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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

COMPILATION

OF VENICE COMMISSION OPINIONS AND REPORTS

CONCERNING POLITICAL PARTIES¹

¹ This document be updated regularly. This version contains all opinions and reports adopted up to and including the Venice Commission's 106th Plenary Session (11-12 March 2016).

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I. Introduction

The present document is a compilation of extracts taken from opinions and reports/studies adopted by the Venice Commission on issues concerning the political parties. The aim of this compilation is to give an overview of the doctrine of the Venice Commission in this field.

This compilation is intended to serve as a source of references for drafters of constitutions and of legislation relating to political parties, researchers as well as the Venice Commission's members, who are requested to prepare comments and opinions on such texts. However, it should not prevent members from introducing new points of view or diverge from earlier ones, if there is good reason for doing so. The present document merely provides a frame of reference.

This compilation is structured in a thematic manner in order to facilitate access to the topics dealt with by the Venice Commission over the years.

The compilation is not a static document and will continue to be regularly updated with extracts of newly adopted opinions or reports/studies by the Venice Commission. This is the second version of the compilation of Venice Commission opinions and reports concerning political parties, which follows the one endorsed by the Commission at its 96th Plenary Session (October 2013) (CDL(2013)045).

Each opinion referred to in the present document relates to a specific country and any recommendation made has to be seen in the specific constitutional context of that country. This is not to say that such recommendation cannot be of relevance for other systems as well.

The Venice Commission's reports and studies quoted in this Compilation seek to present general standards for all member and observer states of the Venice Commission. Recommendations made in the reports and studies will therefore be of a more general application, although the specificity of national/local situations is an important factor and should be taken into account adequately.

Both the brief extracts from opinions and reports/studies presented here must be seen in the context of the original text adopted by the Venice Commission from which it has been taken. Each citation therefore has a reference that sets out its exact position in the opinion or report/study (paragraph number, page number for older opinions), which allows the reader to find it in the corresponding opinion or report/study.

The Venice Commission's position on a given topic may change or develop over time as new opinions are prepared and new experiences acquired. Therefore, in order to have a full understanding of the Venice Commission's position, it would be important to read the entire Compilation under a particular theme. Please kindly inform the Venice Commission's Secretariat if you think that a quote is missing, superfluous or filed under an incorrect heading (venice@coe.int).

II. International standards on political parties

In the preparation of its opinions and reports/studies related to political parties, the Venice Commission takes into account a number of international standards concerning in particular the freedom of association, the freedom of expression, and the prohibition of discrimination as set out, among others, in the International Covenant on Civil and Political Rights (ICCPR) and the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR).

“At the international level, the provisions of two basic instruments must be taken into account. The International Covenant on Civil and Political Rights (1966), developing the rights of this nature proclaimed by the Universal Declaration of Human Rights (1948), recognises the right to hold opinions and the right to freedom of expression (art. 19) alongside with the right to freedom of association (art. 22), notwithstanding the possibility of establishing legal restrictions to their exercise due to the special duties and responsibilities that these rights imply”.

“With a regional scope and for the purpose of advancing the collective enforcement of certain of the rights stated in the Universal Declaration, the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), agreed by the Council of Europe Member States, likewise recognises the rights to freedom of expression (art. 10) and to associate in political parties as part of the general freedom of assembly and association (art. 11)”.

“Other significant provisions of the ECHR include the prohibition of discrimination with regard to the enjoyment of the rights and freedoms set therein (art. 14) and the admission of restrictions on the political activity of aliens (art. 16). The case law of the ECtHR has accordingly developed a consistent interpretation of the non-discrimination principle, making clear that not every distinction or difference of treatment amounts to discrimination. Protocol no. 12 to the ECHR, establishing a general clause of non-discrimination, and the Convention on the Participation of Foreigners in Public Life at Local Level (1992) are also relevant”.

CDL-AD(2009)021 Code of Good Practice in the field of political parties, adopted by the Venice Commission at its 77th Plenary Session (12-13 December 2008) and Explanatory Report, adopted by the Venice Commission at its 78th Plenary Session (Venice, 13-14 March 2009), §§87-88-89.

“The International Covenant on Civil and Political Rights (ICCPR) and the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) are the two main legally binding instruments applicable to states in this regard. In addition, the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW) is integral to understanding the states rule in ensuring gender equality with regards to political parties. Further, the rights and protections articulated in these legally binding documents are reiterated in International Customary Law through the Universal Declaration of Human Rights (UDHR). In addition, there are a number of political commitments persuasive upon OSCE states which are relevant to a full understanding of these issues. Such instruments include, most notably, the Document of the Copenhagen

Meeting of the Conference on the Human Dimension of the OSCE (Copenhagen Document). The Council of Europe (through both the Committee of Ministers and the Parliamentary Assembly), the European Commission on Democracy through Law (Venice Commission) and other bodies of the Council of Europe have also published a number of guiding documents which can provide an understanding of good practice with regards to legislation concerning political parties. A recent addition to this body of instruments is the United Nations Convention Against Corruption (UNCAC) and the 1999 Council of Europe Criminal Law Convention on Corruption”

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), §31.

“The International Covenant on Civil and Political Rights and the European Convention on Human rights represent legal obligations upon states, having undergone a process of

ratification. While the Universal Declaration of Human Rights and the Copenhagen Document do not have the force of binding law, the nature of these political commitments make them persuasive upon signatory states”.

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), Annex A.

A. International Conventions, United Nations and UN specialized agencies

- International Covenant on Civil and Political Rights (1966) (ICCPR) Articles: 2, 14, 19, 22.
- Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) Articles: 3, 4 and 7.
- International Convention on the Elimination of Racial discrimination Articles: 2, 5.
- United Nations Convention against Corruption Article 7(3).
- Universal Declaration of Human Rights Articles 19, 20.

B. Council of Europe

- European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) Articles 10, 11, 14.
- European Convention for the Protection of Human Rights and Fundamental Freedoms-Protocol 12, Article 1.
- Framework Convention for the Protection of National Minorities Articles 4, 7
- Convention on the Participation of Foreigners in Public Life at the Local Level Article 3.
- Decisions of the European Court of Human Rights.
- Recommendation and Resolutions adopted by the Parliamentary Assembly of the Council of Europe, in particular, Resolution 1308 (2002) Restrictions on political parties in the Council of Europe member states, Resolution 1344(2003) Threat posed to democracy by extremist parties and movements in Europe, Resolution 1546 (2007) The code of good practice for political parties.
- Recommendations and Resolutions adopted by the Committee of Ministers of the Council of Europe, in particular, Recommendation (2003)4 on common rules against corruption in the funding of political parties and electoral campaigns.
- Council of Europe, Group of States against Corruption – GRECO, Evaluation Reports.

C. European Union

- Charter of the Fundamental Rights of the European Union Articles 12, 21, 23.

D. OSCE

- Document of the Copenhagen Meeting of the Conference on the Human Dimension of the Conference on Security and Co-operation in Europe (CSCE) Articles 5.4, 5.9, 7.5, 7.6, 9.1, 9.2, 9.3, 9.4.

III. Definition of political parties

As a specific type of “free association of persons”, the central importance of political parties in the functioning of a democracy, their foundational character to a pluralist political society and their fundamental role in the formation of the will of people have been constantly stressed by the Venice Commission in its opinions, reports, studies and guidelines on political parties.

“A political party is ‘a free association of persons, one of the aims of which is to express the political will of citizens including through participation in the management of public affairs and the presentation of candidates to free and democratic elections.’ This definition of parties includes associations at any level that function in order to present candidates for elections or exercise political authority through election to governmental institutions.”

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), §26.

“Political parties are a collective platform for the expression of individuals’ fundamental rights to association and expression and have been recognized by the European Court of Human Rights as integral players in the democratic process. Further, they are the most widely utilized means for political participation and exercise of related rights. Parties are foundational to a pluralist political society and play an active role in ensuring an informed and participative electorate. Additionally, parties often serve as a bridge between the executive and legislative branches of government and can serve to effectively prioritize the legislative agenda within a system of government”.

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), §10.

“One of the purposes of legislation on political parties is to stress their central importance for the functioning of democracy. Therefore, it is common for a political party law to underline the special role of political parties in the “formation of the will of the people”¹.

CDL-AD(2009)041 Joint opinion on the draft law on Political Parties of the Kyrgyz Republic by the Venice Commission and OSCE/ODIHR, adopted by the Venice Commission at its 80th Plenary Session (Venice, 9-10 October 2009), §10.

A. A specific type of association

“A political party is an association with the task of presenting candidates for elections in order to be represented in political institutions and to exercise political power on any level: national, regional and local or on all three levels.

Whilst a few countries lack specific legislation on political parties, most Member States of the Council of Europe do, and in virtually all these cases, legislation aims at differentiating between political parties and other associations, including those involved in politics. Legislation on political parties serves, in this way, for the recognition of their essential role in democratic politics.”

CDL-AD(2009)002 Code of Good Practice in the Field of political parties, adopted by the Venice Commission at its 77th Plenary Session (Venice, 12-13 December 2008), §§10-11.

¹ Political parties play a primordial role in a democratic state and are a form of association essential to the proper functioning of democracy (United Communist Party-judgment, §25).

B. Freedom of establishment

“Political parties in democratic states are free associations, which are protected by Article 11 of the European Convention on Human Rights (hereinafter, the “ECHR”). This means that citizens may freely decide to constitute political parties, however, national legislations can limit this freedom in certain cases on the basis of principles consistent with the ECHR and the case law of the European Court of Human Rights. In a number of European states, there are no rules on prohibition of parties. In other states, there are rules on party prohibition, but these are strictly interpreted, and are only to be used with extreme restraint. In line with this common European democratic legacy, prohibition or enforced dissolution of political parties may only be justified in the case of parties which advocate the use of violence or use violence as a political means to overthrow the democratic constitutional order”.

“Political parties are not, in any Council of Europe Member State, the creation of public organs. The guideline that can be deduced from this practice is that State bodies should abstain from participating in the establishment of political parties and should not limit the right to establish political parties on a national, regional and local level”.

CDL-AD(2009)021 Code of Good Practice in the field of political parties, adopted by the Venice Commission at its 77th Plenary Session (12-13 December 2008) and Explanatory Report, adopted by the Venice Commission at its 78th Plenary Session (Venice, 13-14 March 2009), §§12-13.

CDL-AD (2009)002 Code of Good Practice in the Field of political parties, adopted by the Venice Commission at its 77th Plenary Session (Venice, 12-13 December 2008), §§12-13.

“Freedom of association is the central right which governs the functioning of political parties. A set of recognized universal, European and other regional treaties has given the right to full exercise of free association, including for the formation of political associations, to all individuals. The European Court of Human Rights has also recognized the inherent relationship between freedom of association and its inter-dependent rights of freedom of expression and opinion and assembly.”

“Although applicable international, European and other regional treaties conceptualize such rights as relevant to the individual, it is the free exercise of association itself which allows these protections to be extended to parties as a representative body of protected individuals. As such, groups of individuals choosing to associate themselves as a political party must also be awarded full protection of related rights. The rights of free association, expression, and assembly may only be limited where necessary in a democratic society. A number of useful non-binding recommendations on how these fundamental rights can be protected can be found in recommendations of the Parliamentary Assembly of the Council of Europe and guidelines and opinions adopted by the Venice Commission”.

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), §11.

C. Legal framework

“Wherever a legal regulation of political parties exists it must be consistent with the ECHR and the case law of the European Court of Human Rights. Parties must comply with these norms. When challenging a legal framework which is considered incompatible with higher norms, political parties must always take recourse to the use of legal means.”

CDL-AD(2009)021 Code of Good Practice in the field of political parties adopted by the Venice Commission at its 77th Plenary Session (Venice, 12-13 December 2008) and Explanatory Report adopted by the Venice Commission at its 78th Plenary Session (Venice 13-14 March 2009), §14.

“The role and function of political parties in a democratic system should ideally be defined in the highest legal order of the state to ensure the stability and relative permanence of these provisions. Additionally, as constitutional provisions are often general in nature and may provide overly broad discretion for implementation, many states undertake to provide specific legislation dealing with the proper regulation and protection of political parties. Legal regulations that affect basic rights of political parties should be addressed by parliamentary legislation and not by regulations issued by an administrative authority.

A specific law for political parties is not a requirement for a functioning democracy. In fact, a report compiled by the Council of Europe’s Venice Commission on different regulatory practices of OSCE states in the realm of political parties determined that such legislation is not necessary for the proper functioning of democracy, and may be most effective when quite minimal in its scope.

Where regulations are enacted, they should not unduly inhibit the activities or rights of political parties. Instead, legislation should focus on facilitating the role of parties as potentially critical actors in a democratic society and ensuring the full protection of rights relevant to their proper functioning. While a specific law for political parties is not required, political parties must at a minimum retain the same basic rights afforded other associations as well as the rights to nominate candidates and participate in elections”.

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), §§28-29.

IV. General guiding principles for political parties

As their role is essential in ensuring the proper functioning of democracy, political parties should benefit from a number of guarantees, in particular, that of pluralism, non-discrimination and transparency, which find their basis in the core values of the Council of Europe: Human Rights, democracy and the rule of law.

“The rule of law, democracy and human rights are three pillars of the European and the Council of Europe’s constitutional heritage. Therefore, provisions on democracy, the rule of law and human rights’ protection alongside norms regulating the political system and the separation of powers, stand among the basic principles of the Council of Europe’s Member States. Political parties are major actors in any democratic society, hence they enjoy the benefits of the guarantees of those principles by the State and, accordingly, they must also respect and promote these very same principles. The latter should be taken into account in the parties’ organisation, functioning and financing.”

CDL-AD(2009)002 Code of Good Practice in the field of political parties, adopted by the Venice Commission at its 77th Plenary Session (12-13 December 2008), §15.

CDL-AD(2009)021 Code of Good Practice in the field of political parties, adopted by the Venice Commission at its 77th Plenary Session (12-13 December 2008) and Explanatory Report, adopted by the Venice Commission at its 78th Plenary Session (Venice, 13-14 March 2009), §15.

A. Political parties in the ECHR and the case-law of the ECtHR

“Article 11 of the European Convention on Human Rights protects the right to associate in political parties as part of the general freedom of assembly and association:

“1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.

2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.”

“The right of freedom of association in the context of the Convention is in the case law of the European Court of Human Rights usually interpreted together with Article 10 on freedom of expression.

Article 10 of the Convention provides:

“1. Everyone has the right to freedom of expression. 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 article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.”

And in its case law the European Court of Human Rights has ruled that:

“... protection of opinions and the freedom to express them within the meaning of Article 10 of the Convention is one of the objectives of the freedoms of assembly and association as enshrined in Article 11. That applies all the more in relation to political parties in view of their essential role in ensuring pluralism and the proper functioning of democracy.”²

“To this the Court has added that it considers that: *“there can be no democracy without pluralism. It is for that reason that freedom of expression as enshrined in Article 10 is applicable, subject to paragraph 2, not only to “information” or “ideas” that are favorably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb ... Inasmuch as their activities form part of a collective exercise of the freedom of expression, political parties are also entitled to seek the protection of Articles 10 of the Convention.”³*

Furthermore, the Court, as to the links between democracy and the Convention, has observed: *“Democracy is without doubt a fundamental feature of the ‘European public*

² See *Refah Partisi (The Welfare Party) and Others v. Turkey*, Judgment of 13 February 2003, para 88, and Judgment of 31 July 2001, para 44, reiterating what the ECHR had stated earlier; see *United Communist Party of Turkey and Others v. Turkey*, Judgment of 30 January 1998, para 42 (quoting among other even earlier authorities *Vogt v. Germany*, Judgment of 26 September 1995, para 64); *Socialist Party and Others v. Turkey*, Judgment of 25 May 1998, para 41, and *Freedom and Democracy Party (ÖZDEP) v. Turkey*, Judgment of 8 December 1999, para 37

³ See *Refah Partisi*, Judgment of 13 February 2003 para 89; see Judgment of 31 July 2001, para 44.

order’... That is apparent, firstly, from the Preamble to the Convention, which establishes a very clear connection between the Convention and democracy by stating that the maintenance and further realisation of human rights and fundamental freedoms are best ensured on the one hand by an effective political democracy and on the other by a common understanding and observance of human rights ... The Preamble goes on to affirm that European countries have a common heritage of political tradition, ideals, freedom and the rule of law. The Court has observed that in that common heritage are to be found the underlying values of the Convention ...; it has pointed out several times that the Convention was designed to maintain and promote the ideals and values of a democratic society ...

In addition, Articles 8, 9, 10 and 11 of the Convention require that interference with the exercise of the rights they enshrine must be assessed by the yardstick of what is ‘necessary in a democratic society’. The only type of necessity capable of justifying an interference with any of those rights is, therefore, one which may claim to spring from ‘democratic society’. Democracy thus appears to be the only political model contemplated by the Convention and, accordingly, the only one compatible with it.”⁴

The Court has made these observations in cases concerning the prohibition of political parties. However, the Venice Commission takes the view that there is no reason not to apply the law as stated by the Court on matters concerning regulation of political parties in general. Any regulation concerning political parties, therefore, has to take into account that limitations imposed on political parties and their members must comply with the law as stated by the Court as well as be in conformity with the principles of *legality* and *proportionality*”.

CDL-AD (2004)007rev, Guidelines and explanatory Report on Legislation on political parties: Some Specific Issues, adopted by the Venice Commission at its 58th Plenary Session (Venice, 12, 13 March 2004), §§4-9.

B. Rule of law

“Political parties must comply with the values expressed by international rules on the exercise of civil and political rights (UN Covenant and the ECHR). Parties must respect the Constitution and the law. However, nothing can prevent them from seeking to change both the Constitution and the legislation through lawful means.”

CDL-AD(2009)002 Code of Good Practice in the field of political parties, adopted by the Venice Commission at its 77th Plenary Session (12-13 December 2008), §16.

“A party that aims at a peaceful change of the constitutional order through lawful means cannot be prohibited or dissolved on the basis of freedom of opinion. Merely challenging the established order in itself is not considered as a punishable offence in a liberal and democratic state. Any democratic society has other mechanisms to protect democracy and fundamental freedoms through such instruments as free elections and in some countries through referendums when attitudes to any proposal to change the constitutional order in the country can be expressed.”

CDL-AD(2009)021 Code of Good Practice in the field of political parties, adopted by the Venice Commission at its 77th Plenary Session (12-13 December 2008) and Explanatory Report, adopted by the Venice Commission at its 78th Plenary Session (Venice, 13-14 March 2009).

⁴ See *Refah Partisi*, Judgment of 13 February 2003, para 86, and Judgment of 31 July 2001, para 45, quoting observations in the Case of *United Communist Party of Turkey*, para 45 (see footnote 21).

CDL-INF (2000)001 Guidelines on Prohibition and Dissolution of political parties and Analogous Measures, adopted by the Venice Commission at its 41st plenary session (Venice, 10–11 December, 1999), §12.

“Legality: Any limitations imposed on the right of individuals to free association and expression should have their formal basis in the state’s constitution or parliamentary acts. Such limitations should not be the result of partisan political activity but based on a legitimate aim necessary in a democratic society. Thus, frequent changes in political party legislation may be seen as the result of political whim instead of as satisfying a compelling public interest. A state’s constitution and parliamentary acts should respect the right of association found in relevant international and regional instruments. The law must be clear and precise, indicating to political parties both what activities are considered unlawful and what sanctions are available in cases of violations. Political party legislation should be adopted openly, following debate, and made widely available for public review to ensure individuals and political parties are aware of their rights and the limitations on such rights.”

“Good Administration of Legislation Pertaining to Political Parties: The implementation of legislation relevant to political parties must be undertaken by bodies that enjoy guaranteed impartiality both in law and in practice. The scope and authority of regulatory agencies should be explicitly determined by law. Legislation should also ensure that regulatory bodies are required to apply the law in an unbiased and non-arbitrary manner. Timeliness is one element of good administration. Decisions affecting the rights of political parties must be made in an expeditious manner, particularly those decisions which related to time sensitive processes such as elections.”

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), §§16 and 21.

C. Democracy

“The European Court of Human Rights upheld on several occasions in its jurisprudence that political parties are a form of association essential to the proper functioning of democracy and that in view of the importance of democracy in the European Convention on Human Rights system, an association, including a political party, is not excluded from the protection afforded by the Convention simply because its activities are regarded by the national authorities as undermining the constitutional structures of the State and calling for the imposition of restrictions”.

CDL-INF(2000)001, Guidelines On Prohibition and Dissolution of political parties and Analogous Measures Adopted by the Venice Commission at its 41st plenary session (Venice, 10 – 11 December, 1999), §8.

“Parties are an integral part of a democracy, and their activities should ensure its good functioning. Hence, a commitment to internal democratic functioning reinforces this general function. Although few European states regulate this requirement in detail, several countries require the party’s internal structure and operation to be democratic. This positive experience could be shared between different Council of Europe Member States.”

CDL-AD(2009)002 Code of Good Practice in the field of political parties, adopted by the Venice Commission at its 77th Plenary Session (12-13 December 2008), §17.

The Code of Good Practice in the field of political parties adopted by the Venice Commission at its 77th Plenary Session (Venice, 12-13 December 2008) states that: *“Political parties are major actors in any democratic society, hence they enjoy the benefits of the guarantees of those principles by the State and, accordingly, they must also respect and promote these*

very same principles. The latter should be taken into account in the parties' organisation, functioning and financing".

CDL-AD(2009)021 Code of Good Practice in the field of political parties, adopted by the Venice Commission at its 77th Plenary Session (12-13 December 2008) and Explanatory Report, adopted by the Venice Commission at its 78th Plenary Session (Venice, 13-14 March 2009), §15.

"As parties contribute to the expression of political opinion and are instruments for the presentation of candidates in elections, some regulation of internal party activities can be considered necessary to ensure the proper functioning of a democratic society."

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), §98.

"Right of individuals to associate: The right of individuals to associate and form political parties should, to the greatest extent possible, be free from interference. Although there are limitations to the right of association, such limitations must be construed strictly and only convincing and compelling reasons can justify limitations on freedom of association. Limits must be prescribed by law, necessary in a democratic society, and proportional in measure. Association with political parties must be voluntary in nature and no individual should be forced to join or belong to any association against their will.⁵ The broad protection given to the right of individuals to associate requires that political parties also be free from unnecessary interference."

"The state's duty to protect individual right of free association: It is the responsibility of the state to ensure that relevant legislation enacts necessary mechanisms and practices allowing the free exercise of the individual right to freely associate and form political parties with others, in practice. Further, the state has the responsibility to enact legislation to prohibit interference from non-state actors as well as refrain itself from such interference. Where violations of the right to free association occur, the state bears responsibility to provide reparation as appropriate and to ensure the cessation of the violation. (...) limitations on the right to free association can be restricted only as prescribed by law and necessary in a democratic society. Any interference or limitation on the right of association is subject to the principle of proportionality".

"Political Pluralism: Legislation regarding political parties should aim to facilitate a pluralistic political environment. The ability for citizens to receive a variety of political viewpoints, such as through the expression of political party platforms, is commonly recognized as critical element of a robust democratic society. As evidenced by paragraph 3 of the Copenhagen Document and other OSCE commitments, pluralism is necessary to ensure individuals are offered a real choice in their political associations and vote choices.¹² Regulations of political party functioning should be carefully considered to ensure they do not impinge upon the principle of political pluralism."

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), §§14-15-20.

D. Non-discrimination

"Political parties should not act against the values of the ECHR and the principle of equality. Parties must not discriminate against individuals on the basis of any ground prohibited by the ECHR."

CDL-AD(2009)002 Code of Good Practice in the field of political parties, adopted by the Venice Commission at its 77th Plenary Session (12-13 December 2008), §18.

CDL-AD(2009)021 Code of Good Practice in the field of political parties, adopted by the Venice Commission at its 77th Plenary Session (12-13 December 2008) and Explanatory Report, adopted by the Venice Commission at its 78th Plenary Session (Venice, 13-14 March 2009), §18.

“The Venice Commission considers that not only national legislation but party statutes as well should expressly prohibit any restrictions on membership on the grounds of race, skin, color, language, sex, religion, national, ethnic or social origin, property or place of residence, introducing open conditions for membership instead”.

CDL-AD(2009)021 Code of Good Practice in the field of political parties, adopted by the Venice Commission at its 77th Plenary Session (12-13 December 2008) and Explanatory Report, adopted by the Venice Commission at its 78th Plenary Session (Venice, 13-14 March 2009), §107.

“Freedom of association and freedom of expression, including in the formation and functioning of political parties, are individual rights that must be respected without discrimination. The principle that fundamental human rights are applicable to all within a state’s jurisdiction, free from discrimination, is essential to ensuring the full enjoyment and protection of such rights. Non-discrimination is defined in Articles 2 and 26 of the ICCPR and Article 14 of the ECHR as well as a number of other universal and regional instruments such as CEDAW. Notably, however Article 14 of the ECHR defines discrimination to be unlawful only in the enjoyment of any right protected within Convention”.

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), §53.

“State regulations of political parties may not discriminate against any individual or group on any ground such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth, sexual orientation, or other status.⁹ The individual right to free association does not extend itself to require that a political party be required to accept members who do not share its core beliefs and values. However, the voluntary imposition of the principle of non-discrimination by political parties is welcome”.

“All individuals and groups that seek to establish political parties must be able to do so on the basis of equal treatment before the law. No individual or group wishing to associate as a political party should be advantaged or disadvantaged in this endeavor by the state, and regulation of parties must be uniformly applied. In order to eliminate historical inequalities measures can be taken to ensure equal opportunities for women and minorities. Temporary special measures aimed at promoting de facto equality for women and ethnic, racial or other minorities subject to past discrimination may be enacted and should not be considered discriminatory.”

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), §§18-19.

“State authorities should remain neutral in dealing with the process of establishment, registration (where applied) and activities of political parties and refrain from any measures that could privilege some political forces and discriminate others. All political parties should be given equal opportunities to participate in elections.”

CDL-AD(2004)007rev Guidelines on Legislation on political parties: some specific issues, adopted by the Venice Commission at its 58th Plenary Meeting (Venice, 12-13 March 2004), p.3, D.

E. Transparency and openness

“The parties should offer access to their programmatic and ideological documents and discussions, to decision-making procedures and to party accounts in order to enhance transparency and to be consistent with sound principles of good governance.”

CDL-AD(2009)002 Code of Good Practice in the field of Political Parties, adopted by the Venice Commission at its 77th Plenary Session (12-13 December 2008), §19.

“The most commonly accepted regulations are limited to requirements for parties to be transparent concerning their decision making and to seek input from membership when determining party constitutions and candidates”.

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), §98.

F. Political pluralism

“Legislation regarding political parties should aim to facilitate a pluralistic political environment. The ability for citizens to receive a variety of political viewpoints, such as through the expression of political party platforms, is commonly recognized as critical element of a robust democratic society. As evidenced by paragraph 3 of the Copenhagen Document and other OSCE commitments, pluralism is necessary to ensure individuals are offered a real choice in their political associations and vote choices.¹² Regulations of political party functioning should be carefully considered to ensure they do not impinge upon the principle of political pluralism.”

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), §20.

V. Establishment of political parties

The Venice Commission’s opinions have put forward a number of principles concerning the minimum requirements imposed on political parties for their establishment and registration. While the existence of requirements for registration as such does not amount to a violation of those principles, the Venice Commission applies in this field the principle of proportionality in order to avoid the imposition of excessive requirements on the establishment of political parties, which would be inconsistent with the international standards in this area.

A. Registration of political parties

“Registration as a necessary step for recognition of an association as a political party, for a party’s participation in general elections or for public financing of a party does not *per se* amount to a violation of rights protected under Articles 11 and 10 of the European Convention on Human Rights. Any requirements in relation to registration, however, must be such as are ‘necessary in a democratic society’ and proportionate to the objective sought to be achieved by the measures in question. Countries applying registration procedures to political parties should refrain from imposing excessive requirements for territorial representation of political parties as well as for minimum membership. Matters of internal organisation of political parties, in principle, should not be subject to control by public

authorities. Apart from cases, clearly indicated in the Guidelines on prohibition of political parties and analogous measures, i.e. when parties advocate unconstitutional activities or promote violence, registration of political parties should not be denied”.

CDL-AD(2004)007rev Guidelines on Legislation on Political Parties: some specific issues, adopted by the Venice Commission at its 58th Plenary Meeting (Venice, 12-13 March 2013), p. 3, B.

“The requirements for registration, however, differ from one country to another. Registration may be considered as a measure to inform the authorities about the establishment of the party as well as about its intention to participate in elections and, as a consequence, benefit from advantages given to political parties as a specific type of association. Far-reaching requirements, however, can raise the threshold for registration to an unreasonable level, which may be inconsistent with the Convention. Any provisions in relation to registration must be such as are necessary in a democratic society and proportionate to the object sought to be achieved by the measures in question”.

CDL-AD(2004)007rev, Guidelines and explanatory Report on Legislation on political parties: Some Specific Issues, adopted by the Venice Commission at its 58th Plenary Session (Venice, 12, 13 March 2004), §10.

“A state may be entitled to insist on certain minimum standards of size, organization and democratic standards as a condition of registering a party but it seems [...] doubtful that it can be regarded as necessary in a democratic society to prescribe the precise manner in which a political party is to be founded once the party’s program does not represent a danger to the free and democratic order or to the rights of individuals”.

CDL-AD(2002)028 Opinion on the draft law on political parties and Socio-Political organisations of the Republic of Moldova, endorsed by the Venice Commission at its 52nd Plenary Session (Venice, 18-19 October 2002), §28.

“Notwithstanding the existence of a right of appeal to court against a refusal of registration it would be preferable [...] that somebody independent of the political system (perhaps the Ombudsman or a Court of Law) should take the registration decision rather than a Minister who will invariably be a politician from a rival party.

Registration should not be refused for some trivial failure to comply with the rules. One of the problems with very detailed provisions is that the more complex they become the easier it is to find some failure to comply fully with them”.

CDL-AD(2002)028 Opinion on the draft law on political parties and Socio-Political organisations of the Republic of Moldova, endorsed by the Venice Commission at its 52nd Plenary Session (Venice, 18-19 October 2002, §31.

“(...) The Electoral Commission of Malta may refuse to register a political party if it considers its purposes obscene or offensive. A similar provision appears concerning its emblem (...) According to the European Court of Human Rights’ case-law, the “mere expression of a disturbing or offensive idea” is protected under the Convention, and therefore should not be used as a ground to dismiss an application to register a political party.”

CDL-AD(2014)035 Joint Opinion on the Draft Act to regulate the formation, the inner structures, functioning and financing of political parties and their participation in elections of Malta, adopted by the Venice Commission at its 100th Plenary Session (Rome, 10-11 October 2014). §19.

B. Minimal membership requirement

“The very concept of the political party is based on the aim of participating “in the management of public affairs by the presentation of candidates to free and democratic elections”. They are thus a specific kind of association, which in many countries is submitted to registration for participation in elections or for public financing. This requirement of registration has been accepted, considering it as not per se contrary to the freedom of association, provided that conditions for registration are not too burdensome. And requirements for registration are very different from one country to another: they may include, for instance, organizational conditions, requirement for minimum political activity, of standing for elections, of reaching a certain threshold of votes... However, some pre-conditions for registration of political parties existing in several Council of Europe Member States requiring a certain territorial representation and a minimal number of members for their registration could be problematic in the light of the principle of free association in political parties.”

CDL-AD(2006)025 Report on the Participation of political parties in elections adopted by the Council for Democratic Elections at its 16th meeting (Venice, 16 March 2006) and the Venice Commission at its 67th Plenary Session (Venice, 9-10 June 2006), §15.

CDL-AD(2012)003 Opinion on the Law on political parties of the Russian Federation, adopted by the Council for Democratic Elections at its 40th meeting (Venice, 15 March 2012) and by the Venice Commission at its 90th Plenary Session (Venice, 16-17 March 2012), §26.

“It is true that minimal membership requirements do exist in a number of States (*Azerbaijan, Bosnia and Herzegovina, Canada, Croatia, Czech Republic, Estonia, Georgia, Germany, Greece, Kyrgyzstan, Latvia, Lithuania, Moldova, Russian Federation, Slovakia and Turkey*). At first glance the sequence of thresholds of not fewer than 50, 500 and 5000 individuals may appear as good as any other. However, closer inspection reveals, that these thresholds will be obstacles which would be very difficult or simply impossible to overcome.

Ordinary citizens, who want to found a new party – maybe at first for political work in a municipality and later development into a nationwide active political party –, cannot be expected to overcome these obstacles without active support of an existing organisation with ample administrative resources. If the goal is to found a party for political on the level of a municipality there may not even be 5000 inhabitants in the municipality, in which the future political party is supposed to be active.

The thresholds of 50 and 500 should also be related to the number of individuals, which are necessary to found an association or similar legal person; founding a political party should not be more difficult than founding an ordinary association or company.

In this context the question could be asked, whether and to which extent there will be public support for a newly founded political party. But to find an answer to this question should not be a matter for a court of law in registration proceedings. Instead it should be left to the electorate to decide, whether public support is forthcoming.

Therefore, thresholds of not fewer than 50, 500 and 5000 individuals are questionable. Probably they are far too high and should be reconsidered.

In some of its previous opinions the Venice Commission has expressed doubts as to the necessity to establish minimal membership for parties. In its opinion on the Law on political parties in Moldova the Commission considers that: “*A State may be entitled to insist on certain minimum standards of size, organization and democratic standards as a condition of registering a party but it seems [...] doubtful that it can be regarded as necessary in a*

democratic society to prescribe the precise manner in which a political party is to be founded once the party's programme does not represent a danger to the free and democratic order or to the rights of individuals."

CDL-AD(2008)034 Opinion on the Draft Amendments to the Law on Political Parties of Bulgaria, adopted by the Venice Commission at its 77th Plenary Session (Venice, 12-13 December 2008), §14-19.

"In Western states there are often multiplicities of small political parties. They may be too small to be registered where registration requirements are in place, but that does not make their existence unlawful or prevent them from continuing to strive to organize and grow. It seems [...], for example, indefensible to require a party to dissolve itself when its membership falls below a certain threshold. [...] this is contrary to the right of freedom of association and cannot be regarded as necessary in a democratic society. Nor would such a forced dissolution appear to be consistent with the provisions of the European Convention on Human Rights and the Venice Commission's guidelines."

CDL-AD(2002)028 Opinion on the draft law on political parties and Socio-Political organisations of the Republic of Moldova, endorsed by the Venice Commission at its 52nd Plenary Session (Venice, 18-19 October 2002), §28.

"[Concerning a legislative amendment which proposes to increase the minimum membership of a political party from 1,000 to 5,000] In its previous opinion the Venice Commission expressed the view that a figure of 1,000 in a country of a population of eight million was a reasonable number. The new threshold seems to be formidably high and put a burden on citizens trying to exercise their rights under Article 11 of the ECHR which is potentially restrictive and as such would be disproportionate and not necessary in a democratic society. It seems a large threshold particularly for a new party."

CDL-AD(2011)046 Opinion on the Draft Law on Amendments to the Law on political parties of the Republic of Azerbaijan, adopted by the Venice Commission at its 89th Plenary Session (Venice, 16-17 December 2011), §18.

C. Territorial requirement

"It is particularly difficult to share the assumption in the Law on political parties that all political parties should be active nationwide – not only in a region of the country or locally, a requirement that constitutes a legal impediment to forming parties which concentrate on matters concerning regional issues (for example, the Autonomous Republic of the Crimea).

The Commission recalls in this respect that democracies of Europe offer many examples of well-established political parties with an agenda focused on and with support concentrated to some part of the country only; and there are even more examples of political parties, which are exclusively active on the local level and within the geographical borders of a local community or a province and which play an important role for democratic life there."

"(...) The requirement of a national coverage for political parties might represent a serious restriction to the political activity on regional and local level. Taking into the consideration the status of the right to form political parties as a fundamental right and the legally privileged position of parties in political activities, the Commission considers that the requirement of a national character should be at least loosened (...)"

CDL-AD(2002)017 Opinion on the Ukrainian Legislation on political parties, adopted by the Venice Commission at its 51st Plenary Session (Venice, 5-6 July 2002), §§9-10-15.

When domestic legislation establishes that registration is required, substantive registration requirements and procedural steps should be reasonable and based on objective criteria:

“Countries applying registration procedures to political parties should refrain from imposing excessive requirements for territorial representation of political parties as well as for minimum membership. The democratic or non-democratic character of the party organisation should not in principle be a ground for denying registration of a political party. Registration of political parties should be denied only in cases clearly indicated in the Guidelines on prohibition of political parties and analogous measures, i.e. when the use of violence is advocated or used as a political means to overthrow the democratic constitutional order, thereby undermining the rights and freedoms guaranteed by the constitution. The fact alone that a peaceful change of the Constitution is advocated should not be sufficient for denial of registration.”

CDL-AD(2004)007rev Guidelines and explanatory Report on Legislation on political Parties: Some specific Issues, adopted by the Venice Commission at its 58th Plenary Session (Venice, 12-13 March 2004), p 3, B.

CDL-AD(2012)003 Opinion on the Law on Political Parties of the Russian Federation, adopted by the Council for Democratic Elections at its 40th meeting (Venice, 15 March 2012) and by the Venice Commission at its 90th Plenary Session (Venice, 16-17 March 2012), §19.

“Provisions regarding the limitation of political parties which represent a geographic area should generally be removed from relevant legislation. Requirements barring contestation for parties with only regional support potentially discriminate against parties that enjoy a strong public following but whose support is limited to a particular area of the country. Such provisions may also have discriminatory adverse effects on small parties and parties representing national minorities.

A requirement for geographic distribution of party members can also potentially represent a severe restriction of political participation at the local and regional levels incompatible with the right to free association. As such, geographic considerations should not be a requirement for political party formation. Nor should a political party based on a regional or local level be prohibited.”

CDL-AD(2010)024 Guidelines on political party regulation by OSCE/ODIHR and the Venice Commission, adopted by the Venice Commission at its 84th Plenary session (Venice, 15-16 October 2010), 80-81.

CDL-AD(2012)003 Opinion on the Law on political parties of the Russian Federation, adopted by the Council for Democratic Elections at its 40th meeting (Venice, 15 March 2012) and by the Venice Commission at its 90th Plenary Session (Venice, 16-17 March 2012), §20.

“In the Republican Party ruling, the European Court of Human Rights emphasised that:

“There can be no justification for hindering a public association or political party solely because it seeks to debate in public the situation of part of the State’s population, or even advocates separatist ideas by calling for autonomy or requesting secession of part of the country’s territory. In a democratic society based on the rule of law, political ideas which challenge the existing order without putting into question the tenets of democracy, and whose realisation is advocated by peaceful means, must be afforded a proper opportunity of expression through, inter alia, participation in the political process. However shocking and unacceptable the statements of an association’s leaders and members may appear to the authorities or the majority of the population and however illegitimate their demands may be, they do not appear to warrant the association’s dissolution. A fundamental aspect of democracy is that it must allow diverse political programmes to be proposed and debated,

even where they call into question the way a State is currently organised, provided that they do not harm democracy itself” (paragraph123).”

CDL-AD(2012)003 Opinion on the Law on political parties of the Russian Federation, adopted by the Council for Democratic Elections at its 40th meeting (Venice, 15 March 2012) and by the Venice Commission at its 90th Plenary Session (Venice, 16-17 March 2012), §21.

“(…) A pluralist party system, fulfilling its essential role in a democratic polity, can only emerge if facilitated by a stable legislation which does not impose unjustifiable requirements for registration, nor intrusive controlling mechanisms. Restrictions to political party formation based on regional, linguistic or ethnic grounds may lead to the creation of separatist movements, which may resort to non-peaceful means if the democratic path is forbidden.”

CDL-AD(2012)003 Opinion on the Law on political parties of the Russian Federation, adopted by the Council for Democratic Elections at its 40th meeting (Venice, 15 March 2012) and by the Venice Commission at its 90th Plenary Session (Venice, 16-17 March 2012), §24.

D. Control over the internal affairs of the political parties registered

“The European Court of Human Rights raised particular concern that political parties (...) had to submit annual reports and be liable to inspections by the authorities under threat of dissolution, which would be done by the Supreme Court. The European Court stated in the *Republican Party* case:

“The Court is unable to discern any justification for such intrusive measures subjecting political parties to frequent and comprehensive checks and a constant threat of dissolution on formal grounds. If these annual inspections are aimed at verifying whether the party has genuine support among the population, election results would be the best measure of such support.”

“Any activity requirements for political parties, as a prerequisite for maintaining the status as a political party and their control and supervision, have to be assessed by the same yardstick of what is ‘necessary in a democratic society’. Public authorities should refrain from any political or other excessive control over activities of political parties, such as membership, number and frequency of party congresses and meetings, operation of territorial branches and subdivisions.”

CDL-AD (2004)007rev Guidelines and explanatory Report on Legislation on Political Parties: Some Specific Issues, adopted by the Venice Commission at its 58th Plenary Session (Venice, 12, 13 March 2004), C.

“The bureaucratic control over the political parties, as well as the submission of documents including details about every member of the political party to the Minister of Justice, may have a chilling effect on individual membership and on the registration of political parties. In the light of the above considerations, bureaucratic control over political parties should be reduced and any supervisory powers should be given to an independent authority not part of the executive branch, in order to ensure transparency and build institutional trust.”

CDL-AD(2012)003 Opinion on the Law on political parties of the Russian Federation, adopted by the Council for Democratic Elections at its 40th meeting (Venice, 15 March 2012) and by the Venice Commission at its 90th Plenary Session (Venice, 16-17 March 2012), §45.

VI. Internal organisation of political parties

The importance of the principles of representativeness and receptiveness, responsibility and accountability as well as the principle of transparency with regard to internal organisation of

political parties have been underlined by the Venice Commission on many occasions. These principles have naturally some consequences on the design of the rules governing the membership in political parties, in particular, the participation and representation of women and minorities in political parties, as well as the rules imposing restrictions on the membership of foreign citizens or stateless persons.

“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.

There can be tensions between the principle of party autonomy on the one hand and the principle requiring internal democracy on the other. It is not surprising that the influence of each principle differs in each system. Some countries stress the respect for the freedom of political parties, while others place greater emphasis on compliance with internal democratic requirements by political parties. The tension between these two principles could explain why there are different ways in which legal systems regulate the nomination of candidates within political parties. It is, however, important to note that the degree of tension between the principles depends on several factors. One factor is the concept of democracy chosen. A system primarily based on a “liberal” view – the liberal theory of a ‘free electoral market’ – is likely to emphasise party autonomy and to have only a few rules regulating political parties. A system grounded on a concept of democracy based on the assumption of some fundamental values that democracy should adhere to, will probably have a more strongly regulated regime for political parties, including their internal party organisation. What system prevails in a particular country is basically shaped by its history and current circumstances. Much also depends on more detailed specification of the two principal factors set out above and the weight attached to them. Thus, it cannot be assumed that attachment to the principle of associational autonomy precludes per se any regulation of internal party procedure, since such a conclusion is dependent on contestable normative assumptions as to the degree of autonomy that flows from freedom of association. The same is true in relation to the principle of democracy. It is not self-evident what demands flow from attachment to this principle without further inquiry as to the more particular precepts that constitute the democratic principle and the way in which they might be applicable to the nomination of candidates by political parties.”

“The European Court of Human Rights has held in its case-law that political parties are a form of association essential to the proper functioning of democracy and that, in view of the importance of democracy in the European Convention on Human Rights system, an association, including a political party, is not excluded from the protection afforded by the Convention.

The Venice Commission Guidelines on Political Party Regulation view political parties as private associations that play a critical role as political actors in the public sphere. Although the document considers that “some regulation of internal party activities can be considered necessary to ensure the proper functioning of a democratic society”, such legislation must be “well-crafted and narrowly tailored” in order not to interfere with the freedom of association. However, the Guidelines recognise that:

“As parties contribute to the expression of political opinion and are instruments for the presentation of candidates in elections, some regulation of internal party activities can be considered necessary to ensure the proper functioning of a democratic society. The most

commonly accepted regulations are limited to requirements for parties to be transparent concerning their decision making and to seek input from membership when determining party constitutions and candidates”.

However, stressing the importance of internal democracy, the Guidelines also state that: “[n]ot only political parties’ speech and action ad extra must formally endorse the democratic principles and rule of law contained in constitutional and legal provisions of the country but their internal organisation and functioning must also substantially abide by the principles of democracy and legality. The basic tenets of democracy are not satisfied with formal adherence or lip-service paid by the statutes of the party but require substantial application of them ad intra.””

CDL-AD(2015)020 Report on the method of nomination of candidates within political parties, adopted by the Council for Democratic Elections at its 51th meeting (Venice, 18 June 2015) and by the Venice Commission at its 103rd Plenary Session (Venice, 19-20 June 2015) §§5-6, §§11-13.

“Any activity requirements for political parties, as a prerequisite for maintaining status as a political party and their control and supervision, have to be assessed by the same yardstick of what is ‘necessary in a democratic society’. Public authorities should refrain from exercising excessive control over internal organisation of parties, such as membership, number and frequency of party congresses and meetings, operation of territorial branches and subdivisions”.

CDL-DEM(2003)004rev Guidelines on Legislation on political parties: some specific issues, adopted by the Venice Commission at its 58th Plenary Meeting (Venice, 12-13 March 2013), p.3, C.

A. Membership in political parties

1. General principles

“Everyone must be free to choose to be a member of a political party or not and to choose which party to join. Whilst this principle is universally acknowledged, it is also very common among European parties that they have specific admission procedures. This serves to secure the necessary congruence between the views of the would-be member and the party. Best practices are those that clearly establish in party statutes the procedures and requirements for joining and which clearly state the criteria to be fulfilled to be members.

Parties may withhold membership from any applicant who rejects the values they uphold or whose conduct goes against the values and ideals of the party. Best practice requires the existence of disciplinary bodies and clear procedures for reasoned decisions. Parties must ensure that their members comply with the legal order.

European best practices and legal frameworks share the principle of non-discrimination. Hence, parties’ adherence to this principle must be taken as proof of good practices, which have a number of specific applications. In some cases, such as gender discrimination, national and international legislation plainly prohibit these. In particular, discrimination on the basis of sex, race, colour, language, national or social origin, association with a national minority, property or birth should be avoided (cf. Article 14 ECHR).

Political parties must comply with any domestic legislation prohibiting affiliation to a party by specified officials (for instance, in cases of members of the army and police). It is not unusual for parties to establish different forms of involvement of individuals in their activities such as members, recognised sympathisers, collaborators, campaigners, etc. These

statuses mark different thresholds of personal commitment. Hence, in order to identify the kind of commitments and to respect personal choices, a good practice is for party statutes to clearly spell out the different rights and duties of each situation. Any person must be able to define freely his or her personal form of relationship with a party.

There is a well-established practice among most European states, under the Council of Europe norms to grant voting rights, at least in local elections, to some or all their foreign residents. It is therefore fully in line with this development that, unless prohibited by domestic law, parties accept the accession of non-nationals, who share their values. Nationality is not a solid ground on which to restrict the membership of non-nationals, and the law should make this clear.

Whilst some parties may aim at promoting the interests of specific age groups (for instance, retired persons), no national legislation accepts membership discrimination based on age (except what is referred to as the legal voting age). On the contrary, inclusive practices that successfully include all age groups can be deemed an example of good practice. Moreover, it is a fairly common practice that parties create specific structures (for instance, for young people, particularly for those under the legal voting age) and develop specific programmes for integrating experienced members.

Transnational parties, which exist in the framework of the European Union, are organised as federations of national parties. In most cases, this excludes direct membership. Direct membership does not erode democratic principles, and may reinforce the legitimacy of transnational parties.”

CDL-AD(2009)002 Code of Good Practice in the field of political parties, adopted by the Venice Commission at its 77th Plenary Session (12-13 December 2008), §§20-27.

CDL-AD(2009)021 Code of Good Practice in the field of political parties, adopted by the Venice Commission at its 77th Plenary Session (12-13 December 2008) and Explanatory Report, adopted by the Venice Commission at its 78th Plenary Session (Venice, 13-14 March 2009), 20-27.

2. Participation of women in political parties

“The small number of women in politics remains a critical issue which undermines the full functioning of democratic processes. In many states women still represent a single-digit minority in parliament and the European average is only 18%. Specific measures to ensure women have an adequate opportunity to compete in elections (see section III) and be represented in elected bodies should be considered for internal party rules. This would be consistent with Recommendation 1899(2010), entitled "Increasing women's representation in politics through the electoral system", in which the Committee of Ministers of the Council of Europe encourages the member states to increase women's representation by introducing quotas.

The creation of a specific ‘women’s section’ or ‘gender division’ of a party is sometimes used as a tool to promote greater gender equality. Such sections or divisions can make great strides in ensuring women’s participation by allowing women an opportunity to discuss issues of common concern as well as a forum for expertise building activities. While the OSCE/ODIHR has recognized that these bodies can at times work against the interest of women by marginalizing or side-lining women within the party, their creation should generally be considered a positive measure to ensure women’s equal participation and gender knowledge.

In respect for the universal and regional instruments designed to ensure equality for women as well as general principles for non-discrimination, legislation should endeavour to ensure that women are able to participate fully in political parties as a fundamental means for the full enjoyment of their political rights. In accordance with CEDAW Article 4, special measures should be taken, which might include provisions such as the adoption of quotas for representation, requirements for gender-balance on boards tasked with selecting candidates, introduction of gender neutral selection criteria, or specialized training programs. Voluntary quotas which are not legally mandated but included in party constitutions have also proven effective to ensure the representation of women.

According to the Venice Commission and the Committee of Ministers of the Council of Europe, electoral gender quotas can be considered an appropriate and legitimate measure to increase women's parliamentary representation. In the Committee of Minister's 2009 Declaration "Making Gender Equality a Reality", member states are urged to enable positive action or special measures to be adopted in order to achieve balanced representation in political and public decision-making. Similarly, in accordance with OSCE Decision No. 7/09 on Women's Participation in Political and Public Life, the Ministerial Council calls on the participating States to "consider possible legislative measures, which would facilitate a more balanced participation of women and men in political and public life and especially in decision-making", and to "encourage all political actors to promote equal participation of women and men in political parties, with a view to achieving better gender-balance representation in elected public offices at all levels of decision-making." All such steps are considered good practice.

Where applicable, special measures may also include training and capacity building programs developed for female candidates prior to their selection to ensure they have an equal opportunity to serve as candidates and to be elected. These training programs may include a system of mentoring for inexperienced new members (including women and minorities) as well as gender-sensitive training courses for new members to promote non-discriminatory working relations and respect for diversity in work and management style. Similar programs and specific measures to ensure minority participation should also be enacted. Legislation may require such trainings as a measure to ensure *de facto* equality for women and to minimize the effect of historical inequalities in the political life.

Special measures for women may also include the adoption, implementation and evaluation of gender equality strategies, plans and programmes at different levels, including specific action plans to achieve balanced participation and representation of women and men both in internal political party offices. Moreover, the establishment of target groups, time frames and benchmarks for the effective implementation of gender equality plans, including specific action plans, may also be included.

The participation of women in political party activities can be enhanced by recognizing and considering the family responsibilities of party members. Family responsibilities may be a deterrent for some members to participate in party activities. Efforts to avoid party meetings that conflict with members' family responsibilities and the provision of child care facilities may facilitate participation in party activities."

CDL-AD (2010)024, Guidelines on political party regulation by OSCE/ODIHR and the Venice Commission, adopted by the Venice Commission at its 84th Plenary Session (Venice, 15-16 October 2010), 99-105.

CDL-AD (2011)046 Opinion on the Draft Law on Amendments to the Law on political parties, adopted by the Venice Commission at its 89th Plenary Session (Venice, 16-17 December 2011), §13.

“If there is a specific constitutional basis, rules could be adopted guaranteeing some degree of balance between the two sexes in elected bodies, or even parity. In the absence of such a constitutional basis, such provisions could be considered contrary to the principle of equality and freedom of association.

Moreover, the scope of these rules depends on the electoral system. In a fixed party list system, parity is imposed if the number of men and women who are eligible is the same. However, if preferential voting or cross-voting is possible, voters will not necessarily choose candidates from both sexes, and this may result in an unbalanced composition of the elected body, chosen by voters.”

CDL-AD(2002)023rev Code of Good Practice in Electoral Matters, Guidelines and Explanatory Report, adopted by the Venice Commission at its 52nd session (Venice, 18-19 October 2002), §§24-25.

“An allocation of funds based on party support for women candidates is not considered discriminatory and should be considered in light of the requirements for special measures to be adopted by states according to the UN Convention on the Elimination of All Forms of Discrimination Against Women”.

CDL-AD(2010)048 Joint opinion on the draft law on financing political activities of the Republic of Serbia by the Venice Commission and the OSCE/ODIHR, adopted by the Venice Commission at its 85th plenary session (Venice, 17-18 December 2010), §32.

“The most demanding requirements on the selection of candidates by political parties are those aimed to ensure equal gender representation. The Guidelines on Political Parties Regulation recognise that “the small number of women in politics remains a critical issue which undermines the full functioning of democratic process”. Hence, “electoral gender quotas can be considered an appropriate and legitimate measure to increase women’s parliamentary representation”.

There are various socio-economic, cultural and political factors that can hamper women’s access to the political arena. Structural obstacles in society limiting the political representation of women are not easy to remove and fundamental changes will require much time and effort. Thus, changing the electoral system, for instance, by introducing quota rules, may offer a viable alternative to increase female representation. The Venice Commission, in its Code of Good Practice in Electoral Matters, considered that the legal rules requiring a minimum percentage of persons of each gender among candidates should not be considered contrary to the principle of equal suffrage, if they have a constitutional basis.”

“Legislated quotas are more respectful of political parties’ freedom when they only impose a certain percentage of female candidates in the electoral list. When the proportion of women must be respected in groups of seats, the restriction placed on political parties is higher. The most demanding system is the zipper list, because in this case men and women must alternate. However, this kind of list seems to be the most effective for securing the representation of women.

It should, in any event, be noted that according to the European experience, although gender quotas are an effective tool for increasing women’s presence in political bodies, they do not automatically result in an equal representation of women and men. Quotas must include rules about rank order and sanctions for non-compliance. According to the Study of the European Parliament of 2013, quota provisions must incorporate rules about the placement of candidates on the list. Indeed, a quota system that does not include such rank-order rules may have no effect at all: “If the 40 per cent of a party’s candidates on the

electoral list in a PR system are women but they are placed at the bottom of the list, this may result in no woman being elected at all. In plurality/majority electoral systems, rules are needed with regard to the gender distribution of “winnable” or “safe” seats”. Other aspects of the electoral system in place also influence the effectiveness of quota regulations. For instance, even if women have to be placed at the top of the list, in a system of preference voting, it is the voter who determines which persons will be elected. This may lead to lesser female representatives than might be expected from their position on the list.

Furthermore, the effectiveness of quota provisions depends on the existence of institutional bodies that supervise the application of quotas and impose sanctions for non-compliance.”

CDL-AD(2015)020 Report on the method of nomination of candidates within political parties, adopted by the Council for Democratic Elections at its 51th meeting (Venice, 18 June 2015) and by the Venice Commission at its 103rd Plenary Session (Venice, 19-20 June 2015) §§43-44, 49-51.

“The OSCE/ODIHR noted in its election report on the 2010 parliamentary elections: “women do not feature prominently in politics and are under-represented in decision-making positions”. As a result, previous recommendations of the OSCE/ODIHR have included: (1) considering the extension of gender distribution requirements on candidate lists so that they apply to the final candidate lists; (2) requiring political parties to replace any withdrawn candidate with a member of the same gender; (3) positioning women higher on candidate lists; (4) political parties voluntarily providing female candidates opportunities which are equal to those of their male colleagues, such as addressing the public at rallies and being featured in party campaign materials and advertisements; and (5) political parties voluntarily providing for leadership advancement of female party members. As noted in the discussion on the electoral system for parliamentary elections, the draft law, which presents no new provisions that will result in strengthening the participation of women in elections, will not facilitate the effective participation of women in elections.”

CDL-AD(2014)019 Joint Opinion the Venice Commission and OSCE Office for Democratic Institutions and Human Rights (OSCE/ODIHR) on the draft Election Law of the Kyrgyz Republic adopted by the Council for Democratic Elections at its 48th meeting (Venice, 12 June 2014) and by the Venice Commission at its 99th plenary session (Venice, 13-14 June 2014), §58.

“The draft Act does not contain provisions on the promotion of gender equality within internal party structures or in the wider electoral process. According to the Guidelines, in respecting universal and regional instruments designed to ensure equality for women, as well as general principles for non-discrimination, legislation should endeavour to ensure that women are able to participate fully in political parties as a fundamental means for the full enjoyment of their political rights. There are a number of ways of achieving this goal, some of which are related to internal party regulations, whilst others may be contained in legislation. Gender equality may be promoted through the creation of a “women’s section” or “gender division” within political parties; by introducing electoral gender quotas that could increase women’s parliamentary representation, by providing training and capacity-building programmes developed for female members and potential candidates prior to their selection, by adopting, implementing or evaluating gender-equality strategies, plans and programmes at different levels, including specific action plans to achieve balanced participation and representation of women and men in internal political party offices, or by recognizing and considering the family responsibilities of party members. It is recommended to consider including specific provisions to promote gender equality in the draft Act, and in particular, to ensure greater gender balance in electoral lists.”

CDL-AD(2014)035 Joint Opinion on the Draft Act to regulate the formation, the inner structures, functioning and financing of political parties and their participation in elections of Malta, adopted by the Venice Commission at its 100th Plenary Session (Rome, 10-11 October 2014), §60.

3. Membership of foreign citizens and stateless persons

“Restrictions on political activities of foreign citizens and stateless persons are possible under international law. The reason usually given for this rule is the wish to avoid foreign policy conflicts. But this can hardly justify the general exclusion of foreign citizens and stateless persons from membership in political parties [...].

Provisions regarding political activities of foreign citizens and stateless persons, however, should take into account that even these individuals are included in guarantees for basic rights according to the human rights documents which are applicable in Europe. In 1992 the Convention on the Participation of Foreigners in Public Life at Local Level (ETS no. 144) was opened for signature by the member States of the Council of Europe, and it entered into force in 1997. In light of the latter Convention, an absolute ban on non-citizens’ membership in political parties can be considered unjustified.

One reasonable way to comply with these European standards could be to let foreign citizens and stateless persons to some extent participate in the political life of their country of residence. At the very least, the country of residence should make membership in political parties possible for foreign citizens and stateless persons; but it should also be noted that foreign citizens and stateless persons in many European countries can vote in local elections and can even be elected to local public office in such elections.”

CDL-AD(2002)017 Opinion on the Ukrainian Legislation on political parties, adopted by the Venice Commission at its 51st Plenary Session (Venice, 5-6 July 2002), §§17-19.

“Foreign citizens and stateless persons should to some extent be permitted to participate in the political life of their country of residence, at least as far as they can take part in elections. At the very least, the country of residence should make membership in political parties possible for these persons. In dealing with issues of the participation of foreign nationals in the public life of their country of residence, the member states are invited to apply to the largest possible extent the provisions of the European Convention on the Participation of Foreigners in Public Life at Local Level. Additional measures further extending the guarantees provided for by the provision of this convention would be most welcomed”.

CDL-AD (2004)007rev Guidelines on Legislation on political parties: Some Specific Issues, adopted by the Venice Commission at its 58th Plenary Session (Venice, 12-13 March 2004), item “H”.

CDL-AD(2011)046 The Draft Law on Amendments to the law on political parties of the Republic of Azerbaijan Adopted by the Venice Commission at its 89th Plenary Session Venice (16-17 December 2011), §12.

“Article 11 of the European Convention on Human Rights (ECHR) and Article 3 of the (First) Protocol to this Convention establishes that not only nationals but also others may be politically active – which includes the right to be active within political parties”.

CDL-AD(2008)034 Opinion on the Draft Amendments to the Law on political parties of Bulgaria, adopted by the Venice Commission at its 77th Plenary Session (Venice, 12-13 December 2008), §5.

4. Participation of minorities in political parties

“In accordance with Article 4(2) and Article 15 of the Framework Convention on the Protection of National Minorities, legislation may require state authorities to fulfil an obligation to allow for the full and equal participation of minorities in political life. As a good practice, political parties should voluntarily endeavour to ensure the presentation of issues relevant to national minorities in party programs.

The adoption of specific initiatives aimed at the promotion of minority participation is crucial to ensuring that requirements for equal representation of minorities are more than theoretical. Internal party measures designed to foster the representation of minorities may serve as the basis for receipt of particular legislative incentives, which would be consistent with the Council of Europe Framework Convention for the Protection of National Minorities.

Political parties may consider taking a variety of measures to support minority participation, including the creation of advisory committees on minority issues, training and recruitment programs focused on national minorities, and provisions requiring minority membership on internal party committees and candidates' lists. All such steps are considered good practice.”

CDL-AD(2010)024, Guidelines on political party regulation by OSCE/ODIHR and the Venice Commission adopted by the Venice Commission at its 84th Plenary Session (Venice, 15-16 October 2010), §§106-108.

“The ability for national minorities to be elected is likewise an important area for possible regulation. In accordance with the Framework Convention on National Minorities, states should ensure the free exercise of all political rights to national minorities. Within the electoral process measures should therefore be taken to ensure national minorities have an equal opportunity to be elected and represented in parliament.

Measures to aid in minority representation often include practices such as the reservation of a set number of parliamentary seats for specific minorities, or the practice of waiving the minimum votes threshold for representation in parliament in the cases of parties representing national minorities. Where applicable, such measures should be adopted into legislation by states to help ensure minorities are able to be elected on an equal basis with other candidates”.

CDL-AD(2010)024 Guidelines on political party regulation by OSCE/ODIHR and the Venice Commission adopted by the Venice Commission at its 84th Plenary Session (Venice, 15-16 October 2010), §§137-138.

“Ensuring an inclusive participation of minorities is not often considered in candidates' lists within political parties. Indeed, in general, there are no binding rules in Europe on the nomination of candidates aimed at ensuring the presence of minorities in parliament. The same can be said for Latin America. However, political participation of minorities should be promoted, especially in those countries where the requirements for minimum membership and regional representation could restrict the possibilities of persons belonging to national minorities, or where political parties based on ethnicity or region are prohibited.

The Venice Commission, in its Guidelines on Political Party Regulation, referred to the rights of members of minorities to be elected. Measures should be taken within the electoral process, therefore, to ensure that national minorities have an equal opportunity to be elected and represented in parliament.

In its Study on Electoral Law and National Minorities, the Venice Commission refers to two main elements to be considered by the legislative body:

- a) When lists are not closed, a voter's choice may take into account whether the candidates belong to national minorities. The freedom of choice may have favourable or unfavourable results with respect to minorities, and this depends on many factors.
- b) When a territory where a minority is in the majority is recognised as a constituency, this helps the minority to be represented in the elected bodies, especially if a majority system is applied.”

CDL-AD(2015)020 Report on the method of nomination of candidates within political parties, adopted by the Council for Democratic Elections at its 51th meeting (Venice, 18 June 2015) and by the Venice Commission at its 103rd Plenary Session (Venice, 19-20 June 2015). §§59-61.

5. Prohibition on certain office holders being members of political parties

“In the case of prosecutors Article 6 of the Recommendation REC (2000) 19 of the Committee of Ministers of the Council of Europe on the role of public prosecution in the criminal justice system provides that states should take measures to ensure that public prosecutors have an effective right to freedom of expression and assembly, have the right to form and join lawful organisations and attend their meetings in a private capacity. These rights can only be limited in so far as is prescribed by law and necessary to preserve the legally established aims and powers of the public prosecutor. Notwithstanding these provisions it seems to the Commission that a strong case can be made for the prohibition of involvement in party political activities by senior prosecutors, particularly those responsible for making prosecutorial decisions. To permit such involvement risks compromising the necessary impartiality and independence of the prosecutor. The considerations apply with particular force in emerging democracies, in particular those with a history of political interference in the prosecution of criminal offences. On the whole, therefore, such prohibition can be justified, insofar as it relates to senior decision-makers, although it may be questioned why it is necessary to apply it to all the staff of the prosecutor’s office.

Similar considerations apply to the various other categories of persons precluded from political activity. The inclusion of servicemen is presumably designed both to discourage the armed forces from intervention in politics and to protect the armed forces from party factionalism and political interference. The inclusion of major elements of the public service and in particular the security services may have a similar justification. So far as state-owned media are concerned; if the State is to play a role in the media it is desirable to limit the scope for political advantage. On the other side, however, it may be objected that a ban on membership of political parties may simply conceal the extent to which supporters of a political party may exercise influence without necessarily being paid-up members. Finally, the ban on membership by religious figures may serve the interest of attempting to maintain a separation between church and state, though whether it is likely to be effective in a society where religious leaders have great influence may be doubted.”

CDL-AD(2004)025 Opinion on the law on political parties of the Republic of Azerbaijan, adopted by the Venice Commission at its 59th Plenary Session (Venice, 18-19 June 2004), §§16-17.

“Article 11.2 of the ECHR allows Member States to restrict the freedom of association of three categories of persons: members of the armed forces, of the police and of the administration of the state. Accordingly, the ECtHR has recognised the legitimacy of restricting the political activity of such public authorities, because of the need to guarantee their political neutrality and ensure that they will duly fulfil their duty of impartiality, treating all citizens in a manner that is equal, fair and untainted by political considerations”.

CDL-AD(2009)021 Code of Good Practice in the field of political parties, adopted by the Venice Commission at its 77th Plenary Session (12-13 December 2008) and Explanatory Report, adopted by the Venice Commission at its 78th Plenary Session (Venice, 13-14 March 2009), §109.

B. Party structures

1. The general principles concerning the organisation of a political party

“Representativeness and receptiveness. Applied within a party, these principles mean that the structure of the party and its procedures should represent the opinion of the members and they should be receptive towards these. Although this commitment may not entail a legally expressed obligation, their breach runs against the basic intuitive concept of democratic organisation.

– Responsibility and accountability. Organs (both collective and individual) should be held accountable and responsible to party members. Procedures should secure internal (and external) responsibility and rendering account of actions and policies. Although this commitment may not entail a legally expressed obligation, their breach runs against the basic intuitive concept of democratic organisation.

– Transparency. Parties should make public their statutes and their program. Publishing financial reports improves transparency and public confidence in political parties. Even though this commitment may not entail a legally expressed obligation, their breach runs against the basic intuitive concept of democratic organisation.”

CDL-AD(2009)002 Code of Good Practice in the Field of political parties, adopted by the Venice Commission at its 77th Plenary Session (Venice, 12-13 December 2008), §28.

2. Internal party rules

“Legislation regarding political parties does not necessarily have to include the requirement for creation or publication of party constitutions. However, such constitutions are legally required in some OSCE states and can be an important step in ensuring a party’s commitment to equality and non-discrimination. Party constitutions in some OSCE states include voluntary quotas to ensure equal opportunity for women. The adoption of voluntary quotas is an exemplary effort on the part of such parties and should be viewed positively.

Party constitutions can also be important to ensure party membership is informed of their rights and responsibilities. As such, party constitutions should be approved through a participatory process, such as party congresses, rather than by a party leader individually, and made widely available to party membership.

Party constitutions generally define the rights and duties of political party members, party organization, and procedures for the making of decisions. Party constitutions may also (where applicable) define the responsibilities of parties at the local, regional, and national levels, as well as the relationship between these different bodies.

Party constitutions ideally should provide members who believe that the party’s constitution has been violated with internal avenues of redress. When the law allows access to civil courts, this should only be allowed after internal avenues of redress have been exhausted.”

CDL-AD(2010)024 Guidelines on political party regulation by OSCE/ODIHR and the Venice Commission adopted by the Venice Commission at its 84th Plenary Session (Venice, 15-16 October 2010), §§109-112.

3. Choosing party leadership and candidates for elections

“Parties must have the ability to determine party officers and candidates, free from government interference. Recognizing that candidate selection and determination of ranking order on electoral lists is often dominated by closed entities and old networks of established politicians, clear and transparent criteria for candidate selection is needed, in order for new members (including women, and minorities) to get access to decision-making positions. Gender-balanced composition of selecting bodies should also be commended.”

CDL-AD(2010)024 Guidelines on political party regulation by OSCE/ODIHR and the Venice Commission, adopted by the Venice Commission at its 84th Plenary Session (Venice, 15-16 October 2010), §113.

“In principle, the way in which constitutions refer to political parties has an impact on the legislation on candidate nomination. When the constitution imposes internal democracy, it mandates or, at least, allows the legislator to establish requirements and proceedings for candidate nomination, which bind all political parties. In this way, the constitution enables the law to limit political parties’ freedom in their internal functioning.

When the constitution only recognises the freedom of political parties, the legislator must be more respectful of the autonomy of parties and the proportionality principle. This does not imply that the law cannot rule on the method of nomination of candidates within political parties at all. Equality, freedom of expression and democracy are, to a certain extent, also applicable to political parties, since these entities are the main channels through which citizens participate in public life. It implies that the requirements for limiting freedom imposed by the proportionality test are more demanding, with the consequence that legislative intervention will, in relative terms, be more difficult to justify.

This must be distinguished from the situation in which the constitution makes no reference to political parties, which falls midway between a situation where the constitution imposes internal democracy and that in which it simply recognises the freedom of political parties. In this third scenario, it is open to the legislator, subject to the proportionality principle, to impose regulatory requirements concerning the nomination of candidates and it will, other things being equal, have greater latitude in this respect than where the constitution explicitly recognises the freedom of political parties.”

CDL-AD(2015)020 Report on the method of nomination of candidates within political parties, adopted by the Council for Democratic Elections at its 51th meeting (Venice, 18 June 2015) and by the Venice Commission at its 103rd Plenary Session (Venice, 19-20 June 2015) §§14-16.

4. Forfeiture of a parliamentary mandate

“Article 91(3)(4) of the draft law allows post-election changes in candidate list order where there is “lack of communication between candidate and party.” This is a very broad phrase and could be interpreted to allow mandate forfeiture if an elected deputy fails to return a party leader’s telephone call, for instance. This phrase could be interpreted in numerous ways and “lack of communication” is not a justifiable basis for requiring the forfeiture of a mandate of a deputy elected through the will of voters expressed in elections. The OSCE/ODIHR and the Venice Commission recommend that Article 91(3)(4) be deleted from the law.”

CDL-AD(2014)019 Joint Opinion the Venice Commission and OSCE Office for Democratic Institutions and Human Rights (OSCE/ODIHR) on the draft Election Law of the Kyrgyz Republic adopted by the Council for Democratic Elections at its 48th meeting (Venice, 12 June 2014) and by the Venice Commission at its 99th plenary session (Venice, 13-14 June 2014) §§ 33.

“(...) Deputies in a faction should not forfeit their mandates simply because party leaders want to dissolve the faction. Deputies in the faction have been elected to parliament based on the expression of the will of voters in elections. Regardless of their motivations, leaders of a party or faction should not be able to undermine the will of voters after the elections by deciding to dissolve the faction. (...)”

According to Article 92(1), the powers of a deputy may be suspended by a decision of the leading body of a political party, with the subsequent approval of the supreme governing body of the political party in case of repeated violation (at least twice) of party regulations or the loss of connection with political party or faction; offence, discrediting the status of deputy and member of the party; personal statement, as well as in connection with not entering a faction or entering other deputy units without consent of faction. The numerous possibilities in the draft law for forfeiture of a parliamentary mandate appear to contradict the constitutional provision lifting the imperative mandate and reintroduce a disproportionate level of party or faction control over deputies elected by popular vote. This, in turn, contradicts paragraph 7.9 of the 1990 OSCE Copenhagen Document. Paragraph 7.9 of the 1990 OSCE Copenhagen Document provides that “candidates who obtain the necessary number of votes required by law are duly installed in office and are permitted to remain in office until their term expires”. The Venice Commission and the OSCE/ODIHR again recommend deleting all legal provisions that require forfeiture of a parliamentary mandate for “floor crossing”, “lack of communication”, or due to termination of political party or faction activity.”

CDL-AD(2014)019 Joint Opinion the Venice Commission and OSCE Office for Democratic Institutions and Human Rights (OSCE/ODIHR) on the draft Election Law of the Kyrgyz Republic adopted by the Council for Democratic Elections at its 48th meeting (Venice, 12 June 2014) and by the Venice Commission at its 99th plenary session (Venice, 13-14 June 2014). §§35-36.

“The new sub-paragraph 1 under Article 73 paragraph 3 raises serious constitutional concerns, as it would permit a faction, based on the decision of a political party, to terminate the mandate of a deputy.

In previous opinions, the Venice Commission has declared such practices to be incompatible with the principle of a deputy’s free and independent mandate, and has argued that this “would put [a] parliamentary bloc or group in some ways above the electorate which, in return, is unable to revoke individually a parliamentary mandate conferred through election”. While it should always be possible for a party or faction to expel a deputy (following specific criteria that are spelled out in law), this should not lead to the loss of his/her mandate, since, while such groups or factions may play important roles in parliaments, they do not have the same status as that of deputies elected by the people.”

CDL-AD(2015)014 Joint Opinion on the draft law "on introduction of changes and amendments to the Constitution" of the Kyrgyz Republic, adopted by the Venice Commission at its 103rd Plenary Session (Venice, 19-20 June 2015). §§50-51.

VII. Financing of political parties

A. General

The Venice Commission puts a special emphasis on the principles of equal opportunity and transparency concerning the financing of political parties. Particularly, with regard to private financing, the Commission considers that reasonable limitations on private contributions could be imposed in order to minimize the possibility of corruption or the purchasing of political influence. On the other hand, sanctions imposed on political parties in case of irregularity in the financing should be proportionate to the severity of the offence.

“(...) in the development of legislation in this sphere states should adopt several important parameters when creating political finance systems. These include: restrictions and limits on private contributions, a balance between public and private funding, restrictions on the use of state resources, fair criteria for allocation of public financial support, spending limits for campaigns, requirements that increase transparency of party funding and credibility of financial reporting as well as an independent regulatory mechanism and appropriate sanctions for violations”.

CDL-AD(2010)048 Joint opinion on the draft law on financing political activities of the Republic of Serbia by the Venice Commission and the OSCE/ODIHR, adopted by the Venice Commission at its 85th plenary session (Venice, 17-18 December 2010), §13.

“Regulating the funding of political parties and electoral campaigns is a further important factor in the regularity of the electoral process. First of all, funding must be *transparent*; such transparency is essential whatever the level of political and economic development of the country concerned.

Transparency operates at two levels. The first concerns campaign funds, the details of which must be set out in a special set of carefully maintained accounts. In the event of significant deviations from the norm or if the statutory expenditure ceilings are exceeded, the election must be annulled. The second level involves monitoring the financial status of elected representatives before and after their term in office. A commission in charge of financial transparency takes formal note of the elected representatives’ statements as to their finances. The latter are confidential, but the records can, if necessary, be forwarded to the public prosecutor’s office.

In unitary states, any expenses incurred by local authorities in connection with the running of a national election, the payment of election commission members, the printing of ballot papers, etc..., should normally be borne by the central state.

It should be remembered that in the field of *public funding* of parties or campaigns the principle of equality of opportunity applies (“strict” or “proportional” equality). All parties represented in parliament must in all cases qualify for public funding. However, in order to ensure equality of opportunity for all the different political forces, public funding might also be extended to political formations that represent a large section of the electorate and put up candidates for election. The funding of political parties from public funds must be accompanied by supervision of the parties’ accounts by specific public bodies (e.g. the Auditor General’s Department). States should encourage a policy of financial openness on the part of political parties receiving public funding.”

CDL-AD(2002)023rev Code of Good Practice in Electoral Matters, Guidelines and Explanatory Report, adopted by the Venice Commission at its 52nd session (Venice, 18-19 October 2002), §§107-111.

“The draft Act provides for rules on the financing of political parties. This regulation is a welcome effort; in this context, it is essential that all different aspects relating to financing of political parties are considered. Otherwise, the impact of specific regulations on limitations of donations to the political parties, their assessment and the transparency requirements would be weakened in practice.

The draft Act does not regulate other sources of financing, including the state budget or possible profitable activities undertaken by the party itself. It is recommended to include such financing instruments in the draft Act as well. Such regulation should include safeguards for equal treatment of political parties in accordance with European standards. Article 35 provides for these issues to be stipulated in a separate law, but it would be preferable if they were incorporated into legislation on political parties. At the same time, consideration may be given to also ensuring a proper balance between the different financing sources, so as to safeguard the freedom of association. Limitations on loans or provisions on donations to entities connected with a political party should also be provided.”

CDL-AD(2014)035 Joint Opinion on the Draft Act to regulate the formation, the inner structures, functioning and financing of political parties and their participation in elections of Malta, adopted by the Venice Commission at its 100th Plenary Session (Rome, 10-11 October 2014). §§21-22.

“Financing of political parties can also be done through non-monetary contributions, which is not an issue dealt with in the draft amendments. In a previous Election Observation Report, OSCE/ODIHR has pointed out that the Law does not provide a clear mechanism or reference to other legislation for evaluating such non-monetary contributions. It is recommended that this issue be addressed in the draft amendments as well. In this context, it is noted that all rules regarding funding of political parties should apply *mutatis mutandis* to the funding of electoral campaigns for candidates and to the funding of political activities for elected representatives, as stated in Article 8 of the Council of Europe Committee of Ministers Recommendation 2003 (4).”

CDL-AD(2014)034-e Joint Opinion on Draft Amendments to the Law on the financing of political activities of Serbia, adopted by the Venice Commission at its 100th Plenary Session (Rome, 10-11 October 2014), §21.

B. International standards

“(…)International standards relevant to the financing of political parties and election campaigns are found principally in the United Nations (UN) Convention Against Corruption¹ and in Article 22 of the International Covenant on Civil and Political Rights,² and Article 11 of the European Convention on Human Rights (ECHR), which both protect the right to freedom of association. The right to free elections guaranteed by Article 3 of the First Protocol to the ECHR is also of relevance. This opinion further takes into consideration OSCE commitments, in particular on the protection of the freedom of association (Copenhagen 1990, par 9.3) and on holding genuine and periodic elections (Copenhagen 1990, par 5, 6, 7 and 8).

In addition, soft-law standards in this area can be found in the recommendations of UN, Council of Europe and OSCE bodies and institutions. These include General Comment 25 of the UN Human Rights Committee on the right to participate in public affairs, voting rights and the right of equal access to public service, Council of Europe Committee of Ministers Recommendation (2003)⁴ on Common Rules Against Corruption in the Funding of Political Parties and Electoral Campaigns, as well as the Joint Guidelines on Political Party Regulation issued by OSCE/ODIHR and Venice Commission (...).”

CDL-AD(2014)035 Joint Opinion on the Draft Act to regulate the formation, the inner structures, functioning and financing of political parties and their participation in elections of Malta, adopted by the Venice Commission at its 100th Plenary Session (Rome, 10-11 October 2014) §§11-12.

1. Regular financing

a) Public financing

“The draft amendments introduce a system of direct public funding, which is welcomed and follows previous recommendations made by OSCE/ODIHR. This is the most significant innovation proposed in the draft. The allocation of public funding in a clear, objective and fair manner is an essential tool in the fight against corruption, and reduces the dependency of political parties on wealthy individuals. As such, public funding of political parties also enhances public participation and contributes to the leveling of the playing field for all political parties.”

CDL-AD(2015)025 Joint Opinion on the draft amendments to some legislative acts concerning prevention and fight against political corruption of Ukraine, adopted by the Council of Democratic Elections at its 52nd meeting (Venice, 22 October 2015) and by the Venice Commission at its 104th Plenary Session (Venice, 23-24 October 2015), §22.

“One recurrent problem is the risk of mismatch of possibilities, that is to say an inequality between the government party(-ies) and the opposition party(-ies). Such imbalances can be somehow counteracted by a system of public financing of parties' activities. This system must be established under a thorough legislation on public grants to political parties based on the principle of equality. On another related issue the report also highlights the need to provide proper conditions for parties without representation in parliament...”

In the context of a system of financial grants to political parties, it may be envisaged to establish some financial compensation so that the opposition parties would have an additional contribution in the course of a legislature, compared to the ruling parties. This is intended to compensate them up to a certain extent for the advantage in resources the party(-ies) in power get by having access to the human resources of the government as well as local and regional administrations.

In such context, another important element can also be the establishment of a public system of financing. This system could permit printing of ballot papers and provide financial support, e.g. free or subsidised facilities and office services.

Legislation could also provide for members of parliament and ministers the right to free domestic travels at public expense, and this even during electoral campaigns.”

CDL-AD(2013)033 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) §§127-130.

“Public financing must be aimed at each party represented in Parliament.

In order, however, to ensure the equality of opportunities for the different political forces, public financing could also be extended to political bodies representing a significant section of the electoral body and presenting candidates for election. The level of financing could be fixed by legislator on a periodic basis, according to objective criteria. Tax exemptions can be granted for operations strictly connected to the parties' political activity.

The financing of political parties through public funds should be on condition that the accounts of political parties shall be subject to control by specific public organs (for example by a Court of Audit). States shall promote a policy of financial transparency of political parties that benefit from public financing.”

CDL-INF(2001)008 Guidelines and Report on the Financing of Political Parties, adopted by the Venice Commission at its 46th Plenary Meeting (Venice, 9-10 March 2001), pp.2.

“What must be borne in mind when providing public funding is that while it must be set at a meaningful level, it must also be ensured that it does not create an over-dependence of political parties and actors on state support?”

CDL-AD(2011)006 Joint opinion on the revised draft law on financing political activities of the Republic of Serbia by the Venice Commission and the OSCE/ODIHR, adopted by the Venice Commission at its 86th Plenary Session (Venice, 25-26 March 2011), §10.

“As stated in the Guidelines, public subsidies should be set at a meaningful level to fulfill the objective of providing support, but should not be the only source of income or create the conditions for over-dependency on state support. The OSCE/ODIHR and the Venice Commission have previously expressed concern at the amount of funding provided from public sources to political parties in Serbia. It was noted that although public funding must be set at a meaningful level, this should not create an over-dependence of political parties and actors on state support. It was therefore recommended that the amounts in question be reconsidered.”

CDL-AD(2014)034 Joint Opinion on Draft Amendments to the Law on the financing of political activities of Serbia, adopted by the Venice Commission at its 100th Plenary Session (Rome, 10-11 October 2014), § 29.

“The (...) Law would also benefit from introducing a provision prohibiting the use of public resources (by an office holder) for the purposes of support of a political actor.”

CDL-AD(2010)048 Joint opinion on the draft law on financing political activities of the Republic of Serbia by the Venice Commission and the OSCE/ODIHR, adopted by the Venice Commission at its 85th plenary session (Venice, 17-18 December 2010), §54.

“(...)the draft Act chooses to leave regulation of direct public funding to future, separate legislation (...). While this is of course up to each state, it is noted that public funding could be a useful tool by which to further level the playing field between political parties, so that also smaller parties, with less funds at their disposal, will have a chance to be part of the political landscape of a state. Moreover, a good balance of public and private funding will ensure that political parties do not become too dependent on their donors, and will on the other hand reduce outside influence on political parties (provided such funding is distributed equally, in a neutral and legally foreseeable manner).

Public funding can also be a valuable tool to further gender equality, for example where allocation of public funds is made contingent on compliance with requirements for women's participation. At the same time, as noted in the Guidelines, “[i]rregularities in financial reporting, non-compliance with financial-reporting regulations or improper use of public funds should result in the loss of all or part of such funds for the party.” Bearing in mind the above statements, consideration may be given to including provisions on public funding in this draft Act as well, which should then also include clear provisions on expenditure reporting, and sanctions for wrongdoing.”

CDL-AD(2014)035 Joint Opinion on the Draft Act to regulate the formation, the inner structures, functioning and financing of political parties and their participation in elections of Malta, adopted by the Venice Commission at its 100th Plenary Session (Rome, 10-11 October 2014). §§58-59.

“... Law prohibits certain natural and legal persons from contributing money to political parties. Concerning the prohibition on donations from companies in which the government or local government owns 25%, this percentage could be too high. It is common practice for legislation pertaining to political party financing to ban donations from companies that the state is involved in, regardless of the extent of such involvement. States which do not ban such donations completely usually tend to set the limit of government involvement lower, and prohibit, for example, donations from companies in which the State owns more than 10%. Similarly, the prohibition on donations from companies benefiting from public contracts that account for over 20% of the company turnover during the “period of the contract plus one year” may also be too permissive. The length of the ban on donations (extending only one year after the end of the contract) is quite short. The draft amendments should consider stricter bans, for example lowering the financial threshold.”

CDL-AD(2015)025 Joint Opinion on the draft amendments to some legislative acts concerning prevention and fight against political corruption of Ukraine, adopted by the Council of Democratic Elections at its 52nd meeting (Venice, 22 October 2015) and by the Venice Commission at its 104th Plenary Session (Venice, 23-24 October 2015), § 32.

b) Private financing

“Political parties may receive private financial donations. Donations from foreign States or enterprises must however be prohibited. This prohibition should not prevent financial donations from nationals living abroad. Other limitations may also be envisaged. Such may consist notably of:

- a. a maximum level for each contribution;
- b. a prohibition of contributions from enterprises of an industrial, or commercial nature or from religious organisations;
- c. prior control of contributions by members of parties who wish to stand as candidates in elections by public organs specialised in electoral matters.

The transparency of private financing of each party should be guaranteed. In achieving this aim, each party should make public each year the annual accounts of the previous year, which should incorporate a list of all donations other than membership fees. All donations exceeding an amount fixed by the legislator must be recorded and made public”.

CDL-INF(2001)008 Guidelines and Report on the Financing of political parties, adopted by the Venice Commission at its 46th Plenary Meeting (Venice, 9-10 March 2001), p.3.

“As noted in the Guidelines, limits have historically been placed on domestic funding of political parties in the OSCE region, in an attempt to limit the ability of particular groups to gain political influence by providing financial advantages. Legislation in the area of political party financing may therefore set reasonable limitations on private contributions, which may include the determination of a maximum level that may be contributed by a single donor. The Council of Europe Committee of Ministers’ Recommendation (2003)⁴ also requires that “[i]n case of donations over a certain value, donors should be identified in the records”. Specific rules on donations should be included in key legislation with a view to avoiding conflicts of interest. (...)”

CDL-AD(2014)035 Joint Opinion on the Draft Act to regulate the formation, the inner structures, functioning and financing of political parties and their participation in elections of Malta, adopted by the Venice Commission at its 100th Plenary Session (Rome, 10-11 October 2014), §24.

“Reasonable limitations on private contributions may include the determination of a maximum level that may be contributed by a donor. Such limitations have shown to be effective in minimizing the possibility of corruption or the purchasing of political influence.”

CDL-AD(2011)044rev Joint Opinion on the Draft Law on Amendments and Additions to the Organic Law of Georgia on Political Unions of Citizens, adopted by the Venice Commission at its 89th plenary session (Venice, 16-17 December 2011), §14.

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), §175.

“As previously noted by the OSCE/ODIHR, the limits on private funding set by the Law appear to be too high to be effective. The donation limit by a private individual in an election year is 40 average monthly salaries (approximately EUR 21,000 at a monthly salary, rate of September 2014), while for a company the donation can be up to 400 average monthly salaries in an election year (i.e. approximately EUR 210,000). As noted in para 175 of the Guidelines, limitations on private contributions “have been shown to be effective in minimizing the possibility of corruption or the purchasing of political influence”. It is therefore recommended to lower the limits on private funding in the Law for both private individuals and companies.”

CDL-AD(2014)034 Joint Opinion on Draft Amendments to the Law on the financing of political activities of Serbia, adopted by the Venice Commission at its 100th Plenary Session (Rome, 10-11 October 2014), § 28.

“(…)Law would benefit from explicitly stating that party leaders and members are prohibited from converting their party funds (both public and private, for that matter) into personal use. Lack of such a provision opens the possibility for abuse and corruption.”

CDL-AD(2010)048 Joint opinion on the draft law on financing political activities of the Republic of Serbia by the Venice Commission and the OSCE/ODIHR, adopted by the Venice Commission at its 85th plenary session (Venice, 17-18 December 2010), §29.

“While it is not for the state to establish [the membership] fees, it is noteworthy that legislation should ensure that membership fees are not on the other hand used to circumvent contribution limits, which can be accomplished by treating membership fees as contributions. It is therefore recommended to consider for the (...) law to treat the amount of membership fee as part of the total contributions possible by members under the (...) Law.”

CDL-AD(2010)048 Joint opinion on the draft law on financing political activities of the Republic of Serbia by the Venice Commission and the OSCE/ODIHR, adopted by the Venice Commission at its 85th plenary session (Venice, 17-18 December 2010), §13.

“... [A]though Article 10 sets a maximum value for donations, it does not set any maximum value for membership fees, which are not included in the definition of donations in Article 9. This would allow political parties to circumvent the Law by asking for very high membership fees. It is therefore recommended, as suggested in the OSCE/ODIHR-Venice Commission *Guidelines on Political Party Regulation* to treat membership fees as donations.”

CDL-AD(2014)034 Joint Opinion on Draft Amendments to the Law on the financing of political activities of Serbia, adopted by the Venice Commission at its 100th Plenary Session (Rome, 10-11 October 2014), § 25.

“The safeguards to prevent abuse are for all these reasons inadequate. The Venice Commission and OSCE/ODIHR indicated in some of their standard-setting documents that reasonable limits on the total amount of contributions may be imposed so that there is not distortion in the political process in favour of wealthy interest and that corruption or purchasing of political influence is made impossible.”

CDL-AD(2011)046 Opinion on the Draft Law on Amendments to the law on political parties of the Republic of Azerbaijan Adopted by the Venice Commission at its 89th Plenary Session Venice (16-17 December 2011), §45.

“The draft amendments establish limits on private contributions, together with a regime of reporting and accounting obligations, which is laudable and in line with previous recommendations made by OSCE/ODIHR. However, the draft amendments mostly deal with private contributions in terms of direct financial donations and in-kind support. In practice, private contributions can also take the forms of loans, credits or debts to circumvent restrictions on prohibited sources or contribution limits. This is reflected, e.g., in the definition of “donation to a political party” of Article 2 of the Council of Europe Recommendation Rec (2003)4 pursuant to which this term is defined as “any deliberate act to bestow advantage, economic or otherwise, on a political party.” Loans may be taken out by parties to finance campaign or other activities. If these loans are granted at advantageous conditions or even written off by the creditor, they should be treated as any other kind of financial contribution. While loans and other benefits are mentioned in ... Law, which lists them as contributions to the benefit of a party, loans, credits and debts should be consistently covered by reporting obligations and contribution limits set out in other provisions, both as regards the financing of political parties’ statutory activities and as regards campaign financing, throughout the draft. This is necessary to avoid loopholes that would permit the unlimited channeling of money to the benefit of certain parties.

... Law prohibits certain natural and legal persons from contributing money to political parties. Concerning the prohibition on donations from companies in which the government or local government owns 25%, this percentage could be too high. It is common practice for legislation pertaining to political party financing to ban donations from companies that the state is involved in, regardless of the extent of such involvement. States which do not ban such donations completely usually tend to set the limit of government involvement lower, and prohibit, for example, donations from companies in which the State owns more than 10%. Similarly, the prohibition on donations from companies benefiting from public contracts that account for over 20% of the company turnover during the “period of the contract plus one year” may also be too permissive. The length of the ban on donations (extending only one year after the end of the contract) is quite short. The draft amendments should consider stricter bans, for example lowering the financial threshold.

... The relevant decision-makers in Ukraine may consider including third-party involvement in the ambit of the draft amendments. The term “third party” refers to both individuals and organisations, not legally tied to any candidate or political party, which, in the course of an election, campaign in support of or in opposition to a candidate or a political party or which try to influence policy and decision-making with a view to obtaining some designated results from government authorities and elected representatives. Apart from setting limits on individual contributions, the stakeholders could discuss introducing registration and reporting obligations for lobbyists and political foundations...”

CDL-AD(2015)025 Joint Opinion on the draft amendments to some legislative acts concerning prevention and fight against political corruption of Ukraine, adopted by the Council of

Democratic Elections at its 52nd meeting (Venice, 22 October 2015) and by the Venice Commission at its 104th Plenary Session (Venice, 23-24 October 2015), § 31,32,34.

2. Electoral campaigns

“In order to ensure equality of opportunities for the different political forces, electoral campaign expenses shall be limited to a ceiling, appropriate to the situation in the country and fixed in proportion to the number of voters concerned.

The State should participate in campaign expenses through funding equal to a certain percentage of the above ceilings or proportional to the number of votes obtained. This contribution may however be refused to parties who do not reach a certain threshold of votes.

Private contributions can be made for campaign expenses, but the total amount of such contributions should not exceed the stated ceiling. Contributions from foreign States or enterprises must be prohibited. This prohibition should not prevent financial contributions from nationals living abroad. Other limitations may also be envisaged. Such may consist notably of a prohibition of contributions from enterprises of an industrial or commercial nature or religious organisations.

Electoral campaign accounts will be submitted to the organ charged with supervising election procedures, for example, an election committee, within a reasonable time limit after the elections.

The transparency of electoral expenses should be achieved through the publication of campaign accounts.”

CDL-INF(2001)008 Guidelines and Report on the Financing of political parties, adopted by the Venice Commission at its 46th Plenary Meeting (Venice, 9-10 March 2001), p.3.

“According to common rules against corruption in the funding of political parties and electoral campaigns, states should consider adopting measures to prevent excessive funding of political parties, including the establishment of limits on expenditure in electoral campaigns.”

CDL-AD(2014)035 Joint Opinion on the Draft Act to regulate the formation, the inner structures, functioning and financing of political parties and their participation in elections of Malta, adopted by the Venice Commission at its 100th Plenary Session (Rome, 10-11 October 2014). §23.

“The OSCE/ODIHR has called on the Serbian authorities in the past to consider establishing by law reasonable and justifiable limits to campaign expenditures. This would ensure that the free choice of voters is not undermined or the democratic process distorted by disproportionate expenditure on behalf of any party or candidate. It would thus enhance the level playing field among contestants during the campaign, in line with good electoral practice...”

The OSCE/ODIHR has pointed out in the past that political parties are required to report to the Agency only 30 days after the announcement of election results and are not obliged to provide information on campaign expenditures during the election process. This reduces the transparency of party funding to voters in the run-up to the elections and runs counter to electoral good practice. It is therefore recommended to require political parties to report on campaign financing in a transparent manner during the election campaign.

“Current ... Law stipulates that, whereas private donations are subject to contribution limits, contributions given by a candidate to his or her own campaign fund or his or her party are

not limited. This provision is not changed by the draft amendments. While a candidate's own contributions are often perceived to be of lesser concern in relation to possible corruption and undue influence, unlimited funding of one's own campaign carries the risk that a few wealthy individuals are able to spend unlimited amounts in campaigning for public office. This may not always properly represent societal interests and could jeopardize the creation of a level playing field for political participation. A reasonable limitation could e.g., consist in setting a limit to the amount of contributions which can come from a single source, setting spending limits or stating in the draft amendments that the funding provided by the candidate cannot be more than a certain proportion of the overall private contributions..."

CDL-AD(2015)025 Joint Opinion on the draft amendments to some legislative acts concerning prevention and fight against political corruption of Ukraine, adopted by the Council of Democratic Elections at its 52nd meeting (Venice, 22 October 2015) and by the Venice Commission at its 104th Plenary Session (Venice, 23-24 October 2015), §35.

"Contestants do not have an obligation to report on the expenditures of an election campaign during the campaign period as only reports on donations and income of the campaign finances have to be submitted before the elections. The draft Code does not regulate mechanisms for the National Audit Office (NAO) to check the accuracy of the reports. The OSCE/ODIHR election observation mission report on the 2013 parliamentary elections states: "It should be ensured that all political parties and nomination committees submit information to the public register maintained by the NAO as required by the law on an ongoing basis. The NAO could have the authority to request this information if failure to submit it is suspected and to sanction the respective party for failure to comply with the law. The authority of the NAO could be strengthened and additional resources granted thereby enabling it to crosscheck and verify the authenticity of reported expenditures of electoral contestants against actual expenditures."

... "The OSCE/ODIHR recommended adopting regulations to require that paid content in political advertising be clearly labelled and legislation to prohibit hidden advertising be introduced..."

CDL-AD(2014)001 Joint Opinion on the draft Election Code of Bulgaria adopted by the Council for Democratic Elections at its 47th meeting (Venice, 20 March 2014) and by the Venice Commission at its 98th plenary session (Venice, 21-22 March 2014). §56, 60.

... "The Hungarian Government explains that the goal of this provision is to ensure the publication of political advertising for political parties with nationwide support on an equal basis and free of charge. Referring to the judgment of the European Court of Human Rights in the case of *TV Vest AS & Rogalands Pensjonistparti v. Norway*, the Government points out that paid political advertising is prohibited in a number of European countries.

In its judgment in the case of *TV Vest As & Rogaland Pensjonistparti v. Norway*, the ECtHR indeed assessed a general ban of political advertising on television. The Court was of the opinion that "there was not [...] a reasonable relationship of proportionality between the legitimate aim pursued by the prohibition on political advertising and the means deployed to achieve that aim. The restriction which the prohibition and the imposition of the fine entailed on the applicants' exercise of their freedom of expression cannot therefore be regarded as having been necessary in a democratic society, within the meaning of paragraph 2 of Article 10, for the protection of the rights of others, notwithstanding the margin of appreciation available to the national authorities. Accordingly, there has been a violation of Article 10 of the Convention."

In its recent decision in the case of *Animal Defenders International v. the United Kingdom*, the ECtHR acknowledged “the lack of European consensus on how to regulate paid political advertising in broadcasting” and stated that the UK Government “had more room for manoeuvre when deciding on such matters as restricting public interest debate.” The Court considered that convincing reasons had been given for the ban on political advertising in the United Kingdom and that it had not amounted to a disproportionate interference with the applicant NGO’s right to freedom of expression.

The Venice Commission notes that the ECtHR, in balancing, on the one hand, the applicant NGO’s right to impart information and ideas of general interest which the public is entitled to receive, with, on the other hand, the authorities’ desire to protect the democratic debate and process from distortion by powerful financial groups with advantageous access to influential media, paid specific attention to the fact “that the complex regulatory regime governing political broadcasting in the United Kingdom had been subjected to exacting and pertinent reviews and validated by both parliamentary and judicial bodies. There was an extensive pre-legislative review of the ban, which was enacted with cross-party support without any dissenting vote. The proportionality of the ban was also examined in detail in the High Court and the House of Lords.”

The European Court of Human Rights also pointed out that the British ban on paid political advertising was balanced by the fact that political parties could freely advertise for themselves through party political, party election and referendum campaign broadcasts. Thus the Court took into account that in a party-based democracy political parties need to be able to disseminate their views before elections. There are almost no provisions like the British ones in Hungary. Therefore the situation in Great Britain is quite different from that in Hungary.

The Commission underlines that limits on political advertising have to be seen against the legal background of the particular Member State. Where political advertising in electoral campaigns is concerned, limitations have to be justified in a convincing way as to their necessity in a democratic society. According to the Hungarian authorities the ban on political advertising on private television during the electoral campaign strives “for the dissemination of appropriate information required for the formation of democratic public opinion and to ensure the equality of opportunity”. The Venice Commission cannot agree that this is a sufficient justification for the prohibition of any political advertising in commercial media services prior to elections.

The Venice Commission attaches great importance to the assessment by the Hungarian Constitutional Court’s decision 1/2013 where the Court pointed out that political advertising, besides influencing voters, also informs them and where it stressed that a prohibition of political advertising on commercial television targets exactly the type of media that reaches voters in the widest range. Indeed one has to take a particular look at the effects of the amended Article IX.3 of the Fundamental Law. Since the Government usually has a better chance of public appearances, the governing parties’ positions will already be promoted indirectly through media coverage of governmental activities and statements. The prohibition of any political advertising in commercial media services, which are more widely used in Hungary than the public service media will deprive the opposition parties of an important chance to air their views effectively and thus to counterweigh the dominant position of the Government in the media coverage.”

CDL-AD(2013)012 Opinion on the Fourth Amendment to the Fundamental Law of Hungary Adopted by the Venice Commission at its 95th Plenary Session, Venice, 14-15 June 2013, §§39–45.

“In September 2013 the Fifth Amendment to the Fundamental Law was passed. It allowed private mass-media to show political advertisement, but, again, only during the electoral campaign and free of charge.” ...

“Following the adoption of this Fifth Amendment, fears were expressed that commercial media outlets would not or would rarely endeavour to publish political advertising, as they were simply not interested in giving air time for free. Those fears were confirmed during the electoral campaign for the parliamentary elections of April 2014: none of the Hungarian private broadcasters chose to provide free airtime to electoral contesting at that time. The OSCE/ODIHR Limited Election Observation Mission concluded in its final report on the Parliamentary elections of 6 April 2014 that “in the current media environment, the absence of other political advertisements on nationwide commercial television, combined with a significant amount of government advertisements, undermined the equal and unimpeded access of contestants to the media, which is at odds with paragraph 7.8 of the 1990 OSCE Copenhagen Document.”

Negative effects of such restriction are three-fold. First, it deprives audiences of private broadcasters from access to political messages. Second, it puts the opposition parties in a somewhat unequal position vis-à-vis the ruling majority. On this latter point the Venice Commission observes that the Government usually has a better chance of public appearances because the ruling parties’ positions will already be promoted indirectly through media coverage of governmental activities and statements. This constitutes a serious handicap for the opposition. The balance may be restored (at least to a certain extent) if the opposition parties are allowed to buy extra air time for political advertisement, but it is prohibited under the Hungarian law.

The Venice Commission is aware that there is no European consensus on how to regulate paid political advertising in broadcasting. In analysing limitations on political advertisement in the United Kingdom the ECtHR paid particular attention to the domestic decision-making process. Thus, the Court noted that the complex regulatory regime governing political broadcasting in the UK had been subjected to exacting and pertinent reviews and validated by both parliamentary and judicial bodies. There was an extensive pre-legislative review of the rules, which were enacted “with cross-party support without any dissenting vote”. The proportionality of that regime was also examined in detail in the High Court and the House of Lords. In the opinion of the Venice Commission, without such broad cross-party support and exacting review, the ban on paid political advertisement unjustly penalises the opposition, secures media domination of the ruling majority, and reduces chances of political change.

Finally, such restriction removes a source of advertising revenue from private broadcasters, which are already weakened by uneven distribution of the State advertisement budget (see above), as well as by the general crisis of the media industry in Hungary. Thus, this measure may have a negative effect, albeit indirectly, on the quality of the media content and the diversity of the media market.

Whilst there may be bona fide reasons to wish to limit the amount of political advertising (for example, to regulate the extent to which the amount of advertising is skewed towards the best-funded political parties), there are a number of different models used throughout Council of Europe member states which Hungary could draw upon without interfering with both political advertisers’ right to impart and citizens’ right to receive political information.

Therefore the Venice Commission suggests amending the Constitution, the Media Act and other relevant legislation in order to provide not only for free but also for paid political advertising in private broadcast media.”

CDL-AD(2015)015 Opinion on Media Legislation (ACT CLXXXV on Media Services and on the Mass Media, Act CIV on the Freedom of the Press, and the Legislation on Taxation of Advertisement Revenues of Mass Media) of Hungary, adopted by the Venice Commission at its 103rd Plenary Session (Venice, 19-20 June 2015); §§ 97-103.

“Article 65(13) of the draft law prohibits a person from donating his or her services in support of a candidate’s campaign, as “financial (material) support” can only be given “through election funds”. The Venice Commission and OSCE/ODIHR have previously expressed concern that this provision prohibits persons who do not have financial resources from contributing their time or labour in support of a candidate. Regulation of in-kind contributions is possible through strict reporting requirements. However, in-kind contributions should not be prohibited simply because they are not traceable through the election fund. The OSCE/ODIHR and the Venice Commission previously recommended that the law be amended to allow for the contribution of in-kind services to a political campaign, subject to strict reporting requirements and the same contribution limits that apply to monetary donations. (...)”

CDL-AD(2014)019 Joint Opinion the Venice Commission and OSCE Office for Democratic Institutions and Human Rights (OSCE/ODIHR) on the draft Election Law of the Kyrgyz Republic adopted by the Council for Democratic Elections at its 48th meeting (Venice, 12 June 2014) and by the Venice Commission at its 99th plenary session (Venice, 13-14 June 2014). §93.

“Since financial spending limits may be difficult to enforce in practice, additional measures to limit spending should be taken. In particular, consideration should be given to prohibiting paid political advertising on broadcasting media, while ensuring that the system of allocation of free air time functions in practice. Paid media advertising appears to constitute the highest proportion of campaign spending according to official figures; such a ban could therefore significantly reduce the cost of elections, while being relatively easy to monitor and enforce. Moreover, while the draft amendments cover public funding and private contributions, they do not foresee measures to achieve a proper balance between private and public funding”.

CDL-AD(2015)025 Joint Opinion on the draft amendments to some legislative acts concerning prevention and fight against political corruption of Ukraine, adopted by the Council of Democratic Elections at its 52nd meeting (Venice, 22 October 2015) and by the Venice Commission at its 104th Plenary Session (Venice, 23-24 October 2015), § 30.

The recommendation to prohibit paid political advertising on broadcasting media is linked to the specific situation of Ukraine.

3. Control and sanctions

“Any irregularity in the financing of a political party shall entail sanctions proportionate to the severity of the offence that may consist of the loss of all or part of public financing for the following year.

Any irregularity in the financing of an electoral campaign shall entail, for the party or candidate at fault, sanctions proportionate to the severity of the offence that may consist of the loss or the total or partial reimbursement of the public contribution, the payment of a fine or another financial sanction or the annulment of the election.

The above-mentioned rules including the imposition of sanctions shall be enforced by the election judge (constitutional or other) in accordance with the law.”

CDL-AD(2008)002 Opinion on the Law on the Financing of political parties of Bosnia and Herzegovina, adopted by the Venice Commission at its 74th Plenary Session (Venice, 14, 15 March 2008), §19.

CDL-INF(2001)008 Guidelines and Report on the Financing of political parties, adopted by the Venice Commission at its 46th Plenary Meeting (Venice, 9-10 March 2001), §§13-14-15.

“It would seem desirable to consider other measures such as (a) putting an upper limit on the amount of donations (b) making public the names of donors and amounts above a certain level (c) prohibiting donors from receiving state contracts within a certain period of the donation (d) applying severe sanctions for breach of the legislation”.

CDL-AD(2004)025 Opinion on the Law on political parties of the Republic of Azerbaijan, Adopted by the Venice Commission at its 59th Plenary Session (Venice, 18-19 June 2004), §22.

“Sanctions should be applied to political parties found in violation of relevant laws. Sanctions at all times must be objective, enforceable, effective and proportionate to their specific purpose. The use of sanctions to hold political parties accountable for their actions should not be confused with prohibition and dissolution based on a party’s use of violence or threat to civil peace and the democratic constitutional order of the country. Prohibition and dissolution based on such extreme circumstances is not a matter of holding parties accountable for legal violations, but is in fact done because it is necessary in a democratic society. Where a party is a habitual offender of legal provisions and makes no effort to correct its behavior, the loss of registration status might be appropriate. The loss of registration status may be significant where there is state financial support for parties.”

“There should be a variety of sanctions for non-compliance with laws. As noted above, sanctions must bear a relationship to the violation and respect the principle of proportionality.

Such sanctions should include:

- Administrative fines, the amount of which should consider the nature of the violation, including whether the violation is a reoccurring violation
- Partial or total loss of public funding and other forms of public support, which could be imposed as a temporary measure for set period of time
- Ineligibility for future state support for a set period of time
- Partial or total loss of reimbursement for campaign expenses
- Forfeiture to the state treasury of financial support previously transferred to or accepted by a party
- Ineligibility for presenting candidates in elections for a set period of time
- Criminal sanctions in cases of significant violations, imposed against the party members who are responsible for the violation
- Annulment of a candidate’s election to office, but only as determined by a court of law after compliance with applicable legal protections for due process of law and only if the legal violation likely impacted the electoral result
- Loss of registration status for the party.

Sanctions should always be compatible with the principle of proportionality. Prior to the enactment of any sanction, the regulatory authority should carefully consider the sanction’s aim against a possible detrimental effect to political pluralism or the enjoyment of protected

rights. When sanctions are imposed, the public should be informed of the facts giving rise to the legal violation and the particular sanction imposed on the political party.

Where sanctions are imposed, the party in question should have available recourse to a fair hearing by an impartial tribunal. While regulatory authorities can determine sanctions, there should be an opportunity for a party to request that the final decision regarding sanctions should be made by the appropriate judicial body in accordance with judicial principles”.

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), §§224-228.

“[the provision] on record-keeping is welcomed, in that it also requires political actors to keep detailed accounts on the origin amount and structure of funds. This is in accordance with good practice and the Guidelines which firmly recommend that reports should clearly distinguish between income and expenditure and include itemized lists of donations. Reports should also include general party finance and campaign finance, clearly identifying which was to the benefit of the party and which to the individual candidate. A strong system of party financing oversight outside of elections is imperative in order to avoid providing the possibility for third party interference and circumvention of the rules through conducting activities during a “pre-electoral” period.”

CDL-AD(2010)048 Joint opinion on the draft law on financing political activities of the Republic of Serbia by the Venice Commission and the OSCE/ODIHR, adopted by the Venice Commission at its 85th plenary session (Venice, 17-18 December 2010), §40.

“Sanctions for failure to report before the end of the relevant period, or failure to adhere to rules on form and content of reports, are set at a maximum of EUR 10.000 (Article 31). This relatively low amount may lead to a situation where parties which have received contributions in contravention of the law may decide not to report at all and to pay the fine instead. The same is true for other provisions of the draft Act, which does not calculate the fine in accordance with the sums involved in violation of the draft Act. At the same time, potentially new political parties should not be discouraged by the threat of fines from participating in the political process. It is recommended to consider introducing proportionate punishment, i.e. punishment that takes into account the gravity of the offence, whether it is a repeated violation, what amount of money is involved, and the long-term implications of the relevant punishment. This could be done by calculating punishment as a percentage of the income of a party, or by reference to the amount involved in the violation for non-compliance with reporting requirements or failure to report.

Regarding the proportionality of punishment, it is laudable that the draft Act contains, in most places, the possibility to adjust the level of punishment to the seriousness of the violation. It is recommended to ensure that all provisions are worded to include the concept of proportional punishment; in particular, it is recommended to add it to Article 41 par 4 (sanctioning cases where inaccurate declarations are made knowingly or out of negligence).”

CDL-AD(2014)035 Joint Opinion on the Draft Act to regulate the formation, the inner structures, functioning and financing of political parties and their participation in elections of Malta, adopted by the Venice Commission at its 100th Plenary Session (Rome, 10-11 October 2014) §§44-45.

“Since financial spending limits may be difficult to enforce in practice, additional measures to limit spending should be taken. In particular, consideration should be given to prohibiting paid political advertising on broadcasting media, while ensuring that the system of allocation of free air time functions in practice. Paid media advertising appears to constitute the highest proportion of campaign spending according to official figures; such a ban could therefore

significantly reduce the cost of elections, while being relatively easy to monitor and enforce. Moreover, while the draft amendments cover public funding and private contributions, they do not foresee measures to achieve a proper balance between private and public funding”.

CDL-AD(2015)025 Joint Opinion on the draft amendments to some legislative acts concerning prevention and fight against political corruption of Ukraine, adopted by the Council of Democratic Elections at its 52nd meeting (Venice, 22 October 2015) and by the Venice Commission at its 104th Plenary Session (Venice, 23-24 October 2015), § 30.

The recommendation to prohibit paid political advertising on broadcasting media is linked to the specific situation of Ukraine.

“... Even though reports, in particular pre-election reports, should be processed and analysed quickly, such short deadlines can pose a disproportionate disadvantage to small parties and independent candidates, which may not have a sufficient number of staff or volunteers to comply with these obligations in a timely manner. Hence, the deadlines should provide political parties and regulatory bodies with a reasonable amount of time to fulfill their reporting, analysis and auditing obligations and take into consideration the form of analysis or reporting required (i.e., deadlines for submission and analysis of pre-election reports might be shorter than in the case of post-election reports).”

“The monitoring of accounts of political parties, and of expenses involved in election campaigns, including their presentation and publication by an independent regulatory body, is mandated by international standards and crucial to safeguarding the role and proper functioning of political parties and their ability to adequately represent social interests. The establishment of such a specialized regulatory body is in line with the recommendations made by OSCE/ODIHR. When creating a regulatory body, it is essential that it is sufficiently independent from State structures to conduct effective oversight, and that it is endowed with adequate financial support and investigative powers. Regulatory bodies have to be independent, impartial and non-partisan in nature, which is why the establishment and appointment of representatives of these bodies should follow clearly established and carefully crafted procedures. GRECO has recommended that such a regulatory body should be composed of representatives of both public bodies and of civil society.”

“The publication of reports submitted by political parties, as well as the analysis of such reports on the official websites of parties and regulatory bodies is positive, since it increases transparency and public participation. It is recommended that the draft amendments stipulate that these publications remain accessible on the respective websites, ideally permanently or at least for a longer period of time, such as five years, so that individuals and political parties have sufficient time to access them.”

CDL-AD(2015)025 Joint Opinion on the draft amendments to some legislative acts concerning prevention and fight against political corruption of Ukraine, adopted by the Council of Democratic Elections at its 52nd meeting (Venice, 22 October 2015) and by the Venice Commission at its 104th Plenary Session (Venice, 23-24 October 2015), § 56,36,60.

“In general, administrative sanctions or fines, or other sanctions such as the temporary suspension of public funding or of other forms of public support are preferred responses to the improper acquisition or use of funds by parties. Criminal sanctions should only be imposed for serious violations of financial regulations, which undermine public integrity. Sanctions should be proportionate and allow for a certain level of flexibility based on the seriousness of the offence. The imposition of both administrative and criminal sanctions for the same violation of legislation should also be avoided”.

CDL-AD(2015)025 Joint Opinion on the draft amendments to some legislative acts concerning prevention and fight against political corruption of Ukraine, adopted by the Council of

Democratic Elections at its 52nd meeting (Venice, 22 October 2015) and by the Venice Commission at its 104th Plenary Session (Venice, 23-24 October 2015), § 53.

“The draft amendments further do not provide the institutions responsible for oversight and control with specific powers to access the information they need to perform their roles, such as financial documentation held by parties (e.g., invoices), including the powers to oblige parties to respond to specific requests, etc. Without such powers, it would be difficult for oversight bodies to analyse financial statements in a manner that goes beyond conducting formal checks of internal consistency.

The relevant legislation should also exempt parties from the obligation to undergo auditing if they do not receive public funding, and do not engage in significant financial activities (e.g., cash flow in and out of political parties’ accounts), but generally comply with other regulations. Otherwise, the strain of auditing in terms of both financial means and human resources might have a discriminatory effect on very small or newly formed parties.

... it is recommended that the authorities provide political parties with standardized forms for their reports and guidance on how to prepare an accessible and informative report. Standardised and easily searchable formats of reporting also support civil society and other interested stakeholders to review political party finances and contribute to an informed electorate.”

CDL-AD(2015)025 Joint Opinion on the draft amendments to some legislative acts concerning prevention and fight against political corruption of Ukraine, adopted by the Council of Democratic Elections at its 52nd meeting (Venice, 22 October 2015) and by the Venice Commission at its 104th Plenary Session (Venice, 23-24 October 2015), § 45,46.

“Previous recommendations of the OSCE/ODIHR and the Venice Commission have emphasised the need for transparency in campaign finance and effective mechanisms for monitoring legal compliance through audits. The draft law makes no improvement in these areas. Nor does the draft law provide effective dissuasive sanctions for failure to comply with campaign finance regulations. As a result, previous recommendations for increased transparency and accountability for campaign finance remain unaddressed.”

“(...)In order to provide timely and relevant campaign finance information to the public, the Venice Commission and OSCE/ODIHR recommend that the law should require full disclosure, before and after elections, of sources and amounts of financial contributions and the types and amounts of campaign expenditures. Since the CEC receives these reports, this information can also be published on the CEC website. The OSCE/ODIHR and the Venice Commission recommend that the draft law be revised to provide specific details on the information that must be included on campaign finance reports and that all reports must be publicly available for scrutiny, including on the website of the CEC.

Article 65(20) of the draft law retains the current provision that “the balance of non-spent funds on a special account shall be returned to a candidate, political party”. This article does not specify any limitation on how a candidate or political party is to use these returned funds. Allowing a candidate to retain unspent campaign funds for personal use could have a corrupting effect. In fact, allowing candidates to use unspent campaign funds for personal use could be seen as a form of bribery. The Venice Commission and the OSCE/ODIHR previously recommended that this provision be amended to prohibit the use of unspent campaign funds for the personal benefit of candidates. Unspent campaign funds could be returned to donors on a proportionate basis, given to charities, or required to be used for some other legitimate public purpose. (...)”

CDL-AD(2014)019 Joint Opinion the Venice Commission and OSCE Office for Democratic Institutions and Human Rights (OSCE/ODIHR) on the draft Election Law of the Kyrgyz

Republic adopted by the Council for Democratic Elections at its 48th meeting (Venice, 12 June 2014) and by the Venice Commission at its 99th plenary session (Venice, 13-14 June 2014). §§89, 91-92.

“The Guidelines note that transparency in party and campaign finance is important to protect the rights of voters and to prevent corruption. Transparency is also important because the public has the right to be informed. Voters must have relevant information as to the financial support given to political parties in order to hold parties accountable. At the same time, regulations should not place an undue burden on parties, candidates and oversight bodies.

In the interest of transparency, it should be clear not only which donations a party may receive, but records should also be kept of loans and debts of political parties, and published. This helps increase scrutiny for parties in relation to the receipt of funding claimed to be loans, but which are not actually intended to be paid back. It is recommended that the public and the media should be able to scrutinise records on loans and debts, and that electoral contestants should be required to inform the independent body charged with oversight over political party and campaign finance with information on all loans and debts; the independent body should accordingly be held to publicise such statements on its website.

In addition, the body charged with oversight over both political party and campaign finance should be obliged to publish its analysis of political party and campaign finance reports, and accounts on its website within a reasonable period after having received them (whilst respecting personal data protection rules). Such reports should be made publicly available without unnecessary delay and should be easy to comprehend; they should also be easily accessible to the public for an extended period of time. This could be done by publishing the reports in a standardised and searchable format, and/or through newspapers with a high circulation. In this context, clear and timely deadlines for oversight bodies to publish reports should be included in relevant legislation. Also, both candidates and political parties should be required to provide regular, detailed reports on their campaign income and expenses, within an acceptable time limit, which could then also be made public (in a timely manner). The use of new technologies could be useful in this respect and should be reflected in the draft Act.

There are a number of different ways of enforcing political party and campaign finance provisions, and it is in principle for the State itself to determine which body or bodies to charge with this task. However, the Guidelines state that “[w]hichever body is tasked with regulation should be nonpartisan in nature and meet requirements of independence and impartiality”.

“It may (...) be challenging for any oversight body to detect illegal sources of political party or campaign finance without sufficient powers of investigation. The body enforcing the relevant legislation should therefore have sufficient powers to do so. According to the Guidelines, “legislation should grant regulatory agencies the ability to investigate and pursue potential violations. Without such investigative powers, agencies are unlikely to have the ability to effectively implement their mandate”. Similarly, the Committee of Ministers Recommendation 2003(4) requires that: “independent monitoring should include supervision over the accounts of political parties and the expenses involved in election campaigns as well as their presentation and publication.” The process of auditing alone may be rendered ineffective if the oversight body may do so solely on the basis of information submitted to it, and is not able to examine whether that information is realistic or accurate, and whether it presents an actual and complete picture of a contestant’s income and expenditures. To strengthen the auditing process, several countries have provided their oversight bodies with the power to assess the accuracy of campaign finance reports and their compliance with the rules.

It is thus recommended to consider giving the oversight body a number of additional powers in this area, such as, for example, the power to call witnesses and the power to ask other governmental institutions (tax authorities, anti-corruption authorities, etc.) for assistance in carrying out its work, including through the provision of information or expertise and the power to call witnesses under oath. The infringement of rules on political party and campaign finance should be subject to an effective remedy, including effective, proportionate and dissuasive sanctions. In addition, the body enforcing legislation should be able to issue orders leading to the partial or total loss of funds obtained in contravention to the draft Act. Any sanctions imposed “[...] must bear a relationship to the violation and respect the principle of proportionality”, and it should be possible for the affected political party to appeal such decisions to a court.”

CDL-AD(2014)035 Joint Opinion on the Draft Act to regulate the formation, the inner structures, functioning and financing of political parties and their participation in elections of Malta, adopted by the Venice Commission at its 100th Plenary Session (Rome, 10-11 October 2014) §§36-39, 42-43.

Finally, a system of public grants to political parties could provide a good starting point for a certain public inspection and auditing of the economic conditions of the parties. There is here an opportunity to implement different protective mechanisms against misuse of administrative resources for electoral processes. Such a grant system based on the principle of equality, ultimately reviewed by courts or specific bodies, may fulfil legitimate aims within a democratic society, like in Mexico, where rules are exhaustive and judicial review is guaranteed in every step of the public financing.”

CDL-AD(2013)033 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) § 131.

“Article 29 of the Law (on reporting on election campaign costs) does not require the Agency to publish its conclusions on parties’ campaign financing reports, nor does it set a deadline for publishing such reports on the Agency’s website. The OSCE/ODIHR has noted on a previous occasion that taken together, these factors may undermine the effectiveness of the control mechanisms introduced by the Law and can potentially decrease the public’s trust in the way electoral campaigns are financed. It is therefore recommended to set a deadline within which the Agency must publish parties’ campaign financing reports on its website, and to require the Agency, within a reasonable deadline, to also publish its conclusions on those reports.”

CDL-AD(2014)034 Joint Opinion on Draft Amendments to the Law on the financing of political activities of Serbia, adopted by the Venice Commission at its 100th Plenary Session (Rome, 10-11 October 2014), § 37,35,36.

4. Spending limits

“It is reasonable for a state to determine a maximum spending limit for parties in elections in order to achieve the legitimate aim of securing equality between candidates. However, the legitimate aim of such restrictions must be balanced with the equally legitimate need to protect other rights such as rights of free association and expression. This requires that spending limits to be carefully constructed so that they are not overly burdensome. The maximum spending limit usually consists of an absolute sum or a relative sum determined by factors such as the voting population in a particular constituency and the costs for campaign materials and services. Notably, the Council of Europe Committee of Ministers has supported the latter option, with maximum expenditure limits determined regardless of which

system is adopted in relation to the voting population of the applicable electorate. Whichever system is adopted, such limits should be clearly defined in law.

In addition, the state body with power to develop and review such limits should be clearly defined and the scope of its authority specifically determined in relevant legislation. Limits should be realistic to ensure that all parties are able to run an effective campaign, recognizing the high expense of modern electoral campaigns. It is best that limits are designed against inflation. This requires that the legal rules for limits are based on a form of indexation rather than absolute amounts.”

CDL-AD(2010)024 OSCE/ODIHR-Venice Commission “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), §§196-197.

“However, in case the authorities indeed choose to dispose entirely of the idea of specific election campaign spending limits, it may be considered to introduce an annual spending limit, for political parties and in this case, clarify that election campaign spending would come within the ambit of this limit”.

CDL-AD(2011)044rev Joint Opinion on the Draft Law on Amendments and Additions to the Organic Law of Georgia on Political Unions of Citizens, adopted by the Venice Commission at its 89th plenary session (Venice, 16-17 December 2011), §10.

“All spending limits have to be balanced with the equally legitimate need to protect other rights, such as those of free association and expression, and have to be carefully constructed so that they are not overly burdensome. OSCE/ODIHR has previously underlined that “the lack of spending limits in Ukraine caused many contestants to rely on the support of wealthy individuals or business interests.” In order to guarantee a level playing field for all parties, the draft amendments should consider introducing restrictions on election campaign spending, including carefully constructed maximum spending limits.”

CDL-AD(2015)025 Joint Opinion on the draft amendments to some legislative acts concerning prevention and fight against political corruption of Ukraine, adopted by the Council of Democratic Elections at its 52nd meeting (Venice, 22 October 2015) and by the Venice Commission at its 104th Plenary Session (Venice, 23-24 October 2015), § 29.

C. Prohibition of corporate donations to political parties

“The banning of corporate donations exists in a number of models: France, Poland, Bulgaria, *inter alia*. The French model has been very influential in Europe over the last decade. When combined with significant state financing of political parties, the model aims to decrease the pressure exerted by big business on the political process. It is a legitimate choice for a country to make. However it should be borne in mind that corporate bans may be circumvented in a number of ways, through channeling of corporate money through individual donations (employees of a company, for instance); donating to party-related NGOs (foundations) etc. Also, if there is no adequate level of state subsidies for the political parties, the banning of corporate funding coupled with strict disclosure provisions may create difficulties for the political parties to fundraise”.

CDL-AD(2011)044rev Joint Opinion on the Draft Law on Amendments and Additions to the Organic Law of Georgia on Political Unions of Citizens, adopted by the Venice Commission at its 89th plenary session (Venice, 16-17 December 2011), §13.

“Some countries do place restrictions on trade unions funding political parties. For example, the United States, a member of the International Labour Organisation has had long-standing restrictions on the funding of political parties by trade unions (although it has been possible to circumvent these restrictions whereby trade unions could establish funds made up of voluntary individual contributions). Historically, the labour movement in the US has tended to provide financial support to the Democratic Party. More recently, the Bipartisan Campaign Finance Reform Act of 2002 has sought to ban large-scale donations to national political parties and has placed a ceiling on individual donations.

However, taking the United States as an example, it is significant that US laws have applied equally to workers’ and employers’ representatives and corporations i.e. there is no discrimination between them in terms of freedom or otherwise to make political contributions, at least since the passing of the Taft-Hartley Act of 1947 (the Tillman Act of 1907 had actually banned political funding of parties by businesses and corporations, but its provisions could also be circumvented and were largely ineffective). Both corporations and trade unions are equally subject to restrictions under political finance laws.

One of the main International Labour Organisation Conventions relating to trade unions, the Freedom of Association and Protection of the Right to Organise Convention of 1948,5 does state in one of its primary provisions that:

“Workers and employers, without distinction whatsoever, shall have the right to establish and, subject only to the rule of the organisation concerned, to join organisations of their own choosing without previous authorisation.”

Interpreted broadly, the provision could be taken as authority that all acts of discrimination as to the functioning of employer and employee representatives are prohibited. On the one hand, the provision could be interpreted as relating to joining organisations only. On the other hand, it could be argued that if the prohibition on discrimination were to stop at the mere function or act of joining, all kind of other discriminatory measures could be put in place that would effectively put employees on a lesser footing than employers in terms of collective representation. This broader view of the scope of the provision is supported by the use of “without distinction whatsoever”.

CDL-AD(2004)025 Opinion on the Law on political parties of the Republic of Azerbaijan, Adopted by the Venice Commission at its 59th Plenary Session (Venice, 18-19 June 2004), §24-27.

D. Financial contributions to political parties from foreign sources

“With regard to the different approaches in member States to the problem of the financing of political parties in general, there cannot be only one answer to the question to what extent the prohibition of a foreign political party financing a political party may be considered “necessary in a democratic society”. Old legislative decisions imposing too many restrictions on political parties – taken between the World Wars and during the Cold War – have to be reconsidered in the light of the situation in Europe as it has developed over the last 15 years. One argument for a much less restrictive approach is the experience of the co-operation of political parties within the many supranational organisations and institutions of Europe today. Co-operation of this kind is “necessary in a democratic society”. It is not obvious that the same can be said about the raising of obstacles to co-operation by restricting or prohibiting reasonable financial relations between political parties in different countries or at the national level on the one hand and at the European or a regional level on the other. With regard to the European Convention on Human Rights the mere fact that there are financial relations between political parties cannot as such, justify a reduction of human rights protection.

There could be a number of reasons for the prohibition of contributions from foreign political parties. Such prohibition may be considered necessary in a democratic society, for example, if financing from foreign sources:

- is used to pursue aims not compatible with the Constitution and the laws of the country (for example, the foreign political party advocates discrimination and violations of human rights);
- undermines the fairness or integrity of political competition or leads to distortions of the electoral process or poses a threat to national territorial integrity;
- is part of international obligations of the State;
- inhibits responsive democratic development.

In order to establish whether the prohibition of financing from abroad is problematic in the light of Article 11 of the European Convention on Human Rights every individual case has to be considered separately in the context of the general legislation on financing of parties as well as of the international obligations of a State and among these the obligations emanating from membership of the European Union.”

CDL-AD(2006)014 Opinion on the prohibition of Financial Contributions to political parties from foreign sources, adopted by the Venice Commission at its 66th Plenary Session (Venice, 17-18 March 2006), §§32-34.

“[The prohibition of] contributions by foreign states, foreign natural and legal persons, except for international political associations [...] is consistent with international standards and is practised in many OSCE and Council of Europe states. It is however, noteworthy that there are exceptions to such outright prohibition of foreign donations and it is recommended that this is an area that should be regulated carefully to avoid infringement of free association of parties active at an international level. The Guidelines note that such careful regulation may be particularly warranted in light of the growing role of European Union political parties as set out in the Charter of Fundamental Rights of the European Union.”

CD-AD(2010)048 Joint Opinion on the Draft Law on Financing Political Activities of the Republic of Serbia, adopted by the Venice Commission at its 85th plenary session (Venice, 17-18 December 2010), §20.

“The draft amendments include the prohibition of foreign donations. It might be advisable to consider the introduction of specific exceptions to this prohibition concerning the contributions from international organisations which might provide resources for the purposes of party-building or education. These donations should, however, not be used for campaign financing. Additionally ...a party may conceivably like to support the other party with its endorsement, as well as financially. It is also possible that a party is provided with resources by international or European party groups. Both types of inter-party funding would not be possible under the proposed amendment. Such prohibition would not be compatible with Article 12(2) of the Charter of Fundamental Rights of the European Union on freedom of assembly and association, which states that political parties “contribute to expressing the political will of the citizens of the Union”; while not applicable in Ukraine, it shows the common practice in Europe in this respect and may provide guidance also in Ukraine.”

CDL-AD(2015)025 Joint Opinion on the draft amendments to some legislative acts concerning prevention and fight against political corruption of Ukraine, adopted by the Council of Democratic Elections at its 52nd meeting (Venice, 22 October 2015) and by the Venice Commission at its 104th Plenary Session (Venice, 23-24 October 2015), § 33.

“The most important purpose of restrictions on the “use of externally donated monies” in the sense of the request is that no clandestine political influence is to be allowed on national politics from unknown or uncontrollable sources abroad as distinguished, for example, from open and transparent support by international organisations as the Council of Europe or the European Union or even by other states when based on international agreements. If the use of externally donated monies is to be restricted, it has to be remembered that any restrictions will have to meet the above mentioned standards of the ECHR and the European Court of Human Rights for example on necessity in a democratic society”.

CDL-AD(2008)002 Opinion on the Law on the Financing of political parties of Bosnia and Herzegovina, adopted by the Venice Commission at its 74th Plenary Session (Venice, 14, 15 March 2008), §15.

“(…) [A]s also noted in Recommendation (2003), “[s]tates should specifically limit, prohibit or otherwise regulate donations from foreign donors”. This requires a careful and nuanced approach to foreign funding which weighs the protection of national interests against the rights of individuals, groups and associations to co-operate and share information”. In the Maltese context, the existence of European Union political parties must also be considered, as well as the European Union acquires in this field.

It is noted that currently, the draft Act does not limit, prohibit or otherwise regulate foreign funding of political parties (this issue is regulated elsewhere). It would, however, for the sake of completeness, be preferable if also the draft Act would include a provision on foreign funding, either directly or by reference to other legislation. Such provision should fully respect Article 11 of the ECHR, par 10.4 of the Copenhagen Document, and European Union law; unnecessary infringement of free association in the case of political parties active at the international level should be avoided.”

CDL-AD(2014)035 Joint Opinion on the Draft Act to regulate the formation, the inner structures, functioning and financing of political parties and their participation in elections of Malta, adopted by the Venice Commission at its 100th Plenary Session (Rome, 10-11 October 2014). §§24-25.

VIII. Prohibition or dissolution of political parties

*Taking into consideration the fundamental role of political parties in the functioning of a pluralist democracy, the Venice Commission underlined in its opinions the importance of three basic principles concerning the prohibition or dissolution of political parties: (1) the **exceptional nature** of prohibition or dissolution (2) the **proportionality** of the dissolution or prohibition to the legitimate aim pursued and (3) **the procedural guaranties**: the procedure for prohibition or dissolution of political parties should guarantee the principles of fairness, due process and openness. In its opinions, the Venice Commission has also provided a detailed general overview of national regulations on party closure, in particular concerning the possible criteria for dissolution and the procedures for dissolution or prohibition established in different legal systems.*

A. General principles

“1. States should recognise that everyone has the right to associate freely in political parties. This right shall include freedom to hold political opinions and to receive and impart information without interference by public authority and regardless of frontiers. The requirement to register political parties will not in itself be considered to be in violation of this right.

2. Any limitations to the exercise of the above-mentioned fundamental human rights through the activity of political parties shall be consistent with the relevant provisions of the European Convention for the Protection of Human Rights and other international treaties, in normal times as well as in cases of public emergencies.

3. Prohibition or enforced dissolution of political parties may only be justified in the case of parties which advocate the use of violence or use violence as a political means to overthrow the democratic constitutional order, thereby abolishing the rights and freedoms guaranteed by the constitution. The fact alone that a party advocates a peaceful change of the Constitution should not be sufficient for its prohibition or dissolution.

4. A political party as a whole cannot be held responsible for the individual behaviour of its members not authorised by the party within the frame of political/public and party activities.

5. The prohibition or dissolution of political parties as a particularly far-reaching measure should be used with utmost restraint. Before asking the competent judicial body to prohibit or dissolve a party, governments or other state organs should assess, having regard to the situation of the country concerned, whether the party really represents a danger to the free and democratic political order or to the rights of individuals and whether other, less radical measures could prevent the said danger”.

CDL-INF(99)015 Guidelines on Prohibition and Dissolution of political parties and analogous measures, adopted by the Venice Commission at its 41st Plenary Session (Venice, 10-11 December 1999), pp. 3-4.

CDL-AD(2003)008 Opinion on the proposed amendment to the law on parties and other socio-political organisations of the Republic of Moldova, adopted by the Venice Commission at its 54th Plenary Session (Venice, 14-15 March 2003), §10.

B. Conditions and exceptional nature

“Prohibition or dissolution of a political party is a more serious interference than deregistration (loss of registered status). Prohibition or dissolution is a complete ban on the party’s existence. In the Parliamentary Assembly of the Council of Europe (PACE) Resolution 1308(2002) on Restrictions on political parties in the Council of Europe’s member states, the PACE stated in paragraph 11 that “restrictions on or dissolution of political parties should be regarded as exceptional measures to be applied in cases where the party concerned uses violence or threatens civil peace and the democratic constitutional order of the country.” Thus, opportunity for a state to dissolve or prohibit a political party from forming should be exceptionally narrowly tailored and applied only in extreme cases. Such a high level of protection has been deemed appropriate by the European Court of Human Rights given political parties’ fundamental role in the democratic process. Such protections are granted in the light of parties’ critical role in a democratic society.

Universal and regional human rights instruments recognize valid reasons for restrictions to be placed on the freedom of association, including those of public order, public safety, protection of health and morals of the society, national security (including measures intended to counter terrorism and extremism), and the protection of the rights and freedoms of others. In all cases, such measures must be objective and necessary in a democratic society. However, the prohibition or dissolution of political parties is the most severe of available restrictions on political parties and is only applicable when all less restrictive measures have been deemed inadequate.

Strict considerations of proportionality must be applied in determining if prohibition or dissolution of a party is justified. As the PACE has noted, “as far as possible, less radical

measures than dissolution should be used". Thus, the proportionality principle applies and it must be shown by the state that no lesser restrictive means would suffice.

As noted above, the possibility to dissolve or prohibit a political party from forming should be exceptionally narrowly tailored and applied only in extreme cases. Political parties should never be dissolved for minor administrative or operational breaches of conduct. Lesser sanctions must be applied in such cases. Nor should a political party be prohibited or dissolved because its ideas are unfavourable, unpopular, or offensive. If the party concerned does not use violence and does not threaten civil peace nor the democratic constitutional order of the country, then prohibition or dissolution are not justified.

The fact alone that a party advocates a peaceful change of the constitutional order is not sufficient to justify its prohibition or dissolution. Political parties must be able to promote a change in the law or the legal or constitutional structures of the State, provided that the means used for this promotion are legal and compatible with fundamental democratic principles.

Dissolution of political parties based on the activities of party members as individuals is incompatible with the protections awarded to parties as associations. This incompatibility extends to the individual actions of party leadership, except cases in which they can be proven to act as a representative of the party as a whole. For dissolution to be applicable it must be shown that it was the party's statutory body (not individual members) who undertook objectives and activities requiring such dissolution. A party cannot be held responsible for the action taken by its members if such action is contrary to the party constitution or party activities.

Actions undertaken by particular individuals within a party membership, when not officially representing the party, should be attributed to the individual only. In such cases, appropriate civil and criminal sanctions may be enacted against the individual.

The Venice Commission has found, upon completing a survey of national legislation relating to the regulation of political parties, that where allowed at all, prohibition and dissolution are applicable only in extreme cases including the following: threat to the existence and/or sovereignty of the state, threat to the basic democratic order, violence which threatens the territorial integrity of the state, inciting of ethnic, social, or religious hatred, and the use or threat of violence. Even where such reasons for prohibition or dissolution are listed in legislation it is important to note that prohibition must meet the strict standards for legality and proportionality discussed above in order to be justified."

CDL-AD(2010)024 OSCE/ODIHR-Venice Commission "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), §§89-96.

"Exceptionality: it must be an exceptional case. Prohibition or dissolution is as an extreme measure which is justifiable only in case of advocating the use of violence and put in danger the democratic political order or citizen's fundamental rights".

CDL-AD(2007)002 Comments on the conformity of the Law on political parties of the Republic of Armenia with international standards (AMICUS CURIAE OPINION at the request of the constitutional court of Armenia), endorsed by the Venice Commission at its 69th plenary session (Venice, 15-16 December 2006), §9.

C. Procedural guarantees

“The procedure for prohibition or dissolution must be a judicial one that guarantees fair trial, due process and openness. Article 6 of the ECHR protects the right to a fair trial, which consists in the requirement of public hearing, within a reasonable time, and before an independent and impartial tribunal established by law. The general rulings on due process and fair trial dictated by the Court apply to the cases of dissolution of political parties.”

CDL-AD(2007)002 Comments on the conformity of the Law on Political parties of the Republic of Armenia with international standards (AMICUS CURIAE OPINION at the request of the constitutional court of Armenia), endorsed by the Venice Commission at its 69th plenary session (Venice, 15-16 December 2006), §9.

“Legal measures directed to the prohibition or legally enforced dissolution of political parties shall be a consequence of a judicial finding of unconstitutionality and shall be deemed as of exceptional nature and ruled by the principle of proportionality. Any such measure must be based on sufficient evidence that the party itself and not only individual members pursue political objectives using or getting ready to use unconstitutional means.

The prohibition or dissolution of a political party should be reserved to the Constitutional court or other appropriate jurisdictions in a procedure offering all guarantees of due process, openness and fair trial.”

CDL-INF(99)015 Guidelines on Prohibition and Dissolution of political parties and analogous measures, adopted by the Venice Commission at its 41st Plenary Session (Venice, 10-11 December 1999), p.4.

CDL-AD(2003)008 Opinion on the proposed amendment to the law on parties and other socio-political organisations of the Republic of Moldova, adopted by the Venice Commission at its 54th Plenary Session (Venice, 14-15 March 2003), §10.

“Political parties should also be given clear and effective procedural safeguards to contest the decisions on denial of registration, suspension or dissolution. Election related complaints can be lodged either at the election administration or at the courts. As said in the Guidelines on political party regulations:

“Expedited consideration is an important element to the fairness of a hearing. Proceedings cannot be delayed without risking usurpation of the right to a fair hearing. Legislation should define reasonable deadlines by which applications should be filed and decision granted, with due respect to any special considerations arising from the substantive nature of the decision.

Legislation should specify the procedures for initiating judicial review (appeal) of a decision affecting the rights of a political party. Legislation should also extend the right of judicial review of such decisions to persons or other parties that are affected by the decision.”

CDL-AD(2012)003 Opinion on the Law on political parties of the Russian Federation, adopted by the Council for Democratic Elections at its 40th meeting (Venice, 15 March 2012) and by the Venice Commission at its 90th Plenary Session (Venice, 16-17 March 2012), §50.

“Under Article 11 par 1 of the draft Act, political parties may be dissolved by a “decision, democratically adopted, carrying a two-thirds majority of the members of the political party”. Such provision would appear to be somewhat over-regulatory, as essentially, it should be up to the individual political parties themselves to decide in which way, and with what kind of majority they may dissolve themselves. Moreover, a two-thirds majority may at times be difficult to achieve, and could then lead to a deadlock within a party, if there is no procedure

in place that would deal with such eventuality. It is thus recommended to amend this provision, by removing the requirement of the two-thirds majority.

Article 11 par 2 of the draft Act refers to the possible dissolution of a political party by a decision of the First Hall, Civil Court, when “it is ascertained that the political party persistently and as one of its many purposes propagates xenophobia, homophobia or racism”, provided that such a measure is “necessary in a democratic society”. It is welcome that this provision includes the democratic society test, as Article 11 of the European Convention on Human Rights should be taken into consideration. As the European Court has stated, dissolution of a political party must be the very last resort; it is “of the essence of democracy to allow diverse political programmes to be proposed and debated, (...) provided that they do not harm democracy itself”. The Venice Commission Guidelines on prohibition and dissolution of political parties were followed in Resolution 1308 (2002) of the Parliamentary Assembly of the Council of Europe, on “Restrictions on political parties in the Council of Europe’s member states”, which states that, “[r]estrictions or dissolution of political parties should be regarded as exceptional measures to be applied in cases where the party concerned uses violence or threatens civil peace and the democratic constitutional order of the country.” “The fact alone that a party advocates a peaceful change of the constitutional order is not sufficient to justify its prohibition or dissolution.” Consideration may thus be given to distinguishing accordingly in Article 11 par 2 between violent and non-violent behaviour, and to specify that the dissolution of a political party shall be a measure of last resort, and shall be applied only in extreme cases.”

CDL-AD(2014)035 Joint Opinion on the Draft Act to regulate the formation, the inner structures, functioning and financing of political parties and their participation in elections of Malta, adopted by the Venice Commission at its 100th Plenary Session (Rome, 10-11 October 2014). §§16-17.

D. Comparative overview

1. General comparative overview of national regulation on party closure

“A main point when comparing national rules on party closure is that as regards the legal (formal) regulation, there is no common European model, but rather “considerable diversity” – reflecting different constitutional traditions, differences in history, context and social and political conditions. A number of states have no rules on party closure at all, and manage well without. Those states that do have rules on the prohibition of parties have regulated this very differently, both in form, procedure and substance.

On the other hand, there is a clear common European approach in that there is a common democratic legacy that political parties are *not* prohibited and dissolved. Even in states with seemingly wide rules on party closure there is “extreme restraint” in how these rules are applied. The threshold for actually applying (or even invoking) these rules is extremely high. The very few examples to the contrary only serve to confirm this common legacy.

This practice demonstrates a clear common European approach to the classic “liberal dilemma” of how a democracy should respond to those forces that threaten it – namely by way of open debate and through democratic channels. There is a common practice for allowing parties which advocate fundamental changes in the form of government, or which advocate opinions that the majority finds unacceptable. Political opinions are not censored by way of prohibition and dissolution of the political party concerned, while illegal activities by party members are sanctioned through the ordinary criminal law system.

This practice is basically the same in all European states, whether they have formal rules on party closure or not, and regardless of how these are formulated. This even holds good for those constitutional systems which formally adhere to a principle of “militant democracy”,

such as the German one, which, on closer analysis, is not “militant” but rather liberal and tolerant.

The fact that a large number of European states have no regulation of party prohibition at all led the Venice Commission to conclude in its 1998 report, that such rules “are not essential to the smooth functioning of democracy”. This conclusion still stands today. At the same time, it should be added that in some countries the provisions on party closure in practice do not function as a limitation on the freedom of party activity, but on the contrary as a special privilege and protection, which raises the threshold and protects political parties from the kind of legal dissolution to which other forms of associations might be subjected.

In those states which have specific provisions on party closure, these are usually the result of historical factors – but even there the provisions are hardly ever invoked. Even in those states, where the constitution formally provides for relatively wide rules on party dissolution, these rules do not appear to form part of the operative and “living” constitution, but are rather a passive safety valve, which might serve a function by its mere existence, but which is rarely if ever actually invoked.”

CDL-AD (2009)006 Opinion on the Constitutional and Legal Provisions Relevant to the Prohibition of political parties in Turkey, adopted by the Venice Commission at its 78th Plenary Session (Venice, 13-14 March 2009), §§17-22.

2. Comparative overview of possible criteria for prohibition and dissolution of political parties

“The “considerable diversity” of national regulations on party closure is reflected in the formulation of material requirements that political parties have to abide by, and which might be invoked as criteria for prohibition and dissolution. Based on the 1998 Venice Commission report and new updated material, various national requirements for political parties include bans against:

- threatening the existence or sovereignty of the state
- threatening the basic democratic order
- threatening the territorial integrity of the state
- fostering social, ethnic, or religious hatred
- fostering ethnic discrimination
- use or threat of violence
- nazism or fascism
- criminal associations
- military or paramilitary associations
- secret or subversive methods.

The list is not exhaustive, but illustrates the variation in substance even among those states which do have specific regulations. The basic criteria are usually set out in the national constitution, but can sometimes be supplemented (and extended) in statutory law. It appears that, to a considerable extent, the variations can be explained by different historical experiences.

It should be emphasised that no European constitutional system includes all these criteria. Most national provisions are rather short, with just one or two such criteria. Others have several, but not all of them. It can be argued that although several of these criteria in themselves may be acceptable as part of a democratic system, they are still not acceptable if there are too many that go beyond a “critical mass”.

For the purpose of analysis, a useful distinction can be drawn depending on whether the national criteria for prohibition or dissolution refer to *means* (activities) or *ends* (objectives). Only a few states prohibit party objectives and opinions as such. It is more common that the national criteria refer to illegal means, such as the use of violence. But the most common model in those countries that have rules on party prohibition is that prohibition requires *both* unlawful means (activities) and illegitimate ends (objectives).

The very few and scattered cases in which political parties have actually been prohibited in Europe in modern times have all (with the exception of Turkey) concerned marginal and extremist parties, *inter alia* in Germany in the 1950s and lately in Spain. In Germany the Constitutional Court (BVerfG) has held that the basis for prohibiting a party must go beyond its anti-democratic opinions so as to also require the showing (with a high standard of proof) of a fixed purpose to combat the basic democratic order constantly and resolutely manifested in political action according to a fixed plan (cf. BVerfGE 5, 85, 141).

When assessing different national criteria, one is faced with several challenges familiar to comparative constitutional law. First, it is difficult to compare constitutional texts without going into their interpretation in national legal practice within their specific political and legal context. Second, the extent to which these criteria are actually “hard law”, which might be invoked before the courts varies. In some countries the legal requirements imposed on political parties are not even linked to procedures for their actual application, and thus serve more as political statements. In others, application is in theory possible, but the procedural hurdles are so high as to make this almost impossible.

The number and content of the material criteria contained in any given constitutional system therefore do not necessarily indicate the legal and actual threshold for prohibition of parties. Still it might be held that the more formal restrictions there are, and the wider their formulation, the clearer the signal that this is a legal instrument which may actually be invoked in practice.

A (first) general comparative approach shows that the most striking feature of the Turkish rules on party closure is that they combine a very long list of material criteria for prohibition or dissolution with a very low procedural threshold. Furthermore, prohibition or dissolution can be based both on unlawful activities and on ideological opinions as such. This, together with the national political and historical context, is probably the reason why this instrument has been so widely used.”

CDL-AD(2009)006 Opinion on the Constitutional and Legal Provisions Relevant to the Prohibition of political parties in Turkey, adopted by the Venice Commission at its 78th Plenary Session (Venice, 13-14 March 2009), §23-30.

3. Comparative overview of procedures for prohibition and dissolution of political parties

“When assessing what restrictions apply to political parties, the procedural aspect is as important as the material one. It is the procedural rules that determine how and to what extent the substantial rules may actually be applied.

It is a common principle in all democratic states that cases of potential party prohibition must be heard and decided by impartial courts of law. In most countries with rules on party closure this task is entrusted to the Constitutional Court, as in Turkey. In some countries, such as Spain and Denmark, the competence lays in the hands of the Supreme Court, but with special procedures and the possibility of an appeal to the Constitutional Court in the Spanish case.

Most important from a procedural perspective is the question of which institution is given the competence to *initiate* a prohibition procedure against a political party. Unlike in criminal cases, this power is very seldom entrusted solely to the prosecuting authorities. The reason is the political nature of such cases, and the fact that initiating a procedure for prohibition or dissolution may in itself have grave negative impact on the political situation in the country. Therefore initiating the procedure for the closure of a political party should not be the automatic legal consequence of the fulfilment of certain legal criteria. It should rather be a discretionary decision, which has to be based on an assessment of the risk posed by this party to the functioning of democracy and which has to take into account, in addition to the legal criteria, the political consequences of an eventual closure.

For this reason, the states with rules on party prohibition have established special procedures for bringing such cases before the competent court. In many countries this is purely a political decision. In Germany, for example, the competence rests with the Federal Parliament, the Federal Council or the Federal Government, while the Federal Prosecutor is *not* entitled to file an application. In other countries, there are other forms of political filters, which hinder a purely “legal” approach to such cases. Spain seems, at first sight, an exception to this rule since the procedure for the closure of a political party can be launched not only by the government through the state attorney, acting on its own initiative or at the request of one of the two chambers of the Cortes, but also by the Fiscal Ministry (prosecutor) acting on its own. Spanish practice shows, however, that this power has been used by the Fiscal Ministry only when this was in line with government policy.”

CDL-AD(2009)006 Opinion on the Constitutional and Legal Provisions Relevant to the Prohibition of political parties in Turkey, adopted by the Venice Commission at its 78th Plenary Session (Venice, 13-14 March 2009), §31-34.

E. European legal standards

1. The European Convention on Human Rights

“The European Convention on Human Rights protects the right of freedom of expression (Art. 10) and the freedom of assembly and association (Art. 11). The European Court of Human Rights has held on several occasions that political parties and their activities are within the scope of both articles. In the case *United Communist Party of Turkey and Others v. Turkey* (133/1996/752/951), the Court based its judgment on the importance of democracy in the Convention system to place political parties within the reach of Article 11 (§25). After this judgment, the Court has consolidated this case law in a number of judgments⁵.

Placing political parties within the reach of provisions on freedom of assembly and association does not afford them unlimited protection nor grants them an unlimited rights. On the contrary, they are subject to the eventual restrictions that Article 11 of the ECHR identifies: restrictions to these freedoms are permissible if they are necessary in a democratic society in the interest of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for the prevention of the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary (Art. 11.2).

⁵ *Socialist Party and others v. Turkey* (21237/93), Judgment of 25 May 1998; *Freedom and Democracy Party (ÖZDEP) v. Turkey* (Application No. 23885/94), Judgment of 8 December 1999; *Yazar and others v. Turkey* (22723/93, 22724/93 and 22725/93), Judgment of 9 April 2002; *Dicle for the Democratic Party (DEP) of Turkey v. Turkey* (25141/94) Judgment of 10 December 2002; *Refah Partisi (The Welfare Party) and others v. Turkey* (Applications No. 41340/98, 41342/98, 413343/98 and 41344/98), Grand Chamber, Judgment of 13 February 2003; *The United Macedonian Organisation Ilinden – Pirin and others v. Bulgaria* (Application No. 59489/00), Judgment of 20 October 2005.

Specifically, Article 17 of the ECHR allows the state to create burdens on and to restraint political parties whose programme or activities aim at “the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention”. The Court has already indicated that the general purpose of article 17 was to prevent totalitarian groups from exploiting in their own interest the principles enunciated by the Convention: it prevents from reliance on these with the purpose of subversive activities”⁶.

CDL-AD(2007)002 Comments on the conformity of the Law on political parties of the Republic of Armenia with international standards (AMICUS CURIAE OPINION at the request of the constitutional court of Armenia), endorsed by the Venice Commission at its 69th plenary session (Venice, 15-16 December 2006), §§4-5-6.

2. Jurisprudence of the ECtHR

“The court has on many occasions made clear that the right to freedom of expression includes the right to advocate ideas that offend shock or disturb. In particular the court has also held that political parties are entitled to campaign in favour of a change in the legislation or in the legal or constitutional structures of the state subject to two conditions (1) that the methods employed for this purpose must in all respects be legal and democratic and (2) the change proposed must itself be compatible with fundamental democratic principles. The Court held that the fact that a particular political proposal was incompatible with the existing principles and structures of the state did not mean it was contrary to democratic principles. It was of the essence of democracy to permit the advocacy and discussion of different political proposals, even those which would alter the existing structures of a state. (See *Socialist Party of Turkey (STP) and others v Turkey*, No. 26482/95, 12 November 2003.)”

CDL-AD(2011)046 Opinion on the Draft Law on Amendments to the Law on political parties of the Republic of Azerbaijan, adopted by the Venice Commission at its 89th Plenary Session (Venice, 16-17 December 2011), §22.

“The European Court of Human Rights has examined several cases that question the compliance of a measure of prohibition or dissolution imposed by national authorities with the European Convention on Human Rights. In general, the constitutional court of the state involved imposed these measures. The European Court examines if the judgment of the constitutional court fulfills the requirements for imposing a restriction on Art. 11. In concrete, it examines whether there has been interference to the exercise of Art. 11, and whether the interference was justified. The interference is justified if it's a) prescribed by law, b) pursues a legitimate aim, and c) is necessary in a democratic society. (This is the judgment structure since *United Communist Party of Turkey and Others v. Turkey* (133/1996/752/951), Judgment of 30 January 1998. See §35 ff.)

Several judgments on dissolution or banning of political parties by the Turkish government have reached the ECtHR. Both the government and the constitutional court considered that the political parties dissolved or banned undermined the territorial integrity of the State and the unity of the nation, or sought political activities similar to that of terrorist organisations, or were a center of activities contrary to the principle of secularism and incompatible therefore with the democratic regime. In some of these cases, the Court held that there had been a

⁶ *Lawless v. Ireland*, judgement 01.07.1961 Series A, Nos. 1-3 (1979-1980) 1 ECHR 1, §§6 and 7. In similar terms, the CdE (PACE) has referred to the rise of non-democratic extremist parties and movements as a threat to the fundamental values that the Council of Europe sets out to defend. PACE Recommendation 1438 (2000), Threat posed to democracy by extremist parties and movements in Europe, Text adopted by the Assembly on 25 January 2000 (2nd Sitting); and PACE Resolution 1344 (2003), Threat posed to democracy by extremist parties and movements in Europe, Text adopted by the Assembly on 29 September 2003 (26th Sitting).

violation of Article 11 of the Convention, since the interference by the government in the right to freedom of association had not been justified according to the parameters derived from the Convention and fixed by the Court. A further line of reasoning in these judgments has been the opinion of the Court that not every change of the political system by political parties must be considered contrary to the legal order. Political parties may campaign for a change in law or in legal and constitutional structures of the state by peaceful means, if they respect legal and democratic principles and if the change itself is compatible with these fundamental principles. But where the political activities and programs of the party undermine the rules of democracy and, thus, the democratic regime, the state has indeed the right to adopt restrictive measures and to follow the procedure before the constitutional court to obtain the dissolution of such a party.

The European Court has interpreted them in a cautionary manner. Although the Court has ruled that banning a political party is not incompatible with the ECHR,⁷ its case-law has established that any restrictions and eventual prohibition and measures to dissolve political parties must fulfill the following requirements:

- Exceptionality: it must be an exceptional case. Prohibition or dissolution is as an extreme measure which is justifiable only in case of advocating the use of violence and put in danger the democratic political order or citizen's fundamental rights.⁸
- Proportionality: the measure must be proportionate to the aim pursued.⁹ The Court has consistently advocated in favor of alternative measures, for instance, the use of a legal threshold of votes for granting access to Parliament.
- Procedural guarantees: the procedure for prohibition or dissolution must be a judicial one that guarantees fair trial, due process and openness. Article 6 of the ECHR protects the right to a fair trial, which consists in the requirement of public hearing, within a reasonable time, and before an independent and impartial tribunal established by law. The general rulings on due process and fair trial dictated by the Court apply to the cases of dissolution of political parties. Nevertheless, in the latter the Court has, in most cases, resolved on substantial violations to Articles 10 and 11 of the Convention. When the applicant alleges a violation of Article 6, the Court analyses if there has been a violation only if it considers it necessary, that is, if there has been no substantial violation of Article 11.¹⁰ In a different case referred to

⁷ *Refah Partisi (The Welfare Party) and others v. Turkey* (Applications No. 41430/98, 41342/98, 413443/98 and 41344/98), Grand Chamber, Judgment of 13 February 2003. Paragraph 96 states that *The freedoms guaranteed by Article 11, and by Articles 9 and 10 of the Convention, cannot deprive the authorities of a State in which an association, through its activities, jeopardises that State's institutions, of the right to protect those institutions. In this connection, the Court points out that it has previously held that some compromise between the requirements of defending democratic society and individual rights is inherent in the Convention system. For there to be a compromise of that sort any intervention by the authorities must be in accordance with paragraph 2 of Article 11.*

⁸ The Court has held in several judgments that *the exceptions set out in Article 11 are, where political parties are concerned, to be construed strictly; only convincing and compelling reasons can justify restrictions on such parties' freedom of association. In determining whether a necessity within the meaning of Article 11 §2 exists, the Contracting States have only a limited margin of appreciation, which goes hand in hand with rigorous European supervision embracing both the law and the decisions applying it, including those given by independent courts.* *United Communist Party of Turkey and others v. Turkey* (133/196/752/951), Judgment of 30 January 1998, §46. See also *Gorzelik & others v. Poland* (Application No. 44158/98), Judgment of 20 December 2001, §58; *The United Macedonian Organisation Ilinden and others v. Bulgaria*, (Application No. 59491/00), Judgment of 19 January 2006, §61.

⁹ See *Sürek v. Turkey (No. 1)* (Application No. 26682/95), Judgment of 8 July 1999, §64, where the Court states that *nature and severity of the penalty imposed are factors to be taken into account when assessing the proportionality of the interference.* The Court has held that the interference in issue must be proportionate to the legitimate aims pursued. *Refah Partisi (The Welfare Party) and others v. Turkey* (Applications No. 41430/98, 41342/98, 413443/98 and 41344/98), Grand Chamber, Judgment of 13 February 2003, §133 ff.

¹⁰ *Socialist Party and Others v. Turkey* (21237/93), Judgment of 25 May 1998; and *Sadak and Others v. Turkey (No. 2)*. (Applications Nos. 25144/94, 26149/95 to 26154/95, 27100/95 and 27101/95), Judgment of 6 November 2002.

freedom of expression of a political party, the Court judged that there had been violations both of Articles 6 and 10 of the Convention.¹¹

CDL-AD(2007)002 Comments on the conformity of the Law on political parties of the Republic of Armenia with international standards (AMICUS CURIAE OPINION at the request of the constitutional court of Armenia), endorsed by the Venice Commission at its 69th plenary session (Venice, 15-16 December 2006), §§7-9.

“The Venice Commission is of the opinion that the following principles can be deduced from the relevant case law of the Court on Article 11:

- 1) Democracy appears to be the only political model contemplated by the Convention and, accordingly, the only one compatible with it; the Convention is a constitutional instrument of European public order¹²; political parties play a primordial role in a democratic state and are a form of association essential to the proper functioning of democracy¹³;
- 2) Political parties enjoy the right of freedom of expression and of freedom of association¹⁴;
- 3) Political parties play an important role in ensuring pluralism, which requires a close link between freedom of expression and freedom of association¹⁵;
- 4) Because freedom of expression is a vital tool for ensuring pluralism in democracy, its protection not only extends to information and ideas that are favorably received or regarded as inoffensive or as a matter of indifference, but also, subject to the restrictions provided for in the second paragraph of Article 10, to those that offend, shock or disturb¹⁶;
- 5) However, political parties may promote a change in the law or the legal or constitutional structures of the State provided that:
 - a. the means used to that end are legal and democratic, and
 - b. the change proposed is in itself compatible with fundamental democratic principles¹⁷;
- 6) Political parties cannot rely on provisions of the Convention in order to weaken or destroy the rights and freedoms of the Convention and thus bring about the destruction of democracy;
- 7) In view of the close link between the Convention and democracy, political parties may have to accept limitations of some of their freedoms in order to guarantee greater stability of the country; however, where political parties are concerned, the limitations of freedom of expression and association, provided for under the second paragraph of Articles 10 and 11, respectively, are to be construed strictly, with only a limited margin of appreciation for the domestic authorities and rigorous supervision by the European Court of Human Rights¹⁸;
- 8) In examining the justification of the dissolution of a political party on the ground of a pressing social need, the following points are of particular relevance:

¹¹ *Incal v. Turkey*, (41/1997/825/1031), Judgment of 9 June 1998.

¹² ECtHR, *Loizidou v. Turkey* (Preliminary Objections, judgment of 23 March 1995, §75; United Communist Party-judgment, §45.

¹³ United Communist Party-judgment, §25

¹⁴ *Idem* §42-43.

¹⁵ *Idem* §43.

¹⁶ ECtHR, *Handyside v. United Kingdom*, judgment of 7 December 1976, §49.

¹⁷ ECtHR, *Yazar and Others v. Turkey*, judgment of 9 April 2002, §49.

¹⁸ United Communist Party-judgment, §46.

a. whether there is plausible evidence that the risk to democracy invoked as a justification, provided it has been proved to exist, is sufficiently imminent;

b. whether the acts and speeches of the leaders and members of the political party concerned are imputable to the party as a whole; and

c. whether these acts and speeches formed a whole which gave a clear picture of a model of society conceived and advocated by the party which was incompatible with the concept of a democratic society¹⁹;

9) In addition, it has to be examined whether dissolution is a measure proportionate to the aims pursued; although democracies have the right to defend themselves against extremist parties²⁰, drastic measures, such as the dissolution of a political party or barring its leaders from carrying on their political activities, may be taken only in the most serious cases²¹;

10) A political party animated by the moral values imposed by a religion, cannot be regarded as intrinsically inimical to the fundamental principles of democracy, as set forth in the Convention, provided that the means used to that end are legal and democratic and that the change proposed is itself compatible with fundamental democratic principles”.

CDL-AD(2009)006 Opinion on the Constitutional and Legal Provisions Relevant to the Prohibition of political parties in Turkey, adopted by the Venice Commission at its 78th Plenary Session (Venice, 13-14 March 2009), §45.

3. Council of Europe Resolutions and Reports

“The ECHR and the Court case law have inspired further instruments. In general terms, the international instruments reiterate the interpretation that links prohibition with protection of human rights and democracy. The Parliamentary Assembly of the Council of Europe (PACE) approved a Resolution on Restrictions on political parties in the Council of Europe member states (Resolution 1308 (2002))²² which considers the banning of a political party an exceptional measure only legitimate if the existence of this party threatens the democratic order of the country. The Resolution specified a number of principles that must be complied with:

- exceptional measure,
- less radical measures should be used if possible,
- a party cannot be held responsible for the action of its individual members if contrary to its statutes,
- dissolution is the last resort and only after fair trial,
- it cannot be used in an arbitrary form.

These principles can be re-directed to the three requirements enounced by the Court and mentioned above: the measures must be exceptional, of last resort and less radical measures should be used (proportionality); they cannot be used in arbitrary form and fair trial should be afforded (principle of jurisdictional guarantee) and a party cannot be responsible for the action of individual members if they violate its statutes (though this could be revised at the light of the Refah case)”.

¹⁹ ECtHR, *Socialist Party and Others v. Turkey*, judgment of 25 May 1998 (hereafter: Socialist Party judgment), §51.

²⁰ See Resolution 1308 (2002) of the Parliamentary Assembly.

²¹ United Communist Party-judgment, Å§46.

²² See also Doc. 9526, Restrictions on political parties in the Council of Europe member states, Report of the Political Affairs Committee, rapporteur: Mr Dreyfus-Schmidt, 17 July 2002.

CDL-AD(2007)002 Comments on the conformity of the Law on political parties of the Republic of Armenia with international standards (AMICUS CURIAE OPINION at the request of the constitutional court of Armenia), endorsed by the Venice Commission at its 69th plenary session (Venice, 15-16 December 2006), §§10-11.

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CDL-AD(2014)034 Joint Opinion on Draft Amendments to the Law on the financing of political activities of Serbia, adopted by the Venice Commission at its 100th Plenary Session (Rome, 10-11 October 2014).

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CDL-AD(2015)014 Joint Opinion on the draft law "on introduction of changes and amendments to the Constitution" of the Kyrgyz Republic, adopted by the Venice Commission at its 103rd Plenary Session (Venice, 19-20 June 2015).

CDL-AD(2015)020 Report on the method of nomination of candidates within political parties, adopted by the Council for Democratic Elections at its 51th meeting (Venice, 18 June 2015) and by the Venice Commission at its 103rd Plenary Session (Venice, 19-20 June 2015).

CDL-AD(2015)025 Joint Opinion on the draft amendments to some legislative acts concerning prevention and fight against political corruption of Ukraine, adopted by the Council of Democratic Elections at its 52nd meeting (Venice, 22 October 2015) and by the Venice Commission at its 104th Plenary Session (Venice, 23-24 October 2015).

CDL-AD(2016)004 Joint Guidelines for Preventing and Tackling 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).