



REFORM OF THE STATE ELECTION COMMISSION

# DEPOLITICISATION AND PROFESSIONALISATION AS A PATH TO INTEGRITY

PODGORICA MARCH 2024.

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PROFESSIONALISATION  
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# 1 Editor's note

In Western European democracies with strong institutions and a history of impartiality, it is not uncommon for a separate branch of the executive power to organise elections, which implies the existence of government oversight over the electoral process.

However, this model cannot guarantee impartiality in all contexts – hence a growing trend of insistence on the independence of election commissions, especially in new and transitional democracies. Such an approach highlights commitment to democratic principles and international standards of democratic elections.

However, for many countries, the question of how to ensure independent electoral administration is an open one. It is often the case that although they formally appear to be independent from the executive power, the composition of these bodies is such that they lean towards the governing, political majority. Additionally, in politically polarised societies such as Montenegro, even if the relevant legislation allows for representation of all political parties, true political independence is not guaranteed.

Montenegro is one such example, where formal balanced representation of the Parliamentary majority and opposition in the State Election Commission (SEC) and other bodies involved in elections did not lead to professionalism and neutrality. Contrarily, we witnessed the SEC making decisions along political lines from one election to another, to the detriment of impartial and legal administration of the electoral process.

The actions of the State Election Commission in the 2023 presidential elections will remain as a marker of undue political influence of the election administration on the election outcomes. Specifically, party representatives in the SEC worked with institutions of a foreign state (the Republic of Serbia), which are also under political control, to create ad hoc procedures for one-time political use, resulting in removal of a presidential candidate from the electoral race. The specific candidate was given the highest ratings by public opinion polls, which worked in favour of the other two lead candidates.

This case is a vivid illustration of what it looks like when the balance of representation between the Parliamentary majority and the opposition, conceived as a mechanism for effective control over the electoral process, turns into its antithesis – a form of harmonious cooperation against a common political enemy. The above is a strong enough argument for the need and urgency of legislative reform, which would result in complete depoliticisation and professionalisation of the State Election Commission, as well as subsequent gradual professionalisation of the election administration at lower levels.

The upcoming electoral reform should undertake these activities as a priority; failing to implement them would mean that the reform cannot be considered fundamental or comprehensive. In a truly inclusive process, comparative approaches and models must be considered from the perspective of universally accepted standards on democratic elections, and a model should be proposed that will protect the independence of electoral processes through introduction of high criteria of impartiality, expertise, and ethics of members of election-administration bodies.

The analysis presented in this document offers our perspective on the problem.

This publication was created as part of the project “Electoral Reform in Focus: It’s Time!”, which the Center for Democratic Transition (CDT) is implementing in cooperation with the Association for Responsible and Sustainable Development (UZOR) and the Association of Youth with Disabilities of Montenegro (UMHCG), with the support of the European Union, through the EU Delegation in Montenegro. Its content is the sole responsibility of CDT and does not necessarily reflect the views of the European Union.

We are open to public dialogue related to the content of our publications and to all well-meaning suggestions and criticism.

**CDT team**

## 2 INTRODUCTION

**AUTHOR NIKOLA MUGOSA**

The issue of the composition of the State Election Commission (SEC) is a key challenge in the context of electoral reform. The current, predominantly political model has shown its weaknesses, which became particularly evident during electoral cycles. Political partisanship of SEC members was often the reason behind legally disputed decisions, which is consistently underlined in reports of international and non-governmental organisations that monitor elections in Montenegro.

The European Commission's Report on Montenegro for 2023 also stated that the issue of the SEC's political composition was a problem, underlining, among other things, that politicisation of the State Election Commission makes it impossible for that institution to function as an independent body for administering elections.

Bearing in mind the social context and past experiences, the State Election Commission should be composed of candidates who possess professional knowledge and references, who are not members of political parties, and who would be appointed in a public competition, through a competitive process.



## 3 DOWNSIDES OF THE EXISTING MODEL OF THE STATE ELECTION COMMISSION'S STRUCTURE

The State Election Commission as the umbrella institution for election administration, which, among other things, oversees the legality of the conduct of the election process, is appointed by the Parliament of Montenegro, on the proposal of the competent working body for elections and appointments.

It acquired the status of a legal entity in 2014, with amendments to the Law on the Election of Councillors and Members of Parliament (hereinafter referred to as the Law), which means that it is recognised in the legal system as a subject of rights and obligations, which translates to it having legal capacity (subject to certain rights and obligations), commercial capacity (undertake legal affairs and activities through statements of will) and tortious capacity (be held accountable for harmful actions in their operations).

The State Election Commission has a Chairperson, appointed through a public competition, and a member from among representatives of civil society, the non-governmental sector or universities, who is an expert in matters of electoral legislation, also appointed through a public competition.

The other eight members are appointed on the proposal of political parties from among the Parliamentary majority and the opposition, according to the principle of parity, i.e. four members each from the ruling majority and the opposition. Finally, one member of the permanent composition is a political party representative from the list of candidates for authentic representation of members of a minority nation or a minority national community.

The legislator foresees only three conditions that a candidate, appointed through a public competition, must meet to become the Chairperson of SEC. The Chairperson must be a law graduate with 10 years of professional experience, who must not have been a member of a governing body of a political party in the last three years. In a round of electoral reform in 2014, the function of the Chairperson was professionalised, and the concept of electing a Chairperson who was not proposed by political parties was supposed to “depoliticise” the function. However, the third condition, which states that the SEC Chairperson must not have been a member of a governing body of a political party in the past three years, seems insufficient, i.e. the timing restriction is too short. Additionally, the legislator did not in any way prescribe qualifications other than academic education and length of work experience for this position. It is incomprehensible why more rigid conditions would be defined for a member who is elected from among representatives of civil society, the non-governmental sector and universities, who must be an expert in matters of electoral legislation.

Finally, the Law does not stipulate the obligation to interview candidates for the SEC Chairperson position, which can lead to a lack of transparency in the process.

The principle of parity is prescribed in relation to members of the State Election Commission, so that four members of the permanent composition are appointed on the proposal of the Parliamentary majority, and four on the proposal of the Parliamentary opposition, one of whom performs the function of Secretary of the State Election Commission. The only prescribed condition that applies to the aforementioned members and their deputies is that they have a degree in law and that they have the right to vote. The legislator did not prescribe any qualifications in relation to electoral legislation, nor is the length of work experience in the relevant area defined. Therefore, it is sufficient for the candidate to be nominated by a political party, that they are a law graduate with the right to vote, and that they meet the basic conditions for being appointed.

The legislator has foreseen that one of the four members appointed at the proposal of the Parliamentary opposition should perform the function of SEC Secretary. It seems, however, that this provision suffers from significant shortcomings in how it is implemented. Specifically, the provision has in the past caused conflicting interpretations in terms of which opposition political subject has the right to take the Secretary post. Failure to prescribe that this function e.g. belongs to the most powerful opposition political party leads to arbitrariness and possible political manipulation and “trade”.

Another problematic aspect regarding the SEC Secretary post is that, according to Law, a SEC member should perform the function of Secretary. The Secretary, as the person that manages the Service, prepares the materials that he or she creates jointly with the Professional Service at SEC sessions, and is then expected to vote on proposals that he or she produced. This results in a functional conflict of interest since, in the capacity of a SEC member, the Secretary votes on the proposal that he or she made in their capacity as Secretary.

In addition to the members appointed from among the representatives of the Parliamentary majority and opposition, a political party that submits a candidate list for authentic representation of members of a minority nation or a minority national community, which received the largest number of votes in the previous elections, has the right to one representative, and their deputy should be a member of another minority nation or minority national community. Interestingly, the Law stipulates that a “member of another minority nation or minority national community” is chosen as a deputy member of SEC, whereas the member of SEC should, by Law, be a “representative”.

The right to designate a member and a deputy who will represent members of a minority nation is not conditioned by whether this political entity is in the Parliamentary majority or the opposition. The Law does not even prescribe the criteria for appointing a deputy member, which can lead to arbitrariness, particularly in a situation where there are several representatives of another (same) minority nation in the Parliament of Montenegro.

As for the SEC member appointed from among representatives of civil society, the non-governmental sector and universities, the Law stipulates that this person should be an expert in matters of electoral legislation.

In addition to the general condition that is prescribed for all members, who must have a degree in law, this representative is subject to the most rigid conditions. In order to be appointed, this member must fulfil conditions such as publication of scientific papers and professional articles on the topic of the electoral process, public recognition in this area, and participation in domestic or international monitoring of the electoral process.

These conditions are set cumulatively and not alternatively, which means that in order for this member to be appointed, they must meet all three special conditions. It seems somewhat justified to prescribe strict conditions for this member since they should have expertise in the area of electoral legislation. Thus defined conditions, with certain amendments, should form the foundation for general conditions if professionalisation of membership in the State Election Commission is to be achieved.

With regards to the provision that a person cannot be appointed as a member from the ranks of representatives of civil society, the non-governmental sector and universities if in the last 10 years they have served as a member of a governing body of a political party – it is worth noting that this term thrice exceeds the limitation imposed for the Chairperson of the State Election Commissions. It is the clear intention of the legislator to choose a true professional, an expert in matters of electoral legislation. If the decision to restrict membership in a governing body of a political party for such members of the SEC is justified, it would be appropriate to apply the same measure to the Chairperson and other members of the State Election Commission.

## 4 HOW TO BUILD A PROFESSIONAL AND INDEPENDENT STATE ELECTION COMMISSION

In the context of the composition / structure of central election-administration bodies and the election administration in general, there is no international standard that can be applied. Each country is expected to find a suitable model that fits its legal framework and traditions. The document Guidelines for Reviewing a Legal Framework for Elections issued by the ODIHR states the following:

*“More recently, emerging democracies without long traditions of democratic elections have developed an alternative form of election-administration bodies, based on the concept of a central body whose sole responsibility is the administration of elections. This form of election administration features election commissions whose legal authority is limited to administering elections. Such election administration models have been used by countries in democratic transition, frequently when there is lack of trust in state institutions as potential election administrators.”*

Bearing in mind that trust in the electoral process in Montenegro has long been undermined, and that certain decisions of the SEC have been legally disputed as politically tendentious, which was mentioned in several reports by organisations that monitor elections, as well as the 2023 European Commission Report for Montenegro, the SEC's composition should be restructured to reflect the concept of "professionalisation".

This term implies a "merit-based" approach to the appointment of members of the SEC, whereby election experts would not be members of political entities with professional references. The existing concept of a predominantly political electoral administration has shown all its weaknesses in several election cycles. Additionally, the current conditions and criteria that apply to selection of members of the umbrella institution for the electoral process are also disputed.

As a body whose main role is to administer elections, the SEC should, first of all, be technocratically organised and represent a true service to voters as well as other stakeholders involved in the election process, all with the aim of quality and legal implementation of all phases of the electoral process under its jurisdiction.

The number of members should be reduced to five or seven (odd number) and they should be appointed through a public competition with clearly established criteria in order to reduce arbitrariness in decision-making. The screening criteria should primarily refer to the qualifications or references that the candidates offer, i.e. experience related to participation in election processes in various forms, participation in observation missions abroad, authorship of scientific articles, texts, or publications related to elections. Existing members should elect the Chairperson of the Commission from among themselves.

Therefore, candidates for membership should also have a certain work experience (the existing provision implies that the Chairperson of SEC should have at least ten years work experience). The mandate of the State Election Commission should last six years in order to strengthen the independence of its members, while the mandate of the Chairperson should expire after three years, which means that two Chairpersons could be elected in one mandate of the SEC. The position of SEC Secretary should be profiled so that the same person is the head of the Service that prepares materials for SEC sessions, while ensuring that the person cannot simultaneously be a SEC member.

A good example of how the issue of selection of members can be regulated on a meritocratic basis are the criteria established by the Commission for the Selection and Appointment of Members of the Central Election Commission of Bosnia and Herzegovina. This act defines clear criteria for scoring candidates for membership in their Central Election Commission (CEC), who are interviewed and ranked according to the following indicators:

#### **MEMBERSHIP IN ELECTION-ADMINISTRATION BODIES:**

- Polling board - 1 point
- Election commission and other election-administration bodies - 2 points
- CEC - 3 points

#### **MANAGEMENT OF ELECTION-ADMINISTRATION BODIES:**

- Polling board - 1 point
- Election Commission and other election-administration bodies - 2 points
- CEC - 3 points

#### **PUBLICATION OF BOOKS AND PROFESSIONAL PAPERS IN THE FIELD OF ELECTIONS**

- Up to three published books - 3 points; over three published books - 5 points
- Up to three published professional papers as author or co-author - 1 point; more than three professional papers - 3 points

#### **PARTICIPATION IN ELECTION OBSERVATION MISSIONS**

- Each observation mission - 1 point

#### **ATTENDANCE AT PROFESSIONAL CONFERENCES AND SEMINARS**

- In the country - 1 point
- Abroad - 2 points

#### **PARTICIPATION IN THE WORK OF INTERDEPARTMENTAL/EXPERT COMMISSIONS FOR PREPARATION OF ELECTORAL LEGISLATION**

- 3 points

#### **CONTINUOUS DEVELOPMENT IN THE FIELD OF CHOICE (specialist courses and postgraduate studies)**

- 3 points

#### **ANSWERS TO PROFESSIONAL QUESTIONS AND GENERAL IMPRESSION**

- 1 to 10 points (after which the grades of all members of the Commission are added up and the average grade is calculated)

The SEC structure is completely profiled towards qualification requirements in the field of legal sciences. To some extent, this is in line with comparative practice. However, in certain systems, legal and/or electoral experts are chosen for members of central electoral bodies, e.g. in Bosnia and Herzegovina.<sup>1</sup> Thus, the Final Report of the ODIHR Observation Mission dated June 11, 2023 in Montenegro, states that:

*"...the legal requirement that all commission members, at all levels, be law graduates, limits participation in the election administration."<sup>2</sup>*

In relation to this issue, the aforementioned Guidelines for Reviewing a Legal Framework for Elections offer the following view:

*"Where possible, professionals familiar with the country's electoral framework should be appointed to administer elections. Thus, a common provision found in many legal frameworks requires that members of election-administration bodies, at every level, have a background or training in law. Some legal frameworks also contain a similar requirement for the staff of election-administration bodies. Although such a provision is generally acceptable, it may be overly restrictive for lower level election-administration bodies, particularly at the polling station level."*

In the context of strengthening the capacities of the State Election Commission, a priority activity should be to build the SEC as an institution that owns high-quality statistical data and has adequate capacities for their processing. For example, one of the members of the Republic Election Commission in Serbia is also a representative of the Republic Institute of Statistics. Resources in relation to the use of communication technologies should also be developed, enabling the possibility of developing and managing software that would be a service to voters and political subjects, but also to strengthen the communication agenda of the SEC.

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<sup>1</sup>Election Law of Bosnia and Herzegovina, Art 2.5.

<sup>2</sup>Final Report of the ODIHR Observation Mission from June 11, 2023.



In relation to these issues, the aforementioned Guidelines state that:

*“Furthermore, depending on the responsibilities of the election administration, it could be useful to include experts in administration and other technical areas, such as computers and software programming, in its staff. This would be particularly beneficial at the central level. Provisions concerning the professional background of members of the election administration have to be evaluated within the context of the country in question. It is necessary to assess whether it is possible that the result of such a provision would be that the only people eligible to staff election-administration bodies would be biased in favour of a particular political interest or opinion. It is critically important to ascertain and consider the practical implications of such provisions governing the qualifications for election administration members and staff. The legal framework should ensure a selection method that is open and transparent.”*

## 5 RELATIONSHIP BETWEEN THE SEC AND MECs: A SYSTEM WITH NO EFFECTIVE SUPERVISION AND ACCOUNTABILITY

The Law stipulates that the State Election Commission supervises the work of Municipal Election Commissions (MECs). Supervision is a generic provision, neither defined, nor adequately elaborated.

The Law additionally stipulates that the SEC can take over the authority of a MEC if the latter does not fulfil its obligations in relation to the election of Members of Parliament.

The legislator did not foresee this possibility for the State Election Commission in the context of the election of councillors. It is not clear how effective supervision should be carried out in such an eventuality. Providing instructions, which is also the competence of the Commission, is not a sufficient control mechanism in situations where a MEC seriously neglects implementation of activities that underpin the legality of the election process.

The situation presents an example of *nudum ius*, i.e. there is no prescribed legal consequence if a Municipal Election Commission does not act according to the instructions issued by the SEC.

This is where the dichotomous character comes to the fore regarding the accountability of MECs. On the one hand, the SEC performs overall supervision, while on the other hand, the MECs respond to the body that elected them, i.e. to the competent assembly. The issue of supervision over the work, and possible taking over of competences should be regulated in greater detail, including an added possibility that the State Election Commission can take over responsibilities within the competence of a MEC, should a MEC fail to act in line with obligations regarding the election of councillors.

Another cause of ambiguity related to taking over the competence of a MEC is the lack of legal regulation of procedures in cases when a Municipal Election Commission has not been appointed. The question arises whether in this case the SEC can take over the competence of a MEC, given that the provision is defined so that the State Election Commission takes over the competence “in the event that a MEC does not fulfil its obligations in relation to the election of MPs in accordance with this law”. However, although the provision is narrowly defined, a MEC would essentially be breaching the Law if it did not exercise its legal powers. Therefore, the provision should be taken to mean that the State Election Commission can take over the competence of a MEC when a MEC has not been appointed, but only in relation to administering elections of councillors, i.e. with a corresponding application for the elections of the President of the state.

The situation that occurred during the election of councillors in 2022, when five MECs accepted candidate lists that did not meet the conditions regarding the quota of at least 30% of candidates of the less represented gender, or the condition that among every four candidates on the list there must be at least one woman, is another indicator of the deficiency of the current legislative framework. Such lists were accepted, and none of the authorised persons submitted an objection to their composition.

The lack of objections made the list final, and the SEC could only note an irregularity. The Law does not give the possibility to higher instances, such as the SEC, to act *ex officio* when it comes to possible irregularities in the election procedure. In this case, MECs did not even face the issue of possible accountability due to clear omissions that resulted in the acceptance of candidate lists that did not meet legal conditions.

The Law prescribes that election-administration bodies are respond to the authority that appointed them. Applying this provision to the context of the State Election Commission, it follows that the Commission is responsible to the Parliament of Montenegro. However, the Law does not regulate the responsibility of the SEC as a collective body in any other way. There is no procedure governing potential dismissal of the Chairperson, Secretary or members of the State Election Commission.

The same argument applies to MECs, which are appointed by the competent assembly, as the Law fails to define how MECs should be held accountable. What makes the matter even more complicated in the context of MECs is that, on the one hand, they respond to the competent assembly, and on the other hand, supervision of its work and coordination is carried out by the SEC, which takes over “the competence of the MEC in the event that it does not fulfil its obligations in relation to the election of MPs”. Therefore, MECs fundamentally respond both to the competent assembly that appoints them, and to the State Election Commission, all without clearly established procedures.

Indirect responsibility in the context of election-administration bodies also flows from the provision that stipulates, among other things, that the SEC establishes criteria and benchmarks, and allocates funds to MECs for performing appropriate tasks in administering elections of MPs. The same article stipulates that the SEC controls the use of the aforementioned funds, which further implies that MECs are also financially controlled by the SEC.



The structure established by the legal framework should include a central electoral institution at the national level with exclusive powers and responsibility over all subordinate electoral bodies.<sup>4</sup>

The Guidelines for Reviewing a Legal Framework for Elections argue that election-administration bodies should perform their duties in a professional and impartial manner, independent from any political interests, and that their acts and decisions should be subject to judicial review. Professionalism and impartiality of the election-administration are critical issues, as the bodies that administer elections make and implement important decisions that may have an impact on the overall conduct of elections, and even their outcomes.

The Guidelines further state:

*“The structure of the election administration as established by the legal framework should usually include a central election-administration body, with authority over subordinate election-administration bodies and responsibility for the overall conduct of elections. Federal states with a high degree of decentralisation are sometimes justifiable exceptions to this principle. Whatever the case, the polling station should be the lowest level of the election administration structure. It is common for a subordinate election-administration body to exist for each electoral constituency (district) in which candidates are to be elected. Whether intermediate election-administration bodies are needed will depend on the electoral system, as well as geographic and demographic factors unique to the country. In the context of a particular election, reviewers of electoral legislation should be wary of both an excessive number of election-administration bodies, as well as an insufficient number of levels in the election administration structure.”*

This document underlines that *the legal framework must define the relationship between the central electoral authority and those at lower levels, as well as the relationship between the electoral administration and executive authorities at the state and local levels.*

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<sup>4</sup>International Electoral Standards Guidelines for reviewing the legal framework of elections, International Institute for Democracy and Electoral Assistance (International IDEA) 2002.

Additionally, it advocates the need for permanence of the central body of the electoral administration and the existence of clear legal provisions on how the election-administration bodies function, i.e. what is the subject of their competences. In relation to the question of accountability, the existence of a legal basis and procedure by which a member of the election-administration body can be impeached is stressed, and it inaugurates the principle that impeachment should be limited to what is necessary to protect the impartial and professional performance of the electoral administration, as well as to protect its members from arbitrary and politically motivated impeachment, including impeachment by the appointing authority.

Municipal Election Commissions should also be professionalised, whereby meritocracy would lead to appointment of members that are not members of political parties. Members of MECs should be chosen by members of the SEC, taking into account the biographies of the candidates and interviews. The Law should prescribe measurable criteria for selection of members of MECs, which would not be set as high as for members of the State Election Commission but would be based on the same principles.

Their number should be reduced to three members, who would work to continuously improve the conditions for conducting elections in their respective municipalities, and respond directly to the State Election Commission, which should also have the authority to dismiss them, as required.

## 7 RECOMMENDATIONS

**1**

Professionalise the State Election Commission in such a way that non-political-party candidates with knowledge and references in the field of the electoral processes are chosen as members;

**2**

Define measurable criteria for the appointment of members of the SEC in order to avoid potential arbitrariness in the process;

**3**

Extend the duration of the SEC's mandate to six years to ensure independence in operations and decision-making, and eliminate the provision that the Commission should be appointed after elections;

**4**

Reduce the number of members of the State Election Commission to five or seven;

**5**

Provide clear criteria for cases in which it is possible to dismiss a member of the State Election Commission;

**6**

Introduce a provision that the SEC Chairperson must be elected by SEC members for a period of three years;

**7**

Introduce a provision that the Secretary should simultaneously serve as head of the Professional Service, in charge of preparing materials for the sessions of the State Election Commission, but not a member of the Commission;

**8**

Professionalise Municipal Election Commissions so that non-political-party members are chosen as candidates through a merit-based approach (and introduce more relaxed criteria compared to those that apply to members of the SEC, alongside interviews);

**9**

Prescribe the competence of the State Election Commission to appoint members of MECs, and to dismiss them;

**10**

Provide that the SEC has the power to take over the competence of MECs when they do not perform their functions in line with the Law, and in cases when they conduct elections for councillors and the President of Montenegro.



# 8 REFERENCES/ LITERATURE

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