



Office for Democratic Institutions and Human Rights

REPUBLIC OF AUSTRIA

PRESIDENTIAL ELECTION

REPEAT SECOND ROUND

OSCE/ODIHR NEEDS ASSESSMENT MISSION REPORT

25-26 August 2016



Warsaw
14 September 2016

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**REPUBLIC OF AUSTRIA
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OSCE/ODIHR Needs Assessment Mission Report

I. INTRODUCTION

Following an invitation from the Austrian Federal Ministry for Europe, Integration, and Foreign Affairs (MFA) to observe the 2 October 2016 repeat second round of the presidential election, and in accordance with its mandate, the OSCE/ODIHR undertook a Needs Assessment Mission (NAM) to Vienna from 25 to 26 August. The NAM included Richard Lappin, Deputy Head of the OSCE/ODIHR Election Department, and Alexey Gromov, OSCE/ODIHR Election Adviser.

The purpose of the mission was to assess the pre-election environment and the preparations for the election. Based on this assessment, the NAM recommends whether to deploy an OSCE/ODIHR election-related activity for the repeat second round of the presidential election, and if so, what type of activity best meets the identified needs. Meetings were held with officials from federal institutions and the election administration, as well as representatives of campaign groups, media, and civil society. A list of meetings is annexed to this report.

The OSCE/ODIHR would like to thank the MFA for their assistance in organizing the visit. The OSCE/ODIHR would also like to thank all of its interlocutors for taking the time to meet with the NAM and for sharing their views.

II. EXECUTIVE SUMMARY

Austria is a federal republic consisting of nine states. The federal president is the head of state and is directly elected for a six-year term, with a limit of two consecutive terms. If no candidate obtains a majority of valid votes in the first round, a second round is held between the two candidates who received the largest number of votes. Following the Constitutional Court decision to annul the results of the 22 May second round of the presidential election, primarily due to irregularities in administering postal voting, the government called for a repeat second round between the two candidates on 2 October. On 12 September, the Minister of Interior announced that the repeat second round will be postponed due to the poor quality of glue used for the postal voting envelopes. On 13 September, four parliamentary parties tabled an initiative to postpone the election till 4 December.

The repeat second round will be held under an unchanged legal framework, consisting primarily of the constitution and the laws on presidential and parliamentary elections. The OSCE/ODIHR has previously assessed the legal framework as providing a sound basis for the conduct of democratic elections. In recent weeks, parliamentary initiatives to reform electoral laws have been tabled, including the possible introduction of a centralized voter register. A number of OSCE/ODIHR NAM interlocutors highlighted other areas that would benefit from legal reform, including clarification of election day and postal voting mechanisms, enhanced supervisory powers for the Federal Election Board (FEB) and Ministry of Interior (MoI), and obligatory training for all levels of the election administration. Parliamentary discussions regarding electoral reform are widely expected to commence soon after the president is elected.

Presidential elections are administered by a five-tiered system of election boards and administrative authorities, headed by the FEB with support from the MoI. Election boards at all levels received updated instructions and training materials to avoid the mistakes revealed in the second round of the

election. The majority of OSCE/ODIHR NAM interlocutors expressed a high level of confidence in the election administration. The campaign group of one candidate expressed concerns about the use and regulation of postal voting.

There are some 6.4 million registered voters. According to the law, the same voter lists as finalised before the first round of the election, will be used for the repeat second round. Apart from the lack of possibility for citizens who turned 16 after the first round to vote, no concerns were expressed regarding the overall accuracy and inclusiveness of the voter lists.

Election campaigning is largely unregulated at the federal level. No parties raised concerns about their ability to campaign freely. Following the Constitutional Court decision, the MoI emphasized in its instructions that partial election results will not be shared with media before the end of voting nationwide and that media cannot enter polling stations on election day. These instructions were largely accepted by OSCE/ODIHR NAM interlocutors. No concerns were raised in respect of campaign finance ahead of the second round, despite a lack of legal certainty concerning the application of expenditure limits.

There are few formal procedures for the submission of complaints to election administration bodies and, in general, complaints can only be resolved after the announcement of final results. All OSCE/ODIHR NAM interlocutors expressed overall confidence in the impartiality and effectiveness of the complaints and appeals system and positively appraised proceedings held by the Constitutional Court in considering the challenge to the second round election results, which were deemed to be professional, transparent, impartial, and timely.

All OSCE/ODIHR NAM interlocutors expressed a high level of confidence in the electoral process and the ability of the election administration to effectively and impartially conduct professional elections. Prior irregularities that led to the annulment of the second round results were largely considered by the OSCE/ODIHR NAM interlocutors a result of lax and inconsistent administration, rather than a deliberate attempt to undermine electoral integrity. The Constitutional Court ruling to repeat the second round was widely perceived as demonstrating the resilience and effectiveness of the redress system. Notwithstanding, the majority of OSCE/ODIHR NAM interlocutors welcomed a potential external assessment of electoral legislation, specifically with regard to election day and postal voting procedures.

Based on this, the OSCE/ODIHR NAM recommends the deployment of an Election Expert Team for the repeat second round of the presidential election to review the legal framework in respect of postal voting and election day procedures. The OSCE/ODIHR also reiterates that a number of its previous recommendations on other electoral components remain valid and encourages the authorities to consider these in any future electoral reform process.

III. FINDINGS

A. BACKGROUND AND POLITICAL CONTEXT

Austria is a federal republic consisting of nine states. The federal president is head of state and is directly elected by voters. All presidents since 1945 have represented one of the largest parties, the Social Democratic Party or the Peoples Party, or ran as independent candidates.

In line with legal provisions the presidential election was called for 24 April. Six candidates, including from the largest parties, stood in the first round but none obtained more than 50 per cent of

valid votes required for election. The second round took place on 22 May between the two candidates who received the largest number of votes – Alexander Van der Bellen (independent) and Norbert Hofer (Freedom Party of Austria, FPÖ).

Preliminary results published by the Ministry of Interior (MoI) on 22 May, based on ballots cast at polling stations on election day, placed Mr. Hofer slightly ahead. However, after the postal ballots were counted the following day, Mr. Van der Bellen held an absolute majority. According to the final results published by the FEB on 1 June, Mr. Van der Bellen received 50.35 per cent of votes, and Mr. Hofer 49.65 per cent, with a difference of 30,863 votes.

On 8 June, Mr. Hofer's representatives challenged the results at the Constitutional Court, claiming that provisions regarding postal voting were unconstitutional and that the election results had been affected by widespread irregularities in administering the election. The complaint, in particular, noted non-adherence to general procedures for the receipt, storage, and counting of postal votes, as well as the transmission of partial election results by the FEB to media before voting had concluded throughout the whole country.¹

On 1 July, the Constitutional Court, having publicly interviewed some 90 witnesses, upheld the constitutionality of postal voting, but concluded that certain irregularities during the counting of postal votes had occurred.² The Court's ruling, as well as the majority of OSCE/ODIHR NAM interlocutors, noted that there was no evidence of any fraud on election day or afterwards. However, in taking into account that identified irregularities affected 77,926 postal votes, which was greater than the margin of victory, the Court held that this could potentially have had an influence on the final results, irrespective of whether manipulations actually occurred or not. In addition, the Court also ruled that the sharing of partial election results by state authorities before the close of polls was unconstitutional. On these grounds, the Court annulled the election results and ordered the authorities to repeat the second round of election throughout the country. On 8 July, the federal government, in agreement with the parliament, called the repeat second round for 2 October. On 12 September, the Ministry of Interior announced that the repeat second round will be postponed due to the poor quality of glue used for the postal voting envelopes. On 13 September, four parliamentary parties tabled an initiative to postpone the election till 4 December.

The OSCE/ODIHR previously deployed an Election Expert Team for the 2013 parliamentary elections and an Election Assessment Mission for the 2010 presidential election.³ In February 2016, the OSCE/ODIHR undertook a NAM ahead of the 24 April presidential election. The NAM did not recommend deploying an election-related activity as “no new issues had been identified since the last elections that would benefit from an assessment by the OSCE/ODIHR”. This report should be read in conjunction with the previous NAM report, which provides detail on additional electoral components related to the presidential election.

B. ELECTORAL SYSTEM AND LEGAL FRAMEWORK

The president is directly elected for a six-year term, with a limit of two consecutive terms, through a two-round majoritarian system. If no candidate obtains a majority of valid votes in the first round, a second round is held between the two candidates who received the largest number of votes.

¹ Wide variations in the length of voting hours exist in different municipalities across the country.

² In 14 out of 113 districts, the election boards started counting the postal ballots earlier than provided for by the law or members of the boards were not invited to and/or did not participate in opening and counting postal ballots. Instead, the staff of the local administrations executed the counting procedures alone. See [the decision of the Constitutional Court](#) (in German) as well as the related [press release](#) of the Court.

³ See all previous [OSCE/ODIHR election-related reports on Austria](#).

The legal framework for presidential elections consists primarily of the 1929 Constitution (last amended in 2014), 1971 Presidential Election Law (last amended in 2015) and 1992 Parliamentary Election Law (last amended in 2015), as well as several other laws.⁴ The 2010 and 2013 OSCE/ODIHR final reports assessed the legal framework as providing a sound basis for the conduct of democratic elections. Following the annulment of the second round results, a government initiative to introduce a centralized voter register, as previously recommended by the OSCE/ODIHR, was again placed on the parliamentary agenda.⁵ A number of OSCE/ODIHR NAM interlocutors highlighted other areas that would benefit from legal reform, including clarification of election day and postal voting mechanisms, enhanced supervisory powers for the MoI and Federal Election Board, and obligatory training for all levels of the election administration. In addition, the lack of legal provisions for citizen observation also represents a public concern.⁶ The OSCE/ODIHR has previously made recommendations to strengthen regulations concerning several of these issues. Parliamentary discussions regarding electoral reform are widely expected to commence soon after the president is elected.

C. ADMINISTRATION OF THE REPEAT SECOND ROUND

The repeat second round will be administered under the same framework as applied for the first and second rounds. Therefore, the five-tiered system of election boards and administrative authorities have to repeat all procedures specified by law for the second round. Based on the irregularities identified in the Constitutional Court ruling, the MoI and Federal Election Board updated existing instructions and training materials for the lower-level boards and administrations, with a particular focus on clarifying election day and postal voting procedures. The MoI also prepared and posted online training and voter education materials.

During the OSCE/ODIHR NAM visit, the State Election Boards and District Election Boards (DEBs) received the new MoI instructions and started preparations for training electoral staff. Members of DEBs met with by the OSCE/ODIHR NAM appraised the new instructions and online training course, finding it particularly effective for training political appointees in the lower-level boards.

Despite the irregularities revealed by the Constitutional Court ruling, the majority of OSCE/ODIHR NAM interlocutors retained a high level of confidence in the impartiality of the election administration at all levels, considering previous mistakes due to lax and inconsistent implementation of procedures rather than a deliberate or systematic attempt to undermine the integrity of the electoral process.

In line with the constitution, all citizens who reached the age of 16 by 24 April (first round of election) have the right to vote in the repeat second round. There were 6,382,507 voters included in the voter lists for the first round, including some 40,000 registered abroad, and those lists remain valid for the repeat second round. Several OSCE/ODIHR NAM interlocutors noted frustration that voters who turned 16 years after 24 April would not take part in the upcoming voting, as well as concerns that the records of those people who died after the first round would still remain on the voter lists.⁷ To mitigate against potential concerns regarding the accuracy of the lists, the MoI has

⁴ Other laws are the 1953 Law on Constitutional Court, 1947 Prohibition Law, 1973 Law on the Electoral Register, 2012 Political Parties Law, and 2012 Federal Law on Financing of Political Parties.

⁵ A government initiative to introduce a centralized voter register was previously submitted to parliament in 2013 as a part of a broader “direct democracy bill”.

⁶ See, for example, the position of [Association of Austrian Election Observers](#).

⁷ The MoI informed the OSCE/ODIHR NAM about a parliamentary initiative to update the voter lists to include those voters who turned 16 and exclude those who have died before the new election day.

advised that DEBs include an asterisk on voter lists next to those citizens who died after the first round.

D. VOTING METHODS

Voters can cast their vote in-person at their assigned polling station on election day or by postal ballot from within or outside the country.⁸ Postal ballots can be returned by 17.00 on election day by mail, in-person or by a person of trust and, since 2016, they can be returned to any polling station or DEB in the country on election day, significantly expanding their potential use.⁹ Voters residing abroad may return their ballot by post or deposit it at their embassy or consular representation for return to Austria. Mobile voting is also permitted at prisons, hospitals and for homebound voters.

In order to be able to vote outside of a polling station for the repeat second round, a voter has to (re)apply for a voting card at the local municipality by 30 September at the latest. While the law obliges the voter to specify a reason for requesting a voting card, the municipalities do not have to verify this reason. After the card is issued, the voter list is marked and the voter is then only allowed to cast a ballot with the voting card. Voters sending their ballot by mail are required to accompany the ballot with an affidavit attesting that their vote was made personally, confidentially, and without influence.

Alternative voting mechanisms have traditionally enjoyed a high level of trust and popularity in Austria and none of the OSCE/ODIHR NAM interlocutors raised any objections about their use, with the exception of the FPÖ representatives. The FPÖ stated that postal voting procedures do not safeguard the secrecy of the vote or protect voters from potential coercion, thereby allowing opportunities for voter impersonation and family voting. In addition, the FPÖ, and other interlocutors, expressed concern over the lack of effective security and access measures to the marked postal ballots after their delivery to the authorities.

E. ELECTION CAMPAIGN, MEDIA, AND CAMPAIGN FINANCE

Election campaigning is largely unregulated at the federal level. There is no official campaign period and few limitations are in place with regard to campaign methods. The constitution guarantees freedoms of association and assembly, and none of the OSCE/ODIHR NAM interlocutors noted any concern over the right and ability to campaign freely.

Several OSCE/ODIHR NAM interlocutors noted that the main platforms and positions of both candidates were already well-established, with the repeat second round expected to focus on migration, the economy, and future relations with the European Union. The public Austrian Broadcasting Corporation, which enjoys the largest television market share, plans to organize a series of additional interviews and debates with the candidates, providing another opportunity to present their views and political programmes.

Following the 1 July Constitutional Court decision, the MoI's instructions emphasized that media representatives are not allowed to be present in the polling stations on election day and interview people there, despite a long-standing practice to the contrary. While some interlocutors met with by the OSCE/ODIHR NAM supported this provision, some media representatives argued that this strict

⁸ According to the Article 26.6 of the Constitution, voters who are unable to cast their vote before the electoral authority on election day, for example due to absence, health conditions or staying abroad, may vote by postal ballot upon indicating the reason in an official application.

⁹ While in the 2013 parliamentary elections some 574,000 postal votes were cast, in the 2016 election this number reached some 543,000 in the first round and 760,000 in the second round.

interpretation of the law would result in less engaging news coverage. In line with the Constitutional Court ruling, the FEB will no longer inform media of partial election results before the closing of polls nationwide.

In terms of financing campaigns for the repeat second round, candidates may continue to receive donations, monetary and in-kind, from citizens or legal entities, as well as take loans. Total campaign expenses should not exceed EUR 7 million, although several OSCE/ODIHR NAM interlocutors expressed uncertainty as to whether this limit should be applied for each round of the election or for all three of them. Despite an apparent gap in the legislation, this lack of clarity was not regarded as a primary concern for the repeat second round, as none of the candidates approached the limit during the previous rounds. According to the law, candidates and supporting groups are required to submit reports on their campaign income to the Court of Audit no later than three months after election day.

F. COMPLAINTS AND APPEALS

The complaints and appeals process is regulated by electoral law, the Constitutional Court Law, and the Administrative Court Proceedings Law. There are few formal procedures for the submission of complaints to election administration bodies and, in general, complaints can only be resolved after the announcement of final results.

All OSCE/ODIHR NAM interlocutors expressed overall confidence in the impartiality and effectiveness of the complaints and appeals system. In particular, the proceedings held by the Constitutional Court in considering the challenge of the second round election results were positively appraised by all interlocutors as being professional, transparent impartial, and timely. Although some stakeholders expressed doubts as to the statistical relevance of the identified violations and their potential effect of the nationwide election results, the decision of the Constitutional Court to annul the election was widely perceived as being in line with legal precedent¹⁰ and a demonstration of the resilience and effectiveness of the complaints and appeals system.

IV. CONCLUSION AND RECOMMENDATION

All OSCE/ODIHR NAM interlocutors expressed a high level of confidence in the electoral process and the ability of the election administration to effectively and impartially conduct professional elections. Prior irregularities that led to the annulment of the second round results were largely considered by the OSCE/ODIHR NAM interlocutors a result of lax and inconsistent administration, rather than a deliberate attempt to undermine electoral integrity. The Constitutional Court ruling to repeat the second round was widely perceived as demonstrating the resilience and effectiveness of the redress system. Notwithstanding, the majority of OSCE/ODIHR NAM interlocutors welcomed a potential external assessment of electoral legislation, specifically with regard to election day and postal voting procedures.

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¹⁰ The Constitutional Court informed the OSCE/ODIHR NAM that the first comparable ruling was the 1927 case. Later the Court annulled several local elections results on the similar grounds.

ANNEX: LIST OF MEETINGS

Federal Ministry for Europe, Integration, and Foreign Affairs

H.E. Ambassador Florian Raunig, Head, Department for OSCE and Council of Europe
Martin Hojni, Deputy Head, Permanent Mission of Austria to the OSCE
Karl Russmann, Specialist, Expatriates Abroad

Federal Ministry of Interior

Robert Stein, Head of Department, Electoral Affairs
Gregor Wenda, Deputy Head of Department, Electoral Affairs
Alexander Barth, Legal Officer, Electoral Affairs

Federal Election Board

Meinrad Handstanger, Member of the Board
Monika Juch, Member of the Board
Karl Schön, Member of the Board
Anatolij Volk, Member of the Board
Stefan Wallner, Member of the Board
Tanja Windbüchler-Souschill, Member of the Board
Werner Zögernitz, Member of the Board
Peter Dachsbacher, Substitute Member of the Board
Erich Enengl, Substitute Member of the Board
Michael Graber, Substitute Member of the Board
Rudolf Schicker, Substitute Member of the Board
Werner Suppan, Substitute Member of the Board

Constitutional Court

Stefan Leo Frank, Deputy Director General

Election Authorities in Vienna

Christine Bachofner, Head, Municipal Department 62 - Elections and Specific Legal Affairs
Otto Gmoser, Head of Unit, Municipal Department 62 - Elections and Specific Legal Affairs
Viktoria Neuber, District Election Board No 12
Oliver Birbaumer, District Election Boards No 2 and 20
Eva Huber, District Election Boards No 13 and 14

Campaign Groups

Johannes Hübner, MP, Freedom Party of Austria, Member of the Federal Election Board
Norbert Nemeth, Freedom Party of Austria, Member of the Federal Election Board
Dimitrij Grieb, Freedom Party of Austria
Georg Bürstmayr, Association "Together for Van der Bellen"

Media

Thomas Langpaul, Deputy Head of Department, Austrian Broadcasting Corporation
Johannes Bruckenberger, Deputy Editor-in-chief, Austrian Press Agency
Katharina Shell, Head of Department, Internal political affairs, Austrian Press Agency
Ulrike Drucker, Editor, Internal political affairs, Austrian Press Agency

Civil Society

Erich Neuwirth, Professor of Statistics and Computer Science, University of Vienna