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Solutions and Challenges for Online Meetings of Electoral Bodies³

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Abstract

In our presentation, we review the procedure and method of meeting the electoral bodies of different (mainly European) countries – in particular the issue of ensuring the publicity and extent to which they can operate online. In addition, we examine in more detail the practice and procedural method of the Hungarian electoral bodies, in particular the National Election Commission. Based on the above, we also outline the possibilities for the further development of Hungarian practice. Our main findings: it is clear that although online meetings of election commissions are still used only in several countries, but the COVID-19 epidemic has highlighted the need to open up to the online space not only in the election process but also in the practice of individual election bodies. The regulations of the Hungarian National Election Commission define the rules of online meetings in great detail. This makes Hungary one of the few EU countries where it is possible to meet by videoconference. In our opinion, this direction will become decisive in the EU countries in the coming years. Moreover, we do not consider it inconceivable that the entire electoral process (including remote voting) should be digitised, as is the case in Estonia. However, this still requires many steps to be taken by individual countries to increase voter confidence in digitisation. For now, however, we have to be satisfied with one of the positive benefits of the COVID-19 epidemic: the ability to online meetings of election commissions.

Keywords: election commission, online meeting, publicity, online decision-making, constitutional guarantees.

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Spotkania online organów wyborczych – rozwiązania i wyzwania⁴

Streszczenie

W artykule przygladamy się bliżej procedurom organizacji spotkań z organami wyborczymi różnych krajów (głównie europejskich), a w szczególności kwestii jawności ich obrad oraz stopnia, w jakim mogą one funkcjonować online. Ponadto analizujemy szczegółowo także praktyki i procedury, którym podlegaja wegierskie organy wyborcze, a zwłaszcza węgierska Państwowa Komisja Wyborcza. W świetle powyższych kwestii nakreślamy również potencjalne scenariusze i możliwości dalszego rozwoju działalności takich organów w uwarunkowaniach węgierskich. Nasze główne wnioski: choć spotkania komisji wyborczych online mają miejsce tylko w kilku krajach, epidemia COVID-19 pokazała, że jest to niezwykle istotne, by domena procesu wyborczego otworzyła się na przestrzeń internetową, także w praktyce poszczególnych organów wyborczych. Przepisy regulujące funkcjonowanie węgierskiej Państwowej Komisji Wyborczej bardzo jasno określają zasady organizacji spotkań online. Dzięki temu Węgry są jednym z niewielu krajów UE, w których możliwe jest zorganizowanie spotkań w formie wideokonferencji. Naszym zdaniem, ten trend nasili się w najbliższych latach w innych krajach UE. Co więcej, nie wykluczamy możliwości 'ucyfrowienia' całego procesu wyborczego (w tym głosowania na odległość), jak ma to miejsce choćby w Estonii. Poszczególne kraje musiałyby jednak podjąć wiele działań mających na celu zwiększenia zaufania wyborców do cyfryzacji. Na razie wygląda na to, że musimy zadowolić się jedną z nielicznych korzyści wynikających z epidemii COVID-19: możliwością prowadzenia posiedzeń komisji wyborczych w formule online.

Słowa kluczowe: komisja wyborcza, spotkanie online, jawność, podejmowanie decyzji online, gwarancje konstytucyjne.

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Introduction

As of 21 January 2021, the Hungarian Electoral Procedure Act⁵ stipulates that the meeting of the National Election Commission may be held by electronic means, based on the decision of the chairman. The reason for the change in regulation was clearly the coronavirus epidemic. In the spring of 2020, the pandemic caused by the coronavirus had an impact on all walks of life. The need to reduce personal contacts was also a huge challenge in the functioning of constitutional bodies. Thus, for instance, the various parliaments, or even the Plenary Session of the Hungarian Constitutional Court, had to adapt to the challenges of the online space. The operation of electoral bodies, especially election commissions, is no exception.

An electoral body is of particular importance in a democratic state – especially if it performs a legal remedy's function. It is therefore unavoidable that their operation is guaranteed even during a period when, due to the reduction of contacts, personal presence is not or only difficult to ensure. At the same time, regardless of the pandemic, it is important that in the 21st century, online meetings can be guaranteed in normal operation too, as this would also serve to maintain the short deadlines in electoral remedies. It is therefore important to regulate and develop the possibility of online meetings, and such a procedure should be surrounded by appropriate constitutional guarantees.

In our study, therefore, we review the procedure and method of meeting the electoral bodies of different (mainly European) countries – in particular the issue of ensuring publicity, and the extent to which they can operate online. In addition, we examine in more detail the practice and procedural method of the Hungarian electoral bodies, in particular the National Election Commission. Based on the above, we also outline the possibilities for the further development of Hungarian practice.

⁵ Act XXXVI of 2013 on election procedure, https://njt.hu/translation/J2013T0036P_20211120_FIN.PDF (access: 22.01.2022).

The European Practice of Election Commission Meetings by Videoconference and Their Publicity

In order to place the Hungarian regulations in an international context, it is first of all important to examine how the forms of meetings of the national election commission and the framework of the online election procedure are regulated in the countries of the European Union (EU).

Online Procedures in the Electoral Systems of EU Countries

Regardless of the COVID-19 epidemic, the big challenge for electoral systems in the 21st century is whether there is an intention to move all electoral processes, including voting itself, to the entire online space. If we look at the electoral procedures of the countries of the EU, we can see that some kind of electronic procedure can be found in the regulations of almost all countries. If not elsewhere then e.g. the various procedural applications (registration, nomination) may also be submitted electronically. For instance, the Slovakian Electoral Procedure Act⁶ (in § 15) authorises the Minister of the Interior to determine the system of electronic communication between the electoral bodies. The Polish Electoral Procedure Act⁷ (in § 162) provides that the National Electoral Commission has the right to determine the conditions and methods for the complementary use of electronic technology. However, in terms of the electoral process, there is only one country in the EU where online voting is also allowed:⁸ Estonia,⁹ where electronic voting is possible from 9 a.m. on the sixth day before the election day until 8 p.m. on the first day before the election. However, it is not possible to vote electronically on the day of the election, but a voter who votes electronically has the right to change his or her vote by personal vote on the day of the election. Estonia has a well-developed system and principles for electronic selection that provide adequate guarantees for the fair and transparent operation of the system.¹⁰ It is interesting to note that

⁶ Zákon o podmienkach výkonu volebného práva a o zmene a doplnení niektorých zákonov (180/2014), see: https://www.torvenytar.sk/zakon-88 (access: 22.01.2022).

⁷ See: https://isap.sejm.gov.pl/isap.nsf/download.xsp/WDU20110210112/U/D20110112Lj.pdf (access: 22.01.2022).

⁸ See the pros and cons of e-voting for more information: T. Hallók, *Electoral Participation and Constitutional Law: Voting Methods*, PhD dissertation, Miskolc 2012. pp. 277–309. http://midra.uni-miskolc.hu/ document/13069/5191.pdf (access: 22.01.2022).

⁹ See: https://www.valimised.ee/et/e-haaletamine/e-haaletamisest-lahemalt/e-haaletamise-ja-paberhaaletamise-toimingute-vordlus (access: 22.01.2022).

¹⁰ See these principles in detail: https://www.valimised.ee/et/e-haaletamine/e-haaletamisest-lahemalt/ elektroonilise-haaletamise-hea-tava (access: 22.01.2022).

in addition to Estonia, only several countries in the world have tried with more or less success in online voting:

- 1. In Norway,¹¹ where online voting was first used in ten local governments in 2011 as part of a pilot project, and later in the 2013 parliamentary elections, it was possible in 12 municipalities. After that, however, the project was completed.
- 2. As another European country, Switzerland¹² has also experimented with online voting: in the referendum of 3 March 2013, it was possible to vote online in 11 cantons. It is worth noting, however, that three cantons (Geneva, Neuchatel and Zurich) already tried this between 2001 and 2005. The cantons of Geneva and Neuchatel will still be using online voting from 2019 onwards.
- 3. Thirdly, it is important to highlight an example outside Europe: Canada, where it is possible to vote online in local elections.¹³ However, in 2017, the Canadian government confirmed that there are no plans to introduce online voting at the national level.

In addition to the above, two countries are worth highlighting: Brazil and India. In Brazil, it is also possible to vote by electronic ballot (in addition to paper-based voting). In this case, the voter must appear in person in the constituency, but can cast his or her vote by electronic means.¹⁴ A similar method works in India, where voters can only vote on an electronic voting machine in constituencies.¹⁵ This method can help count votes, but is not considered true electronic voting.

However, the primary focus of our investigation within the electronic election process is currently on the possibility of online election commission meetings. In this regard, having reviewed the legislation of EU countries and the websites of election commissions, we can see that relatively few countries adopted a rule in 2020 (or earlier, independently of the pandemic) that allows election commissions to meet online. One such country is Germany, where the electoral law¹⁶ (Bundeswahlgesetz, in § 52) gives the Minister of the Interior the opportunity to make regulations (with the consent of the Bundestag) in the event of some force majeure.

¹¹ https://www.regjeringen.no/no/dokumentarkiv/stoltenberg-ii/krd/tema-og-redaksjonelt-innhold/ kampanjesider/e-valg-2011-prosjektet/id597658/ (access: 22.01.2022).

¹² https://www.ch.ch/en/demokratie/voting-online/ (access: 22.01.2022).

¹³ https://www.tvo.org/article/how-e-voting-is-taking-over-ontario-municipal-elections (access: 22.01.2022).

¹⁴ https://www.tse.jus.br/eleicoes/urna-eletronica (access: 22.01.2022).

¹⁵ However, the method has been widely criticised: https://www.bbc.com/news/world-asia-india-47906440 (access: 22.01.2022).

¹⁶ https://www.gesetze-im-internet.de/bwahlg/ (access: 22.01.2022).

In this context, the Minister of the Interior may provide that members of election commissions may meet and decide at a distance, by electronic means. However, no specific regulation has been established for the COVID-19 epidemic. Another example is Portugal,¹⁷ where a new piece of legislation was adopted in 2020 in connection with the National Electoral Commission meeting. It is already emphasised in the preamble that, in order to overcome the difficulties that arise, it should be possible to meet by videoconference (but only in exceptional cases). Article 3 of that legislation expressly provides that, exceptionally, meetings may be held by videoconference and members who are physically unable to attend shall be allowed to attend. Article 6 sets out how such meetings are to be held, and how the majority to be determined. It is important that the decision made in this way is considered complete. It is also important to highlight the Baltic States, among which we find quite detailed regulations on this issue. It is important to note that in Estonia, despite the possibility of online voting described earlier, online meetings of the election commission are not possible. However, in Lithuania¹⁸ and Latvia,¹⁹ they are possible. In Latvia, on 5 November 2020, the Central Election Commission adopted rules for online meetings. According to this, the chairman of the Central Election Commission may order that the meeting of the committee be held by videoconference if: 1) a state of emergency has been declared or 2) assembly restrictions have been imposed, or 3) a member of the Central Election Commission may not appear during the meeting due to his or her state of health, business or other objective reasons. It is therefore important to emphasise that in Latvia it is not only possible to meet online in the case of a special legal order. In Lithuania, an online meeting can take place if: 1) a state of emergency is introduced or 2) the health or life of members of the Central Election Commission is endangered by an epidemic. In addition to the above, it is important to point out that the proposal to introduce online parliamentary voting was already approved by the Lithuanian Parliament in 2006 but has not been adopted since.

The Publicity of Election Commission Meetings

In a democratic state, in accordance with the rule of law, it is also of paramount importance that the functioning of constitutional bodies be transparent and that their activities and procedures.

¹⁷ https://www.cne.pt/sites/default/files/dl/regimento-cne_dr-05-05-2020.pdf (access: 22.01.2022).

¹⁸ https://www.e-tar.lt/portal/lt/legalAct/TAR.AF228880894E/asr (access: 22.01.2022).

¹⁹ https://www.cvk.lv/lv/tiesibu-akti/citi-dokumenti/kartiba-kada-organizejamas-centralas-velesanu-komisijas-sedes-izmantojot-videokonferenci (access: 22.01.2022).

The Concept of Democratic Legitimacy

The principle of the democratic rule of law implies the need to form the political will of the people: in modern constitutional democracies, acts of public power must always be traceable to the will of the people, and to ensure that members of the people can participate equally in the formation of the will of public authorities. This so-called political will training also means training the will of the people and the will of the state. The 'will of the people' can be obtained from the individual will during the legal process in accordance with the constitutional order. Furthermore, this will-forming process presupposes that all individuals can participate in it freely and equally so that will-formation creates the homogeneous will of the majority. The will of the people, then, does not exist separately from and independently of the individual will, but the will of the people is not merely an ideologically summed up designation of every individual will that exists. Therefore, in a democracy, the will of the people is not a given, but a political process in which all members of the constitutionally defined people can participate and exert influence through their participation. The will of the people is thus formed in the free and open process of political will formation, based on the freedom of democratic participation of individuals in the constitutional sense.²⁰ A necessary precondition for this formation of political will is that the meetings and activities of the bodies be public, known and transparent (as well as the fact that the provision of publicity is frequently a double-edged sword; we are thinking here mainly of the extent to which a person's vote or words can be influenced by the press present). The most important element of this is, of course, in the functioning of parliaments or even the courts, but it is also of great importance in the meetings of election commissions that guarantee the exercise of the right to vote, which is most closely connected with the formation of political will.

The Publicity of EU Countries' Election Commission Meetings

The Hungarian Electoral Procedure Act (Act XXXVI of 2013 on electoral procedure) clearly states that the meetings of election commissions are public. With regard to international comparisons, it can also be noted that most countries explicitly provide for the publicity of electoral body meetings. In this context, three countries are worth highlighting:

1. Latvia, where the public must be provided not only at meetings held in person, but also at meetings held online. In this case, the Secretary of the

²⁰ J. Petrétei, About Political Will Training, [in:] N. Chronowski, Z. Pozsár-Szentmiklósy, P. Smuk, Z. Szabó (eds.), For the Freedom-Loving Man: Liber Amicorum István Kukorelli, Budapest, 2017, pp. 67–69, 73–74.

Central Election Commission will send the details of his or her attendance to the persons who have been invited or wish to attend the meeting by videoconference, thus ensuring the publicity. Access data required to attend the meeting will also be sent to media representatives (and meetings must also be recorded in video or audio format, which will be published later).²¹

- 2. In Lithuania, the online meeting is also broadcast live on the website of the Central Election Commission.²² The interesting thing about the regulation is that people in the meeting room of the Central Election Commission can take photos or videos. The public shall be notified of the remote election meeting of the Central Election Commission on the committee's website and the members of the committee shall be notified by electronic means. It is important to emphasise that the video and audio recordings of the online meeting of the Central Election Commission should be preserved, which should be made public on the website at a later date.²³
- 3. As a third country, it is worth highlighting Romania, where, contrary to majority practice, election commission meetings are not open at all.²⁴

Online Meeting of Electoral Bodies in Hungary

As we have alluded to before with regard to the online meeting of electoral bodies in Hungary, Act CLXVII (167) of 2020 Section 16 introduced a new section into the Electoral Procedure Act, i.e. Section 40/A., according to which the meeting of the National Election Commission may be held by electronic means on the basis of the decision of the chairman. The Venice Commission and ODIHR in their joint opinion on the 2020 amendments to electoral legislation considered this a positive technical change which are welcome,²⁵ and which provides flexibility particularly in the face of an emergency situation, such as the COVID-19 pandemic.²⁶ It should be emphasised that the Electoral Procedure Act provides a legal basis for online meetings only in the case of the National Election Commission, so there is no legal possibility for this in the case of other, lower-level election commissions.

²¹ See more: https://www.cvk.lv/lv/tiesibu-akti/citi-dokumenti/kartiba-kada-organizejamas-centralas-velesanu-komisijas-sedes-izmantojot-videokonferenci (access: 22.01.2022).

²² At the contact below: https://www.vrk.lt/vrk-posedziai (access: 22.01.2022).

²³ See more: https://www.e-tar.lt/portal/lt/legalAct/TAR.AF228880894E/asr (access: 22.01.2022).

²⁴ See: https://www.roaep.ro/prezentare/ (access: 22.01.2022).

²⁵ Opinion No. 1040/2021 OSCE/ODIHR; Opinion Nr.: ELE-HUN/430/2021 CDL-AD(2021)039, p. 8.

²⁶ Opinion No. 1040/2021 OSCE/ODIHR; Opinion Nr.: ELE-HUN/430/2021 CDL-AD(2021)000, p. 9.

Rules for Online Meetings of the National Electoral Commission

In view of the new Article 40/A of the Electoral Procedures Act, which entered into force on 21 January 2021, the Rules of Procedure of National Election Commission set out the detailed rules for the meeting held using electronic means of communication. These details are provided in the Rules of Procedure of the National Election Commission²⁷ for online meetings specifically in Section 7/A, according to which, based on the decision of the Chair, the members of the Commission participate in the meeting by electronic means of video conferencing, i.e. online meeting. In particular, the Chair may decide to hold an online meeting if justified by an epidemiological emergency or other circumstances or if a short, undisputed committee meeting is expected based on the subject matter of the proposed decisions, e.g. issuing of the mandate, registration of candidates and nominating organisations etc.

So, it should be emphasised that an epidemiological emergency situation is not the only reason for online meeting. The Chair of the National Election Commission can decide to hold an online meeting even if there is no epidemiological emergency, but if it is justified by 'other circumstances', or a short, undisputed committee meeting is expected based on the subject matter of the proposed decisions. The Rules of Procedure of the National Election Commission list two examples for this, on the one hand issuing of the mandate, on the other hand registration of candidates and nominating organisations. However, this is not an exhaustive list, it can be expanded for further similar situations on the basis of the decision of the chairman. The word 'etc.' expressly refers to this possibility of the Chair in the Rules of Procedure.

For the online meeting, the Rules of Procedure contains special provisions among sections 7/A and 7/E. For instance, the invitation must include information that the meeting will be held online. The online meeting will be held using an online application technically supported by the National Election Office, which will provide real-time video and audio transmission, allowing for the identification of the members attending the meeting and for mutual and unrestricted communication between them. In order to participate in the online meeting, members shall use electronic communication device, provided by the National Election Office, or, in the absence of such a device, members shall use their own electronic communication device, which allows for video and audio transmission. A member shall be deemed to be present during the part of the online session for which he or she has logged into the session by clicking on the link sent by the Secretariat or by clicking

²⁷ The detailed rules to be followed by the National Election Commission shall be set out in a Rules of Procedure within thirty days of the inaugural meeting. The Rules of Procedure shall be published on the official website of the elections. Act XXXVI of 2013 on electoral procedure, 42 §.

on the join button on the application's calendar interface during the session and for which simultaneous transmission of live video and audio is provided on the member's side. It is the member's responsibility to have the broadband internet connection necessary to participate in the meeting for the duration of the online meeting. If a member's internet connection is interrupted during the online session, he/she has the possibility to re-join the session once the technical problem has been resolved. The Chair may suspend the meeting until the technical impediment has been removed. In the event of any technical impediment, the meeting may be resumed only if the quorum is maintained.

The Secretariat shall transmit the documents of the online meeting only by electronic means to the members' official electronic mail address. A paper copy of the meeting documents shall also be placed in the file of the meeting. The minutes and decisions of the meeting shall also be published on the website.

A member wishing to propose an amendment to the agenda shall notify the Chair of his or her intention to do so via the application. The member who wishes to make a comment following the presentation of a proposal for a decision shall also indicate this in the application. The President took the floor in the order in which the applications were received. If the order of applications is not clear, the Chair shall give the floor to members in alphabetical order. The National Election Commission shall take its decision by open vote, via the application, in the manner decided by the Chair. The National Election Commission shall take its decision by open vote, via the Application by

The National Election Office will record the audio and video material of the online meeting for technical assistance purposes only, for the purpose of drafting the minutes, which will be destroyed after the minutes have been signed. The minutes of the online meeting shall indicate the place of the meeting as the place where the meeting was held using electronic means of communication and shall indicate the names of the members who attended the meeting and of those who were absent, whether certified or not. The attendance list for the online meeting, based on the minutes, shall be placed in the file.

It must be noted, that there is no legal basis to hold a hybrid online meeting, that said, it is not possible for some members to join the meeting online, while the other part of the members should be personally connected to the meeting. The meeting may take place either purely online or in a purely presence format.

The Publicity of Online Meetings of the National Election Commission

Another important question that had been raised regarding the online meeting is the publicity of the session. According to the Rules of Procedure 6 § (1) the meeting

of the Committee shall be open to the public. The voters concerned, as well as observers and representatives of the press, may participate in it in accordance with the entry procedure of the building hosting the meeting of the National Election Commission. For the publicity of the online meeting, the Rules of Procedure contains a special provision, that is 7/C § (1), according to which, the publicity of the online meeting is provided to interested parties, relevant voters, observers and representatives of the press at the seat of the National Election Office in a manner determined by the National Election Office.

Conclusion and Possible Directions

Based on the above, it is clear that although online meetings of election commissions are still used only in a few countries, but the coronavirus epidemic has highlighted the need to open up to the online space not only in the election process but also in the practice of individual election bodies. The regulations of the Hungarian National Election Commission define the rules of online meetings in great detail. This makes Hungary one of the few EU countries where it is possible to meet by video conference. In our opinion, this direction will become decisive in the EU countries in the coming years. Moreover, we do not consider it inconceivable that the entire electoral process (including remote voting) should be digitised, as is the case in Estonia. However, this still requires many steps to be taken by individual countries to increase voter confidence in digitisation. In our opinion, today's voters do not fully trust digital devices. For instance, in the 2018 parliamentary elections in Hungary, when the website of the National Electoral Office collapsed for a few hours after the vote ended, many claimed fraud occurred, even though voting and counting were completely paper-based. However, if this confidence could be increased, the conduct of an election and the counting of votes could be made much easier. In addition, a much higher participation rate could be achieved. For now, however, we have to be satisfied with one of the positive benefits of the COVID-19 epidemic: the ability to organise online meetings of election commissions.

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