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**EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW**

**(VENICE COMMISSION)**

**AND**

**OSCE/OFFICE FOR DEMOCRATIC INSTITUTIONS AND HUMAN RIGHTS**

**(OSCE/ODIHR)**

**JOINT OPINION**

**ON DRAFT AMENDMENTS TO LEGISLATION ON THE ELECTION  
OF PEOPLE'S DEPUTIES  
OF UKRAINE**

**Adopted by the Venice Commission  
at its 96<sup>th</sup> Plenary Session  
(Venice, 11-12 October 2013)**

**on the basis of comments by**

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**TABLE OF CONTENT**

I.	Introduction .....	3
II.	Executive Summary .....	5
III.	Comments on the July 2013 draft amendments .....	6
	A. Electoral System, Suffrage Rights and Basic Principles.....	6
	B. Territorial Organisation of Elections .....	8
	C. Election Commissions .....	9
	D. Voter Lists .....	10
	E. Financing of Elections.....	10
	F. Nomination and Registration of Candidates.....	11
	G. Electoral Campaign and Media.....	12
	H. Voting, Counting and Establishment of Results .....	14
	I. Complaints and Appeals.....	15
IV.	Law on Repeat Elections.....	16
V.	Conclusion .....	17

## I. Introduction

1. In April 2013, the Minister of Justice of Ukraine, Mr. Oleksandr Lavrynovych, requested the Venice Commission and the OSCE/ODIHR to comment on the text of the draft laws regulating parliamentary elections, including a draft law for holding repeat elections for the constituencies where results had not been established in the 2012 parliamentary elections. In response to this request, the Venice Commission and the OSCE/ODIHR reviewed the draft amendments, and on 17 June 2013, the Venice Commission and the OSCE/ODIHR provided a written joint opinion on the draft legislation.<sup>1</sup>

2. In July 2013, the Ministry of Justice provided additional amendments (hereinafter, the "July amendments"), as well as extensive written comments in response to the June 2013 joint opinion, and requested the OSCE/ODIHR and the Venice Commission to provide an opinion on the new amendments.<sup>2</sup> This joint opinion has carefully considered the written comments of the Ministry of Justice submitted both in August and in October 2013 in the assessment of the July amendments.

3. The July amendments include amendments to the following laws: (1) the Code of Ukraine on Administrative Offences; (2) the Law on Political Parties; (3) the Code on Administrative Proceedings, (4) the Law on the Information Agencies; (5) the Law on the Central Electoral Commission, (6) the Law on the Election of People's Deputies of Ukraine and (7) the Law on the Principles of State Language Policy. The amendments are included in the document CDL-REF(2013)039, together with the evaluation of the recommendations made by the Ministry of Justice (CDL-REF(2013)042). This joint opinion focuses solely on how the July amendments address previous OSCE/ODIHR and Venice Commission recommendations. Thus, this joint opinion does not repeat all previous recommendations and focuses on reviewing the July amendments to discuss the extent to which the July amendments address or attempt to address the recommendations.

4. This joint opinion should be read in conjunction with prior joint opinions of the Venice Commission and the OSCE/ODIHR, as well as numerous election observation reports from previous OSCE/ODIHR and Parliamentary Assembly of the Council of Europe (PACE) election observation missions in Ukraine, which provide good background for understanding the development of the electoral legislation in Ukraine.<sup>3</sup> In addition to providing joint opinions on past legislative efforts to reform electoral legislation in Ukraine, the Venice Commission and the OSCE/ODIHR have participated in various consultations with election stakeholders. Both the OSCE/ODIHR and the Venice Commission have stressed on different occasions that the process of electoral reforms should include an open and inclusive debate as means to enhance transparency of and public confidence towards the electoral law.

5. On 20 June 2013, the Venice Commission and the OSCE/ODIHR participated in a roundtable in Kyiv organised by the Delegation of the European Union and the Embassy of

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<sup>1</sup> Joint Opinion on the Draft Amendments to the Laws on Election of People's Deputies and on the Central Election Commission and on the Draft Law on Repeat Elections of Ukraine, CDL-AD(2013)016, 17 June 2013 (hereinafter, the "June 2013 joint opinion"). This opinion was adopted by the Council for Democratic Elections at its 45th meeting (Venice, 13 June 2013) and by the Venice Commission at its 95th Plenary Session (Venice, 14-15 June 2013).

<sup>2</sup> The comments provided by the Ministry of Justice are titled "Evaluation of the recommendations expressed in the joint opinion by the Venice Commission and OSCE/ODIHR", submitted by the Ministry of Justice of Ukraine (hereinafter, "Ministry of Justice Evaluation").

<sup>3</sup> All OSCE/ODIHR and Venice Commission joint opinions on the Ukrainian legal framework can be found at: <http://www.osce.org/odihr/elections/ukraine> and <http://www.venice.coe.int/countries/ukraine>. All OSCE/ODIHR election observation mission reports can be found at: <http://www.osce.org/odihr/elections/ukraine>. All PACE reports can be found at: <http://assembly.coe.int/defaultE.asp>.

the United States of America in Ukraine to discuss the June 2013 joint opinion. On 22 July 2013, the Ministry of Justice approved a schedule of a series of roundtables to discuss the OSCE/ODIHR and the Venice Commission recommendations and electoral reform in Ukraine. The first roundtable was organised on 12 August 2013 with the participation of over 70 representatives of political parties, state institutions, academia, civil society and international organisations. The second roundtable took place on 11 September 2013, focusing on the issue of codification of the electoral legislation. The Venice Commission and the OSCE/ODIHR have participated in these two roundtables. Another roundtable has taken place on 3 October and the last one is scheduled to take place in November. These developments are welcome since they are in line with the recommendations of the Venice Commission and the OSCE/ODIHR concerning the importance of the inclusiveness of all electoral stakeholders in the reform process.

6. This joint opinion is based on unofficial English translations of the July amendments to the laws noted above and the Ministry of Justice's written comments responding to the June 2013 joint opinion. This joint opinion cannot guarantee the accuracy of the translations reviewed, including the numbering of articles, clauses, and sub-clauses. Any legal review based on translated laws may be affected by issues of interpretation resulting from translation.

7. This opinion should also be read in conjunction with the following documents:

- Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE (29 June 1990);
- Code of Good Practice in Electoral Matters. Guidelines and Explanatory Report, adopted by the Venice Commission at its 52nd session (Venice, 18-19 October 2002), CDL-AD (2002)023rev;
- International and regional documents which are binding on Ukraine;
- Previous assessments and joint OSCE/ODIHR and Venice Commission opinions noted herein;
- Final reports of the OSCE/ODIHR election observation missions noted herein; and
- PACE election observation reports.

8. The June 2013 joint opinion did not comment on the legislative processes which resulted in the proposed amendments. It did quote an earlier 2011 joint opinion, stating: "it is an established principle that legislation regulating fundamental rights, such as the right to genuine elections should be adopted openly, following public debate, and with broad support in order to ensure confidence and trust in electoral processes. In the process of drafting electoral legislation a broad consensus on the main rules is particularly important since electoral legislation should not favor the interests of one political party. A broad public consultation process encourages public trust and confidence in electoral outcomes."<sup>4</sup> The Ministry of Justice states in its most recent comments that it maintains a "discussing bills" page on its official website and it never received any comments or suggestions on the text of the pending amendments to the election legislation.<sup>5</sup> However, based on the statements of participants at the different roundtables in Kyiv, it would appear that there are many opposing views notwithstanding the absence of official website comments.

9. This opinion is provided with the goal of assisting the authorities in Ukraine, political parties, and civil society in their efforts to develop a sound legal framework for democratic elections.

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<sup>4</sup> CDL-AD(2011)037, par. 8.

<sup>5</sup> See Ministry of Justice Evaluation, page 2, CDL-REF(042).

10. *This opinion was adopted by the Venice Commission at its 96<sup>th</sup> Plenary Session (Venice, 11-12 October 2013).*

## **II. Executive Summary**

11. Although the July amendments are in general a positive step, extensive revisions are necessary to incorporate unaddressed recommendations. A comprehensive electoral reform, amending and harmonizing the different pieces of electoral legislation regulating parliamentary, presidential and local elections is necessary.

12. Positive steps reflected in the July amendments include:

- Changing the deadline for the Central Election Commission (CEC) to establish electoral districts and district boundaries from 175 to 360 days before the election;
- Reducing the maximum number of voters allocated to polling stations;
- Reducing the number of members on a Precinct Election Commission (PEC);
- Expanding the categories of election commission documentation that must be published;
- Lowering the amount of the required electoral deposit for political party lists and single-member district candidates; and
- Clarifying text to ensure campaign information in minority languages is posted in areas where minority languages are widely spoken.

13. However, some key recommendations remain unaddressed. Issues that have not been addressed by the July amendments include:

- The mixed system of 225 single-mandate districts and 225 proportional representation mandates is retained in the draft electoral law, although it has reintroduced deficiencies already noted in previous joint opinions and in the OSCE/ODIHR report on the 2012 parliamentary elections;
- Limitation on the right to be a candidate for anyone convicted of a deliberate crime, regardless of the severity of the crime committed;
- A five-year residency requirement for candidates, which is excessive and unreasonable;
- The need to adopt a single, unified electoral code to ensure that uniform procedures are applied to all elections;
- Lack of pluralism in the election administration due to guaranteed positions on the DEC and PEC remaining with parties already holding parliamentary mandates and with non-parliamentary parties limited to participating for the remaining vacant positions through a lottery;
- Lack of strong mechanisms for enforcing campaign finance provisions and the absence of effective, proportionate and dissuasive sanctions for violation of campaign finance provisions; and
- Confusing rules for the invalidation of election results.

14. The July amendments also introduce some provisions which should be clarified, as the English translation is not clear. This includes amendments to Articles 66 and 86 of the electoral law, which are discussed in this joint opinion. Further, the amendment in Article 66, which makes “the Central Election Commission, district election commissions, National Council on Television and Radio Broadcasting of Ukraine, and the central executive body for implementing state policy in the information and publishing sectors” responsible for overseeing and ensuring compliance with media regulations, may hinder instead of facilitate

legal enforcement.

15. The Venice Commission and the OSCE/ODIHR remain ready to assist authorities of Ukraine in support of their efforts to improve election-related legislation and bring it more closely in line with OSCE and Council of Europe commitments and international standards. At the same time, it must be emphasised that, in addition to further amendments to the legislative framework, full and effective implementation of the law is necessary in order to ensure conduct of elections in line with international standards.

### **III. Comments on the July 2013 draft amendments**

#### **A. Electoral System, Suffrage Rights and Basic Principles**

16. Both the 2011 and 2013 joint opinions commented on different aspects of the electoral system,<sup>6</sup> in particular, the potential negative impact that the five percent legal threshold for the allocation of mandates in the nationwide proportional component may have on political pluralism. The Ministry of Justice has defended the five per cent threshold, based in part on the electoral performance of political parties in the 2012 parliamentary elections, where no party received a percentage of votes in the range between 3 and 5 per cent of the valid votes cast.<sup>7</sup> The Ministry of Justice has also argued that the 5 per cent threshold was approved by the 2006 Venice Commission and OSCE/ODIHR Opinion on the Law on Elections of People's Deputies of Ukraine, CDL-AD(2006)002rev, 2 March 2006.<sup>8</sup> During the roundtables organised by the Ministry of Justice in Kyiv with all stakeholders, part of the opposition did not seem to disagree with the existing 5 per cent threshold and the fact that the formation of blocs is not allowed.

17. Comparison of the 2006 threshold with the current threshold is questionable for several reasons. First, the electoral system reviewed in 2006 provided for 450 seats elected in a national proportional representation election and not for 225 proportional representation seats. Secondly, the electoral law reviewed in 2006 provided for the participation of electoral blocs. Thirdly, the electoral law reviewed in 2006 lowered the legal threshold to 3 per cent. Although the 2006 opinion observed that some countries have a higher legal threshold, up to 5 per cent, the 2006 opinion did not state that a 5 per cent threshold, coupled with a reduction of proportional representation seats from 450 to 225 and the elimination of electoral blocs, would be appropriate for Ukraine.

18. The Venice Commission and the OSCE/ODIHR recommendations on different aspects of the electoral system remain unaddressed.

19. The June 2013 joint opinion recommended the introduction of measures to increase the participation of women in elections. An amendment to Article 15 of the Law of Ukraine on Ensuring Equal Rights and Opportunities for Women and Men requires a political party to respect any gender quota requirement stated in its party statute. An amendment to Article 8 of the Law on Political Parties in Ukraine supports the above amendment. A tenth point is added to Article 8, which requires a political party's statute to include a statement of the minimum level of representation of women and men in the party's electoral list of candidates for deputies. The Ministry of Justice acknowledges in its comments that the gender quota "is

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<sup>6</sup> See Joint Opinion on the Draft Amendments to the Laws on Election of People's Deputies and on the Central Election Commission and on the Draft Law on Repeat Elections of Ukraine, CDL-AD(2013)016, pages 15-19; Joint Opinion on the Draft Law on Election of the People's Deputies of Ukraine, CDL-AD(2011)037, pages 6-7, para. 19.

<sup>7</sup> See Ministry of Justice Evaluation, page 3.

<sup>8</sup> See Ministry of Justice Evaluation, page 2.

a voluntary consolidation by political parties in their statutes”.<sup>9</sup>

20. The Venice Commission and the OSCE/ODIHR recommendation to reduce the five-year residency requirement to stand for parliamentary elections has not been addressed. Addressing this recommendation would require a change in the Constitution as well as in the election legislation. During the different visits to Kyiv and the discussions held with all stakeholders, the ongoing process of constitutional reform was considered to be the appropriate framework to introduce the changes needed.

21. The Ministry states in its written comments that the *five-year residency requirement* was addressed in the European Court of Human Rights (ECtHR) case of *Mykola Melnychenko v. Ukraine*<sup>10</sup> and that the Court considered that this requirement is not unreasonable.<sup>11</sup> The Venice Commission Code of Good Practice in Electoral Matters and General Comment No. 25 of the United Nations Human Rights Committee are quite explicit concerning residency requirements. The Code of Good Practice states: “a length of residence requirement may be imposed on nationals solely for local or regional elections.”<sup>12</sup> General Comment No. 25 states: “Persons who are otherwise eligible to stand for election should not be excluded by unreasonable or discriminatory requirements such as education, residence or descent, or by reason of political affiliation.”<sup>13</sup> It is important to note that General Comment No. 25 places length of residency in the same category as education, descent, and political affiliation as being unreasonable and discriminatory. This should be contrasted with the same text in General Comment No. 25, which notes that some restrictions, such as an age restriction, may be acceptable if justified by “objective and reasonable criteria.”<sup>14</sup>

22. The July amendments do not address the Venice Commission and the OSCE/ODIHR recommendation that the restriction on candidacy, due to a criminal conviction, be more narrowly defined to apply only to specified crimes so serious that forfeiture of suffrage rights satisfies the principle of proportionality. The Ministry of Justice’s position on this recommendation is similar to its position concerning the five-year residency requirement as the Constitution would also have to be amended to address the recommendation.<sup>15</sup> However, during the roundtables held in Kyiv, it seemed there was a general consensus among participants that the restriction of suffrage rights for convicted people regardless of the severity of the crime committed should be reconsidered.

23. The June 2013 joint opinion reaffirmed a long-standing recommendation for harmonising electoral principles in a *single electoral code* so that a common set of electoral principles applies to all elections in Ukraine. Paragraph 7.1.1 of the PACE Resolution 1755 of 10 October 2010, on the functioning of democratic institutions in Ukraine, which makes the same recommendation, used the terminology “single unified electoral code”. The PACE Resolution states the recommendation would ensure that uniform electoral principles are applied to all elections. The July amendments do not address this recommendation.

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<sup>9</sup> See Ministry of Justice Evaluation, page 15.

<sup>10</sup> Application 17702/02, 19 October 2004. The reasonableness of the five-year residency requirement was not the controlling issue in the case of *Melnychenko v. Ukraine*. The controlling issue in this case was whether Mr. Melnychenko, who feared for his personal safety in Ukraine, could be excluded from being a candidate due to the five-year residency requirement. In fact, the ECtHR ruled that Mr Melnychenko’s suffrage rights had been violated, he had “suffered non-pecuniary damage as a result of being prevented from standing as a candidate in the general election”, and was awarded EUR 5,000. See paragraph 78 of the court’s judgment.

<sup>11</sup> See Ministry of Justice Evaluation, page 4.

<sup>12</sup> Code of Good Practice in Electoral Matters, CDL-AD(2002)23rev, 1.1(c)(iii).

<sup>13</sup> General Comment No. 25, paragraph 15. The Human Rights Committee has adopted a General Comment (General Comment No. 25) interpreting the principles for democratic elections and public service set forth in Article 25 of the International Covenant on Civil and Political Rights.

<sup>14</sup> General Comment No. 25, Paragraph 15.

<sup>15</sup> See Ministry of Justice Evaluation, page 3.

24. The Ministry of Justice argues in its comments that the adoption of unified election laws in other countries has not prevented electoral malfeasance or inconsistent application of electoral principles.<sup>16</sup> The Ministry of Justice states that the “improvement of electoral legislation depends largely on the outcome of the election campaigns” and “Ukraine does not yet have sufficient practice in the various parameters of the electoral system, electoral and referendum procedures.” The Venice Commission and the OSCE/ODIHR do not find these arguments to be convincing. During the roundtable discussions organized by the Ministry of Justice, the rapporteurs observed that there was a genuine discussion on the issue of harmonization, which is a positive step towards the preparation of a draft Electoral Code.

25. Concern has been expressed by certain stakeholders that the new point introduced in Article 2 of the electoral law, which provides that citizens abroad shall receive only a ballot for the proportional vote in the nationwide district violates Article 24 of the Constitution.<sup>17</sup> In 2012, the European Court of Human Rights has ruled that citizens abroad do not have to have the same voting rights as citizens residing within the country: “In short, none of the legal instruments examined above forms a basis for concluding that, as the law currently stands, States are under an obligation to enable citizens living abroad to exercise the right to vote.”<sup>18</sup> However, the Parliamentary Assembly of the Council of Europe encourages member states to allow their citizens living abroad to participate to the fullest extent possible in the electoral process.<sup>19</sup> Although States have a margin of appreciation to consider the issue of out-of-country voting, because there are no precise international standards, elections abroad should generally meet the same standards for democratic elections as in-country procedures.<sup>20</sup>

## **B. Territorial Organisation of Elections**

26. Addressing a previous recommendation, the July amendments revise the deadline by which the CEC is required to make a decision on the change of boundaries and single-mandate districts. The deadline of no later than 175 days prior to the day of voting has been increased to 360 days by an amendment to Article 18 of the electoral law. This is a positive amendment that provides political parties and candidates additional time to become familiar with the demographics of electoral districts prior to elections.

27. The OSCE/ODIHR and the Venice Commission have previously recommended reducing the number of voters allocated to polling stations in order to ease the problem of overcrowding in polling stations. An amendment to Article 19 of the electoral law reduces the maximum number of voters in a polling station from 2,500 to 2,000 for “large” polling stations and from 2,500 to 1,200 for “medium” polling stations. This is a positive amendment that addresses the recommendation. However, to implement this amendment in a successful manner, clear criteria for the formation of new polling stations and redistribution of the voters should be established, as well as the necessary resources to implement the changes should be taken into account.

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<sup>16</sup> See Ministry of Justice Evaluation, pages 8-9.

<sup>17</sup> The OSCE/ODIHR Needs Assessment Mission Report on the 2012 Parliamentary Elections in Ukraine states at page 4: “... the Constitutional Court ... deemed the provisions allowing voters abroad to vote both for majoritarian and proportional contests unconstitutional. Among the arguments put forward by the Court were that out-of-country voters had been added to a Kyiv constituency, undermining equality and not providing equal opportunities for majoritarian candidates, and that voters abroad would not know the situation in single-mandate constituencies.”

<sup>18</sup> See *Case of Sitaropoulos and Giakoumopoulos vs. Greece*, Application no. 42202/07 (12 March 2012), G.C. at paragraph 75.

<sup>19</sup> See Resolution no 1459 (2005) (paragraph 7) and Recommendation no 1714 (2005) (paragraph 1.ii) on the abolition of restrictions on the right to vote; see also Recommendation no 1410 (1999) on links between Europeans living abroad and their countries of origin (paragraph 5.iii).



### C. Election Commissions

28. The June 2013 joint opinion noted changes in the electoral law providing that the registration of candidates in the single-mandate districts is conducted by the relevant DEC. The change addressed a previous recommendation of the Venice Commission and the OSCE/ODIHR. The June 2013 joint opinion, however, did note that it was important for the CEC to exercise oversight of candidate registration by the DECs. Further, at the different roundtables in Kyiv, many participants expressed the concern that this change in the law could result in abusive practices at the DEC level. Thus, the June 2013 opinion stressed the importance of oversight of the CEC. Following the discussions and the views of ruling majority and opposition, as well as civil society, as stated in the Comments sent by the Ministry of Justice to the draft Joint Opinion on 9 October 2013, the Venice Commission and the OSCE/ODIHR consider that the distribution of competences in this respect between the DECs and the CEC should be agreed in an inclusive manner among all stakeholders.

29. The June 2013 joint opinion recommended revision of Article 30.3 of the electoral law to make it clear under what circumstances publication of Acts of the CEC is required prior to the start of the electoral process. The text of the article required Acts of the CEC, which have legal character, to be published prior to the election process “where possible”. It was recommended to clarify the phrase “where possible” in order to make the provision effective and to avoid it to be arbitrarily ignored by the CEC. The July amendments do not address this recommendation as they do not clarify the phrase “where possible”. However, the Ministry of Justice states in its comments that CEC Acts must be published before the start of the electoral process except where a specific time limit is stated in the electoral law.<sup>21</sup> This statement assumes that the CEC will publish all Acts prior to the commencement of the electoral processes (excluding those with specific time limits). The text, though, still conditions the requirement to “where possible”. Thus, additional clarification is needed to address this recommendation.

30. The previous recommendation for a reduction in the maximum and minimum numbers of PEC members has been addressed by the July amendments. The number of ten remains for the minimum number of PEC members for smaller precincts, but the maximum number has been reduced from 18 to 14. The range for medium precincts has been changed from 14-20 to 12-16, and the range for large precincts has been changed from 18-20 to 14-18.

31. The June 2013 joint opinion recommended increased pluralism in election commission membership, noting that the guaranteed positions on the DECs and PECs remain with parties already holding parliamentary mandates and non-parliamentary parties can only participate for the remaining vacant positions through a lottery. The Venice Commission and the OSCE/ODIHR are aware of the complexity both recommendations provided in the June 2013 joint opinion: increasing pluralism and, at the same time, reducing the number of PEC members. The right to be represented in DECs and PECs should be based on the principle of equity; that is, political parties that nominated candidates in the single, nationwide district should be able to nominate members to all DECs/PECs, while parties that nominate candidates only in certain districts should be able to nominate DEC/PEC members only in those districts where they are contesting. In the event of lotteries to select commission members, those should be held individually in each DEC/PEC concerned.

32. A July amendment to Article 35 of the electoral law addresses the recommendation that all written documents of the election administration be made available for public inspection, including on the CEC website.

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<sup>21</sup> See Ministry of Justice Evaluation, pages 19-20.

#### **D. Voter Lists**

33. As noted in the June 2013 joint opinion,<sup>22</sup> a voter can request a change to his/her own data or to any other voter's data. The OSCE/ODIHR and the Venice Commission recommended that the electoral law be amended to require that a voter be notified and have the opportunity to respond to a request for a change in the voter's personal data. A July amendment to Article 40 of the electoral law partially addresses the recommendation. The recommendation was for the voter to be given notice in order to respond to challenge the request for a change in the voter's personal data. The amendment provides for the notice of the decision to be given to the voter so that the voter can appeal the decision after the decision is made. It would be a better practice to allow the voter to challenge the request before the decision is made. The recommendation for notice was intended to give the voter the opportunity to prevent a wrongful removal instead of appealing a wrongful removal.

#### **E. Financing of Elections**

34. Article 50 of the parliamentary electoral law requires the banking institution to return to the party any unused funds based on a request from the party after the elections. On the other hand, any unused funds in the account of a single-mandate district candidate shall be transferred to the state budget. The June 2013 joint opinion noted this practice was discriminatory and should be ended. A July amendment to Article 50, creating a thirteenth point in the article, partially addresses the recommendation by allowing single-mandate district candidates to be returned their own unused funds. However, any excess funds in the campaign account due to contributions from other donors are still transferred to the state budget instead of being returned to those donors on a pro rata basis.

35. The June 2013 joint opinion recommended the deadline in Article 48.9 of the electoral law, which prohibits any payments from the campaign electoral fund after 18:00 on the day prior to election day, be revised to allow for payment of expenses received after the deadline.<sup>23</sup> A July amendment to this article partially addresses the recommendation by extending the deadline to 18:00 on the Wednesday following election day. This deadline may still be too short, depending on the invoicing policies of a particular vendor.

36. The June 2013 joint opinion recommended that Article 61 of the electoral law be clarified to state whether campaign finance violations, which can result in warnings to candidates, can also be the basis of cancellation of candidate registration.<sup>24</sup> This recommendation is not addressed by the July amendments. The failure to submit financial reports or the entry of invalid data in the reports should not be the basis of cancelling of candidate registration.

37. The lack of specific dissuasive sanctions in the electoral law for violation of campaign funding provisions has been a concern of the Venice Commission and OSCE/ODIHR. The June 2013 joint opinion recommended that, in addition to specific dissuasive sanctions, the introduction of public funding could be an additional mechanism for enforcing sanctions for campaign violations.<sup>25</sup> Since the July amendments do not introduce public funding, there is no available mechanism for implementing specific dissuasive sanctions for violations of campaign funding provisions and other mechanisms have to be found. Regarding general dissuasive sanctions, the Ministry of Justice states that the Criminal Code provides for possible imposition of a "fine, remedial works, confinement, imprisonment".<sup>26</sup> The Ministry

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<sup>22</sup> CDL-AD(2013)016, para. 44.

<sup>23</sup> CDL-AD(2013)016, para. 53.

<sup>24</sup> CDL-AD(2013)016, para. 55.

<sup>25</sup> CDL-AD(2013)016, para. 56.

<sup>26</sup> See Ministry of Justice Evaluation, page 11.

also notes that the Code on Administrative Offenses allows for the imposition of a fine for campaign finance violations.

38. The provisions in the Criminal Code and Code on Administrative Offenses were noted and discussed by the Council of Europe's Group of States against Corruption (GRECO) Evaluation Report on Ukraine, which is cited in the June 2013 joint opinion.<sup>27</sup> Concerning these provisions, the GRECO report stated:<sup>28</sup>

“In addition, the Criminal Code provides for a fine of about 156 to 468 EUR in case of provision of “gross” financial (material) aid (about 34,630 EUR or more) to the election campaign of a candidate or political party or bloc in violation of the pertinent rules, or deliberate use of such support by a candidate, political party or bloc, their authorised representative, trustee of the candidate or an authorised person. In cases not involving a “gross” amount, the Code of Administrative Offences provides for a fine of about 78 to 109 EUR (about 109 to 156 EUR for officials) on the donor. Here again, the GRECO Evaluation Team is concerned about the limited range of sanctions available – which have never been applied in practice – and about the obvious deficiencies in the system of sanctions. For instance, no penalty is laid down in the event that an electoral subject fails to file its financial statement with the supervisory authorities.”

39. Thus, the recommendation for the introduction of specific dissuasive sanctions for campaign finance violations remains unaddressed.

40. The June 2013 joint opinion noted that numerous recommendations remained to be implemented for campaign finance provisions. The July amendments make few changes. The July amendments require all campaign finance reports to be “analyzed”, including the provisional report submitted five days before election day. However, the July amendments do not state what the analysis of the report involves. The analysis is done by the respective electoral commission receiving the report. The analysis of both the provisional report and final report filed within 30 days after election day is published on the respective election commission's website and posted on the commission's stand for official materials for public view. Aside from these changes, the July amendments do not address the numerous recommendations that remain for improving campaign finance provisions.

## **F. Nomination and Registration of Candidates**

41. The recommendation to allow political parties to form electoral blocs to present candidates in parliamentary elections is not addressed by the July amendments.

42. The recommendation to lower the financial deposit for registration has been addressed by the July amendments. Article 56 of the electoral law is amended to lower the deposit required for a political party submitting candidates in the national proportional representation contest from the amount of two thousand minimum wages (about 210,000 EUR) to one thousand minimum wages (about 105,000 EUR). The deposit for a single-mandate district candidate has been lowered from the amount of twelve minimum wages (about 1,260 EUR) to ten (about 1,050 EUR).

43. The July amendments do not address the Venice Commission and OSCE/ODIHR recommendation that the reasons for cancellation of candidate registration stated in Article 61.4 of the electoral law, due to a criminal conviction, be more narrowly defined to apply only

<sup>27</sup> See June 2013 joint opinion, paragraph 57.

<sup>28</sup> See “GRECO Evaluation Report on Ukraine: Transparency of Party Funding”, 21 October 2011, available at: [www.coe.int/t/dghl/monitoring/greco/evaluations/round3/GrecoEval3\(2011\)1\\_Ukraine\\_Two\\_EN.pdf](http://www.coe.int/t/dghl/monitoring/greco/evaluations/round3/GrecoEval3(2011)1_Ukraine_Two_EN.pdf), paragraph 91.

to specified crimes so serious that forfeiture of suffrage rights satisfies the principle of proportionality.

### **G. Electoral Campaign and Media**

44. The June 2013 joint opinion, citing the OSCE/ODIHR final report on the 2012 parliamentary elections, recommended that the electoral law strengthen institutional mechanisms to deal with the prevalent problem of the abuse of state resources, particularly in regard to media coverage. The joint opinion recommended that the electoral law require more balanced coverage in media regulations, political pluralism in media coverage, and did not give candidates with governmental positions privileged treatment over other candidates. The July amendments introduce both positive and negative changes.

45. In a positive amendment, a new point 4 of Article 74 of the electoral law prohibits campaign activities during events organised by state authorities, local governments, and state or municipal enterprises, institutions and organisations. As these events often include the participation of incumbent candidates, they have an advantage over other candidates if campaigning occurs. This change, if implemented properly, could address the recommendation that incumbent candidates be not permitted to use state resources to their own advantage.

46. The Ministry states in its comments that the Ministry analysed alleged violations of the law occurring in the 2012 parliamentary elections and the “vast majority of information on events received by the police did not contain elements of crimes or offenses and usually were associated with dissatisfaction of some candidates for people's deputies of Ukraine or their representatives with actions of their political opponents.”<sup>29</sup> The issue of implementation of the law is of concern because the observations of the OSCE/ODIHR, stated in its final election report on the 2012 parliamentary elections, are not consistent with conclusions reached by the Ministry of Justice concerning legal violations in 2012. Thus, it remains to be seen whether Article 74.4 will be implemented in a manner that reduces the abuse of state resources.

47. The July amendments introduce some changes for media regulation. A July amendment to Article 66, in an apparent effort to address the lack of balance in media coverage, states “Mass media and news agencies should seek to obtain information about events related to the election from two or more sources, preferring primary sources.” This amendment does not create an obligation, but only states what media and news agencies “should” do. Further, having a second source for information does not ensure balance. This amendment does not effectively address previous recommendations.

48. It was noted positively in the June 2013 joint opinion that an amendment to Article 66 limits the share of broadcasting time of parliamentary parties and their candidates to “not more than 30 per cent from the average amount of broadcasting time”. However, a July amendment uses the text “MP candidates” instead of the previous text of “parties represented in current collocation of the Verkhovna Rada of Ukraine which are subject of the election process or of MP candidate who are currently MP from respective party”. The July amendment also removes the following phrase (introduced in an April amendment) after this 30 per cent limitation: “To broadcasting time devoted to parties which are subjects of election process a broadcasting time of MP candidate slated by that party is included.” Thus, it appears that the 30 per cent limitation now only applies to an individual candidate and not a

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<sup>29</sup> See Ministry of Justice Evaluation, page 34.

parliamentary party. This is not a positive development and it would be better to return to the draft amendment proposed in April and considered in the June 2013 opinion.

49. In the June Joint Opinion, it was noted that an amendment was introduced stating “the National Council for Television and Radio Broadcasting of Ukraine may use monitoring materials provided by civic organizations registered according to law-established procedure, statutes of which envisage activities on monitoring and observation of election process.” It could be considered that detailed criteria on what monitoring data can be used and in what circumstances be delineated.

50. In the June 2013 joint opinion, the OSCE/ODIHR and the Venice Commission positively assessed the amendment according to which “the National Council on Television and Radio Broadcasting of Ukraine oversees and ensures compliance with the requirements of this Law as regards the participation of the media and news agencies in providing information and conducting election campaigning.” The July amendments relieve the National Council on Television and Radio Broadcasting of the sole responsibility for overseeing and ensuring compliance with media regulations during the elections. A July amendment to Article 66 of the Law to the Election of People’s Deputies of Ukraine states that: “Central Election Commission, district election commissions, National Council on Television and Radio Broadcasting of Ukraine, and the central executive body for implementing state policy in the information and publishing sectors shall oversee and ensure compliance with the requirements of this Law as regards the participation of the media and news agencies in providing information and conducting election campaigning.” It is not clear whether this oversight must be exercised jointly, requiring the agreement of all of the listed institutions, or if any one of the listed institutions may take enforcement action on its own initiative. This change has the potential for weakening, as opposed to strengthening, institutional mechanisms if authority must be shared and exercised jointly.

51. An amendment to point 11 of Article 74 of the electoral law raises concern due to its potential to allow for the suspension of licensing and closing of media during the election campaign. This amendment provides the possibility for a court, when considering an election dispute, to impose sanctions for media violations. The text states “a court shall pass a decision temporarily (till the end of the election process) suspending the license, temporarily suspending the business of the news agency, or temporarily banning (till the end of the election process) the issuance of the printed publication.” Although limited to the context of the adjudication of a pending electoral dispute, the amendment does provide a mechanism for silencing political views during the election campaign. This amendment is troubling and is a negative development.

52. The Venice Commission and the OSCE/ODIHR recommended that the 20 minutes restriction, prohibiting broadcasters from commenting on or assessing the content of election campaigning, the activities of the party or candidate in any form within 20 minutes before and after the broadcasting of a campaign spot, be revised. One of the July amendments reduces the prohibition from 20 minutes to 10 minutes, which partially addresses the recommendation.

53. An amendment to Article 67.4 of the electoral law reduces the blackout period during which opinion polls cannot be published by the media from 10 days to 7 days before elections. However, even a period of 7 days is difficult to justify and is inconsistent with the provisions of Article 10 of the European Convention for Human Rights. Several constitutional courts have addressed this issue, within the context of the Convention and domestic legal frameworks, and found such prohibitions to unreasonably restrict the rights of freedom of expression and the press. The analysis of these decisions is insightful and should be

CDL-AD(2013)026

considered.<sup>30</sup> A prohibition on the publication of opinion polls beginning 24 to 48 hours before the opening of polling stations is more consistent with Article 10 of the Convention and recent constitutional court decisions from other countries.

54. One of the July amendments to Article 69.8 of the electoral law requires local self-government and local executive bodies to allocate places for posting of campaign material in accordance with the principle of equal opportunities. This amendment addresses the Venice Commission and OSCE/ODIHR recommendation that this principle be clearly stated in Article 69.

55. The blanket restriction on “the participation in election campaigning” of foreigners and stateless persons in Article 74 is not addressed by the July amendments. The ECtHR has addressed Articles 10 and 16 of the European Convention and the circumstances under which the free speech rights of foreigners may be legitimately restricted. In the *Case of Piermont v. France*,<sup>31</sup> the Court addressed the rights of a German citizen to express political opinions on French territory during the election campaign preceding the territorial assembly and parliamentary elections. The Court found there had been a violation of Article 10, noting the foreigner’s comments had already “appeared in the programmes of the local political parties and had in no way constituted a threat to public order”, and concluded “the freedom guaranteed in Article 10 applied regardless of frontiers...”.<sup>32</sup> In fact, the Court found the foreigner’s comments to be “a contribution to a democratic debate”.<sup>33</sup> The blanket restriction in Article 74 is incompatible with Article 10 of the Convention and cannot be justified.

56. The June 2013 joint opinion recommended that official electoral information should be available in minority languages in areas where they are widely spoken regardless of whether specifically requested by a political party or single-mandate candidate. A July amendment to Article 69 of the electoral law and an amendment to Article 12 of the Law on the Principles of State Language Policy address this recommendation, although it does not specify the resources and how the financial burden will be shared.

## **H. Voting, Counting and Establishment of Results**

57. Article 77.9 of the electoral law allows official observers to “take necessary measures within the limits of legislation to stop illegal actions during the voting and vote counting at the election precinct”. A July amendment to the electoral law strikes this provision, addressing the recommendation of the June 2013 joint opinion that this provision be deleted from the law. This is a positive amendment as it is a better practice that official observers should immediately notify the PEC, DEC, CEC or other relevant authorities if they observe actions they believe to be illegal rather than take action themselves.

58. The June 2013 joint opinion recommended that the number of ballots to be taken by the PEC members responsible for homebound voting should be specified in the law. A July amendment to Article 86 of the electoral law partially addresses this recommendation. However, the English translation of the amendment is not clear. The English translation states the number of ballots “shall not exceed more than 5 percent of voters included in the excerpt from the voter list to vote at home, but not less than one ballot.” There would not be enough ballots if the number of ballots could not exceed “5 percent of voters”. This is likely an issue of translation and the original text of the amendment should be checked. Further,

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<sup>30</sup> See, e.g., Decision 6/2007 (II. 27.) AB on 26 February 2007 of the Constitutional Court of Hungary and Decision U-I-67/09, 24 March 2011 of the Constitutional Court of Slovenia.

<sup>31</sup> Application no. 15773/89; 15774/89 (27 April 1995).

<sup>32</sup> Court’s judgment at paragraph 73.

<sup>33</sup> Court’s judgment at paragraph 77.

the phrase “but not less than one ballot” would also allow for an insufficient number of ballots for homebound voters.

59. Article 92 of the electoral law contains a minimum percentage of abuse that must occur before the voting results in the polling station can be declared invalid under the provisions of the article. The Venice Commission and the OSCE/ODIHR has consistently recommended that invalidation not be tied to an arbitrary percentage and the results should be subject to invalidation where the level of fraud or misconduct was such that the will of the voters cannot be determined.<sup>34</sup> The July amendments do not address this recommendation.

60. The June 2013 joint opinion recommended improvement in the text of points 16 and 17 of Article 94 as it was observed in the 2012 parliamentary elections that this article was abused, leading to numerous recounts by DEC and subsequent declarations of invalidity. It was also noted that ballots in some of these instances appeared to have been tampered with in the DEC premises and the invalidation of PEC results by the DEC changed losing candidates into winning candidates. The July amendments make textual changes in Article 94, but these changes are minor ones that do not address the concern that provisions for invalidity were abused. It will remain to be seen whether these minor textual changes prevent future abuses in the implementation of Article 94.

61. The July amendments make a textual change in point 17 of Article 94 of the electoral law by specifically referencing the grounds stated in point 16 of the article for invalidation of election results. However, this amendment is purely textual and makes no substantive change in the grounds for invalidation of election results. There are also textual changes in references to other articles in point 17, but these are not substantive changes. Textual but not substantive changes are also made in Article 92 by the July amendments. The July amendments do not address the recommendations of the Venice Commission and OSCE/ODIHR for the need to establish clear guidelines and procedures for invalidation that are based on objective criteria and not arbitrary percentages.<sup>35</sup>

62. Although a July amendment to Article 92 (declarations of invalidity) references the constituency abroad, it appears the provision remains in Article 96<sup>1</sup> point 8 of the electoral law, which states “Forbidden to declare the elections invalid in the abroad election precincts”. Thus, the recommendation of the Venice Commission and the OSCE/ODIHR that mechanisms be in place for invalidation where irregularities may have affected the outcome, including precincts abroad, remains unaddressed.

63. A July amendment to point nine of Article 94 of the electoral law addresses the recommendation that polling station results received by DEC be forwarded to the CEC as received and published on the CEC website upon receipt.

## **I. Complaints and Appeals**

64. The June 2013 joint opinion reiterated the recommendations of previous joint opinions of the Venice Commission and the OSCE/ODIHR, as well as the final reports of the OSCE/ODIHR, for simplification of the system for adjudicating electoral disputes. The June 2013 joint opinion, although noting improvement in the system for resolving electoral

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<sup>34</sup> See in this respect the *Report on the cancellation of election results*, CDL-AD(2009)054, December 2009, available at [http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2009\)054-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2009)054-e); see also *Cancellation of election results*, report elaborated by Mr Colliard at the Unidem Seminar held in Malta in November 2008, available at [http://www.venice.coe.int/webforms/documents/?pdf=CDL-UD\(2008\)008-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL-UD(2008)008-e).

<sup>35</sup> Ibidem.

CDL-AD(2013)026

disputes over the course of amendments since 2004, again raised the issue of the complexity of the complaints and appeals system.

65. The Ministry of Justice has responded that the complexity of the system is due to the structure of the court system and the responsibility of courts for appeals against decisions, acts, and omissions of state authorities, local self-government, officers and officials. Thus, the Ministry states it would require amendment of the Constitution to remove the concurrent jurisdiction of courts and election commissions over an electoral dispute.<sup>36</sup> Further, the Ministry of Justice states the Venice Commission Code of Good Practice in Electoral Matters expressly recognises having both courts and election commissions involved in the adjudication of complaints and appeals.<sup>37</sup> However, the Venice Commission and the OSCE/ODIHR recommendations are not for the abolishment of courts or election commissions. The recommendations are for simplification and clarification of jurisdiction as detailed in the following paragraph.

66. The OSCE/ODIHR final report on the 2012 parliamentary elections stated: “A significant number of complaints were rejected on procedural grounds, such as being filed with the wrong body”.<sup>38</sup> Something is fundamentally wrong when complainants cannot determine the correct body for filing a complaint. In order to address this fundamental issue, and in light of current structural restraints in the Ukrainian legal system, the Venice Commission and the OSCE/ODIHR make two recommendations, both of which are found in the Venice Commission Code of Good Practice in Electoral Matters: (1) providing special forms for complainants to complete when filing a complaint or appeal (with instructions to the complainant where to file the complaint or appeal) and (2) adoption of simplified filing procedures to reduce the observed 2012 occurrence of “a significant number of complaints [being] rejected on procedural grounds, such as being filed with the wrong body”. At first instance, electoral complaints should be handled by electoral commission, and, in a second instance, they should be handed by courts. No change in the Constitution is needed in this respect; the recommendations call for a simplification and a clarification of the relevant rules in order to achieve a more efficient and effective electoral complaints and appeals procedure.

67. The June 2013 joint opinion recommended increased transparency in the complaint system, including the publication of complaints, responses, and decisions. A July amendment to Articles 31 and 32 of the electoral law partially addresses this recommendation. This amendment requires submission of “summarised” complaint and decision information to the CEC by the DEC and to the DEC by the PEC. However, these amendments allow both the PEC and DEC to “summarise information about the claims and complaints submitted” and “the outcome of the consideration thereof”. The recommendation of the June 2013 joint opinion was for complete documentation on complaints and decisions to be made available for public inspection. This should not be difficult to achieve with the appropriate scanning hardware and software. It is recommended this additional amendment be further revised to require publication of complete documentation as opposed to summary information on all complaints and decisions.

#### **IV. Law on Repeat Elections**

68. The July amendments do not address the recommendations for improvement of the draft law on repeat elections. Those recommendations remain.

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<sup>37</sup> See Code of Good Practice in Electoral Matters, CDL-AD(2002)23rev, II.33.C.

<sup>38</sup> See OSCE/ODIHR Election Observation Mission Final Report on the 28 October 2012 Parliamentary Elections, page 25.



## **V. Conclusion**

69. The OSCE/ODIHR and the Venice Commission welcome the organisation by the Ministry of Justice of public and inclusive discussions of the amendments and the electoral reform process with different stakeholders, including the civil society. The Venice Commission and the OSCE/ODIHR hope that the outcome of the different public discussions will be reflected in the legislative and constitutional changes which are expected.

70. However, the Venice Commission and the OSCE/ODIHR express once again the regret that this reform process does not comprehensively amend and harmonise different laws regulating the electoral legal framework.

71. Certain July amendments are a positive step toward improvement of electoral legislation in Ukraine. However, key recommendations of the Venice Commission and the OSCE/ODIHR opinions, which are critical and basic to the rights to vote and be elected, remain unaddressed. Some of the July 2013 amendments, as noted in this joint opinion, are of concern and require clarification. The positive steps made by the July amendments, as well as the unaddressed recommendations, are noted throughout this joint opinion and many are stated in the Executive Summary.

72. The Venice Commission and the OSCE/ODIHR welcome the letter of the Minister of Justice of 2 October 2013, which stated the need of a comprehensive reform and the commitment to continue the inclusive process of electoral reform to harmonise the Ukrainian legal framework with International standards.

73. The Venice Commission and the OSCE/ODIHR stand ready to assist the authorities of Ukraine in their efforts to create a legal framework for democratic elections in conformity with OSCE commitments, Council of Europe and other international standards for democratic elections.