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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

DRAFT OPINION

**ON THE DRAFT ELECTION CODE
OF THE VERKHOVNA RADA**

OF UKRAINE

On the basis of comments by

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**This document has been classified restricted on the date of issue. Unless the Venice Commission decides otherwise, it will be declassified a year after its issue according to the rules set up in Resolution CM/Res(2001)6 on access to Council of Europe documents.*

I. Introduction

1. On 7 June 2010, the Chairman of the Verkhovna Rada of Ukraine, Mr Lytvin, requested the Venice Commission to comment on the Draft Election Code of Ukraine submitted to the Rada by Messrs Y. Kliuchkovsky, S.R. Hrynevetskyi, S.P. Podhornyi and V. Synchenko.

2. Due to the latest local elections in Ukraine and the establishment by the Presidency of Ukraine of an additional working group in charge of the reform of the electoral legislation, the Venice Commission decided to provide a very general comment on the text of the Draft Code. The following text provides comments on part one (General Part) and two (Nationwide Elections) and does not include comments on the part three (Local Elections). These are some preliminary comments on the text and a full and a more detailed review of the draft legislation on elections can be provided at a later stage.

3. This opinion is based on an unofficial English translation of the Draft Election Code provided by OSCE office in Kyiv. The translation reviewed consists of 584 articles of text on 371 pages.

4. The following opinion also takes into account some previous recommendations of the OSCE/ODIHR and the Venice Commission, notably, this opinion is based on:

- the Joint Opinion on the Law on Amending some legislative acts on the election of the President of Ukraine adopted by the Verkhovna Rada of Ukraine on 24 July 2009 by the Venice Commission and the OSCE/ODIHR adopted by the Council for Democratic Elections at its 30th meeting (Venice, 8 October 2009) and by the Venice Commission at its 80th Plenary Session (Venice, 9-10 October 2009) CDL-AD(2009)040);

- Joint Opinion on the Draft Law No. 3366 about Elections to the Parliament of Ukraine by the Venice Commission and the OSCE/ODIHR adopted by the Council for Democratic Elections at its 29th meeting (Venice, 11 June 2009) and by the Venice Commission at its 79th Plenary Session (Venice, 12-13 June 2009) CDL-AD(2009)028);

- the OSCE/ODIHR Final Report on the 2007 Pre-term Parliamentary Elections in Ukraine, 30 September 2007 OSCE/ODIHR Election Observation Mission Report,

- the OSCE/ODIHR Final Report on the 2006 Parliamentary Elections in Ukraine, 26 March 2006, and

- the Code of Good Practice in Electoral Matters adopted by the Venice Commission, including the Guidelines on Elections (CDL-AD(2002)023rev).

5. This opinion was adopted by the Council for Democratic Elections at its ... meeting (Venice,.....) and by the Venice Commission at its Plenary Session (Venice,.....).

II. General Remarks

6. The draft Code provides very detailed regulation of elections in Ukraine. It has taken into consideration a number of recommendations of the OSCE/ODIHR and the Venice Commission and is a first attempt to codify all electoral rules in a single Election Code and the Commission would like to praise the drafters for this important work. The Venice Commission hopes that the remaining recommendations of previous opinions of the Venice Commission and OSCE/ODIHR will be duly considered in the future stages of work on the draft electoral legislation.

7. There are numerous and detailed provisions to enhance transparency, accountability, and establish processes for voting, counting, and tabulation of results. The text also integrates sound and sensible provisions on electoral administration, registration of voters and the complaints and appeals system. However, some of the provisions of the draft Code could be further improved.

8. The draft Code has a number of positive features and incorporates a number of previous recommendations of both the OSCE/ODIHR and the Venice Commission. It is clear that there are areas in the draft Code that could be addressed with further revisions, but it represents a considerable step forward compared to the existing legislation on elections.

9. In the past, electoral legislation in Ukraine was too often changed, sometimes just a few months before elections. This was seriously undermining the stability of the electoral law and as a consequence, the trust of voters in elections. The Code of Good Practice in Electoral Matters recommends that¹:

“a. Apart from rules on technical matters and detail – which may be included in regulations of the executive –, rules of electoral law must have at least the rank of a statute.

b. The fundamental elements of electoral law, in particular the electoral system proper, membership of electoral commissions and the drawing of constituency boundaries, should not be open to amendment less than one year before an election, or should be written in the constitution or at a level higher than ordinary law”.

10. The draft Election Code fully meets these two recommendations. It also establishes a comprehensive framework for the electoral process as a whole and solves the existing problem of lack of harmonisation between the different normative acts on elections.

III. Specific comments on the text of the Draft Election Code.

11. As it has been already mentioned in paragraph 2 the purpose of this paper is not to give a detailed review of the text but rather give a general evaluation of the different chapters of the draft. This opinion will not comment on provisions on local elections (part three) since these were subject to an expert review by the Directorate of Democratic Institutions of the Council of Europe².

12. The text of the draft Code is complex and very detailed. It is understandable that the drafters were trying to establish detailed procedures so that the user of this document (commission member, voter or observer) would have a clear picture of the procedures to be followed. The Code also addresses the problem of the uniformity of procedures used in different elections and this is a positive step. However, there is a risk that overregulation might create problems of understanding or for operation of electoral bodies in certain circumstances.

13. The draft Election Code regulates all types of elections - of the President of Ukraine, Members of Parliament of Ukraine, Members of Parliament of the Autonomous Republic of Crimea, oblast, raion, village, settlement, city and city raion councils, village, settlement and city mayors as they are envisaged by the Constitution of Ukraine. Section 1 of the Code (articles 1 – 7) explains the modalities of each election. Referendums are not regulated by this Act.

1. Section II (Articles 8 – 21) on basic principles of the suffrage

14. This section generally follows the recommendations of the Code of Good Practice in Electoral Matters of the Venice Commission³. It defines the scope of the electoral rights in Articles 8 – 12.

¹ See Doc. CDL-AD (2002) 023rev, II.2.

² See Doc. DPA/LEX 6/2010, Appraisal of the Draft Electoral Code of Ukraine (local elections).

³ See footnote 1.

15. Article 8 (and some of the following provisions of the draft Code) grants electoral rights only to citizens of Ukraine. The current trend in most of the European countries is to give the right to participate in the political life on the local level also to foreigners legally residing on their territory. The Code of Good Practice in Electoral Matters recommends in paragraph 1.1.b.2 that *“... it would be advisable for foreigners to be allowed to vote in local elections after a certain period of residence...”*

16. Paragraph 6 of the same article (as well as some other articles further in the text, notably 113, 264) on complaints and appeals introduce a system where complaints can be dealt with by electoral commissions or courts of law. It is difficult to understand the practical reasons for these alternative solutions which obviously could lead to confusion, overloading of commissions and courts with repetitive claims and contradictory decisions unless the whole system is governed by courts. The higher election commission should in principle have the power to decide whether a violation has taken place and only in cases when the higher election commission fails to do so the appeal could be submitted to the court. The Code of Good practice in electoral matters provides that:

“It is ... vital that the appeal procedure, and especially the powers and responsibilities of the various bodies involved in it, should be clearly regulated by law, so as to avoid any positive or negative conflicts of jurisdiction. Neither the appellants nor the authorities should be able to choose the appeal body. The risk that successive bodies will refuse to give a decision is seriously increased where it is theoretically possible to appeal to either the courts or an electoral commission...”⁴

17. It should be pointed out that the Code includes provisions on complaints and appeals in different parts of the text. Another matter of concern is the lack of express regulations on which court would be competent to deal with electoral complaints and appeals. The Code should make clear references to the procedural legislation indicating which courts are competent to deal with these matters.

18. In this light Article 11 of the draft Code could also be problematic. Its provisions and similar provisions in other articles which totally exclude the right of the non citizens to receive and impart information and ideas concerning elections seem to be contrary to Article 10 of the European Convention of Human Rights. Part. 2 of Article 10 of the Convention provides expressly that freedom of expression can be restricted only *“...in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary”*.

19. Article 13 paragraph 2 foresees a procedure for “self-nomination” – a new provision that meets the previous recommendations made by OSCE/ODIHR and the Venice Commission. Previous law on elections of members of the Rada did not foresee a possibility of (direct) participation of independent candidates in the electoral process.

20. However, the same Article 13. paragraphs 2. and 3 provide that only political parties registered *“...three hundred sixty five days prior to the election day or by a party created by way of integration (merger) of parties, provided that all integrated parties were registered not later than three hundred sixty five days prior to the election day”* can nominate candidates for national or local elections. It is difficult to understand the reason for discrimination of parties which legally exist on the day of the start of elections and for sure the term of one year is not acceptable. If the translation is correct, it would seem that even parties created as a

⁴ Code of Good Practice in Electoral Matters (Doc. CDL-AD (2002) 023-rev), II.3.3.c.

consequence of a reorganisation of the parties which have existed for many years will not be allowed to participate in elections. This solution might clearly create a problem of consolidation of the party system and diminish the chances of small parties to be represented in the Parliament.

2. Section III (Articles 22 - 25): electoral process.

21. The three articles of this section describe the general features of the electoral process, providing its basic principles, defining its subjects and establishing rules for ensuring its openness. This section identifies main areas which are dealt with in a more detailed way further in the text and does not include any provisions that might be in contradiction with the European electoral standards as identified in the Code of Good Practice in Electoral Matters.

22. It is a positive development that the authors of the text dedicate specific articles to the openness of the election process. The Venice Commission has indicated on a number of occasions that any election should be organised in a way that all subjects of the election process are fully informed about it and are aware of their rights and duties. The Code of Good Practice in Electoral Matters provides that *“Only transparency, impartiality and independence from politically motivated manipulation will ensure proper administration of the election process, from the pre-election period to the end of the processing of results”*(Section 3.1). The Draft Code provides clear indications on how electoral commissions have to operate in order to inform the voters about different stages of the electoral process.

3. Section IV (Articles 26 - 47): Territorial organisation of elections.

23. For national elections the Code foresees a combined system of single nationwide election district and territorial election districts. Such approach aims at addressing the critical remarks of several international organisations of the current electoral system of elections in a single nationwide constituency (with closed party lists). Article 29 also addresses the issue of out-of-country voting which has been an important issue during the 2006 and 2007 parliamentary elections.

24. A clear provision on special election precincts in Article 36 is also a positive development since it sets a clear list of cases when such precincts can be created.

25. Article 38 paragraph 3 provides for a possibility to create a precinct even with 5 voters. It is questionable how the secrecy of the vote can be ensured in such small precincts.

26. Article 39 on Voting and Office Premises of the Precinct Election Commission could be improved by adding a provision that should be accessible to all voters, including disabled people or elderly voters. The latest election observation reports by international observation missions pointed out that some premises were not taken into account the needs of these specific groups of voters.

4. Sections V, VI and VII: Election Commissions (Articles 48 – 116).

27. The draft Code establishes a new system of electoral commissions operating on professional basis. Article 51 provides that *“The Central Election Commission shall be a permanent collegial state body acting on the basis of the Constitution of Ukraine, this Code, and other laws of Ukraine...”*. This is a substantial change if compared with the current system, however, the choice between partisan commissions and professional ones is a choice to be made by each country and the Venice Commission is not in a position to make any comments on it.

28. Sections V and VI seem to provide sufficient guarantees for the operation of the commissions at different levels. However, these sections should probably integrate specific

rules on gender equality in articles on formation procedure for the commissions (for example, Article 57).

29. Article 57 provides that the appointment of the members of the Central Election Commission by the Parliament will be based on proposals of the President of Ukraine. It is unusual for the Head of the state to nominate all the candidates for this important body and some of the subjects of the electoral process could question the independent and impartial nature of the electoral commission, especially bearing in mind the fact that the acting President can stand as a candidate. An option can be to allow the factions in the Parliament to make proposals and to ensure that the opinion of the minority is not disregarded.

30. Article 65 - the impartiality and independence of the Central Election Commission is vital for democratic elections and necessary for credibility of this body. This goal can not be achieved without clear rules of appointment and removal from office of members, which would exclude any possibility of pressure. This task will be difficult to achieve, if potential candidates have the authority to initiate the removal from office of the members of the Central Election Commission. In this context the paragraph one of the article, which gives to the President of Ukraine, a potential candidate, the competence to initiate the removal from office of the members of the Central Election Commission can undermine the independence of this body.

31. Article 82 establishes detailed rules for training of the commission members. Considering that this issue is purely technical this issue could be regulated by specific decisions of the Commission rather than by the Code itself.

32. Provisions on the establishment of lower level commissions (articles 86 - 89) are very detailed but, as it has been already mentioned in the introduction, this could be helpful for the electoral administration – the description of the process is logical and clear. However, a requirement that “at least eight members of an election commission should have a master’s or a specialist’s degree, specializing in “law” or “international law”, or an academic degree in the field of legal sciences or public administration” seems to be mandatory for commissions of different levels. If this is the case it is not difficult to anticipate that this will make impossible or very expensive to respect this provision.

33. Articles 89 and 100 try to resolve a problem of equal representation of each subject of the electoral process on the level of management of the commissions – a positive step which could increase the trust of voters.

34. The wording of Article 110 should be checked. From the English translation of the Election Code at the disposal of the Venice Commission, one could suggest that instead of the sentence providing that the Precinct Election Commission shall “recognize voting on the respective elections at the election precinct in the event of the circumstances stipulated by Article 249 of this Code” one could just say that the Precinct Commission “recognizes the vote as invalid in accordance with the Article 249”.

5. Section VIII. Training of the members of Election commissions (Articles 117 - 127).

35. Following the general provisions of article 82 about the training of commission members, Section VIII establishes specific procedure (principles, requirements, licensing, etc) for training of commission members. It is a choice of a legislator to put such specific rules in the text of the draft Code, however, it would seem that leaving this particular field outside the text would be better. It will give more flexibility to the Central Electoral Commission to adapt trainings of electoral administration to the concrete needs.

6. Chapter III. Sections IX and X. General principles of the State voter register and maintenance of the register (Articles 128 – 157) .

36. Section IX seems to integrate the provisions of the existing law on the State Register of Voters. This law was examined previously by the Venice Commission and OSCE/ODIHR. A detailed analysis of the law can be found in the Joint Opinion on the Draft Law on State Register of Voters of Ukraine by the Venice Commission and the OSCE Office for Democratic Institutions and Human Rights (OSCE/ODIHR) adopted by the Venice Commission at its 71st Plenary Session (Venice, 1-2 June 2007)⁵.

37. Provisions of the Article 139 on the openness of the register to the general public are to be welcomed, however such openness should be considered in the light of the standards of the protection of personal data.

7. Section XI. Voter lists (Articles 158 – 171).

38. The provisions of Section XI try to address a number of previous recommendations of several international organisations, including the Venice Commission.

39. Among the positive features one can mention paragraph 5 of Article 158 giving a possibility to the members of the district election commission (on nationwide elections) to be included in voter lists in one of the election precincts of the respective territorial election district as well as the provision of Article 159 that voters receive a notification about the election with the information on their precinct. Specific measures to ensure public control over the process of compiling the preliminary voter lists foreseen in article 160 are also a positive development compared to the existing provisions in this field.

8. Section XII: Absentee voting certificates (Articles 172 – 178).

40. This section is very detailed and does not seem to present any particular problems – the procedures are very detailed and clear.

9. Chapter IV: Section XIII (financing elections from the budget – articles 179 – 184).

41. This section is detailed and does not seem to present any particular problems – the procedures are very detailed and clear.

10. Section XIV. Electoral funds of subjects of the election process (articles 185 – 189).

42. Article 185 deals with the issue of election funds. The selection by territorial election commission of the banking institution of Ukraine in which the subject of the election process can open its electoral fund's account is not very clear. Why is such a limitation necessary? One would imagine that banking institutions have a State licence. Normally political parties and individual candidates should be capable of choosing themselves which institution they trust.

43. Article 186 provides clear rules on how electoral fund's accounts are opened. Paragraph 3 provides that "*Procedure for opening and closing of the electoral funds' accounts of subjects of the election process shall be prescribed by the National Bank of Ukraine subject to the Central Election Commission's consent. The aforementioned procedure may not be amended during the election process*". This provision combined with corresponding paragraphs of the Article

⁵ CDL-AD(2007)026

187 on administrators of the account appointed by subjects of the election process and rules on reporting on the campaign spending allow the Central Electoral Commission to exercise control over the process of financing of campaign. The requirement of paragraph 9 of article 187 that *“financial reports on entry and utilization of resources of the electoral funds of subjects of the election process shall be officially published by the Central Election Commission of the respective elections in printed mass media within fifteen days from the day of their submission to the election commission”* provides sufficient guarantees for transparency of the process. This guarantee is further reinforced by paragraph 1 of Article 189 which provides that documents on each voluntary contribution shall *“obligatory contain full name, date of birth, place and address of residence of an individual making such voluntary contribution”*.

44. Article 188 on the sources of electoral fund gives a comprehensive procedure for contributions, however, it might be useful to establish the upper limit for financing of electoral campaign. The provision on the use of the own resources of the candidate could be clarified as well.

11. Section XV on information support of the election (articles 191 – 198) and XVI on election campaign (articles 199 – 213).

45. These sections are detailed and do not seem to present any particular problems – the procedures are very clear. However, there are several provisions that could be further improved. The wording of Article 203 could be reviewed, since it is not clear who are the “creative specialists” mentioned in this article, this provision could be problematic in the light of Article 10 of the European Convention on Human Rights.

46. Article 205 can be improved by including a specific mention that the use of printing equipment belonging to parties and candidates should also be accounted for as part of the campaign spending. The current provision does not have this reference and limits itself to declaring that “the party (organization of the party) - subject of the election process, candidate registered for participation in the respective elections may produce printed materials for its election campaign using the equipment belonging to such party (organization of the party) or personally to the candidate, respectively”.

47. It is questionable if the strict rule on the involvement of foreign media in the campaign can be justified. At least the drafters could be clearer on the issue of what kind of media is considered as foreign. If a media is registered in Ukraine, can it be considered as foreign in the sense of this article? Some of the provisions of Article 209 might be in conflict with Article 10 of the European Convention on Human Rights, especially the right of the National Television and Radio Broadcasting Council of Ukraine to “...cease, prior to the termination of the election process, the broadcasting on the territory of Ukraine, including by telecommunication operators, of foreign television channels...”

48. Article 213 foresees a right of reply, which is a positive provision allowing candidates or parties to react to any critical remarks which they consider unjustified. Such specific provision could help to conduct electoral campaigns in a less confrontational environment between different subjects of electoral process. But it is necessary to have a more clear rules on this right of reply in order to avoid any abuse of this right by different subjects of the electoral process.

12. Section XVII. Official observers (articles 214 – 219)..

49. Articles 214 and 216 give the right to observe an election to non-governmental organisations. This is a positive provision. Articles 216 and 218 give a detailed description of the participation of NGOs in the electoral process which could be considered as positive both

for NGOs and for electoral administration since the rights and obligations of each party are clearly defined.

50. The restriction in Article 216 for non-governmental organizations registered less than two years before the election day to have official observers during the elections is excessive. This provision should be revised.

51. The Draft Code includes a specific provision on international observers – Article 219. State bodies have a positive obligation to facilitate the operation of international observers – this is a welcomed provision.

13. Section XVIII: Ballot papers (articles 220 – 228).

52. This section does not seem to present any particular problem – the procedures are very detailed and clear.

14. Section XX. Counting of votes (articles 240 – 261).

53. Article 249 allows to invalidate the polling station results if the number of ballots found in the ballot boxes exceeds the number of voters by ten percent. Such an arbitrary standard of impermissible abuse establishes, in effect, a legal tolerance level for fraud of up to 9.99%, which cannot be compatible with the proper conduct of elections. Invalidation of election results should be possible only where it is shown that electoral violations raise doubts as to the reliability of the results even if the amount is less than ten percent. The Code of Good practice recommends that: “the appeal body must have authority to annul elections where irregularities may have affected the outcome (...)”⁶.

15. Section XXV. Nomination and registration of candidates in presidential elections (articles 289 – 310).

54. Article 290. The electoral law may impose some requirements concerning the nomination of candidates but should not go too far as to regulate the number of delegates at the congress and the space for media. So, the Law may require that candidates have to be presented by parties, according to some general criteria (democratic principles) and in accordance with the party charter adopted in accordance with the requirements of the law on Parties. This solution must be revised in all cases of nomination of candidates by parties (for example Article 342).

55. Article 293. In a number of cases candidates seeking registration are required to submit a property and income statement not only for themselves but also for their family members. However, the law does not define which persons are considered as “family” members. This is a term that should be clearly defined in the law as there are serious legal consequences for violation of the law.

56. Article 297 regulates the procedure for collecting signatures by a presidential candidate. Paragraph one of this article establishes that “*the candidate for the post of the President of Ukraine can be supported with the signatures of the persons who have a representative mandate...*” but in the same time paragraph 2 of the same article imposes ‘*...no less than three hundred signatures...*’ and the Art. 301 provide that “*The Central Election Commission shall cancel its decision on registration of a candidate for the post of the President of Ukraine if... ..the candidate for the post of President of Ukraine fails to submit the quantity of statement (as specified in part one of Article 297 of this Code) of the persons who have representative*”

⁶ Code of Good Practice in Electoral Matters (Doc. CDL-AD (2002) 023-rev), II.3.3.e

mandates...". This solution might be in contradiction with the general right of citizens to stand for an election.

16. Section XXVI. Peculiarities of the information support and election campaign at the elections of the President of Ukraine (articles 311 – 315).

57. Article 315. The provision concerning public debates, especially that "No more than two candidates for the post of the President of Ukraine may simultaneously participate in one and the same broadcast of a relevant series" and that the "...*number of broadcasts in one series of TV debates shall be such as to provide each of the candidates with the possibility to participate in them not more than once...*" are contrary to international standards and commitments regarding freedom of opinion and expression. These norms establish the excessive limits on freedom of expression by prohibiting all media, including private media, from allowing candidates to engage in debates in media beyond a single occasion and two participants. This suppression of the exchange of political views during an election goes far beyond what might be "necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary".

17. Section XXVIII. General provisions on elections of members of the Parliament of Ukraine (articles 334 – 339).

58. Article 335 establishes a five years residence requirement for being a candidate in elections, which seems to be excessive and unnecessary. The Code of Good practice in electoral matters recommends that a length of residence requirement may be imposed on nationals solely for local or regional elections, and it should not exceed six months, unless its aim is to protect national minorities⁷.

IV. Conclusion.

59. The Venice Commission would like to congratulate the Working Group on the Election Code of the Verkhovna Rada with the result of its work. Notwithstanding a number of suggestions and critical remarks of the present opinion, the text of the Draft Election Code is an important step forward in the process of the electoral reform in Ukraine. It integrates an important number of recommendations of different international organisations. The Draft Election Code can be further improved and the Venice Commission remains at the disposal of the Ukrainian authorities for any future co-operation in this field.

60. The Venice Commission welcomes the commitment of the Ukrainian authorities to reform the electoral legislation. It also hopes that the Working group on electoral law established by the President in Ukraine, which includes some of the members from the Working group of the Rada, which drafted the examined text, will take into consideration this Draft Election Code and will use it as one of the basic documents for its discussions.

⁷ Code of Good Practice in Electoral Matters (Doc. CDL-AD (2002) 23-rev), 1.1.c.iii.