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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

UKRAINE

OPINION

ON THE AMENDMENTS TO THE LAW ON ELECTIONS REGARDING THE EXCLUSION OF CANDIDATES FROM PARTY LISTS

Adopted by the Council for Democratic Elections at its 55th meeting (Venice, 9 June 2016)

and by the Venice Commission at its 107th Plenary Session (Venice, 10-11 June 2016)

on the basis of comments by

Mr Michael FRENDO (Member, Malta)
Mr Pere VILANOVA TRIAS (Member, Andorra)
Mr Peter PACZOLAY (Honorary President)

I. Introduction

1. In a letter of 15 March 2016, Mr Cezar Florin Preda, Chair of the Monitoring Committee of the Parliamentary Assembly, requested the Commission to prepare an opinion on the Ukrainian law on amendments to the law on the election of the people's deputies of Ukraine (Law n° 3700 as it appears in the document CDL-REF(2016)024, hereinafter "the Law").

2. Messrs Michael Frendo, Pere Vilanova Trias and Peter Paczolay were appointed as rapporteurs.

3. The present opinion was prepared on the basis of the contributions of the rapporteurs. It was subsequently adopted by the Council for Democratic Elections at its 55th meeting (Venice, 9 June 2016) and by the Venice Commission at its 107th Plenary Session (Venice, 10-11 June 2016).

II. Background

4. On 16 February 2016 the Verkhovna Rada of Ukraine by a majority of 236 votes adopted Law N° 1006-VIII amending the Law on elections of people's deputies of Ukraine allowing the exclusion of candidates for people's deputies of Ukraine from the election list in the national multi-member constituency after the tabulation of electoral results (Articles 1 and 2 of the Amending Law of Ukraine "On Elections of People's Deputies of Ukraine"). The Law states that it "*covers electoral lists of candidates for people's deputies of Ukraine from political parties, which had been subjects of electoral process at snap elections of people's deputies of Ukraine on 26 October, 2014*."

5. This Law was criticised by a number of national NGOs, including OPORA, the Committee of Voters of Ukraine (KVU) and the Reanimation Package of Reforms Initiative (RPR), which noted that it violated the principle of legal certainty; could open the door to political corruption; would have a negative impact on internal party democracy and violated the constitutional principle of direct suffrage.

6. Several political parties took immediate measures to implement the law. On 9 March 2016 the CEC, on the basis of changes in the law "on Elections of People's Deputies", removed nine candidates to the Verkhovna Rada from the list of the radical party of Oleg Lyashko. On 23 March Party "Samopomich" requested the CEC to delete 11 candidates from its electoral list of 2014. Party officials said that the 14 March party congress, in accordance with the law "on Elections of People's Deputies" decided to exclude those candidates from the party who had not taken part in the activities of the party or were expelled from the party for violations over the past 1.5 years. On 25 March, 2016, Petro Poroshenko's Block excluded several candidates from its list as well.

III. Scope of the present opinion

7. The examined law introduces amendments to Articles 61 and 105 of the 2012 Law on elections of people's deputies of Ukraine. Other relevant legislation includes Article 81 of the Constitution of Ukraine and some provisions of the 2001 Law on political parties.

8. This law raises a number of issues which shall be indicated below:

a. The first issue relates to the power of political parties to remove a candidate or change his/her ranking on the party list after an election has taken place in the interim period between the election and the time when the Central electoral commission declared him/her as elected. Article 81 of the Constitution of Ukraine allows the disqualification of an elected member who, having been elected as part of one political formation, then

moves to another political formation within the period of the same legislature for which he or she was elected. The Law introduces the possibility of a disqualification without specific conditions. The lapse of time between the election day and the declaration of a candidate as elected may be several years for candidates who were not elected immediately but were next on the list.

b. The second issue is whether the wording indicated in the above paragraph, as delineated in Section II Clause 3 of the Law is limited to the electoral process in 2014 or whether it can also be applied to all subsequent electoral processes.

c. The third issue is that this is a retrospective law which declared in 2016 that its scope covers electoral lists of candidates for people's deputies of Ukraine from political parties, which had been subject of the electoral process in 2014.

d. The fourth issue is that the Law is not clear as to the powers of the Central electoral commission and a possibility to appeal against the decision of a party congress for the candidates excluded from the list.

9. This opinion examines the amendments adopted by the Verkhovna Rada and the issues mentioned in the previous paragraph in the light of the previous opinions and recommendations of the Venice Commission on political parties, in particular:

a. CDL-AD(2015)025 Joint Opinion on the draft amendments to some legislative acts concerning prevention and fight against political corruption of Ukraine ;

b. CDL-AD(2015)020 Report on the method of nomination of candidates within political parties;

c. CDL(2015)008 Comparative Table on the Method of nomination of candidates within political parties - Replies by country concerning political parties / Tableau comparatif sur la méthode de désignation des candidats au sein des partis politiques - Réponses par pays concernant les partis politiques.

d. CDL-AD(2010)024 Guidelines on political party regulation, by the OSCE/ODIHR and the Venice Commission ;

e. CDL-AD(2009)027 Report on the Imperative Mandate and Similar Practices;

f. CDL–AD(2005)015 Opinion on the amendments to the Constitution of Ukraine adopted on 8.12.2004;

g. CDL-AD(2002)023rev Code of Good Practice in Electoral Matters: Guidelines and Explanatory Report.

10. This opinion is based on an informal English translation of the draft amendments: certain comments may be due to inaccuracies of the translation.

IV. Analysis

a. The power of political parties to remove elected representatives in the Ukrainian legal framework

i. The adopted law, in the light of Article 81 of the Constitution of Ukraine

11. The Constitution of Ukraine foresees the removal of an elected representative from the parliament. According to its Article 81 paragraph 2 (6) and last paragraph[1], as currently in force, an elected representative who, having been elected as a member of a political bloc, moves to another political formation within the lifetime of the legislature for which he or she was elected, loses his/her seat. The last paragraph of this Article gives the power to take such decision to political parties in the following terms:

> *"Where a People's Deputy of Ukraine, as having been elected from a political party (an electoral bloc of political parties), fails to join the parliamentary faction representing the same political party (the same electoral bloc of political parties) or exits from such a faction, the highest steering body of the respective political party (electoral bloc of political parties) shall decide to terminate early his or her authority on the basis of a law, with the termination taking effect on the date of such a decision".*

12. The automatic loss of a parliamentary seat when an elected member of parliament moves from his/her original parliamentary formation to another formation reflects the view that he or she is a delegate forming part of a political formation and not a representative who is elected to freely exercise his/her discretion in the lifetime of that particular legislature. Political parties argued that this rule was an efficient deterrent against "floor crossing" and other practices aimed at destabilising political factions in the parliament.

13. Article 81 was criticised by the Venice Commission in its opinion on the 2004 Constitution as not reflecting good practice. The opinion stressed that:

> *"[…] the proposed procedure in the Constitution gives the parties the power to annul electoral results. It might also have the effect of weakening the Verkhovna Rada itself by interfering with the free and independent mandate of the deputies, who would no longer necessarily be in a position to follow their convictions and at the same time remain a member of the Parliament. As the Commission has stressed in its previous opinion, linking a mandate of a national deputy to membership of a parliamentary faction or bloc is also inconsistent with the other constitutional provisions bearing in mind that Members of Parliament are supposed to represent the people and not their parties"[2].*

14. Article 81 represents a clear constitutional choice for a model where the political party is an entity superior to the individual candidate and where the political formations in Parliament, rather than the individual Member of Parliament, are the dominant element in the exercise of parliamentary democracy. However, parties exercise these powers in specific cases based on the behaviour of elected candidates.

15. The adopted Law reinforces even more the party's control over the parliamentary mandate by allowing to remove a candidate or change his/her ranking on the party list after an election has taken place. The Law goes beyond Article 81: political parties can decide to exclude someone from the list not only if the candidate leaves the party but at their discretion. In its

[1] CDL-REF (2014)012.
[2] CDL–AD(2005)015 Opinion on the amendments to the Constitution of Ukraine adopted on 8.12.2004 adopted by the Commission at its 63rd plenary session (Venice, 10-11 June 2005), para.12

2009 report on the imperative mandate and similar practices the Venice Commission insisted that such provisions would "[…] give the parties the power to annul electoral results"[3]. Parties are instruments not owners of the social contract between the electors and the parliament. According to a generally accepted principle in modern democracies, the parliamentary mandate belongs to an individual MP, because he/she receives it from voters via universal suffrage and not from a political party.[4] This principle equally applies to candidates on party lists.

ii. The Law on Election of People's Deputies of Ukraine, on party candidates

16. Article 98 (10) of the Law on Election of People's Deputies of Ukraine states very clearly that "*The persons who have been elected as MPs shall be determined based on the descending order of the parties electoral lists, in accordance with the number of MP mandates obtained by the parties' electoral lists.*"

17. Furthermore, the same law states, in Article 58 (4), that "*A person included in a party's electoral list shall have the right to withdraw his or her consent to be nominated as an MP candidate prior to the date of registration. Such a person shall be deemed excluded from the electoral list of a party from the moment of receipt of the Central electoral commission of a statement of withdrawal…"*

18. In this context, it is also important to note that in Article 80 (4) of the Law on the Election of the People's Deputies of Ukraine dealing with Ballot Papers, the law states that "*A ballot paper shall contain the number of each party determined by drawing lots, the full name of the respective party, family names, first names (all names) and patronymics (if any) of the first five registered MP candidates, included in the electoral list of the party. An empty box shall be placed between the number of each party and the name of that party."*

19. The above clauses are being highlighted to indicate very clearly that the law is constructed in a way that it allows changes to take place in the party list prior to the elections but that from election day onwards the situation is fixed so as to enable the voters to have their true say, subsequent to which the sovereign will of the people needs to be respected. The newly adopted amendments therefore seem to be in conflict with other provisions of the Law on Election of People's Deputies of Ukraine on party candidates.

20. Clearly, while changes are allowed prior to the submission of names to the voter to express his or her views, there is a cut-off point where the proposal to the voter is settled and fixed: and that is when there is a final registration of candidates and of parties' lists. That is the goal post which faces the electorate.

21. Once the goal posts facing the electorate have been set and the voters have expressed themselves, there should be no moving of that goal posts in relation to both those who are deemed elected and those who are "deemed unelected".

22. This is exactly what the new amendments do: they move the goalposts after the voters have expressed themselves and place the right of might in the hands of the supreme organ of the political party in relation to the candidates on the list who are "deemed unelected", albeit it gives this power to the party for a specific period of time, that is, until the Central electoral commission declares those candidates as having been elected.

[3] See CDL-AD(2009)027 Report on the Imperative Mandate and Similar Practices, paragraph 34.
[4] Cf ECtHR, Paunović and Milivojević v. Serbia, Application no. 41683/06, Judgment of 24 May 2016, para.63.

23. The result is that the party becomes more powerful than the will of the electorate. This power is exercisable without any specific limitation or criterion. The Guidelines on political party regulation by OSCE/ODIHR and the Venice Commission clearly provide that parties should be "prohibited from changing the order of candidates within an electoral list after voting has commenced".[5]

24. While Article 81 was criticised by the Venice Commission in its 2005 opinion on the constitution, the law goes far beyond what Article 81 allows. A party can even remove from its lists candidates who want to remain in the party. While note should be taken of the Venice Commission's report on the nomination of candidates where it stated that "*political parties should be free to establish their own organisation and the rules for selecting party leaders and candidates, since this is regarded as integral to the concept of associational autonomy*"[6], this Law introduces a type of imperative mandate for potential members of parliament which is unacceptable in a modern democracy.

b. Applicability of the adopted rule: to the results of the 2014 election, or a general rule for any election in the future?

25. Clearly the electoral law amendments apply to the "snap elections of people's deputies of Ukraine on October 26, 2014" (Paragraph 3 of the final and transitional provisions of the examined law).

26. As such, if this were to be the only application of the law, it becomes immediately subject to the criticism that this is an ad hoc law directed only at a specific situation, which in principle should not be distinguished from other electoral contexts.

27. The law declares that the scope of this Law "covers" the electoral lists of candidates of the snap elections of October 2014 and therefore can only be interpreted as applicable to those specific elections without any effect on any future election.

c. Retrospective effect of the law

28. The exclusion of candidates from the existing list may be considered an unfair (constitutionally dubious) "retroactive measure" in the light of Article 58 of the Constitution which explicitly establishes that laws cannot have retroactive effect. In this context the adopted Law creates a double problem. The first one can be identified with a violation of the right of citizens to choose their candidates in elections and to be informed about the rules applicable to the lists of elected candidates. The second one concerns the right of an individual who accepted to participate in elections as a candidate of a given political party under certain conditions.

29. In a democracy the ruling principle must be that the people's vote must be respected at all times, subject to the Constitution: therefore people have voted on a party list which is known in advance and it is unacceptable for that list to be changed subsequent to the exercise of the will of the people in the electoral process, notwithstanding the fact that this process is fundamentally based on a vote for political formations rather than for an individual candidate: the parties presented a list of candidates, and the electorate took its decision on this basis.

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[5] See CDL-AD(2010)024, Guidelines on political party regulation, by OSCE/ODIHR and Venice Commission - Adopted by the Venice Commission at its 84th Plenary Session, (Venice, 15-16 October 2010), para 129.

[6] CDL-AD(2015)020 Report on the method of nomination of candidates within political parties, para. 5.

30. In addition, changes of the way lists are managed may cause prejudice to a candidate on the list by changing the conditions under which he/she accepted to run in the election.[7] It is not acceptable within a European democracy to legislate retrospectively to affect candidates on a party lists who were potentially electable to parliament prior to the enactment of the law.[8]

31. The critical remark of this being an ad hoc law is again applicable here.

d. The powers of the CEC and the possibility of appeal against the decision of a party congress

32. The short list of amendments introduced by the Law is very significant but needs some clarification as to its real impact on the powers of the CEC: "In case of a party decision regarding candidate for deputy envisaged by part three or Article 105 of this Law[9] before the CEC takes decision on declaring him/her elected, the CEC shall take a decision on exclusion of the candidate specified in the decision from the party's election list". The new paragraph 3 of the law is giving a political party the power to "impose" on the Central electoral commission "a decision" to "implement" with no margin to question the decision of the party congress and/or to check if the procedural guarantees were respected.

33. This could be interpreted as a restriction of the competences of the Central electoral commission (see Article 25, Chapter IV of the Election Law), which would be problematic in the light of democratic standards.

34. The Law does not indicate if there is a possibility for an excluded candidate to appeal against the decision of a party congress. According to the new wording of paragraph 3 of Article 105, the CEC has five days after the decision of a party congress to exclude the candidate from the list of the party. The CEC does not have powers to check if the procedure in respect of (a) candidate(s) was in conformity with the party's statute. In the absence of any procedure for complaints and appeals, it is questionable whether an interested party can have a court decision within the indicated timeframe.

35. This lack of right to appeal against a decision of a party congress could create additional problems in the light of the right to be elected.[10] If the excluded candidate wins the case in the court of law after the date when candidates next on the list get their seats in the parliament, there is practically no possibility to redress the situation. At least, the appeal should have a suspensive effect.

36. This absence of a clear appeal procedure is problematic in the light of Article 8 of the Constitution which provides that "[i]n Ukraine, the principle of rule of law is recognised and effective". Access to courts is an essential element of the principle of the rule of law[11] .

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[7] The Venice Commission's "Report on the method of nomination of candidates within political parties" (CDL-AD(2015)020) underlines in its paragraph 5 that "In contemporary democracies, two main principles are central to the internal functioning of political parties. The first one is the principle of party autonomy, under which political parties are granted associational autonomy in their internal and external functioning. According to this principle, political parties should be free to establish their own organisation and the rules for selecting party leaders and candidates, since this is regarded as integral to the concept of associational autonomy. The second element is the principle of internal democracy, the argument being that because political parties are essential for political participation, they should respect democratic requirements within their internal organisation."

[8] CDL-AD(2016)007 Rule of Law Checklist, II.B.6.

[9] The Law on the election of the People's Deputies of Ukraine. See CDL-REF(2016)040.

[10] See ECtHR, Paunović and Milivojević v. Serbia, Application no. 41683/06, Judgment of 24 May 2016, para.67ff.(on the violation of Article 13 of the Convention taken in conjunction with Article 3 of Protocol No.1).

[11] CDL-AD(2016)007 Rule of Law Checklist, II.E.2.a.

V. Conclusion

37. The Venice Commission has already expressed itself on the powers entrenched in the Constitution of Ukraine whereby a deputy who changes his or her political formation can be deprived of his or her parliamentary seat by decision of the original political formation. It has deplored this constitutional regulation enabling the dismissal of elected MPs.

38. The Venice Commission has been requested to examine a law which further empowers the political parties from stifling political opinion or dissent within its own ranks by allowing them, at their absolute discretion, without any limitation, to remove from the party list a candidate with the potential to be legitimately elected by the voters, after election day and prior to such a candidate being so confirmed as elected by the Central electoral commission.

39. In conformity with its previous comments on Article 81 of the Constitution, the Venice Commission considers as contrary to international standards the empowerment of political parties ex post facto to deny the electorate its choice and choose who to place on its party list in a position to be elected. The power of political parties to remove from their lists, after an election has taken place, candidates who at the time were “deemed unelected” but retain a potential to be elected, should be removed in the light of European standards.

40. The Commission remains at the disposal of the Ukrainian authorities for any further co-operation on this matter.