member state” and “discussions with another Member State”). Moreover, the report did not look into most of the specific findings and recommendations made by ODIHR in 2009.

## 6. Recommendations for the EU

Overall, the dense European legal and institutional structure that governs the electoral process functions well. It has yielded an impressive body of standards on free and fair elections. These include clear norms against media bias and media capture by incumbent political parties. The system of election observations is crucial for the adherence to these standards as they can unveil in a swift and transparent manner, through a well-developed methodology, any shortcomings in the electoral process. The largest weakness in this compliance mechanism is the largely voluntary nature of both participation and follow up. Only the PACE can participate on its own initiative. The EU is well situated to improve the overall effectiveness of election oversight. Most crucial is the embedding of democratic conditionality in the EU’s rule of law framework, where the EU could draw inspiration from the PACE. This implies that the **EU should build on, and attach consequences to, the findings and recommendations on the electoral process** made by OSCE/ODIHR and the various bodies of the Council of Europe (PACE, Venice Commission, Congress).

Of specific concern for the EU is the lack of member state-specific observation missions to both local elections and elections to European Parliament as the participation of EU citizens in these elections are guaranteed by the EU treaties. In view of the upcoming elections for European Parliament in 2024, the **EU should make permanent and transparent arrangements for independent election observation missions to these elections, including a robust system of review and follow up.**

More specifically:

1. The EU should resume the practice whereby all EU member states invite OSCE/ODIHR to observe elections to European Parliament. ODIHR reports are based on a far more comprehensive and better methodology and more transparent than the Commission’s evaluation reports. An obligation for all Member States to invite OSCE/ODIHR to observe elections for European Parliament should be included in the **Electoral Act of 1976**. Until this amendment enters into force, **the Council of Ministers or the European Council** should coordinate the practice of sending out invitations, starting with the European Parliament elections planned for May 2024.
2. Pursuant to **Article 12 of the Electoral Act of 1976, European Parliament** should refuse the credentials of the national delegation of parliamentarians from a Member State that was elected under unfree or unfair election conditions, as established in the final report of the mission observing the election in the Member State.

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<sup>65</sup> [COM\(2015\) 206 final](#); [COM\(2020\) 252 final](#).

3. Any refusal of a Member State to invite observation missions for national parliamentary or presidential elections should have consequences at EU level. A refusal to cooperate in good faith with international observers is to be considered a clear risk of a serious breach of Union values in the meaning of **Art. 7, paragraph 2 TEU**.
4. The **European Commission and/or European Parliament** should systematically recommend OSCE/ODIHR to carry out a **full-scale election observation mission** to member states in which the freedom of elections is reported to be under threat or which are subjected to the procedure of Art. 7 TEU, as 62 Members of European Parliament did for the 2022 parliamentary election in Hungary.<sup>66</sup> This recommendation also applies to the upcoming European Parliament election of May 2024.
5. In respect of EU member states that are subjected to full-scale election observation missions and negative assessments by OSCE/ODIHR, the **European Commission** should ask the member state concerned to additionally invite OSCE/ODIHR and/or the Congress of Local and Regional Authorities to observe any upcoming **local elections**. A refusal to do so should be followed up in the rule of law-reporting.
6. The **European Commission** should systematically review and use, where appropriate, the findings of election observation missions to member states in its rule of law-related activities, in particular in the country chapters of its annual **Rule of Law Report**.
7. In its Rule of Law Reports, the **European Commission** should specifically address concerns about unlevel political playing fields in member states during the electoral process as a result of **media bias and media capture**, and the financing of campaigns and political parties.
8. Any finding of election observation missions that national elections in a member state were overall unfair or unfree is to be regarded as a clear risk of a serious breach by a Member State of the values of the Union in the meaning of **Art. 7 TEU** as well as a breach of the principles of the rule of law in the meaning of the **Conditionality Regulation (2020/2092)** and should result in the activation of both mechanisms.
9. **Regulation 2020/2092** should be amended after its evaluation to specify that unfair or unfree elections are a threat to the sound financial management of the EU budget.
10. In view of the limited budget and capacity of OSCE/ODIHR, the EU should fully **compensate** the funding of election observation missions carried out by OSCE/ODIHR, especially those that feed into the rule of law-activities of the EU and those that are provided for in the Treaties. Such funding can be part of permanent working arrangements with OSCE/ODIHR that should also involve observation missions to elections for European Parliament.

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<sup>66</sup> [Letter](#) of MEPs to the Director of the OSCE/ODIHR, 18 January 2022.