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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

PRELIMINARY DRAFT GUIDELINES
FOR PREVENTING AND TACKLING
THE MISUSE OF ADMINISTRATIVE RESOURCES
DURING ELECTORAL PROCESSES

on the basis of comments by

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I. Introduction

1. These Guidelines are aimed at assisting national parliaments and other legislators in adopting laws¹ and initiating other measures to prevent and act against the misuse of public administrative resources during electoral processes.

2. The purposes behind such laws are:

- to ensure neutrality and impartiality in the electoral process;
- to ensure equality of treatment as between different candidates and parties in relation to administrative resources;
- to lessen the advantage of incumbency; and
- to ensure that public resources are not used for partisan purposes.

3. The Guidelines are built on the Venice Commission's Report on the misuse of administrative resources during electoral processes² and the conclusions of the 11th European Conference of Electoral Management Bodies that has dealt with this topic on 26-27 June 2014 in Helsinki. In these conclusions,³ the participants to the Conference invited "the Council for Democratic Elections [...] to consider developing guidelines aimed at preventing the misuse of administrative resources during electoral processes".

4. The Guidelines are based on the following documents:

- the [Code of Good Practice in Electoral Matters](#);⁴
- the [Report on the misuse of administrative resources during electoral processes](#);
- the [conclusions](#) of the Seminar held on 17-18 April 2013 in Tbilisi on the use of administrative resources during electoral campaigns;⁵
- the [conclusions](#) of the 11th European Conference of the Electoral Management Bodies held in Helsinki on 26-27 June 2014 on the same topic;⁶
- the Recommendation of the Committee of Ministers to member states on measures concerning media coverage of election campaigns.⁷

5. Before going through the Guidelines, it is useful to recall the definition of 'administrative resources' used by the Report of 2013 on the misuse of administrative resources during electoral processes:⁸ "administrative resources are human, financial, material, *in natura*⁹ and other immaterial resources enjoyed by both incumbents and civil servants in elections, deriving from their control over public sector staff, finances and allocations,¹⁰ access to public facilities as well as resources enjoyed in the form of prestige or public presence that stem from their position as elected or public officers and which may turn into political endorsements or other forms of support".¹¹

6. According to the 2013 Report on the misuse of administrative resources during electoral processes, an electoral process should be understood as a period much longer than the

¹ The term "law" and subsequently the expression "legal framework" captures any text from the Constitution to Codes and sub-legal rules. The legal framework covers therefore electoral as well as criminal laws. This has to be understood as such for the Guidelines in general.

² Adopted by the Council for Democratic Elections at its 46th meeting (Venice, 5 December 2013) and by the Venice Commission at its 97th plenary session (Venice, 6-7 December 2013; CDL-AD(2013)033).

³ CDL-EL(2014)001syn.

⁴ CDL-AD(2002)023rev.

⁵ CDL-EL(2013)003syn.

⁶ CDL-EL(2014)001syn.

⁷ CM/Rec(2007)15, Recommendation adopted by the Committee of Ministers on 7 November 2007 at the 1010th meeting of the Ministers' Deputies.

⁸ Paragraph 12 of the Report.

⁹ Like some benefits from social programmes, including goods and in kind resources.

¹⁰ As well as state-owned media [...].

¹¹ This definition aims at harmonising various expressions that can be found in domestic legislation such as "public resources" or "state resources". Both expressions are synonyms with "administrative resources".

electoral campaign as strictly understood in electoral law. It covers the various steps of an electoral process as starting from, for example, the definition of the electoral constituencies, the recruitment of election officials or the registration of candidates or lists of candidates for competing in elections. This whole period leads up to the election of public officials. It includes all activities in support of or against a given candidate, political party or coalition by incumbent government representatives before and during the election day.¹²

7. Some of the elements in the Guidelines may require a formal legislative basis in the national legal frameworks, if they are not already provided for in the Constitution, while other elements can be achieved through codes of ethics or public/civil service codes of practice and interpretation of national legislation by authorised courts.

8. In the case of by-elections or partial elections, the Guidelines should be applied in a more restricted sense to reflect the fact that the operations of central Government continue.

9. Based on these preliminary considerations and on the 2013 Report on the misuse of administrative resources during electoral processes, fundamental principles have first of all to be recalled. The Guidelines' first objective is to prevent the misuse of administrative resources specifically during electoral processes by suggesting improvements in the electoral or general legal framework. The Guidelines have also the objective to tackle such misuse.

10. *The present preliminary Guidelines were adopted by the Council for Democratic Elections at its XXX meeting (Venice, XXX) and by the Venice Commission at its XXX plenary session (Venice, XXX).*

II. Guidelines

I. Principles

I. 1. Rule of Law

I. 1. 1. The legal framework should provide for a general prohibition of the misuse of administrative resources during electoral processes. The prohibition has to be established in a clear, predictable and proportional manner. Criminal sanctions on this and other related wrongdoings, such as corruption or threatening have to be provided for and implemented. Such sanctions need to be efficient and proportional.¹³

I. 1. 2. Legality and the right to due process, including the possibility to bring complaints about the misuse of administrative resources to an independent tribunal (or equivalent judicial body), should be central to ensuring the appropriate use and to prevent the misuse of administrative resources during electoral processes.

I. 1. 3. It is important that rules – including laws, agreements and commitments that regulate or relate to the use of administrative resources during electoral processes, as well as judicial decisions interpreting them – are clear and accessible to all stakeholders, including authorities, candidates, political parties and citizens, and that sanctions and consequences for not abiding with these rules are foreseeable.

¹² Paragraph 9 of the Report. Whilst the majority could influence election results by amending electoral system before elections, such action cannot be considered as misuse of administrative resources. However, it has to be avoided as recommended by the Code of Good Practice in Electoral Matters (II.2.b).

¹³ See the Guidelines III. 2.

I. 2. Freedoms of expression, to form an opinion and of information

I. 2. 1. The restrictions imposed on civil servants during electoral processes must reflect the complex relationships between the different rights and freedoms enjoyed by the individuals and the political actors. In this respect, according to the European Court of Human Rights,¹⁴ “[f]ree elections and freedom of expression, particularly freedom of political debate, together form the bedrock of any democratic system”. Therefore, “it is particularly important in the period preceding an election that opinions and information of all kinds are permitted to circulate freely”. The Court nonetheless underlined that “in certain circumstances, the two rights [free elections and freedom of expression] may come into conflict and it may be considered necessary, in the period preceding or during an election, to place certain restrictions, of a type which would not usually be acceptable, on freedom of expression, in order to secure the 'free expression of the opinion of the people in the choice of the legislature'.”

I. 3. Impartiality

I. 3. 1. The legal framework should provide for explicit requirements for all public authorities and civil servants to act impartially during the whole electoral process while performing their official duties. Such regulations should establish the impartiality, independence and professionalism of the Civil Service. Therefore, while their personal views remain inviolate, civil servants in their official capacity should be restricted to take sides or to express their political convictions publicly.

I. 3. 2. Civil servants, other staff of public bodies and potentially their relatives should have legal protection, notably in employment law and public law. The legal framework should prohibit and sanction any victimisation and pressure exerted arising from their refusal to work on campaign activity, and for such officials who disclose misuse of administrative resources.

I. 4. Transparency

I. 4. 1. The legal framework should regulate transparency, including the clear distinction between the operation of government, activities operated by the Civil Service and the conduct of the political campaign.

I. 4. 2. The legal framework should ensure trustworthy, complete and accurate information to voters and political competitors on the use of administrative resources

¹⁴ For instance, European Court of Human Rights, *Case of Bowman v. United Kingdom* (ref. 141/1996/760/961; judgment of 19 February 1998):

“42. Free elections and freedom of expression, particularly freedom of political debate, together form the bedrock of any democratic system (see the *Mathieu-Mohin and Clerfayt v. Belgium* judgment of 2 March 1987, Series A no. 113, p. 22, § 47, and the *Lingens v. Austria* judgment of 8 July 1986, Series A no. 103, p. 26, §§ 41–42). The two rights are inter-related and operate to reinforce each other: for example, as the Court has observed in the past, freedom of expression is one of the 'conditions' necessary to 'ensure the free expression of the opinion of the people in the choice of the legislature' (see the above-mentioned *Mathieu-Mohin and Clerfayt* judgment, p. 24, § 54). For this reason, it is particularly important in the period preceding an election that opinions and information of all kinds are permitted to circulate freely.

43. Nonetheless, in certain circumstances the two rights may come into conflict and it may be considered necessary, in the period preceding or during an election, to place certain restrictions, of a type which would not usually be acceptable, on freedom of expression, in order to secure the 'free expression of the opinion of the people in the choice of the legislature'. The Court recognises that, in striking the balance between these two rights, the Contracting States have a margin of appreciation, as they do generally with regard to the organisation of their electoral systems (see the above-mentioned *Mathieu-Mohin and Clerfayt* judgment, pp. 23 and 24, §§ 52 and 54).”

during electoral processes operated by public authorities as well as entities owned or controlled by public authorities.

I. 4. 3. The legal framework should regulate transparency and accountability of the use of public funds by political parties and electoral competitors. Political parties and candidates should be required to report on the origin and destiny of their finances (on-going and in relation to elections) to facilitate the detection of potential misuse of administrative resources and to ensure that, once elected, they do not unduly favour their donors.

I. 5. Neutrality

I. 5. 1. The legal framework should ensure the neutrality of the Civil Service by prohibiting campaigning activities of public officials acting as such, either being themselves competitors or simply supporting competitors. This applies as well to public and semi-public entities likely to be supporting competitors. This principle of neutrality in the use of administrative resources should avoid any kind of interference of public money and public goods in electoral campaigns. This includes prohibiting donations from state companies, companies under state control or companies which provide goods or services to the public administration sector.

I. 5. 2. The legal framework should provide for incompatibilities between elected mandates and public positions, in particular senior management positions in the public sector. In this respect, the legal framework should provide for a range of adequate rules. Such rules may include the suspension of office or resignation of certain public officials running for elections. The law should therefore ensure neutrality of the Civil Service during electoral processes and consequently to avoid any risk of conflict of interest.

I. 5. 3. The legal framework should ensure the independence and if not neutrality at least balance of publicly-owned media. Law and practice should both ensure that publicly-owned media are not involved in “hidden” campaigning in favour or disfavour of particular political competitors.

I. 6. Equality of opportunity

I. 6. 1. The legal framework should grant equality of opportunity to all candidates and political parties during the electoral process.

I. 6. 2. The legal framework should ensure an equal access (proportionally) to administrative resources before, during and after the election, an equal access (proportionally) to the use of public funding of political parties and campaigns, and the equal rights for access to publicly-owned media for all political competitors.

II. Preventing the misuse of administrative resources during electoral processes

There is a need for a proper and effective legal framework aimed at preventing the misuse of administrative resources during electoral processes. This does not prevent from recommending additional measures, which are developed hereafter.

II. 1. Through the law

II. 1. 1. The legal framework should provide for effective mechanisms for prohibiting public authorities as well as public and semi-public entities to hold official public events for electoral campaigning purposes.

II. 1. 2. If public buildings and facilities are used for campaign purposes there has to be equal opportunity for all parties and candidates and a clear procedure of adjudication of such resources.

II. 1. 3. The legal framework should prohibit public authorities as well as public and semi-public entities from engaging in activities during the electoral process which intentionally or unintentionally favour or disfavour any political party or candidate. This relates to specific funds (state or local budget) as well as institutional resources (staff, vehicles, infrastructure, phones, computers, etc.).

II. 1. 4. The legal framework should prohibit competing public officials and political parties from receiving public funding, funding from public or semi-public entities, institutions that have a connection to the State as well as companies that provide the public administration sector with goods or services. An alternative is to thoroughly regulate such funding by law thus ensuring neutrality and transparency.

II. 1. 5. The legal framework should stipulate that there should be no major infrastructural announcements during the election period. Accordingly, the legislation should prohibit new programs and actions with financial impact that were not planned before an electoral campaign. For instance, the number of inaugurations of public buildings or any other public facilities should be on a similar level during electoral campaigns compared to periods without elections. Alternatively other means should be taken hindering improper use of such activities.

II. 1. 6. The legal framework should stipulate that there should be no inessential appointments to public bodies by the incumbents during the election period.

II. 1. 7. There should be a protocol put in place by a competent authority (head or governing body of the Civil Service or special committee) identifying what activities are considered to be campaign activities and therefore forbidden to the public/civil service. The head or the governing body of the public/civil service should have an advisory role in relation to queries during the election period as to whether something is captured by the prohibition on campaign activities by public/civil service.

II. 1. 8. The legal framework should provide for a clear distinction between “campaigning activity” and “information activity” of public media in order to ensure equality among political competitors in the media as well as a conscious and free choice for voters.

II. 1. 9. In addition to the national legislation, charters of ethics or agreements could be appropriate steps to tackle the misuse of administrative resources during electoral processes.

II. 2. Through independent and effective audit

II. 2. 1. The national audit office – or equivalent body – should be empowered and resourced to supervise all public expenditure and use of administrative resources, and it should be able to report abuse during electoral processes.

II. 2. 2. The legal framework should provide the audit authority with enough resources and adequate rules to fulfil this task.

II. 3. Through effective implementation and information

II. 3. 1. A comprehensive and effective implementation of the legislation is essential for preventing the misuse of administrative resources during electoral processes. Thus, restrictions on the use of administrative resources should be implemented in good faith.

II. 3. 2. Authorities, including electoral management bodies should create wide-reaching information campaigns with a rights-based approach, in which citizens and civil servants, candidates and political party leaders, are aware of their responsibilities during electoral processes. In this sense, clear criteria should be established to distinguish illegitimate from legitimate campaign activities. Such criteria should be applied consistently.

II. 3. 3. Training and guidelines for civil servants as well as internal guidelines for Ministers and their departments need to be developed to promote ethical, i.e. non-partisan, conduct within the executive branch. Guidelines for civil servants, public commitments, codes of ethics and other instruments, should be disseminated.

II. 4. Through political willingness

II. 4. 1. A sincere political will of the highest State authorities is a key factor in achieving the objective to effectively prevent and sanction the misuse of administrative resources.

II. 4. 2. In this respect, political parties would agree on such charters or agreements and would publicly express such commitments. Publicity and the thorough dissemination of these instruments are crucial in increasing their effectiveness. The development of a political culture, a mutual understanding and a sense of responsibility of both the incumbent and opposition political forces, as well as a respect of recognised values of a democratic society are of essential importance.

III. Acting against the misuse of administrative resources when observed during electoral processes

III. 1. Through complaints and appeals procedures

III. 1. 1. Constitutional courts, electoral courts, or equivalent bodies, as well as ordinary courts take the ultimate responsibility for the administration of justice dealing with the misuse of administrative resources.

III. 1. 2. The legal framework should provide for an effective system of complaints before a competent, independent and impartial court (or an equivalent judicial body). Particularly, an independent judiciary is a *sine qua non* condition for sanctioning the misuse of administrative resources. A specialised jurisdictional authority can be more likely to address the particular challenges that arise from electoral conflicts.

III. 1. 3. The legal framework should ensure the independence of electoral management bodies and courts in their decisions when adjudicating disputes regarding the misuse of administrative resources. This should be both reflected in their training and technical capabilities. For this purpose, electoral management bodies should get appropriate staffing and other work conditions.

III. 1. 4. Ensuring the integrity of the police, prosecutors, judges as well as auditors of political competitors is of essential importance. Concrete measures should address

the issue of integrity so as to ensure the neutrality of these persons in their capacity vis-à-vis the entire electoral processes. The implementation of sanctions against the misuse of administrative resources is possible only if the investigation, auditing, prosecution and justice systems are independent from the ruling political power.

III. 1. 5. While tackling cases related to the misuse of administrative resources, including via adjudication of the election-related disputes, electoral management bodies and courts of law must apply laws in a uniform and impartial manner irrespective of the political status of the members of electoral management bodies.

III. 2. Through sanctions

III. 2. 1. The legal framework should define the misuse of administrative resources during electoral processes as an electoral offence. Such offence should be a legal basis for proceedings with the ultimate sanction of cancelling the election result.

III. 2. 2. The legal framework should foresee that in case public finances or financially evaluable advantages are given to political parties or competitors without legal basis, such financing has to be returned to the state or municipal budget.

III. 2. 3. The legal framework should establish clear, predictable and proportionate sanctions for infringements of the prohibition of the misuse of administrative resources. A similar range of sanctions should apply for infringements regarding public funding of political parties and/or election campaign.

III. 2. 4. Political parties and candidates who abuse public administrative resources should be subject to criminal or other sanctions, reduction in public funding and electoral disqualification, in conformity with the principle of proportionality.

III. 2. 5. The law should therefore penalise both donors and recipients of banned funding.

III. 2. 6. Civil servants or staff of publicly-owned media who misuse administrative resources during electoral processes should be subject to sanction, including criminal conviction, and disciplinary sanctions, including dismissal from office.

III. 2. 7. The legal framework should refer in this respect to the role of the independent national audit office in supervising the spending of the public budget.¹⁵

¹⁵ See in this respect Guidelines II. 2.