

# COUNTERING MISUSE OF ADMINISTRATIVE RESOURCES DURING ELECTORAL PROCESSES





# Countering misuse of administrative resources during electoral processes

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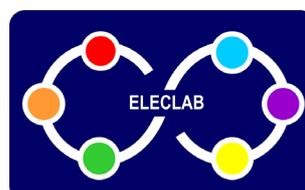
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Council of Europe Electoral Laboratory

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# European Commission for Democracy through Law

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**T**he European Commission for Democracy through Law – better known as the Venice Commission because it meets in plenary in Venice – is the Council of Europe’s advisory body on constitutional matters.

The Commission's primary mandate is to provide constitutional and legal assistance to states, mainly, but not exclusively, those which participate in its activities. Such assistance takes the form of opinions prepared by the Commission at the request not only of states, but also of organs of the Council of Europe. The Commission has thus made an often crucial contribution to the development of constitutional law, mainly, although not exclusively, in the new democracies of central and eastern Europe.

The aim of the assistance given by the Venice Commission is to provide a thorough, precise, detailed and objective analysis not only of compatibility with European and international standards, but also of the practicality and viability of the solutions envisaged by the states concerned. The Commission reaches its conclusions after extensive dialogue with the authorities, the opposition, state institutions and relevant stakeholders, including civil society. The Commission’s recommendations and suggestions are largely based on common European experience in this sphere.

The Commission also prepares general reports and guidelines which identify and develop standards in specific, topical fields. These reports have contributed to defining and updating Council of Europe standards.

The Commission has 62 member states: the 47 Council of Europe member states and 15 other countries (Algeria, Brazil, Canada, Chile, Costa Rica, Israel, Kazakhstan, the Republic of Korea, Kosovo\*, Kyrgyzstan, Mexico, Morocco, Peru, Tunisia and the USA). Argentina, Japan, the Holy See and Uruguay are observers, and Belarus has the status of an associate member state. The South African Republic and the Palestinian National Authority have a special co-operation status. The European Union and the Office for Democratic Institutions and Human Rights of the Organization for Security and Co-operation in Europe (OSCE/ODIHR) participate in the plenary sessions of the Commission.

Its individual members are university professors of public and international law, supreme and constitutional court judges, members of national parliaments and a number of civil servants. They are appointed for four years by the member states, but act in their individual capacity. Mr Gianni Buquicchio from Italy has been President of the Commission since December 2009.

The Commission works in three areas:

- ▶ democratic institutions and fundamental rights;
- ▶ constitutional justice and ordinary justice;
- ▶ elections, referendums and political parties.

The Commission shares the standards and best practices of the Council of Europe beyond its borders, notably with countries of the southern Mediterranean, Central Asia and Latin America.

Its permanent secretariat is located in Strasbourg, France, at the headquarters of the Council of Europe. Its plenary sessions are held in Venice, Italy, at the Scuola Grande di San Giovanni Evangelista, four times a year (March, June, October and December).

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\* All references to Kosovo, whether to the territory, institutions or population, in this text shall be understood in full compliance with United Nations’ Security Council Resolution 1244 and without prejudice to the status of Kosovo.

## Division of Elections and Civil Society (Directorate General Democracy)

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**T**he Division of Elections and Civil Society (Directorate General Democracy) at the Council of Europe provides advice and technical assistance to the member states on various aspects of elections, such as capacity building of electoral stakeholders and raising voter awareness.

In the field of capacity building, the Division of Elections and Civil Society works closely with election commissions to ensure that election commissioners are familiar with national election regulations and that they observe voters' rights when performing their duties. The division also works to enhance the capacities of other relevant electoral stakeholders, such as the bodies in charge of oversight of campaign and political party financing (for example, the State Audit Office of Georgia) or media coverage of election campaigns (such as the Audiovisual Council of the Republic of Moldova).

In this field, special attention is paid to enhancing the capacities of non-governmental organisations (NGOs) in charge of domestic observation of elections (more than 5 000 domestic observers were trained ahead of the 2014 early presidential elections in Ukraine, for example). Furthermore, in order to guarantee access to information for domestic observers, an e-learning course with a certification based on two handbooks on report writing techniques and international standards in elections has been put at their disposal.

The division also contributes to raising awareness of the importance of participating in elections as voters and candidates. It assists national election administrations in developing voter education and information campaigns, with a special focus on women, first-time voters and persons belonging to national minorities (such as awareness-raising campaigns for first-time voters in Albania).

In addition, the technical assistance work has been carried out with a view to updating the Council of Europe Recommendation Rec(2004)11 of the Committee of Ministers to member states on legal, operational and technical standards for e-voting. At the 1289th Session of the Ministers' Deputies on 14 June 2017 the Committee of Ministers adopted a new recommendation on standards for e-voting. The new Recommendation CM/Rec(2017)5, which follows the previous Rec(2004)11, was developed to ensure that electronic voting complies with the principles of democratic elections, and is the only international standard on e-voting in existence to date.

Council of Europe Electoral Laboratory (Eleclab) concentrates on the division's research and thematic work in order to innovate and produce useful and relevant guidelines in various areas of electoral matters ranging from primo voters, to better representation of women to modern strategic planning. Since 2019 the division bases its assistance and support activities in line with URSO methodology for electoral co-operation – Useful, Relevant, Sustainable and Owned. "The URSO toolkit for strategic and co-operation planning" is available online. Its primary audience are national electoral stakeholders who are continuously engaged in electoral reforms, in particular, central electoral commissions.

# Introduction

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*Richard Barrett*

## **INTERNATIONAL INSTRUMENTS AIMED AT PREVENTING AND COUNTERING MISUSE OF ADMINISTRATIVE RESOURCES DURING ELECTORAL PROCESSES**

The fair use of public administrative resources is vital in ensuring that full and fair democratic elections take place. Misuse by those who have power over such resources during an electoral process has the potential to seriously inhibit the full and fair participation of opponents thereby undermining the legitimacy of the results. Moreover, the guarantees and/or spirit of numerous international texts, for example, of Article 25 of the International Covenant on Civil and Political Rights and Article 3 of Protocol No. 1 to the European Convention on Human Rights (the Convention) are likely to be breached by a misuse of administrative resources which influences the electorate.

### **Concept of administrative resources**

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The concept of administrative resources, also referred to as state or public resources, goes far beyond public finances and covers those resources deriving from a public position or intended for the benefit of the general public. For example, the prestige of public office can fall within the concept of administrative resources, hence the deployment of incumbent office holders at campaign events is often seen by opponents as abusive. The Venice Commission's 2013 Report on the misuse of administrative resources during electoral processes (report) defines administrative resources as follows:

Administrative resources are human, financial, material, in natura and other immaterial resources enjoyed by both incumbents and civil servants in elections, deriving from their control over public sector staff, finances and allocations, 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.

The Organization for Security and Co-operation in Europe (OSCE)/Office for Democratic Institutions and Human Rights (ODIHR) *Handbook for the Observation of Campaign Finance* uses the term "abuse of state resources" which is defined as the "undue advantage obtained by certain parties or candidates, through use of their official positions or connections to governmental institutions, in order to influence the outcome of elections".

For the purposes of this overview, administrative/public resources are considered to be all "human, financial, material, in natura and other immaterial resources" deriving from a public position or intended for the benefit of the general public. The use of public buildings and facilities, the appointment of individuals to official positions, and decisions (indeed even announced intentions) regarding infrastructural/investment programmes may all amount to administrative resources in the context of electoral processes.

The possible abusers of resources extend beyond incumbents seeking re-election. For example, a well-connected opponent/opposition with access to local government resources could equally misuse such resources in an electoral process. Private organisations such as trade unions, charities and non-governmental organisations (NGOs) in receipt of, or with access to, public resources may also have a partial interest in the outcome of an election and occupy an influential position in the minds of the electorate.

### **Dilemma**

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At the same time, it must be recognised that deploying public funds and other administrative resources is absolutely necessary to enable electoral processes to take place. Moreover, the use of such resources can benefit the democratic process by putting smaller, less well financed opponents on an equal footing with established political machines in the expensive process of preparing for elections. Thus, while a general statement that administrative resources should not be used to benefit a party during an election appears straightforward, without any public funds and other administrative resources the electoral process would be inherently plutocratic.

This dichotomy illustrates the inherent conflict when looking at the use and misuse of administrative resources during the electoral process. Using public resources is necessary to have full and fair democratic elections but their misuse undermines the very same objective. Determining whether resources have been legitimately used or misused is a difficult task even before one considers legitimate politicking, decisions and actions as part of the normal course of governance, events of happenstance and, of course, the traditions of individual states.

## Defining the concept of misuse

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Public resources are required in order to have a democratic electoral process. At the most basic level, resources are required to establish electoral areas, electoral periods and the legal conditions of an election. Moreover, buildings are required for polling stations and count centres and these will either be public buildings or financed by public monies. Thus, the use of administrative/public resources during an electoral process is not only legitimate, but also essential.

What is it that turns the use of resources into a misuse? In principle, misuse is the application of state/public resources for party political ends. The definition offered by the Congress of Local and Regional Authorities Report is:

*“Abuse”/“misuse” of such resources can be defined as the “undue advantage obtained by certain parties or candidates, through use of their official positions or connections to governmental institutions, in order to influence the outcome of elections”. In this sense, the abuse of administrative resources also includes related offences, such as forms of pressure or threats exerted by public authorities on civil servants.*

When identifying a misuse, it is important to understand the rationale for tackling the misuse of administrative resources – the propriety in the expenditure of public resources and the level playing field in the democratic process. When considering whether resources have been misused, there has to be causative link between the (mis)use and the principle of propriety or the level playing field.

It is also important to recognise that the electoral process goes beyond the electoral campaign. National laws generally allow for a relatively short electoral campaign period. The electoral process, in contrast, covers the various steps in the election of public officials. In the Venice Commission's 2013 Report, for example, it is described as follows.

*An electoral process as understood in the report is a period going beyond the electoral campaign as strictly understood in electoral laws, it covers the various steps of an electoral process as starting from, for example, the territorial set-up of elections, 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 election day.*

Thus, while an electoral process incorporates the campaigning period, it is significantly broader in scope. There is a risk of misuse throughout the entire process but it is more likely and obvious during the campaign period.

## Legal basis to address this misuse

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When the issue of such misuse arises in national systems it is assessed by the national legal and constitutional framework as influenced by the democratic principles in that framework and also by international obligations and standards.

It is essential therefore to identify how the principle preventing misuse of administrative resources is addressed in the international legal instruments which encompass elections. The more overarching international documents do not specifically identify the misuse of administrative resources at elections as a problem, but the broader rights and obligations in those documents imply that such misuse is a corrupt interference with equal access to electoral opportunities and a corrupt abuse of a public resource.

At the more general level the Universal Declaration on Human Rights protects “genuine elections” in Article 21 which, like the concept of “free” or “fair” elections found in other instruments, is taken to mean an election process which is not corrupted by manipulation.

More specifically, Article 25 of the International Covenant on Civil and Political Rights (ICCPR) on the right to political participation (as explained in paragraphs 19 and 25 of General Comment No. 25 in 1996) provides that:

*persons entitled to vote must be free to vote for any candidate for election and for or against any proposal submitted to referendum or plebiscite, and free to support or to oppose government, without undue influence or coercion of any kind which may distort or inhibit the free expression of the elector's will. Voters should be able to form opinions independently, free of violence or threat of violence, compulsion, inducement or manipulative interference of any kind.*

Article 17 of the United Nations Convention Against Corruption requires states to criminalise “embezzlement, misappropriation or other diversion by a public official ... of any property, public or private funds ... or any other thing of value entrusted to the public official by virtue of his or her position”, while Article 19 addresses the abuse of functions or position. In the European context, Article 3 of Protocol No. 1 to the Convention requires that “High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature”.

Article 11 of the Charter of Fundamental Rights of the European Union deals with the freedom of expression and information and includes, “This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.” This is wider than the electoral context but encompasses it. Article 39.2 provides that members of the European Parliament shall be elected by direct universal suffrage in a free and secret ballot.

Further European soft law documents, guidelines and checklists are also of relevance as they are more focused on the specific issue and reflect the development of international standards.

Paragraph 5.4 of the OSCE 1990 Document of the Copenhagen Meeting of the Conference on the Human Dimension of the Commission on Security and Cooperation in Europe (CSCE) underlines the need for a “clear separation between the State and political parties” and provides parties should have the necessary legal guarantees to enable them to compete with each other on the basis of equal treatment before the law and by the authorities. This requires that a distinction be maintained between campaign activity and governmental activity. Paragraph 7.7 commits OSCE states to “permit political campaigning to be conducted in a fair and free atmosphere in which neither administrative action, violence or intimidation bars the parties and the candidates from freely presenting their views...”

The Venice Commission Code of Good Practice in Electoral Matters sets out that equality of electoral opportunity requires a neutral attitude by state authorities during an election campaign. The issue of such misuse is implicit in the Code in the context of equality of opportunity and the separate context of the freedom of voters to form an opinion.

The Venice Commission Report on this topic in 2013 was a significant step in gathering together material on the misuse of administrative resources. In summary, this report gives examples of misuse from observation reports and electoral practice and an overview of case law. It emphasises that essentially mitigation of such misuse depends on awareness and motivation within the public service. The report concludes that there were inherent weaknesses in a lot of national legislation and in practice these may lead to the misuse of administrative resources, potentially giving an undue advantage to incumbent political parties, thus affecting the equality of electoral processes and the freedom of voters to form an opinion. The report also emphasises that legislative intervention is not a panacea, any legislative instruments must also be properly used by the executive power, alleged/potential abuses must be independently investigated/audited, and the law must be applied by the relevant enforcement body.

Following from the 2013 Report, the Venice Commission and the OSCE/ODIHR agreed on Joint Guidelines for preventing and responding to the misuse of administrative resources during electoral processes in March 2016. These guidelines were aimed at national law makers and authorities in light of the findings of the 2013 Report. They set out the principles which should be reflected in the national legal framework to prevent and remedy this area of abuse and emphasise the importance of separating the government from political parties. This involves some restrictions on canvassing by civil servants which constitutes a limitation on political rights. The guidelines recommend a restraint on major policy announcements or non-essential appointments during the election period and protection for civil servants who disclose misuse or refuse to cooperate with it. Many of the recommended provisions can be outside the Election Code in media laws, laws on political parties, laws protecting whistle-blowers, civil service laws or indeed in soft law instruments.

In short, the guidelines recommend that laws and concrete enforcement measures be introduced about administrative resources, the objective of which is to:

- ▶ promote neutrality and impartiality in the electoral process;
- ▶ promote equality of treatment between different candidates and parties in relation to administrative resources;
- ▶ level the playing field between all stakeholders, including incumbent candidates; and
- ▶ safeguard against the potential misuse of administrative resources for partisan purposes.

The Congress of Local and Regional Authorities' report from 2016 entitled *The misuse of administrative resources during electoral processes: the role of local and regional elected representatives and public officials* develops the issue with particular focus on local government. This report notes that "the intrinsic linkage between local and regional elected representatives and a given community" and the generally close relationship between "incumbents or candidates, civil servants and public officials working for the municipality and the electorate" creates a further layer of complexity when looking at the misuse of administrative resources. The Congress advocates a legal framework which clearly delineates what is permissible with particular focus on the election campaign, political party and campaign finance, and the media sector.

The Congress published its own *Checklist for compliance with international standards and good practices preventing misuse of administrative resources during electoral processes at local and regional level* in 2017. This checklist identifies risk areas of potential misuse of administrative resources, sets out factors to guide in the assessment of a country's legal framework, provides guidelines for identifying specific instances of misuse, and deals with concrete preventive action in the form of suggested voluntary declarations, codes of conduct and awareness-raising activities.

## Difficulties in application

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If the misuse of administrative resources is the application of state/public resources for party political ends, governmental action and political campaigning should be distinct activities.

In the first place there should be an identifiable separation between public funds and political campaign finances. This principle is easy to state but once one scratches the surface it becomes very difficult to apply. Political parties are generally in receipt of public funds and while the method of allocation varies from country to country, usually allocations are not equal. While there is no inherent difficulty with this, provided of course the relevant principles applicable to party funding are complied with, it creates a difficulty when looking at whether public funds are being misused for the purposes of elections. If an incumbent party is in receipt of more public funds than an opposition, does that create an inherently abusive position regarding those funds unless they are excluded from use during the electoral process?

In reality, no hard rule can be set down. There is no inherent problem with the rules on party financing applying *mutatis mutandis* to campaign financing. Whether public funds are being misused as opposed to used will be determined on a case-by-case basis having regard to the principles of creating equality in the election process. Campaign and party finance laws, and transparency in both, are a central tenet for democratic elections and should operate to prevent the misuse of resources. Certainly, public funding of political parties should not operate to allow any party to finance an electoral campaign which places opponents at a disadvantage because of their lack of public funding. Thus, many systems provide that public funding for party activity is not to be used for election campaigns.

Leaving aside the direct use of public funds, politicians in official positions often receive specific public financial support. This may come in various forms such as an allowance to employ staff, publicly funded transport, or access to free facilities such as postage. There is, of course, no fundamental difficulty with these public resources being bestowed on such persons. However, these resources may also give that person a beneficial electoral position. If, for example, a staff member paid through public funds was to undertake campaign work during the course of the normal working day, this would put the candidate in a superior position through the use of public funds. Again however, a simple statement that such party political work should be prohibited is easier to say than to apply. One can easily envisage situations where the line between official publicly funded business and political campaigning is blurred, for example when does normal constituency work become electoral work?

What about conducting official public business and decision making during an electoral process? The commencement of a large infrastructure project during or in the immediate run-up to an electoral period may have a significant effect on the election, but a country must continue to function during an electoral period. The UK Government *General election guidance for civil servants 2019* refers to a custom where ministers observe "discretion in initiating any action of a continuing or long-term character" and decisions on matters of policy which a new government might want to take a different view upon should be postponed unless detrimental to the national interest or wasteful of public money. That is hard to disagree with but it is difficult to pin down the boundaries of those statements. Moreover, the issue is even more complex in the context of regional elections that do not coincide with national elections. Let's use an infrastructure project as an example, and a decision by the national government which would undoubtedly benefit a particular region. Should this decision be postponed during the electoral process? Does the answer to that question depend on whether the decision had been in the pipeline for a long period? Would the

determination on whether this is a misuse of public resources consider the particular needs of the region and, if so, on what basis should this affect the determination?

Similarly, if the actions by a supposedly neutral officer, for example a senior civil servant or publicly funded NGO, had been less politically overt and simply offered support to a particular manifesto policy of a party, would that amount to a misuse of resources?

## **The importance of national guidelines and codes of conduct**

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The purpose of the above is simply to demonstrate that it is often difficult to pin down exactly when the use of administrative resources will amount to a misuse. Of course, it is vitally important that the misuse of administrative resources is prevented, detected, and rules enforced through an adequate legal framework. As such, there must be adequately resourced, independent, and sufficiently powerful enforcement bodies such as an electoral management body. However, even a model regulator will face difficult challenges in resolving the types of complex cases which have been outlined above. Moreover, if the regulator is required to make a judgment call in a borderline case, accusations of political bias are easily foreseeable regardless of merit. To avoid these difficulties as much as possible, the legal framework should spell out what is permitted and what is prohibited.

The adoption of the types of laws recommended by the Venice Commission and other international organisations can assist but a theme running through this overview is that while general statements on the misuse of administrative resource are relatively easy to put forward, in reality the grey area is far greater than the black and white areas. Constitutional and/or legislative provisions, while necessary, can only go so far in spelling out what is permitted and what is prohibited because an overly prescriptive law is likely to proscribe legitimate conduct given that distinguishing between use and misuse depends on context and effect rather than an action or event.

Soft instruments in the form of guidelines and established practices are particularly useful in this area. If the legal framework should spell out what is permitted and what is prohibited, soft law provides the better format to facilitate the margin necessary to determine whether there has been a misuse by reference to principles of propriety in public spending and the level electoral playing field. The Venice Commission and OSCE/ODIHR Joint Guidelines neatly summarise the generally appropriate legal framework as follows:

Some of the elements in the Guidelines may require a formal constitutional or legislative basis in national orders, while other elements can be achieved through codes of ethics or public/civil service codes or practice and interpretation of national legislation by competent courts. In all cases, it is important that legislation, regulations and judicial decisions, are well aligned, avoiding gaps, ambiguities and contradictory provisions.

## **The important role of the public service**

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Finally, a word should be said about public/civil servants. The civil service is an administrative resource in its own right that can be misused for electoral purposes. Further, civil servants are generally the gatekeepers of public resources and, therefore, have a special role in ensuring they are not misused in the electoral process. The above-mentioned 2019 guidance for civil servants from the UK Government is admirable for its clarity on the issue. In particular, the document provides concrete guidance on the application of the principle that civil servants should not undertake any activity that could give rise to criticism that public resources are being used for party political purposes. The following paragraphs neatly encapsulate the correct role of the civil service and civil servants during the electoral process:

Ministers continue to be in charge of departments. It is reasonable for departments to continue to provide support for any necessary government functions and receive any policy advice or factual briefing necessary to resolve issues that cannot be deferred until after the election.

Departments can check statements for factual accuracy and consistency with established government policy. Officials should not, however, be asked to devise new arguments or cost policies for use in the election campaign. Departments should not undertake costings or analysis of Opposition policies during the election campaign.

Officials should decline invitations to events where they may be asked to respond on questions about future government policy or on matters of public controversy.

As with almost every scenario that raises the issue of the misuse of administrative resources, complex factual circumstances will create significant grey areas. That said, the UK guidance and the above statements provide a helpful guide on maintaining the neutrality of the civil service as a resource and on the role of civil servants in respect to the misuse of administrative resources.

## **CONCLUSION**

Democracy requires that the law develops to identify, detect and take enforcement action against the misuse of administrative resources in the electoral process. Despite the many reports and guidance on the topic, the misuse of administrative resources during the electoral process is a subject that will continue to throw up novel issues. Indeed, the ever-expanding influence of social media on the electoral process will create further issues in respect of administrative resources and the electoral process. That is all to say, the issue of the misuse of administrative resources in the electoral process is far from closed.

# Good practices for countering the misuse of administrative resources for electoral purposes among Council of Europe members

*Yves-Marie Doublet*

**T**he misuse of administrative resources is defined as the unlawful use of public resources enjoyed by both incumbents and civil servants in elections.<sup>1</sup> It includes human, financial, material, *in natura* and immaterial resources. It excludes situations where all relevant actors receive support, such as through the organised provision of public funding to political parties and electoral candidates.<sup>2</sup> We must confess that there are more examples of the misuse of administrative resources for electoral purposes giving an unfair advantage to incumbents in power than examples of best practices which clearly separate public services and political parties or candidates in order to avoid a natural advantage to incumbents. If we explore more deeply the regulations on the use of administrative resources in political and electoral affairs among member states of the Council of Europe, we note that most of them share a similar approach to this issue and have formally adopted rules to address the misuse of administrative resources. However, in some situations, these rules are very detailed, while in others, less so. They have not been enforced as a result of ineffective monitoring and inadequate sanctions and they have not been strengthened enough when they were deficient. Nevertheless, to counter this misuse, lawmakers and stakeholders can learn valuable lessons from sources of some best practices which are worthy to be held up as examples and are recommended.

In its evaluation of the electoral and party funding system of the member states of the Council of Europe, the Group of States against Corruption (GRECO) expressed its concern about the use of public facilities during the electoral period in different countries. For instance, it considered that Bulgarian legislation did not clearly address the use of public facilities during election periods.<sup>3</sup> GRECO's attention has also been drawn to the participation in election campaigns by certain officials occupying official public positions in Georgia.<sup>4</sup> In Greece, GRECO noted at the time that no fewer than 857 public servants remunerated by the administration were seconded to members of the national parliament and of the European Parliament to the benefit of the political parties to which these elected representatives belonged.<sup>5</sup> In Montenegro, the legal framework regarding in-kind donations to voters of public resources such as subsidies for electricity and utility services of voters during an electoral campaign was very poorly prepared.<sup>6</sup> The abuse of public resources during an electoral period was not just a theoretical issue in Russia either.<sup>7</sup> In Serbia, candidates who had already been elected used the public resources at their disposal such as official cars, communication equipment or secretariat services.<sup>8</sup>

But the same countries have been reluctant to change these practices and to lay down rules regarding which public resources may be used and in what manner, and which may not. If we refer to the suggestions addressed to these countries made by GRECO, all relevant recommendations were only partly implemented.<sup>9</sup> Moreover, even if the regulations were changed in some cases,<sup>10</sup> we know that legislation regulating campaign and

1. In the official documents, administrative resources are also called public resources: [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2016\)004-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2016)004-e), paragraph 17. GRECO's recommendations refer to misuse of public office or public facilities, for instance: Council of Europe, Guidelines on political party regulation, by OSCE/ODIHR and Venice Commission, (CDL-AD(2010)024), paragraph 6.
2. Magnus Ohman, *Abuse of state resources, A brief introduction to what it is, how to regulate against it and how to implement such resources*, 1. Definition of abuse of state resources. [https://www.ifes.org/sites/default/files/georgia\\_abuse\\_of\\_state\\_resources\\_july\\_2011\\_0.pdf](https://www.ifes.org/sites/default/files/georgia_abuse_of_state_resources_july_2011_0.pdf).
3. 3rd round Evaluation Report on Bulgaria Transparency of party funding, 1 October 2010, Paragraph 108, recommendation viii.
4. 3rd round Evaluation Report on Georgia on Transparency on Party funding, 27 May 2011, Section 69, recommendation vi.
5. 3rd round Evaluation Report on Greece on Transparency on Party funding, 11 June 2010, Section 115, recommendation iv.
6. 3rd round Evaluation Report on Montenegro on Transparency of Party Funding, 3 December 2010, Section 67, recommendation iv.
7. 3rd round Evaluation Report on the Russian Federation on Transparency of Party Funding, 22 March 2012, Section 94, recommendation iii.
8. 3rd round Evaluation Report on the Republic of Serbian on Transparency of Party Funding, 1 October 2010, Section 71, recommendation iii.
9. Bulgaria, Georgia, Montenegro, Russia.
10. *Idem*.

party funding cannot be judged purely in terms of the text of regulations but has to be assessed in terms of its enforcement and associated supervision machinery. Enforcement means implementation of sanctions in the case of an infringement of the law, which presupposes that penalties have been established by regulations. Transparency without sanctions will remain inefficient.

The unfinished character of the relevant legislation, following GRECO's compliance reports concerning the use of administrative resources for campaigning, is reflected in some of the regulations put in place by the above-mentioned countries and implemented on a grassroots level in electoral campaigns.

The compliance reports of GRECO are instructive from this perspective.

Prohibition of the use of any public administrative resource, free of charge, in relation to an election campaign, and the related sanctions provided by Articles 168,5(3) and 476 of the Bulgarian Electoral Code (with an implicit similar rule provided by Article 24(4) of the Political Parties Act for political parties) permits the paid use of public administrative resources, but with the risk of a benefit received under market value. Moreover, GRECO considered that these provisions were not broad enough to clearly apply outside the election campaign context nor did they clearly cover human resources usually associated with public services.

Pursuant to Article 50, last section of the Electoral Code of Montenegro, "assets (money, technical devices, premises, equipment and the like) of State bodies, public companies, public institutions and funds, local Government units or companies in which the State has an ownership stake may not be used for candidate lists purposes". But in the parliamentary elections, on 30 August 2020, the OSCE/ODIHR limited election observation mission interlocutors on the spot noted that the unfair advantage of the ruling party was accentuated by the persistent, systematic practice of the offer of state employment in exchange for support and that a legal ban on public recruitment after the call of elections was reportedly circumvented by new temporary employment contracts.<sup>11</sup>

Article 40 of the Russian Federal Act on basic guarantees of electoral rights and the rights of the Russian Federation to participate in a Russian referendum lays down general prohibitions: in the period of an election campaign, a referendum campaign, persons who are not candidates and occupy state or elective municipal offices or are in state or municipal service or are members of the management bodies of legal entities (irrespective of the form of ownership), except for political parties, shall not take advantage of their offices or official position to promote the nomination of a candidate, a list of candidates and/or election of candidates, the advancement or furthering of a referendum initiative, or to obtain a certain answer to the referendum question. Taking advantage of an office or official position covers many public facilities (involvement of persons, use of premises, means of communication and transportation).

However, when we move to the sanctions applicable to such breaches, we note that Article 141.1 of the Criminal Code refers to other forms of breaches, which means that they will not be sanctioned by the Federal Act referred to above. Over 470 complaints and applications were filed with the Central Electoral Commission concerning the misuse of administrative resources<sup>12</sup> in the 2018 Russian presidential election.

How can this reluctance to introduce comprehensive, clear and deterrent measures on the use of administrative resources during elections be explained? Three categories of considerations may be put forward.

## **HISTORICAL BACKGROUNDS**

The fact that one party has ruled more or less uninterruptedly for a long time or from the founding of the state, and the permanent weight of public institutions and companies in the economy may easily explain the blurring between state and political parties, giving undue advantage to the ruling party.

## **CONSTITUTIONAL PRINCIPLES**

Countries without any specific rule on the misuse of administrative resources during electoral campaigns but with a long-standing tradition of democratic elections have either constitutional principles or good practices. This would include standards such as equality of opportunity of candidates or political parties,<sup>13</sup> transparency of the electoral process, neutrality of government and oversight authorities in the electoral process and a

11. [www.osce.org/files/f/documents/a/0/458884.pdf](http://www.osce.org/files/f/documents/a/0/458884.pdf).

12. [www.osce.org/files/f/documents/3/7/462016\\_2.pdf](http://www.osce.org/files/f/documents/3/7/462016_2.pdf).

13. BverfGE 1, 208 (242), 5 April 1952, in Germany for instance.

balance of powers. These countries express a strong confidence in the electoral process and in the capacity of the stakeholders to manage the election in a transparent way.

Without any specific norm on prohibition of the use of administrative resources in electoral campaigns, the United Kingdom is a good example of this profile. It is a requirement of the Ministerial Code in the United Kingdom that ministers must not use government resources for party political purposes and must uphold the political impartiality of the Civil Service.<sup>14</sup> Ministers are provided with facilities at government expense to enable them to carry out their official duties. These facilities should not generally be used for party or constituency activities.<sup>15</sup> In practice, attention of the OSCE/ODIHR observers has not been drawn on any such misuse of administrative resources during the electoral campaign following the 6 May 2010 general election<sup>16</sup> and the early general election of 12 December 2019,<sup>17</sup> From 2007 to 2012 there was a model code of practice for all local authorities on standards of behaviour by councillors too. The latter included restrictions on the use of council resources for party political purposes. This was revoked in 2012 but many councils have retained the restriction on the use of council resources for party political purposes in voluntary codes of conduct. There is some talk of national standards being reintroduced and a draft code has been produced.

## PRACTICAL CONSIDERATIONS

These cannot be overlooked to understand the shyness of the lawmakers in this field. Rules are not so easy to draft: for instance, what should be considered a reasonable duration of an electoral campaign to avoid any transfer of public funds just before the official electoral campaign? What should constitute a permitted advertising activity of a ministerial department to avoid any partisan approach during an electoral campaign? What is an acceptable threshold for public shares to assess the influence of the state in a public company, which would not be authorised to make a donation? How should in-kind donations from subsidiaries of state companies be treated? How can payments through the social welfare system, an increase of public wages, pensions or housing allocations provided by the state or public bodies during an electoral campaign and decided by the incumbent government avoid criticism of the inappropriate use of administrative resources for electoral purposes? How is it possible to prevent an incumbent mayor during an electoral campaign from promoting the achievements or management of his/ her local authority in an advertising campaign?

For these reasons there is a great variety of potential legal solutions.

If we try a synthesis, there are three basic approaches to fight against the misuse of administrative resources in electoral campaigns and party funding.

1. The use of administrative resources, whatever they are, outside of clear legal obligations, may be prohibited.
2. The prohibition of the use of certain specified administrative resources may be targeted.
3. The application of regulations governing administrative resources should be tackled in a pragmatic manner.

Whatever the regulations may be, they must be accompanied by sanctions.

## 1. GENERAL PROHIBITION OF ADMINISTRATIVE RESOURCES DURING ELECTORAL CAMPAIGNS

Outside the allocation of public funds for campaigning purposes and/or for the regular functioning of political parties, in conformity with the principle of equality, a general ban of any form of administrative resources is the most radical option.

A general prohibition will be more effective than targeted prohibitions because a list of targeted prohibitions may not be comprehensive. Moreover, such prohibitions have to be updated, as we have noted in recent years with the dissemination of social networks, which now interfere in electoral campaigns and have to be taken into account in rules dealing with electoral campaigns.

This general prohibition of administrative resources would apply to political parties and candidates during an electoral campaign and to political parties in general. Insufficient sanctions would limit transparency and

14. General election guidance 2019, <https://www.gov.uk/government/publications/election-guidance-for-civil-servants>.

15. Cabinet Office, *Ministerial Code*, August 2019, p.14, <https://www.gov.uk/government/publications/ministerial-code>.

16. OSCE, *United Kingdom of Great Britain and Northern Ireland General Election, 6 May 2010*, OSCE/ODIHR Election Assessment Mission Report, <https://www.osce.org/files/f/documents/5/5/69072.pdf>.

17. OSCE, *United Kingdom of Great Britain and Northern Ireland Early General Elections, 12 December 2019*, <https://www.osce.org/odihr/elections/uk/440540>.

accountability. A general ban on the use of any form of administrative resources, with a monitoring system, effective complaint mechanisms and deterrent sanctions would secure the implementation of the legal framework.

Article 88.1 of the Electoral Code of Albania lays down, for instance, a comprehensive ban of public resources, except for other legislative provisions which may provide the contrary: “Except when otherwise provided by law, resources of central or local public bodies, or of any other entities, or of any other entity where the State holds capital or shares or/and appoints the majority of the supervisory or administrative body of the entity regardless of the source of the capital or ownership, may not be used or made available to support candidates, political parties or coalitions in elections”.

This general rule encompasses many forms of administrative resources during the electoral process, but it does not refer precisely to the electoral campaign, and the provisions on sanctions concerning the breach of use of administrative resources are more focused on voting than on the electoral campaign. Moreover, in the 2017 parliamentary elections, OSCE/ODIHR interlocutors expressed concerns over the abuse of state resources during the electoral campaign and pleaded for an independent body to act and follow up these matters in the pre-electoral period.<sup>18</sup>

### **1.1. General prohibition of administrative resources during electoral campaigns must be accompanied by sanctions**

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Adequate and predictable sanctions in the case of infringements of the rules on the misuse of administrative resources for electoral purposes have to be addressed in legislation. To be efficient, a general rule requires a legal framework on investigation, prosecution and sanctions with an independent supervision body of the ruling political power.<sup>19</sup>

In this sense, Section 33 of the Pre-Election Campaign Act<sup>20</sup> in Latvia offers a broad scope of forms of administrative resources and political stakeholders.

Prohibition of the use of administrative resources refers to the:

1. use of administrative resources in a pre-election campaign.
2. the use of administrative resources shall be considered to be the use of financial resources, movable and immovable property or provision of services of a state authority and an authority of derived public persons and capital companies, in which the capital shares (stocks) belong to the state or derived public persons, as well as of the capital companies, in which capital shares (stocks) owned by one or more state capital companies or capital companies of derived public persons individually or in aggregate exceed 50%, for conduct in a pre-election campaign, as well as advertising of these authorities for payment within the period of 30 days before the elections, if the relevant advertisement with regard to its content is related to a deputy candidate, political party, association of political parties, as well as candidates for the post of prime minister or a minister nominated by administrative bodies of a political party or association of political parties, or reflecting a person related to a political party or an association of political parties or reflecting activities by such a candidate or person.

Section 34 of the act refers to liability for non-compliance with the restrictions on the use of administrative resources. This misuse is to be evaluated in financial terms and corresponds to the value of financial resources or property used in a prohibited manner. The supervision body, the Corruption Prevention and Combating Bureau (KNAB) shall demand the reimbursement of the amounts in accordance with the Act on Administrative Procedure.

Provisions of Article 52.7 of the Electoral Code of Moldova go further, concerning both the scope of the infringements of the rules and the sanctions: “Candidates may not use public means and goods (administrative resources) during electoral campaigns, while public authorities/institutions and other related institutions may not send/grant public goods or other benefits unless a contract is concluded in this end, providing equal terms to all candidates.” Violations of these rules shall be sanctioned by administrative penalties according to Article 77 of the same code.

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18. [www.osce.org/files/f/documents/4/d/346661.pdf](http://www.osce.org/files/f/documents/4/d/346661.pdf), p.14.

19. Venice Commission, report on the misuse of administrative resources during electoral processes CDL-AD (2013) 033, section 33, [www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2013\)033-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2013)033-e).

20. In the pre-campaign law, “pre-election campaign” refers to advertising of a political party, associations of political parties, voters’ associations or a deputy candidate in the mass media or elsewhere, if it contains a direct or indirect invitation to vote for or against any political party, association of political parties, voters’ association or a deputy candidate (Pre-campaign Act 2012, amended 2014).

Funding of the presidential electoral campaign in Poland with the state budget, state organisation units, budgets of local government units, municipal unions and self-government councils, state-owned enterprises, other economic subjects with the participation of the state treasury, units of local administration, municipal unions and other municipal legal persons as well as associations and other corporations of units of local administration excluding public companies is banned (Article 86 of the Act on Election of the President of Poland). Such conduct is liable to fines (Article 88g).

Financing a political activity with money stemming from public institutions, public enterprises, companies and entrepreneurs engaged in services of general interest is not permitted in Serbia and liable to remittance to the budget of the Republic of Serbia within 15 days from the day of the reception of the funds (Articles 12 and 15 of the Act on Financing Political Activities).

Similar provisions to prevent quid pro quo donations from companies close to the ruling party, exist in Slovenia: "The elections campaign shall not be financed by budgetary funds and funds of companies whose invested public exceeds 25% and companies in which they have a majority holding, except by the funds provided to the political parties from the budget in compliance with the Act regulating political parties" (Article 4 of the Election and Referendum Campaign Act). A fine ranging from €2 000 to €4 000 shall be imposed on a public body which acts contrary to this regulation (Article 37.3 of the same act).

The prohibition of money or in-kind donations from public funds to election accounts is regulated in Spain by Article 128 of the Representation of the People Institutional Act: "No Public Administration agency or corporate or other public sector body or company belonging to the State, a Self-governing Community, a province or a local council or partly privately-publicly owned company may bring funds into election accounts. The same prohibition applies to any firms who supply services or goods or undertake works on a contractual basis for any Public Administration department". Article 136 considers that acts can be deemed to be an offence under these rules and the Criminal Code and shall be punished under the provisions providing for the higher penalty.

**Good practices: outside legal obligations for all relevant stakeholders, general prohibition of administrative resources during an electoral period should be sanctioned by law**

If a general prohibition on the misuse of administrative resources refers to electoral campaigns in certain countries, in other countries it concerns political parties.

## **1.2. General prohibition of resources from public entities to political parties should also be sanctioned**

We have to recall the relevant international standard in that field. It is provided by Article 5.c of the Recommendation Rec(2003)4 of the Committee of Ministers to member states on common rules against corruption in the funding of political parties and electoral campaigns: "States should prohibit legal entities under the control of the State or of other public authorities from making donations to political parties". It excludes public funding regulations to political parties based on votes obtained in general elections or/and representation of the elected body.

According to Section 6(6) 5 of the Austrian Political Parties Act, political parties are not allowed to receive donations from public bodies and from public companies with 25% of the capital in public hands. Breaches of these provisions are punished by a fine which may go up to three times of the amount of the offence (section 10 of the act).

In the Czech Republic, the threshold of the share of the state or the municipality is 10%. An unlawful donation is to be returned by the political party, together with an interest based on the discounted rate of the Czech National Bank (Sections 19 and 19.a of the Czech Act on association within political parties).

Section 25(2)1 of the German Act on Political Parties lays down the principle that donations from public corporations, parliamentary groups of municipal councils (local assemblies) to political parties are banned, given the reliance on specific rules provided by section 18 of the Act dedicated to Public Funding (Principles and extent of public funding). A political party which has accepted donations and not remitted them to the president of the German Bundestag shall be liable to pay three times the amount of the illegally obtained sum of money; donations already remitted shall be deducted from the payable amount. A party which fails to publish donations in its statement of accounts in accordance with the provisions of the act shall be liable to pay twice the amount of the sum not disclosed as prescribed by the act.

Section 24 of the Slovak Act on Political Parties states that parties may not receive donations and other non-refundable funds from the state, the national ownership fund of the Slovak Republic, the real estate fund of the Slovak Republic, larger localities or territorial units, from public institutions and other legal entities established by the act. The sanction is double the amount of the donation or other non-refundable funds (section 31(2).b of the act).

**Good practices: general prohibition of administrative resources from public entities to political parties should be sanctioned by law**

## 2. A TARGETED APPROACH

A targeted approach of the misuse of administrative resources has been chosen by several countries. It is focused on buying votes, institutional resources, financial resources and advertising campaigns.

### 2.1. Prohibition of the direct buying of votes

The most common approach shared by member states is the prohibition of buying votes. A number of member states ban offering or giving money, making promises for jobs or other favours in any form, with the intent of getting signatures for presenting a candidate, for voting in favour or against a candidate. Among these countries we can mention Albania, Denmark, France, Greece, Ireland, Italy, Latvia, Lithuania, Republic of Moldova, Montenegro, Serbia, Sweden, Spain, United Kingdom and Ukraine. But it will not be so easy to bring evidence of such practices if they are widespread over the whole territory. They will be mostly sanctioned by a fine or imprisonment.<sup>21</sup> This money may have private or public sources.

For instance, Article 146 of the Spanish Institutional Act of the General Electoral Regime points out that “those who by reward, gift, remuneration or promises of such, require directly or indirectly the vote of any elector or induces him or her to abstain from voting shall be punished with the penalty of imprisonment for a term from six months to three years or a fine between twelve and twenty four months (sic)”.

Many forms of such bribery are taken into account by Article 113 of the British Representation of the People Act: “a person shall be guilty of bribery if he, directly or indirectly, by himself or by any other person on his behalf who gives any money or procures any office to or for any voter or to or for any other person on behalf of any voter or to or for any other person in order to induce any voter to vote or refrain from voting”.

### 2.2. Regulation of the indirect buying of votes

Another method to influence votes is to buy indirectly votes through authorisations, welfare payments, recruitments, utility bills, increase of wages or social benefits, for instance. Construction permits, licences, decisions on land use and professional agreements delivered close to the election day are a common practice to collect votes.

The hiring of staff before an election is an indirect way, among others, to buy votes. It is a practice used, for instance, in Montenegro.

According to Article 44 of the Act on Financing Political Entities and Election Campaigns adopted just before the 2020 general elections, employment and hiring of employees by public bodies on a fixed term or on a temporary basis from the day of the announcement of the election until the day of holding elections is liable to a disclosure by the Agency for Prevention of Corruption’s Plan of Control and Supervision for Election Campaigns. If this information represents progress in terms of transparency, the debate on the need of such employment during this specific period by comparison to the number of workplaces in other public services and the average number of employees in the same public service in the past, remains open. This kind of hiring of persons continues to influence voting.

Several OSCE /ODIHR interlocutors for the general parliamentary elections 2020 noted that the undue advantage of the ruling party was accentuated by the persistent, systematic practice of the offer of state employment in exchange for support. A legal ban on public recruitment after the announcement of elections was reportedly circumvented by new temporary employment contracts.

21. Detecting irregular political finance, Council of Europe, Action against economic crime and corruption, 2016, [www.coe.int/en/web/corruption/publications](http://www.coe.int/en/web/corruption/publications).

The Albanese approach is one of self-restraint by the government concerning any movement of civil servants during the electoral period. It consists of prohibiting the recruitment, dismissal, release, movement or transfer of duty in public institutions except for legally justified cases. These cases refer to violations of legislation when the movement or release from duty, or recruitment by the public institution or entity, in fulfilling its mission, is carried out within the organisation's staffing and structure in force before the electoral campaign (Article 88 of the Electoral Code).

Campaigning may also coincide with the unexpected distribution of public funds, which is a more sophisticated form of misuse of public funds. Indeed, public announcements by the incumbent government with obvious electoral purposes based on public resources are not infrequent. For instance, the ruling party granted vouchers to all pensioners in the Hungary parliamentary elections<sup>22</sup> and the Russian Government increased public wages during the campaign prior to the presidential election in 2018.<sup>23</sup>

The same technique was used in Montenegro to pay social welfare payments and to write off debts for utilities provided by electricity companies to certain citizens during the 2020 electoral campaign. During the same election period, extraordinary welfare benefits were allocated by the government with unclear and allegedly subjective criteria to groups identified as "vulnerable" and additional benefits were allocated for pensioners.<sup>24</sup> These social welfare payments have been granted despite the new rules of Article 40 of the Act on Financing Political Entities and Election Campaigns, which prohibited the use of the current budget reserve at national and local levels to allocate social benefits in the year in which local or parliamentary elections are held, except in cases of war, emergency, epidemic or pandemic of infectious diseases.

Some countries, such as Georgia, have adopted restrictions on this use of state resources.

From the 60 days before and including election day, it is prohibited to increase the amount of welfare benefits (pensions, hardship allowances, allowances, etc.), except for benefits whose increase was provided for through legislation at least 60 days before election day. It is also prohibited to fund welfare benefits (pensions, hardship allowances, allowances, etc.) that were not provided for through legislation at least 60 days before election day. If the procedures under this paragraph are not met, an authorised person may apply to the Court to suspend expenses (Article 49.4 of the Electoral Code of Georgia).

But such provisions come up against two obstacles:

- ▶ Allocation or increase of welfare payments or public wages will apply beyond election day and therefore are not strictly connected with the electoral period. This form of use of state resources differs in this sense from hiring employees for the period of the electoral campaign. For that reason, it is much more difficult to encounter such a practice than to ban temporary and short-term contracts in public services during an electoral period.
- ▶ If a sanction should be imposed, who would be liable to a sanction: the candidate, his/her agent, his/her political party, the treasurer? They cannot be held responsible for such measures which contravene the principle of equal opportunity of candidates and political parties in electoral competition, but which lie within the jurisdiction of the government. Therefore, it would be much more difficult to prosecute a party or a candidate for this reason of unequal opportunity than on a legal basis strictly linked to an electoral period.

**Good practices: prohibit buying votes, recruitment on any short-term contracts and any writing-off of debts of public utilities during an electoral period**

Forms of more sophisticated specific public sources which may be misused for electoral purposes are usually split into three parts: institutional resources, financial resources and advertising campaigns.

## 2.3. Institutional public resources

### 2.3.1. Public facilities

A list of such facilities is provided by Article 23 of the Electoral Code of Armenia: dissemination of any type of campaign material, use of premises, means of transport and communication, material and human resources provision for performing official responsibilities for election campaign purposes, except for security measures applicable in respect of high-ranking officials subject to state protection under the law of the Republic of Armenia.

22. OSCE, Hungary, parliamentary elections, 18 April 2018, [www.osce.org/files/f/documents/0/9/385959.pdf](http://www.osce.org/files/f/documents/0/9/385959.pdf).

23. OSCE, Russian Federation, presidential election, 18 March 2018, [www.osce.org/files/f/documents/2/4/383577\\_0.pdf](http://www.osce.org/files/f/documents/2/4/383577_0.pdf).

24. OSCE, Montenegro, parliamentary elections, 30 August 2020, [www.osce.org/files/f/documents/3/7/462016\\_2.pdf](http://www.osce.org/files/f/documents/3/7/462016_2.pdf).

According to Article 48 of the Georgian Electoral Code, any person authorised to canvas may not use administrative resources in the course of the election campaign in support of or against any political party, candidate for electoral subject, or electoral subject. In addition, the same article provides a list of prohibited public resources:

- ▶ use of premises occupied by state authorities and municipal bodies also by organisations funded from the state budget of Georgia, provided that other political parties, candidates for electoral subject, or electoral subjects are unable to use the same or similar premises under the same conditions;
- ▶ use of means of communication, information services and other kinds of equipment designated for state authorities and municipal bodies also for organisations funded from the state budget of Georgia (except for political parties);
- ▶ use of means of transportation owned by state authorities or municipal bodies.

Violation of these requirements shall be subject to a penalty of the amount of 1 000 Georgian lari.<sup>25</sup>

Such a list is inadequate because it may contain loopholes and it has to be updated.

The Spanish supervision body (Junta Electoral Central) calls on neutrality of all public authorities during electoral campaigns and therefore bans the inaugurations of public utilities and services by reference to Article 50 of the Institutional Act on the Electoral Regime.<sup>26</sup> This act pertains specifically to inaugurations.

From the calling of elections until the completion of voting it is prohibited to hold any event directly or indirectly organized or funded by public authorities that contain references to the achievements or accomplishments, or that uses images or expressions similar or coincidental with those used in their own campaigns by any of the political entities running in the elections.

Similarly, during the same period it is prohibited to undertake any inauguration of public works or services, irrespective of its denomination, even though these works or public services may start functioning during the aforementioned period.

**Good practices: establish a level playing field for candidates and political parties concerning public facilities**

### 2.3.2. Use of public premises

The principle of free election campaigns through the provision by the state and the local self-government bodies of halls and other premises for election assemblies, meetings and other election-related events is laid down by Article 19.2 of the Electoral Code of Armenia.

French jurisprudence takes the view that there is nothing in the Electoral Code to prohibit a district which owns premises suitable for use for public meetings from hiring or lending them to candidates, provided there is no discrimination.<sup>27</sup>

If all candidates take advantage of equal access to public premises, this electoral expenditure does not need to be recorded in the campaign accounts of the candidates.<sup>28</sup>

Public premises are considered in Germany as premises available to everybody for general purposes.<sup>29</sup>

In Germany, if access to these public premises is forbidden for one political party, this decision shall be in conflict with the constitutional principle of equality of chances between political parties and would apply to all political parties.<sup>30</sup>

Pre-election meetings in Slovenia are not allowed in the premises of state authorities, authorities of self-governing local communities, public institutions and other entities of public law, nor in the premises of religious communities, except when a religious community is the organiser of a referendum campaign (Article 4 of the Elections and Referendum Act (ZVRK)).

25. Around €262.

26. Instrucción 2/2011, de 24 de marzo, de la Junta Electoral Central, sobre interpretación del artículo 50 de la Ley Orgánica del Régimen Electoral General, en relación al objeto y los límites de las campañas institucionales y de los actos de inauguración realizados por los poderes públicos en periodo electoral.

27. 97-2275, 25 November 1997, Constitutional Council, Guadeloupe, Constituency 4, paras 3 to 5, p. 272.

28. Council of State, 18 December 1992, Sulzer, 135650, 139894.

29. Bay VGH, Urteil 23 March 1988, 4B 86.2336.

30. BVerfG, 7 March 2007, 2 BvR 447/07, Rn 3.OVG Lüneburg, decision of 14 April 2011, Az.10 ME 47/11.

Similar provisions prevail in Ukraine: “the use of premises of State bodies, of State bodies of the Autonomous Republic of Crimea and bodies of local self-Government for conducting election campaigning at the expense of the funds or MP candidates in single mandate election shall be prohibited” (Article 74.3 of the Act on Elections of the People’s Deputies in Ukraine).

Under the 1983 Representation of the People Act in the United Kingdom, candidates have a right to use certain local authority and school rooms “free of charge”. This does not apply in Northern Ireland. Candidates may use a school room or other listed public “meeting rooms” for a public meeting. The term “public meeting” is not defined in the legislation but *Parker’s Law and Conduct of Elections*, the standard work on electoral law, notes it “would seem proper to construe the words narrowly”. The meeting should be genuinely open to the public, not just party members or limited to ticket-holders.<sup>31</sup>

### Good practices: grant equal access to public premises for every political stakeholder

#### 2.3.3. Neutrality of civil servants

The European Court of Human Rights (the Court) clarified this principle, which prohibits the exercise of any pressure on civil servants. The adoption of the regulations restricting the participation of certain categories of local government officers, distinguished by the sensitivity of their duties, in forms of political activity can be considered a valid response by the legislature to addressing that need and one which was within the respondent state’s margin of appreciation. It should be observed in this regard that the organisation of local democracy and the arrangements for securing the functioning, funding and accountability of local authorities are matters which can vary from state to state having regard to national traditions. It is no doubt also the case with respect to the regulation of the political activities of local government officers where these are perceived to present a risk to the effective operation of local democracy, especially where, as in the respondent state, the system is historically based on the role of a permanent corps of politically neutral advisers, managers and arbitrators above factional politics and loyal to the council as a whole.<sup>32</sup>

Political neutrality is demanded in Bulgaria, the Czech Republic, the Netherlands, Poland and the United Kingdom. Prohibition of any commitment in political activities is required by section 5 of the Irish Civil Service Code. Problems may arise when public sector employees may join a political party inasmuch as this does not conflict with the smooth running of the state (Belgium). Article 6 of the Civil Servants’ Act of Croatia imposes an obligation of impartiality to Croatian agents: “In their work, civil servants shall neither discriminate nor favour citizens based on age, nationality, ethnic or territorial affiliation, linguistic and racial origin, political or religious beliefs or affinities, disability, education, social status, sex, marital or family status, sexual orientation or some other grounds contrary to the Constitution or legally-established rights and freedoms”. The same rule is part of the Spanish Code of Conduct for Civil Servants (fourth ethical principle of the code).

In Germany civil servants have the right to exercise each political activity but must strictly observe neutrality when on duty.<sup>33</sup> In Portugal agents of public entities must observe neutrality and impartiality in election campaigns (Article 57 of the Act Governing Elections to the Assembly of the Republic).

According to the 2019 general elections guidance in the United Kingdom, “the basic principle for civil servants is not to undertake any activity that could call into question their political impartiality or that could rise to criticism that public resources are being used for party political purposes. This principle applies to all staff working departments”.

The pre-election period before general elections is not regulated by statute, but governed by conventions based largely on the Civil Service Code. The Cabinet Office issues guidance for civil servants in UK Government departments, and the staff and members of non-departmental public bodies (NDPBs) and other arm’s length bodies (ALBs) on their role and conduct during election and referendum campaigns.<sup>34</sup>

Particular regulations cover endorsement by public officials to influence a vote and may be in certain countries a more specific deterrent than general rules.

31. Pre-election period of sensitivity, House of Commons Library, Briefing paper, Number 5262, 5 November 2019, <https://commonslibrary.parliament.uk/research-briefings/sn05262/>.

32. *Ahmed and others v. the United Kingdom*, 2 September 1998, 65/ 1997/849/1056.

33. Section 60 of the status of the federal civil servants and section 33 of the status of civil servants in the *Länder* (same rules).

34. Pre-election period of sensitivity, House of Commons Library, Briefing paper, Number 5262, 5 November 2019.

Pursuant to Article 49 of the Georgian Electoral Code, “a person having the right to participate in canvassing, who holds an office within the State authorities or local Government bodies, shall be prohibited to use his/her official status or capacity in the course of canvassing and election campaign in support of or against any political party, candidate for electoral subject, or electoral subject”

It includes:

- ▶ “getting any career subordinate or otherwise dependent person involved in an activity that may support to presentation and/or election of a candidate;
- ▶ collecting signatures and conducting canvassing during business trips funded by State authorities or municipality bodies;
- ▶ conducting canvassing during working hours and/or in the course of performing official duties.”

Penalty for such behaviour amounts to 2 000 Georgian lari.<sup>35</sup>

In Lithuania “State or municipal officials, civil servants shall be prohibited from taking advantage of their official position in order to provide exclusive conditions for campaigning for themselves or for the party.” The same provision imposes administrative or criminal sanction for such infringements (Article 54.1 of the Act on Elections to the Seimas).

Sanctions are imposed by Portuguese legislation to punish undue influence of civil servants on elections: “citizens who are invested with public authority, staff or agents of the State or of another public legal person and ministers of any denomination who make improper use of their functions in order to, or who, during the exercise of those functions, use them in order to, compel or induce electors to vote for a given list or lists or refrain from voting from them, shall be punished by a prison term between six months and two years and a fine between ten thousand and one hundred escudos” (Article 153 of the Act Governing Elections to the Assembly of the Republic of Portugal).

### Good practices: require neutrality of civil servants during electoral campaigns

## 2.4. Financial resources

These financial resources can take various forms: interference of parliamentary groups in funding of electoral campaigns, feedback practices with tenders, financing of expert studies, use of public funds stemming from the European Parliament outside the legal framework of these funds.

### 2.4.1. Parliamentary groups, local groups and funding of electoral campaigns

Section 50.1 of the Members of the Bundestag Act regulates the resources of the parliamentary groups in this assembly: “for the purpose of performing their duties, the parliamentary groups shall be entitled to monetary benefits and benefit in kind from the federal budget”.

Section 50.4 considers that benefits provided under this rule may only be used by the parliamentary groups for duties incumbent upon them by virtue of the Basic Law (*Grundgesetz*), the Members of the Bundestag Act and the Rules of Procedure (*Geschäftsordnung*) of the German Bundestag. The use of these benefits for party political purposes is not permitted.

The differentiation between parliamentary groups and political parties has legal grounds. Political parties are unions of citizens and according to Article 21.1 of the German Basic Law, they participate in the formation of the political will of the people. Parliamentary groups are unions of members of parliament who shall be representatives of the whole people not bound by orders or instructions (Article 38.1). The Constitutional Court considered, in a historical decision on party funding, that it would be unconstitutional if parliamentary groups were to receive public subsidies without any real justification, which would dissimulate party funding.<sup>36</sup>

Similar rules apply in the *Länder*. The use of the public funds allocated to these groups is liable to monitoring by the audit office at the federal level (Bundestag) and to the local audit offices at the level of the *Länder*. Several cases of misuse of public resources for the political party close to a parliamentary group have been recorded.<sup>37</sup>

35. Article 79 of the Electoral Code.

36. BVerfGE 20, 56, 105, 19 July 1966.

37. Verwendung von Fraktionsgeldern zur Finanzierung von Parteiaufgaben, Deutscher Bundestag, WD 3-3000-455 /10, 19 November 2010, [www.bundestag.de/resource/blob/412766/f38bdec95369d08c6f25b08e91c5544/WD-3-455-10-pdf-data.pdf](http://www.bundestag.de/resource/blob/412766/f38bdec95369d08c6f25b08e91c5544/WD-3-455-10-pdf-data.pdf).

In Spain in 2018 within the investigation committee of the Senate on the funding of political parties,<sup>38</sup> it was revealed that taking advantage from a legal loophole public funding for political groups in municipalities had been transferred to political parties for electoral purposes.

In the United Kingdom, Short money and Cranborne money dedicated to the opposition respectively in the House of Commons and in the House of Lords is exclusively provided to the party's parliamentary business and must not be used for political activities and campaigns. An audit certificate must confirm that expenses claimed by political parties were incurred in relation to parliamentary activities.

**Good practices: confirm a clear financial separation between political parties and political groups belonging to national and local assemblies**

### 2.4.2. Tenders

Tenders concluded by public bodies may be used to encourage donations in return from companies unless these companies who made donations are prohibited from bidding for tenders or will be prohibited from making donations in the future, if donations from companies are authorised.<sup>39</sup>

A solution may be to prohibit from funding any political activity companies which have concluded public procurement contracts for a certain period. It would mean that a "cooling-off period" for donations would be set up. But such a measure is infrequent. Serbia has this rule in its legal arsenal: "Financing of political entity by a natural person or legal entity engaged in activities of general interest pursuant to contract with organs of the Republic of Serbia, autonomous province and local Government and public services founded by them is prohibited throughout the validity of such contract and for a period of two years" (Article 12 of the Act on Financing Political Activities).

The regulations of Article 33 of the Act on Financing of Political Parties in Montenegro are in line with these provisions:

Legal entities, companies and entrepreneurs and related natural persons which, based on a contract with the competent bodies and in accordance with the Law, performed activities of public interest or concluded a contract through the public procurement procedure, in the period of two years preceding the conclusion of the contract, for the duration of the business relationship, as well as two years after the termination of the business relationship shall not give contributions to the political entities.

**Good practices: regulate donations from companies which have concluded public procurements with public bodies**

### 2.4.3. Expertise studies

It may happen that studies which are useful for the conduct of the electoral campaign are paid not by the political parties or by the candidates but by public bodies.

Between 2006 and 2008, the Bavarian Government financed a "Feed-back study".<sup>40</sup> It contained the recommendation to focus the political contest on the social democratic and green parties. The three studies cost the Government of Bavaria €108 000 and were not reported in the conservative's party financial report. The Bavarian Audit Office investigated the matter. It concluded that since 2000 the government had commissioned surveys for a total of €558 302.51 and stated that "questions of political parties are not a matter of the Government and must be subject of surveys commissioned by the Government. Such activities are the responsibility and at the expense of political parties".

**Good practices: charge candidates or political parties the cost of surveys, opinion polls and expertise studies**

38. Comision de Investigacion sobre la financiacion de los partidos politicos. XII legislature.

39. "It is prohibited in the US for contractors which provide goods, services to the federal government or any affiliated department or agency to make any political contribution", *Financing democracy*, OECD 2016, p. 61.

40. Detecting irregular political finance, p. 38.

#### 2.4.4. Use of public funds from the European Parliament for electoral purposes

Revised Regulation (EU, Euratom) No 1141/2014 of the European Parliament and of the Council of 22 October 2014 provides a legal framework for the funding of European political parties from the general budget of the European Union or from any other source to finance campaigns conducted by European political parties in the context of elections to the European Parliament.

However, to avoid potential abuse of these funding rules for purposes other than European elections, according to Article 22 of this regulation, European political parties should not fund directly or indirectly other political parties and, in particular, national parties or candidates. Neither should European political foundations fund, directly or indirectly, European or national political parties or candidates. Moreover, European political parties and their affiliated European political foundations should not finance referendum campaigns.

In 2018, 10 European political parties and 10 European political foundations received funding from the European Union budget.

An alleged misuse of public funds from the European Parliament has been highlighted as the circumvention of these funds to pay employees of political parties. Members of political parties from two different member states broke European Parliament rules by transferring part of their salaries to the national party coffers. An inquiry led by the European Anti-Fraud Office (OLAF) has found that the investigations, which were launched in 2017 and 2018, focused on allegations that certain members of the European Parliament and staff, including parliamentary assistants, were paying a part of their monthly salary and allowances to the national party. OLAF concluded that the European Parliament should have effective sanctions in place to address effectively the breach of its rules and to enable the recovery of due amounts established by the investigation. In addition, for this investigation OLAF issued recommendations to the European Parliament proposing disciplinary action,<sup>41</sup> Members of the direction of the parties have been indicted.

**Good practices: respect the rules on the use of public funds granted by the European Parliament**

### 2.5. Advertising campaigns

The issue of advertising campaigns raises different questions such as public announcements by the executive during electoral campaigns, outdoor political advertising as well as publications and electoral pamphlets.

#### 2.5.1. Public announcements by the executive

There is a balance to be found between the restrictions on any government activity that might influence voters and the need for day-to-day government business to take place.<sup>42</sup>

Distinction between the official position of the incumbent candidate and his/her political message as a candidate is a way to avoid overlapping which may prevail in certain circumstances.

As for instance Nicolas Sarkozy, as running president was candidate for a second term in 2012, the use of administrative resources by him as candidate became a key issue. The Constitutional Council in charge of the monitoring of the implementation of the rules on financing of the electoral campaign for president considered that the purpose of this legislation was neither to limit the travels of the President of the Republic nor to limit its public conference attendance, both being part of its function; that the expenditures in relation to conferences it attended could only be included in his campaign account if they were of a clearly electoral nature. Therefore, the Constitutional Council noted that because of the electoral nature of a public conference in a place, there was a sufficient ground to reintegrate to his campaign account the expenditures relating to this meeting, not including protection and travel expenditures related to the term of the President of the Republic.<sup>43</sup>

The French National Campaign Accounts and Political Funding Committee indicated that a governmental message broadcast on social networks during the electoral campaign to the 2018 European Parliament should

41. [https://ec.europa.eu/anti-fraud/media-corner/news/30-04-2020/olaf-uncovers-financial-irregularities-meps\\_en](https://ec.europa.eu/anti-fraud/media-corner/news/30-04-2020/olaf-uncovers-financial-irregularities-meps_en).

42. Cabinet Office, Government Response to the Public Administration and Constitutional Affairs Committee Report on Lessons Learned from the EU Referendum, Cm 9553, December 2017, p. 2. <https://publications.parliament.uk/pa/cm/cm201617/cmselect/cmpubadm/496/496.pdf>.

43. 2013-159 PDR, 4 July 2013, Constitutional Council, paragraphs. 18- 20, p. 930.

be regarded not only as an invitation to people to vote but also as having an electoral character and therefore it should be recorded as an electoral expenditure.<sup>44</sup>

One remedy to prevent practice of public announcements of the government during an electoral campaign to influence the vote<sup>45</sup> may be provided by the German regulation in this respect. In a decision of 2 March 1977,<sup>46</sup> the Constitutional Court considered the communication activities of the government as related to the presentation and the explanation of the current and future policy and the explanation of unpopular measures and general information on legislative initiatives. This jurisprudence was confirmed in 1983<sup>47</sup> and 2002.<sup>48</sup> In 2002 the scope of this communication policy of the executive also covered crisis situations.

Difference has been made between public announcements and announcements by a member of the federal government in Germany or a member of the government of a *Land* or a mayor, as private persons. The latter are permitted by the jurisprudence.<sup>49</sup>

In Italy under Article 9 of Act 28 from 22 February 2000, it is mandated that from the start of the electoral campaign, public administration offices may not carry out communication initiatives if they are not essential and strictly related to their functions.<sup>50</sup>

Guidelines to the government during the electoral campaign in the United Kingdom are an invitation to self-restraint for the executive:

During an election campaign the Government retains its responsibility to govern and ministers remain in charge of their departments. Essential business (including routine business necessary to ensure the continued smooth functioning of Government and public services) must be carried on. Cabinet Committees are not expected to meet during the election period, however there may be exceptional circumstances under which a committee meeting is required. If something requires urgent collective consideration, the Cabinet Secretary should be consulted.

However, it is customary for ministers to observe discretion in initiating any action of a continuing or long-term character. Decisions on matters of policy, and other issues such as large and/or contentious commercial contracts, on which a new Government might be expected to want the opportunity to take a different view from the present Government, should be postponed until after the election, provided that such postponement would not be detrimental to the national interest or wasteful of public money.<sup>51</sup>

### **Good practices: Define the rights of public announcements by the executive during an electoral campaign**

**Require from the legislation a clear distinction between official functions of the incumbent candidate and his/her activities of an electoral nature**

## **2.5.2. Outdoor political advertising**

No canvassing shall be admissible in Bulgaria at state and municipal offices, institutions, state-owned and municipal-owned enterprises and at commercial corporations wherein the state or a municipality holds a participating interest in the capital exceeding 50% pursuant to Article 182(1) of the Electoral Code of Bulgaria.

This form of communication in the buildings occupied by state administration, law-enforcement and other state and municipal institutions and establishments is prohibited in Lithuania too (Article 51.9.1 of the Act on Elections to the Seimas). Persons who have violated the requirements of the procedure for installing and communicating outdoor political advertising shall be held liable under the act (Article 51.12).

### **Good practices: ban any form of canvassing in public offices during electoral campaigns**

44. [www.cncfp.fr/docs/commission/cncfp\\_rapport\\_activite\\_2019.pdf](http://www.cncfp.fr/docs/commission/cncfp_rapport_activite_2019.pdf), p. 72.

45. Increases of salaries or remuneration or privilege to any government official are banned by Article 261.2 of the Electoral Code of the Philippines.

46. BVerfGE 44, 125.

47. BVerfGE 63, 230, 23 February 1983.

48. BVerfGE 105, 279, 26 June 2002.

49. BVerfGE 44, 125, 142 and VG Meiningen, decision of 11 August 2002, Az.2 K 221/09.

50. Disposizioni per la parità di accesso ai mezzi di informazione durante le campagne elettorali e referendarie e per la comunicazione politica.

51. Cabinet Office, *General Election Guidance 2019*: guidance for civil servants section G. [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/844380/General\\_Election\\_Guidance\\_2019.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/844380/General_Election_Guidance_2019.pdf).

### 2.5.3. Publications and electoral pamphlets

A distinction has to be drawn between local newspapers, publications and advertising campaigns.

Where a candidate regularly publishes a newspaper, only articles directly related to his/her campaign in the constituency have to be considered for the purpose of expenditures that must be entered in his/her accounts. It is therefore necessary to check whether issues of the periodical published by the candidate contains material that is electoral.<sup>52</sup> The cost of a monthly publication devoted entirely to municipal life must not be recorded in the campaign accounts.<sup>53</sup> However, a publication cannot be used as a political platform.<sup>54</sup>

In Germany, neutral publications which are released over a certain time period do not breach neutrality.<sup>55</sup>

In the United Kingdom there are year-round restrictions on local authority publicity. These obligations are particularly sensitive during the pre-election periods for local elections which start at the latest on date of publication of the notice of election:

During the period between the notice of an election and the election itself, local authorities should not publish any publicity on controversial issues or report views or proposals in such a way that identifies them with any individual members or groups of members. Publicity relating to individuals involved directly in the election should not be published by local authorities during this period unless expressly authorised by or under statute. It is permissible for local authorities to publish factual information which identifies the names, wards and parties of candidates at elections.<sup>56</sup>

Under section 125 of the Political Parties, Elections and Referendums Act 2000, there is a prohibition on publishing certain promotional material by central and local government within 28 days of any referendum.

**Good practices: make a clear distinction between information and electoral pamphlets**

### 2.5.4. Mass media

The determination of which candidates or political parties should be given free political advertising time may be based either on an equality principle or a proportionality principle. The equality principle means that each candidate or political party is allocated the same amount of time. The proportionality principle means that neither candidates nor political parties are allocated time according to objective criteria, for example, the results of the latest elections, the number of seats currently held in parliament or at the lower house or the number of candidates standing. France, Germany, Ireland, the Netherlands, Spain have chosen a system of proportional access to broadcast based on the previous results of elections.

For instance, Article 66.1 of the Spanish Representation of the People Institutional Act proclaims that: "The respect of political and social plurality, as well as of equal, proportional and neutral information by publicly owned mass-communication media at election time, shall be ensured by the organization of said media and control thereof in the manner prescribed by the law."

In electoral campaigns, if state media such as public television, are made available to the candidates, the airtime provided to the candidates and their parties cannot be arbitrary. It means that if some parties are allowed to broadcast their message on public television, this access cannot be hampered without any justified decision.<sup>57</sup> But a difference of treatment such as the requirement of votes for a party to receive public funds to avoid political fragmentation will be considered as a legitimate and proportional measure.<sup>58</sup>

In the judgment *Communist Party of Russia and Others v. Russia*, 2012,<sup>59</sup> the Court addressed the question as to whether the state had a positive obligation under Article 3 of Protocol No. 1<sup>60</sup> to ensure that coverage by

52. Decision No 2002-2657/2841 of 19 December 2002, Constitutional Council, Paris, Constituency 15, paragraph 11, p. 552.

53. Decision No 2002-2688/2692/2714 of 28 November 2002, Constitutional Council, Hauts-de-Seine, Constituency 12, paragraph 11, p. 493.

54. Decision No 2002-2672 AN of 21 November 2002, Constitutional Council, Val d'Oise, Constituency 5, paragraph 2, p. 470.

55. Hess VGH, decision of 11 January 1991, Az. P.St.1079.

56. Point 34 of the *Code of Recommended Practice on Local Authority Publicity*, [www.gov.uk/government/publications/recommended-code-of-practice-for-local-authority-publicity](http://www.gov.uk/government/publications/recommended-code-of-practice-for-local-authority-publicity).

57. *Partija "Jaunie Demokrati" and "Partija Musu Zeme" v. Latvia*, Application Nos. 10547/07 and 34049/07, judgment/decision of 29 November 2007.

58. *Özgürlük ve Dayanışma Partisi (ÖDP) v. Turkey*, Application No. 7819/03, judgment of 10 May 2012.

59. *Communist party of Russia and others v. Russia*, Application No. 29400/05, judgment of 19 June 2012.

60. "The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature."

regulated media was objective and compatible with the spirit of free elections, even in the absence of direct evidence of deliberate manipulation. The Court reiterated that where a state decides to create a public broadcasting system, domestic law and practice must guarantee that the system provides a pluralistic service.<sup>61</sup>

For the 2018 presidential elections in Russia, the total time provided by each national state-funded station free of charge was one hour per registered candidate and one hour per nominating party. Half of the total time must be devoted to debates amongst candidates, one third to political parties, and the rest to spots of candidates. The OSCE/ODIHR took the view it provided advantageous conditions for party-nominated candidates over self-nominated ones in volume of free airtime.<sup>62</sup>

In Austria, ministries or municipal administrations used to buy advertising space in free newspapers which were then distributed in public premises or rent commercial billboard spaces to deliver some form of public policy message shortly before elections. There was no definition of the campaign period in Austria nor advertising regulations in that context.<sup>63</sup>

Best practices on media are not just a matter of a balanced amount of airtime space or a neutrality of attitude obligation by publicly owned media.<sup>64</sup> Broadcasters may complete general legal rules on impartiality by issuing codes of conduct.<sup>65</sup> Impartiality concerns moderators on television too. Article 65 of the Romanian Act for the Election of Local Public Administration Authorities requires the directors and anchors of electoral shows and debates to be impartial; to ensure the necessary balance during the show, giving each candidate participating in the debates the opportunity to express his/her opinions; to formulate his/her question clearly without bias or partiality.

More specifically the Electoral Code of Armenia sets up regulations related to the media coverage of candidates who are public servants. The mass media coverage carrying out terrestrial on-air broadcasting for such candidates shall consider this when covering the activities of other candidates, political parties, running elections, in order to comply with the non-discriminatory principle of equality prescribed by Article 20 of the code.<sup>66</sup>

**Good practices: grant equal access to political parties and candidates to public broadcast either on the base of equality or the proportionality principle**

### **3. A PRAGMATIC APPROACH TO THE ASSESSMENT OF ADMINISTRATIVE RESOURCES**

The dividing line between what is permitted and what is not permitted depends on the context of each case which warrants allowance for domestic conditions.

#### **3.1. General rules based on case law**

Section L. 52-8 of the French Electoral Code, as amended by the Act of 19 January 1995, prohibits all public figures and public sector corporates from giving donations or other benefits to a candidate but neither this provision nor any provision applicable to elections requires campaign accounts to be rejected solely on the ground that the candidate enjoyed a benefit within the meaning of these provisions. It is for the supervision body, the National Campaign Accounts and Political Funding Committee, and ultimately the electoral court to assess whether the campaign accounts should be rejected accordingly, having regard to all circumstances and in particular the value of the benefit, the conditions in which the benefit was given and its amount.<sup>67</sup>

If a great number of people working in the department has been provided to a candidate for his/her campaign at a district election, his/her campaign account has to be rejected.<sup>68</sup>

61. In this case it could not be considered that the state failed to meet its positive obligations.

62. OSCE, *Russian Federation, Presidential Election 18 March 2018: Final Report*.

63. GRECO, Austria, 3rd round, Evaluation report, section 64. <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016806c6555>.

64. Venice Commission, *Code of good practice in electoral matters – Guidelines and explanatory report*, (2002) 23 rev., paras. 2.3.d, <https://rm.coe.int/090000168092af01>.

65. BBC Editorial Guidelines; code of ethical conduct.

66. "Political parties running in elections of the National Assembly and the Council of Elders of Yerevan shall have the right to use the airtime (including by live broadcasting) of public radio and public television on equal conditions, free of charge and for pay."

67. Decision No. 97-2208 AN of 14 October 1997, Constitutional Council, Val-de-Marne, Constituency 1, paragraph 2, p. 180.

68. 8 November 1999, Council of State, District election of Bruz, Mr Barre, No. 201966.

If the investigation revealed that assistance given to the successful candidate in his campaign consisted of the occasional use of an official vehicle and communications and reproduction facilities and if the National Campaign Accounts and Political Funding Committee rightly assessed the value of these benefits at €760, given their amount and their nature, they did not justify the rejection of the candidate's campaign accounts.<sup>69</sup>

In a case where the incumbent mayor was running for a new term and was presenting a new construction complex in an event organised by the Social Democratic Party during the electoral campaign, an Administrative Court in Germany considered, as the candidate answered questions on this project, that the event was part of his electoral campaign.<sup>70</sup> The court brought up the fact that the candidate would have performed official duties, if he had signed official papers or if he had been on the spot with civil servants.

The rule fixed by the Ministerial Code in the United Kingdom on a possible confusion between an official position and a political commitment is the following: "Where a visit is a mix of political and official engagements, it is important that the department and the Party each meet a proper proportion of the actual cost."<sup>71</sup> The same guide provides that speeches made in a party political context should not be distributed via official machinery and more generally that official resources may not be used for the dissemination of material which is essentially party political.

**Good practices: assess the in-kind benefits regarding their value, the conditions they were given and their amount**

### 3.2. Facilities offered by a local authority

Three criteria are used in France by the electoral court to appreciate if the local authority has or has not given a benefit to a candidate: the link with the election, the regularity of the event and the inclusion or not of this event in a local policy. For instance, the inauguration of a free of charge bus network will not be regarded as an event with a direct link to an election.<sup>72</sup> Participation of the incumbent candidate in an event has to be appreciated in relation to similar events during other periods without any election.<sup>73</sup> Distribution of gifts such as coffee pots on Mother's Day by an association subsidised by the commune of which the successful candidate is mayor is so traditional that it cannot be regarded an expenditure incurred specifically for the general election.<sup>74</sup> Participation of the candidate in a greeting ceremony,<sup>75</sup> at a meal with elderly people of the constituency,<sup>76</sup> at a tea dance with elderly people of the constituency too,<sup>77</sup> will not be considered as a public benefit to a candidate.

Episodic use of an official vehicle during an electoral campaign for a small amount did not justify the rejection of the campaign accounts of the candidate.<sup>78</sup> Events which are part of a local promotional policy will not be regarded as public benefits if they are intangible.<sup>79</sup>

**Good practices: assess the link of the benefit with the election and the tradition of this benefit**

### 3.3. Involvement of civil servants in an electoral campaign

The involvement in the successful candidate's campaign of local authority staff for the district where the candidate for parliamentary elections is mayor is not regarded in France as a benefit in kind if the staff acted on a voluntary basis and outside working hours.<sup>80</sup> The same rule applies when the local employee is in holiday. For that reason, this expense has not to be recorded in the campaign account of the candidate.<sup>81</sup>

69. Ibid.

70. VGH Kassel, Decision of 10 July 2003, 8 UE 2947/ 01.

71. Ministerial Code op. cit., 10.15.

72. Decision No. 2007-3888/3967 of 29 November 2007, Constitutional Council, Eure-et-Loir, Constituency 1 paragraph 3, p. 411.

73. Decision 97-2261, 15 January 1998, Constitutional Council, Alpes Maritimes Constituency 2, paragraph 6, p. 69 and 17 June 2015, Council of State, municipal elections of Bron, 385204 for an inauguration.

74. Decision No. 2002-2613/2616/2763 of 19 December 2002, Constitutional Council, Réunion, 3 Constituency, paras. 7 and 8, p. 549.

75. Decision No. 2012-4645 NA of 20 November 2012, Constitutional Council, Savoie, Constituency 1, paragraph 6, p. 584.

76. 6 December 2002, Council of State, municipal elections of Argeles-sur-mer, 239674.

77. 16 November 2005, Council of State, district elections of Gravelines (North), 274797.

78. Decision No. 97-2358 AN of 15 January 1998, Constitutional Council, Essonne, Constituency 4, paragraph 2, p. 76.

79. Decision No. 93-1209 AN of 17 December 1993, Constitutional Council, Val-de-Marne, Constituency 7, paragraph 16, p. 557.

80. Decision No. 97-2198 AN of 16 December 1997, Constitutional Council, Loire, Constituency 4, paragraph 3, p. 310.

81. Decision No. 2007-3618/3749/3874 AN of 22 November 2007, Constitutional Council, Moselle, Constituency 1, paragraph 11, p. 371.

If leaves of absence for civil servants close to candidates are granted to these civil servants but refused to other civil servants close to other candidates, it is considered as a breach of equality.<sup>82</sup>

Regarding the involvement of one assistant of Nicolas Sarkozy in his electoral campaign, the supervisory body considered that according to the proceedings, the purpose of these meetings held by this assistant was mainly to present the results of Nicolas Sarkozy's term, to call for the candidacy of Mr Sarkozy and to promote it. Pursuant to the functions carried out by this assistant and the publicity given to these meetings, they could only take place with the consent of the candidate. Accordingly, the supervisory commission had grounds to proceed, because of their electoral nature, to the reintegration of the cost of these meetings in question.<sup>83</sup>

What is taken into account in Germany is the influence of the person in the local organisation and the context. For instance, an official representative for immigration affairs<sup>84</sup> took part in a debate organised by a foundation during an electoral campaign but the candidate for the office of Oberbürgermeister was not present at this event and the representative had not been introduced regarding his functions. The Administrative Court considered that in this case neutrality was not broken.<sup>85</sup>

In Ireland personal assistants and special advisers in ministers' offices are exempt from the general rules that restrict civil servants in relations to political activity. Personal appointees of ministers, ministers of state, parliamentary office holders and the attorney general must take annual leave to cover periods involved in campaign work.<sup>86</sup>

**Good practices: assess the administrative status of the civil servants involved in electoral campaigns and prohibit any involvement of civil servants paid with public funds**

### 3.4. Treatment of donations by the Electoral Commission in the United Kingdom

Public funding for political parties is limited in the United Kingdom. It covers policy development grants, known as "Short money and Cranborne money"<sup>87</sup> and some forms of public funding (financial assistance to opposition parties in Northern Ireland and Scotland). Policy development grants are designed to assist political parties with the development of policy for inclusion in any manifesto. Short money in the House of Commons and Cranborne money in the House of Lords is subject to reporting. Grants available to opposition parties have to be accounted for as donations and to be reported to the British Electoral Commission. On the other hand, a free television broadcast before elections and facilities for candidate such as the use of schools for public meetings and free postage for election material are considered as donations and do not have to be reported.

Political parties, election candidates, and certain other individuals and organisations known as "regulated donees" must follow rules on which donations they can accept and how they record and report them. They are legally required to check the permissibility of donations before accepting them. Donations are defined as money, goods or services provided without charge or on non-commercial terms.<sup>88</sup> Any donation other than money must be reported at market value and if anything is provided at a discount, legislation provides that the donation should be reported as the difference between the market value and the amount paid (see point 4.3).

A mayor or local government councillor can only lawfully use council property in the exercise of the specific functions of that local authority, and that would not include using such resources to further the electoral prospects of a candidate, whether or not such a candidate was already a mayor or other councillor. There are provisions to guard against misuse of council property. For example, each local authority is required to adopt a code of conduct against which councillors' conduct may be assessed, and investigations can take place if there are alleged breaches of such a code. Any such breaches are not a matter for the Electoral Commission, but rather for the local government and regulators concerned.

As far as electoral law is concerned, a donation classified as an impermissible donation by law cannot be accepted or used by the candidate but has to be reported and if it is accepted, it can amount to a criminal

82. Decision No. 2003-20 ELEC of 15 May 2003, p. 370.

83. Decision No. 2013-159 PDR of 4 July 2013, Constitutional Council, paras. 5 and 6, p. 930.

84. These representatives may make presentations in a municipal council but they do not have the right to vote in the council which downplays their influence.

85. Kleine Anfrage zur schriftlichen Beantwortung mit Antwort, Anfrage des Abg. Dirk Toepffeer eingegangen am 1. Oktober 2013, Niedersächsischer Landtag.

86. Circular 09/2009: <https://circulargov.ie/pdf/circular/finance/2009/09.pdf>.

87. See 2.4.1.

88. <https://researchbriefings.files.parliament.uk/documents/SN07137/SN07137.pdf>.

offence. For impermissible donations, party officers in the United Kingdom must report: the amount or nature of the donation and its value; the manner in which the donation was made; the date of the received donation and the date of the returned donation.

**Good practices: adopt a code of conduct for representatives of public bodies who are candidates, for the management of electoral campaigns**

## 4. SUPERVISION

As already stated, enforcement mechanisms are essential for this legal framework. Monitoring the application of the legislation on the use of public sources in electoral campaigns requires an independent oversight body, with human and financial adequate resources to investigate alleged infringements of regulations, appropriate working methods, proactive monitoring and efficient sanctions.

### 4.1. Status of the supervisory body

A supervisory body has to be independent to be in line with Article 14 of Recommendation Rec(2003)4 of the Committee of Ministers to member states on common rules against corruption in the funding of political parties and electoral campaigns.<sup>89</sup> It means that monitoring bodies which are too close to the executive branch or the legislative branch will not be considered as independent. Single independent agencies prevent problems related to institutional co-operation, improving standardisation of training and expertise.<sup>90</sup>

As examples of independent supervision bodies we can mention:

- ▶ the British Electoral Commission composed by 10 members independent of political parties and four commissioners put forward by leaders of the largest parties, accountable directly to Parliament;
- ▶ the French National Campaign Accounts and Political Funding Committee made up of nine members appointed for five years, the terms being renewable once. These members are appointed by the chairs of the three highest courts, with three members in active service or honoraria of each of these institutions: Conseil d'Etat, Cour de Cassation and Cour des Comptes (Audit office);
- ▶ the Irish Standard Commission chaired by a former judge of the high court, four *ex officio* members and a person who must be a former member of the House of the Oireachtas and who is not an MEP;
- ▶ the Italian Committee for the Transparency and Control of Financial Statements of Parties and Political Movements, which is composed of representatives of the judiciary working on a full-time basis.

**Good practices: ensure independent and substantial monitoring in respect of fair use of administrative resources by political stakeholders**

### 4.2. Means of the supervisory body

To ensure independent and significant monitoring, it requires adequate means with a transparent, impartial recruitment and financial resources. A unique body vested with these means, a clear mandate to detect effectively the breaches of the rules on funding of political parties and electoral campaigns regarding the use of public resources would be the most appropriate solution to perform this duty. Independence will confer on the monitoring body the authority to ensure appropriate and proactive oversight. To penalise abuse of public resources for electoral purposes, it assumes co-operation with public bodies, agencies, local bodies if documents and information are requested from these legal persons by the supervisory body.

**Good practices: equip the oversight bodies with proper means of control and adequate staff**

<sup>89</sup>. "States should provide for independent monitoring in respect of the funding of political parties and electoral campaigns."

<sup>90</sup>. Fernando Casal Bértoa and Juan Rodríguez Teruel, *Political Party Funding Regulation in Europe, East and West: A Comparative Analysis* (2019), <https://whogoverns.eu/wp-content/uploads/2017/12/OSCE-ODIHR-Discussion-Paper-on-Political-Party-Finance-Spain.pdf>.

### 4.3. Working methods of the supervisory body

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Supervisory bodies have to assess the value of the resource, whether it is permitted or forbidden. The supplier who supports the electoral campaign of a candidate or a party may give him or it a service or goods at a reduced value. Supervisory bodies have to ensure that electoral expenses are properly recorded at their market value. For that purpose, they have to collect information and find out what similar providers charge for the same services or goods. However, the value of certain services or goods is easier to assess than the value of others. For instance, it will be easier to assess the value of a short-term contract than the value of an opinion poll, a market survey, studies on specific issues worked out for the incumbent ruling party and paid by a public body. A wage of a public employee will have data available for a monitoring body which will use the rate charged for similar customers or for the same services. The value of incorporeal services is always difficult to assess and may be liable to kickbacks. The French supervisory body may have recourse to experts to assess market value of electoral expenses, but expertise requires time. It was used particularly in 2018 for the monitoring of the electoral campaign for the European Parliament to evaluate the real cost of websites.

The most developed methodology is the one used by the British Electoral Commission. It refers to notional spending, which is the difference in value between the market rate for the item or the service and the price the candidate or the political party pays. In the United Kingdom, if a political party is given property, goods or services free of charge or at a non-commercial rate, it must value it at the market rate. If it receives a discount of 10% or less or if the difference in value is £200 or less, it only needs to record the amount it paid. If it is over this rate, it will be considered as a donation. For example, if the market rate for the item is £1 000 and if the price the party paid is £400, the value of the donation will be £600.<sup>91</sup> The same would apply in respect of any public resources provided at a discount. Failure to report details such as the proper value of the donation can amount to a criminal offence.

**Good practices: grant efficient working methods for supervision bodies to detect the misuse of administrative resources**

### 4.4. Powers of the supervisory body

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The British Electoral Commission with its powers to require the production and provision of documents and to conduct investigations by addressing persons who are suspected to have committed an offence under rules on political finance is, in terms of benchmarking, one of the most efficient supervision body in that field.

Supervisory powers support routine work monitoring compliance by regulated organisations and individuals with the requirements set down in law.

Investigatory powers extend to any person – including individuals and organisations. These powers may be used when the Electoral Commission has reasonable grounds to suspect that a person has failed to comply with the Act on party and election finance. Investigatory powers may be used and enforced in respect of that person or any other person who holds relevant documents or information.<sup>92</sup>

The Electoral Commission may issue a disclosure notice requiring a regulated organisation or individual to provide them with specific documents and/or information. These documents or information must be related to the income and expenditure of the organisation or individual and must be reasonably required for the purpose of carrying out its functions.

When the Electoral Commission is unreasonably refused access to documents following a request – including during a voluntary inspection of premises – it may ask a justice of the peace or, in Scotland, a sheriff, to issue an inspection warrant.

The Estonian Party Funding Committee for instance has extensive powers too to request additional information or documents from candidates and political parties but also from whomever else might be involved with an investigation. The committee may ask providers of services prices, terms or conditions they have granted to political parties when they provided these services.

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91. The Electoral Commission, *Managing donations to political parties*, <https://www.electoralcommission.org.uk/media/1811>.

92. OECD (2016), *Financing Democracy – Funding of political parties and election campaigns and the risk of policy capture*, pp. 100 and 173.

The National French Campaign Accounts and Political Funding Committee has two main missions. One is to review the campaign accounts of candidates in elections in constituencies with at least 9 000 inhabitants and set the reimbursement due by the state; the other is to verify the compliance of political parties with regulations governing their financing.

Concerning the review of campaign accounts, after examining campaign accounts, the committee deliberates and reaches a collegial decision. It may:

- ▶ approve the campaign accounts, approve the accounts after amendment, in particular in cases where the candidate's spending includes items that are not of an electoral nature;
- ▶ reject accounts in the case of failure to comply with a substantive formality required by law (failure to have accounts audited, donations received from a legal person, debit balance on account, spending limit exceeded, etc.). The committee can also take official note of the candidate's failure to lodge an account within the required time.

It also:

- ▶ certifies parties' compliance with accounting and financial obligations and each year provides the government with a list of those that fail to comply, which cannot then receive public financing in the following year;
- ▶ ensures publication of summaries of party accounts in the Official Gazette;
- ▶ grants or withdraws approval of political parties' financing associations;
- ▶ administers the system of donation receipts and examines receipt stubs for any breaches of the Act of 1988 on party funding;
- ▶ monitors the compliance of financial proxies (individuals and financing associations) and where a penalty is appropriate, refuses to provide them with donation receipt forms;
- ▶ informs the public prosecutor of anything that might be a cause for criminal proceeding;
- ▶ requests as necessary the document of any accounting or supporting document needed for its monitoring duties. The refusal to deliver information is liable to one year's imprisonment and a €15 000 fine. It has the power to request documents from parties relating to their support of presidential candidates too.<sup>93</sup> In 2018, the committee referred eight cases for refusal of document delivery to the prosecutor.

The Latvian KNAB is worth citing regarding its investigative powers. Among other powers, an official of this body has the right:

- ▶ to request and receive free of charge information, documents and other material from the State administration and local Government institutions, companies (undertakings), organisations, officials and other persons, regardless of the secrecy regime thereof;
- ▶ to request and receive free of charge information from credit institutions in cases and in accordance with the procedures specified in the Law on Credit Institutions;
- ▶ to have free access to all information stored in registered data bases, the registration of which is specified in regulatory enactments, regardless of the ownership thereof;
- ▶ to obtain, receive, register, process, compile, analyse and store information necessary for the performance of the functions of the Bureau, the procedures for use of which shall be determined by the Head of the Bureau;
- ▶ to check personal documents of identification while performing corruption combating functions and control functions of financing of political organisations (parties) and associations thereof" (section 10 of the Act on the Corruption Prevention and Combating Bureau).

The most efficient method to gather information and to collect data for a monitoring body is to carry out offsite and onsite controls and to compare information with documents collected by voters, observers, associations, media and to cross-check these data.

The Serbian Anti-Corruption Agency may be mentioned in this regard. It has the right to direct and free access to book-keeping records and documentation and financial reports of a political entity and to engage relevant experts and institutions. The agency is also entitled to direct and free access to book-keeping records and documents of an endowment or foundation founded by a political party. A political entity shall, at the agency's request, and within the timeframe set by the agency which may not exceed 15 days, submit to the agency all documents and information necessary to the Agency to carry out tasks from its purview set forth under

<sup>93</sup>. Article 3.II of the Institutional Act of 6 November 1962.

this act. In the course of an election campaign, a political entity is required upon the request of and within the timeframe set by the agency, which may not exceed three days, to submit information necessary to the agency to carry out tasks from its purview set forth under this act (Article 32 of the Serbian Act of Financing Political Activities).<sup>94</sup>

Supervisors of this monitoring body collect campaign data, make notes of activities that could have represented costs and document them with photo or video material. These data are presented in reports to coordinators on a weekly basis and forwarded to the agency.

**Good practices: ensure that the supervision body fulfil its functions in an effective manner with adequate powers**

## 4.5. Sanctions

Legislation cannot just state that certain actions are not allowed during electoral periods but must be completed with sanctions to be effective. Sanctions ensure the credibility of any regulations on political finance.

To be sanctioned offences have to be clearly defined. It must address the abuse of a position for personal advantage or to cause harm to another.<sup>95</sup>

A 2003 Council of Europe recommendation on party and campaign funding calls on member states to require infringement of rules concerning funding of political parties and electoral campaigns to be subject to “effective, proportionate and dissuasive sanctions”. These sanctions should be flexible and have a broad scale. Too excessively severe sanctions will be inappropriate to deal with minor misuse of public resources. Too weak sanctions will not present a deterrent. Spanish rules are a good example. They contain escalating sanctions directly linked to the illegal act performed by political parties, their responsible officers or donors, as well as related entities. These sanctions can be enforced by the Court of Auditors. They do not exclude criminal liability in the terms established by the Penal Code.

The Czech Republic, France, Germany, Poland, the Slovak Republic, Slovenia, the United Kingdom apply fines. In Armenia, the amount of the fine to punish the violations of the principles of the Electoral Code is determined by several factors such as the duration of the actions that led to the offence, the attitude of the perpetrator, the efforts to hide the violation or the possible use of public resources (Article 172 of the Electoral Code).

The British Electoral Commission has a number of civil sanction powers comprising the imposition of fixed or variable monetary penalties, the issuing of compliance or restoration notices requiring steps to be taken to stop non-compliance or undo its effects, the issuing of stop notices, failure to comply which is a criminal offence and agreeing enforcement undertakings. It may also refer cases to prosecution bodies for criminal cases.<sup>96</sup> A fixed monetary penalty is a fixed fine of £200. A variable monetary penalty may be imposed and is calculated in relation to the nature of the offence. It will be between £250 and £20 000. Failure to return a donation from an impermissible donor within 30 days of receiving it will not be sanctioned as a failure to provide notification of gifts to a political party exceeding £25 000 has been liable to a variable monetary penalty. The recipient of a sanction may appeal to a county court.

In France disqualification for eligibility is a possible sanction. Ineligibility may be ordered by the electoral court when the campaign accounts have been rejected on the grounds of fraud or of a serious breach of the campaign financing rules (in which case it applies for a maximum of three years and to all elections, but without any impact on offices held as a result of previous elections); in the event of fraudulent acts having the aim or outcome of undermining the fairness of the elections (in which case it can be ordered for a maximum of three years). In the event of irregularities, the supervisory body may reduce the amount of the flat-rate reimbursement depending on these irregularities’ number and seriousness.

The statute of limitation regime has to be construed so as not to impede the conduct of investigations and sanctioning for violations. In some countries like Armenia, Republic of Moldova and Romania, the status of limitation has been extended at the request of GRECO.

94. Venice Commission, CDL-EL(2014)004-bil, 11th European Conference of Electoral Management bodies, [www.venice.coe.int/webforms/documents/?pdf=CDL-EL\(2014\)004-bil](http://www.venice.coe.int/webforms/documents/?pdf=CDL-EL(2014)004-bil).

95. Law Commission, *Misconduct in Public Office*, United Kingdom.

96. Financing Democracy, op. cit. p. 173.

In addition to any legal framework pointing out what is permitted and forbidden with a consistent and adequate oversight body and sanctions, as already stated, codes of conduct, as internal guidelines and ethical rules have to be developed by national, local assemblies and municipalities.

**Good practices: clearly define infringements of the use of administrative resources and introduce effective, proportionate and dissuasive sanctions for these infringements with sufficient limitation periods applicable to these infringements**

# Prevention of misuse of administrative resources during electoral processes in Georgia and practical examples of abuse of administrative resources

*Vakhtang Khmaladze*

## INTRODUCTION

The first additional protocol to the Convention [Article 3] imposes an obligation on the state “to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature”. This obligation is reflected in the Constitution of Georgia, according to which:

“People are the source of state authority. People exercise power through their representatives, as well as through referendums and other forms of direct democracy [Article 3.2];

...

No one shall have the right to seize power. The current term of a body elected in general elections shall not be extended or reduced by the Constitution or law [Article 3.3];

...

Political parties shall participate in the formation and exercise of the political will of the people [Article 3.4];

...

1. Freedom of opinion and the expression of opinion shall be protected. No one shall be persecuted because of his/her opinion or for expressing his/her opinion.

2. Every person has the right to receive and impart information freely.

3. Mass media shall be free. Censorship shall be inadmissible ...

4. Everyone has the right to access and freely use the internet ... [Article 17].

Every citizen of Georgia who has attained the age of 18 shall have the right to participate in referendums and elections of the bodies of the state, autonomous republics and local self-governments. The free expression of the will of a voter shall be guaranteed [Article 24.1];

...

Every person has the right to apply to a court to defend his/her rights ... [Article 31.1];

The Parliament of Georgia is the supreme representative body of the country ... [Article 36.1], which... is composed of 150 Members of Parliament elected in a single multi-mandate electoral district for a term of 4 years by a proportional system on the basis of universal, free, equal and direct suffrage, by secret ballot [Article 37.2];<sup>97</sup>

...

Citizens of Georgia shall regulate issues of local importance through representative and executive bodies of local self-government. Representative bodies shall be elected on the basis of universal, equal and direct suffrage by secret ballot [Article 74.1];

...

<sup>97</sup> This norm of the constitution will come into force in 2024, and the parliament elected in 2020 will consist of 120 members elected by the proportional system and 30 members elected by the majoritarian system according to the single-mandate constituencies.

The Constitutional Court of Georgia shall in accordance with the procedures established by the Organic Law:

- a) review the constitutionality of a normative act with respect to the fundamental human rights enshrined in Chapter Two of the Constitution on the basis of a claim submitted by a natural person, a legal person or the Public Defender; ...
- h) review disputes related to norms regulating referendums or elections, and the constitutionality of referendums and elections held or to be held based on these norms, on the basis of a claim submitted by the President of Georgia, by at least one fifth of the Members of Parliament, or by the Public Defender; ..." [Article 60.4].

The fulfilment of the above-mentioned obligations with respect to the elections should, first of all, be ensured by the election legislation and the actions of the government. Authorities, election administrations, political parties, civil society organisations and the media should facilitate informed decision making by voters, and observer organisations should conduct objective assessments of the electoral process.

Due to the great political importance of the elections and the fierce political competition, the electoral process is accompanied by a number of threats, one of which is the so-called abuse or misuse of administrative resources. The Venice Commission Report states that

After more than twenty years of observation of elections in Europe and more than ten years of legal aid to member states of the Council of Europe, there have been many improvements in electoral law and practice. At the same time, the practical implementation of election laws and laws related to political parties (including the financing of political parties and electoral processes) remains somewhat problematic.

Today one of the most important and recurring challenges in Europe and beyond is the misuse of administrative resources, also known as public resources, during electoral processes. This practice is an established and widespread phenomenon in many European countries, including countries that have a long tradition of democratic elections. Several generations of both officials and civil servants consider this practice to be normal and part of the electoral process. As it seems, they do not consider such practice as an illegitimate act against the competition in the elections. It may be more difficult to use administrative resources for these challenges. This phenomenon seems to be part of the established political culture and is related not only to actions that are potentially considered illegal, but also to the involvement of government bodies in the electoral process due to the lack of ethical standards.<sup>98</sup>

Misuse of administrative resources is particularly common in hybrid democracies, which often have a one-party parliamentary majority and, consequently, a one-party executive branch. In such countries, the degree of merger of the ruling party with the government is usually high. The danger increases especially when the degree of independence of the judiciary from political power is low. This is exactly the situation in Georgia.

This study describes and evaluates the legal basis for the prevention of misuse of administrative resources during the electoral process in Georgia, types of administrative resources used frequently, practical examples of misuse of administrative resources, audit mechanisms for the use of administrative resources, the importance of political will to prevent misuse of administrative resources and awareness raising and information campaigns related to elections.

In using the term administrative resources, we refer to the definition given in the above-mentioned Report of the Venice Commission:

Administrative resources are human, financial, material, *in natura*<sup>99</sup> and other immaterial resources enjoyed by both incumbents and civil servants in elections, deriving from their control over public sector staff, finances and allocations, 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.<sup>100</sup>

For the misuse or abuse of administrative resources the same expression is used in the study entitled "Misuse of administrative resources", which is defined as "the extra advantage that certain parties or candidates gain by using their official positions or relation with government institutions in order to influence the results of elections".<sup>101</sup> Misuse of administrative resources may also include offences such as pressure or

98. Report on the misuse of administrative resources during electoral processes 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, paragraph 1. According to Article 12(a) of the Convention on Access to Official Documents, "authority" means:

1. Government and administration at national, regional and local levels;
2. Legislatures and the judiciary to the extent that they perform administrative functions in accordance with the national law;
3. Natural or legal persons, insofar as they exercise administrative powers. [...]"

99. As well as some of the benefits of social programmes, including commodities and non-monetary resources.

100. *ibid*, paragraph 12.

101. OSCE/ODIHR, *Handbook for the Observation of Campaign Finance*, 2015.

intimidation<sup>102</sup> of public authorities against public officials, as well as misuse of legal administrative resources (using decision-making legislative and executive bodies and courts in the political interests of the ruling party or its candidate).<sup>103</sup>

## LEGAL BASES FOR THE PREVENTION OF MISUSE OF ADMINISTRATIVE RESOURCES

The legal basis for the prevention of misuse of administrative resources is defined by the Organic Laws of Georgia: the Election Code of Georgia, the Law on Political Associations of Citizens and the Law on the State Audit Office, the Law on Broadcasting, the Law on Civil Service, and the Law on the Protection of Personal Data, the Criminal Code, the Code of Administrative Offences.

The legislative framework has been improved over the years based on the recommendations of the Venice Commission and the OSCE/ODIHR and analysis of the cases of use of administrative resources identified by international and local observer organisations in the election process. The last amendments to several of the above laws were made in summer of 2020. Most of the recommendations have been implemented and it can be said that “despite some shortcomings, the legislative framework provides an adequate basis for democratic elections.”<sup>104</sup> The same can be said specifically about the legal basis for preventing misuse of administrative resources. However, there are some rather wide “gaps” that leave the possibility of misuse of administrative resources, which we refer to when describing the relevant part of the legal framework.

### 1. Election administration

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The most important function in the election process is assigned to the election administration, whose status, function, authority, procedure of operation, composition and responsibilities are defined in the Election Code of Georgia.

The Election Administration of Georgia “is an independent administrative body, which is independent from other state bodies within its authority...” It consists of the Central Election Commission (hereinafter referred to as the CEC) and its staff, the Supreme Election Commissions of the Autonomous Republics (hereinafter referred to as the SEC) and their offices, the District Election Commissions and the Precinct Election Commissions. The supreme body of the Election Administration of Georgia is the CEC, which within its authority directs and controls all levels of election commissions and ensures the uniform application of the election legislation of Georgia throughout the territory of Georgia.<sup>105</sup>

The function of the CEC and its subordinate district and precinct election commissions is to hold elections to the Parliament of Georgia, the president of Georgia, the representative body of the municipality (Sakrebulo) and the head of the executive body (mayor) of the municipality, as well as a referendum and a plebiscite, and the function of the SEC is to hold elections to the supreme representative body (Supreme Council) of the Autonomous Republic.

The CEC and the District Election Commission, respectively, shall ensure the conduct of elections, referendums and plebiscites within the scope of their authority throughout the territory and in the election district of Georgia, control the implementation of the election legislation of Georgia and ensure its uniform application. The Precinct Election Commission shall ensure the conduct of elections, referendums and plebiscites within the scope of its authority on the territory of the polling station, implementation of election legislation, observance of the procedure established by law during voting, exercise of rights guaranteed by voters, representatives and observers. The powers of each level of election commission are defined in the Election Code.<sup>106</sup>

All election commissions consist of 12 members.

A member of the election commission is not a representative of the subject nominating/electing him/her. He/she is independent in their activities and obeys only the Constitution of Georgia, the law and relevant by-laws. Influencing

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102. Joint Guidelines for Preventing and Responding to The Misuse of Administrative Resources During Electoral Processes, Adopted by the Council of Democratic Elections at its 54th meeting (Venice, 10 March 2016) and by the Venice Commission at its 106th Plenary Session (Venice, 11-12 March 2016), CDL-AD(2016)004, paragraph 1(10).

103. Handbook on the use of administrative resources for local self-government representative and executive bodies during elections of June 15, 2014 Elections, p. 2. CEC Legal Department, 2014, <https://cesko.ge/res/old/other/27/27551.pdf>.

104. OSCE/ODIHR, Election Observation Mission Final Report. Georgia, Presidential Election, 2018 (Warsaw, 28 February 2019), paragraph IV, [www.osce.org/ka/odihr/elections/georgia/414827](http://www.osce.org/ka/odihr/elections/georgia/414827).

105. Election Code of Georgia [Article 7].

106. *ibid.* [Articles: 14, 15, 21, 22, 26, 27].

the member of the election commission or interfering with his/her activities in order to influence the decision-making is prohibited and is punishable by law.<sup>107</sup> A member of the election commission does not have the right to conduct pre-election agitation and participate in agitation.<sup>108</sup>

In cases of negligent or improper performance of official duties by a member of a district or precinct election commission, as well as gross violation of election legislation and election commission regulations, the superior election commission may apply the following disciplinary measures: reprimand, warning, withholding of salary or part of it, early termination of authority (except for a member appointed by the parties). In addition, administrative and criminal liability is imposed for various types of offenses committed by a member of the election commission. In particular, the person who obstructs making an entry in the polling day record book by a person with the right to be present in the polling station, will be fined with 500 Georgian lari. In case of correction of the data entered in the summary protocols of voting and election results, if the correction is not confirmed by the correction protocol of the relevant election commission, the chairperson and/or secretary of the relevant election commission will be fined with 500 Georgian lari. In case of non-issuance or late issuance of a copy of the summary protocol of the election results, the chairperson and/or secretary of the relevant election commission will be fined with 1 000 Georgian lari.<sup>109</sup> Deliberate falsification of election-related documents (voter lists, protocols, ballot papers, registration journals and ballot papers) is punishable by up to two years in prison.<sup>110</sup>

At first glance, all the conditions are in place to prevent the misuse of administrative resources in the election administration. However, the rule of composition of election commissions allows for politically biased (beneficial to the ruling party) decision making.

5 members of the CEC are elected by the Parliament of Georgia from non-partisan candidates with higher education, selected by open competition. The CEC chairperson is elected by the CEC based on the recommendation of the President of Georgia from 3 non-partisan candidates with higher education selected on the basis of consultations with local non-profit (non-commercial) legal entities, by two thirds of the total membership, by secret ballot. If the CEC fails to elect a chairperson, the chairperson shall be elected by the Parliament of Georgia from the same candidates. The remaining 6 members of the CEC are appointed by the political parties that won seats in the Parliament and formed a parliamentary faction; these 6 seats are distributed among these parties in proportion to the votes they received in the last parliamentary elections, given that one party does not have the right to appoint more than 3 members to the CEC. The party does not have the right to change the CEC member appointed by it from the day of calling the elections until summing up of its final results. The term of office of CEC members is 5 years.<sup>111</sup>

5 members of the District Election Commission are elected by the CEC from non-partisan candidates with higher education selected by open competition for a term of 5 years, after calling the elections, for a period of time before the announcement of the final results of the elections, an additional 1 member is elected by the CEC and 6 members are appointed by political parties in the same manner as the members of the CEC. The chairperson of the district election commission is elected by the district election commission from the members of the commission, by a majority of the full membership (7 votes).<sup>112</sup>

A person may not be elected/appointed as a member of the CEC and the District Election Commission: who does not have a certificate of an election administration official; who was dismissed from a position held in the election administration (within four years from the date of dismissal) for violating the election legislation of Georgia; who was declared an administrative offender by the court due to the violation of the election legislation of Georgia (within 4 years after the entry into force of the court decision); who was convicted (unless the person has been fined as a sanction); also, the election subject/subject candidate or his/her representative and/or observer.

6 members of the Precinct Election Commission are elected by the relevant DEC by a majority of the full membership, with the additional condition that the elected member must be supported by at least 3 members elected by the CEC to the DEC for a term of 5 years. A member of the District Election Commission shall not participate in the procedure of electing these members if he/she is a family member of the candidate for the relevant precinct election commission (spouse, relative of direct ascending or descending branch, stepson/stepdaughter; sister, brother, stepson/stepdaughter of a parent/child; spouse's sister, brother, parent). It is prohibited to elect a person as a member of a precinct election commission who was appointed as a member of any election commission by a political party in the last general elections. In addition to these 6 members, 6 members of the commission are appointed by political parties in the same manner as members of the CEC. The term of office of a member of the Precinct Election Commission begins on the day of the first meeting of the Precinct Election Commission (30-40 days before the elections day) and ends as soon as the summary protocol of the voting results is drawn up in the relevant district election commission.<sup>113</sup>

Part of the conditions for inadmissibility of election/appointment as a member of the Precinct Election Commission is the same as for CEC and DEC members, except that PEC members are not required to have a certificate of election

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107. *ibid.* [Article 8].

108. *ibid.* [Article 45].

109. *ibid.* [Articles: 28, 87, 89, 90].

110. Criminal Code of Georgia [Article 1643].

111. Election Code of Georgia [Articles: 10-13].

112. *ibid.* [Article: 19, 20].

113. *ibid.* [Articles: 24, 25].

administration official.<sup>114</sup> In addition, there are additional restrictions for them, namely, a member of the Parliament of Georgia, the Head of the Office of the Parliament of Georgia, the Minister and his/her deputies, the heads of departments and divisions of the Ministry, the chairperson of the municipal representative body (City Council – Sakrebulo), the mayor and their deputies, military servicemen, officials of the Ministry of Internal Affairs of Georgia, Ministry of Defence of Georgia, the State Security Service of Georgia, the Georgian Intelligence Service, the Special Penitentiary Service, the Special State Protection Service and the Investigation Service of the Ministry of Finance of Georgia, employees of the Investigation division of the State Inspector Service, judge and his/her assistants, employees of the Prosecutor’s Office may not be elected/appointed as members of the Commission. The law allows for the election/appointment of other public servants as PEC members who may (though not necessarily) be on leave during their term of office. Statistics show that a large proportion of those elected by district election commissions as precinct election commission members are civil servants, employees of legal entities established by central and local government bodies, public schools, and kindergartens. These individuals are relatively easily influenced by their superiors, which dramatically increases the risk of misuse of administrative resources.

The above-mentioned rule of composition of election commissions and the existence of a one-party parliamentary majority will most likely lead to the election of the desired 5 candidates for this party as members of the CEC. In addition, this rule allowed the ruling party to appoint 3 CEC members out of 6 seats allocated to parties from 2017. In addition, the rule of electing the CEC chairperson will most likely lead to the selection of a desired candidate for the ruling party. Thus, 9 out of 12 members of the CEC, including the CEC chairperson, his/her deputy and the CEC secretary, are most likely to be preferred by the ruling party. The CEC of such a composition elects 6 members of each district election commission, and the remaining 6 members are appointed by the parties in the same proportion as when appointing the CEC members. Thus, 9 out of 12 members in the district election commissions, including the heads of the commissions, are most likely to be preferred by the ruling party. The situation is exactly the same in the precinct election commissions.<sup>115</sup>

This is evidenced by the fact that during 2018 presidential elections, a person elected as a member of the precinct election commission by the district election commission or a person appointed as a member of the precinct election commission by the ruling party was elected as a chairperson of all precinct election commissions.<sup>116</sup> It is reasonable to say that it was this composition of the commissions that led to the fact that over the years, almost none of the complaints requesting a recount of the voting results was satisfied (all 21 such complaints were rejected during 2018 presidential elections and after the first round of elections, out of 654 complaints filed with the district election commissions, which mainly concerned procedural violations observed on the election day, only 20% were satisfied in whole or in part).<sup>117</sup>

A report by the OSCE Office for Democratic Institutions and Human Rights states that “it is true that proportionate political representation in election commissions is in line with the established international practice, but these new rules have negatively affected public perceptions of election commission impartiality.”<sup>118</sup>

***In conclusion, it can be said that the rule adopted in 2017 for the composition of election commissions, which is still in force, is an example of misuse of legal administrative resources.***

The current rules for composition of election commissions give the public a sense of biased decision making by commissions, even when there is no objective basis for doing so, which undermines confidence in election results.

## **2. Funding of political parties**

Given the constitutional function of political parties, it is important to ensure legislative provision of their independence. One of the most important components of a party’s independence is the financing of its activities in such a way that it does not depend on the source of funding. This is achieved, on the one hand, by funding parties in a fair manner established by the law, and, on the other hand, by limiting the amount of money donated to political parties by individuals and legal entities.

The rule for financing political parties is defined in the Organic Law of Georgia on Political Associations of Citizens [Chapter III], and during the elections, also by the Election Code.

114. The fact that a certificate of election to the administration for an official is not mandatory for PEC members has a significant negative impact on the quality of PEC work, even though training courses are offered.

115. Before 2017, all levels of election commissions consisted of 13 members, with seven seats reserved for parties, and each party had one member. Accordingly, the estimated number of candidates for the ruling party in the election commission was 54%, and since 2017 this number has increased to 75%.

116. OSCE/ODIHR Election Observation Mission Final Report, Georgia, Presidential Election, 2018 (Warsaw, 28 February 2019), paragraph V, [www.osce.org/ka/odihr/elections/georgia/414827](http://www.osce.org/ka/odihr/elections/georgia/414827).

117. Ibid, paragraph XIV.

118. Ibid, paragraph V.

- a. State funding of political parties. Before 2006, the law provided for the possibility of state funding for parties, although this was not an obligation and no party received state funding. Since 2006, the law has stipulated that the state will fund the parties that ran independently or through an electoral bloc in the last parliamentary elections if the party or electoral bloc concerned receives at least 4% of the vote. The amount of funding was proportional to the number of votes received by the party/election bloc. The amount for each vote received was also determined. The amount allocated to the electoral bloc was divided equally among the parties united in the bloc. In 2007, party funding was supplemented by fixed so-called basic funding, and an alternative was added to the party funding basis, overcoming the 3% election threshold in local government elections. Since 2012, party funding has been supplemented by a gender balance incentive – party funding would increase by 10% if two female candidates were included in each of the 10 parties on the proportional list. From 2014, this incentive increased to 30% if three female candidates were included in every 10 parties on the proportional system for elections; in addition, the party funding was based on overcoming a 3% election threshold in parliamentary or local elections.<sup>119</sup>

It should be noted that in 2013, a component (300 000 Georgian lari) was added to the party funding formula to form a parliamentary faction by party members and from 2018 funding was given to a party that failed to overcome the electoral threshold but at least one of its candidates won a single-party constituency and formed a parliamentary faction. The latest change is a clear example of the misuse of legal administrative resources. In 2018 one of the parties in the parliament was represented by only one member of the parliament who won in a single-mandate constituency, who joined the parliamentary majority, and to whom several members of the parliament were “lent” to by the nomination of the ruling party to form a faction (through such a trick, this party received an annual state funding of 600 000 Georgian lari).

In addition to the funding described above, the law provides for additional funding for political parties:

- in the year of the general elections of the parliamentary and local self-government bodies, the political party that was eligible for funding according to the results of the last general elections, received state funding to cover the costs of television commercials during the election campaign in the amount of three times the number of votes received, but not more than 600 000 Georgian lari;<sup>120</sup>
- additional funding is allocated annually for such parties to fund research, training, conferences, business trips, regional projects, civic and electoral education projects for voters;<sup>121</sup>
- on election day, to ensure representation in the election commissions, the party which has the state funding and the electoral bloc, in which such party is, as well as the electoral bloc, in which the united parties received at least 3% of the total votes in the last parliamentary or municipal general elections, will receive about 370 000 Georgian lari;<sup>122</sup>
- the party that participates in the elections independently and the election bloc, which will receive 5% or more of the votes in the parliamentary elections, and in the first round of the presidential elections 10% or more of the votes cast in the elections, will receive no more than 1 million Georgian lari from the state budget of Georgia on a single occasion to cover the expenses incurred during the election campaign;<sup>123</sup>
- an independent party and election bloc that receives at least 3% or more of the votes cast in the general elections of municipal representative bodies (Sakrebulo) will receive no more than 500 000 Georgian lari from the state budget of Georgia on a single occasion to cover the expenses incurred in the Sakrebulo/mayor election campaign.<sup>124</sup>

It should also be noted that the law did not prohibit the formation of several parliamentary factions by members of one party (there should not be fewer than six members in a faction), which were used by parties and received procedural privileges defined in the parliamentary regulation and financial resources allocated for the activities of the fractions. This is also an example of misuse of legal administrative resources.

Such a rule of state funding of parties, especially additional funding, creates a significant imbalance between the parties receiving state funding and the rest of the parties. This imbalance has been significantly eradicated following legislative changes in 2020 that will take effect after the 2020 parliamentary elections.

119. Organic Law of Georgia on Political Associations of Citizens [Article 30].

120. *ibid.* [Article 30].

121. *ibid.* [Article 301].

122. Election Code of Georgia [Article 43].

123. *ibid.* [Article 56].

124. *ibid.* [Article 56].

After the 2020 parliamentary elections, the political party, which will receive at least 1% of the actual voter turnout in the last parliamentary elections in Georgia, will receive state funding, all the above-mentioned additional funding will be cancelled, and from 2028 the gender balance stimulating funding<sup>125</sup> will be cancelled, and the party's funding will be 15 Georgian lari (for not more than 50 000 votes) for each vote received in the last parliamentary elections and more than 50 000 for each vote, to the amount of 5 Georgian lari.<sup>126</sup>

- b.** Private funding of political parties. Private funding of a political party includes membership fees and voluntary donations by party members, as well as the annual income received from making and disseminating symbols, arranging lectures, exhibitions and other public events, based on statutory purposes, publishing and other activities, which should not exceed twice the minimum of the basic funding required by the law. Most of the party's private funding comes from donations.

The amount transferred to the party bank account from a Georgian citizen and by a legal entity from its own bank accounts in a commercial bank licensed in Georgia is considered a lawful donation. This legal entity must be registered in Georgia and its partners must be only Georgian citizens and those legal entities registered in Georgia whose final beneficiaries are only Georgian citizens. Material or intangible assets and services received by the party free of charge or at a discount/preferential terms (except for work done voluntarily by the volunteer) are also considered legal donations.

In order to prevent the misuse of administrative resources, the party is prohibited from accepting anonymous donations, as well as from: a state body, a state organisation, a legal entity under public law, a public company created with the share participation of the state; from a non-profit legal entity and religious organisation, except for the organisation of lectures, seminars and other similar public events; from a legal entity whose more than 15% of the actual income of the previous calendar year or election year (before the voting day) is received through simplified state procurement in its favour or in favour of the enterprise established with its participation. It is also prohibited to receive donations from citizens and legal entities of other countries, international organisations and movements, except for lectures, seminars and other similar public events, from stateless persons.

The maximum amount of donations made for one year is 60 000 Georgian lari (approximately EUR 16 000) per citizen and 120 000 Georgian lari for a legal entity. The annual amount of membership fee paid by one member of the party should not exceed 1 200 Georgian lari.

The total amount of expenditures incurred by the party and in favour of another person during the year shall not exceed 0.1% of the gross domestic product of Georgia for the previous year. In 2020, this amount was equal to 50 million Georgian lari (approximately €13.3 million).

The above-mentioned prohibitions imposed on a political party also apply to persons with declared election goals.

- c.** Transparency of financial activities of a political party. The party is obliged to send the previous year's financial statement to the State Audit Office before 1 February of each year, together with the conclusion of the independent auditor. The declaration should reflect the party's assets, its annual income (including membership fees and donations, and the identity of donors) and expenses (including election expenses). The transparency of the party's financial activities is ensured by the State Audit Office, which is obliged to publish the declaration on its website within five days after its receipt. If the party does not submit the financial declaration to the State Audit Office before 1 February, the State Audit Office will notify it in writing and if the party does not submit the financial declaration within the next five days, it will lose the right to receive state funding within the next year.

After calling elections, all election subjects are required to submit a financial report to the State Audit Office once every three weeks in the form prescribed by the State Audit Office, and those election subjects who, according to the preliminary data, receive the required number of votes set by the Election Code, no later than 12 days after polling must submit to the State Audit Office a report on the funds used from the date of calling the elections as of the polling day. All election subjects must submit a report on the funds used as of the date of publication of the final results from the date of the elections, which must be accompanied by an audit report to the State Audit Office no later than one month after the publication of the election results, and the election subjects participating in the second round of elections, no later than one month after the publication of the results of the second round.<sup>127</sup>

125. Funding stimulating gender balance until 2028, amounting to 30% of core funding, will be given to a party if one of the three candidates on each of its party lists submitted in the last parliamentary elections is of the opposite gender.

126. Organic Law of Georgia on Political Associations of Citizens [Article 30].

127. Election Code of Georgia [Articles: 54, 57, 192].

- d. Sanctions for violating party funding rules. Violation of party funding rules is an administrative offence and financial sanctions are imposed for such violations (for example, if a party or person with a stated election purpose receives and/or conceals a legally prohibited donation or membership fee, the amount received will be credited to the state budget and he/she will be fined double that amount). An administrative violation report is drawn up by an authorised person from the State Audit Office and is immediately sent to the court for approval. The court must make a decision within 15 days, and in the pre-election period within five days. The court decision can be appealed to the court of appeals, which must make a decision within 15 days, and in the pre-election period within 72 hours.

### 3. Prohibition of the use of administrative resources in the pre-election campaign (agitation)

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The pre-election campaign (agitation) officially starts 60 days before the election day. In order to prevent the misuse of administrative resources during the pre-election campaign, the law imposes a number of restrictions and sanctions for their violation.<sup>128</sup>

- a. During the pre-election campaign it is prohibited to hinder distribution of agitation materials or to use agitation vehicles and other means with special equipment for pre-election agitation. The infringer will be fined with 1 000 Georgian lari and if he/she is a public official 2 000 Georgian lari.<sup>129</sup>
- b. The following have no right to conduct pre-election agitation and participate in agitation: members of election commissions; judges; public servants of the Prosecutor's Office of Georgia, the Ministry of Internal Affairs and the Ministry of Defence, State Security and Intelligence Services and Special State Protection Service; other public servants during working hours and/or when they perform their official functions directly;<sup>130</sup> the Auditor General; the Public Defender of Georgia; members of the Georgian National Communications Commission and the Georgian National Energy and Water Regulatory Commission; employees of legal entities under public law (except for employees of higher and vocational education institutions, religious organisations and the Georgian Bar Association); employees of non-profit (non-commercial) legal entities established by the state or municipality and public school teachers during working hours or when they perform their official functions directly. Infringers of this prohibition will be fined with 2 000 Georgian lari.<sup>131</sup>
- c. Conducting pre-election agitation by the organiser at the event/presentation organised with the funding of the state or municipal budget of Georgia shall be considered as the use of administrative resources and prohibited. It is prohibited to use during the pre-election campaign for support or opposing any political party or candidate those means of communication, information services and various equipment intended for state institutions, municipal bodies and organisations financed from the state budget of Georgia. The use of vehicles owned by state authorities or municipal bodies is also prohibited, unless the official vehicle is used by a political official<sup>132</sup> protected by a special state security service. An infringer of the above will be fined with 2 000 Georgian lari.<sup>133</sup>

It is also prohibited for a political party or candidate to use buildings where state and municipal authorities or state-funded organisations are located, if other political parties and candidates do not have access to the same or similar buildings under the same conditions. The official who violates this prohibition and issues the relevant permit will be fined with 1 000 Georgian lari.<sup>134</sup>

- d. It is prohibited for a state or local government official to conduct pre-election agitation during working hours and/or in the performance of official functions (this restriction does not apply to political officials and the use of time allocated for pre-election agitation on television and radio broadcasting), collecting signatures during business trips and pre-election agitation, involvement of a subordinate or otherwise dependent person in pre-election agitation. Infringers of this prohibition will be fined with 2 000 Georgian lari.<sup>135</sup> In addition, influencing the will of a voter and/or violating the secrecy of the ballot, committed with violence, using material or official dependence, is punishable by a fine, house arrest for a term of six months

128. *ibid* [Articles: 45, 48, 49, 112, 136].

129. *ibid* [Article 80].

130. Law of Georgia on Civil Service [Article 15].

131. Election Code of Georgia [Article 79].

132. Political official – President of Georgia, member of parliament, prime minister, other members of the government and their deputies, members of the highest representative bodies and heads of government of the autonomous republics, members of the municipal representative body – Sakrebulo and executive body – mayor, state representative [Election Code of Georgia, Article 2].

133. Election Code of Georgia [Article 88].

134. *ibid*. [Article 81].

135. *ibid*. [Article 88].

to two years or imprisonment for a term of up to three years and such an act, committed repeatedly, against several persons or in a group, is punishable by imprisonment for a term of up to four years.<sup>136</sup>

- e. Incompatibility of the status of a candidate for the membership of the parliament with his/her position: The incompatibility of the status of the candidate for the membership of the parliament with his/her official position established by the Election Code serves the prevention of abuse of administrative resources, in particular, the abuse of his/her position by the candidate in order to gain an advantage in the elections. Namely, the following officials should resign and be dismissed no later than the second day after being officially nominated as a candidate for the membership of the parliament: the president and ministers of Georgia (except the prime minister), the ministers of the autonomous republics, the heads of government and state subdivisions and their deputies; members of the Board of the National Bank of Georgia; auditor general and his/her deputies; state representatives and their deputies; chairperson and mayor of the municipal council; officers of the Ministry of Internal Affairs and the Ministry of Defence of Georgia, state security and intelligence services and the Special State Protection Service; chief of staff of the National Security Council and his/her deputy; head of the Civil Service Bureau and his/her deputies; members of the High Council of Justice; judges; prosecutors, their deputies, assistants and investigators; members of the National Communications Commission and the National Energy and Water Regulatory Commission; Public Defender of Georgia and his/her deputy; advisers to the president of Georgia.

A positional incompatibility similar to the above has been established for candidates for membership in the municipal representative body and mayoral candidates. Their term of office is terminated before they are officially nominated.

- f. Prohibition of the use of budget funds: In order to prevent the use of budget funds by the ruling party to gain the support of voters, from the official start of the election campaign until election day, it is prohibited:
- to implement projects/programmes that were not previously envisaged in the state budget of the Republic of Georgia, autonomous republic or municipality, unless the projects/programmes are funded at least 60 days before the election day within the allocations provided by the relevant budget code and/or funds allotted from these allocations, as well as funds allocated by donors;
  - to increase the amount of social benefits (pension, social assistance, allowance, etc.) and introduce new social benefits and/or benefits, if this was not established by law before the start of the election campaign;
  - to place an advertising video on the air of the broadcaster by the state government or a municipal body, which contains information about the work done or planned by the relevant agency;
  - to produce agitation material, video or audio material, a website or part of it by funds from the state budget or municipal budget, which reflects the political party/candidate or their serial number of participation in elections and/or contains information for or against the party/candidate;
  - to use the serial number of a political party/candidate running in the elections or his/her turnout number in a social advertisement made with the funds of the state budget or the municipal budget.

The prohibition provided for in the first two paragraphs shall not apply to the financing of measures for the elimination of the consequences of a natural disaster or other force majeure circumstance.

It should be noted that these bans were rarely violated, however, during the general election years, state and municipal budgets were planned in such a way that the increase in social benefits and the start or completion of infrastructure projects coincided with the official pre-election campaign period.

- g. Prohibition of staff movements of senior officials: In practice, it was quite common to change the heads of state and self-government bodies during the election period who, in the opinion of the ruling party, failed to ensure the protection of its electoral interests. In order to prevent such action, from the end of the registration period of election subjects until the end of the polling day, the movement of senior officials of the municipal body, police and prosecutor's office was prohibited, except in cases of expiration of the term of their office and/or violation of the law by them.

Since the introduction of the above ban, before each election, there have been several instances of voluntary resignation from the position of the mayor of the municipality, leading to reasonable suspicion that the resignation was not voluntary but forced.

<sup>136</sup> Criminal Code of Georgia [Article 1644].

**h. Interagency commission:** In order to prevent and respond to violations of election legislation by public servants, an interagency commission is established with the Ministry of Justice of Georgia by the order of the minister to coordinate interagency activities and develop relevant proposals. The commission shall be established no later than 1 July of the election year, and in case of extraordinary parliamentary elections, within three days after the appointment of the elections and shall be abolished as soon as the final results of the elections are officially announced. The powers and the procedure of operation of the commission shall be determined by the statute approved by the Minister of Justice.

The commission usually consists of the minister for internal affairs, the minister for foreign affairs, the minister for finance, the minister for defence, the minister for regional development and infrastructure, the minister for education, science, culture and sports, the minister of IDPs from the occupied territories, labour, health and social affairs, the Prosecutor General of Georgia, and the Head of the State Security Service and representatives of the State Audit Office. The commission is chaired by the Minister of Justice of Georgia or his/her deputy.

Political parties receiving funding from the state budget of Georgia participate in the activities of the interagency commission with the right of deliberative vote, as well as other parties on a one-off basis, which provide the commission with information on violations of election legislation by public servants at the session where the relevant issue is discussed.

According to the Election Code, the interagency commission ensures the verification of the information received by the public servants from the subjects involved in the election process on the violation of the election legislation and the information spread by the media. In case of confirmation of the violation of the legislation, the commission shall address a recommendation to any public servant, administrative body, CEC with a request to take appropriate measures within a reasonable timeframe.

According to election observation organisations and various stakeholders, during the review of the complaints, the commission's impartiality, and an inadequate response to irregularities were observed, and the review of complaints that were not within its mandate reduced the effectiveness of the commission.<sup>137</sup>

#### **4. Local and international observers**

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Local and international observer organisations, which monitor the entire election process through a representative of the organisation, play an important role in detecting violations of electoral law in the electoral process, including the misuse of administrative resources. Local observer organisations usually start observing the election process a few months before the official start of the election process and periodically publish an observation report. Most of the statements, complaints and lawsuits about the violation of the election legislation are submitted by them.

The status, rights and obligations of an observer organisation and an observer are defined by the Election Code of Georgia [Articles: 39-41].

A local observer organisation may be a local non-profit (non-commercial) legal entity whose charter or other founding document (registered at least one year prior to the date of the elections) provides for election monitoring and/or human rights protection.

An international observer organisation may be a representative of another state, an organisation registered in another state or an international organisation whose founding document/charter provides for election monitoring and/or human rights protection and whose activities are based on internationally recognised principles.

The local observer organisation acquires the rights defined by the Election Code after registration with the CEC or the relevant district election commission, and the international observer organisation, after registration with the CEC. Observers from these organisations must also register.

The observer has the right to: attend the sessions of the election commission; move freely in the territory of the polling station and observe all the stages of the voting process freely, without hindrance; participate in the inspection of ballot boxes before they are sealed and after they are opened; observe the counting of votes in conditions that ensure seeing the ballot paper; observe the compilation of the summary protocol of the voting results and other documents by the precinct election commission; in case of identification of violation of the voting procedure, apply with a statement/complaint to the chairperson of the precinct election commission with a request to prevent the violation; appeal against

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137. OSCE/ODIHR Election Observation Mission Final Report. Georgia, Presidential Election, 2018 (Warsaw, 28 February 2019), paragraph XII, [www.osce.org/ka/odihr/elections/georgia/414827](http://www.osce.org/ka/odihr/elections/georgia/414827).

the actions of the election commission or a member of the commission to a higher election commission and the court; receive copies of election commission summary protocols ...

The relevant person will be fined 500 Georgian lari for restricting the legal rights of an observer or obstructing his/her activities.<sup>138</sup>

## 5. Participation of mass media in the election process

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The informed decision-making process by the voters is significantly influenced by the media, especially television and radio broadcasting, and in recent years, the social networks of the internet. In order to provide objective information to voters, more or less equal conditions for the parties participating in the elections, and to prevent the misuse of administrative resources, the election legislation sets out a number of obligations that must be met by the broadcasters who use the frequency resource of the state after the official start of the election campaign. Internet use is not regulated by the law.

According to the law, “during the pre-election campaign, the broadcaster must adhere to the principle of impartiality and fairness in broadcasting socio-political programmes and election coverage in accordance with the Law of Georgia on Broadcasting, the Code of Conduct for Broadcasters and this Law.”<sup>139</sup> The broadcaster must broadcast pre-election debates in a non-discriminatory manner and with the participation<sup>140</sup> of all qualified election subjects.<sup>141</sup>

The public broadcaster<sup>142</sup> is obliged to allocate five minutes per hour during the general election campaign for free placement of pre-election advertisements and to distribute this time equally to the qualified election subjects every three hours, provided that the advertising time allocated for one subject does not exceed 90 seconds. In addition, the public broadcaster is obliged to allocate time for the placement of pre-election advertisements of all other election subjects and to distribute this time equally among them.<sup>143</sup>

The national broadcaster<sup>144</sup> is obliged to allocate at least 7 minutes and 30 seconds every three hours during the general election campaign to place free pre-election advertisements and to distribute this time equally to qualified election subjects, provided that the advertising time allocated to one subject does not exceed 90 seconds. It also has the right to allocate time for paid pre-election advertising; the paid time tariff should be the same for all election subjects.<sup>145</sup> Unlike the public broadcaster, the general national broadcaster is not obliged to allocate free airtime to other election subjects.

The local broadcaster is obliged to place pre-election advertisements free of charge only if it places paid pre-election advertisements of the election subject that has received state funding to cover the costs of placing television advertisements.

The broadcaster has the right to recognise a political party as a qualified electoral subject, which, according to public opinion polls conducted on the whole territory of Georgia in accordance with the conditions established by the Election Code, according to the results of at least five polls conducted in the election year or a survey conducted during one month before the elections, enjoys the support of at least 4% of the voters and, accordingly, allocates free advertising time to it.

The OSCE observation mission report states that “the existing system, in which larger parties have free airtime and other wide opportunities, while smaller parties and independent candidates are being limited incorrectly, is in conflict with OSCE commitments.”<sup>146</sup>

From 2025 the rule described above will be partially changed. Free airtime will be distributed equally to those political parties that receive at least 3% of the votes in the last parliamentary elections.

It should be noted that in 2020, 18 parties had the status of a qualified electoral subject, while 55 parties participated in the parliamentary elections, seven of which were united in two electoral blocs.

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138. Election Code of Georgia [Article 91].

139. *ibid.* [Article 51].

140. Qualified election subject – a political party that receives state funding, as well as an electoral bloc that includes such a party.

141. This norm is valid until 2025, and then if any party is invited to the debate, the broadcaster must also invite a party with a similar or better result in the last parliamentary elections.

142. Public Broadcaster – TV and radio broadcaster established on the basis of the state property, acting on the basis of public funds, independent of the government and accountable before the public, which is not affiliated with any government agency and aims to provide diverse programmes to the public free from political and commercial influence, corresponding to the public interests.

143. *ibid.* [Article 51].

144. General national broadcasting – broadcasting with at least two topics (including news and socio-political topics), which is available to at least 90% of the population of Georgia.

145. Election Code of Georgia [Article 50].

146. OSCE/ODIHR Election Observation Mission Final Report. Georgia, Presidential Election, 2018 (Warsaw, 28 February 2019), paragraph XII, [www.osce.org/ka/odihr/elections/georgia/414827](http://www.osce.org/ka/odihr/elections/georgia/414827).

## 6. Election disputes

Election disputes are an accompanying process of any elections. During all elections hundreds of statements, complaints and lawsuits related to the electoral process are submitted to the state bodies and courts, the quality of whose review determines the degree of prevention of violations of electoral law and, consequently, the degree of confidence in the election results.

The terms and procedure for appealing the violation of the election legislation, as well as the number of persons who have the right to file an application/complaint with the election commission and file a lawsuit in the common courts are defined in detail in the Election Code of Georgia [Articles 77, 78] and the terms and procedure for filing and reviewing a constitutional claim on the constitutionality of elections to be conducted or conducted on the basis of this norm in the Constitutional Court of Georgia is determined by the Organic Law of Georgia in the Constitutional Court of Georgia.

In almost all possible election disputes, registered election subjects or their representatives, accredited observer organisations or their observers and members of election commissions have the right to file an application/complaint/claim. However, voters can only file a complaint if they are not on the voter list, which the OSCE observation mission considers to be a violation of OSCE commitments, other international standards and international practice.<sup>147</sup> It should be noted that giving voters the right to appeal on other issues dramatically increases the number of complaints, including ungrounded ones, which negatively affects the quality of decisions of already overloaded election commissions and courts that must make decisions within a day or two. It should also be noted that voters can appeal a violation through observers or representatives of election subjects who know the election law better than them and can filter out ungrounded complaints.

The decision of the precinct election commission/head of the precinct election commission may be appealed to the relevant district election commission, its decision to the relevant district/city court, and the decision of this court to the court of appeals.

The decision of the district election commission/head of the district election commission may be appealed to the CEC, the CEC decision to Tbilisi City Court, and the decision of this court to the court of appeals.

As we can see, the final stage of resolving election disputes is the court. It can therefore be said that the necessary condition for preventing the misuse of administrative resources, as well as fair sanctions, is the independence and impartiality of the judiciary.

The deadline for appealing the above decisions is one or two days after the decision is made, as is the deadline for reviewing them. However, the deadline for reviewing the application/complaint related to the violations of pre-election regulations, which will be reviewed by the chairpersons of the CEC or the district election commission, is one month. Such a long term in the pre-election period does not help to prevent violations. It should also be noted that if the CEC chairperson does not satisfy the complaint (does not impose an administrative sanction on the offender), his/her decision cannot be appealed in the court, which "contradicts the OSCE commitments and international standards on effective remedies".<sup>148</sup> The inability to appeal such an action by the CEC chairperson can be considered as an abuse of legal administrative resources.

The extremely limited timeframe for preparing and reviewing election-related applications/complaints/lawsuits does not provide for a thorough review, but extending each of these deadlines by a few days will significantly increase the timeframe for determining the final election results, which is politically undesirable. However, even increasing these deadlines by one day, which would increase the deadline for determining the final results of the elections by only six days, would significantly improve the quality of reviewing complaints.

### AUDIT OF THE USE OF FINANCES AND ADMINISTRATIVE RESOURCES OF ELECTION SUBJECTS

In order for the election process to proceed in accordance with the law, it is necessary to conduct a continuous audit of the use of the finances and administrative resources of political parties and candidates. The audit should be conducted by one or more institutions functionally independent from other bodies, impartial and effective, which should have sufficient authority and resources to fully perform their function within the short timeframe typical of the election process.<sup>149</sup>

147. OSCE/ODIHR Election Observation Mission Final Report. Georgia, Presidential Election, 2018 (Warsaw, 28 February 2019), paragraph X.b, [www.osce.org/ka/odihr/elections/georgia/414827](http://www.osce.org/ka/odihr/elections/georgia/414827).

148. *ibid.*

149. Joint Guidelines for Preventing and Responding to The Misuse of Administrative Resources During Electoral Processes, Adopted by the Council of Democratic Elections at its 54th meeting (Venice, 10 March 2016) and by the Venice Commission at its 106th Plenary Session (Venice, 11-12 March 2016), CDL-AD(2016)004, paragraph II.B (2).

During the elections in Georgia, the financial audit is carried out by the State Audit Office, and the audit of the use of administrative resources is carried out by the CEC and law-enforcement bodies, within their competence. The State Audit Office is an independent constitutional institution. It is accountable only to the parliament.

The State Audit Office monitors the financial activities of political parties and election subjects within the scope of its competence established by the Election Code of Georgia and the Organic Law of Georgia on Political Unions of Citizens. It is authorised to conduct audits, seize the property of individuals, legal entities, citizens' political associations (including bank accounts), draw up a report on the violation and make a relevant decision.<sup>150</sup>

If an election subject who received the required number of votes established by the Election Code fails to submit an election campaign fund report within the deadline, or if the violation of the requirements of the law is confirmed, the State Audit Office should warn him/her, request to fill in the gaps and provide detailed written information related to the detected violation. If the State Audit Office deems that the irregularity was substantial and it could have affected the election results, it is entitled to make a recommendation to the relevant election commission to apply to the court and request a summary of the election results received without considering the votes received by this election subject.<sup>151</sup>

Failure to provide the necessary information and/or documentation to the State Audit Office, submission of incorrect information, interference with its activities or other obstruction of its activities will result in a fine of 1 000 Georgian lari to the responsible person. The protocols on such administrative offences shall be drawn up by the authorised person defined by the normative act of the auditor general and submitted to the court for a final decision.<sup>152</sup>

It should be noted that the law does not stipulate expedited deadlines for the State Audit Office to study and respond to various violations of the financial reports, complaints, funding rules of election subjects during the election campaign, which reduces the effectiveness of examination of the pre-election campaign funding. In addition, the lack of human resources of the State Audit Office has a negative impact on the implementation of a fully fledged financial audit. Despite these shortcomings, it can be said that the quality of work performed by the State Audit Office during the election campaign has significantly improved compared to previous years.

The legality of the use of administrative resources is controlled by the CEC and law-enforcement agencies, within their competence. It should be noted that the scale and quality of this control is very low.

## **TYPES OF RELATIVELY FREQUENTLY USED ADMINISTRATIVE RESOURCES AND PRACTICAL EXAMPLES OF THEIR MISUSE**

Observations of election campaigns over the years provide an opportunity to identify the types of administrative resources that are relatively often misused. The main source of information is the reports of observer organisations, information disseminated through television and social media.

### **1. Vote buying**

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Direct vote buying has declined, but it is still common for election subjects (mainly the ruling political party) or their affiliates to distribute food to certain groups of the population and to organise free health examinations. For example, in July 2020, a free medical event was organised in the Senaki municipality by the State Veterans Affairs Service and the non-profit organisation "Georgian Dream – for a Healthy Future", with the support of Deputy Chairman of the Parliament Giorgi Volski (member of the Georgian Dream party) and the City Hall of the Senaki municipality. Socially disadvantaged families living in the municipality, citizens displaced from the occupied territories, war and defence veterans and their family members underwent free preventive medical examinations. The affiliation of the ruling party with this event is obvious. Also, on 5 August 2020, one of the television stations broadcast a story filmed in one of the markets in Kobuleti, in which the citizens were being given vegetables for free (the market was supplied with vegetables by the Kobuleti Agroservice Center) and their personal data were being recorded (by those who distributed vegetables) were being written. Citizens said the vegetables were distributed by the ruling party coordinators.

150. Organic Law of Georgia on the State Audit Office [Article 6].

151. Election Code of Georgia [Article 57].

152. Organic Law of Georgia on the State Audit Office [Articles: 261, 262].

It should be noted that other parties conducted similar activities.<sup>153</sup> It is true that the cases described took place before the start of the official election campaign and therefore it was not a violation of the law, but the nature of their motivations concerning the elections is obvious.

The statement of the Cartu Charitable Foundation about the programme of debt relief of bank loans to the amount of one and a half billion Georgian lari targeting 600 000 citizens had a clearly election-motivated character during the 2018 presidential election, in the implementation of which the Government of Georgia was involved. In October 2020, less than a month before the parliamentary elections, the Mayor of Tbilisi, who is simultaneously the secretary general of the Georgian Dream party, announced that the Cartu Foundation had donated the former hippodrome area owned by it in one of the city's central districts for the arrangement of a central park and that the arrangement of the park would be financed by Cartu (Tbilisi residents have been asking the Tbilisi municipality to buy this area and arrange a park for years). The founder and financier of this fund is Bidzina Ivanishvili, the chairman of the ruling party (Georgian Dream). Both cases were widely publicised by representatives of the ruling party. None of the cases were qualified as voter bribery.

## 2. Use of budget funds

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The Election Code of Georgia prohibits the launch of new programmes financed by the state or municipal budget and the increase of funding for previously planned budget programmes only 60 days before the elections.<sup>154</sup> Various governments have repeatedly used this legislative "gap" and amended the budget shortly before the ban came into force and/or planned the budget in such a way that the increase in social benefits and the start or completion of infrastructure projects coincided with the official election campaign. For example, according to the decision of the Government of Georgia of 20 August 2020, 11 days before the ban came into force, the list of cancer treatment medicines was expanded within the framework of the universal health care programme from 1 September 2020 and the funding package for cancer patients was increased by 8 000 Georgian lari. This programme affected up to 40 000 people. On 31 August 2020, one day before the ban took effect, the Ministry of Defence of Georgia announced that the debts of citizens (approximately 1 000 persons) to the military hospital for various services since 2009 would be written off. In early August 2020, the Government of Georgia introduced to the public the third phase of the COVID-19 Crisis Response Plan, which included several social assistance programmes. Such lawful and correct action was given election-motivated character by the comments of the Prime Minister and other officials, who said that such large-scale social programmes were made possible by donations made to the StopCov Foundation established by the government and that Bidzina Ivanishvili was the main donor.

In addition, it has become customary that any government action favoured by the public is presented as a merit of the ruling party, thus blurring the line between the state and party, contrary to OSCE commitments and international practice.<sup>155</sup>

## 3. Participation of ruling party parliamentary candidates in events organised with budget funding

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The presentation of state or municipal budget projects, the opening of enterprises and rehabilitation facilities were usually attended by parliamentary candidates of the ruling party along with the leaders of the central and municipal governments, who often shared this information on social media. Such action blurs the line between the state and the ruling party and therefore contains signs of misuse of administrative resources.

## 4. Participation of public servants in pre-election agitation

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The misuse of administrative resources by state and municipal officials, such as instructing subordinate public officials and heads of municipal enterprises and institutions, as well as public school and kindergarten principals

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153. Georgian Young Lawyers Association, Interim Report of the 2020 Parliamentary Elections Long-Term Observation Mission (June-August), <https://gyla.ge/>;  
International Society for Fair Elections and Democracy, 2020 Parliamentary Elections. Pre-election monitoring III Interim Report (4 August-5 September), <https://isfed.ge/>;  
Transparency International-Georgia, Election violations and responding to them. Parliamentary Elections 2020, <https://transparency.ge/>.

154. See paragraph II.3(f) of this study.

155. "The state and political parties must be clearly separated from each other", paragraph 5.4 of the document of the 1990 OSCE Copenhagen Conference, [www.osce.org/odihr/elections/14304](http://www.osce.org/odihr/elections/14304).

to agitate in favour of the ruling party and compile lists of its supporters, has been going on for years and has taken on a systematic character, although they do not speak publicly about it.<sup>156</sup>

Public officials actively used the social network Facebook for agitation, often during working hours. However, the CEC did not satisfy the complaints filed, as it did not consider agitation from Facebook's personal account to be within its scope of regulation, which is a very narrow definition of the concept of agitation defined by the Electoral Code and does not correspond to the legitimate purpose of the law.

## 5. Donations to political party funds

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Practice has shown that the regulation of private donations described above (see paragraph II.2(b) of this study) has not been sufficient to prevent the misuse of administrative resources. Statistics<sup>157</sup> on private donations received by political parties show that the proportion of annual donations received by the ruling party during the general national elections (2012-20) ranged from 60 to 90% of total donations, with donations from legal entities and their shareholders almost entirely directed to the ruling party. In addition, a significant portion of the companies and/or their owners that won tenders for administrative bodies were found to be donors to the ruling party. According to NGOs, this was the case until 2012. It is noteworthy that in 2012 the ruling party (United National Movement) received 71% of donations and lost the parliamentary elections at the end of the same year. The following year it received only 5% of donations, and the coalition that won in the elections (Georgian Dream) received 60%. There is therefore a reasonable suspicion that such a situation is the result of the misuse of administrative resources by the ruling party, although this is almost impossible to prove.

## 6. Violence and threats

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During pre-election campaigns in previous years, information was reported almost daily about violence against political opponents (with a few exceptions, against political opposition activists). Opposition activists claimed that they and their family members were threatened with losing their jobs, publishing secret and compromising privacy records, "slipping" drugs, and socially vulnerable people were threatened with cessation of social assistance. Investigating such crimes by law-enforcement agencies is highly ineffective. On 24 September 2020, the Public Defender of Georgia stated: "Unfortunately, the practice of previous years shows that practically no one is responsible for the acts of violence committed during the pre-election period, and we still have no victims or defendants in the cases of bribery or other cases."

Such a situation reinforced public opinion that impunity of the perpetrators of the above-mentioned crimes was in the interests of the ruling party (until 2013, the United National Movement, from 2016, the Georgian Dream).<sup>158</sup> The actual inaction of law-enforcement agencies, in essence, can be attributed to the misuse of administrative resources.

## 7. Checking voting results

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The credibility of the voting results established by the precinct election commissions is extremely important for the legitimacy of the election results. For this purpose, the CEC has the right to make a decision on opening the sealed documents received from the precinct election commissions and recounting the ballot papers, and the district election commission is "obliged on the basis of an application/complaint ..., as well as on its own initiative to check the legality of the precinct election commissions (including the accuracy of registration of election participants, counting of ballot papers, etc.) and in case of detection of violations ... to change the data of the summary protocol of the voting results of the Precinct Election Commission according to the result of the inspection ... in case the District Election Commission makes a decision on recount, the commission shall inform all election subjects and observer organisations whose representatives attended the counting of ballots at the polling station, and if they wish so, ensure attendance of their representatives at the recount process."<sup>159</sup> The decision to recount ballot papers is made by the election commission by at least two thirds of those present at the session.

Despite the above rights and obligations, the CEC and district election commissions have not, on their own initiative, reviewed the voting results for years and have not satisfied any of the complaints requesting a

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156. See, for example, Transparency International-Georgia, Election violations and responding to them. Parliamentary Elections 2020, <https://transparency.ge/>.

157. Website of the State Audit Office of Georgia, <https://monitoring.sao.ge/en>.

158. During the 2013 and 2014 elections, under the Coalition Parliamentary Majority and the Coalition Government, there were fewer offences.

159. Election Code of Georgia [Articles: 14, 21].

recount of the voting results. Unfortunately, such complaints were not upheld by the courts either. This can also be attributed to the misuse of administrative resources.

## **8. Action of the Georgian National Communications Commission**

The Georgian National Communications Commission shall determine the rules for media participation and its use in the election process, monitor the observance of the norms established by the Broadcasting Code of Georgia and respond accordingly to the violation of these norms.<sup>160</sup> Although only a couple of the decisions of this commission were appealed, given their importance, they should still be noted.

At the start of the 2018 presidential election campaign, the commission charged broadcasters who published public opinion poll results and/or commissioned a survey during the pre-election period with an obligation to verify the credibility of the survey and be held accountable for failure to carry out this obligation. Although the law sets out the requirements that an election-related public opinion poll<sup>161</sup> must meet, the law does not oblige a broadcaster to verify the validity of a survey conducted by others – it is the responsibility of the surveyor. This is an example of the misuse of legal administrative resources.

Before the start of the 2018 presidential election campaign, one of the broadcasters published an election advertisement of the opposition party, which was considered a violation of the law by the National Communications Commission based on the norm of the Electoral Code, which regulates the placement of broadcasters only during the pre-election campaign. Such action makes the impartiality of the commission questionable and can be assessed as an abuse of administrative resources.

### **IMPORTANCE OF POLITICAL WILL TO AVOID MISUSE OF ADMINISTRATIVE RESOURCES AND INTIMIDATION OF VOTERS**

To prevent misuse of administrative resources and vote buying, intimidation or coercion, it is not enough to prohibit them by law and set respective sanctions. The administrative offence should be investigated and the infringer should be properly sanctioned by the administrative body (in some cases the decision of the administrative body should be approved by the court), while the crime must be investigated by the police or the prosecution, the prosecution must file a charge based on the investigation (it is at the discretion of the prosecution as to whether to prosecute or refuse to prosecute) and the final decision must be made by the court. It is clear that if there is no political will of the government, this procedural chain will be broken at some level, the offender will not be punished, and a syndrome of impunity will be in place.

The clear political will of the government is particularly important in preventing the misuse of administrative resources during elections, as well as in preventing voter bribery, intimidation or coercion. However, the publicly expressed political will of the government should not be mere words, which, unfortunately, often happens. If there were no secret consent of the government, we would be dealing with only separate cases of misuse of administrative resources.

### **ELECTION-RELATED AWARENESS RAISING AND INFORMATION CAMPAIGNS**

The degree of democracy in elections is significantly influenced by the level of civic awareness and information, which is the responsibility of the government to increase. However, not only the government but also civil society organisations should take care of this. The media, especially the electronic media, can play an important role in this.

In order to raise election-related awareness, the civic education curriculum of secondary schools includes election-related issues. Many projects have been implemented by non-governmental organisations, and the CEC, together with the Electoral Systems Development, Reforms and Training Centre<sup>162</sup> permanently implements various projects, which include “Electoral Development Schools”, supported by the Council of Europe electoral assistance project and the International Foundation for Electoral Systems (IFES) (whose objective is to increase civil participation in electoral processes, promote elections among youth), election administrator courses (voting procedures), an “Elections and Young Voter” information training course (for 11th and 12th grade public school students in ethnic minority and mountainous regions), a “Legal Clinic” (for students of law

160. *ibid.* [Article 51].

161. *ibid.*

162. This centre is a legal entity under public law established on the basis of the Election Code, which is controlled by the CEC.

faculties of universities), and a distance education programme for any person (whose objective is to promote election-related awareness).

It should be noted that the CEC has prepared guidelines (in Georgian, Armenian and Azerbaijani) for district and precinct election commission members, commission chairpersons and commission secretaries, and a training module for precinct election commission members (on election security). After the PECs are composed, their members receive mandatory training.

The CEC publishes timely information on election procedures and decisions of the election administration on its website, and systematically prepares and broadcasts videos to inform voters on important topics after calling the elections.

The public broadcaster and other television broadcasters actively cover the election campaign. In addition to the time devoted to news programmes and political advertisements, television broadcasters devote considerable time to presenting to the public those election subjects who have a chance of success according to public opinion polls. While most broadcasters fail to maintain political neutrality, and some clearly express political bias, these diverse, sometimes conflicting, streams of information facilitate informed decision making by voters.



# Combating misuse of administrative resources in the electoral process: case study from Ukraine

*Volodymyr Venher*<sup>163</sup>

## INTRODUCTION

Use of administrative resources for the purpose of obtaining advantage within an election campaign is currently a widespread phenomenon. This is also true for countries with developed democratic traditions. Certain political parties and candidates resort to the misuse of their authoritative powers and capabilities.

The above-mentioned problems are particularly acute in emerging democracies. Shortage of stable democratic traditions, as well as high levels of political culture and stable standards of public administration ethics together create an environment where formal legislation constitutes the major tool for misuse prevention. Accordingly, the forms and tools of the use of administrative resources in the electoral process advance incredibly fast. It is common that in such countries administrative resources are applied via advanced tools requiring an instant response as well as the introduction of new restrictions and prohibitions. International standards and domestic legislation are simply unable to respond to such new challenges due to lack of time.

Nevertheless, should the adjustment of national legislation be carefully and relatively quickly carried out, new forms and manifestations of officials' misuse of power to achieve their political goals undertake other forms.

The Ukrainian experience of combating misuse of administrative resources in elections is challenging and indicative. National legislation contains a number of instruments that implement international standards and solid election management practices. The experience of the application of such tools is also quite rewarding and demonstrates a vast amount of achievements. At the same time, the named tools still leave gaps illegally utilised by politicians and officials.

The classical understanding of the administrative resource in the election process is based on the following definition:

Administrative resources are human, financial, material, in natural and other immaterial resources enjoyed by both incumbents and civil servants in elections, deriving from their control over public sector staff, finances and allocations, 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.<sup>164</sup>

Nevertheless, this concept requires a wider and more comprehensive consideration in Ukrainian realities. These are not only the powers and resources that may be illegally used during the election process, but also the resources that can be used long before the elections and after they have been conducted and require solid in-depth consideration. Therefore, in addition to the "classic" blocks on election administration, political financing and campaign restrictions, we will analyse two additional irregular blocks: misuse of the legislature and ensuring the inevitability of legal liability.

## MISUSE OF LEGISLATIVE POWERS

The functioning of the parliament as a representative political body presupposes the active political parties' functioning. Unfortunately, representatives of the political parties are trying not only to ensure that parliament performs its functions, but also to take measures to improve their legal status and simplify the conditions for their participation in the future elections.

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164. Report on the misuse of administrative resources during electoral processes adopted by the Council for Democratic Elections at its 46th meeting (Venice, 5 December 2013) and the Venice Commission at its 97th Plenary Session (Venice, 6-7 December 2013), [www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2013\)033-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2013)033-e).

In the Verkhovna Rada of Ukraine, it often happens that the adoption and/or non-adoption of certain legislative regulations directly affects the ability of parliamentary parties to facilitate their participation in elections. Generally, such activities can be viewed as the misuse of parliamentary/legislative resources. Several blocks of possible violations may generally be outlined here.

## FREQUENT CHANGES IN ELECTORAL LEGISLATION

Changes to the Ukrainian electoral legislation is a continuous process. Almost every election is conducted under the revised legislation. In some cases, such new legislation becomes “revolutionary”. The relevant experience from the last decade is particularly worth analysis:

- ▶ Prior to the 2012 parliamentary elections in November 2011, a new Law of Ukraine “On Elections of People’s Deputies of Ukraine” was adopted. This law has significantly revised the system of territorial organisation of elections, the basic principles of election commissions activity, as well as other election procedures. However, the most significant issue was the change of the election system – from proportional to a mixed election system.
- ▶ During the 2014 presidential elections in Ukraine, the Law of Ukraine “on the Presidential Elections of Ukraine” was amended six times. The last changes were made five days before the election day.
- ▶ Prior to the regular local elections in October 2015, a new version of the Law of Ukraine “on Local Elections” was adopted in July 2015. This law provided for the introduction of new election systems for the election of certain local councils, as well as for mayors of large cities.
- ▶ Prior to the local elections in October 2020, a new Electoral Code of Ukraine was adopted in December 2019, which has been substantially amended in July 2020 – in fact, a month before the start of the election process. The rules regulating local elections have also been amended twice during the ongoing election process (those amendments were narrowly focused, however).

In fact, even minor changes in electoral procedures and conditions for participation can significantly affect the course of the electoral process and the equality of its participants. Ultimately, the stability of electoral legislation is the key to free and fair elections. Obviously, certain changes can be objective and critical. As an example, amendments to the Law of Ukraine “on Elections of the President of Ukraine” in May 2014 have been made due to the occupation of the Crimea by the Russian Federation and its armed aggression in Donetsk and Luhansk oblasts, and therefore the impossibility of organising elections on respective territories. At the same time, a prohibition to change electoral legislation less than a year before the election is considered an essential guarantee for the implementation of the principles of electoral law.<sup>165</sup>

Political parties involved in parliamentary activities (with their representatives there) are definitely in a better position. It is not only changes to the election legislation that they can immediately find out about, but also the opportunity they have with respect to drafting such changes. This, obviously, provides them with an opportunity to better prepare for the application of the new legislation. This is critical, especially during national elections when even the slightest change in electoral legislation requires the engagement of a high number of people across the country. At the same time, the election process is very limited in time, so parliamentary parties are able to use this “resource” much faster and gain some benefits during elections.

In addition, frequent changes to the legislation violate the principle of legal certainty as an element of the rule of law. The lack of legal certainty and protection of trust in stable legislation significantly limits the actions and activities of political parties, which learn about the adopted changes only during the election process after their adoption. However, the issue of the quality and objectivity of such changes requires more significant consideration and is discussed below.

## IMPACT ON LEGISLATION QUALITY

### Errors and inaccuracies

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Untimed adoption of changes to electoral legislation constitutes a kind of “patching holes”. Should this happen on the eve of elections, or already during the election process, such changes usually raise serious doubts

165. p.II.2.b. Code of Good Practice in Electoral Matters: Guidelines and Explanatory Report – Adopted by the Venice Commission at its 51st and 52nd sessions (Venice, 5-6 July and 18-19 October 2002) (CDL-AD(2002)023, rev2-cor-e), [www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2002\)023rev2-cor-e#](http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2002)023rev2-cor-e#).

regarding their quality and substantive unity. It is obvious that such drawbacks of the legislative process primarily affect the content of the adopted laws and the quality of the organisation and conduct of elections. However, focus should also be made on the aspect of deliberate poor regulation of relations at the legislative level, when a mistake or “incompleteness” made by the parliament will be corrected by election administration bodies that are formed by political parties and can still reflect party interests in one way or another (this issue is analysed further in the text).

In practice, such mistakes, conflicts and gaps in the Electoral Code or other law are corrected by the CEC during the adoption of additional by-laws. In some cases, there also can be the adoption of special clarifications on the application of the provisions of the electoral legislation.

As an example, in the course of preparation for the 2020 local elections, the CEC officially adopted nearly 20 clarifications on the application of electoral legislation. Quite often, such explanations and by-laws are aimed not only at clarifying the provisions of the Electoral Code, but also lead to its evolution. For example, the CEC Resolution No. 249 of 11 September 2020<sup>166</sup> provides clarifications on the provisions of Article 216 of the Electoral Code and defines levels of local councils where simultaneous running of candidates as local councilors is not allowed. The CEC by its decision has applied the provisions of the Electoral Code which *de facto* sets a rule which should be specified in law.

In fact, this is a case when parliament self-withdraws from regulating certain issues in legislation. The legislative procedure and the nature of law significantly limits possible misuse further on. While by-laws adopted by the CEC or even adopted in the process of application of the law by other election commissions leave “room for manoeuvre” and possible misuse.

Thus, in such situations, parliament leaves excessive discretionary powers to the CEC, which under certain political conditions may lead to misuse. This issue definitely needs to be carefully studied in separate research.

## Untimely decision making

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Even those decisions of parliament, adopted in compliance with the requirements of their form and content, may be made too late for their proper consideration by parties and candidates running in the elections. Just two examples of the latter are the calling of local elections and changes into the administrative-territorial division.

According to the Constitution of Ukraine, the parliament calls for local elections to be held on the day clearly specified by the constitution (the last Sunday of October of the fifth year of the powers of local self-government bodies elected upon the results of previous regular elections). Obviously, the function of the parliament here is more formal. However, failure to do so creates uncertainty for the participants of future elections. On 15 July 2020, the Verkhovna Rada of Ukraine called for regular local elections on 25 October 2020. Such a delayed call is made within the minimum term required. However, the main problem is that such a decision of the parliament was not final and underwent significant changes later.

The reason is that administrative and territorial reform has been carried out simultaneously with the development of a comprehensive reform of the electoral legislation in Ukraine. On 17 July 2020 (after calling for regular local elections), the Verkhovna Rada of Ukraine adopted a resolution on the liquidation of 490 *rayons* and the formation of 136<sup>167</sup> new ones. The main problem was that these processes had not taken place in public and the final *rayon* boundaries had been unknown both to the parliamentary parties and all other parties having planned to participate in elections until the final decision was taken. It was only the parliamentary ruling majority which fully understood the situation, as its representatives drafted the respective resolution of the parliament jointly with the government.

A similar situation occurred with the elections at the primary basic level (village, settlement and city). The Cabinet of Ministers of Ukraine has also radically changed the boundaries of all communities in Ukraine. The composition, territory and number of voters in almost all communities of the country has changed. This decision was made by the government on 12 June 2020. However, this decision was made public and was submitted to the CEC for the appointment of the respective first elections only on 27 July 2020. This means that for more than a month and a half, neither political parties, nor future candidates were aware about the borders and format of the elections and, consequently, could prepare to participate in the elections. As a

166. Resolution of the Central Election Commission “On Clarification of the Application of Certain Provisions of the Electoral Code of Ukraine Concerning the Nomination of Candidates in Local Elections”, No. 249 of 11 September 2020.

167. Resolution of the Verkhovna Rada of Ukraine “On the formation and liquidation of districts” of 17 July 2020, No. 807-IX, <https://zakon.rada.gov.ua/laws/show/807-20#Text>.

result, the CEC only called for the first elections in all communities within the country on 8 August 2020,<sup>168</sup> and the elections of *rayon* councils on 14 August 2020.<sup>169</sup>

Thus, territorial organisation of elections (*rayon* boundaries, community boundaries, number of voters and other important information to prepare for the elections) were unknown to the public and parties' representatives. Such information was available only to the government, which is formed by the representatives of the parliamentary ruling party. As a result, most political parties did not have time to re-register their local organisations in cities and *rayons* to participate in the elections. Consequently, the nomination of election commissioners, as well as candidates were often carried out by the parties not at the respective level of the city or *rayon*, but only at the oblast level where the only "legitimate" party organisations existed.

Obviously, the above-mentioned action and inaction are not classic examples of administrative resource misuse in elections. However, the development and implementation of such comprehensive reforms by the government on the eve of the election creates a situation of undue advantage to the ruling party and a situation of discriminatory uncertainty for all other parties and candidates because of the lack of access to respective information and public resources.

## LEGISLATIVE INACTION

Legislative inaction of the parliament can also be considered as a new noteworthy form of the misuse of power. Generally, the parliament has a degree of discretion on the law drafting with respect to different issues. This comes from the theory of parliamentary sovereignty. However, there are certain issues for which the right of the parliament to pass a law should become a duty. Failure to do so in a situation where it would help a particular political party gain more support in elections should be regarded as a new and extraordinary form of administrative resource.

The misuse of parliamentary power is clearly illustrated by the situation of legislative regulations on campaigning on the internet via social and online media. The current Electoral Code of Ukraine does not contain any clear provision on campaigning on the internet. Such campaigning is partially regulated by general restrictions set out in the Electoral Code with respect to election campaigning. However, most current features of internet and modern digital technologies require a separate legal regulation. The absence of such specific regulations actually undermines the influence of the state on this sphere and leaves such campaigning in the "shadows".

The issue of outdoor advertising, targeted advertising, spreading aggressive advertising, placing hidden political ads, using fake news, and so forth remains outside of the legal framework. Of course, full and comprehensive regulation of these issues is currently hardly possible. Moreover, not all countries with developed democratic traditions have already developed the appropriate regulatory mechanisms. However, the Ukrainian Parliament did not even attempt to resolve these issues.

In December 2019, the Electoral Code was adopted as the only document that regulates all types of elections. This is undoubtedly the most significant electoral reform in the history of Ukraine. New electoral and large-scale amendments were made to the Electoral Code in July 2020. All these electoral legislation reforms have not advanced towards setting the rules for campaigning on the internet or at least providing for general requirements with regard to restrictions. The problem here is not a "backwardness" nor unpreparedness of society, however.

It is difficult to believe that it could have happened coincidentally. After all, the activity of political parties on the internet during the 2019 presidential and parliamentary elections and during the 2020 local elections was extremely high. Political parties have been incredibly active in using a variety of formats to disseminate information about themselves. The most commonly used were Facebook, Instagram, YouTube, Tik Tok and Telegram.<sup>170</sup> The parliamentary party, "Servant of the People", having a ruling majority in the current convocation of the parliament, outlined its "digital direction"<sup>171</sup> as an important tool in their election campaign during the last parliamentary elections. It was also decided to use digital tools in election campaigning for the 2020 local elections, and a special information technology (IT) department was set up to develop an "innovative

168. Resolution of the Central Election Commission "On the first elections of deputies of village, settlement, city councils of territorial communities and relevant village, settlement, city mayors on October 25, 2020" of 8 August 2020, No. 160, <https://zakon.rada.gov.ua/laws/show/v0160359-20#Text>.

169. Resolution of the Central Election Commission "On calling the first elections of deputies of district councils to October 25, 2020" of 14 August 2020, No. 176, <https://zakon.rada.gov.ua/laws/show/v0176359-20#Text>.

170. See, for example, "Candidates in social networks: what political technologies look like online", <https://rubryka.com/article/political-technology-online/>.

171. "Servant of the People": press conference of the party, [https://ze2019.com/blog/press\\_conf\\_sluga\\_narodu](https://ze2019.com/blog/press_conf_sluga_narodu).

product”.<sup>172</sup> Thus, the ruling political party, having actively used and using digital technologies, has not suggested any even simple general regulation of these issues in the Electoral Code.

At the same time, a different approach is taken regarding other aspects of digitalisation and use of electronic services. The Verkhovna Rada of Ukraine, while amending the Electoral Code in July 2020, provided a step forward in this direction. In this regard, provisions regarding the possibility of electronic submission of certain documents and certificates to election commissions, the possibility of drawing up protocols on voting results (Articles 18, 155, 222- 224, 236 of the Electoral Code), the requirement to publish certain information in the form of a dataset organised in a format that allows its automated processing by electronic means (machine reading) for repeated use (in the form of open data) (Articles 23, 47, 106, 161 of the Electoral Code) and some other issues were included.

The Electoral Code does not provide for any regulation of hidden political advertising due to indirect campaigning, which may be contained in social advertising, television shows, television series, feature films or documentaries. On the eve of the 2019 presidential elections, a television show, television series and a film were actively broadcasted with the main character being played by the candidate for the President of Ukraine who went on to win the elections. Moreover, this happened even on a Day of Silence, on Saturday, the day before election day,<sup>173</sup> and one of the highest-rated television channels broadcast the feature film “Reagan”, where the voice-over of the main character was performed by the candidate for the President of Ukraine.<sup>174</sup>

Thus, the forms of direct and indirect campaigning actively used by the pro-presidential party, having a ruling majority in the parliament, remain for some reason unresolved and beyond the legal framework, even given the largest, with respect to its scope, electoral reform in Ukrainian history – the adoption of the Electoral Code.

## MISUSE OF POWER AND LOBBYING OF PARTY INTERESTS

This element of misuse of power is probably the most clear and obvious. Parliamentary parties have the opportunity to consider their own needs in the law-making process and to adopt a legal framework for elections that will be comfortable for them and will ensure their success in elections. Of course, such misuse of power is unacceptable in a democratic society. Unfortunately, in the Ukrainian context, this happens quite often. The advantages for certain political parties in the text of the electoral legislation can sometimes be spotted very easily. Here are just a few brief examples of the role of parliamentary political parties and their interests in elections.

Adjusting the electoral system is probably the most common example of misuse of power. Such manipulations have occurred very often in Ukraine. This leads to relatively frequent changes to the electoral legislation mentioned before.

The July 2020 amendments to the Electoral Code have adjusted certain elements of the proportional system for the elections of oblast and *rayon* councils, as well as local councils in large communities. In particular, in order to support large national political parties, the threshold for the application of the respective electoral system was lowered. Previously it was used only in large cities, where the number of voters is 90 000 and more voters. Thereafter, the legislative changes have lowered this threshold to 10 000 voters. Accordingly, even in relatively small cities and villages, where the majority electoral system had to be applied, it was decided to hold elections under the proportional representation electoral system.

Similarly, the threshold for “getting a mandate” by a candidate within the party list was increased. If previously, according to the election results, the party’s electoral list of candidates was “rearranged” depending on the votes’ cast in support of a particular candidate, with the new changes, only those candidates having received 25% (of the electoral quota) and more votes in their constituency could be placed higher in the party’s list. Thus, the role of party nomination was strengthened, and therefore, the party leadership was given additional opportunities to influence the election results. These examples show quite clearly that when the amendments

172. “Looks like a ministry.” The “Servant of the people” tells about the headquarters and preparation for local elections, <https://babel.ua/news/48241-viglyadaye-yak-ministerstvo-u-sluzi-narodu-rozpovili-pro-shtab-ta-pidgotovku-do-miscevih-vivoriv>.

173. On the “day of silence”, the 1 + 1 TV channel shows a show and a film with Zelensky’s participation, [www.radiosvoboda.org/a/news-den-tyshi/29878886.html](http://www.radiosvoboda.org/a/news-den-tyshi/29878886.html); On the “day of silence”, 1 + 1 again shows programmes and a film with Zelensky, [www.ukrinform.ua/rubric-elections/2680534-u-den-tisi-11-znovu-pokaze-programi-ta-film-iz-zelenskim.html](http://www.ukrinform.ua/rubric-elections/2680534-u-den-tisi-11-znovu-pokaze-programi-ta-film-iz-zelenskim.html); Channel 1 + 1 explains the broadcast of Zelensky’s show on the “day of silence”: he is an actor there <https://hromadske.ua/posts/kanal-11-poyasniv-translyaciyu-shou-zelenskogo-u-den-tishi-vin-tam-aktor>.

174. On the “day of silence”, the projects of candidate Volodymyr Zelensky are shown on the 1 + 1 channel, [https://zaxid.net/u\\_den\\_tishi\\_na\\_kanali\\_11\\_pokazivatimut\\_proekti\\_kandidata\\_volodimira\\_zelenskogo\\_n1478157](https://zaxid.net/u_den_tishi_na_kanali_11_pokazivatimut_proekti_kandidata_volodimira_zelenskogo_n1478157).

to the Electoral Code were adopted, the electoral system was adjusted to satisfy the interests of certain political powers and their more comfortable participation in elections.

The formation of election commissions (election management bodies) is another example of how the electoral legislation implies the interests of the parliamentary parties. In Ukraine, a system of election commissions is formed for the organisation and conduct of elections. They function for a limited period of time, mainly during elections. Election commissions are formed on the basis of propositions from political parties (for local elections – local party organisations). At the same time, parliamentary parties have the right to include their representative in the election commission in both national and local elections, while candidates from non-parliamentary parties can be included in the commission only if there are vacancies for them and only after the appropriate draw (so as not to exceed the maximum composition of the commission).

The July 2020 amendments to the Electoral Code provided parliamentary parties with the right to nominate not one but two candidates to election commissions. In this case, both candidates shall be included in the composition of the election commission. Therefore, parliamentary parties have provided their local organisations with an unconditional organisational advantage in the 2020 local elections. An even more significant situation is provision of the nomination right to two parliamentary groups<sup>175</sup> of deputies with the condition of mandatory inclusion of one candidate in each election commission. According to the legislative amendments, a parliamentary deputies' group transfers its right to nominate candidates to election commissions to a political party with which it concludes a co-operation agreement.

Thus, while revising the Electoral Code, there were not only parties having their factions in the current parliament, but also two parliamentary groups which obtained preferences in the process of formation of election commissions.

Control over ballot paper printing is already a traditional aspect of electoral procedures carried out by parliamentary parties as a matter of priority. Special control commissions are set up during both parliamentary and local elections in order to carry out an external control over the ballot paper printing, proper functioning of the printing company, and the destruction of defective ballot papers and printing forms. Only parliamentary political parties have the right to be represented in such commissions (Articles 169 and 242 of the Electoral Code). There are no other additional tools of control for other parties or candidates.

Setting the amount of electoral deposit: the Electoral Code provides for the payment of an election deposit in order to run for elections. In general, this practice is quite common in European countries and can be applied. However, the amount of the election deposit during the adoption of the Electoral Code, back in December 2019, was disproportionately increased in order to meet the interests of parliamentary large "network" political parties.

Civil society and experts have repeatedly drawn attention to the inadmissibility of using such a large amount of deposit at local elections. For example, the election deposit for a mayor candidate in Kyiv exceeded the amount of the election deposit for candidates for the post of the President of Ukraine. Some political parties, not having adequate representation in the regions and an extensive system of territorial organisations, have also insisted on reducing the amount of the election deposit. In fact, when the amendments to the Electoral Code were adopted in July 2020, the amount of the election deposit was also reduced, although it still remains quite high. Accordingly, a high level of election deposit, especially at local elections, can be considered as a property qualification, as it can be an excessive obstacle for participation in elections. Obviously, large parties, by setting such an additional barrier, were trying to achieve less competition and more comfortable conditions for themselves.

Unfortunately, these and some other aspects of the electoral legal framework are under the direct influence of parliamentary political parties. Of course, such aspects do not fully correlate with the common understanding of the misuse of administrative resources during elections, but also require additional consideration and research.

## **ORGANISATION OF ELECTION PROCEDURES**

International experience in combating the misuse of administrative resources and international standards in this area prove that the field of organisation and conduct of elections is often subject to administrative influence. At various stages of organisation of elections, the interference of public authorities can have significant

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175. A deputies' group is a voluntary association of deputies in the Verkhovna Rada of Ukraine. Such a group includes non-party (independent) deputies who were elected without a party nomination or were expelled from a certain parliamentary faction. Such an association is not a parliamentary faction but enjoys all the rights of the faction in parliamentary procedures.

consequences. Ukraine has quite well-written legislation in this regard. In order to look deeper into this issue, it is worth analysing the main blocks related to combating the misuse of administrative resources during organisation of elections.

## Election administration

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Formation of election commissions: elections are organised and conducted by special collegial bodies – election commissions, which are formed based on the nominations made by various political parties participating in elections, as well as by candidates running for elections. It helps to ensure impartiality of these bodies. The CEC plays a central role in the administration of elections. This is a collegial body formed by the Verkhovna Rada of Ukraine (parliament) based on the proposals of parliamentary factions supported by the President of Ukraine. The procedure for establishing the CEC and the principles of its activities are determined by the Law of Ukraine “On the Central Election Commission”. The Ukrainian Parliament appoints the CEC members by majority of votes and by open ballot. However, two thirds of the constitutional composition of the Verkhovna Rada of Ukraine is required for early termination of the powers of the entire CEC. Such a regulation, in general, makes it possible to ensure the CEC’s objectivity and impartiality in the conduct of basic election procedures.

Other election management bodies include the system of district (territorial – at local elections) and precinct election commissions. State executive bodies or local self-government bodies, formally, do not have any influence on the formation of such commissions. Although in practice, obviously, certain influence is possible, it is neither, however, systemic nor on a large scale.

Laws of Ukraine “On Elections of People’s Deputies of Ukraine” No. 2766-III as of 18 October 2001 and “On Elections of the President of Ukraine” as amended by Law No. 1630-IV of 18 March 2004 have radically changed the procedure for forming election commissions, namely, excluding relevant local councils from the nomination process and delegating this function to higher-level election commissions. This approach to the formation of election commissions has created conditions which help to prevent interference by public authorities and local self-government bodies into the activities of election commissions, as well as to ensure their impartiality to political parties and candidates.

The same approach to the formation of election commissions has been introduced at local elections: territorial election commissions of regional (*oblast*) and district (*rayon*) levels are formed by the CEC, territorial election commissions of villages, settlements, cities, districts-in-the-city – by relevant *rayon* or city territorial election commissions, and precinct commissions – by respective village, settlement, city, district-in-the-city territorial election commissions.

At the same time, the current provisions of the electoral legislation stipulate that an election commission may not include, in particular, officials and staff of state authorities, authorities of the Autonomous Republic of Crimea and local governments, judges, court employees and law-enforcement agencies (Part 3 of Article 34 of the Electoral Code). The CEC carries out very careful control over the observance of this rule with the assistance of special software. In practice, sometimes isolated cases of violation of this rule happen. However, they are neither large scale nor widespread.

The situation is somewhat more complicated with the inclusion of secondary school teachers, librarians, employees of cultural institutions and others in the election commissions. These employees are still subordinated to local self-government bodies. Specifically, in rural areas, such people are the “core” personnel who may potentially be employed by election commissions. However, such persons cannot be viewed as being directly dependent on local self-government officials, and no serious cases of illegal influence on election commissions have yet been identified this way.

A more acute problem is the dependence of election commissioners on the political parties having nominated them. This is often accompanied by illegal extra payment from political parties and the use of other instruments of the party’s full control over the activities of election commissioners. Unfortunately, there are legal preconditions for this, including provisions of the Electoral Code. Although this problem is not related to the misuse of administrative resources, it requires separate research through the prism of anti-corruption and criminal legislation.

## Activities of election commissions

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The activities of election commissions are obviously based on the territorial organisation of elections. Previously, in each election, local self-government and executive bodies participated in the formation of precincts. Large

numbers of cases of administrative misuse were reported at this stage. Quite often the boundaries of precincts and the number of voters were disproportionate. However, the Law of Ukraine “On Elections of People’s Deputies of Ukraine”, adopted in 2011, obliged the CEC to establish precincts that will exist on a permanent basis. This was done during the 2012 parliamentary elections. Since then, such polling stations have been in existence on a permanent basis and are used for all types of elections. The CEC has the right, if necessary, to adjust the boundaries of such precincts, liquidate them or create new ones. The centralisation of this process at the CEC level has made the use of administrative resources practically impossible on this aspect of the organisation of elections.

The principles and requirements for the activities of election commissions are also set on a fairly high level. Election commissions must meet, act collegially, openly and transparently. Of course, certain violations of these principles do occur during both national and local elections, but this is unlikely to be the result of misuse of administrative resources.

In order to protect election commissioners from administrative pressure, the legislation also lays down an exhaustive list of persons who may be present at an election commission meeting at the polling station on election day without the permission or invitation of the commissioners, including during vote counting and the establishment of voting results (Article 36 of the Electoral Code).

All others, including government officials, may attend meetings only with the permission of the relevant election commission.

The precinct election commission shall be responsible for organising the voting process and maintaining proper order at the polling station, ensuring the secrecy of the ballot during voting. In case of violation, which is liable under the law, a chair or a deputy chair of a precinct election commission has the right to invite a police officer to the polling station, who shall take measures with respect to the perpetrator and then leave the polling station. The presence of police officers in the polling station is prohibited in other cases.

Law-enforcement officers ensure legal order during the voting and vote counting, only being physically present outside the polling station. In case of violation of the law and legal order, a chair, a deputy chair or a secretary of the election commission may call for law-enforcement officers only to perform actions necessary to restore legal order and for a period necessary for such actions.

A voter may stay in the polling station only for the time necessary for voting.

Thus, employees of state bodies and local self-government bodies are completely excluded from the organisation of the election process. They cannot control the work of election commissions, be present at their meetings, and put pressure on voters during voting by their presence.

## Voters’ lists

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An important stage in protecting the process of securing elections from the influence of government officials was the creation of the State Registry of Voters in Ukraine.

Compiling voters’ lists at polling stations is a crucial step in the electoral process, which should provide guarantees for citizens to exercise active suffrage, as electoral law stipulates that a voter may exercise the right to vote at only one polling station where he or she is included in the voters’ list.

In Ukraine, voters’ lists for each election were traditionally compiled by the executive bodies of local councils (bodies that perform these functions) or by other bodies upon their submission. Thus, the local authorities compiled voters’ lists based on which voters exercised their voting rights at local elections. As a result, “twins” and “dead souls” often appeared on such lists.

Until 2006, local elections in Ukraine were held on the same day as parliamentary elections. Such misuse of administrative resources has also affected the national elections. In addition, the practice of “election tourism” was widespread, namely, it was possible to organise voting of one voter in several polling stations using just one absentee ballot.

The OSCE/ODIHR Parliamentary Election Observation Mission’s report of 31 March 2002 stated that according to more than 33% of observation reports persons not included in the voters’ lists could register on the election day and vote in the parliamentary elections without absentee ballots and in violation of the law. In some cases, the number of people who registered this way was quite significant. This shortcoming, providing the possibility of filling out ballots to persons who did not have the right to do so, was a matter of serious concern.

Election observation missions have repeatedly issued their recommendations stating that the Law on the National Registry of Voters should be adopted.<sup>176</sup> This law should ensure the establishment of a centralised voters' database, which would be regularly updated; at the local level, the compilation of voters' lists was supposed to later be incorporated into a single civil registry, maintained by a body separate from the system of election commissions.<sup>177</sup>

The adopted Law of Ukraine of 22 February 2007 No. 698-V "On the State Registry of Voters" (as amended) provided for the compilation of a national registry of voters, which is regularly updated and is designed to create voters' lists and for other purposes related to the election process and provided by the Law. The Venice Commission and the OSCE/ODIHR noted in their joint opinion that this law was to "make a significant contribution to the protection and realization of the right to vote in Ukraine".<sup>178</sup>

The creation of the State Registry of Voters in the form of an automated information and telecommunication system was designed to store and process data containing information required by the law, and use those data, but it also greatly simplified the mechanism to ensure the right to vote at national elections beyond the voters' place of registration, as well as made the creation of permanent precincts and territorial districts possible over time.

Additionally, the amendments to the law on the State Registry of Voters adopted before the 2020 local elections allowed voters to change their voting address without the slightest explanation of the reason for such a change. This has led to the return of the "electoral tourism" practice. The law-enforcement bodies should take an active part in combating such practices. However, its impact on the results of the elections of 25 October can no longer be changed. Moreover, such a legislative change reduces all positive outcomes from the introduction of the State Registry of Voters.

## Election observation

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To ensure control over the subjects of the electoral process and the legality of the organisation and conduct of elections in Ukraine, an institute of official observers nominated by candidates and political parties (local organisations of political parties), being subjects of the electoral process, has been introduced for the first time by Ukraine Law No. 474-XIV of 5 March 1999.

Official observers are authorised to observe at all stages of the organisation and conduct of elections: immediately after the registration of the relevant candidates (in local elections) or the formation of district election commissions (in national elections) until the election results are established.

Given the widespread attitude of Ukrainians towards the elections as: "it is not important how you vote at elections, but how your vote is counted", it is the official observers' crucial function to observe the vote counting at polling stations.

At the same time, the law defined official observers as subjects of the electoral process. They are authorised to draw up acts on violations of electoral legislation, as well as to appeal against decisions, actions and inaction of election commissions and other subjects of the electoral process.

The Law of Ukraine "On Elections of People's Deputies of Ukraine" of 17 November 2011 has also added to the subjects of the electoral process official observers from civil society organisations, whose statutory activities include issues of the election process and observation. They have been able to observe the elections since 2004.

The following amendments were in line with the recommendations of the Venice Commission, OSCE/ODIHR election observation experts, whose reports state that the election law provides for observation of the election process by international and civic observers who exercise broad and comprehensive rights throughout the election process, including the right to be present at meetings of district and precinct election commissions and to receive copies of protocols on the voting results, and that the active involvement of a large number of civic observers throughout the election process has increased its overall transparency.<sup>179</sup>

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176. Final Report of the OSCE/ODIHR Election Observation Mission on 31 March 2002, [www.osce.org/odihr/elections/ukraine/14947](http://www.osce.org/odihr/elections/ukraine/14947).

177. Final Report of the OSCE/ODIHR Election Observation Mission to the Verkhovna Rada of Ukraine, 26 March 2006, [www.osce.org/odihr/elections/ukraine/19595](http://www.osce.org/odihr/elections/ukraine/19595).

178. 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) CDL-AD (2007) 026, [www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2007\)026-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2007)026-e).

179. Final Report of the OSCE/ODIHR Election Observation Mission on 26 October 2014, [www.osce.org/odihr/elections/ukraine/132556](http://www.osce.org/odihr/elections/ukraine/132556).

The introduction of an institute of official election observers has become a valuable and effective means of combating the misuse of administrative resources. Since its introduction, different NGOs<sup>180</sup> have been tasked to carry out systematic and focused election observation in Ukraine.

## Election financing

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Traditionally, election financing is one of the most risky areas in which administrative resources can be misused. The use of budget funds for campaign purposes of candidates and parties, being subjects of the electoral process, is one of them. It can be prevented by introducing an effective mechanism for monitoring the financing of political parties and election campaigns.

Ukraine employs a range of regulatory tools to prevent such misuse. In October 2015, the Verkhovna Rada of Ukraine adopted the Law of Ukraine "On Amendments to Certain Legislative Acts of Ukraine Concerning the Prevention and Counteraction of Political Corruption," No. 731-VIII (hereinafter Law No. 731-VIII). This law introduced rather strict requirements in the field of political parties and election campaign financing.

### Political parties' financing and reporting

Law No. 731-VIII has introduced a fairly clear and unambiguous algorithm for political financing, which makes it impossible, or at least significantly more difficult, to use illegal funds.

The key legislative novelty was the introduction of state funding of the political parties' statutory activities. Until then, political parties did not receive any regular support from the state. This step was aimed at strengthening the financial independence of political parties, reducing the level of dependence of parties on funding from private donors (oligarchs, industrial and financial groups, and so on) and reducing the corresponding corruption risks.

The major forms and limits of private donations to political parties were also regulated in detail. At the same time, the concept of donation included not only money, but also any property, property rights, and even intangible objects in the form of benefits, advantages or services. Thus, the opportunities for political parties to resort to illegal resources have been significantly limited.

Political parties are required to submit a quarterly report to the National Agency for the Prevention of Corruption for all their funds, donations and property. The submitted reports of political parties on property, income, expenses and liabilities of a financial nature are included in the Unified State Register of reporting of political parties on property, income, expenses and liabilities of a financial nature, formed and maintained by the National Agency on Corruption Prevention. Such reports are immediately published on a special public website, and are then apparently checked. Such measures have significantly limited the use of public funds to fund the activities of political parties and/or their participation in elections.

### Election campaign financing

The Electoral Code contains sufficiently clear rules on the possibility of financing elections exclusively from the state (or local) budget or from the election funds of parties/candidates. According to part 5 of Article 12 of the Electoral Code of Ukraine, only funds from the party's electoral fund (in case of local elections, it refers to a local party organisation) and/or candidates may be used to finance the election campaign. As defined in part 4 of Article 51 of the Electoral Code of Ukraine, campaigning is carried out at the expense of election funds of candidates, parties (party organisations) participating in elections.

After the July 2020 amendments to the Electoral Code, the possibilities of using funds from the electoral funds of parties/candidates were broadened. Such funds before were used to cover the expenses for campaigning purposes only. Currently, the Electoral Code explicitly provides for the possibility of financing from the electoral fund of other expenses for a party's/candidate's participation in elections.

The Electoral Code provides for a special mechanism for opening electoral fund accounts, managing them (appointing administrators), accumulating and spending funds from such accounts. One of the essential factors is that the funds from the election fund can be used only in non-cash form. This should help to monitor possible violations and misuses more effectively.

Parties/candidates submit an interim financial report (five days before the voting) and a final one after election day (different deadlines for different types of elections have been set) on all revenues to the election

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<sup>180</sup>. For example, the all-Ukrainian NGO "Civil Network OPORA", the all-Ukrainian NGO "Committee of Voters of Ukraine" and others.

fund and expenditures from such a fund. Such reports are submitted to the relevant election commission. At national elections, such reports should be submitted to the CEC, and at local elections they are supposed to be submitted to the relevant territorial election commission. After receiving the interim or final financial report, respective election commissions analyse it and publish a report together with publishing the analysis on their website. The major problem here is the lack of time for proper and detailed analysis of reports, as well as the lack of qualified specialists during local elections for proper analysis of reports at the local level.

## Effective control and responsibility

These innovations, both in terms of party funding and in terms of campaign finance, were also ensured by rather strict mechanisms of administrative and criminal liability. Indeed, Law No. 731-VIII simultaneously amended other special legislation and provided for new types of administrative and criminal penalties. Sanctions for such offences were set at a fairly high level. This has made it possible to discipline parties with respect to their financial activities in general and their activities during elections in particular.

Immediately after putting all those new rules into practice during the 2015 local elections, some national experts made a range of critical remarks regarding such tools to ensure financial transparency and accountability.<sup>181</sup> Following the monitoring of financing of the election campaigns during the 2019 presidential and parliamentary elections, experts expressed a number of critical reservations about the proposals for further improvements to be made. Therefore, it is quite common that elections are won with funds mainly from fictitious donors, and political forces bear neither legal nor electoral responsibility for this.<sup>182</sup> International experts were no less critical in assessing the level of practical application of the requirements of the legislation on financial transparency.<sup>183</sup>

In particular, due to such critical statements, the parliament has adopted the Law of Ukraine “On Amendments to Certain Legislative Acts of Ukraine to Improve Electoral Legislation” (of 16 July 2020 No. 805-IX), which, among other things, provides for strengthening criminal liability for violating the rules on political parties’ financing: submission of knowingly false information in the report of a political party on property, income, expenses and liabilities of a financial nature; intentional making and receipt of an “illegal” donation in support of a political party.

Despite significant difficulties with the practical application of the relevant rules regarding the procedure for political parties and election campaign financing, as well as accountability mechanisms for its violation, respective legislation is a serious step forward to ensure democratic tools for organising and conducting elections.

## Complaints and appeals in the electoral process

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Until 2005, the specifics of complaints and appeals in the electoral process were laid down by the provisions of electoral legislation. The adoption of the Code of Administrative Proceedings of Ukraine No. 2747-IV of 6 July 2005 was an important step in the legislative regulation of these issues within court proceedings, as it was codified into one piece of legislation and it introduced unified provisions with the specifics of electoral dispute resolution during the fast-paced electoral process, including with respect to territorial jurisdiction, terms of appeal, securing of an administrative claim, peculiarities of proceedings, terms of consideration of cases, and so forth.

The relevant provisions of the Code of Administrative Proceedings, as amended by the Law of Ukraine (of 3 October 2017 No. 2147-VIII), are in line with the recommendations of the OSCE/ODIHR, made upon the results of election observation of early parliamentary elections in Ukraine on 26 October 2014, on the consideration of possible changes in procedural formalities in higher courts which may ensure that electoral disputes are considered by one panel of judges, or on the provision of other safeguards to prevent inconsistent application of the law by the same court.

At the same time, the OSCE/ODIHR election observation missions in Ukraine have repeatedly stated that “the election dispute resolution mechanism should be reviewed. The election law should clarify which cases can

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181. Final report on the results of monitoring of election finances in the 2015 local elections in Ukraine, [www.cvu.org.ua/nodes/view/type:news/slug:finalnyi-zvit-za-rezultatamy-monitoryngu-vyborchychk-finansiv-2015](http://www.cvu.org.ua/nodes/view/type:news/slug:finalnyi-zvit-za-rezultatamy-monitoryngu-vyborchychk-finansiv-2015).

182. No party showed financial report for the second quarter, “CHESNO”, [www.ukrinform.ua/rubric-politics/3110173-zodna-partia-nepokazala-finzvitu-za-ii-kvartal-cesno.html](http://www.ukrinform.ua/rubric-politics/3110173-zodna-partia-nepokazala-finzvitu-za-ii-kvartal-cesno.html).

183. International observers are concerned about vote buying, the report, [https://lb.ua/news/2019/07/22/432805\\_mezhdunarodnie\\_nablyudateli.html](https://lb.ua/news/2019/07/22/432805_mezhdunarodnie_nablyudateli.html).

and cannot be filed and with which body, including where they can be appealed. The complainant should not be allowed to choose the venue for filing a complaint.”<sup>184</sup>

Therefore, the Electoral Code now clearly defines which decisions, actions or inaction by which subjects of the electoral process can be appealed only before a court. For example, Article 64 of the Electoral Code defines that actions or inaction of candidates; decisions or actions of a party (local party organisation); decisions, actions or inaction of the authorities; decisions, actions or inaction of media and some other entities can be appealed only before a court.

In fact, the extension of court jurisdiction to most electoral relations and procedures is a positive factor. Although an administrative (extrajudicial) appeal is faster, in the Ukrainian reality it may be subject to greater threats of administrative influence from the authorities. Thus, more effective involvement of the court in the election dispute resolution system not only allows a quality decision upon the results of consideration of a particular case to be obtained, but more importantly, the election commissions, knowing about the “threat” of the appeal before a court, try to act more carefully and responsibly.

Thus, electoral legislation has been gradually improved in its provisions regarding procedural guarantees for a fair, open electoral process, unification of the provisions on the formation and status of election commissions, the principles of their activities, mechanisms to ensure financial transparency, creation and operation of an effective system of appeals, powers of respective official observers from the subjects of the electoral process, public organisations, foreign states and international organisations. The systematic application of these legislative provisions with respect to election management obviously contributes to limiting, and in some cases even preventing, the misuse of administrative resources in elections.

## LIMITATIONS ON CAMPAIGNING

Campaigning involves, first of all, the free dissemination of information about parties and candidates. Such information should directly or indirectly encourage voters to vote for or against a particular party/candidate. From the point of view of counteracting the misuse of public resources, the major idea here is to separate the public activities of the authorities and their officials from campaigning. Such a distinction should be made at least regarding separating information on the activities of bodies and officials from the election campaign, as well as the establishment of special restrictions for candidates holding public office.

### Differentiation between campaigning and information support of elections

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The first aspect in this section is the need to distinguish between election information and campaigning. This is a crucial aspect that contributes to ensuring equal opportunities for parties and candidates in elections. The Venice Commission also applies guidelines, which are prerequisites for preventing the misuse of administrative resources, in particular, the principle of transparency and freedom of information and the principle of equality of opportunity.<sup>185</sup>

The Code of Good Practice in Electoral Matters defines that ensuring the freedom of voters to form their opinion is one of the components of the principle of free elections. For this purpose, it is assumed that public authorities are primarily obliged to be impartial, in particular, with regard to media, visual agitation, freedom of assembly, and the financing of parties and candidates.

Public authorities should also have a number of positive obligations. In particular, they are required to make the names of the nominated candidates public; provide voters access to the lists of candidates and individual candidates running in the elections, for example, through the proper placement of visual campaigns. This information should also be available in the languages of national minorities, at least where they constitute a certain part of the population.

Violation of the obligation to observe the neutrality or restriction of the freedom of voters to form their opinion should entail the application of sanctions.

At the same time, the principle of equal elections includes, in particular, equality of opportunity, which according to the Venice Commission means that all parties and candidates must be guaranteed equal opportunities,

184. Final Report of the OSCE/ODIHR Election Observation Mission to Ukraine on 17 January and 7 February 2010, [www.osce.org/odihr/elections/ukraine/67844](http://www.osce.org/odihr/elections/ukraine/67844).

185. Report on the misuse of administrative resources during electoral processes adopted by the Council for Democratic Elections at its 46th meeting (Venice, 5 December 2013) and the Venice Commission at its 97th Plenary Session (Venice, 6-7 December 2013), [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2013\)033-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2013)033-e).

which also refers to the impartial attitude of public authorities to the election campaign; media coverage, including publicly owned media; public funding of parties and campaigns. The principle of freedom of expression entails that the law should provide for a certain minimum access of all participants in the election campaign and in campaigning to private electronic media. Political parties' candidates' and election campaign funding should be transparent. At the same time, the principle of equal opportunities may, in certain circumstances, be the basis for limiting the overall costs of political parties, in particular, for campaigning.<sup>186</sup>

Thus, the legislative regulation of election information and campaigning in the electoral process should be analysed separately and in the context of ensuring equal and free elections.

These international standards are reflected in Ukrainian national legislation. In Ukraine, the provisions on pre-election campaigning were separate from provisions on information support of elections for the first time at the legislative level with the adoption of the Law of Ukraine (of 17 November 2011 No. 4061-VI) "On Elections of People's Deputies of Ukraine". The relevant provisions were also reflected in the Law of Ukraine "On Elections of the President of Ukraine", as amended by the Law of Ukraine (of 13 March 2014 No. 879-VII), and by the Law of Ukraine (of 14 July 2015 No. 595-VIII) "On Local Elections".

The respective provisions are included in the Electoral Code of Ukraine and currently valid. A separate Chapter VII (Articles 47-50) of the Electoral Code is focused on these issues. Such norms provide that voters have access to comprehensive, objective and impartial information necessary for making informed and free choices. In practice, the implementation of these rules generally does not face any significant obstacles or violations.

### **Differentiation between information about government activities and election campaigning**

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National legislation generally contains fairly comprehensible regulatory restrictions on the inadmissibility of using the official information about the body's activities as a tool for direct or hidden campaigning. However, in practice, these rules are not always applied properly.

According to parts 3 and 6 of Article 51 of the Electoral Code of Ukraine, election campaigning does not include official notifications during the electoral process (without comments, which may be of a campaign nature, as well as video, audio, film, photo illustrations) about the actions of candidates related to the performance of official (service) duties laid down by the constitution or laws of Ukraine.

Official notifications during the electoral process about the actions related to the performance of a candidate's official powers laid down by the Constitution of Ukraine and laws of Ukraine, being prepared in the manner prescribed by the Law of Ukraine "On the procedure for covering the activities of public authorities and local governments in Ukraine by mass media" do not belong to election campaigning. Such official messages should not contain comments of an agitational nature, nor video, audio, film, photo illustrations of the actions of these persons as candidates.

Such notifications shall not refer to these persons' participation in elections or their intentions on certain activities in case of being elected.

Therefore, the information about candidates being officials at state authorities, authorities of the Autonomous Republic of Crimea or local self-government bodies is not considered by the legislator as part of an election campaign, although in practice it is difficult for a voter to distinguish information reported by such a candidate as an official from that of the same person as a candidate, as it comes from one and the same person and, thus, citizens perceive everything they do as the actions of one person.

The OSCE/ODIHR election observation mission in Ukraine on 17 January and 7 February 2010 stated in its final report that "rules on the coverage of candidates holding institutional positions in the news should prohibit broadcasters from giving preferences to such candidates. It is recommended to consider any appearance of a candidate holding an official position as election campaigning and to consider this time as allocated for the candidate's election campaign".<sup>187</sup>

Unfortunately, the relevant recommendations are not properly reflected in national legislation. In practice, the said provisions of the Electoral Code are violated quite often. In cases when candidates do not refer to such activity as campaigning, it often is campaigning, nonetheless.

186. Code of Good Practice in Electoral Matters CDL-AD (2002) 023 [www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2002\)023rev2-cor-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2002)023rev2-cor-e).

187. Final Report of the OSCE/ODIHR Election Observation Mission to Ukraine on 17 January and 7 February 2010, [www.osce.org/odihr/elections/ukraine/67844](http://www.osce.org/odihr/elections/ukraine/67844).

For example, during the 2020 local elections, the President of Ukraine made a number of official business trips to various regions. Such trips were accompanied by mass events using the symbols of the presidential party “Servant of the People”. The president himself did not consider such actions to be election campaigning.<sup>188</sup> However, experts and civic observers considered this to be indirect campaigning and the president’s attempt to support his party’s candidates during the local elections.<sup>189</sup> This is a very illustrative and large-scale example. There is a high number of similar examples at the local level.

### **Limitation of campaigning with the involvement of government resources**

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The establishment of campaigning restrictions is a solid precaution against the use of administrative resources in the election campaign.

The Electoral Code defines the concept of “election campaigning” as any activity to encourage voters to vote or not to vote for a particular candidate, party (party organisation) who are the subjects of the electoral process. The election campaign may be conducted in any form and by any means that do not contradict the Constitution and laws of Ukraine. At the same time, the Electoral Code does not limit the list of forms of campaigning. Thus, that election campaigning can be conducted in almost any form<sup>190</sup> that does not contradict the Constitution of Ukraine and the laws of Ukraine.

Campaigning, distribution of campaign materials, showing campaign films or videos, distribution of election leaflets, posters, other printed campaign materials or printed publications containing campaign materials, public appeals to vote or not to vote for parties being subject to the electoral process, candidates at respective elections or public assessment of their activities during events organised by the state authorities, authorities of the Autonomous Republic of Crimea, local self-government bodies, state or municipal enterprises, institutions, establishments, organisations (paragraph 2 of part 1 of Article 57 of the Electoral Code of Ukraine) is prohibited.

The Electoral Code also prohibits using “official” public resources by candidates. Candidates holding office during respective elections, including part-time positions, in the executive authorities, authorities of the Autonomous Republic of Crimea and local self-government bodies, state, municipal enterprises, institutions, establishments, organisations, military units (formations), are prohibited from involving subordinates in election campaigning, using official transport, communications, equipment, premises, other facilities and resources at the place of work, as well as using official or working meetings and staff meetings for campaign purposes (part 12 of Article 57).

These norms regulate the restrictions on the use of administrative resources in elections quite adequately. However, the practical possibility of identifying all possible cases of the named requirements’ violation is extremely difficult. Civic activists and official observers in the local elections did, nonetheless, record a high number of violations of these requirements by local authorities.

Perhaps the best example worth mentioning here is the nationwide poll/questionnaire initiated by the President of Ukraine (not an official referendum, but just a regular unofficial poll) that was supposed to take place on the day of local elections at all polling stations.<sup>191</sup> Experts believe that such an initiative has every reason to be considered a violation of the rules of campaigning and the actual use of administrative resource.<sup>192</sup> After all, the initiative of a poll focusing on popular issues on election day by the president and entailing the presence of activists conducting the poll at each polling station creates a reminder for voters about the president, his and his party’s election campaign promises. However, the proper legal response to such an initiative has not been undertaken.

At the level of local self-government bodies, the number of cases of misuse of public status and activities of public authorities is also quite common. The Ukrainian NGO “Civic Network ‘OPORA’”, in its interim report on the results of observation of the local elections during September 2020, indicated the fact that officials and

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188. Zelensky stated that he could not campaign for anyone in the local elections, [https://lb.ua/news/2020/09/08/465500\\_zelenskiy\\_zayaviv\\_shcho\\_mozhe\\_ni.html](https://lb.ua/news/2020/09/08/465500_zelenskiy_zayaviv_shcho_mozhe_ni.html).

189. Zelensky’s election tour: does the president have the right to campaign? [www.dw.com/uk/peredyborchi-hastroli-zelenskoho-chy-maie-prezydent-pravo-ahituvaty/a-54932367](http://www.dw.com/uk/peredyborchi-hastroli-zelenskoho-chy-maie-prezydent-pravo-ahituvaty/a-54932367); The Committee of Voters stated that Zelensky uses working trips to campaign for the “Servant of the People”, [www.unian.ua/elections/miscevi-vibori-2020-zelenskiy-agituye-za-slugu-narodu-kvu-11119418.html](http://www.unian.ua/elections/miscevi-vibori-2020-zelenskiy-agituye-za-slugu-narodu-kvu-11119418.html).

190. The code even provides an indicative list of the most common forms of campaigning, such as meetings with voters; publication of political advertising; distribution of election leaflets, posters and other printed campaign materials, and so forth.

191. Volodymyr Zelensky announced all the questions of the national poll on October 25, [www.president.gov.ua/news/volodimir-zelenskij-ogolosiv-usi-zapitannya-zagalnonacionaln-64629](http://www.president.gov.ua/news/volodimir-zelenskij-ogolosiv-usi-zapitannya-zagalnonacionaln-64629).

192. Analytical information on the presidential initiative to poll the society on October 25 [www.oporaua.org/news/vybory/mistsevi-vybory/mistsevi\\_2020/opytuvanya](http://www.oporaua.org/news/vybory/mistsevi-vybory/mistsevi_2020/opytuvanya).

elected representatives have access to the staff of public authorities and local governments, manage resources of state and local budgets, material and technical means and objects of public property, carry out and control staff appointments, and it is crucial for the purposes of election campaigns as it can lead to non-competitive advantage of certain individuals being subjects of the electoral process. Observers have recorded a large number of cases where various forms of administrative resources (personnel, material, budget) have been used. Many officials and civil servants have resorted to this type of misuse or misconduct according to reports.<sup>193</sup> Unfortunately, there is no prompt and proper legal response to such cases.

## Restrictions for public officials

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Article 57 of the Electoral Code prohibits participation in election campaigning by executive authorities, authorities of the Autonomous Republic of Crimea and local self-government bodies, law-enforcement agencies and courts, and their officials during office hours (unless such a person is a candidate running for respective elections).

While with regard to the executive authorities, the authorities of the Autonomous Republic of Crimea and local self-government bodies, this rule is not contested, it seems ambiguous with regard to officials.

It should also be noted that this norm is not a novelty introduced by the Electoral Code of Ukraine. It was laid down in the electoral legislation well before the adoption of the Code. The words “during office hours” recently supplemented the relevant legislative provisions, while previous versions of the electoral legislation provided for a complete ban on the participation of officials of state bodies in the election campaign.

At the same time, the norm of the election legislation on the complete ban on campaigning, both by public authorities and their officials, was the subject of interpretation by the Constitutional Court of Ukraine.

As the Constitutional Court of Ukraine pointed out in its judgment, this prohibition is aimed, primarily, at preventing the use of the resources of these bodies and official positions by relevant officials during campaigning for a particular candidate... , and secondly, at preventing pressure on voters. Such a ban is reasoned by the need to create conditions for the voters’ free expression of will during elections.<sup>194</sup>

It should also be noted that the vast majority of officials of the executive authorities, the authorities of the Autonomous Republic of Crimea, law-enforcement agencies and courts are public servants. In view of this, the named provisions of the Code do not appear to be consistent with the Law of Ukraine “On the Public Service”, because the fourth part of its Article 10 provides that a public servant has no right to organise and participate in campaigning at any time, not just during office hours.

Consequently, paragraph 2 of part 1 of Article 57 of the Electoral Code of Ukraine states “except in cases, when such person is a candidate running for respective elections”. It means that if a public servant is a candidate running for respective elections, he/she may participate in election campaigning, including during office hours.

However, the Law of Ukraine “On the Public Service” does not provide for any such exception. The exception is only made for a person having taken leave.

Moreover, this provision of the Electoral Code is not in line with the principle of political impartiality, which is preventing the influence of political views on the actions and decisions of public servants, as well as refraining from demonstrating their attitude to political parties, demonstrating their own political views in office (paragraph 8 of the part 1 of Article 4 of the Law of Ukraine “On the Public Service”)<sup>195</sup>.

Additionally, the aforementioned provisions of the Electoral Code do not comply with the International Code of Conduct for Public Officials, while paragraph 11 of the Code stipulates that public officials may engage in political or other activities outside their official duties in accordance with laws and administrative regulations so as not to undermine the faith of the public in the impartial implementation of their functions and responsibilities.<sup>196</sup>

In this case, other provisions of the Law of Ukraine “On the Public Service”, providing for leave of a public servant if he/she is registered as a candidate for deputy, could be a safeguard against the participation of

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193. Interim report of the OPORA Civic Network on the results of non-partisan observation of the September 2020 local elections [www.oporaua.org/report/vybory/mistsevi-vybory/mistsevi\\_2020/21113-promizhnii-zvit-gromadianskoyi-merezhi-opora-za-rezultatami-pozapartiinogo-sposterezhennia-na-mistsevikh-viborakh-za-veresen-2020-roku#\\_Toc52526876](http://oporaua.org/report/vybory/mistsevi-vybory/mistsevi_2020/21113-promizhnii-zvit-gromadianskoyi-merezhi-opora-za-rezultatami-pozapartiinogo-sposterezhennia-na-mistsevikh-viborakh-za-veresen-2020-roku#_Toc52526876).

194. Judgment of the Constitutional Court of Ukraine of 24 March 2005, No. 3-rp/2005 (case on elections of the President of Ukraine), <https://zakon.rada.gov.ua/rada/show/v003p710-05#Text>.

195. Law of Ukraine “On Civil Service”, <https://zakon.rada.gov.ua/laws/show/889-19#Text>.

196. International Code of Conduct for Public Officials, [https://zakon.rada.gov.ua/laws/show/995\\_788#Text](https://zakon.rada.gov.ua/laws/show/995_788#Text).

public servants in the election campaign. However, these rules provide for the right and not an obligation of a public servant to take his/her leave.

Nevertheless, civil society activists and observers have reported numerous cases of public officials being candidates running for elections and at the same time violating the requirements of political neutrality. "Public activity of the most incumbent mayors of regional centers, running for local mayors, is manifested in a combination, on the one hand, of them actively performing their duties accompanied by hidden campaigning and, on the other hand, of their formal participation in election campaigning during non-office hours."<sup>197</sup>

It should also be noted that any prohibitions on the organisation and participation in campaigning imposed on public servants do not apply to members of the government, as their positions are political. This allowed the Minister for Health of Ukraine to run for the Odesa Regional Council representing one of the political parties in the 2020 local elections,<sup>198</sup> and to be able to use the information available to him as a high-ranking official which set him in an unequal position with other political forces having nominated candidates for regional councillors. Similar reservations can also be made with respect to a large number of other mayors, as most of them did not take leave during the elections and continued their activities.

In view of the above, the current legislation of Ukraine needs to be seriously revised in order to create additional barriers and prevent the use of administrative resources in elections by officials of public authorities and local self-government bodies. In particular, it is necessary to amend the Electoral Code of Ukraine with a provision on a complete ban on campaigning for officials and officials-candidates during office hours. It is also necessary to introduce the European practice of mandatory leave of officials running for elections during the election campaign. This will allow the differentiation between the performance of official duties by a person as an official and campaigning as a candidate.

## LEGAL LIABILITY

Current Ukrainian legislation does not only regulate, in a very detailed manner, the electoral procedures that should prevent the misuse of administrative resources, but it also provides for a set of rules on legal liability for such violations. Indeed, a number of special types of offences and crimes are foreseen in the provisions of the Code on Administrative Offences<sup>199</sup> and the Criminal Code of Ukraine that should prevent the misuse of administrative resources. However, these rules do not fulfil their function. There are at least two issues raising concerns: the quality of the legislation on legal liability itself and the lack of political will to change the situation.

### Quality of legislation

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The provisions of the Criminal Code of Ukraine and the Code on Administrative Offences in the electoral sphere are probably the ones that are the most frequently changed. Only throughout the last five years have the respective provisions been significantly changed at least three times.

The latest changes were adopted by the Verkhovna Rada of Ukraine in July 2020. These changes, amongst other things, provide for enhancing the administrative liability for violation of restrictions on election and referendum campaigning (Article 212-10 of the Code of Ukraine on Administrative Offences). Amendments were also made to the Criminal Code of Ukraine, namely:

- ▶ the possibility of deprivation of the right to hold certain positions as an additional punishment is established in cases when a person is convicted of crimes against the voting rights and freedoms of citizens provided for in Articles 157-160 of this Code for a term of five years (Article 55);
- ▶ the liability for submission of knowingly false information in the report of a political party on property, income, expenses and liabilities of a financial nature or in the financial report on receipt and use of funds of the electoral fund of a political party, local organisation of a political party, candidate running in elections, whereas the term for deprivation of the right to hold certain positions or engage in certain activities has been increased from three to five years (Article 159-1);

197. Interim report of the OPORA Civic Network on the results of non-partisan observation of the September 2020 local elections, [www.oporaua.org/report/vybory/mistsevi-vybory/mistsevi\\_2020/21113-promizhnii-zvit-gromadianskoyi-merezhi-opora-za-rezultatami-pozapartiinogo-sposterezhennia-na-mistsevikh-viborakh-za-veresen-2020-roku#\\_Toc52526876](http://oporaua.org/report/vybory/mistsevi-vybory/mistsevi_2020/21113-promizhnii-zvit-gromadianskoyi-merezhi-opora-za-rezultatami-pozapartiinogo-sposterezhennia-na-mistsevikh-viborakh-za-veresen-2020-roku#_Toc52526876).

198. Stepanov to head list of "Servants of the People" in Odessa regional council (updated), [https://lb.ua/news/2020/09/16/466052\\_stepanov\\_ocholit\\_spisok\\_slugi.html](https://lb.ua/news/2020/09/16/466052_stepanov_ocholit_spisok_slugi.html).

199. This code establishes the types of administrative offences (misdemeanors), the sanction for such violations, as well as the procedure for bringing to justice.

- ▶ enhanced liability for providing voters, referendum participants, legal entities with illegal benefits, accompanied by election or referendum campaigning, mentioning a name of a candidate, a name of a political party having nominated a candidate for the elections, or using the image of a candidate, symbols of a political party having nominated a candidate for the elections (part 3 of Article 160).<sup>200</sup>

It should also be noted that such changes were adopted and promulgated almost one month before the start of the local election process. It is obvious that such frequent changes to the legislation do not contribute to its proper application. After all, the peculiarities of the qualification of new *corpus delicti*, determining the features and nuances of such crimes, requires additional trainings to be delivered to representatives of the national police, prosecutors, other law-enforcement agencies and judges. The lack of stable, clear and predictable legislation is not the major, but still very important factor that determines the inevitability of liability for the violation.

Another problem is the lack of a relevant provisions that would provide for liability for certain misuse or violation of the law. The example is the situation with public servants violating the requirement not to campaign using their official position. The current legislation of Ukraine does not provide for any accountability mechanisms in case of a public servant's failure to submit an application for unpaid leave for the period of his/her participation in the election campaign. However, according to paragraph 8 of part 2 of Article 65 of the Law of Ukraine "On the Public Service", non-compliance with the requirements of political impartiality by a public servant shall be considered just a disciplinary offence.

If a public servant commits disciplinary offences, including the one related to political impartiality, the appointing authority or the head of the public service may warn the public servant of incomplete compliance with the position (part 4 of Article 66 of the Law of Ukraine "On the Public Service"). In this case, in accordance with the second part of Article 74 of this law, a disciplinary sanction may be imposed only if the fact of a disciplinary offence and the guilt of a public servant is legally established.

There is a similar problem with the legislation restricting campaigning on the internet. The Electoral Code does not even set a general framework for such a restriction. Concepts such as "targeted advertising", "fake news", "hidden advertising" and a number of others remain outside the parliament's scrutiny and are not subject to strict regulation. Accordingly, accountability mechanisms for such actions are not provided for.

The absence of provisions establishing legal liability for certain actions does not, of course, violate the principle of equality of parties or candidates, but it may, under certain conditions, create unjustified advantages for a ruling party by combining a lack of regulation with other elements of administrative resources.

## Presence/absence of political will

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This issue is even more acute than all those described in the previous sections as it is a question of not even applying existing sanctions for violation of electoral legislation, procedures and illegal campaigning.

In fact, there is a number of cases in Ukraine when violations of legislation, even if officially reported, unfortunately, remain unnoticed by the law-enforcement authorities. This is specifically true if such notifications and reports are made with respect to violations committed by the ruling party or its candidates. This, of course, is not a unique practice and, probably, it is not only Ukraine where such an approach is widespread. For almost the entire period of independence, such "selective" prosecution of electoral offences has unfortunately become quite common.

The OSCE/ODIHR election observation mission on the 21 July 2019 parliamentary elections in Ukraine stated in its final report that "further law-enforcement efforts are required to ensure the freedom of voters to form their own opinion by effectively preventing and punishing the misuse of administrative resources during campaigns."<sup>201</sup>

There is a number of formal reasons and circumstances for not imposing sanctions on perpetrators of electoral legislation. One of the most common is jurisdictional disputes between various public authorities as

200. Law of Ukraine "On Amendments to Certain Legislative Acts of Ukraine Concerning the Improvement of Electoral Legislation" of 16 July 2020, No. 805-IX, <https://zakon.rada.gov.ua/rada/show/805-20#Text>.

201. ODIHR Election Observation Mission, Final report, Extraordinary elections of people's deputies on 21 July 2019, [www.cvk.gov.ua/wp-content/uploads/2020/05/2019\\_osce\\_ndu.pdf](http://www.cvk.gov.ua/wp-content/uploads/2020/05/2019_osce_ndu.pdf).

to whether or not they have the authority to take certain strict measures. Civil society experts<sup>202</sup> warn about certain measures to be taken as a response to the named problems. The situation is more global and complex, however. Ignoring violations and the deliberate non-prosecution of perpetrators clearly makes a new large-scale form of misuse of public resources.

Obviously, this form of misuse of power is possible only due to the fully fledged support at a high political level. It poses more threats for the elections and the development of democracy in general, as it violates the principles of free and equal elections.

## CONCLUSIONS

The adoption of the Electoral Code of Ukraine in December 2019 has made it possible to carry out a comprehensive reform of the electoral legislation, its systematisation and generalisation. Currently, this Code contains common approaches with respect to the regulation of issues related to the prevention of misuse of administrative resources at all types of elections.

Long-lasting work on the implementation of international electoral standards into the national legislation has led to quite decent results. A number of issues related to the administration and organisation of elections in Ukraine enjoy a decent regulation by the relevant provisions of the Electoral Code and other related acts, for example:

- ▶ the formation of election management bodies (election commissions) without explicit influence of local state authorities or local self-government bodies;
- ▶ the compilation, maintenance and use of a voters' lists with the help of a single automated State Registry of Voters –the introduction of this voters' registration tool has made it possible to prevent cases of misuse that have been previously extremely common with respect to incorrect voters' lists;
- ▶ the introduction of the basic principles of activity of election commissions as collegial bodies, which should adhere to the principles of transparency and openness in their work, while being independent from local authorities –the right to be present at election commission meetings and during voting is regulated quite clearly, and does not provide grounds for influence by public authorities or even police or other law-enforcement agencies;
- ▶ the introduction of a fairly clear and effective distinction between election information support and election campaigning;
- ▶ the introduction of a rather strict legislation on the procedure for political parties and election campaign financing, as well as mandatory reporting on expenditures in order to achieve financial transparency.

At the same time, a number of issues require additional efforts and measures to be taken in order to prevent the misuse of administrative resources during elections.

First, the so-called misuse of legislative power is a rather serious problem. It primarily concerns the adoption of laws or individual provisions that will directly or indirectly give preference to certain political actors during elections.

Secondly, the restriction of forms of election campaigning has not been fully implemented. National legislation does not contain any adequate response to the current challenges as regards regulation of campaigning on the internet, social media, digital tools, and so on. The lack of such regulation is combined with the extremely active use of these tools by ruling party and other political actors.

Thirdly, the legislation restricting the use of administrative resources during elections, even in cases already well prescribed in the Electoral Code, does not correlate with the actual practice of its application. A high number of examples where good election law is simply ignored in practice is still a reality.

Fourthly, the inaction of law-enforcement authorities with respect to bringing perpetrators of the electoral legislation to justice diminishes all other outcomes and achievements. The inevitability of liability for violations should be the solid ground for the law-enforcement activities. "Selective justice" can destroy not only electoral standards, but also the core foundations of democracy.

202. The process of Ukraine's implementation of election recommendations provided by international and national observation missions, international organisations and foreign partner countries, [www.oporaua.org/report/vybory/45461-protses-vykonannya-ukrayinoyu-rekomendatsiy-u-sferi-vyboriv-nadanykh-mizhnarodnyimi-ta-natsionalnymi-sposterezhnymi-misiyamy-mizhnarodnyimi-orhanizatsiyamy-ta-inozemnymi-krayinamy-partneramy](http://www.oporaua.org/report/vybory/45461-protses-vykonannya-ukrayinoyu-rekomendatsiy-u-sferi-vyboriv-nadanykh-mizhnarodnyimi-ta-natsionalnymi-sposterezhnymi-misiyamy-mizhnarodnyimi-orhanizatsiyamy-ta-inozemnymi-krayinamy-partneramy).

# Countering the misuse of administrative resources: effective enforcement mechanisms and practical examples in Latvia

Arnīš Cimdarš

## INTRODUCTION AND BACKGROUND

Today, one of the most important and recurrent challenges observed in Europe and beyond, is the misuse of administrative resources, also called public resources, during electoral processes. This practice is an established and widespread phenomenon in many European countries, including countries with a long-standing tradition of democratic elections. Several generations of both incumbents and civil servants consider this practice as normal and part of an electoral process.<sup>203</sup>

Administrative resources are “human, financial, material, *in natura* and other immaterial resources enjoyed by both incumbents and civil servants in elections, deriving from their control over public sector staff, finances and allocations, 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”.<sup>204</sup>

The 1990 CSCE/OSCE Copenhagen Document indicates the vital need for a “clear separation between the State and political parties; in particular, political parties will not be merged with the State”. The political parties should provide “the necessary legal guarantees to enable them to compete with each other on a basis of equal treatment before the law and by the authorities”.<sup>205</sup>

It is the duty of the state to protect the right of voters to form an independent opinion, thus ensuring equal and neutral treatment of political forces and election candidates, who have not yet gained public recognition in high public office. Political parties must have equal opportunities to compete with each other for the votes of the electorate.

During the pre-election campaign period, political parties and the media must comply with restrictions on advertising and promoting election candidates. However, politicians who already hold important positions also stand for election, and their status offers various opportunities to promote themselves, for example by expressing their views in the media on various issues or by participating in events covered on television, radio and the press.

How can one distinguish when election candidates – current members of parliament, ministers and other officials – perform their duties in good faith, and when they take the opportunity to brighten their image before the election, by taking advantages of status, which is prohibited by law?

On the one hand, for non-incumbent candidates it is an opportunity to criticise a competitor for untapped opportunities, mistakes and other omissions in the performance of their duties. On the other hand, the position held by an election candidate provides ample opportunities to use the available administrative resources, which can make the pre-election struggle unequal and therefore undemocratic.

Strict restrictions on political parties funding their pre-election advertisements, as well as influencing the voters' choice in favour of more advertised candidates, who have abused the financial resources or status

203. Joint Guidelines for preventing and responding to the misuse of administrative resources during electoral processes, paragraph 4, [www.venice.coe.int/webforms/documents/default.aspx?pdf=CDL-AD\(2016\)004-e&lang=EN](http://www.venice.coe.int/webforms/documents/default.aspx?pdf=CDL-AD(2016)004-e&lang=EN).

204. The Report on the misuse of administrative resources during electoral processes, paragraph 8, [www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2013\)033-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2013)033-e).

205. Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE, paras. 5.4 and 7.6, [www.osce.org/odihr/elections/14304](http://www.osce.org/odihr/elections/14304).

available to them, are also a matter of constitutional law. Unfair electoral processes can seriously undermine the democratic principles of a constitutional state.

For the purpose of this goal, even the restriction of freedom of expression, which includes the right to freely obtain, keep and disseminate information, to express one's views without the presence of censorship, Article 100 of The Constitution of the Republic of Latvia, is permissible. Assessing the restriction of pre-election campaigning in the context of freedom of expression, the Constitutional Court acknowledged that restrictions on pre-election campaigning do restrict freedom of expression, but the norm has been adopted to achieve the legitimate goal mentioned in Article 116 of the constitution. Consequently, the benefit of this restriction to society outweighs the restriction imposed on political parties, associations of political parties and unrelated persons to campaign.

In Latvia, the law does not draw a bold line where the performance of a candidate's duties ends and covert prohibited pre-election advertising begins. The impartiality of the media and the journalists' ethics are of great importance. Therefore, the pre-election time is a special test for the professionalism of any media. In Latvia, the electronic media law obliges public and commercial media to ensure that facts and events are covered fairly, objectively, promoting the exchange of views, and in accordance with generally accepted principles of journalism and ethics.<sup>206</sup>

The candidate's understanding of honesty is essential, as is the demand of the voters themselves for the moral stance of their representatives. Candidates should also be aware of the issues of administrative resource misuse which includes the misuse of the status of an official, the use of administrative powers and resources to obtain additional benefits, opportunities and guarantees, ensuring his or her personal or party re-election. In other words, the abuse of the state resources, which is to say taxpayers' money and trust, for selfish electoral purposes.

The use of administrative resources has a negative effect on the electoral process and society as a whole: first, there is a threat to the correct performance of public functions. This is a waste of state resources not in the public interest, but for selfish political interests. Secondly, the freedom of choice of a citizen and political competition between parties is limited, and the fact that the voter must make his or her decision freely and without influence, ignored.

Until 2012, there were no special norms to prevent the misuse of administrative resources during electoral processes in Latvia. The use of administrative resources in elections could, of course, be equated with abuse of office, which could be punished according to Article 318 of the Criminal Law of the Republic of Latvia. However, in most cases, manipulation of politicians with administrative resources is not criminal.<sup>207</sup>

## **Regulation of pre-election resources – The public demand**

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Political party financial control was established in 1995 and it was supervised by the Ministry of Justice and the State Revenue Service. However, the results of the controls were weak and the public criticised institutions for their lack of appropriate response and inefficiency.

After the Law on the KNAB came into effect on 1 May 2002, - the parliament of the Republic of Latvia, the Saeima, appointed a newly established bureau in charge of party finance control. In reality, the bureau did not start its operations until on 10 October 2002 after the Saeima appointed the bureau director.

Until 2012, the illegal use of administrative resources was not separately highlighted by law, although it was demanded by society. Society is not satisfied with the administrative resource budget influence: "Budget funding for municipalities. This method is using by political parties, which have access to the state budget money. They 'generously' buy 'Heads of Municipalities' with state funds, by distributing money to building and reconstruction of local hospitals and schools, or, for example, the party of the Minister of Transport invests money in 'his municipalities' for road construction and maintenance. To receive such 'funds', the Head of Municipality has to join the appropriate party and has to use all administrative resources for political campaign."<sup>208</sup>

The NGO, Transparency International's, chapter in Latvia, Delna, in 2004 noted "very serious, but little studied problem – the use of administrative resources in favor of ruling political parties' campaigns. ... Generally, the use of administrative resources during pre-election campaign is the abuse of office and it is illegal and criminally punishable according to Section 318 of Criminal law of Latvia. However, in many cases politicians' manipulations with administrative resources are not legally punishable. Nevertheless, the use

206. <https://lvportals.lv/norises/262224-brivu-un-demokratisku-velesanu-prieksvelesanu-agitacijas-ierobezojumi-i-2014>.

207. [www.diena.lv/raksts/pasaule/krievija/ka-tiek-izmantoti-pasvaldibu-resursi-pirms-velesanam-12252789](http://www.diena.lv/raksts/pasaule/krievija/ka-tiek-izmantoti-pasvaldibu-resursi-pirms-velesanam-12252789).

208. [www.kompromat.lv/item.php?docid=readn&id=2704](http://www.kompromat.lv/item.php?docid=readn&id=2704).

of administrative resources in favor of ruling party pre-election campaign is abuse of power entrusted by electorate and must be considered as unethical.<sup>209</sup>

By improving the quality of party financial control, there are more limitations on communication channels used by pre-election campaigns. Unfortunately, it stimulates the use of such unethical and amoral methods as administrative resources, hidden advertising, so-called “grey and black” public relations technologies, manipulation of information and disinformation, and so on.

In 2005, Delna monitored the use of administrative resources before the municipal elections. As explained by the Executive Director of Delna, Roberts Putnis: “with this study for the first time we have raised awareness of administrative resource use problem during pre-election campaigns in Latvia, we systematically gathered and compiled data. The aim of the Project was to decrease political corruption in Latvia by monitoring the use of administrative resources during Municipal elections and by informing society of this problem. The conclusion shows that during Municipal elections there are manipulations with significant amounts of administrative resources.”<sup>210</sup>

The study shows that institutional resources are mainly used by engaging municipality employees that are subordinated to politicians, by using municipality premises for political party office needs, or by manipulating with the power of the elected authority. The second most common administrative resource abuse type is the use of mass media resources. Depending on the municipality, it could be an agreement with mass media, for example, for displaying information in local newspapers, or it could be printing the municipality’s own newspaper or leaflet. Furthermore, deputies are in charge of the municipality’s budget that could potentially risk budget resource misuse, because there are no limits to introducing some populist last-minute changes, for example, by increasing salaries for municipality employees.

Since the Latvian independence restoration day party pre-election campaign, finances have been constantly increasing, reaching a peak in 2006 during the ninth Saeima elections, by reaching six and a half million lats. In 2011, the situation changed dramatically. Due to the economic crisis the donation amount for parties decreased. Furthermore, the changes in party finance law introduced limits of acceptable expenditure amounts for party pre-election campaigns. It decreased twice for the emergency election. As other pre-election expenditure, such as the preparation of advertisement materials, the organisation of the pre-election campaign, were free of limits, it was predictable that the use of administrative resources, which often cannot be distinguished from hidden advertising, would increase. “Deputy candidates, who simultaneously is the parliament or municipality deputies, uses every chance to appear in media, in such way ensuring illegitimate advantages over political competitors.”<sup>211</sup>

## **The prohibited use of administrative resources in pre-election campaign law**

The situation significantly changed, when on 29 November 2012 the Saeima adopted a new pre-election campaign law and amended the law on the financing of political organisations (parties). The Saeima not only introduced restrictions in the pre-election agitations in the mass media, but also prohibited the use of administrative resources in the pre-election campaign.<sup>212</sup>

“The use of administrative resources shall be considered use of financial resources, movable and immovable property or provision of services of a State authority and an authority of derived public persons and capital companies, in which the capital shares (stocks) belong to the State or derived public persons, as well as of the capital companies, in which capital shares (stocks) owned by one or more State capital companies or capital companies of derived public persons individually or in aggregate exceed 50 per cent, for conduction of pre-election campaign, as well as advertising of these authorities for payment within the period of 30 days before the elections, if the relevant advertisement with regard to its content is related to reflecting of a deputy candidate, political party, association of political parties, as well as candidates for the post of the Prime Minister or a Minister nominated by administrative bodies of a political party or association political parties, or reflecting a person related to a political party or an association of political parties or reflecting of activities by such a candidate or person.”<sup>213</sup>

Within the meaning of the law, a person related to a political party or association of political parties shall be an official, a member of the political party or association of political parties, or such person who during the last

209. [www.diena.lv/raksts/pasaule/krievija/ka-tiek-izmantoti-pasvaldibu-resursi-pirms-velesanam-12252789](http://www.diena.lv/raksts/pasaule/krievija/ka-tiek-izmantoti-pasvaldibu-resursi-pirms-velesanam-12252789).

210. Sarmīte Pelcmane, “Pašvaldības resursi – politiku vajadzībām?”, Newspaper “Kurzemes Vārds”, 27.05.2005. Nr.123(4287), page 10.

211. <https://lvportals.lv/norises/235081-prieksvelesanu-agitacija-graudi-un-pelavas-2011>.

212. Pre-election Campaign Law, Section 33, paragraph 1, <https://likumi.lv/ta/id/253543>.

213. Pre-election Campaign Law, Section 33, paragraph 2, <https://likumi.lv/ta/id/253543>.

18 months before the elections has had business relations with the relevant political party or association of political parties in relation to the provision of services to that political party or association of political parties, by planning, preparing or organising the election campaign, or such person who within the last 18 months before the elections has been an employee, official or a member of the political party or political association.<sup>214</sup>

New regulations prohibited political advertisements on television one month before elections, twice decreased the limits of pre-election expenses and the maximum donation amount, and also allocated finance for pre-election political discussions in commercial media.

Deputy member of the Saeima, Lolita Čigāne, characterises this norm: “for the first time in the history of the Republic of Latvia there is a very precise definition of administrative resource use in pre-election campaign. There is also set liability for non-compliance with the restrictions, and it is monitored by the Corruption Prevention and Combating Bureau.<sup>215</sup> This law defines also that promotion of positive publicity or use of municipality financed newspapers are considered as use of administrative resources. It means that definition concerning administrative resource use is very broad and law currently in force determines it. There will always be the temptation to use administrative resources, it is as old as the world, however now its use, unlike the situation before, is prohibited.”<sup>216</sup>

“Placement of materials of pre-election campaign is prohibited in publications issued by a State authority or an authority of derived public persons or capital companies in which capital shares (stocks) belong to the State or derived public persons, as well as the capital companies, in which capital shares (stocks) owned by one or more State capital companies or capital companies of derived public persons individually or in aggregate exceed 50 per cent.”<sup>217</sup>

“Placement of interviews with deputy candidates or candidates for the post of the Prime Minister or a Minister, nominated by administrative bodies of a political party or association political parties, as well as to place such articles in which it is indicated that the person mentioned in it is a deputy candidate for the post of the Prime Minister or a Minister nominated by administrative bodies of a political party or association of political parties, is prohibited on election day, as well as 30 days prior to the election day in publications issued by a State authority or an authority of derived public persons or capital companies, in which the capital shares (stocks) owned by one or more State capital companies or capital companies of derived public persons individually or in aggregate exceed 50 per cent.”<sup>218</sup>

## **SUPERVISION AND CONTROL OF THE REQUIREMENTS OF THE PRE-ELECTION CAMPAIGN LAW**

The KNAB, and the National Electronic Mass Media Council (NEPLP) supervises compliance with the pre-election campaign law. The control of the compliance with the regulations for the placement of pre-election campaign materials in public places is within the competence of the state police and the local government police.

The level of effectiveness of preventing the impact of the administrative resources in Latvia, conditionally, depending on the regulatory laws, administrative capacity and priorities on the voters' agenda, can be divided into three development stages.

The first stage (1990-2002) – The first stage of electoral development, the main achievements – political competition (instead of one party), secret ballot, transparency procedures, transparent (verifiable) compilation of results, beginning of the formation of an environment of equal opportunities for competitors. For example, the same free-of-charge time on television and radio, equal prices for paid advertising, etc. Illegal use of administrative resources is not separately defined in the legislation. It is considered that an article on abuse of office or waste of state or municipal resources may apply. The law does not provide for the prevention and control of administrative resources by an institution. There were no penalties for violations.

The second stage (2002–2012) – There are institutions controlling the pre-election campaign of the parties (entrusted with such responsibilities and allocated resources). There are no detailed restrictions of administrative resource misuse in the law. During this period, the rules and experience of party financing and their control are developing very rapidly. The public demand for a ban on the use of administrative resources in elections

214. Pre-election Campaign Law, Section 33, paragraph 4, <https://likumi.lv/ta/id/253543>.

215. Pre-election Campaign Law, Section 33, paragraph 7., <https://likumi.lv/ta/en/en/id/253543>.

216. Lolita Čigāne, the comment on the article “I have not come here to please anyone. What's happening to the Reform Party?“, [www.diena.lv/raksts/sodien-laikraksta/es-te-neesmu-nacis-tamdel-lai-kadam-izpatiktu-14012480](http://www.diena.lv/raksts/sodien-laikraksta/es-te-neesmu-nacis-tamdel-lai-kadam-izpatiktu-14012480).

217. Pre-election Campaign Law, Section 33, paragraph 5, <https://likumi.lv/ta/id/253543>.

218. Pre-election Campaign Law, Section 33, paragraph 6, <https://likumi.lv/ta/id/253543>.

is emerging. This is evidence in newspaper articles criticising the current situation (see the Delna 2006 study, “Monitoring the Use of Administrative Resources before the 9th Saeima Elections”).<sup>219</sup>

The third stage (2013-20) – The law on pre-election campaigns came into force, in which several new cases appeared for the first time, including a ban on administrative resources in elections. During this period, the institutions controlling the pre-election campaigns of the parties – the KNAB and the NEPLP – were developing serious activities for the prevention of misuse of administrative resources. Public support for this task is growing. Thanks to public support and its co-operation with controlling institutions, the use of administrative resources is becoming increasingly difficult.

Successful pre-election monitoring requires three conditions.

1. Prohibitions, restrictions and penalties for infringements are clearly stated in law.
2. The control of restrictions are entrusted to an institution which has the appropriate capacity and resources (in Latvia, the KNAB, including the powers of the investigating authority). Good intentions are not enough to prevent the misuse of administrative resources – strict rules and a strong controlling body are needed.
3. There is a demand in society for fair election campaigns.

For comparison (Table 1, and Table 2), the effectiveness of control depending on the task is clearly spelled out in law, and the task is entrusted to a powerful institution.

For comparison (Table 1 and Table 2), the effectiveness of control depends on whether the task is clearly spelled out in law and whether the task is entrusted to a powerful institution.

**Table 1. Monitoring the financial activities of political parties**

Time period	Authorised bodies with appropriate resources	The task is defined by law	Effectiveness
1990-2002	0*	1	0
<b>2002-12</b>	<b>KNAB</b>	<b>1</b>	<b>1</b>
<b>2013-20</b>	<b>KNAB</b>	<b>1</b>	<b>1</b>

\* Formally, the institutions have been designated: the State Revenue Service and the Ministry of Justice. Latvia was criticised for the low effectiveness of controls.

**Table 2. Prevention of misuse of administrative resources**

Time period	Authorised bodies with appropriate resources	The task is defined by law	Effectiveness
1990-2002	0	0	0
2002-12	<b>KNAB &amp; NEPLP</b>	0**	0
<b>2013-20</b>	<b>KNAB &amp; NEPLP</b>	<b>1</b>	<b>1</b>

\*\* There is no regulation in the law, Article 318 of the criminal law on abuse of official position can be formally applied.

Control over the illegal use of administrative resources (as well as party financial control) can be successfully implemented only if all three conditions are met simultaneously: a clear law, a powerful controlling body and demand in society.

## **Competence and tasks of the Corruption Prevention and Combating Bureau (KNAB)**

The KNAB is a body performing investigative field work.<sup>220</sup> The bureau controls whether political parties and unrelated persons comply with the restrictions on the amount of pre-election campaign expenses specified in the law on financing of political organisations (parties) since 2002, and the law on pre-election campaigning since 2012. Within its competence, the KNAB ascertains whether a person who publicly expresses support for

219. <https://delna.lv/lv/darbibas-jomas/publikacijas/>.

220. Law on Corruption Prevention and Combating Bureau, Section 2, paragraph 3, <https://likumi.lv/ta/en/en/id/61679>.

a political party during the pre-election period is not involved in covert pre-election campaigning, in other words, has not conducted a paid pre-election campaign whose payer is not specified contrary to the provisions of the law.

The KNAB conduct investigations and operational activities to detect criminal offences related to corruption and party funding. It takes decisions on the transfer of the excess amount of pre-election expenses to the state budget and decisions on compensation for losses for illegally used administrative resources.

### **Liability for non-compliance with the restrictions on the use of administrative resources<sup>221</sup>**

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1. Officials or employees of state authorities or authorities of derived public persons or capital companies, in which capital shares (stocks) belong to the state or a derived public person, as well as of capital companies in which capital shares (stocks), owned by one or more state capital companies or capital companies of derived public persons individually or in aggregate exceed 50%, who have used the financial resources or property of the relevant authorities unlawfully, by violating the restrictions on the use of administrative resources laid down in this law, shall bear liability laid down by the law for the non-compliance with the restrictions on the use of administrative resources in a pre-election campaign.
2. The financial resources and property used unlawfully by violating the restrictions on the use of administrative resources in a pre-election campaign laid down in this law shall be under the jurisdiction of the state, by presuming that by violating the restrictions on the use of administrative resources determined by the state, the official or employee has caused such harm to the state administrative order as is to be evaluated in financial terms and corresponds to the value of financial resources or property used in a prohibited manner.
3. In accordance with the provisions of this section, officials or employees referred to in this section have an obligation to reimburse the losses incurred.
4. The KNAB shall demand the reimbursement of the losses in accordance with the administrative procedure law by issuing an administrative act on the reimbursement of losses incurred and conducting activities for the execution of the administrative act as set out in the laws and regulations. The execution thereof shall be ensured through the bailiff.
5. The recovery of losses from officials or employees shall be carried out irrespective of whether the relevant officials or employees are brought to administrative liability for the infringement of the provisions of this law.

### **Competence and tasks of the National Electronic Media Council (NEPLP)**

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The NEPLP monitors whether electronic media comply with the constitution, the electronic media law, as well as the pre-election campaign law. One of the tasks of the NEPLP during the pre-election campaign period is to monitor whether the electronic media comply with the prohibitions and obligations imposed by law. During the pre-election campaign period (120 days before election day), the NEPLP monitors radio and television programmes and services.

The law on pre-election campaigning stipulates the obligation for electronic media, not less than 150 days before election day, to send the NEPLP a price list of pre-election campaign transmission time, including planned discounts and discount application criteria for the entire pre-election campaign period.

In accordance with the provisions of the law on pre-election campaigning, these price lists after their publication on the NEPLP website cannot be changed. If the electronic media have not sent the NEPLP a pre-election campaign transmission time price list, within the time limits specified in the pre-election campaign law, it is prohibited for this media to publish pre-election campaign materials during the pre-election campaign period.

To assist the media, the NEPLP has issued guidelines on the application of the electronic media law in the preparation of news, informative, documentary and discussion programmes, especially during the pre-election period.

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<sup>221</sup>. Pre-election Campaign Law, Section 34, <https://likumi.lv/ta/id/253543>.

### The year of the European Parliament and the Saeima elections, 2014

In preparation for the European Parliament elections in 2014, for the first time in Latvia, in order to ensure financial transparency and legitimacy of party campaigns, the KNAB<sup>222</sup> asked citizens for co-operation to monitor and control the party's election campaign for the entire period throughout Latvia.

A special e-mail address was set up for this purpose, so that any volunteer could become an active participant in the monitoring of the European Parliament's pre-election campaign.

In cases where there are signs of the use of administrative resources in the election campaign (for example, using cars or other technical equipment, or employees to organise or distribute election campaigns), the KNAB must immediately be informed by filling out a questionnaire on the website, calling the toll-free number, or writing by e-mail (including sending photos and videos).<sup>223</sup>

A month before the parliamentary elections, the KNAB also made an appeal to officials of various ranks. It draws attention to the fact that all civil servants, especially candidates for parliamentary deputies, must comply with restrictions and prohibitions on the use of administrative resources. The KNAB informs government officials that the use of administrative resources for planning and organising election campaigns will be considered in cases where:

1. the property of state and local government institutions is transferred to a person for free-of-charge use or at an obviously reduced price, and this property is used for planning, organisation, formation or placement of the pre-election campaign, except for the provisions of Chapter VI of the pre-election campaign law;<sup>224</sup>
2. employees of state and local government institutions, in addition to (or not performing) their direct duties during or after working hours, perform activities for remuneration paid by the state or local government which are not related to the performance of direct duties, but to political parties planning, organising, creating or placing pre-election campaigns;
3. state institutions and local self-government institutions use their resources to provide services free of charge or at a clearly lower price to political competitors for the purpose of planning, organising, creating or conducting election campaigns,
4. for example, the use of administrative resources includes:
  - the use of computers, copiers, scanners, or other office equipment or means of communication (the internet, telecommunications, etc.), if their use will be related to the organisation, creation and placement of pre-election campaigns;
  - any involvement of employees of a state or local government institution in activities that are not related to the tasks to be performed by the relevant institution, but which will ensure their direct or indirect participation in advertising a particular political party or its deputy candidate or if their activities are used for organisation, creation and deployment;
5. a situation shall be deemed to be an unlawful use of administrative resources if on the day of the election, as well as 30 days before the election, an interview is placed in any press release issued by a state or local government institution:
6. with candidates for deputies, with candidates nominated by political parties, governing bodies of an association of political parties for the position of prime minister or minister, as well as an article stating that the person mentioned is: a candidate for deputy; a candidate for the post of prime minister or minister nominated by the governing bodies of a political party or association of political parties;
7. a situation will be considered as illegal use of administrative resources if in the 30 days prior to the elections any advertising of state and local government institutions is performed for a fee (from the financial resources of the said institutions), if the relevant advertising is related to:
  - a candidate for deputy;
  - a candidate for prime minister;

222. <https://lvportals.lv/dienaskartiba/260924-ikviens-var-klut-par-knab-brivpratigo-paligu-2014>.

223. <https://juristavards.lv/zinas/265075-knab-atgadina-valsts-amatpersonam-par-administrativa-resursa-izmantosanas-aizliegumu/>.

224. <http://likumi.lv/doc.php?id=253543>.

- a candidate for the post of minister;
- a representation of a person associated with the party or a representation of the activities of such a candidate or person.<sup>225</sup>

According to the KNAB's annual report, this year has been special with two national elections. For violations related to non-compliance with the procedure for submission of election declarations and donation lists, 46 decisions have been made in administrative violation cases, within the framework of which fines were imposed on 39 parties.

## The year of the municipal elections, 2017

The law on pre-election campaigning, which explicitly prohibits the use of administrative resources, at the beginning of 2017 was in force for four years. However, only five people were punished during that time. The most severe penalty imposed so far has been €50 for placing a party's campaign on the municipality's website. The KNAB explains that so far the penalties have not been severe, because the regulation was new, but it could change: "if there is no response to any of our requests, we will, of course, take all this into account when applying this accountability mechanism."<sup>226</sup> These bans were introduced four years ago to make competition in the elections fairer and for parties in power not to be in a more favourable position. The penalty for the violation threatens the person who has decided to use the administrative resources for the campaign."

Thanks to the widespread calls and previous preparations, the KNAB received intense feedback from the population. Upon receipt of the materials, they were evaluated to ascertain whether an offence had been committed. "If even a particular resident has doubts whether there is a violation of the law or not – there is no need to doubt! Information must be sent to the Office." In total, the KNAB initiated more than 150 inspections of possible campaign violations, including the possible use of administrative resources.<sup>227</sup> This number indicates a high level of public interest.

According to the KNAB, in the first two months of February 2017, when the pre-election campaign period began, the KNAB had already initiated 10 inspections on the use of administrative resources for agitation, when politicians use municipal resources to glorify themselves. Examples are listed below.

1. One referred to several videos on the portal of Ventspils City Council, in which the leader of the local ruling parties praises himself and the candidates on his list, as well as criticises potential competitors in the upcoming municipal elections.<sup>228</sup> "The investigation has been started because we discovered that information containing hidden signs of agitation has been posted on the City Councils website. There were several videos posted on that portal."
2. The mayor of Jūrmala believes that even during the pre-election period, she can continue the usual practice of addressing voters in the city newspaper: "I don't think this is related to the elections, because I did it for all the years, not just four. Historically, we report events in the municipality ... and I do not think that this is related to the election campaign."
3. The mayor of Liepāja "is waiting" for the readers with a picture on the first page in the municipal edition of almost 35 000 copies. In his column, he condemns the "conspiracy theorists" and the city's "scoundrels" – namely, all those who questioned the economic justification for the resumption of the national airline airBaltic's regular flight to Liepāja in May.
4. The record holder in March is the mayor of Jekabpils. His picture was on five pages: on the cover, among other "thinkers", signing a contract, with some young people and with a group of children.
5. Riga City Council paid for time on a television programme in which the mayor of Riga, and at the same time the leader of the list of candidates, spoke about the news of the capital and provided daily advice. His social network accounts were also advertised, which are regularly used to campaign for his party list of candidates and against its competitors.
6. In the City Council, there was a practice that a local government employee sent pre-election campaign materials by e-mail from his/her workplace. The employee was prosecuted.

Municipal newspapers and websites are not the only promotion tools used by the mayor. In the last weekend before the elections several municipalities held city festivals, or even some kind of newly invented festivals.

<sup>225</sup>. [https://juristavards.lv/zinas/265075-\*knab-atgadina-valsts-amatpersonam-par-administrativa-resursa-izmantosanas-aizliegumu\*/](https://juristavards.lv/zinas/265075-<i>knab-atgadina-valsts-amatpersonam-par-administrativa-resursa-izmantosanas-aizliegumu</i>/).

<sup>226</sup>. <https://bnn.lv/knab-verte-pasvaldibas-resursu-izmantosanu-lemberga-partijas-slavinasanai-222059>.

<sup>227</sup>. <https://lvportals.lv/dienaskartiba/287590-informacija-par-prieksvelesanu-izdevumu-apmeriem-2017>.

<sup>228</sup>. <https://bnn.lv/knab-verte-pasvaldibas-resursu-izmantosanu-lemberga-partijas-slavinasanai-222059>.

## The year of the parliamentary elections, 2018

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Continuing the good practice of previous years, the KNAB again invited the public to help in these elections. For the first time in this election, it was proposed to use a smartphone application: "Report KNAB". The app was available for free download on the (Apple) App Store and Google Play, and a month before the election, mobile app users had already submitted 676 messages. The information sent in the application was easy to check, because the image of the violation (video file) also contained its location (GPS) and the time of its commission.

In addition, in order to prevent unfair competition between candidates for deputies, the KNAB especially emphasised that the use of administrative resources for pre-election campaigning is considered a misuse when:

- ▶ a candidate speaks or pays special attention to events organised by the institutions, and directly or indirectly promotes a vote for a candidate as a member of parliament or a list of elections;
- ▶ the municipality/institution, which is perceived by the public as closely related to a specific person who is a candidate for a deputy or other position, conducts an atypically wide-ranging, self-promoting campaign shortly before the election;
- ▶ institutional equipment (transport, office equipment), human resources, information at the disposal of institutions and other resources are used for pre-election campaigning;
- ▶ information about a candidate for deputy is placed on the websites of the institutions, and the publication is not directly related to the coverage of the activities of the said institution;
- ▶ shortly before the elections, the institution organises events whose costs and dates are not typical and similar events are not held outside the pre-election period;
- ▶ the pre-election campaign is placed in a newspaper or website issued by local governments.

To illustrate the situation, below are some examples.

1. During the pre-election period, government officials used the institution's vehicles to go to a meeting with potential voters. An examination of the facts revealed that the persons who used these vehicles were candidates for deputy and that the purpose of using the vehicles was to get to a specific place to conduct the campaign. Persons who decided to use these state resources for the purposes of pre-election campaigning were administratively punished. The persons also had to compensate the state for the damage caused.
2. During the pre-election period, public authorities posted a notice of a political party meeting with voters on a website. After evaluating the content of this advertisement, it was found that the announcement contained a pre-election campaign, because the announcement used the party's logo and symbolism. The statement was recognised as a pre-election campaign by the party concerned. This particular placement as well as similar announcements on the municipality website is prohibited, and the head of the municipality, who made the decision to publish this information, was administratively punished accordingly.
3. During the pre-election period, an employee of a public authority sent an e-mail from his work computer to other employees containing information about a specific political force. When evaluating the content of the e-mail, it was found that the text of the e-mail contains an invitation to vote for a political party and is recognised as a pre-election campaign. An employee of a state or local government institution may not use the technology of the relevant institution for the formation, coordination and dissemination of agitation. For this violation of law, the employee was held responsible by the administration, and the funds of the institution spent on campaigning were reimbursed to the state.
4. During the pre-election campaign, it was found that an article was published in a municipal newspaper with positive information about the political party and its representatives who also work in the municipality, which was considered a pre-election campaign. The head of the municipality was prosecuted for deciding to issue a newspaper.
5. During the pre-election campaign, it was found that a municipal institution issued a newspaper providing positive information about a deputy candidate, which is considered a pre-election campaign. The official responsible for publishing the newspaper and its contents was held accountable.

The NEPLP monitored commercial and public electronic media in the period from 1 September 2018 to 6 October 2018 (election day). In the distributed content of public electronic media programmes, the NEPLP did not identify any violations of the pre-election campaigning law. For this period, the NEPLP did not receive any complaints about possible violations of the law on pre-election campaigning.

## The year of the European Parliament elections, 2019

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The elections to the European Parliament were held on 25 April 2019. In April, the KNAB announced that it had already begun 19 inspections of possible violations of the election campaign.<sup>229</sup> One of the checks involved a suspected stealthy social media campaign. Seven were on the possible use of administrative resources for election campaigning, including the resources of Riga City Council.

An example follows. After inspections, it was found that during the pre-election campaign period of the European Parliament, one municipal authority sent out information letters to the population. The information contained in the letters expressed a negative attitude towards the political forces in power, which in turn can be considered as pre-election campaigning. The head of the relevant municipal institution was held responsible by the administration because he decided to send the letters and pay the expenses related to their dispatch.

The NEPLP monitored commercial and public electronic media in the period from 26 January 2019 to 25 May 2019 (election day). No submissions were received during this period regarding possible violations of the law on pre-election campaigning. Despite extensive NEPLP monitoring (more than 10 000 broadcast hours), only one administrative violation was identified. During the pre-election campaign period, the NEPLP also provided support to the KNAB in analysing the content of electronic media television and radio programmes.

### CONCLUSION

The Venice Commission Report states that the aim must be a political and legal culture with fair rules and politicians, especially officials, adhering to high ethical standards in all their activities.

It is no less important that public officials adhere to ethical principles not only during the pre-election period, but also in their daily work. Consequently, it is a question not only of the culture of politicians, but of the professionalism of the public administration and public officials, in general. Meanwhile, it is in the public interest to engage actively in a broad discussion of what these ethical principles are. The more information and discussions there are on this topic, the more difficult it is for politicians to violate ethical principles without receiving condemnation.

The experience of recent years shows that the awareness of politicians and the public about the unfair use of state and municipal resources in elections has significantly increased. However, the use of administrative resources in Latvia, although already clearly recognised as a problem, is to some extent relevant before each election.

Looking at the 30-year history of restricting the illegal use of administrative resources in Latvia, it can be stated that its place in the list of priorities has steadily increased. Initially, the main priorities were the development of the technical management of the elections, the strengthening of which brought other needs to the fore, including the need to prevent the illegal influence of administrative resources on election results.

Successful pre-election monitoring requires three conditions:

1. prohibitions, restrictions and penalties for infringements to be clearly stated in law;
2. the control of restrictions to be entrusted to an institution which has the appropriate capacity and resources (in Latvia, the KNAB, including the powers of the investigating authority: good intentions are not enough to prevent the misuse of administrative resources – strict rules and a strong controlling body are needed);
3. a demand by society for fair election campaigns.

Control over the illegal use of administrative resources (as well as party financial control) can be successfully implemented only if all three conditions are met simultaneously: a clear law, a powerful controlling body and demand in society.

Public demand is the best motivation, and public trust and co-operation is the best reward.

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229. [www.la.lv/knab-sacis-jau-19-parbaudes-par-prieksvlesanu-agitacijas-parkapumiem](http://www.la.lv/knab-sacis-jau-19-parbaudes-par-prieksvlesanu-agitacijas-parkapumiem).

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# Case law of the European Court of Human Rights with a particular emphasis on misuse of administrative resources

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*Vugar Fataliyev*

## INTRODUCTION

The right to free elections is enshrined in Article 3 of Protocol No. 1 to the Convention, which reads as follows: “The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature.”

Protocol No. 1 to the Convention was opened for signature in 1952 and entered into force in 1954. As of today, almost all the member states of the Council of Europe have ratified it, with two exceptions (Monaco and Switzerland). By the beginning of 2020, the Court delivered 99 judgments in respect of complaints under Article 3 of Protocol No. 1.

According to the Preamble to the Convention, fundamental human rights and freedoms are best maintained by “an effective political democracy”. Article 3 of Protocol No. 1 is accordingly of prime importance in the Convention system<sup>230</sup> and the rights guaranteed under it are crucial to establishing and maintaining the foundations of an effective and meaningful democracy governed by the rule of law.<sup>231</sup>

## GENERAL OVERVIEW OF ARTICLE 3 OF PROTOCOL NO. 1

### Principles of interpretation

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The Court adopts autonomous interpretation of the concepts used in the Convention and its protocols. As a result, the Convention’s definition of terms might differ from that in domestic legal provisions.<sup>232</sup>

In interpreting the provisions of the Convention and its protocols, the Court takes into account the ordinary meaning of the language used in its context as well as its object and purpose.<sup>233</sup>

The object and purpose of the Convention, which is an instrument for the protection of human rights, requires its provisions to be interpreted and applied in such a way as to make their stipulations not theoretical or illusory, but practical and effective.<sup>234</sup>

### Types of elections covered by Article 3 of Protocol No. 1

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The scope of Article 3 of Protocol No. 1 is limited to elections – held at reasonable intervals – determining only the choice of the legislature. The term “legislature” is not necessarily confined to the national parliament. It has to be interpreted in light of the constitutional structure of the state in question.<sup>235</sup> Furthermore, the Court has,

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230. See *Mathieu-Mohin and Clerfayt v. Belgium*, judgment of 2 March 1987, paragraph 47, Series A, No. 113.

231. See, among many other authorities, *Ždanoka v. Latvia [GC]*, No. 58278/00, paragraphs 98 and 103, ECHR 2006-IV, and *Yumak and Sadak v. Turkey [GC]*, No. 10226/03, paragraph 105, ECHR 2008.

232. See, *mutatis mutandis*, *Mihalache v. Romania [GC]*, Application No. 54012/10, paragraph 91, judgment of 8 July 2019.

233. See *Cumhuriyet Halk Partisi v. Turkey*, Application No. 48818/17, paragraph 38, decision of 21 November 2017.

234. See, among many other authorities, *United Communist Party of Turkey and Others v. Turkey*, 30 January 1998, paragraph 33, Reports 1998I, and *Lykourazos v. Greece*, No. 33554, paragraph 56, ECHR 2006-VIII.

235. See *Mathieu-Mohin and Clerfayt*, cited above, paragraph 53.

on a number of occasions, taken the view that the European Parliament forms part of the “legislature” within the meaning of Article 3 of Protocol No. 1.<sup>236</sup>

Generally speaking, the scope of Article 3 of Protocol No. 1 does not cover local elections, whether municipal<sup>237</sup> or regional.<sup>238</sup> The Court has found that the power to make regulations and by-laws, which is conferred on the local authorities in many countries, is to be distinguished from legislative power, which is referred to in Article 3 of Protocol No. 1, even though legislative power may not be restricted to the national parliament alone.<sup>239</sup>

The Court has concluded that this provision is not applicable to presidential elections in various countries.<sup>240</sup> Nor is it applicable to referendums.<sup>241</sup> However, in connection with referendums, the Court takes account of the diversity of electoral systems in the various states. It has thus not excluded the possibility that a democratic process described as a “referendum” by a contracting state could potentially fall within the ambit of Article 3 of Protocol No. 1. In order to do so the process would need to take place “at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature.”<sup>242</sup>

### Positive obligation and implied individual rights

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Article 3 of Protocol No. 1 differs from the other substantive provisions of the Convention and the protocols as it is phrased in terms of the obligation of the high contracting parties to hold elections which ensure the free expression of the opinion of the people rather than in terms of a particular right or freedom.

However, having regard to the preparatory work in respect of Article 3 of Protocol No. 1 and the interpretation of the provision in the context of the Convention as a whole, the Court has established that this provision also implies individual rights, comprising the right to vote (the “active” aspect) and the right to stand for election (the “passive” aspect).<sup>243</sup>

The rights in question are not absolute. There is room for “implied limitations” on those rights, and the contracting states are given a wide margin of appreciation in this sphere. The concept of “implied limitations” under Article 3 of Protocol No. 1 is of major importance for the determination of the relevance of the aims pursued by the restrictions on the rights guaranteed by this provision. Article 3 of Protocol No. 1 is not limited by a specific list of “legitimate aims” such as those enumerated in Articles 8 to 11 of the Convention.<sup>244</sup> The contracting states are therefore free to rely on an aim not contained in that list to justify a restriction, provided that the compatibility of that aim with the principle of the rule of law and the general objectives of the Convention is proved in the particular circumstances of a given case.

This also means that the Court does not apply the traditional tests of “necessity” or “pressing social need” which are used in the context of Articles 8 to 11 of the Convention. While assessing restrictions on electoral rights, the Court has focused mainly on two criteria: whether there has been arbitrariness or a lack of proportionality, and whether the restriction has interfered with the free expression of the opinion of the people. It also has to satisfy itself that the limitations do not curtail the rights in question to such an extent as to impair their very essence and deprive them of their effectiveness.<sup>245</sup>

Stricter requirements may be imposed on eligibility to stand for election (the “passive” aspect) than is the case for eligibility to vote (the “active” aspect). While the test relating to the “active” aspect usually includes a wider assessment of the proportionality of the statutory provisions disqualifying a person or a group of persons from the right to vote, the Court’s test in relation to the “passive” aspect is more limited: it is confined largely

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236. See *Matthews v. the United Kingdom* [GC], No. 24833/94, paragraphs 45-54, ECHR 1999-I, and *Occhetto v. Italy*, Application No. 14507/07, paragraph 42, decision of 12 November 2013.

237. See *Xuereb v. Malta* Application No. 52492/99, decision of 15 June 2000, and *Salleras Llinares v. Spain*, Application No. 52226/99, decision of 12 October 2000.

238. See *Malarde v. France*, Application No. 46813/99, decision of 5 September 2000.

239. See *Mólka v. Poland*, Application No. 56550/00, decision of 11 April 2006.

240. See *Guliyev v. Azerbaijan*, Application No. 35584/02, decision of 27 May 2004; *Boškoski v. “the former Yugoslav Republic of Macedonia”*, Application No. 11676/04, decision of 2 September 2004; and *Krivobokov v. Ukraine*, Application No. 38707/04, decision of 19 February 2013.

241. See *Cumhuriyet Halk Partisi* (dec.), cited above, paragraph 38.

242. See *Moohan and Gillon v. the United Kingdom*, Application Nos. 22962/15 and 23345/15, paragraph 42, decision of 13 June 2017.

243. See *Mathieu-Mohin and Clerfayt*, cited above, paragraphs 48-51, and *Ždanoka*, cited above, paragraph 102.

244. See *Ždanoka*, cited above, paragraph 115, and *Sitaropoulos and Giakoumopoulos v. Greece* [GC], Application No. 42202/07, paragraph 64, ECHR 2012.

245. See *Mathieu-Mohin and Clerfayt*, cited above, paragraph 52; *Ždanoka*, cited above, paragraphs 104 and 115; and *Yumak and Sadak*, cited above, paragraph 109 (iii) and (iv).

to verification of the absence of arbitrariness in the domestic procedures leading to disqualification of an individual from standing as a candidate.<sup>246</sup>

## Electoral systems and organisation of elections

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Article 3 of Protocol No. 1 was not conceived as a code on electoral matters, designed to regulate all aspects of the electoral process. There are numerous ways of organising and running electoral systems and a wealth of differences, *inter alia* in historical development, cultural diversity and political thought within Europe, which are for each contracting state to mould into its own democratic vision.<sup>247</sup>

The contracting states enjoy considerable latitude to establish rules within their constitutional order governing parliamentary elections and the composition of the parliament, and the relevant criteria may vary according to the historical and political factors peculiar to each state.<sup>248</sup> Therefore, for the purposes of applying Article 3 of Protocol No. 1, any electoral legislation must be assessed in the light of the political evolution of the country concerned, so that features that would be unacceptable in the context of one system may be justified in the context of another.<sup>249</sup>

That being so, the Court has confirmed that the common principles of the European constitutional heritage, which form the basis of any genuinely democratic society, enshrine within themselves the right to vote in terms of the opportunity to cast a vote in universal, equal, free, secret and direct elections held at regular intervals. In this setting, free elections are to be seen as both an individual right and a positive obligation of the state, comprising a number of guarantees starting from the right of the voters to form an opinion freely, and extending to careful regulation of the process in which the results of voting are ascertained, processed and recorded.<sup>250</sup>

## Electoral disputes and domestic appeal systems

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Article 3 of Protocol No. 1 also contains certain positive obligations of a procedural character, in particular requiring the existence of a domestic system for the effective examination of individual complaints and appeals in matters concerning electoral rights.<sup>251</sup> The existence of such a system is one of the essential guarantees of free and fair elections. Such a system ensures the effective exercise of the rights to vote and to stand for election, maintains general confidence in the state's administration of the electoral process and constitutes an important device at the state's disposal in achieving the fulfilment of its positive duty under Article 3 of Protocol No. 1 to hold democratic elections. Indeed, the state's solemn undertaking under that provision and the individual rights guaranteed by it would be illusory if, throughout the electoral process, specific instances indicative of failure to ensure democratic elections were not open to challenge by individuals before a competent domestic body capable of effectively dealing with the matter.<sup>252</sup>

For the examination of appeals to be effective, the decision-making process concerning electoral disputes must be accompanied by adequate and sufficient safeguards ensuring that any arbitrariness can be avoided. In particular, the decisions in question must be taken by a body which can provide sufficient guarantees of its impartiality. The discretion enjoyed by the body concerned must not be excessive; it must be circumscribed with sufficient precision by the provisions of domestic law. The procedure must be such as to guarantee a fair, objective and sufficiently reasoned decision, and the examination of election-related appeals should be devoid of excessive formalism, in particular where the admissibility of appeals or evidence is concerned.<sup>253</sup>

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246. See *Ždanoka*, cited above, paragraph 115, and *Melnichenko v. Ukraine*, Application No. 17707/02, paragraph 57, ECHR 2004-X.

247. See *Hirst v. the United Kingdom (No. 2)* [GC], Application No. 74025/01, paragraph 61, ECHR 2005-IX.

248. See *Tănase v. Moldova* [GC], Application No. 7/08, ECHR 2010.

249. See *Mathieu-Mohin and Clerfayt*, cited above, paragraph 54, and *Podkolzina v. Latvia*, Application No. 46726/99, paragraph 33, ECHR 2002-II.

250. See *Davydov and Others v. Russia*, Application No. 75947/11, paragraph 285, 30 May 2017.

251. See *Namat Aliyev v. Azerbaijan*, Application No. 18705/06, paragraph 81 et seq., 8 April 2010, and *Davydov and Others*, cited above, paragraph 274.

252. See *Namat Aliyev*, cited above, paragraph 81; *Davydov and Others*, cited above, paragraph 274; and *Mugemangango v. Belgium* [GC], Application No. 310/15, paragraph 69, judgment of 10 July 2020.

253. See *Podkolzina*, cited above, paragraph 35; *Kovach v. Ukraine*, Application No. 39424/02, paragraphs 54-55, ECHR 2008; *Kerimova v. Azerbaijan*, Application No. 20799/06, paragraphs 44-45, judgment of 30 September 2010; *Riza and Others v. Bulgaria*, Application Nos. 48555/10 and 48377/10, paragraphs 143, judgment of 13 October 2015; *Namat Aliyev*, cited above, paragraphs 76-93; and *Mugemangango*, cited above, paragraph 70.

## The Court's subsidiary role and varying levels of scrutiny applied

The Court is not required under Article 3 of Protocol No. 1 to the Convention to verify whether every particular alleged irregularity amounted to a breach of domestic electoral law. It is not in a position to assume a fact-finding role by attempting to determine whether all or some election irregularities alleged by applicants have taken place and, if so, whether they amounted to irregularities capable of thwarting the free expression of the people's opinion. Owing to the subsidiary nature of its role, the Court needs to be wary of assuming the function of a first-instance tribunal of fact, where this is not rendered unavoidable by the circumstances of a particular case. Its task is nevertheless to satisfy itself, from a more general standpoint, that the respondent state has complied with its obligation to hold elections under free and fair conditions and has ensured that individual electoral rights were exercised effectively.<sup>254</sup>

However, in cases where it is alleged that the breach of the domestic legal rules was such that it seriously undermined the legitimacy of the election as a whole, Article 3 of Protocol No. 1 to the Convention requires the Court to assess whether such a breach has taken place and has resulted in a failure to hold free and fair elections. In doing so, the Court may have regard to whether an assessment in this respect has been made by the domestic courts; if it has been made, the Court may review whether or not the domestic courts' finding was arbitrary.<sup>255</sup>

Thus the Court's level of scrutiny in a given case depends on the aspect of the right to free elections. Tighter scrutiny should be reserved for any departures from the principle of universal suffrage, but a broader margin of appreciation could be afforded to states where the measures prevented candidates from standing for elections. A still less stringent scrutiny would apply to the more technical stage of vote counting and tabulation.<sup>256</sup>

A mere mistake or irregularity in the electoral process, and in particular at the later and more technical stages of it, would not, per se, signify unfairness of the elections, if the general principles of equality, transparency, impartiality and independence of the electoral administration were complied with. The concept of free elections would be put at risk only if there is evidence of procedural breaches that would be capable of thwarting the free expression of the opinion of the people, for instance through gross distortion of the voters' intent, and where such complaints receive no effective examination at the domestic level.<sup>257</sup> Accordingly, in order to attract the scrutiny of the Court of the manner in which election-related complaints were dealt at the domestic level, an applicant must demonstrate that those complaints were "serious and arguable".<sup>258</sup>

### MISUSE OF ADMINISTRATIVE RESOURCES IN ELECTIONS

As the Court's case law presently stands, no clearly defined sub-section of the case law on "misuse of administrative resources" in elections can be delineated. In a few elections-related cases the general issue of "misuse of administrative resources" can be said to have clearly been the crux of the complaint raised before the Court (for example, *Communist Party of Russia and Others v. Russia*, described below). However, the majority of complaints lodged with the Court under Article 3 of Protocol No. 1 have usually concerned, more narrowly, concrete instances of restrictions on individual electoral rights. Nevertheless, in a number of those cases, various matters relating to the use of administrative resources in elections have been implied by, or expressly raised as part of, the complaint and as such addressed by the Court, or can otherwise be discerned and/or inferred from the Court's analysis in those cases. Below is a summary of a selection of the relevant cases.

In *Gitonas and Others v. Greece*<sup>259</sup> domestic legislation precluded certain categories of holders of public office, including salaried public servants and members of staff of public-law entities and public undertakings, from standing for election and being elected in any constituency where they had performed their duties for more than three months in the three years preceding the elections. Moreover, the disqualification would stand notwithstanding a candidate's prior resignation, unlike the position with certain other categories of public servants. The Court found that this measure served a dual purpose: to ensure that candidates of different

254. See *Namat Aliyev*, cited above, paragraph 77; *Gahramanli and Others v. Azerbaijan*, Application No. 36503/11, paragraph 72, decision of 8 October 2015; *Davydov and Others*, cited above, paragraph 276; and *Mugemangango*, cited above, paragraph 71.

255. See *Kovach*, cited above, paragraph 55; *Karimov v. Azerbaijan*, Application No. 12535/06, paragraph 43, judgment of 25 September 2014; and *Davydov and Others*, cited above, paragraph 277.

256. See *Davydov and Others*, cited above, paragraph 286.

257. See *Davydov and Others*, cited above, paragraph 287, and *Mugemangango*, cited above, paragraph 72.

258. See *Namat Aliyev*, cited above, paragraph 78; *Gahramanli and Others*, cited above, paragraph 73; *Davydov and Others*, cited above, paragraph 289 et seq.; and *Mugemangango*, cited above, paragraph 78 et seq.

259. See *Gitonas and Others v. Greece*, judgment of 1 July 1997, *Reports of Judgments and Decisions*, 1997-IV.

political persuasions enjoyed equal means of influence, since holders of public office may on occasion have an unfair advantage over other candidates, and to protect the electorate from pressure from public officials.

*Ahmed and Others v. the United Kingdom*<sup>260</sup> concerned legislation restricting the participation of specific categories of local government officers in certain forms of political activity, such as participation in certain types of elections as candidates, election agents and canvassers, simultaneously holding certain types of offices in political parties, and publicly campaigning for political parties. The applicants complained of the impact which the restrictions had on their rights to stand for election at local, national and European levels and to take part in electoral campaigns. In their view, these restrictions were such as to impair the very essence of the free expression of the opinion of the people in the choice of legislature by limiting without justification the electorate's choice of candidates. However, the Court noted that the aim of the restrictions imposed on the applicants' right to contest seats at elections was to secure their political impartiality. That aim was considered to be legitimate for the purposes of restricting the exercise of the applicants' right to stand for election. The restrictions did not limit the very essence of that right having regard to the fact that they only operated for as long as the persons concerned occupied politically restricted posts. Any of the applicants wishing to run for elected office was at liberty to resign from his or her post.

In *Partija "Jaunie Demokrāti" and Partija "Mūsu Zeme" v. Latvia*,<sup>261</sup> on the question concerning the equality of airtime granted to candidates, the Court stated that, while Article 3 of Protocol No. 1 enshrined the principle of equal treatment of all citizens in the exercise of their electoral rights, it did not guarantee, as such, any right for a political party to be granted airtime on radio or television during the electoral campaign. However, an issue might indeed arise in exceptional circumstances, for example, if in the run-up to an election one party were denied any kind of party political broadcast while other parties were granted slots for that purpose.

In *Communist Party of Russia and Others v. Russia*<sup>262</sup> the Court addressed the question as to whether the state had a positive obligation under Article 3 of Protocol No. 1 to ensure that coverage by regulated media, including state-owned and state-affiliated television channels, was objective and compatible with the spirit of "free elections", even in the absence of direct evidence of deliberate manipulation.

In particular, during the electoral campaign for the 2003 parliamentary elections, the parties participating in it received a certain amount of free airtime on television channels for "electoral campaigning". In addition, parties and candidates could buy a certain amount of paid airtime for campaigning on an equal footing with the others. However, the applicants noted that, besides providing airtime to each party for such "campaigning", all channels were also involved in media coverage of the elections, including reporting on the elections in various news items, analytical programmes, talk shows and so on. The applicants maintained that this media coverage was unfair and hostile to opposition parties and candidates, and that in the guise of media coverage these television channels in fact campaigned for or displayed favouritism to the ruling party, by allocating more time to the media coverage of that party, by disseminating information which was not neutral, in other words, which was more "positive" compared to other parties, and by broadcasting interviews and news items containing tacit campaigning by high-level officials. The applicants asserted that such coverage was a result of a political manipulation and that it affected public opinion to a critical extent.

On the issue of the alleged manipulation of the media, bearing in mind its subsidiary role, the Court examined in detail the decisions of the domestic courts, which found that the applicants had failed to show a causal link between the media coverage and the results of the elections and that the journalists covering elections or political events had been independent in choosing the events and persons to report on. The Court noted that, indeed, the applicants had not adduced any direct proof of abuse by the government of their dominant position in respect of the television companies concerned, such as any complaints by journalists of undue pressure by the government or their superiors. The domestic courts' conclusions did not appear "arbitrary or manifestly unreasonable".

The next issue examined by the Court was whether the state was under any positive obligation under Article 3 of Protocol No. 1 to ensure that media coverage by the state-controlled mass media was balanced and compatible with the spirit of "free elections", even where no direct proof of deliberate manipulation was found. In this respect, the Court held that the state was under an obligation to intervene in order to open up the media to different viewpoints and that, all things considered, the arrangements which existed during the elections in question guaranteed the opposition parties and candidates at least minimum visibility on television. As to the

260. See *Ahmed and Others v. the United Kingdom*, judgment of 2 September 1998, *Reports of Judgments and Decisions*, 1998-VI.

261. See *Partija "Jaunie Demokrāti" and Partija "Mūsu Zeme" v. Latvia*, Application Nos. 10547/07 and 34049/07, decision of 29 November 2007.

262. See *Communist Party of Russia and Others v. Russia*, Application No. 29400/05, judgment of 19 June 2012.

allegation that the state should have ensured the neutrality of the coverage, the Court, reiterating its repeated warnings against prior restraints on free speech, stressing that in the sphere of political debate wide limits of criticism were acceptable, and having had regard to all materials of the case, considered that the applicants' claims in this respect had not been sufficiently substantiated. While the impugned arrangements had probably not secured *de facto* equality, it could not be considered established that the state had failed to meet its positive obligations in this area to such an extent as to amount to a violation of Article 3 of Protocol No. 1.

In *Georgian Labour Party v. Georgia*,<sup>263</sup> in which the Court examined, *inter alia* the method of composition of Georgian electoral commissions at the relevant time, it underlined the necessity to maintain the political neutrality of those civil servants, judges and other persons in state service who exercise public authority, so as to ensure that all citizens receive equal and fair treatment that is not vitiated by political considerations. As a corollary to that principle, it was particularly important for an agency in charge of electoral administration to function in a transparent manner and to maintain impartiality and independence from political manipulation.

Noting that there was no uniform system for the composition and functioning of electoral administrative bodies in Europe and that in practice there could be no ideal or uniform system to guarantee checks and balances between the different state powers within a body of electoral administration, the Court nevertheless observed that a particularly high proportion of commissions' members appointed by the president and his party could be problematic. So long as the presidential party was simultaneously running in the repeat parliamentary election, it was not implausible that other candidate parties, including the applicant party, might have been placed in an unfavourable position by the presidential majority in the electoral administration. Ultimately, the *raison d'être* of an electoral commission was to ensure the effective administration of free and fair polls in an impartial manner, which would be impossible to achieve if that commission became another forum for political struggle between election candidates.<sup>264</sup> Nevertheless, the above, on its own, was not sufficient to establish that there was a violation of Article 3 of Protocol No. 1 in a particular case: in addition, an applicant party or candidate should submit evidence of specific incidents of abuse of power or electoral fraud.

In *Tahirov v. Azerbaijan*,<sup>265</sup> the applicant, an opposition candidate, complained of a number of irregularities that had allegedly taken place on election day, including instances of undue interference in the voting process by officials of the local executive authority and persons affiliated with the candidate from the ruling party. He argued that his domestic complaints in this regard, made to the electoral commissions and courts, had not been effectively examined, which was in part due to the alleged inherently biased composition of the electoral commissions. On the latter question, the Court noted that, indeed, and similarly to the case described above, the proportion of pro-ruling-party members in each electoral commission was high and was one of the systemic factors affecting the effectiveness of the examination of election-related complaints on the electoral commission level. Nevertheless, the Court decided that the case did not require it to determine whether the method of composition of the electoral commissions was, in itself, compatible with Article 3 of Protocol No. 1 and considered that it fell to the Committee of Ministers of the Council of Europe to follow up on the implementation of general measures and evolution of the system of electoral administration in line with the Convention requirements during the process of supervision of the execution of the Court's judgments. Instead, the Court proceeded to examine the applicant's complaint from the standpoint of the respondent state's compliance with its positive obligation of a procedural character, requiring it to ensure the effective examination of individual complaints concerning electoral matters. On the facts of the case, it found that the conduct of the electoral commissions and courts in this particular case, and their respective decisions, revealed an apparent lack of a genuine concern for combating the alleged instances of electoral fraud.

In *Kerimova v. Azerbaijan*,<sup>266</sup> the applicant, representing the political opposition, was a winning candidate in a single-seat constituency according to preliminary voting results. However, the CEC invalidated the election results in the constituency after finding that election results records had been tampered with, making it "impossible to determine the will of the voters". The applicant argued that, while there had indeed been tampering, the changes in the results records had in effect reduced the number of votes recorded in her favour and had increased those cast in favour of the candidate immediately after her (representing the ruling party) and that she remained the winner even despite the changes. Her domestic appeals were unsuccessful. In the meantime, two election officials were convicted of having falsified the election results in the applicant's constituency, for the benefit of other candidates.

263. See *Georgian Labour Party v. Georgia*, Application No. 9103/04, ECHR 2008.

264. These principles were also reiterated and further elaborated on in *Mugemangango*, cited above, paragraph 97 et seq.

265. See *Tahirov v. Azerbaijan*, Application No. 31953/11, judgment of 11 June 2015.

266. See *Kerimova v. Azerbaijan*, Application No. 20799/06, judgment of 30 September 2010.

The Court noted that, even despite the fact that the irregularities had been made in an attempt to inflate the number of votes for the applicant's opponents, the election results had still showed the applicant as a clear winner. Yet the election authorities had not given adequate reasons to explain why the alleged breaches had altered the outcome of the elections to a degree necessary to invalidate them. Nor had they even considered the possibility of recounting the votes. The examination of the applicant's appeals had therefore been ineffective, because the relevant requirements of the Electoral Code had not been taken into account and the primary evidence had not been adequately examined. As a result, the authorities' inadequate approach had brought about a situation where the election process in the entire electoral constituency had been single-handedly sabotaged by two electoral officials who had abused their position by making unlawful changes to results records. By invalidating the election results because of those officials' actions, the national authorities had essentially helped them to obstruct the election. Consequently, the decision to invalidate the election had revealed a lack of concern for the integrity and effectiveness of the electoral process which could not be considered compatible with the spirit of the right to free elections.

## ADMINISTRATIVE RESOURCES AND ELECTIONS: INTERRELATION WITH OTHER CONVENTION PROVISIONS

The rights guaranteed under Article 3 of Protocol No. 1 are interdependent with a number of other rights guaranteed under the Convention and, therefore, many cases set in an election-related context are examined under other Convention provisions.

In a number of cases concerning Article 10 of the Convention (Freedom of expression), the Court had emphasised the close relationship between the right to free elections and freedom of expression. For example, in *Bowman v. the United Kingdom*, a case concerning prosecution of an abortion campaigner after she had distributed leaflets prior to the general election, the Court found that free elections and freedom of expression, particularly freedom of political debate, together formed the bedrock of any democratic system. The two rights are interrelated and operate to reinforce each other: for example, 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". For this reason, it is particularly important in the period preceding an election for opinions and information of all kinds to be permitted to circulate freely. 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.<sup>267</sup> The same principles were reiterated by the Court in a number of other Article 10 cases.<sup>268</sup>

Numerous cases concerning election campaigns have been examined under Article 10. For example, in *TV Vest AS and Rogaland Pensjonistparti v. Norway*<sup>269</sup> the Court found a violation of Article 10 on account of a fine imposed on a television channel for broadcasting an advertisement for a small political party (the Pensioners Party), in breach of legislation prohibiting any political advertising on television. The Court was prepared to accept that the lack of European consensus in this area spoke in favour of granting states greater discretion than would normally be allowed in decisions with regard to restrictions on political debate. The rationale for the statutory prohibition on television broadcasting of political advertising had been, as stated by the Supreme Court, the assumption that allowing the use of such a powerful and pervasive form and medium of expression was likely to reduce the quality of political debate generally. Complex issues could easily be distorted, and financially powerful groups would get greater opportunities for marketing their opinions. However, the Pensioners Party did not come within the category of parties or groups that were the primary targets of the prohibition. On the contrary, it belonged to a category which the ban in principle had intended to protect. Furthermore, in contrast to the major political parties, which had been given wide edited television coverage, the Pensioners Party had hardly been mentioned. Therefore, paid advertising on television had been the sole means for that party to get its message across to the public through that type of medium. Having been denied this possibility under the law, that party had moreover been put at a disadvantage in comparison to the major parties. Finally, the specific advertising at issue, namely a short description of the party and a call to vote for it in the forthcoming elections, had not contained elements apt to lower the quality of political debate or offend various sensitivities. In those circumstances, the fact that television had a more immediate and powerful effect than other media could not justify the prohibition and fine imposed on TV Vest.

267. See *Bowman v. the United Kingdom*, judgment of 19 February 1998, paragraphs 42-43, *Reports of Judgments and Decisions*, 1998-I.

268. See, for example, *Orlovskaya Iskra v. Russia*, Application No. 42911/08, paragraphs 110-111, judgment of 21 February 2017, and *Magyar Kétfarkú Kutya Párt v. Hungary* [GC], Application No. 201/17, paragraph 100, judgment of 20 January 2020.

269. See *TV Vest AS and Rogaland Pensjonistparti v. Norway*, Application No. 21132/05, ECHR 2008.

In *Republican Party of Russia v. Russia*<sup>270</sup> the Court examined, among other issues, a complaint under Article 11 of the Convention (Freedom of assembly and association) concerning the dissolution of the applicant party for its failure to comply with two statutory requirements, including the requirement of minimum membership. In this connection, the Court rejected the government's submission that the applicant party could have reorganised itself into a public association, observing that this would have deprived it of an opportunity to stand for election, which was one of its main aims. As to the requirement for political parties to have a minimum number of members, it was noted that the threshold set under Russian law was the highest in Europe. The applicant party, which had existed and participated in elections since 1990, was dissolved in 2007 following a drastic five-fold increase in the minimum membership threshold, which had jumped from 10 000 to 50 000 members. The domestic authorities had argued that such a high threshold had been necessary both to avoid disproportionate expenditure from the state budget during electoral campaigns and to promote the stability of the political system by avoiding excessive parliamentary fragmentation. As regards the question of expenditure, the Court noted that the existence of a certain number of smaller political parties would not have represented a considerable financial burden on the state treasury since under domestic law only those parties that had taken part in the elections and obtained more than 3% of the votes cast were entitled to public financing. As to the aim of avoiding excessive parliamentary fragmentation, this was achieved by the 7% electoral threshold required in Russia and the rule that only parties that had seats in the state Duma or had submitted a certain number of signatures could nominate candidates for elections. Accordingly, the Court was not persuaded that additional restrictions such as an unreasonably high minimum membership requirement were necessary. Such a requirement would be justified only if it allowed the unhindered establishment and functioning of a plurality of political parties representing the interests of various, even minor, population groups and ensuring them access to the political arena.

Certain election-related complaints raise issues of discrimination in the enjoyment of electoral rights, and the Court has therefore examined a number of these complaints under Article 14 of the Convention (Prohibition of discrimination) in conjunction with Article 3 of Protocol No. 1. For example, in two cases against Romania, the applicants complained about legislation imposing an additional eligibility condition applicable solely to national minority organisations not already represented in parliament, thus arguably giving an advantage to the incumbent organisations already represented in parliament. The Court accepted that the law in question pursued a legitimate aim of ensuring that organisations not yet represented in parliament were properly represented and of eliminating frivolous candidates. However, in *Danis and Association of Ethnic Turks v. Romania*<sup>271</sup> the law imposing the additional criterion had been enacted just a few months before the elections, with the result that it had been objectively impossible for the applicants to fulfil it. In this connection, it is worth noting that stability of the law is a crucial element for the credibility of electoral processes. In *Cegolea v. Romania*<sup>272</sup> the procedure for obtaining the additional criterion did not afford sufficient safeguards against arbitrariness and lacked effective judicial scrutiny over discretionary powers of the executive authorities.

## CONCLUSION

The Court's case law under Article 3 of Protocol No. 1 is gradually expanding and now reaches into many areas of the electoral process. While the text of Article 3 of Protocol No. 1 provides for the states' positive obligation to secure free elections to the legislature at reasonable intervals, the Court has read into this provision the individual rights to vote and to stand for elections, both of which may be subject to "implied limitations". In recent years, the Court's case law has evolved to offer guarantees of a procedural character requiring the existence of a domestic system for the effective examination of individual complaints and appeals concerning the conduct and outcome of elections. These developments have significantly enhanced the effectiveness of Article 3 of Protocol No. 1.

This trend of case law expansion can also be seen from the application of Article 3 of Protocol No. 1 and the interrelated Convention provisions to various issues concerning the use of administrative resources in elections, such as, *inter alia* state regulation of media coverage of elections, requirements concerning the neutrality of civil servants in elections, and the relationship between the rights to free elections and to freedom of expression. The Convention has often been described as a "living instrument", with its interpretation subject to constant evolution in the light of "present-day conditions". Naturally, the Court's case law concerning various new issues relating to the use (or misuse) of administrative resources in elections is also susceptible to further development and evolution.

270. See *Republican Party of Russia v. Russia*, Application No. 12976/07, judgment of 12 April 2011.

271. See *Danis and Association of Ethnic Turks v. Romania*, Application No. 16632/09, judgment of 21 April 2015.

272. See *Cegolea v. Romania*, Application No. 25560/13, judgment of 24 March 2020.

# Appendix I

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## **VENICE COMMISSION AND OSCE/ODIHR, JOINT GUIDELINES ON PREVENTING AND RESPONDING TO THE MISUSE OF ADMINISTRATIVE RESOURCES DURING ELECTORAL PROCESSES (CDL-AD (2016)004)**



Strasbourg, Warsaw, 14 March 2016

**CDL-AD(2016)004**  
Or. Engl.

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**EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW**  
**(VENICE COMMISSION)**

**OSCE OFFICE FOR DEMOCRATIC INSTITUTIONS AND HUMAN RIGHTS**  
**(OSCE/ODIHR)**

### **JOINT GUIDELINES**

### **FOR PREVENTING AND RESPONDING TO THE MISUSE OF ADMINISTRATIVE RESOURCES DURING ELECTORAL PROCESSES**

**Adopted by the Council of Democratic Elections  
at its 54<sup>th</sup> meeting (Venice, 10 March 2016)**

**and by the Venice Commission  
at its 106<sup>th</sup> Plenary Session (Venice, 11-12 March 2016)**

**on the basis of comments by**

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## I. Introduction and background

1. The Guidelines follow the Venice Commission's Report on the misuse of administrative resources during electoral processes<sup>1</sup> and the conclusions of the 11<sup>th</sup> European Conference of Electoral Management Bodies that dealt with this topic on 26-27 June 2014 in Helsinki. In these conclusions,<sup>2</sup> 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". The guidelines also build upon the OSCE/ODIHR's election observation findings and recommendations in respect of the misuse of administrative resources.

2. The Guidelines are aimed at assisting national lawmakers and other authorities in adopting laws<sup>3</sup> and initiating concrete measures to prevent and act against the misuse of administrative resources during electoral processes. Therefore, they are not intended as a set of hard rules.

3. In order to fulfil their purposes, such laws and measures must provide the conditions to:

- promote neutrality and impartiality in the electoral process;
- promote equality of treatment between different candidates and parties in relation to administrative resources;
- level the playing field between all stakeholders, including incumbent candidates; and
- safeguard against the potential misuse of administrative resources for partisan purposes.

4. In Europe, "after more than twenty years of election observation in Europe and more than ten years of legal assistance to the Council of Europe member states, many improvements were observed regarding electoral legislation and practice. However, the practical implementation of electoral laws and laws related to political parties (including financing of political parties and electoral processes) remains problematic up to a certain extent. Today, one of the most important and recurrent challenges observed in Europe and beyond, is the misuse of administrative resources, also called public resources, during electoral processes. This practice is an established and widespread phenomenon in many European countries, including countries with a long-standing tradition of democratic elections. Several generations of both incumbents and civil servants consider this practice as normal and part of an electoral process. They seem even not to consider such practice as illegitimate action *vis-à-vis* challengers in elections. It may be consequently harder for these challengers to take advantage of administrative resources. This phenomenon seems part of an established political culture and keeps a relation not only with practices potentially regarded as illegal but also with the ones caused by the lack of ethical standards related to the electoral processes of the public authorities in office."<sup>4</sup>

<sup>1</sup> Adopted by the Council for Democratic Elections at its 46<sup>th</sup> meeting (Venice, 5 December 2013) and by the Venice Commission at its 97<sup>th</sup> plenary session (Venice, 6-7 December 2013; [CDL-AD\(2013\)033](#)).

<sup>2</sup> [CDL-EL\(2014\)001syn](#).

<sup>3</sup> These Guidelines refer to laws and legal frameworks that have to be understood as any domestic texts, from Constitutions to Codes and sub-legal rules. The legal framework covers electoral laws as well as laws imposing a legal liability (including administrative and criminal sanctions).

<sup>4</sup> 2013 Report, para. 1. As defined in the Convention on Access to Official Documents, Article 1(2)a i, "Public authorities' means:

1. government and administration at national, regional and local level;
2. legislative bodies and judicial authorities insofar as they perform administrative functions according to national law;
3. natural or legal persons insofar as they exercise administrative authority. [...]"

This definition of 'public authorities' is the one retained in the present Guidelines throughout the document.

5. Such problems are regularly addressed by international organisations. Within the OSCE region it has been observed that “failures to provide for a level playing field among electoral contestants and the abuse of state resources in favour of incumbents caused concern in several States, particularly when such abuse amounted to intimidation of voters”.<sup>5</sup>

6. Similarly, GRECO has observed on different occasions, during the country evaluations conducted to date concerning transparency of political financing (and to a lesser extent, concerning the prevention of corruption of parliamentarians), a variety of situations where administrative resources are being misused. This concerns property and means owned at State level or by local authorities (human, financial, material and technical means), especially – but not only – in the context of electoral processes. It was also occasionally observed that funds managed by the ministries are particularly exposed to risks of misuse, including for political financing purposes, where elected authorities have excessive discretion or where special statutory rules provide for derogations to the general transparency and accountability requirements. Depending on the seriousness of the problem and the overall situation and context, GRECO has sometimes issued recommendations to the country concerned. Examples include “to take appropriate measures to ensure that the regulation of party and electoral campaign financing is not undermined by the misuse of public office” or “to provide clear criteria on the use of public facilities for party activity and election campaign purposes”.

7. The absence of clear demarcation lines specifying that the in-kind resources and – where these exist – financial means allocated to political groups in parliament are meant to support exclusively the work of the legislature, has also occasionally led to questionable contributions from such groups to parties and candidates before, during or after elections (to co-finance certain events or to repay certain debts). Moreover, the misuse of administrative resources may be widespread even where the law provides for a ban on donations from public institutions and public companies, as well as from institutions and companies with State capital share. In some post-communist countries, the widespread misuse of administrative resources may reflect a persisting lack of distinction between the State and the governing party. This also explains occasional allegations of widespread abuse of the public media and of public facilities in connection with electoral campaigns, even where equal and unbiased coverage of political parties and of (outgoing) candidate parliamentarians by the State-owned media is guaranteed by existing detailed legal provisions. Controversies have also been occasionally triggered at domestic level by situations where the ruling parties manage to attract additional indirect financial resources, for instance by arranging for public authorities to purchase in the newspapers under their control substantial amounts of advertisement space (or by making fictitious contracts with a similar purpose).

8. Apart from the 2013 Report on the misuse of administrative resources during electoral processes, the Guidelines are based on the following documents:

- Organization for Security and Cooperation in Europe (OSCE), [Copenhagen Document](#), 1990, Paragraph 5.4;
- United Nations, [International Covenant on Civil and Political Rights](#) (ICCPR), General Comment No. 25, Article 25;<sup>6</sup>

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<sup>5</sup> OSCE/ODIHR, [Review of Electoral Legislation and Practice in OSCE Participating States](#), p. 4.

<sup>6</sup> International Covenant on Civil and Political Rights (ICCPR), General Comment No. 25, Article 25 – Participation in Public Affairs and the Right to Vote, the Right to Participate in Public Affairs, Voting Rights and the Right of Equal Access to Public Service. Adopted at the Fifty-seventh Session of the Human Rights Committee, on 12 July 1996 (ref.: CCPR/C/21/Rev.1/Add.7, General Comment No. 25).

- Council of Europe, Committee of Ministers, [Recommendation](#) of the Committee of Ministers to member states on common rules against corruption in the funding of political parties and electoral campaigns;<sup>7</sup>
- Council of Europe, Committee of Ministers, [Recommendation](#) of the Committee of Ministers to member states on measures concerning media coverage of election campaigns;<sup>8</sup>
- Council of Europe, Committee of Ministers, [Recommendation](#) of the Committee of Ministers on protection of whistleblowers;<sup>9</sup>
- Council of Europe, Group of States against Corruption (GRECO), Horizontal Review “[Fighting Corruption – Political Funding](#)”,<sup>10</sup> as well as country evaluation reports especially those of the [Third Evaluation Round](#);<sup>11</sup>
- Venice Commission, [Report on the misuse of administrative resources during electoral processes](#);<sup>12</sup>
- Venice Commission, [conclusions](#) of the Seminar held on 17-18 April 2013 in Tbilisi on the use of administrative resources during electoral campaigns;<sup>13</sup>
- Venice Commission, [conclusions](#) of the 11<sup>th</sup> European Conference of the Electoral Management Bodies held in Helsinki on 26-27 June 2014 on the same topic;<sup>14</sup>
- Venice Commission, [Code of Good Practice in Electoral Matters](#);<sup>15</sup>
- Venice Commission, [Code of Good Practice in the Field of Political Parties](#);<sup>16</sup>
- OSCE, Office for Democratic Institutions and Human Rights (OSCE/ODIHR) and Venice Commission, [Guidelines on Political Party Regulation](#);<sup>17</sup>
- OSCE/ODIHR, [Handbook for the Observation of Campaign Finance](#);<sup>18</sup>
- OSCE/ODIHR, [Review of Electoral Legislation and Practice in OSCE Participating States](#).<sup>19</sup>

9. The 2013 Report defines the administrative resources as follows:<sup>20</sup> “administrative resources are human, financial, material, *in natura*<sup>21</sup> and other immaterial resources enjoyed by both incumbents and civil servants in elections, deriving from their control over public

<sup>7</sup> CM/Rec(2003)4, Recommendation adopted by the Committee of Ministers on 8 April 2003 at the 835<sup>th</sup> meeting of the Ministers’ Deputies.

<sup>8</sup> CM/Rec(2007)15, Recommendation adopted by the Committee of Ministers on 7 November 2007 at the 1010<sup>th</sup> meeting of the Ministers’ Deputies.

<sup>9</sup> CM/Rec(2014)7, Recommendation adopted by the Committee of Ministers on 30 April 2014 at the 1198<sup>th</sup> meeting of the Ministers’ Deputies.

<sup>10</sup> Council of Europe, Group of States against Corruption, Fighting Corruption – Political Funding, by Yves-Marie Doublet, Deputy Director at the National Assembly, France – Thematic Review of GRECO’s Third Evaluation Round.

<sup>11</sup> The third round evaluation reports deal with the transparency and supervision of political financing. The reports of the [Fourth Evaluation Round](#) sometimes also contain some pertinent information as they deal *inter alia* with the prevention of corruption of parliamentarians.

<sup>12</sup> Report adopted by the Council for Democratic Elections at its 46<sup>th</sup> meeting (Venice, 5 December 2013) and by the Venice Commission at its 97<sup>th</sup> plenary session (Venice, 6-7 December 2013; CDL-AD(2013)033).

<sup>13</sup> CDL-EL(2013)003syn.

<sup>14</sup> CDL-EL(2014)001syn.

<sup>15</sup> CDL-AD(2002)023rev.

<sup>16</sup> CDL-AD(2009)021.

<sup>17</sup> Guidelines adopted by the Venice Commission at its 84<sup>th</sup> Plenary Session (Venice, 15-16 October 2010, CDL-AD(2010)024).

<sup>18</sup> Publisher: OSCE/ODIHR. Date: 21 January 2015.

<sup>19</sup> Publisher: OSCE/ODIHR. Date: 15 October 2013.

Other international institutions have issued publications directly or indirectly related to the issue of the use of administrative resources during electoral processes, which are not referenced in the present Guidelines. The following publications can however be quoted: International IDEA, Funding of Political Parties and Election Campaigns: A handbook on political finance; International Foundation for Elections Systems, Training in Detection and Enforcement (TIDE) program – [Political Finance Oversight Handbook](#); and Organization of American States (OAS), [Observing Political-Electoral Financing Systems: A manual for OAS Electoral Observation Missions](#).

<sup>20</sup> Paragraph 12 of the Report.

<sup>21</sup> Like some benefits from social programmes, including goods and in-kind resources.

sector staff, finances and allocations,<sup>22</sup> 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”.<sup>23</sup>

10. The misuse of administrative resources may also include related offences, such as forms of pressure or threats exerted by public authorities on civil servants. All rules dealing with electoral campaigns are potentially relevant for assessing the use of administrative resources by incumbents.

11. Similarly, the OSCE/ODIHR has defined ‘abuse of state resources’ (terminology used as well by other international institutions) as the “undue advantage obtained by certain parties or candidates, through use of their official positions or connections to governmental institutions, in order to influence the outcome of elections”.<sup>24</sup> For the purposes of these Guidelines, the term ‘abuse of state resources’ should be understood as analogous to ‘misuse of administrative resources’. It should also be noted that in election observation mission reports as well as documents issued by other international institutions, references to ‘use’ of administrative resources typically relates to misuse. For such quotations of external sources, it should be understood that it refers to misuse of administrative resources.

12. As noted before, the notion of administrative resources developed in these Guidelines is broad. These Guidelines cover the actions of civil servants in their official duties. This includes how civil servants may misuse their duties and public means or, conversely, be pressured to support or vote for certain electoral contestants. These Guidelines also cover the actions of elected incumbents, particularly while campaigning. These two categories do not usually overlap, as such. These Guidelines hereafter specify whether they cover both civil servants and incumbent candidates or only one of these categories.

13. 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 electoral campaign as strictly understood in national electoral law. It covers the various steps of an electoral process starting from, for example, the definition of the electoral constituencies, the nomination or the registration of candidates or lists of candidates for competing in elections. This period lasts until the election of public authorities. It includes all activities in support of or against a given candidate, political party or coalition by incumbent representatives before and during the election day.<sup>25</sup> This broad definition covers the multifaceted ways in which administrative resources may be misused during the entire electoral process, not only the official electoral campaign period.

14. Some of the elements in the Guidelines may require a formal constitutional or legislative basis in national orders, while other elements can be achieved through codes of ethics or public/civil service codes or practice and interpretation of national legislation by competent courts. In all cases, it is important that legislation, regulations and judicial decisions, are well aligned, avoiding gaps, ambiguities and contradictory provisions.

15. It should also be underscored that these Guidelines do not have the ambition of being an exhaustive set of prescriptive legal recommendations. They rather provide guidance that can be followed by lawmakers, in line with democratic principles. Indeed, even where the legal framework provides a solid basis against the misuse of administrative resources, legislation

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<sup>22</sup> As well as state-owned media, which will not be addressed here.

<sup>23</sup> 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”.

<sup>24</sup> OSCE/ODIHR [Handbook for the Observation of Campaign Finance](#).

<sup>25</sup> Paragraph 9 of the 2013 Report. Whilst the majority could influence election results by amending the 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).

will only be effective if the public bodies involved implement such legislation in good faith. This includes the political will to impartially uphold the letter and the spirit of the law.

16. The Guidelines include three parts. The first one recalls the applicable fundamental principles (part II. A.). The Guidelines proper deal with the way to prevent and sanction the misuse of administrative resources during electoral processes, first by suggesting improvements to the electoral or general legal framework (part II. B.), and then by suggesting concrete remedies and sanctions (part II. C.).

17. The present joint Guidelines were adopted by the Council for Democratic Elections at its 54<sup>th</sup> meeting (Venice, 10 March 2016) and by the Venice Commission at its 106<sup>th</sup> plenary session (Venice, 11-12 March 2016).

## **II. Guidelines**

### **A. Principles**

Respect for the principles outlined below is essential for preventing and responding to the misuse of administrative resources during electoral processes. Formal, substantive and procedural principles are cumulative prerequisites intended to ensure the foundations of a legal framework to regulate the use of administrative resources.

#### **1. Rule of law**

**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 and predictable manner. Sanctions for misuse of administrative resources have to be provided for and implemented. Such sanctions need to be enforceable, proportionate and dissuasive.<sup>26</sup>

**1. 2.** Stability of the law<sup>27</sup> is a crucial element for the credibility of electoral processes. It is therefore important that stability of electoral law be ensured in order to protect it against political manipulation. This applies not least to the rules on the use of administrative resources.

**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 public authorities, civil servants, voters, candidates, political parties, and that sanctions and consequences for not abiding with these rules are foreseeable.

**1. 4.** The possibility to bring complaints about the misuse of administrative resources to an independent and impartial tribunal – or equivalent judicial body – or to apply to an authorised law-enforcement body should be central in ensuring the appropriate use and to prevent the misuse of administrative resources during electoral processes.

#### **2. Political freedoms**

Freedoms to form an opinion, together with freedoms of association and expression, form the bedrock of any democratic system, including during electoral processes.

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<sup>26</sup> See the Guidelines C. 2.

<sup>27</sup> Code of Good Practice in Electoral Matters, II. 2.

Opinions and information should freely circulate during pre-electoral periods, especially during electoral campaigns. In general, the right to free elections and freedom of expression reinforce each other. Nevertheless, possible tensions between such rights and freedoms have been recognised by the European Court of Human Rights. In this respect, it may be necessary to place certain restrictions on freedom of expression in order to secure the 'free expression of the opinion of the people in the choice of the legislature'.<sup>28</sup>

### 3. Impartiality

The legal framework should provide explicit requirements for civil servants to act impartially during the whole electoral process while performing their official duties. Such regulations should establish the impartiality and professionalism of the civil service.

### 4. Neutrality

**4. 1.** The legal framework should ensure the neutrality of the civil service by prohibiting civil servants from campaign activities in their official capacity, either by being themselves candidates or when supporting candidates. This applies as well to public and semi-public entities. It is important that a clear separation between the state and political parties is maintained; in particular political parties should not be merged with the State.<sup>29</sup>

**4. 2.** In order to ensure neutrality of the civil service during electoral processes and consequently to avoid any risk of conflict of interest, the legal framework should provide for a clear separation between the exercise of politically sensitive public positions, in particular senior management positions, and candidacy. In this respect, the legal framework should provide for a range of adequate and proportionate rules. Such rules may include a clear instruction on how and when campaigning in a personal capacity may be conducted, suspension from office or resignation of certain public authorities running for elections.

**4. 3.** The non-involvement of judges, prosecutors, police, military and auditors of political competitors in their official capacity in electoral campaigning is of essential importance. Concrete measures should ensure such official neutrality throughout the entire electoral processes.

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<sup>28</sup> See 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)."

<sup>29</sup> This separation should comply with Paragraph 5.4 of the 1990 OSCE Copenhagen Document.

**4. 4.** The legal framework should ensure the objective, impartial, and balanced coverage of election-related events by publicly-owned media. Law and practice should both ensure that publicly-owned media are not involved in “hidden” campaigning for or against particular political competitors.

## **5. Transparency**

**5. 1.** The legal framework should provide for transparency and accountability of the use of public money and public goods by political parties and candidates during electoral processes.

**5. 2.** A clear distinction between the operation of government, activities of the civil service and the conduct of the electoral campaign should be made.

**5. 3.** The legal framework should provide for the availability of trustworthy, diverse and objective information to voters and political competitors on the use of administrative resources during electoral processes operated by public authorities as well as entities owned or controlled by public authorities.

## **6. Equality of opportunity**

**6. 1.** The legal framework should provide for an equal right to stand for elections and for equality of opportunity to all candidates, including civil servants, and political parties during electoral processes.

**6. 2.** The legal framework should provide for equitable access<sup>30</sup> for all political parties and candidates to administrative resources during electoral processes, to public funding of political parties and campaigns, and to publicly-owned media. This also applies to public buildings and facilities used for campaigning.<sup>31</sup>

## **B. Prevention of the misuse of administrative resources**

There is a need for a thorough and effective legal framework to prevent the misuse of administrative resources during electoral processes. This does not exclude recommending additional measures, which are developed hereafter.

### **1. Legal framework**

**1. 1.** The legal framework should provide effective mechanisms for prohibiting public authorities from taking unfair advantage of their positions by holding official public events for electoral campaigning purposes, including charitable events, or events that favour or disfavour any political party or candidate. More precisely, reference is made to events which imply the use of specific funds (state or local budget) as well as institutional resources (staff, vehicles, infrastructure, phones, computers, etc.). This does not preclude incumbent candidates from running for election and campaigning outside of office hours and without the use of administrative resources.

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<sup>30</sup> See also Guideline B. 1. 6. See as well the Code of Good Practice in the field of political parties, I. 2.3. b: “Depending on the subject matter, equality may be strict or proportional. If it is strict, political parties are treated on an equal footing irrespective of their current parliamentary strength or support among the electorate. If it is proportional, political parties must be treated according to the results achieved in the elections. Equality of opportunity applies in particular to radio and television air-time, public funds and other forms of backing.”

<sup>31</sup> As developed in Guideline B. 1. 2.

**1. 2.** If public buildings and facilities are permitted for campaign purposes, the legal framework should provide for equal opportunity and a clear procedure for equitably allocating such resources to parties and candidates.

**1. 3.** The ordinary work of government must continue during an election period. However, in order to prevent the misuse of administrative resources to imbalance the level playing field during electoral competitions, the legal framework should state that no major announcements linked to or aimed at creating a favourable perception towards a given party or candidate should occur during campaigns. This does not include announcements that are necessary due to unforeseen circumstances, such as economic and/or political developments in the country or in the region, e.g. following a natural disaster or emergencies of any kind that demand immediate and urgent action that cannot be delayed.

**1. 4.** The legal framework should stipulate that there should be no non-essential appointments to public bodies during the electoral campaign.

**1. 5.** There should be a regulation put in place by a competent authority – electoral management body, branch of the civil service or special committee – identifying what activities are considered to be campaign activities and therefore forbidden to civil servants when acting in their official capacity. The competent authority should have an advisory role in relation to queries during the election period as to whether something falls under the prohibition on campaign activities by the civil service.

**1. 6.** The legal framework should provide for a clear distinction between ‘campaign activity’ and ‘information activity’ of public media in order to ensure equity among political competitors in the media as well as a conscious and free choice for voters.<sup>32</sup>

**1. 7.** In addition to national legislation, charters of ethics or codes of conduct could be appropriate instruments to prevent the misuse of administrative resources during electoral processes.

## **2. Audit**

**2. 1.** An institution functionally independent from other authorities should be responsible for auditing political parties and candidates in their use of administrative resources during electoral processes. In this respect, such a body, regardless of its institutional form, should act impartially and effectively.

**2. 2.** That institution should be sufficiently empowered and resourced to supervise all public expenditure and use of administrative resources. Moreover, this authority should be required to report misuse during electoral processes in a timely, clear and comprehensive manner.

**2. 3.** Political parties and candidates should be required to report on the origin and purpose of all their campaign finance transactions in order to facilitate transparency and the detection of potential misuse of administrative resources. Any permissible use of administrative resources for parties or candidates should be treated as a campaign finance contribution and be reported accordingly.

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<sup>32</sup> See *inter alia* the ICCPR General Comment No. 25, Article 25.

**2. 4.** Communication between audit authorities and other bodies should be regulated in a way that facilitates efficient flows of information and effective implementation of transparent decisions.

### **3. Political will**

**3. 1.** Effective implementation of legislation requires that any restrictions on the use of administrative resources be implemented in good faith.

**3. 2.** Where necessary, public authorities could make clear statements and issue written instructions that no pressure on civil servants will be tolerated and that no civil servant or citizen should fear for their employment or social services as a result of supporting or not supporting any political party or candidate. Civil servants should accordingly benefit from protection against any intimidation or pressure.

**3. 3.** Civil servants as well as their relatives should be protected against (hidden) sanctions, pressure or intimidation when they disclose an alleged fraud or misuse of administrative resources. If the law does not protect whistleblowers in general, there should be specific rules in the context of electoral processes.<sup>33</sup>

**3. 4.** Genuine political will of the highest State, regional, and local authorities is a key factor to effectively preventing and sanctioning the misuse of administrative resources. The development of a pluralistic political culture – characterised by transparency towards the electorate –, 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 therefore of essential importance.

**3. 5.** Civil society, including domestic election observers, has a crucial role in reporting on potential misuse of administrative resources and proposing recommendations to strengthen legislation and practice.

### **4. Information and awareness raising**

**4. 1.** Authorities, including electoral management bodies, should create wide-reaching information activities, in which citizens and civil servants, candidates and political party leaders, are aware of their rights and responsibilities during electoral processes. Clear criteria should be established to distinguish electoral campaign activities from information activities. Such information should be distributed consistently.

**4. 2.** Internal instructions and training for civil service need to be developed to promote legally based non-partisan conduct within the executive branch. Guidelines for civil servants, public commitments, codes of conduct and other instruments, should be disseminated.<sup>34</sup>

**4. 3.** Civil society can raise awareness among citizens and political stakeholders on the importance of a fair use of administrative resources during electoral processes.

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<sup>33</sup> See in this respect the Recommendation of the Committee of Ministers of the Council of Europe on protection of whistleblowers ([CM/Rec\(2014\)7](#)).

<sup>34</sup> See also Guidelines B. 1. 7.

## C. Remedies and sanctions

### 1. Complaints and appeals

1. 1. The legal framework should provide for an effective system of appeals before a competent, independent and impartial court, or an equivalent judicial body: an independent judiciary is a *sine qua non* condition for sanctioning the misuse of administrative resources.

1. 2. The first instance appeal body in electoral matters should be either an electoral management body or a court or an equivalent judicial body. In any case, final appeal to a court must be possible.<sup>35</sup> This guidance should apply to alleged cases of misuse of administrative resources.

1. 3. The legal framework should ensure the independence of electoral management bodies, other administrative 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.

1. 4. While tackling cases related to the misuse of administrative resources, including via adjudication of election-related disputes, electoral management bodies, other administrative bodies, and courts must apply laws in a uniform and impartial manner irrespective of the parties to the particular case.

1. 5. Authorised law-enforcement bodies – police, prosecutors – should investigate cases on the misuse of administrative resources effectively and timely.

1. 6. The legal framework should ensure that the electoral management bodies and courts – and other judicial bodies – hold hearings and that their decisions are made public, written and reasoned. The legal framework should also ensure a timely adjudication and appeals process.

### 2. Sanctions<sup>36</sup>

2. 1. The legal framework should define the misuse of administrative resources during electoral processes as an electoral offence.

2. 2. The legal framework should establish clear, predictable and proportionate sanctions for infringements of the prohibition of the misuse of administrative resources, from administrative fines to the ultimate consequence of cancelling election results where irregularities may have affected the outcome.<sup>37</sup> Civil servants who misuse administrative resources during electoral processes should be subject to sanction, including criminal and disciplinary sanctions, up to the dismissal from office.

2. 3. Political parties and candidates who deliberately benefit from a misuse of administrative resources should be subject to a range of sanctions proportionate to the offence committed. This may include formal warnings, fixed monetary penalties, reduction in public financing, or referral for criminal prosecution.

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<sup>35</sup> Code of Good Practice in Electoral Matters, II. 3.3 a.

<sup>36</sup> Code of Good Practice in Electoral Matters, II. 3.3.

<sup>37</sup> Code of Good Practice in Electoral Matters, II. 3.3. e.

**2. 4.** The legal framework should foresee that in case of violations of the rules on public finances which imply a misuse of administrative resources or when illicit financial advantages are given to political parties or candidates, such financing has to be returned to the state or municipal budget, regardless of other applicable sanctions.

**2. 5.** The implementation of sanctions against the misuse of administrative resources is effective only if the investigation, auditing, prosecution and justice systems are independent from the political power.

# Appendix II

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## **TRAINING MATERIALS FOR THE E-LEARNING COURSE “ELECTION CAMPAIGN AND ADMINISTRATIVE RESOURCES – PREVENTION OF MISUSE OF ADMINISTRATIVE RESOURCES IN ELECTORAL PROCESSES AND RESPONSE TO VIOLATIONS” DEVELOPED IN CO-OPERATION WITH THE CENTRAL ELECTION COMMISSION OF GEORGIA AND THE CENTRE FOR ELECTORAL SYSTEMS DEVELOPMENT, REFORMS AND TRAINING**

### E-learning course

“Election campaign and administrative resources – Prevention of misuse of administrative resources in electoral processes and response to violations”

### **Objective of the course**

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An informational-educational training course has been developed for the next parliamentary elections of Georgia of 2020. It is based on national law and international practice and ensures awareness raising of the programme users about participation of public servants in the election campaign, use of administrative resources and official position, relevant restrictions and sanctions.

The course is designed for persons employed in public institutions, as well as for others interested in election issues.

This informational-educational training course has been developed by the Legal Entity under Public Law, the Centre for Electoral Systems Development, Reforms and Training in co-operation with the CEC of Georgia and aims to prevent the misuse of administrative resources in the election process and to ensure free and fair elections.

The project is implemented with the support of the Council of Europe project “Supporting Transparency, Inclusion and Integrity of Electoral Practice and Process in Georgia”.

### **The role of public servants in the process of conducting democratic elections**

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Public servants employed in the branches of central and local government are directly involved in the process of governing the country and ensuring the proper functioning of the state. According to their mandate, public servants have:

- ▶ access to tangible and intangible property (administrative resource) owned and/or used by a public institution;
- ▶ influence on subordinates;
- ▶ authority (legitimacy) to influence various spheres of public life, including political (electoral) processes, through their actions and decisions.

Most importantly, each public servant in the process of carrying out his/her responsibilities should:

- ▶ fulfil the rights and duties assigned to him/her on the basis of the rule of law and the principle of protection of public interests;
- ▶ use administrative resources entrusted to the state and to him/her only for the purposes of exercising official authorities;
- ▶ not use his/her official position for party and political, or any other private interest.

By implementing the requirements of the law and guiding principles of ethics, the civil servant ensures protection of universally recognised human rights and freedoms, one of which is the supreme right of citizens to participate in the formation of government through free and fair elections.

In order to get acquainted with the legislative regulations established for public servants, the training programme covers the following important issues:

- ▶ legal status of public servants in election processes;
- ▶ pre-election agitation by a public servant, participation in agitation – admissions and restrictions;

- ▶ use of administrative resources and official position in the election process – admissions and restrictions;
- ▶ prevention and response to violations of administrative resources and misuse of official position in the election process.

The legislative regulations discussed in the curriculum apply to civil servants, as well as employees of legal entities under the public law (except for employees of higher and vocational educational institutions, religious organisations and the Georgian Bar Association), employees of entrepreneurial or non-entrepreneurial legal entities established by the state or municipality and public school teachers. The term “public servant” used in the training programme unites the circle of the mentioned persons.

## MODULE I: LEGAL STATUS OF PUBLIC SERVANTS IN ELECTORAL PROCESSES

A civil servant as a citizen has the right to participate in electoral processes. Depending on the mandate, public servants are subject to certain restrictions set by the law in a number of cases.

A public servant has the right to:

- ▶ participate in elections as a voter;
- ▶ participate in the elections as a majoritarian candidate for the parliament, as well as a candidate nominated by a party list;

Restriction: to register as a candidate, the following persons must resign and be dismissed from their position: the President of Georgia; ministers (except for the prime minister), as well as ministers of the autonomous republics, heads of government and state subdivisions and their deputies; members of the board of the National Bank of Georgia; auditor general and his/her deputies; state representatives and their deputies; chairperson of the municipal council; mayor; officers of the Ministry of Internal Affairs and the Ministry of Defence of Georgia, the State Security and Intelligence Services of Georgia and the Special State Protection Service; judges; Public Defender of Georgia and his/her deputy; advisers to the President of Georgia; members of the High Council of Justice of Georgia; head of the Civil Service Bureau and his/her deputies; prosecutors, their deputies, assistants and investigators; members of the Georgian National Communications Commission and the Georgian National Energy and Water Regulatory Commission; chief of staff of the National Security Council and his/her deputy.

- ▶ in case of registration as a candidate for membership of the Parliament of Georgia on the basis of submission of his/her own application and a relevant certificate, take unpaid leave for the pre-election campaign period;
- ▶ be a member of a political party;

Restriction: a public servant has no right to hold a managerial position in a political party.

- ▶ make donations in favour of a political party or an election subject;

Restriction: the total amount of donations made by each citizen should not exceed 60 000 Georgian lari per year.

- ▶ be a member of the Precinct Election Commission, including appointment as a member of the commission by a political party;

Restriction: persons employed in public institutions may not be elected/appointed as members of the Precinct Election Commission: members of Parliament of Georgia, Head of the Office of the Parliament of Georgia; ministers of Georgia, as well as of the autonomous republic and their deputies; heads of departments and divisions of the ministry; chairperson of the representative body of the municipality – city council, mayor and their deputies; military servicemen, employees of the Ministry of Internal Affairs of Georgia, the Ministry of Defence of Georgia, the State Security Service of Georgia, the Georgian Intelligence Service, the State Penitentiary Institution within the system of the Ministry of Justice of Georgia, the Special State Protection Service and the Investigation Service of the Ministry of Finance of Georgia, the Investigation Unit of the State Inspector’s Office; judges and their assistants; prosecution staff.

- ▶ in case of appointment/election as a member of the Precinct Election Commission, temporarily suspend his/her authority in a permanent place of work during the term of office of a member of the Precinct Election Commission, for which he/she can take unpaid leave or paid leave;
- ▶ be an observer of a local observer organisation;

Restriction: persons employed in public institutions may not act as observers: the President of Georgia; members of Parliament of Georgia; the Prime Minister of Georgia, other members of the Government of Georgia and his/her deputy; members of the highest representative bodies of the autonomous republics and members of governments, their deputies; members of the local self-government representative body – City Council and the head of the executive body, his/her deputy; judge; employees of the Ministry of Internal Affairs and the Ministry of Defence of Georgia, a state sub-agency within the system of the Ministry of Justice of Georgia – the Special Penitentiary Service, the State Security and Intelligence Services of Georgia and the Special State Protection Service; prosecution official.

- ▶ be a representative of an election subject;
- ▶ engage in pre-election agitation or participate in agitation, except during working hours or non-working hours, when he/she directly performs official functions;

Restriction: persons employed in public institutions have no right to conduct pre-election agitation and participate in agitation: a judge; public servants of the Prosecutor's Office of Georgia, the Ministry of Internal Affairs and the Ministry of Defence of Georgia, the State Security and Intelligence Services of Georgia and the Special State Protection Service; the auditor general; the Public Defender of Georgia; members of the Georgian National Communications Commission and the Georgian National Energy and Water Regulatory Commission.

Restriction: the right to agitate and participate in agitation is not restricted to the President of Georgia; members of Parliament of Georgia; the Prime Minister of Georgia, other members of the Government of Georgia and their deputies; members of the highest representative bodies and heads of government of the autonomous republics; members of the local self-government representative body – City Council and head of the executive body; state representative.

## **MODULE II: PRE-ELECTION AGITATION BY A PUBLIC SERVANT, PARTICIPATION IN AGITATION – ADMISSIONS AND RESTRICTIONS**

The pre-election campaign (agitation) starts 60 days before polling day. A public servant must take into account the following restrictions when conducting pre-election agitation or participating in it:

- ▶ as a supporter of an electoral subject, he/she can appear with a programme for the future activities of the electoral subject, which should not include propaganda of war and violence, violent change or overturning the state and public system, violation of Georgia's territorial integrity, call for national hatred and enmity, religious and ethnic confrontation;
- ▶ it is prohibited to conduct pre-election agitation in the buildings of the executive bodies of Georgia, in the buildings of the courts and in the military units, as well as in the polling station on polling day;
- ▶ agitation material may be displayed on buildings and other objects with the consent of their owners. It is prohibited to place/display agitation materials on religious buildings, cultural heritage buildings, interiors and exteriors of buildings of state authorities and local self-government bodies, courts, prosecutor's offices, military units, police, Georgian State Security and Intelligence Services and Special State Protection Service units, as well as on road signs;

Note: during the election period, local self-government bodies determine the list of buildings on which the display of agitation materials is prohibited. In addition, they determine the places and set up stands to post and exhibit the agitation material.

- ▶ It is not allowed to display agitation material at a distance of 25 metres from the entrance of the polling station.

Note: agitation material displayed in violation of the above rule is subject to removal/dismantling/seizure.

- ▶ From the publication of the relevant legal act on the appointment of elections, including the voting day, it is prohibited to:
  - transfer funds, gifts and other material values (regardless of their value) to the citizens of Georgia by election subjects, candidates of election subjects and their representatives personally or through someone, sell goods at a discounted price, deliver for free or disseminate any goods (except for agitation material), as well as catch the interest of the citizens of Georgia by promising funds, securities and other tangible assets (regardless of their value);
  - perform work or provide services by individuals and legal entities with personal funds and/or funds of an election subject that fall within the competence of the Georgian state government and/or municipal bodies (for example, repairing internal roads, coating with asphalt, gasification works, etc.) in accordance with the legislation of Georgia.

Note: the restriction does not apply to the performance of work or service obtained in accordance with the law of Georgia on state procurement.

An authorised person may apply to a court to establish the fact of voter bribery. Registration of an election subject who has been engaged in prohibited activities directly or through his/her representative or any other natural or legal person acting in his/her favour, if the fact is confirmed, will be cancelled by a court decision.

## MODULE III: USE OF ADMINISTRATIVE RESOURCES IN THE ELECTION PROCESS – ADMISSIONS AND RESTRICTIONS

### What is an administrative resource?

Human resources, financial resources, any tangible and intangible assets necessary for the functioning of a public institution, regardless of whether these resources are the property of the institution or it has the right to use them (for example, a leased building) are considered to be administrative resources according to international practice.

Source: *Administrative resources and fair elections – A practical guide for local and regional politicians and public officials*, Congress of Local and Regional Authorities of the Council of Europe, Strasbourg, 2018.

Note: According to international and national practice, it is defined that:

- ▶ material goods, among different material resources, include institutional resources – office equipment, office supplies, stationery, vehicles, buildings and other material resources financed from the budget;
- ▶ intangible assets, among different intangible resources, include internet and communication resources – budget-funded internet, business e-mail, official website of the institution, official social media pages.

Source: Comments on the Resolution of the Government of Georgia “*On the Definition of General Rules of Ethics and Conduct in Public Institutions*”, prepared by the Georgian Civil Service Bureau with the support of the German Society for International Cooperation (GIZ).

### What are the international standards for misuse of administrative resources?

- ▶ It is necessary to have a clear separation between the state and the political party, the party should not be confused with the state.  
OSCE Copenhagen Document (1990).
- ▶ Allocation of resources should be carried out state support based on the objective, fair and reasonable principle. The government should prohibit state-owned legal entities or other public institutions from supporting political parties in any way.

Recommendation Rec(2003)4 of the Committee of Ministers to member states on common rules against corruption in the financing of political parties and electoral campaigns

- ▶ Misuse of state resources may include manipulating or intimidating public officials. The government's demand for its employees to attend government rallies is not uncommon. Such practices should be strictly and universally prohibited by law.

*Guidelines on Political Party Regulation, OSCE/ODIHR and the Venice Commission (2011)*

- ▶ Equality of opportunity should be ensured for all candidates and parties.  
Venice Commission, Code of Good Practice in Electoral Matters – Guidelines and explanatory report (2002)
- ▶ Participating states should provide the necessary legal guarantees for the parties participating in the elections to have an opportunity to compete on equal terms before the law.  
OSCE Copenhagen Document (1990)
- ▶ Legislation aimed at preventing the misuse of administrative resources should promote the creation of appropriate conditions to ensure neutrality and impartiality in the electoral process.

Joint Guidelines for preventing and responding to the misuse of administrative resources during electoral processes, Venice Commission of the Council of Europe and the OSCE/ODIHR (2016)

## **What negative impacts can be caused by misuse of administrative resources?**

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If the employees of public institutions use administrative resources and the mechanism of control over their subordinates illegally, in other words, for the benefit of any subject (political party, electoral subject, candidate of electoral subject) for electoral purposes, this action will put a particular election subject in an advantageous position over his/her competitors. As a result, misuse of administrative resources and official position, on the one hand, threatens the credibility of the elections and, on the other hand, calls into question the existence of a politically neutral public service.

## **What are the restrictions of the current national legislation regarding the use of administrative resources and official position?**

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### **I. Consider the examples of misuse of tangible and intangible resources**

Example 1: all buildings for voter meetings were allocated at the same time. The director of the theatre under the auspices of the municipality allocated the building to one of the election subjects free of charge. A few days later, another election subject applied to the theatre management in order to hold meetings with the voters, but was refused free access to the requested space. As the meeting could not be postponed, the election subject had to pay a fee.

Example 2: a specialist from the ministry's Public Relations Department uploaded footage of an event organised by the Ministry on the ministry's official website and Facebook page, which also featured a banner from one of the parties.

Example 3: the head of a local representation of a political party asked his/her friend, who was employed in the Culture Service of the city hall of the municipality, for a sound amplifier, which was owned by the service. The friend handed over the equipment to the representative of the political party. He/she used the equipment to hold a meeting with voters in the park.

Example 4: a driver employed by the ministry arrived in one of the municipalities in a company car on Saturday and took part in an event related to the nomination of majoritarian MPs.

Let's consider legislation that prohibits misuse of tangible and intangible resources.

1. If the buildings occupied by the state authorities and local self-government bodies, as well as organisations financed from the state budget, are used for election purposes in favour of one entity and the same opportunity is not given to other entities, it will be considered a violation of the principle of equal access to administrative resources by an official who fails to comply with the request through inaction or unreasonable refusal.

Note: this reservation also applies to those buildings of state and local self-government bodies that have been transferred to individuals to perform a certain function under a contract.

2. It is prohibited for state government institutions or local self-government bodies and organisations financed from the state budget of Georgia (except for political parties) to use means of communication, information services and various equipment in the pre-election agitation and campaign of any political party, candidate or election subject.
3. It is prohibited to use vehicles owned by state authorities or local self-government bodies in the process of pre-election agitation and campaigning of any political party, candidate of an election subject, election subject.

Note: the use of an official vehicle for election purposes is not restricted to persons protected by the Special State Protection Service: the President of Georgia; the chairperson of the Parliament of Georgia; the Prime Minister of Georgia; heads of the highest legislative and executive bodies of the autonomous republics.

In addition, by the decision of the Government of Georgia, personal protection may be appointed or removed for: the deputy speaker of the Parliament of Georgia; members of Parliament of Georgia; members of the government of Georgia; the head of other state agencies of Georgia; high-ranking officials of the state government of Georgia during his/her term of office.

## II. Let's consider compiled examples of misuse of official position, which also includes issues of misuse of human resources for electoral purposes.

Example 1: the head of one of the divisions instructed invited staff and heads of non-entrepreneurial (non-commercial) legal entities established by the ministry to participate in the events held within the framework of the pre-election campaign of his/her close friend. He/she also asked them to share information about participation in the same event with other employees.

Example 2: the head of the Monitoring Department of the ministry invited heads of subordinate structural units and non-entrepreneurial (non-commercial) legal entities to a working meeting. At the meeting, he/she delicately asked those gathered to come to the polling station near the ministry by the end of the day and sign a list of supporters to allow his wife to participate in the elections as an independent candidate.

Example 3: in a city where employees of a subdivision of the ministry were on a business trip, a concert was held in support of one of the parties in the main square. In the course of the business trip and thus, during working hours the public servants attended the concert and participated in the distribution of campaign materials.

Let's consider legislation prohibiting the misuse of official position (also includes issues of misuse of human resources for electoral purposes):

- ▶ a person holding a position in a state or local government body is prohibited from involving a person who is in his subordination due to position, or an otherwise subordinated person in activities that promote the nomination and/or election of a candidate;

Note: The term "otherwise subordinated person" means a person who due to his/her activities is materially or in some other way dependent on the relevant official.

- ▶ a person holding a position in a state or local government body is prohibited from conducting pre-election agitation during working hours and/or during non-working hours in the performance of official functions;

Note: the restriction does not apply to the use of time allocated by television and radio broadcasting for pre-election agitation, as well as to the following political officials: the President of Georgia; members of Parliament of Georgia; Prime Minister of Georgia; other members of the government of Georgia and their deputies; members of the highest representative bodies and heads of government of the autonomous republics; members of the local self-government representative body – City Council and the head of the executive body; state representative.

- ▶ a person holding an official position in a state or local government body is prohibited from collecting signatures and conducting pre-election agitation during business trips financed by the state government or local self-government body;

- ▶ in order to avoid misuse of official position, it is prohibited to carry out relocation of the staff of local self-government bodies, senior officials of the police and the prosecutor's office from the moment of expiration of the registration period of election subjects till the end of the voting day.

Note: This reservation does not apply to cases of expiration of the term of office of the above-mentioned senior officials and/or violations of the law by them.

### III. Let's consider the compiled examples of misuse of financial resources.

Example 1: a change in the local budget was made 45 days before the elections to finance the rehabilitation of the irrigation system. The project was not envisaged in the budget of the local self-government unit, the funds for the programme were also not allotted within the allocations provided for in the relevant programme code of the relevant budget.

Example 2: according to the decision of the municipal council, 50 days before the elections, the amount of social allowance was increased at the expense of the funds saved in different items of the budget of the local self-government unit, the increase of which was not provided for by law.

Example 3: two weeks before election day, a promotional video was aired covering the city hall completing road rehabilitation work in one of the resort areas.

Example 4: an advertising company, by order of the state representative, produced a social advertisement, in which some episodes, in a far distance shot, clearly showed the symbols and serial number of one of the political parties.

Example 5: a concert hall was built in the centre of the municipality with the funding of the Ministry of Culture. The opening event was organised with the funds allocated by the ministry and the technical support of the local self-government. The event was chaired by the chairperson of the municipal council, who repeatedly expressed his/her support for one of the election subjects participating in the elections.

Let's consider legislation that prohibits misuse of financial resources.

1. From the 60th day before election day including election day, it is prohibited to implement projects/programmes that were not previously envisaged in the budget of the republican or local self-governing unit of the state, autonomous republics of Georgia. In case of violation of this rule, the authorised person can apply to the court and request the suspension of costs.

Note: this reservation does not apply when the projects/programmes are financed at least 60 days before the election day within the allocations provided by the relevant budget code of the relevant budget and/or with the funds allotted from these allocations, as well as funds allocated by donors.

This reservation also does not apply to the financing of liquidation measures resulting from natural disasters or other force majeure circumstances and to the funding of the arrangement and/or repair works of the polling station by the state and/or municipal authorities.

2. From the 60th day before elections until and including the day of elections, it is prohibited to provide benefits, as well as social benefits (pension, social assistance, allowance, and so forth) and/or increase their amount. In case of violation of this rule, the authorised person may apply to the court and request the suspension of costs.

Note: This restriction does not apply to the benefits, social benefits and/or an increase in their amounts, whose provision and/or increase was provided for by the law at least 60 days before election day.

This restriction also does not apply to the benefits, social benefits and/or an increase in their amounts due to the consequences of natural disasters or other force majeure circumstances.

3. From the 60th day before election day, including the day of elections, the state authority or the municipal body is prohibited from broadcasting a video advertisement, which contains information about the work done or planned by the relevant agency.
4. During the pre-election campaign, it is prohibited to make agitation material, video or audio material using funds from the state budget/local self-government unit budget, to create a website or part of a

website, which reflects an election subject, or his/her serial number in the elections, and/or containing information supporting/opposing an election subject. It is also prohibited to use an election subject or his/her serial number in a social advertisement made with the funds of the state budget/local self-government unit budget.

5. Pre-election agitation by the organiser at the event/presentation organised with the funding from the state budget of Georgia/budget of the local self-government unit shall be considered as inappropriate use of administrative resources.

## **MODULE IV: PREVENTING THE MISUSE OF ADMINISTRATIVE RESOURCES AND OFFICIAL POSITION IN THE ELECTION PROCESS AND RESPONSE TO VIOLATIONS**

An interagency commission shall be established with the Ministry of Justice of Georgia no later than 1 July of the election year in order to prevent and respond to violations of Georgian election legislation by public servants.

In case of confirmation of the fact of violation, the Commission shall be authorised to make a recommendation to any public servant, administrative body or the CEC of Georgia with a request to take appropriate measures.

The sanctions envisaged by the *Organic Law of Georgia – Election Code of Georgia* are:

Participation in election campaigning in violation of the requirements of this Law shall be subject to a penalty in the amount of GEL 2 000.

...

▶ *Article 79*

The conduct of election campaigning in institutions where such activities are prohibited by this Law and the issuing of permission for implementation of such activities by an authorised person shall be subject to a penalty in the amount of GEL 1 000.

...

▶ *Article 81*

Any violation of the requirements of this Law in the course of using administrative resources or exercising official duties or an official capacity during canvassing and election campaign shall be subject to a penalty in amount of GEL 2 000.

...

▶ *Article 88*

Protocols on administrative offences committed by public servants in the above cases shall be drawn up by the CEC Chairperson, persons authorised by the CEC and relevant district election commissions.

The test assignment includes 17 questions (including six case studies). Each question is awarded one point. To pass the test, the user of the programme must accumulate 12 points.

The correct answer is underlined.

1. Pre-election campaign (agitation) starts:
  - a) 65 days before the election day.
  - b) 45 days before the election day.
  - c) 60 days before the election day.
  - d) none of the answers is correct.

### **Grounds**

Article 45(1) of the Organic Law of Georgia the "Election Code of Georgia".

2. The following have no right to conduct pre-election agitation and participate in agitation:
  - a) a member of the Election Commission.
  - b) a public servant employed in the Ministry of Defence.
  - c) a foreign citizen.
  - d) all answers are correct.

### **Grounds**

Article 45(4)(a), (c), (f) of the Organic Law of Georgia the "Election Code of Georgia".

3. The right to agitate during working hours and to participate in agitation is restricted to
- a) a member of the Parliament of Georgia.
  - b) employees of non-profit (non-commercial) legal entities established by the state or municipality.
  - c) a member of the City Council.
  - d) the Prime Minister of Georgia.

#### Grounds

Article 45(4)(j) of the Organic Law of Georgia the "Election Code of Georgia".

4. Public school teachers are not restricted from conducting pre-election agitation and participating in agitation:
- a) during business trips.
  - b) during working hours.
  - c) during non-working hours, when they do not directly perform their official functions.
  - d) with the permission of the public school principal.

#### Grounds

Article 45(4)(j) of the Organic Law of Georgia the "Election Code of Georgia".

5. Which reasoning is correct:
- a) pre-election agitation is prohibited in the buildings of the executive bodies of Georgia.
  - b) pre-election agitation on polling day is prohibited in the polling station.
  - c) pre-election agitation is prohibited in military units.
  - d) all answers are correct.

#### Grounds

Article 45(5)(11) of the Organic Law of Georgia the "Election Code of Georgia".

6. Agitation material can be exhibited:
- a) on cultural heritage buildings.
  - b) on road signs.
  - c) with the consent of the owner of privately owned buildings.
  - d) in the interiors and exteriors of the buildings of local self-government bodies.

#### Grounds

Article 46(1)(2) of the Organic Law of Georgia the "Election Code of Georgia".

7. A public servant has the right to:
- a) be a member of the Precinct Election Commission, except in cases provided by law.
  - b) be a representative of an election subject.
  - c) be an observer of a local observer organisation, except in cases provided by law.
  - d) all answers are correct.

#### Grounds

Article 24(6), Article 42(2<sup>1</sup>), Article 39(4) of the Organic Law of Georgia the "Election Code of Georgia".

8. The obligation to resign and dismiss for registration as a candidate for the membership of the Parliament does not apply to:
- a) the Prime Minister.
  - b) Ministers.
  - c) the head of the Civil Service Bureau.
  - d) the Chairperson of the Municipal Council, the Mayor.

### Grounds

Article 112(1)(b) of the Organic Law of Georgia the "Election Code of Georgia".

9. In case of appointment/election as a member of the Precinct Election Commission, the public servant:
- a) may take unpaid or paid leave.
  - b) may take only unpaid leave.
  - c) may take only paid leave.
  - d) must terminate the authority in the permanent workplace, as the membership of the Precinct Election Commission is incompatible with the status of a public servant.

### Grounds

Article 24(6) of the Organic Law of Georgia the "Election Code of Georgia".

10. The following shall not be considered as the misuse of administrative resources:
- a) if the local self-government body ceded the building occupied by it to any election subject for election purposes and gave the same opportunity to other election subjects.
  - b) if the local self-government body ceded the building occupied by it to any election subject for election purposes and did not give the same opportunity to other election subjects.
  - c) if the local self-government body devoted an official website to the posting of agitation material of any election subject and gave the same opportunity to other election subjects.
  - d) if the local self-government body devoted an official website to posting campaign material of any election subject and did not give the same opportunity to other election subjects.

### Grounds

Article 48(1)(a) of the Organic Law of Georgia the "Election Code of Georgia".

11. Which of the following reservations does not comply with the recommendations of international standards for ensuring the prevention of misuse of administrative resources in the election process?
- a) according to the joint guidelines for the prevention and response to the misuse of administrative resources in the Council of Europe Venice Commission and the OSCE/ODIHR election process, the legislation should promote appropriate conditions to ensure neutrality and impartiality in the electoral process.
  - b) according to the OSCE Copenhagen Document (1990), there is no need for a clear separation between a state and a political party.
  - c) according to the Venice Commission Code of Good Practice, equality of opportunity must be ensured for all candidates and parties.
  - d) according to Recommendation Rec (2003) of the Committee of Ministers of the Council of Europe on the financing of political parties and election campaigns, the government should prohibit state-owned legal entities or other public institutions from supporting political parties in any way.

### Grounds

The OSCE Copenhagen Document (1990), according to which it is necessary to have a clear separation between the state and the political party.

12. Due to the damage of the water pipes entering the building, the employees of the relevant non-entrepreneurial (non-commercial) legal entity under the self-government were sent to repair them on Saturday. Representatives of a political party appeared during the repair process and started distributing agitation materials. The staff of the non-entrepreneurial (non-commercial) legal entity was well acquainted with the party representatives and, in parallel with the repair work, provided assistance in distributing the agitation material. Did non-commercial (non-entrepreneurial) legal entity employees have the right to distribute agitation material in the given situation?
- a) **yes**
  - b) no

### Grounds

Article 45(4)(j) of the Organic Law of Georgia the "Election Code of Georgia" prohibits them from doing so directly at the moment of performing their official duties.

13. In the centre of the settlement, one of the candidates posted agitation material on an advertising billboard. The strong wind damaged the lights on the billboard, so that in the evenings the agitation material was almost no longer visible on the banner. Wishing to help a friend, an employee of the State Emergency Management Service repaired the lighting using service equipment, a crane. Due to this action, the observer of the local observer organisation applied to the District Election Commission and demanded a fine of GEL2000 for the mentioned public servant. Is the claim of the complainant reasonable?

- a) yes  
b) no

### Grounds

Article 48(1)(b) of the Organic Law of Georgia the "Election Code of Georgia"

14. During the pre-election campaign, an image video prepared by the order of the local self-government body was broadcast on TV to provide information to the population about the activities and achievements. Was this action permissible?

- a) yes  
b) no

### Grounds

Article 49(3<sup>1</sup>) of the Organic Law of Georgia the "Election Code of Georgia"

15. 10 days before the elections, the ceiling of the kindergarten building where the Precinct Election Commission was located collapsed. An alternative space could not be found and the election administration applied to the local self-government body for repairs. The request was not met because the budget of the local self-government unit did not include the costs of repair works, and at least 60 days before the elections, the budget change was prohibited by law. Is the decision of the local self-government body legal?

- a) yes  
b) no

### Grounds

Article 49(5) of the Organic Law of Georgia the "Election Code of Georgia"

16. According to the decision of the Municipal Council, 50 days before the elections, the amount of social assistance, including one-time benefits for firewood and medicines, was increased at the expense of the savings in various budget items. The decision was appealed in court with a request to suspend the issuance of allowance funds. Is the complaint well-founded?

- a) yes  
b) no

### Grounds

Article 49(4) of the Organic Law of Georgia the "Election Code of Georgia"

17. At the request of the Deputy Mayor, his/her driver transported the supporters to the election headquarters by the official car. In order not to violate the law, the deputy Mayor poured fuel into the car with his/her own funds. Was the requirement of the law violated?

- a) yes  
b) no

### Grounds

Article 48(1)(c) of the Organic Law of Georgia the "Election Code of Georgia"



# Appendix III

## MEMORANDUM OF UNDERSTANDING ON IMPLEMENTATION OF THE E-LEARNING COURSE (GEORGIA)



### Memorandum of Understanding

Between

Central Election Commission of Georgia

Council of Europe Office in Georgia

Inter-Agency Task Force for Free and Fair Elections

Civil Service Bureau

Tbilisi

25 September 2020

The Central Election Commission of Georgia, the Council of Europe Office in Georgia, the Inter-agency Task Force for Free and Fair Elections and the Civil Service Bureau (hereinafter "the Parties"),

Expressing their desire to promote free, impartial and transparent elections in the country;

Taking into consideration importance of the role of civil servants in conducting of democratic elections;

Understanding the need of adhering to the requirements of the law and ethical guiding principles by the civil servants for the purpose of promoting conducting of elections in line with international standards;

Adhering to the principles of protection of human rights and freedoms, and ensuring equally accessible electoral environment to all engaged in the electoral processes;

Express their desire to cooperate and conclude present Memorandum, as follows:

### **Article 1. Purpose of the Memorandum**

The memorandum aims to raise awareness of those employed in public institutions regarding the relevant national and international regulations in order to ensure prevention of unlawful misuse of administrative resources and abuse of a position during electoral processes, as well as to prevent violations of the rules of campaigning and participation in the election campaign.

### **Article 2. The Subject of the Memorandum**

The subject of the Memorandum is facilitation of implementation of the informational-educational training E-learning course - "Election Campaign and Administrative Resources - Prevention of Illegal Use of Administrative Resources in Electoral Processes and Response to Violations"- developed by the Central Election Commission of Georgia (CEC) and the Center for Electoral Systems Development, Reforms and Training (Training Center) in co-operation with the Council of Europe electoral assistance project for the Georgian civil servants prior to Parliamentary Elections of Georgia on October 31, 2020.

### **Article 3. Forms of co-operation between the parties**

In view of the purpose of the Memorandum, the Parties agree to cooperate in the process of carrying out the following measures within their competence:

- a) The informational-educational E-learning course for civil servants will be hosted by the E-learning platform designed and developed by the CEC and the Training Center in co-operation with the Council

of Europe project - "Supporting Transparency, Inclusiveness and Integrity of Electoral Practice and Process in Georgia" - which shall be accessible to civil servants without any limitations in time and space;

- b) In order to inform civil servants regarding the program and to promote their participation in the informational-educational E-learning course, the use of relevant information-communication channels will be ensured;
- c) In order to achieve the purpose of the Memorandum, the Parties shall, whenever necessary, and within the scope of their competence, facilitate implementation of other relevant measures.

**Article 4. Final Provisions**

- 1. This Memorandum shall enter into force on the date of its signature by the parties and shall remain in force until the final results of the respective elections shall be summarised.
- 2. The Memorandum is drawn up in four copies with equal legal force (in Georgian and English languages).

**Central Election Commission of Georgia**

.....

Tamar Zhvania  
(The Chairperson of the Central Election Commission of Georgia)

**Council of Europe Office in Georgia**

.....

Vahagn Muradyan  
(Deputy Head of the Council of Europe Office in Georgia)

**Inter-Agency Task Force for Free and Fair Elections**

.....

Gocha Lortkipanidze  
(Deputy Minister of Justice of Georgia)

**Civil Service Bureau**

.....

Catherine Kardava  
(Head of the Civil Service Bureau)

# Appendix IV

## Declaration of Conduct (Moldova)

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### DECLARATION OF CONDUCT

As regards the conditions and provision of financial, tangible and intangible support for the election campaign related to the parliamentary elections and the consultative republican referendum of 24 February 2019

#### Article 1. General Provisions

We, the representatives of political parties, electoral blocs, independent candidates, referendum participants, as well as other actors directly or indirectly involved in the election campaign as per

Article 22(1)(r) of the Electoral Code, being

- ▶ AWARE of the importance of elections for building a democratic society;
- ▶ INTERESTED in the democratic conduct of the electoral process;
- ▶ COMMITTED to the use of the highest standards of integrity and good faith in the implementation of the existing legal framework on financing the activity of political parties and election campaign by political parties and election candidates;
- ▶ GUIDED by the need to overcome the climate of mistrust among parties;
- ▶ DETERMINED to strengthen the safeguards for free and fair elections during the election campaign for the parliamentary elections and the republican consultative referendum scheduled for 24 February 2019; have agreed as follows:

#### Article 2. Object of Regulation

The Declaration of Conduct as regards the conditions and provision of financial, tangible and intangible support for the election campaign (hereinafter referred to as the Declaration), regulates the conduct of political parties, electoral blocs, independent candidates, referendum participants in the election campaign and aims to ensure transparency of financing and supporting the election campaign, to counteract the misuses, including those of administrative resources, as well as to create uniform standards of conduct.

#### Article 3. Definitions

Misuse of administrative resources – use of public function and resources (including those of law enforcement, staff, financial, material, and other resources) by politicians or political parties to promote themselves during the elections in violation of legal rules and responsibilities and/or other rules governing the exercise of public office.

Corruption of voters – offering or giving money, goods, services or other benefits in order to determine the voters to exert or not their voting rights during the parliament and local elections or referendums.

Donation – money, goods or services provided free of charge or below the market price.

#### Democracy matters

Anonymous donations – money, goods or services provided to a political party, electoral bloc, independent candidate by a donor with a hidden identity, or one that indicated incorrect data.

Financing of election campaigns – direct and/or indirect financing, and other material support of the election candidates by the state, individuals and/or legal entities.

Direct financing – support of a political party, electoral bloc or independent candidate during the election campaign using their own funds and/or by an individual or legal entity.

Illegal financing of the election campaign – forgery of reports on election campaign funding with a view to substituting or concealing donors' identities, the amount of accumulated funds or the destination or amount of used funds.

Indirect (illegal) financing – a donation made by an individual or legal entity through an intermediary, in order to avoid the restrictions prescribed by law, or a donation made by an individual or legal entity on behalf of a

third party. For instance, donations from abroad, transferred through a Moldovan citizen who is in the country, in order to circumvent the ban on foreign financing.

Financing on behalf of a third party – expenditures made by an individual and/or organisation, independent of a political party, electoral bloc or independent candidate or by a third party affiliated with an entity/controlled or created by a person associated to a political party, electoral bloc, independent candidate, in order to promote or to oppose a political party, electoral bloc or independent candidate.

Financing of a political party – direct and/or indirect financing by offering, allocating or transmitting financial, material or other means from the state, individuals and/or legal entities to a political party.

Direct public financing – allocation of subsidies from state budget sources to political parties in order to finance their activity or provision of material support to election candidates by granting interest-free credits.

Indirect public financing – provision of resources having monetary value for the election campaign (rental of state-owned premises; public billboards; free access to national TV and radio broadcasters, etc.) to political parties and independent candidates by the state, in line with the legal provisions.

Supervisory and control body – an authority that receives financial reports from political parties, election candidates, referendum participants, then it reviews them and, should it find that the law was violated, the authority has the right to apply or request sanctions.

Misuse of institutional administrative resources – use of office equipment, means of transport, government structures, subordinate civil servants and other publicly financed material and human resources, for organising and carrying out both pre-election and election activities.

Coercive administrative resources – use of coercive methods against political opponents, their supporters and voters and to exert unjust influence over them.

Abuse of administrative media resources – provision of privileged conditions to the election subject or its candidate by media outlets financed from the state and local budgets.

Material (in-kind) support – any tangible (material) asset offered for free or cheaper than the market price to a political party, electoral bloc or independent candidate.

Non-material support – services or any other intangible (non-material) asset offered for free or cheaper than the market price to a political party, electoral bloc or independent candidate. For instance, this means offering own vehicle for free-of-charge use.

#### **Article 4. General Principles**

In financing the election campaign related to the parliamentary elections and the consultative republican referendum the signatories shall respect the principles of integrity, legality, equality, responsibility, impartiality and non-discrimination; shall acknowledge person's rights, freedoms and dignity; shall refrain from interfering in the work of electoral officials and accredited observers.

#### **Article 5. Signatories**

For the purpose of this Declaration, the term "signatory" shall include:

- a) election candidates: parties, electoral blocs and independent candidates;
- b) referendum participants.

#### **Article 6. Objectives:**

We, the representatives of political parties, electoral blocs, independent candidates, referendum participants, as well as other stakeholders directly or indirectly involved in the election campaign undertake to reach the following objectives:

- a) comply with election law and other applicable legislation, as well as with the provisions hereof;
- b) submit correct and objective reports on election campaign financing, under the conditions provided for in Article 43 of the Electoral Code, as well as in regulations approved by the CEC;
- c) avoid all means and forms of voter corruption;
- d) respect the rules of financing political parties, election candidates, referendum participants, including direct/indirect public financing and/or tangible and intangible support through other activities by individuals, legal entities or third parties affiliated with political parties, including their members;

- e) use only financial resources obtained from legal activity carried out on the territory of the Republic of Moldova;
- f) provide donors' identity information and ensure transparency of revenues and expenses in the election campaign;
- g) eliminate any forms of indirect support for political parties, election candidates and referendum participants, whether tangible, intangible and/or on behalf of third parties;
- h) prohibit funding or any support, either direct or indirect, tangible and intangible from foreign individuals, international organisations, including international political organisations, and individuals who are not citizens of the Republic of Moldova;
- i) prohibit direct funding of or tangible/intangible support to election candidates from philanthropic organisations, charities, trade organisations and/or non-governmental organisations that contain identity elements, symbols, names of political parties or their representatives, of persons holding public dignity positions, of persons holding management/executive positions in political parties or in social-political organisations;
- j) prohibit any preferential treatment of election candidates due to their social status and/or held positions. Any person involved in electoral processes, regardless of his/her status, shall not misuse the legal administrative, institutional, coercive, media, and other resources in support of or against any political party, election candidate or referendum participant.
- k) inform and persuade members, persons of trust, treasurers and supporters not to violate this Declaration;
- l) build the capacities of political parties, election candidates, referendum participants, and other stakeholders, involved directly or indirectly in the election campaign, to manage their funds during the election campaign.

#### **Article 7. Co-operation**

Each signatory shall cooperate with:

- a) electoral officials to ensure:
  - clarification/review of cases alleging violation of the electoral legislation on financing of election campaigns;
  - voters' access to information on election campaign financing, in accordance with the law;
- b) accredited observers to create an environment enabling the review of the lawfulness of electoral campaign financing procedures;
- c) signatories to take measures to ensure the electoral process integrity.

#### **Article 8. Entry into Force**

- (1) This Declaration shall be signed at the Central Electoral Commission, where its original copy shall be stored and kept.
- (2) The rules of conduct set forth in this Declaration constitute a moral obligation for its signatories, involved in the election campaign.
- (3) This Declaration shall enter into force for each signatory at the time of its signature and shall be valid until the day when the final election results are confirmed by the Constitutional Court.

#### **Signatories of this Declaration of Conduct:**

On behalf of parties, independent candidates, electoral blocs, referendum participants

Date

Signature



# Appendix V – Manual for preventing and responding to the misuse of administrative resources during electoral processes (Moldova)



## CENTRAL ELECTORAL COMMISSION

Legal Directorate within the Apparatus of the Central Electoral Commission  
Chisinau 2018

### I. GENERAL PROVISIONS

1. This guide shall be intended for electoral bodies and all actors involved in electoral processes (political parties, candidates for elective offices, state officials and bodies, media institutions, etc.) during the election period, in order to prevent and combat the misuse of administrative resources for electoral purposes.
2. This guide shall be based on the:
  - Constitution of the Republic of Moldova;
  - Electoral Code of the Republic of Moldova;
  - Code of Good Practice in Electoral Matters, Venice Commission;
  - Joint Guidelines for preventing and responding to the misuse of administrative resources during electoral processes, Venice Commission;
  - UN Convention on Civil and Political Rights 1966;
  - European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950;
  - Pact of the Copenhagen Meeting of the CSCE Conference on the Human Dimension, 1990.
3. For the purposes of this guide, the administrative resources in electoral processes shall be the human, financial, material resources in-kind and other immaterial resources available to both incumbents and civil servants involved in electoral processes, which derive from the control thereof over the staff, financial resources and allowances in the public sector, from the access to public facilities, as well as resources resulting from the fact that they enjoy prestige or constitute a public presence following their election to an elective position or holding the capacity of civil servants, which could provide them political advantage or other forms of support.

### II. LEGAL FRAMEWORK ON PREVENTING THE MISUSE OF ADMINISTRATIVE RESOURCES IN ELECTORAL PROCESSES

4. National provisions:

4.1. Constitutional provisions:

Art. 2 para. (2)  
Sovereignty and state power

No private person, no part of the people, no social group, no political party nor other public party may exercise state power in its own name.

Art. 16 para. (2)  
Equality

All citizens of the Republic of Moldova shall be equal before the law and the public authorities, regardless of race, nationality, ethnic origin, language, religion, sex, opinion, political affiliation, wealth or social origin.

Art. 20 para. (1)  
Free access to justice

Every person shall have the right to an effective remedy by the competent national courts against acts violating their legitimate rights, freedoms and interests.

Art. 38 para. (1)  
The right to vote and the right to be elected

The will of the people shall be the foundation of state power. This will shall be expressed through free elections, which are periodically conducted, by universal, equal, direct, secret and freely expressed suffrage.

Art. 39 para. (2)  
Right to administration

Every citizen shall be guaranteed access to a public office, according to the law.

Art. 41 para. (2)  
Freedom of parties and of other socio-political organisations

Parties and other socio-political organisations shall be equal before the law.

Art. 55  
Exercise of rights and freedoms

Every person shall exercise his/her constitutional rights and freedoms in good faith, without infringing the rights and freedoms of others.

4.2. Provisions from organic laws:

Art. 13 para. (3) of the Electoral Code  
Limitations

Citizens of the Republic of Moldova who, by virtue of the office held, do not have the right to be members of parties or other socio-political organisations, as well as persons with high positions of responsibility, whose method of appointment or election is regulated by the Constitution of the Republic Moldova and/or the organic laws, from the moment of their registration as electoral competitors, shall suspend their activity in the position held. The persons subject to these provisions shall be:

- a) Deputy Prime Ministers, Ministers and *ex officio* members of the government;
- b) heads of the central public authorities;
- c) presidents and vice-presidents of districts;
- d) mayors and deputy mayors;
- e) praetors and vice-praetors.

Art. 41 para. (3) let. b) of the Electoral Code  
The conditions and the way of financial support of the electoral campaigns

It shall be forbidden to finance or materially support, in any form, direct and/or indirect, the activity of political parties, initiative groups, electoral campaigns/ electoral competitors by public authorities, organisations, enterprises, public institutions, other legal entities financed from the public budget or having state capital, unless the provision of services or material support is expressly provided for by the law.

Art. 52 para. (7) and (8) of the Electoral Code  
Electoral agitation

Candidates may not use public means and goods (administrative resources) in election campaigns, and public authorities/institutions and those assimilated thereto may not give/grant public goods or other favours to electoral competitors, except on a contractual basis, on equal terms, for all electoral competitors.

Images representing state institutions or public authorities, both in the country and abroad, or international organisations, may not be used for electoral advertising purposes. It shall be forbidden to combine colours and/or sounds that invoke national symbols of the Republic of Moldova or another state, the use of materials featuring historical personalities of the Republic of Moldova or abroad, the symbolism of foreign states or international organisations or the image of foreign officials.

Art. 69 para. (4) and (7) of the Electoral Code  
General principles on the media coverage of elections

The media shall not adopt privileged treatment of electoral competitors by virtue of their social status and/or positions held by their candidates.

The media shall have the right to cover the elections and to inform the public about all electoral issues free from any interference or involvement from public authorities, competitors/candidates or other entities.

Art. 75 of the Electoral Code  
Legal liability

- (1) The natural and legal persons who violate the provisions of the electoral legislation, prevent the free exercise of the electoral rights of the citizens, prevent the activity of the electoral bodies shall be liable in accordance with the legislation in force.
- (2) For the violation of the electoral legislation, the Central Electoral Commission or the constituency electoral council may apply to the initiative group or to the electoral competitors the following sanctions:
  - a) warning;
  - b) cancellation of the registration of the initiative group;
  - c) initiating the contravention process according to the legislation;
  - d) the lack of allocations from the state budget, as a basic or complementary sanction;
  - e) requesting the cancellation of the electoral competitor's registration.
- (3) The warning shall be applied by decision of the Central Electoral Commission in case of any elections, as well as by decision of the constituency electoral council - in case of local elections.
- (4) In case of repeated application of the sanction in the form of a warning during an electoral period for violations regarding the financing of the electoral campaign, the Central Electoral Commission shall apply to the political parties registered as electoral competitors, the complementary sanction regarding the lack of allocations from the state budget, for a period from 6 months up to one year.
- (5) The cancellation of the registration shall be applied at the request of the Central Electoral Commission, and in the case of local elections - also at the request of the constituency electoral council, by a final court decision, which finds:
  - a) the use by the electoral competitor of the undeclared financial and material funds or the exceeding of the expenses over the ceiling of the means from the electoral fund;
  - b) the use by the electoral competitor of the financial means from abroad;
  - c) non-suspension from office by the candidate who has this obligation. In this case, the registration of the independent candidate shall be cancelled or the respective candidate shall be excluded from the list of the electoral competitor;
  - d) the violation by the electoral competitor of the provisions of Art. 52 para. (3).
- (6) In the cases provided for in para. (5), the Central Electoral Commission or the constituency electoral council shall address an application for the annulment of the electoral competitor, by adopting a decision to this effect, to the Chisinau Court of Appeal, in case of parliamentary and presidential elections, or the court in whose territorial area the respective electoral council is located, in the case of general local elections or new local elections. The court shall examine the application and issue a decision on it within 5 days, but not later than the day before the elections.

Art. 102, 126, 148, 182, 210 of the Electoral Code  
Null and void elections [referendum]

If, in the electoral process, on the day of the elections [referendum] and/or the counting of votes, violations of this code have been committed, which have influenced the voting results and the allocation of mandates, the elections [referendum] shall be declared null and void.

Art. 5 para. (3) of Law no. 294 of 21.12.2007 regarding the political parties  
State support for political parties

The support of political parties by the state shall be achieved only under the law.

Article 26 para. (6) let. d) of Law no. 294 of 21.12.2007 regarding the political parties  
Donations

It shall be forbidden to finance, provide free services or material support, in any form, direct and/or indirect, to political parties by: public authorities, organisations, enterprises, public institutions, other legal entities financed from the public budget or who have state capital, unless the provision of services or material support is expressly provided by law.

Art. 31<sup>1</sup> of Law no. 294 of 21.12.2007 regarding the political parties  
Violation of donation provisions

- (1) In case a political party receives donations in violation of the provisions of Art. 26, including in case of receiving donations that exceed the established ceilings, the respective political party shall, within 3 days from the submission of the donation, pay to the state budget, the amounts received in violation of the law or return the amounts exceeding the established ceilings.
- (2) In case of non-compliance with the requirements of para. (1), the Central Electoral Commission shall issue a written summons addressed to the political party, requesting the removal of the violation and informing about the measures taken, within 3 working days from the issuance of the summons.
- (3) The failure to enforce the summons of the Central Electoral Commission shall constitute a contravention and shall be sanctioned in accordance with the provisions of the Contraventional Code.
- (4) In case of repetition, during a calendar year, of the violation provided in para. (3) and of the application of contraventional sanctions for these violations, the Central Electoral Commission shall adopt a decision regarding the deprivation of the respective party of the right to the allocations from the state budget for a period from 6 months up to one year.

Art. 48 of the Contraventional Code

The use of undeclared, non-compliant or foreign funds for the financing of political parties

- (1) The use by political parties of undeclared, non-compliant or foreign funds shall be sanctioned with a fine from 30 to 90 conventional units applied to the natural person, or with a fine from 180 to 300 conventional units applied to the person in a position of responsibility.
- (2) The financial means used in the manner provided in para. (1) shall be seized and made revenue to the state budget.

Art. 48<sup>1</sup> of the Contravention Code

Violation of legislation on the management of financial means of political parties and of electoral funds

Illegal use of administrative resources (public goods), including favouring or consenting to the illegal use of administrative resources (public goods), in electoral campaigns, if it does not constitute a criminal offence, shall be sanctioned with a fine from 90 to 240 conventional units applied to the person in a position of responsibility and by deprivation of the right to hold certain positions or to conduct certain activities for a period of up to one year.

Art. 181<sup>2</sup> para. (2) of the Criminal Code

Illegal financing of political parties or electoral campaigns, violation of the way of managing the financial means of political parties or of electoral funds

The use of administrative resources (public goods), including favouring or consenting to the illegal use of administrative resources (public goods) in electoral campaigns, if large-scale damage has been caused, shall be punishable by a fine in the amount of 4000 to 6000 conventional units or by imprisonment for up to 3 years, in both cases by deprivation of the right to hold certain positions or to exercise certain activities for a term of 2 to 5 years.

## 5. Provisions from international acts:

### Art. 25 of the UN Convention on Civil and Political Rights, 1966

Every citizen shall have the right and the possibility, without any of the discriminations referred to in Article 2 and without unreasonable restrictions:

- a) to take part in the management of public affairs, either directly or through freely elected representatives;
- b) to elect and be elected, in elections that are periodic, honest, with universal and equal suffrage and by secret ballot, ensuring the free expression of the will of the voters;
- c) to have access, in general conditions of equality, to the public offices in his/her country.

### Art. 3 of the Protocol no. 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950

The High Contracting Parties shall undertake to conduct, at reasonable intervals, free elections by secret ballot, under conditions which ensure the free expression of the opinion of the people regarding the election of the legislative body.

### Point 2.3 of the Code of Good Practice in Electoral Matters, Venice Commission Equality of opportunity

Equality of opportunity must be guaranteed for parties and candidates alike. This entails a neutral attitude by state authorities, in particular with regard to: the election campaign; coverage by the media, in particular by the publicly owned media; public funding of parties and campaigns.

### Points 1.4.1 and 1.4.5 of the Joint Guidelines for preventing and responding to the misuse of administrative resources during electoral processes, Venice Commission Neutrality

The legal framework should ensure the neutrality of the civil service by prohibiting civil servants from campaign activities in their official capacity, either by being themselves candidates or when supporting candidates. This applies as well to public and semi-public entities. It is important that a clear separation between the state and political parties is maintained; in particular political parties should not be merged with the State

The regulatory framework shall ensure the objective, impartial and balanced coverage of election-related events by the public media. Law and practice shall ensure together that public offices are not involved in the "hidden" campaign for or against certain electoral competitors.

### Point II.1.3. of the Joint Guidelines for preventing and responding to the misuse of administrative resources during electoral processes, Venice Commission

The legislative framework should prohibit public authorities, as well as public and semi-public bodies in the exercise of their functions, from engaging, during the electoral process, in activities that, intentionally or accidentally, favour or discriminate a political party or candidate. It refers to public funds (from the state or local budget), as well as institutional resources (staff, vehicles, infrastructure, telephones, computers, etc.).

### Point II.2.3. of the Joint Guidelines for preventing and responding to the misuse of administrative resources during electoral processes, Venice Commission

Political parties and candidates should be required to specify the sources and destinations of the funds, in order to be able to identify potential misuses of administrative resources. Any use of administrative resources in favour of parties or candidates should be considered and recorded as a contribution to the financing of their election campaign.

## III. GENERAL PRINCIPLES

6. No person involved in electoral processes, regardless of their status, should misuse the administrative resources in support of or against any political party, candidate for election or participant in a referendum, which can be manifested in the following forms:

6.1. *Legal resources* (legislative and regulatory) - the use by the electoral competitor of the decision-making bodies: legislative and executive, of law and of the courts, in order to become an electoral subject, or the exclusion of the opposing candidate from the electoral race.

One of the guarantees that the candidate benefits from in the elections against the abusive use of administrative resources through the law-enforcement bodies, established in Art. 51 para. (4) of the Electoral Code, shall consist in the fact that, in order to be held criminally liable, arrested, detained or subjected to administrative sanctions, except in cases of flagrant criminal offences, the consent of the electoral body that registered it shall be required. Furthermore, without giving his/her consent, the candidate cannot be dismissed or transferred to another job or position, this being a legal obstacle for persons with positions of responsibility (heads of entities) to misuse their duties to the detriment of the candidate.

However, when examining complaints from law-enforcement bodies, the electoral body shall take into account: the severity of the allegedly illegal actions; the impact on the possibility of conducting the electoral campaign; the date of committing the actions; finding the candidate in search; evading liability using candidate status and exceeding the limitation period. Therefore, the electoral body shall agree to hold the candidate accountable only in exceptional cases with the formulation of sound arguments, taking into account all circumstances of the case.

The legislative body is to take into account the recommendations given by the Venice Commission in the Code of Good Practice on Electoral Practice, according to which essential amendments to the Code (electoral system, electoral bodies and constituencies) should not be allowed less than a year prior to the day scheduled for the elections, only technical adjustments to regulate the electoral process being admissible.

Examples:

- ▶ shortly before the elections, the legislative forum amends the legal provisions to facilitate its own candidate or, conversely, to exclude opponents (changes the age required to stand as a candidate, introduces the obligation to have additional documents to stand as a candidate, establishes the submission of the advance money, etc.);
- ▶ a criminal/contraventional case is filed against the opponent and the pre-trial or contraventional arrest is applied;
- ▶ the opponent is transferred to another locality than where he/she standing as a candidate.

6.2. *Institutional resources* - the use of office equipment, means of transport, government structures, subordinate civil servants and other material and human resources, financed from state funds, for the organisation and conduct of both pre-electoral and electoral activities.

It should be noted that, based on judicial practice, the use of administrative resources by the candidate may be grounds for declaring the election null and void by excluding him/her from repeated elections. However, persons running for elective offices, except for those subject to the provisions of Art. 13 para. (3) of the Electoral Code (ministers, *ex officio* members of the government, heads of central public authorities, district presidents and vice-presidents, mayors and deputy mayors, praetors and vice-praetors), shall not have the obligation to suspend their office during the electoral campaign. Therefore, such persons can use institutional resources, but not in order to obtain electoral benefits, but in order to achieve functional activity. For example, persons who enjoy the right to be protected by the state cannot be blamed for using administrative resources when conducting visits for electoral purposes (use of vehicle and security). At the same time, the actions of persons who, in the exercise of their service duties, turn working visits into events with electoral connotations can be qualified as misuse of administrative resources.

If buildings and public infrastructure are used for electoral campaign purposes, equal access to them for all candidates and political parties should be ensured.

Examples:

The Prime Minister/President of the Republic of Moldova/President of the Parliament, not being persons who, pursuant to Art. 13 para. (3) of the Electoral Code have the obligation to suspend their activity in the office they hold, use service cars, subordinates, government rooms, press and protocol services, in various events which they turn into electoral agitation and urge voters to vote for a particular candidate, not necessarily their own candidacy (festive opening of a building, awarding of prizes, etc.);

- ▶ the use of administrative buildings and equipment for broadcasting or displaying the electoral agitation (the mayor/head of the unit displays the electoral agitation on buildings managed by the local public administration body or distributes the electoral booklets for the general public);

- ▶ production of materials of an electoral agitation nature from the account of the state/local budget (periodic press of the central and local public administration or booklets, leaflets with general topics, but which contain elements of agitation);
- ▶ the person who is subject *de jure* to Art. 13 para. (3) of the Electoral Code is suspended from office, but *de facto* continues to use the office, the service car, etc.

6.3. *Forced resources* - the use of forced methods against political opponents, their supporters and voters and for their unjust influence.

This form of use of administrative resources can be manifested by creating obstacles for subordinates (the work team) to participate in electoral meetings of the electoral opponent, or vice versa: forcing the team to participate in an electoral demonstration, blocking transport with supporters travelling to election rally or blocking access to the space intended for the election rally, under various pretexts. The basic idea is that political forces should be able to express their views through the public media and that all political forces should have the right to organise rallies, including on the main streets, to distribute literature and to exercise their right to display electoral posters.

The requirement to collect signatures in favour of the candidate/issue subject to the referendum, or to sign the subscription list is also to be regarded as an inadmissible use of administrative resources.

In any case, the competent bodies should react promptly to such situations by resolving the issue of the free exercise of the rights of the actors involved.

Examples:

- ▶ the head of the budgetary institution, gathers the team, during working hours, for an electoral meeting, including for collecting signatures, on the other hand, does not allow the work team to participate outside working hours at an electoral meeting, including by artificially creating orders;
- ▶ the head of the budgetary institution, after the election day, collects, under different pretexts (such as, it is requested by the accounting or the personnel service), the identity cards, with the accompanying cards where the special stamp is applied upon voting, to check if the subordinates were present at the vote;
- ▶ the head of the budgetary institution requires subordinates to disseminate, place election agitation materials, including in their own work rooms or vehicles.

6.4. *Media resources* - the provision of privileged conditions to the electoral subject or its candidate, by the media agencies financed from the state and local budget.

The inability of the media to impartially present information about the electoral campaign and candidates is one of the major problems in the elections. The same obligations of public broadcasters to give all candidates equal airtime and to equidistantly cover the electoral campaign should also be borne by private broadcasters, regardless of whether they organise electoral debates or not.

According to Art. 69 para. (5) of the Electoral Code, during the electoral period, the broadcasters and the written media, to which web pages are also assimilated, under the conditions of Art. 70 para. (8) of the Electoral Code, shall clearly distinguish, in their journalistic materials, between the exercise of official functions and the electoral activity.

In turn, in accordance with Article 69 para. (6) of the Electoral Code, electoral competitors who consider themselves affected in their rights, shall have the right to reply. The written request regarding the granting of the right to reply shall be submitted to the media within 2 calendar days from the dissemination/publication of the information. In the case of broadcasters, the refusal to grant the right of reply shall be challenged at the Audiovisual Coordinating Council, and in the case of the written media - in the courts of law. The right to reply shall be granted within 3 calendar days from the submission of the request/appeal, but not later than the day prior to the voting day, under conditions equal to those in which the legitimate rights were violated.

Therefore, the competent bodies should react promptly for the fulfilment of this right, or, in case of an unfounded refusal from the public broadcaster, the action shall be seen as misuse of the administrative resource.

The restrictions imposed on civil servants during the electoral period should reflect the complex relationships between the different rights and freedoms enjoyed by political persons and actors. Thus, the European Court of Human Rights ruled (*Bowman v. Great Britain*, ref. 141/1996/760/961, decision of 19 February 1998) "free elections and freedom of expression, in particular the right to political debate, together form the cornerstone of any democratic system".

Examples:

- ▶ the public broadcasters reflect the activity of the central and local public administration bodies, but do not distinguish between the basic activity of the bodies and persons involved (dignitaries and civil servants) and the electoral one, also the electoral actions being presented, although for this, there is the ether block intended for electoral events, that is, without separating them;
- ▶ the public broadcasters only reflect the activity of state dignitaries who stand as candidates for elective offices or create agitation in favour of their own candidates and ignore covering the activity of other candidates, or cover it for less time and/or with a negative connotation;
- ▶ the public broadcasters present the activity of the persons who have suspended their activity under the conditions of Art. 13 para. (3) of the Electoral Code as further being in the respective position.

7. The explicit requirement of the Joint Guidelines for preventing and responding to the misuse of administrative resources during electoral processes, approved by the Venice Commission, is that public authorities and civil servants act impartially throughout the electoral process, while fulfilling the legal duties.

It is particularly important to ensure the integrity of judges, prosecutors, police and electoral officials. It should be noted that, although some members of the electoral bodies are nominated by the political parties represented in Parliament, they should, in no case, promote the interests of the party proposing them, but ensure the adoption of impartial decisions in accordance with legal provisions, being a balance for not admitting the favouring of the interests of certain candidates.

8. In accordance with para. 41 of the Code of Good Practice in the field of political parties, in addition to the forms of public funding provided by law, candidates and political parties shall refrain from receiving financial or other assistance from public authorities, in particular those led by their members. This condition shall also be applicable to state-controlled private law entities (state and municipal enterprises, joint stock companies, etc.). Therefore, the provision of material or financial resources on preferential terms by a state-controlled commercial entity (holding representatives in the administrative body) to an electoral competitor or to the competitor's donor cannot be admitted.

It should be mentioned that any conflict of interests, including of personal interest, shall be viewed and evaluated including in the light of the provisions of Law no. 133 of 17 June 2016 on the declaration of wealth and personal interests. It should be noted that, having the obligation to declare all conflicts of interest and to exercise service duties with impartiality and objectivity, in accordance with Art. 18 para. (2) of the law concerned, persons in the public service may not obtain benefits not provided by law or by the individual employment contract due to the office previously held.

In its turn, according to Art.13 para. (1) let. a) of Law no. 133/2016, the head of the public organisation shall not knowingly admit that persons working in the organisation he/she leads fulfil their service duties being in a situation of conflict of interests.

### **III. FINAL PROVISIONS**

9. The whole set of rights and obligations shall be clearly regulated, respecting the right to equality of all candidates, and any breach of this right shall be properly sanctioned, guaranteeing the organisation and conduct of free and fair elections.

10. State bodies, as exponents of administrative power, regardless of their level and status, are formed exclusively through elections, and the admission of the uses of administrative resources at the source of formation, such as elections, distorts their foundation and, consequently, lead to the inefficiency of the activity in the interest of the citizen, - the latter being the primary element of power in the state.



A competitive, fair and healthy electoral environment is crucial at every stage of the electoral cycle. However, it has utmost importance during the electoral period, including campaigns, as well as on election day. The line between a state and a ruling party is very fragile and can sometimes be blurred even in recognised democracies, which detracts from other improvements in electoral practices. The abuse of public administrative resources damages the democratic development of states and leads to citizens' frustration with elections and their results.

The toolkit "Countering the misuse of administrative resources during electoral processes" was developed as methodological guidelines for the Council of Europe member states to introduce effective mechanisms for preventing the abuse of public administrative resources and responding to violations in a timely and efficient manner. The toolkit was designed in co-operation with the Venice Commission and is based on the Council of Europe's *acquis* and the case law of the European Court of Human Rights. This publication proposes an overview of international standards and good practices, case studies and practical examples, empowering electoral stakeholders with necessary instruments for countering the misuse of administrative resources during electoral processes. The toolkit presents interesting comparative analysis of examples from Latvia, Georgia, Ukraine, the Republic of Moldova and other Council of Europe member states. The authors propose recommendations and practical solutions, as well as complex measures that are already in place and have changed electoral practices for the better. The methodological guidelines also include codes of conduct, training materials and concepts of e-learning courses in the field aimed at raising awareness of electoral stakeholders of the necessity of ensuring a fair and competitive electoral environment.

The toolkit is primarily for electoral officials and public servants, but it can also serve as a road map for other electoral stakeholders.



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