



Strasbourg, 8 December 2005

Opinion no. 338 / 2005

CDL-EL(2005)056
Engl. only

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

DRAFT JOINT OPINION

**ON THE DRAFT LAW ON THE STATE REGISTER
OF VOTERS OF UKRAINE,
submitted by people's Deputies of Ukraine,
Mr O. Zadorozhny and Mr Yu. Klyuchkovsky**

On the basis of comments by

Mr Angel SANCHEZ NAVARRO (Substitute member, Spain)
Mr Joseph MIDDLETON (Expert – OSCE/ODIHR)

I. Introduction

1. *In April 2005 the Minister of Justice of Ukraine requested an opinion on the Draft Law on the State Register of voters of Ukraine.*
2. *This draft opinion is based on comments provided by Messrs Joseph Middleton (expert of the Office of Democratic Institutions and Human Rights (ODIHR) of the OSCE) and Angel Sanchez Navarro (Substitute Member of the Venice Commission, Spain), and are based on an English translation of the Law provided by the Ministry of Justice Ukraine.*
3. *The joint Venice Commission - OSCE/ODIHR opinion was adopted by the Council for Democratic Elections at its ... meeting and by the Venice Commission at its ... plenary session.*

II. General remarks

4. The objective of the examined law is to create a single national register of voters in Ukraine. It also requires active participation of the voters in initiating their own registration, which is an entirely new approach in the Ukrainian context.
5. In the Ukrainian context, a clear difference exists between the concept of ‘voter list’ (‘spysok vybortsiv’) and the concept of ‘voter register’ (‘reestr vybortsiv’). Traditionally, and it is still the case in the Law on the Election of People’s Deputies of Ukraine as amended in July 2005 (CDL-EL (2005) 054), voters data are recorded on ‘voter lists’, which are not permanent and are created *ex nihilo* for each election according to a particular timeframe and methodology.
6. The draft Law of Ukraine “On the State Register of Voters of Ukraine” is an attempt to adopt an entirely new system whereby voters data would be recorded in permanent ‘voter register’.
7. The term of entry into force is not clear, as this “*Draft Law on the State Register of Voters*” affirms that it “*shall enter into force on 1 January 2005*”. If it were the case, in the terms that have been submitted to this opinion (which would then deal not with a Draft Law, but with a Law of Ukraine), it would coexist with the previously mentioned Law on the Election of People’s Deputies, which sets forth a traditional system of voter lists, while foreseeing the existence of a Law of Ukraine “On the State Register of Voters of Ukraine” (article 102.8).
8. All that said, this Law sets up a model of State Register of Voters which seems technically correct, and more practical than the complex system fixed by the Law on Election of Deputies. It provides for:
 - a permanent State Register, with a system for periodical updating of personal data;
 - a structure with different levels (local, regional and Central Registers of Voters), which may act in a coordinate way;
 - a definition of the authorities in charge of the system;
 - a definition of the rights, duties and responsibility of all subjects affected, and
 - a system of complaints and appeals to protect legitimate rights and interests at stake.

9. Nevertheless, the Law presents some of the characters found in other Ukrainian texts on the same issues and, in particular, the tendency to regulate in details, which explains the length of this draft law (21 articles plus three short final provisions).

10. In any case, the adoption and enactment of a single Ukrainian electoral code should be considered, as it would make it easier for citizens to understand, for political actors to handle, and for electoral commissions and courts to deal with electoral matters. In that sense, this particular law seems a good starting point to solve one of the main problems of any electoral legislation, which is relative to the formation of the Register of Voters, essential to practically define the constitutional concept of “people”, as subject of sovereignty.

III - Particular considerations

1. General Provisions (Chapter I)

11. The content of Article 1 (‘definition of terms’) would possibly be better placed in the body of the text. For instance, the definition of “State Register of Voters” could initiate the present article 2 (‘main objectives of the State Register’), which defines its objectives. That article would hence have two paragraphs: one defining the Register, and the second, its objectives. In fact, as far as the definition of the responsibility of the CEC is concerned, the following can be said: while Article 1 provides that the term “administrator of the State Register shall mean the Central Election Commission”, an almost identical definition is repeated in 10.2 (“The Central Election Commission shall be the authority of maintenance of the Central Register of Voters and the main administrator thereof) and in 13.2 (“The Central Election Commission shall be the *Main* Administrator of the State Register”, which exists with *other* administrators -regional, local: art. 13.1-, so modifying the definition in article 1). And, after these variations, in some occasions the Law still refers to the “Central Election Commission”, instead of using the alternative definition (see article 14.2). It is recommended to use consistent definitions throughout the whole text.

12. The principles of maintenance of the Register (art. 3), and the list of the data that have to be registered (art. 4) do not pose major problems. The draft Law envisages the compilation of a State Register of Voters, as a database containing basic details of each person qualified to vote in Ukraine. The draft Law sets out an appropriate and exclusive list of data to be included in the register: name, date and place of birth, residence address, date of acquisition of Ukrainian citizenship; relevant data about the voter’s capacity (Article 4.1). Voters with more than one residence must choose which residence to use as their electoral address (Article 7.3).

13. The provision in Article 4.1.6 that the State Register should include ‘data about the voter’s capacity’ raises question. It may be wise to clarify this provision. Article 70 of the Constitution states that citizens who have reached the age of 18 have the right to vote, except citizens who have been deemed by a court to be incompetent of mind.

14. Although Article 3.1.1 of the draft Law prohibits denial of the vote to those entitled to it under Article 70 of the Constitution, for the avoidance of doubt it may be worth clarifying what the term ‘data about the voter’s capacity’ means.

15. With respect to the rights and duties listed in article 5, it may be difficult to put into practice the right to “disprove false information regarding... *other voters*” since the law does not provide for making this information public. Finally, the provision (art.5.3) that ‘the voter is required to take measures to avoid his/her multiple entry into the State Register of Voters’ raise question regarding the modalities of the ‘measures’ to be taken by the voter, as well as regarding the actual enforcement of this duty.

2. Structure of the State Register of Voters (Chapter II)

16. The Register seems to have a sound structure, with a Central Register, regional registers and local registers (Article 8). Regional registers are kept by the regional department of justice under the control of the CEC (Article 11.3). Local registers are kept by local government authorities (Article 12.5).

17. It may be pointed out that the translation uses both terms (State: art. 9.1 and 9.2; or Central: 9.3) with reference to the same national Register. Their general design and system of relations among them seem quite adequate.

18. Article 9.2 states that the State Register is to be kept in written and electronic forms. However, Article 9.3 states that the Central Register shall be kept in electronic form. Presumably this means that the body responsible for maintaining the Central Register – the Central Electoral Commission (CEC) – must produce an electronic database. If the intention of the drafters of the law was to create a legal prohibition on the CEC making printed copies of the Central Register (as art. 9 could suggest), a rule which might conceivably be thought necessary to reduce the risk of unauthorised copying and distribution, this should be made clear.

3. Maintenance of the Register (Chapter III)

19. In so far as the draft Law envisages the creation and maintenance of permanent voter lists it marks a clear and welcome improvement over the present arrangements. However, it is not clear how the initial voter registers will be compiled once the Law comes into force.

20. The basic process of voter registration appears to rely on voters taking the initiative to submit an application to be registered (Article 15). Applications must be made in writing and supported with documentary evidence of identity and citizenship (Article 15.2). Applications are submitted to the appropriate local government authority. Separate rules apply for special categories of voters (military personnel, those residing abroad etc.) The procedure for the submission of data seems sound, although the responsibility given to the CEC in art.15.10 to determine the procedure and time limits for these processes raises question, as these might be better specified in the law.

21. Yet, turning to a system which requires the active participation of the voter to initiate their registration corresponds to an entirely new approach for Ukraine and is an exception in the region. Consequently, it will necessitate significant and sustained public information efforts.

22. Some transitional provisions may also be considered in this respect. For instance, instead of creating registers *ex nihilo*, it may be expedient to use the most recently compiled voter lists for national parliamentary or presidential elections as a basis for the first Registers.

23. Other parts of the Law, as the rules about the updating and correction of data of the Register of Voters may be too detailed, but in general seem to be realistic. Only the provision of regular checks using information owned by other public organs (Ministries of Internal Affairs and Justice, State Tax Administration and the State Department for Execution of Services, art. 17.2) may pose some difficulties, if it is not handled within the legal framework to the respect of personal data. And, as it may be also pointed out with reference to the Law on Election of Deputies, it is also arguable if regular checks should be fixed at certain moments referred to the future elections (“from September 1 to November 1 of the year preceding the year of regular elections of deputies and from February 1 to April 1 of the year preceding the year of regular elections of the President”, art. 17.3), instead of regularly (every year or every two years, for instance), or at a given moment after last elections (for instance, two/three years).

24. It is clear from Articles 15.9 and 17.2 that data used in compiling or maintaining the State Register may and will come from sources other than the voter himself. Article 15.9 states that information received from ‘other sources’ may be provided to the relevant regional authorities, and they may provide data from ‘other sources’ to local authorities. The Law should specify clearly what ‘other sources’ are envisaged.

25. The answer may lie in some part in Article 17.2, which requires the authorities responsible for maintaining a particular register to conduct periodic checks of data and updates of the information. This is to be done by comparison of data in the register with data held by local bodies of the Ministry of Internal Affairs, the Ministry of Justice, the State Tax Administration and the State Department of the Execution of Services. The heads of such bodies are required to submit any necessary data upon request. These refinements to the voter registers are required to be conducted from 1 September to 1 November of the year preceding regular elections to the national parliament and from 1 February to 1 April of the year preceding regular elections of the president.

26. Civil registry offices are required to inform local and regional authorities of deaths so that deceased voters can be removed from the registers (Article 16.3.1).

27. It should also be noted that there appears to be a contradiction between Article 4.2, with its exhaustive list of categories of data to be recorded in the State Register, and Article 16. The latter provision requires courts to submit to the registering authorities information about voters being deprived of their liberty as a form of punishment or being recorded as missing. If this is to be recorded then the list in Article 4.2 needs to be amended. It may also be expedient to record the source of such information in case of future queries.

28. In case of any change in the personal data, voters are required to submit updates within one month of the change in question (Article 16.1).

29. Where multiple entries of a voter have been detected, the relevant authority must inform the voter of the need to correct his or her data so as to avoid multiple inclusions on the State Register (Article 16.7). The voter has then seven days to respond. According to art.16.8, failure of the voter to comply with this requirement “shall entail administrative responsibility”. Considering the possible consequences, a period of seven days to respond would seem too short. Consideration should be given to extend the duration of the period of response. In addition, while placing responsibility upon the voter would appear to be consistent with the active participation required from them in the process; this should not be perceived as relieving the administration from its own responsibility to maintain accurate registers.

30. According to Article 18.2, voters have the right to *use* the information in the State Register, so far as their own data are concerned, only upon a written application to the appropriate authority. The word 'use' lacks clarity. Presumably the voter has the right to familiarise him/herself with the data held in relation to him/her, not least so that he/she can check its accuracy and request any changes. If something different is implied by the word 'use', the Law should indicate what it is. The Law should also confirm that a voter may make such a request at any time in the election cycle and that he/she should be entitled to check his/her data as it appears in all three relevant registers (the relevant Local and Regional Registers, as well as the Central Register).

31. Where inaccuracies or contradictions in a voter register are discovered as a result of information provided by a government body, the authority responsible for maintaining the register must verify and eliminate any apparent defect in the presence of the voter (Article 17.7). This may be going too far. It is certainly essential that no change is made in such circumstances without ensuring that the voter is informed of the problem in good time before any change is made and that he/she is provided with an opportunity to comment on or explain any problem and to submit any relevant evidence. But to insist on the voter's presence may mean that in case of obvious error, the problem cannot be resolved because the voter did not attend. The maintenance of accurate official records should not depend on the willingness or ability of an individual to come to the office where the records are kept.

32. Overall, the draft law draws a registration system which combines an active participation of the citizens and a substantial role for the administration, which would benefit from further clarification. For example it is not clear in the law whether voters can be registered *ex officio* without having initiated their registration.

4. Enforcement of the Law (Chapter IV)

33. Any disputes between a voter and the appropriate registering authority may be resolved in a court or any other procedure provided by law (Article 20).

34. A number of provisions regarding data protection appear in the draft Law. Information about a voter may be given to other natural or legal persons only with the voter's written consent. Data may only be transferred to law enforcement agencies only in accordance with a court decision. If the law is to permit transfer of data by order of a court, it needs to indicate on what grounds the court may issue or refuse to make such an order.

35. The draft Law envisages sanctions (whether administrative or criminal is not indicated)

- for citizens who fail to submit data for entry in the State Register on time or at all or intentionally provide false data; and

- for officials who fail to enter data or knowingly enter false data or violate the procedure on use of data in the State Register (Article 21).

36. The Law should indicate which violations of its provisions, if any, constitute or might constitute criminal offences. Given the nature of the violations in question, it seems unlikely that anything other than submission of information known to be false would warrant a criminal penalty rather than an administrative sanction.