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**EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW**  
**(VENICE COMMISSION)**

**OSCE OFFICE FOR DEMOCRATIC INSTITUTIONS**  
**AND HUMAN RIGHTS (OSCE/ODIHR)**

**JOINT OPINION**

**ON THE DRAFT AMENDMENTS TO SOME LEGISLATIVE ACTS CONCERNING  
PREVENTION OF AND FIGHT  
AGAINST POLITICAL CORRUPTION**

**OF UKRAINE**

**Adopted by the Council of Democratic Elections  
at its 52<sup>nd</sup> meeting (Venice, 22 October 2015)**

**and by the Venice Commission at its 104th Plenary Session  
(Venice, 23-24 October 2015)**

**on the basis of comments by**

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## Table of Contents

I.	Introduction .....	3
II.	Scope of the Opinion .....	4
III.	Executive Summary .....	4
IV.	Analysis and Recommendations .....	6
	1. <i>International Standards relating to Political Party Regulation</i> .....	6
	2. <i>General Remarks</i> .....	7
	3. <i>Different Forms of Funding of Political Parties and Election Campaigns</i> .....	8
	3.1 <i>Public Funding</i> .....	8
	3.2 <i>Private Contributions and Their Limits</i> .....	11
	3.3 <i>Funding by Candidates of their Own Campaigns and Limitations to such Funding</i> .....	12
	4. <i>Oversight and Monitoring of Political Party Finance</i> .....	13
	5. <i>Auditing and Reporting Obligations of Political Parties</i> .....	14
	6. <i>Sanctions for Violations of Financial Regulations</i> .....	16
	7. <i>Banning of Political Parties</i> .....	18
	8. <i>Deadlines</i> .....	18
	9. <i>Additional Remarks</i> .....	19

## I. Introduction

1. On 22 July 2015, Mr Yehor Soboliev, the Chairperson of the Committee on Corruption Prevention and Counteraction of the *Verkhovna Rada* (Parliament) of Ukraine sent a letter to the OSCE Office for Democratic Institutions and Human Rights (hereinafter “OSCE/ODIHR”), in which he asked for a review of draft amendments to Some Legislative Acts of Ukraine Concerning Prevention of and Fight against Political Corruption (CDL-REF(2015)031), (hereinafter “the draft amendments”) to assess their compliance with international human rights standards. The draft amendments propose changes to seven different Ukrainian legal acts, namely the Code of Administrative Offences,<sup>1</sup> the Criminal Code of Ukraine,<sup>2</sup> the Law on the Accounting Chamber,<sup>3</sup> the Law on the Elections of the President of Ukraine (hereinafter “Presidential Election Law”),<sup>4</sup> the Law on Political Parties of Ukraine (hereinafter “Political Parties Law”),<sup>5</sup> the Law on Election of Members of Parliament of Ukraine (hereinafter “Parliamentary Elections Law”)<sup>6</sup> and the Law on Prevention of Corruption (hereinafter “Anti-Corruption Law”).<sup>7</sup>

2. By letter of 29 July 2015, the OSCE/ODIHR Deputy Director confirmed OSCE/ODIHR’s readiness to review the draft amendments, and proposed that OSCE/ODIHR draft the opinion jointly with the Council of Europe’s European Commission for Democracy through Law (hereinafter, Venice Commission), given both institutions’ regular cooperation in relation to legislation pertaining to political parties and elections.

3. This joint opinion has been prepared in response to the above-mentioned request.

4. In 2013, OSCE/ODIHR and the Venice Commission issued two joint opinions on draft electoral legislation of Ukraine, which also touched on campaign financing of political parties and campaign financing.<sup>8</sup> Additionally, in 2014, OSCE/ODIHR prepared a legal opinion on a previous set of draft amendments pertaining to some Legislative Acts of Ukraine concerning Transparency of Financing of Political Parties and Election Campaigns (hereinafter the “2014 OSCE/ODIHR Opinion”).<sup>9</sup>

5. The present draft joint opinion was transmitted by OSCE/ODIHR to the Ukrainian authorities and made public on 2 September 2015. The law was adopted by the Verkhovna Rada on 8 October 2015. The Venice Commission and OSCE/ODIHR issued their opinion on the draft submitted and not on the final version of the law as adopted by the Verkhovna Rada. It was subsequently adopted by the Council for Democratic Elections at its 52<sup>nd</sup> meeting (Venice,

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<sup>1</sup>Vidomosti Verkhovnoyi Rady URSR, 1984, Addendum to No. 51, page 1122.

<sup>2</sup>Vidomosti Verkhovnoyi Rady Ukrainy, 2001, No. 25-26, page 131.

<sup>3</sup>Vidomosti Verkhovnoyi Rady Ukrainy, 1996, No. 43, page 212.

<sup>4</sup>Vidomosti Verkhovnoyi Rady Ukrainy, 1999, No. 14, page 81.

<sup>5</sup>Vidomosti Verkhovnoyi Rady Ukrainy, 2001, No. 23, page 118.

<sup>6</sup>Vidomosti Verkhovnoyi Rady Ukrainy, 2012, No.10-11, page 73.

<sup>7</sup>Vidomosti Verkhovnoyi Rady Ukrainy, 2014, No. 49, page 2056.

<sup>8</sup> Joint Opinion on the Draft Amendments to the Laws on Election of People’s Deputies and on the Central Election Commission and on the Draft Law on Repeat Elections of Ukraine (17 June 2013), available at [http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2013\)016-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2013)016-e) and Joint Opinion on Amendments to Legislation on the Election of People’s Deputies of Ukraine (14 October 2013), available at [http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2013\)026-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2013)026-e) .

<sup>9</sup>OSCE/ODIHR Opinion on Draft Amendments to Some Legislative Acts of Ukraine concerning Transparency of Financing of Political Parties and Election Campaigns (11 September 2014), available at <http://www.osce.org/odihr/123753?download=true> in English and at <http://www.legislationline.org/documents/id/19833> in Ukrainian.

22 October 2015) and by the Venice Commission at its 104<sup>th</sup> Plenary Session (Venice, 23-24 October 2015).

## **II. Scope of the Opinion**

6. This joint opinion analyses the provisions of the draft amendments against relevant international obligations and standards, in particular those of the Council of Europe, and OSCE commitments, as well as good practices from other OSCE participating States and Council of Europe member States. Where appropriate, it also refers to the relevant recommendations made in previous OSCE/ODIHR and Venice Commission Joint Opinions.

7. The scope of this joint opinion covers only the draft amendments submitted for review. As such, the joint opinion does not constitute a comprehensive review of the seven legal acts, which the draft amendments seek to amend, nor of the entire legal and institutional framework governing the regulation of political parties and their activities, or the conduct of elections and campaign financing; the joint opinion thus concentrates on the provisions within the above legal acts which were changed or supplemented by the draft amendments.

8. The joint opinion raises key issues and indicates areas of concern. In the interests of conciseness, the joint opinion focuses on those provisions that require improvement and provides recommendations accordingly, rather than on the positive aspects of the draft amendments.

9. The joint opinion is based on an unofficial English translation of the draft amendments and errors from translation may therefore result.

10. In view of the above, OSCE/ODIHR and the Venice Commission would like to make mention that this joint opinion is without prejudice to any written or oral recommendations or comments on the respective legal acts or related legislation that OSCE/ODIHR and the Venice Commission may make in the future.

## **III. Executive Summary**

11. Overall, OSCE/ODIHR and the Venice Commission welcome the draft amendments, which largely improve the existing legal framework on the financing of political party activities and election campaigns, including the financing of individual candidates. The draft amendments thereby represent an important tool in the fight against political corruption and aim to enhance transparency in political funding.

12. At the same time, the draft amendments could benefit from certain revisions and additions to ensure the effectiveness of the provisions, as well as their full compliance with international standards. In particular, this joint opinion welcomes the establishment of a system of public funding for political parties' statutory activities in Ukraine. However, consideration should be given to extending some funding to small or new parties enjoying a minimum level of citizen support. Reimbursement of campaign expenses should be subject to the outcome of auditing and the results of analyses of political parties' statements by the National Agency for Prevention of Corruption ("hereinafter NAPC"). The Central Election Commission should be able to suspend such reimbursement until further clarification. Loans, credits and debts should be included in the list of limitations for private contributions throughout the draft amendments to ensure that they are not used to circumvent restrictions on prohibited sources or contribution limits. The relevant decision-makers should furthermore consider the introduction of an overall campaign spending limit.

13. Moreover, the competencies of different oversight bodies should be clarified to ensure coordination and information-sharing and avoid overlapping responsibilities. Provisions on auditing should include detailed procedural rules and exceptions for smaller parties or parties without substantial financial activities (e.g., cashflow). In numerous parts of the draft amendments, regard should be paid to the proportionality of sanctions for violations of financial regulations.

14. Throughout the draft amendments, relevant deadlines should either provide political parties with enough time to prepare financial statements and allow a proper analysis by regulatory bodies, or the term “analysis” should be defined in the draft amendments in a way which ensures that essential minimum elements can be included within the given timeframe and additional complaints or requests for clarification are possible after the deadline expires.

15. In light of the above, OSCE/ODIHR and the Venice Commission make the following recommendations for the improvement of the draft amendments:

### **Key Recommendations**

- A. To clearly specify which activities are seen as campaign activities and define the term “statutory activities” for the purposes of public funding or reimbursement of campaign expenses;
- B. To consider maintaining an overall campaign expenditure limit in Article 48 of the Law on Parliamentary Elections and to introduce such a limit into the Law on Presidential Elections;
- C. To include provisions and guidelines, in particular, in the new Article 6 of the Law on the Accounting Chamber and Articles 17-9 of the Political Parties Law and 49-7 of the Parliamentary Elections Law, as amended, to ensure the autonomy of the monitoring bodies and their control over reporting and auditing obligations of all electoral stakeholders, and to clearly outline their mandates to avoid overlapping responsibilities;
- D. To include loans, credits and debts in the overall reporting obligations and contribution limits;
- E. To ensure proportionate administrative and criminal sanctions for violations of the law;

### **Additional Recommendations**

- F. To expand the deadlines for political parties to submit reports and auditing results and/or to clearly define by law which elements such reports must entail;
- G. To ensure that the deadlines in the draft amendments correspond to one another, so that the Central Election Commission can base its decisions on reimbursement of campaign expenses on prior statement analysis and auditing outcomes;
- H. To consider modifying the system of reimbursement of electoral expenses by introducing a differentiated system of state funding based on the votes received in the last parliamentary elections;
- I. To ban donations from companies which the State is involved in or to allow donations from such companies only if the State owns smaller stakes, such as 10%;

- J. To introduce concrete exceptions to the prohibition of donations coming from international organisations;
- K. To consider requiring third parties, i.e., individuals or organisations not tied to any candidate or political party, such as lobbyists and foundations, to register and require them to file reports disclosing their finances and donations;
- L. To provide the Central Election Commission with the possibility to suspend reimbursement for campaign expenses due to the incomplete fulfilment of reporting obligations;
- M. To provide a clearly outlined exemption from the requirement to undergo auditing for small or new parties;
- N. To return unused campaign funds to self-nominated candidates; and
- O. To conduct a proper impact assessment on the financial and other impacts that the draft amendments may have.

#### **IV. Analysis and Recommendations**

##### **1. International Standards relating to Political Party Regulation**

16. This joint opinion analyses the draft amendments with regard to their compatibility with international, in particular, Council of Europe obligations and standards on the prevention of corruption in politics, political party and campaign financing, as well as with key OSCE commitments. In this regard, recommendations from the Council of Europe's Group of States against Corruption (GRECO), as well as good practices from other OSCE participating States and Council of Europe member States are also taken into account.

17. International standards pertaining to the financing of political parties and election campaigns are found in Article 7 par 3 of the United Nations (UN) Convention against Corruption.<sup>10</sup> Article 22 of the International Covenant on Civil and Political Rights<sup>11</sup> and Article 11 of the European Convention on Human Rights (ECHR)<sup>12</sup> set standards regarding the right to freedom of association, which protects the rights of political parties as special types of associations and their members. The right to free elections guaranteed by Article 3 of the First Protocol to the ECHR is also of relevance. This joint opinion further takes into consideration OSCE commitments, in particular, on the protection of the freedom of association (Copenhagen Document, par 9.3) and free and periodic elections (Copenhagen Document, pars 5, 6, 7 and 8).<sup>13</sup>

18. In addition, soft-law standards in this area can be found in the recommendations of the UN, Council of Europe and OSCE bodies and institutions. At the UN level, these include General Comment No. 25 of the UN Human Rights Committee on the right to participate in

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<sup>10</sup>UN Convention against Corruption, adopted on 31 October 2003, ratified by Ukraine on 2 December 2009, available at:

[http://www.unodc.org/documents/treaties/UNCAC/Publications/Convention/08-50026\\_E.pdf](http://www.unodc.org/documents/treaties/UNCAC/Publications/Convention/08-50026_E.pdf).

<sup>11</sup>International Covenant on Civil and Political Rights adopted by the UN General Assembly by resolution 2200A (XXI) of 16 December 1966. The Covenant was ratified by Ukraine on 12 November 1973.

<sup>12</sup>Council of Europe's Convention for the Protection of Human Rights and Fundamental Freedoms, entered into force on 3 September 1953. The Convention was ratified by Ukraine on 11 September 1997.

<sup>13</sup>1990 OSCE Copenhagen Document (29 June 1990) (1990) 29 ILM 1305, available at <http://www.osce.org/odihr/elections/14304?download=true>.

public affairs, voting rights and the right of equal access to public service.<sup>14</sup> Within the Council of Europe and OSCE area, Council of Europe Committee of Ministers Recommendation 2003(4) on Common Rules against Corruption in the Funding of Political Parties and Electoral Campaigns,<sup>15</sup> as well as the Joint OSCE/ODIHR-Venice Commission Guidelines on Political Party Regulation are of relevance.<sup>16</sup> Throughout the joint opinion, reference will also be made to reports issued by GRECO<sup>17</sup> and to previous opinions issued by OSCE/ODIHR and the Venice Commission, (either individually or jointly). In particular, this joint opinion cites the 2014 OSCE/ODIHR Opinion<sup>18</sup> and another legal opinion prepared by OSCE/ODIHR on draft anti-corruption legislation of Ukraine.<sup>19</sup> In 2013, OSCE/ODIHR and the Venice Commission issued two joint opinions on Ukrainian election legislation, which will also be referenced.<sup>20</sup> Additionally, election reports from previous OSCE/ODIHR election observation missions in Ukraine are also mentioned and referenced.<sup>21</sup>

## 2. General Remarks

19. The draft amendments submitted for review are part of on-going legal reform efforts in Ukraine pertaining to the field of anti-corruption legislation, in the framework of which some laws have already been adopted, and anti-corruption agencies and bodies have been set up. The draft amendments at hand focus on the fight against corruption in the field of funding of political parties and campaign finance, which is essential to the good functioning of democratic institutions. They are also part of the long-lasting on-going electoral reform in Ukraine.

20. The 2013 OSCE/ODIHR and Venice Commission Joint Opinion on Amendments to Legislation on the Election of People's Deputies of Ukraine<sup>22</sup> (hereinafter the "2013 Joint Opinion on the Election of People's Deputies of Ukraine") welcomed the introduction of reporting requirements on the origin and use of campaign funds before Election Day and the publication of these reports on the website of the Central Election Commission. However, it was also noted that the lack of independent monitoring of campaign finance, as well as the lack of effective, proportionate and dissuasive sanctions for violations of campaign funding provisions<sup>23</sup> would impede the effective implementation of legislation on political party financing. The 2013 Joint Opinion on the Election of People's Deputies of Ukraine concluded, as did

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<sup>14</sup>UN Human Rights Committee General Comment 25, *The right to participate in public affairs, voting rights and the right of equal access to public service*, UN Doc. CCPR/C/21/Rev.1/Add.7, available at <http://www.refworld.org/docid/453883fc22.html>.

<sup>15</sup>Council of Europe Committee of Ministers Recommendation (2003)4 on *Common Rules against Corruption in the Funding of Political Parties and Electoral Campaigns*, available at [http://www.coe.int/t/dghl/cooperation/economiccrime/cybercrime/cy%20activity%20interface2006/rec%202003%20\(4\)%20pol%20parties%20EN.pdf](http://www.coe.int/t/dghl/cooperation/economiccrime/cybercrime/cy%20activity%20interface2006/rec%202003%20(4)%20pol%20parties%20EN.pdf).

<sup>16</sup>OSCE/ODIHR and Venice Commission *Guidelines on Political Party Regulation* (2010), available at <http://www.osce.org/odihr/77812>.

<sup>17</sup>Available at [http://www.coe.int/t/dghl/monitoring/greco/default\\_en.asp](http://www.coe.int/t/dghl/monitoring/greco/default_en.asp).

<sup>18</sup>*Op. cit.* footnote 9 (2014 OSCE/ODIHR Opinion).

<sup>19</sup>OSCE/ODIHR Opinion on Two Anti-Corruption Laws of Ukraine (18 July 2014), available at <http://www.osce.org/odihr/121526?download=true> in English and at <http://www.legislationline.org/documents/id/19138> in Ukrainian.

<sup>20</sup>*Op. cit.* see footnote 8 (Joint Opinion on the Draft Amendments to the Laws on Election of People's Deputies and on the Central Election Commission and on the Draft Law on Repeat Elections of Ukraine and Joint Opinion on Amendments to Legislation on the Election of People's Deputies of Ukraine).

<sup>21</sup>All OSCE/ODIHR election observation mission reports can be found at: <http://www.osce.org/odihr/elections/ukraine>.

<sup>22</sup>*Op. cit.* footnote 8 (Joint Opinion on Amendments to Legislation on the Election of People's Deputies of Ukraine).

<sup>23</sup>*Ibid.* pars 12 and 13.

GRECO reports<sup>24</sup> and several OSCE/ODIHR election observation reports,<sup>25</sup> that Ukraine's party finance regulations fall short of international standards and recommendations.<sup>26</sup>

21. It is welcomed that the proposed draft amendments significantly change the political financing system, notably by introducing a system of public subsidies to parties and more stringent requirements on the reporting and publication of party election campaign finances. They further establish a system of more extensive internal and external audit supervision and enhanced oversight, coupled with higher sanctions for violations of financing regulations. The draft amendments thereby take into account several recommendations made by the 2013 Joint Opinion on the Election of People's Deputies of Ukraine<sup>27</sup> and the 2014 OSCE/ODIHR Opinion.<sup>28</sup>

### 3. Different Forms of Funding of Political Parties and Election Campaigns

#### 3.1 Public Funding

22. The draft amendments introduce a system of direct public funding, which is welcomed and follows previous recommendations made by OSCE/ODIHR.<sup>29</sup> 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<sup>30</sup> and contributes to the levelling of the playing field for all political parties.<sup>31</sup>

23. The draft amendments establish two types of public funding: first, direct annual public funding that is proportionate to a party's election results in the last parliamentary elections (new Article 17-1 of the Political Parties Law), and second, the reimbursement of election campaign expenses for parliamentary elections (new Article 17-4 of the Political Parties Law). A new Article 17-1 of the Political Parties Law stipulates that statutory activities by political parties shall be funded by the national budget unless they relate to campaign activities in presidential, parliamentary or local elections. It would be advisable, however, to amend Article 17-1 of the Political Parties Law to read "may be funded" or "are eligible to be funded", as perhaps not all statutory activities can be reimbursed by the State. Besides, the distinction between statutory and campaign activities is very abstract and seems somewhat artificial. It will be hard for parties to know exactly which activities are classified as campaign-related and which activities can be categorised as statutory activities, particularly in cases involving, e.g., information and communication campaigns with the public, employee salaries or the renting of headquarters,

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<sup>24</sup> E.g., GRECO Third Evaluation Round, Evaluation Report on Ukraine – Transparency of Party Funding (Theme II) (2011), available at [http://www.coe.int/t/dghl/monitoring/greco/evaluations/round3/GrecoEval3\(2011\)1\\_Ukraine\\_Two\\_EN.pdf](http://www.coe.int/t/dghl/monitoring/greco/evaluations/round3/GrecoEval3(2011)1_Ukraine_Two_EN.pdf).

<sup>25</sup> OSCE/ODIHR Final Report on Election Observation Mission for Early Parliamentary Elections in Ukraine (2014), available at <http://www.osce.org/odihr/elections/ukraine/132556?download=true>, page 18; OSCE/ODIHR Election Observation Mission Final Report on Parliamentary Elections (2012), available at <http://www.osce.org/odihr/elections/98578?download=true>, page 18.

<sup>26</sup> *Op. cit.* footnote 8, par 57 (2013 Joint Opinion on the Election of People's Deputies of Ukraine).

<sup>27</sup> *Op. cit.* footnote 8, e.g., pars 27, 37 (2013 Joint Opinion on the Election of People's Deputies of Ukraine).

<sup>28</sup> See recommendation in *op. cit.* footnote 9 e.g., pars 23, 27, 30, 36-39, 2014 OSCE/ODIHR Opinion

<sup>29</sup> *Op. cit.* footnote 9, paras 38-39 (2014 OSCE/ODIHR Legal Opinion) and *op. cit.* footnote 25, page 19 (OSCE/ODIHR Election Observation Mission Final Report on Parliamentary Elections (2012)).

<sup>30</sup> See *op. cit.* footnote 16, par 170 (OSCE/ODIHR and Venice Commission Guidelines on Political Party Regulations).

<sup>31</sup> This was part of the recommendations issued in former joint opinions in Ukraine, particularly see CDL-AD(2013)026.



amongst others.<sup>32</sup> The definition of what constitutes a “campaign purpose” also needs to be laid out clearly in the law according to international guidelines.<sup>33</sup> Transparency of the draft amendments would be enhanced, as would legal security for political parties, if the draft amendments would specify a list of concrete activities, which would be considered as activities related to election campaigns. The beginning, duration and end of the period during which expenses can be reimbursed as election expenditures should likewise clearly be defined in the draft amendments.<sup>34</sup> If this period corresponds to the time frames for election campaigning in Article 70 of the Parliamentary Election Law, the law should clearly state this.

24. Article 17-2 of the Political Parties Law provides that the public contributions received by political parties shall be one hundredth of the minimum salary multiplied by the number of voters in the last parliamentary elections. Pursuant to Article 17-3, a political party shall qualify for public funding if its list of candidates won at least 3% of votes in the last parliamentary elections. In this context, it is noted that although Ukraine habitually has a very high number of registered political parties running for the elections, very few are represented in the *Verkhovna Rada*. Even though it is a common practice to link public funding to the result of the last elections,<sup>35</sup> consideration could be given to extending some funding to small or new parties enjoying a minimum level of citizen support, in order to further political pluralism.<sup>36</sup>

25. Regarding the reimbursement of campaign expenses for parliamentary elections, a new Article 17-4 of the Political Parties Law states that the Central Election Commission shall take a decision on whether or not to reimburse a specific party on the basis of the financial statement of sources and use of campaign funds submitted to the NAPC, according to the Parliamentary Election Law. Reimbursement can be denied if the Central Election Commission, the NAPC or a court find “that the party failed to submit an interim or final financial statement of sources and use of campaign funds within the timelines established by law or included deliberate misrepresentations in such statements” (new Article 17-4 of the Political Parties Law).

26. The draft amendments on reimbursement of campaign expenses are problematic on several levels. First, they do not give the Central Election Commission the right to deny reimbursement for incomplete financial statements, but only in cases of non-submission or deliberate misinterpretation. Second, there is no possibility for the Central Election Commission to simply suspend the reimbursement of expenses until political parties have resubmitted their statements or supplemented them with missing information. Whereas suspension due to incomplete submission seems to be an option open to the Central Election Commission regarding the funding of political parties’ statutory activities pursuant to Article 17-7 of the Political Parties Law, no such option seems to exist for the reimbursement of campaign expenses. The draft amendments should be supplemented accordingly.

27. These problems are connected to the main weakness of the system of reimbursement, namely that the deadlines for submission and analysis of statements and auditing by the NAPC are generally too short and do not match the deadlines within which the Central Election Commission shall decide on the reimbursement of funds. The Central Election Commission has to take its decision on whether or not to reimburse party expenses for parliamentary elections no later than 60 days after the publication of the election results (new Article 17-4 of the Political Parties Law). Parties, on the other hand, have fifteen days (seven days for self-nominated candidates) after the election to submit their financial statements of sources and use of election

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<sup>32</sup> See *op. cit.* footnote 16, par 162 (OSCE/ODIHR and Venice Commission Guidelines on Political Party Regulations).

<sup>33</sup> *Ibid.*, par 162.

<sup>34</sup> *Ibid.*, par 162,

<sup>35</sup> *Ibid.*, par 183.

<sup>36</sup> *Ibid.*, par 188.

campaign funds to the NAPC and the CEC. . Ideally, the Central Election Commission should base its decision on the outcome of the auditing conducted by the NAPC, as also stipulated in the draft amendments when setting out the mandate of the NAPC as the exercise of “general control over the compliance with the standards of financing of election campaigns of candidates” in Presidential Elections (new Article 43 par 10 of the Presidential Election Law). The draft amendments should better reflect this concept by introducing longer deadlines, so that a proper analysis by the NAPC, as well as consideration of its results by the Central Election Commission, are possible before the latter takes its decision on reimbursement of campaign expenditures.

28. In this context, regard should also be paid to the fact that the proposed system for reimbursement of parties’ electoral expenses is very generous in terms of the maximum amount for which a party could be reimbursed; pursuant to Article 17-4 of the Political Parties Law, any party which “participated in a seat allocation in the national constituency at the latest regular or extraordinary parliamentary election” and met its reporting obligations, would be reimbursed up to an amount of 100,000 minimum salaries, which currently amounts to UAH 121,800,000, i.e. approximately EUR 4,700,000.<sup>37</sup> This may result in a situation where it may become impossible for the State budget to cover the cost of elections. In order to mitigate this risk and avoid the inclusion of personal expenses in reimbursements, parties should be required by law to provide proof of the incurrence of expenses prior to reimbursement. In addition, it may be advisable to cap the maximum state subsidy at a lower amount and/or to maintain existing spending limits in Article 48 of the Parliamentary Elections Law and establish them in the Presidential Election Law. It would be important to coordinate the public funding system with other aspects of finance regulation, as the relevant legislation also permits in-kind assistance to parties and candidates during election campaigns in the form of free airtime and (limited) campaign posters. Such assistance would have a greater levelling effect if effective limits on campaign spending were established, which would also ensure that public resources do not contribute to ever-increasing expenditure in election campaigns.

29. 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.<sup>38</sup> 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.”<sup>39</sup> 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.<sup>40</sup>

30. Since financial spending limits may be difficult to enforce in practice, additional measures to limit spending should be taken.<sup>41</sup> 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. Finally,

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<sup>37</sup>In 2015 the minimum wage in Ukraine was UAH 1218 which, in August 2015, was approximately EUR 47.

<sup>38</sup> See *op.cit.* footnote 9, par 35 (2014 OSCE/ODIHR Opinion).

<sup>39</sup>*Op. cit.* footnote 25, page 18 (2012 Election Observation Mission Final Report on Parliamentary Elections)

<sup>40</sup> See *op. cit.* footnote 14, par 19 (General Comment 25); see also e.g., *op. cit.* footnote 25, page 19 (OSCE/ODIHR Election Observation Mission Final Report on Parliamentary Elections (2012)).

<sup>41</sup> Such as limits on certain campaign activity, e.g., political advertising on television.

no State subsidies are envisaged for self-nominated candidates in single-member constituencies, despite the fact that around one quarter of all Members of Parliament elected in 2014 were self-nominated candidates. The draft amendments should be supplemented to address these issues, should the parallel proportional-majoritarian electoral system be preserved.<sup>42</sup>

### 3.2 Private Contributions and their Limits

31. 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.<sup>43</sup> 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.”<sup>44</sup> 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.<sup>45</sup> While loans and other benefits are mentioned in Article 14 of the Political Party 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 amendments (e.g., Articles 42 par 7 and 43 part 4 of the Law on the Accounting Chamber, and Articles 15 and 50 par 3 of the Political Parties Law). This is necessary to avoid loopholes that would permit the unlimited channelling of money to the benefit of certain parties.

32. Article 15 of the Political 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%.<sup>46</sup> 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.

33. 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 (mentioned in Article 15 par 3 of the Political Parties Law), which might provide resources for the purposes of party-building or

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<sup>42</sup> This would also be in line with *op.cit.* footnote 13, par. 7.5 (Copenhagen Document).

<sup>43</sup> *Op. cit.* footnote 9 pars 36-37 (2014 OSCE/ODIHR Opinion).

<sup>44</sup> *Op. cit.* footnote 15, Article 2 (CoE Recommendation 2003/4).

<sup>45</sup> *Op. cit.* footnote 16, par. 171 (OSCE/ODIHR and Venice Commission Guidelines on Political Party Regulations).

<sup>46</sup> See e.g., *op. cit.* footnote 13, par 5.4. (Copenhagen Document), which asks for a clear separation between the State and political parties.

education.<sup>47</sup> These donations should, however, not be used for campaign financing. Additionally, Article 15 par 6 prohibiting contributions from other political parties should be re-discussed, and possibly revised, since 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.<sup>48</sup> 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.

34. Finally, 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. It is also recommended to expand Article 15 in order to also include third parties which act on behalf of persons prohibited from giving donations.

### **3.3 Funding by Candidates of their own Campaigns and Limitations to such Funding**

35. Current Article 43 par 3 of the Presidential Elections 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,<sup>49</sup> 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,<sup>50</sup> 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. Stakeholders should discuss whether this provision should be changed to reflect other limits on contributions, which are already set out in the draft amendments and/or to require the disclosure of such contributions and of assets and liabilities by the candidate.<sup>51</sup>

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<sup>47</sup> Some countries make an explicit exception allowing contributions from international organisations (e.g., Lithuania) see pages 5 and 17 Venice Commission Opinion on the Prohibition of Financial Contributions to Political Parties from Foreign Sources (31 March 2006), available at [http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2006\)014-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2006)014-e).

<sup>48</sup> There are countries (e.g., Austria, Belgium, Denmark, Finland) which, for various reasons, do not prohibit donations from foreign political parties (see *op. cit.* footnote 47, par 23 (Venice Commission Opinion on the Prohibition of Financial Contributions to Political Parties from Foreign Sources).

<sup>49</sup> *Op. cit.* footnote 16, par 169 (OSCE/ODIHR and Venice Commission Guidelines on Political Party Regulations).

<sup>50</sup> *Ibid.*, par 175 (OSCE/ODIHR and Venice Commission Guidelines on Political Party Regulations); See also Ingrid van Biezen “Financing political parties and election campaigns - guidelines” available at [https://www.coe.int/t/dghl/monitoring/greco/evaluations/round3/Financing\\_Political\\_Parties\\_en.pdf](https://www.coe.int/t/dghl/monitoring/greco/evaluations/round3/Financing_Political_Parties_en.pdf) pages 20-21.

<sup>51</sup> *Op. cit.* footnote 16, par 169 (OSCE/ODIHR and Venice Commission Guidelines on Political Party Regulations).

#### 4. Oversight and Monitoring of Political Party Finance

36. One of the key changes introduced by the draft amendments is the oversight of contributions to and spending of political parties by the NAPC, as well as other regulatory bodies. 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.<sup>52</sup> The establishment of such a specialized regulatory body is in line with the recommendations made by OSCE/ODIHR.<sup>53</sup> 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.<sup>54</sup> 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.<sup>55</sup> GRECO has recommended that such a regulatory body should be composed of representatives of both public bodies and of civil society.<sup>56</sup> In order to guarantee the efficiency and independence of regulatory bodies, the recommendations made in the 2014 OSCE/ODIHR Opinion on Two Anti-Corruption Laws of Ukraine should be implemented.<sup>57</sup>

37. The current draft amendments provide for a complicated interaction between several regulatory bodies whose mandates are not clearly set out. These are the Accounting Chamber, territorial and district election commissions, the Central Election Commission and the NAPC. The NAPC is the central anti-corruption agency in Ukraine. It is a board composed of five members, controlled by the Verkhovna Rada and accountable to the government.<sup>58</sup> The Central Election Commission consists of 15 members appointed by the Verkhovna Rada.<sup>59</sup> The Accounting Chamber is the auditing body of the Verkhovna Rada, whose head is appointed for a seven-year term.<sup>60</sup> According to the Constitution, the Accounting Chamber executes control over revenues and expenditures of the State Budget.<sup>61</sup>

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<sup>52</sup> *Op. cit.* footnote 15, Article 14 a and b (CoE Recommendation 2003/4); *op. cit.* footnote 16, pars 211-223 (OSCE/ODIHR and Venice Commission Guidelines on Political Party Regulations).

<sup>53</sup> *Op. cit.* footnote 9, par 27 (2014 OSCE/ODIHR Opinion).

<sup>54</sup> *Op. cit.* footnote 16, pars 212 and 218 (OSCE/ODIHR and Venice Commission Guidelines on Political Party Regulations); *op. cit.* footnote 19, par 26 (OSCE/ODIHR Opinion on Anti-Corruption Legislation).

<sup>55</sup> *Op. cit.* footnote 16, pars 212-213 and 219-223 (OSCE/ODIHR and Venice Commission Guidelines on Political Party Regulations); see also GRECO Fifth Addendum to the Compliance Report on Ukraine (adopted 19 June 2015) available at [http://www.coe.int/t/dghl/monitoring/greco/evaluations/round2/GrecoRC1&2\(2009\)1\\_FifthAdd\\_Ukraine\\_EN.pdf](http://www.coe.int/t/dghl/monitoring/greco/evaluations/round2/GrecoRC1&2(2009)1_FifthAdd_Ukraine_EN.pdf) at pages 4-5.

<sup>56</sup> *Op. cit.* footnote 55, pages 4-5 (GRECO Fifth Addendum to Ukraine Compliance Report).

<sup>57</sup> See *op. cit.* footnote 19, in particular key recommendations A-H at pages 3-4 (OSCE/ODIHR Opinion on Anti-Corruption Legislation).

<sup>58</sup> Article 5 par 1 of the Law on Prevention of Corruption; The members of the NAPC are selected by a panel consisting of eight members, four of which shall be proposed by civil society groups working on anti-corruption issues.

<sup>59</sup> *Op. cit.* footnote 25 (OSCE/ODIHR Final Report on Election Observation Mission for Early Parliamentary Elections in Ukraine 2014), page 8.

<sup>60</sup> See Article 10 of the Law on the Accounting Chamber; the draft amendments and this legal opinion do not take into account the changes in the Law of the Accounting Chamber which were adopted in July 2015.

<sup>61</sup> See Article 98 of the Constitution of Ukraine, available at <http://legislationline.org/documents/section/constitutions>.

38. As already mentioned in the 2014 OSCE/ODIHR Opinion, when several different bodies deal with the same subject-matter, duplication of work and mandates can ensue, to the detriment of effective monitoring of political party and campaign finances.<sup>62</sup> In particular, in the area of corruption prevention through oversight, it is crucial that the mandates of different bodies are clearly differentiated, and easily understandable to parties, wider society, as well as the respective bodies themselves. Additionally, provisions ensuring co-ordination and information-sharing between these different bodies are necessary to avoid overlapping responsibilities. The draft amendments do not yet include sufficiently detailed provisions of this kind, and should be supplemented accordingly.

39. In particular, the new Article 6 of the Law on the Accounting Chamber should define the modes of interaction between the Accounting Chamber, the Central Election Commission and the NAPC. Additionally, Article 17-9 of the Political Parties Law, as amended, states that “[t]he Accounting Chamber and the National Agency for Prevention of Corruption shall exercise the public control over the lawful and intended use by political parties of funds allocated from the national budget of Ukraine to finance their statutory activities”, without setting out clear mandates for either institution. The respective provisions of the draft amendments should be enhanced by clearly specifying the different and ideally complementary manners in which these bodies shall conduct public control over the use of political party funding.

40. Additionally, pursuant to the amendments to Article 49 pars 6 and 7 of the Parliamentary Elections Law, the reports of the administrators of election campaign funds are analysed by the respective district election commissions and referred to the Central Election Commission for publication on its official website. Only if the Central Election Commission flags irregularities to the NAPC will the NAPC look into a potential violation. This could mean that different agencies might have to develop monitoring capacity in the same area and hire and train staff to conduct very similar activities, which would require substantial financial and human resources. In order to ensure consistent application of the law and interpretation of the submitted reports, it would be preferable if all the reports would be automatically analysed by one central agency with a clearly outlined mandate, which allows it to efficiently analyse and investigate alleged violations and to impose sanctions.

41. The draft amendments provide for the deletion of Article 43 par 14 of the Presidential Election Law. This provision currently mandates the Central Election Commission to publish information about the size of the candidates’ campaign funds, as well as their financial statements in specific newspapers and online. Transparency is a key element in the fight against corruption and also necessary to keep the electorate informed and ensure that parties are held accountable. It is therefore recommended for the relevant stakeholders to consider retaining this provision in the Presidential Election Law.

## **5. Auditing and Reporting Obligations of Political Parties**

42. The new wording of Article 17 of the Political Parties Law specifies the reporting obligations of political parties and their local organisations and mandates parties to undergo annual internal as well as external auditing. As such, Article 17 of the Political Parties Law addresses recommendations previously made by OSCE/ODIHR<sup>63</sup> and GRECO.<sup>64</sup> The draft article also sets out rules and procedures as regards the monitoring of political parties’ financial reports by the NAPC, the deadlines for parties to submit and publish their financial statements and the obligation of the NAPC to publish its analysis results. This is in line with good practices

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<sup>62</sup> *Op. cit.* footnote 9, par 26 (2014 OSCE/ODIHR Opinion).

<sup>63</sup> *Ibid.*, par 23.

<sup>64</sup> See *op. cit.* footnote 24 (GRECO Third Evaluation Round, Evaluation Report on Ukraine – Transparency of Party Funding) Recommendation vii.

regarding reporting and disclosure requirements. There are, however, several problematic aspects pertaining to political parties' financial reporting obligations.

43. The draft amendments stipulate that the new Article 17 of the Political Parties Law shall require all parties to undergo annual internal and external auditing. Article 8 of the Political Parties Law, as amended, mandates political parties to develop a procedure for financial auditing. While auditing is necessary to guarantee compliance with financing regulations and the inclusion of internal and external auditing requirements in the draft amendments are generally welcomed,<sup>65</sup> the draft amendments need to be supplemented with detailed, objective and non-discriminatory procedural standards specifying how and on what grounds parties are chosen for auditing and which institutions are allowed to conduct financial and compliance audits.<sup>66</sup> This issue was already raised by OSCE/ODIHR and GRECO in past opinions and reports.<sup>67</sup> Furthermore, the draft amendments need to include procedures for regulatory bodies to use financial audits in their analysis or in the investigation of irregularities by accepting or rejecting them and to conduct their own compliance audits if needed for further enforcement action.

44. The requirements for parties to undergo an independent external audit are stated only in general terms in the new Article 17 of the Political Parties Law. This is not sufficient to fulfil key GRECO recommendations in this area, which require the introduction of "independent auditing of party and election campaign accounts by certified auditors."<sup>68</sup> The draft amendments also do not establish who should perform external auditing or how the persons or organisations responsible for external auditing shall be selected and remunerated. This should be further clarified in the changes to the Political Parties Law proposed by the draft amendments.

45. 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 draft amendments should be enhanced, so that all electoral stakeholders subject to audits of their financial reports are obliged to provide auditors and the responsible oversight bodies with any information that is needed.

46. 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. Hence, exemptions from auditing obligations should specifically be made for such parties detailing, as stated above under para 43, the grounds on which parties are chosen for or exempted from auditing.

47. According to the new Article 17 number 2 of the Political Parties Law, political parties, in their statements submitted to the NAPC, shall provide information about the "date, size

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<sup>65</sup> *Op. cit.* footnote 16, par 214 (OSCE/ODIHR and Venice Commission Guidelines on Political Party Regulations).

<sup>66</sup> *Ibid.*, par 214.

<sup>67</sup> *Op. cit.* footnote 9, pars 33-34 (2014 OSCE/ODIHR Opinion); see also *op. cit.* footnote 24, pars 68-70 (GRECO Third Evaluation Round, Evaluation Report on Ukraine – Transparency of Party Funding).

<sup>68</sup> See *op. cit.* footnote 24, recommendation vii (GRECO Third Evaluation Round, Evaluation Report on Ukraine – Transparency of Party Funding).

(amount) and intended purpose of every contribution made in favour of the party and its local organisation, which became a legal person according to established procedures as well as about every contribution to the campaign fund of the party, its local organisation or a candidate representing the party/local organisation at a respective national or local election (...).” It is advisable to supplement the draft amendments with some guidance as to the degree of specificity required of parties when describing, in their statements, the date, size and intended purpose of each donation.

48. Online publication of party statements on property, income, expenses and financial liabilities, as envisaged in Article 17 of the Political Parties Law, should also allow access to original invoices as a form of public inspection.

49. Finally, it is recommended that the authorities provide political parties with standardised 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.

## 6. Sanctions for Violations of Financial Regulations

50. Paragraph 16 of the 2003 Council of Europe Recommendation<sup>69</sup> states that any infringement of rules concerning the funding of political parties and electoral campaigns should be subject to “effective, proportionate and dissuasive sanctions.” The draft amendments establish the following range of sanctions for violations of political finance regulations:

- **Administrative fines** of 100-200 tax-free minimum incomes<sup>70</sup>(ranging approximately between UAH 1700-3400 i.e. about EUR 71-142) may be imposed at the initiative of the NAPC or the Central Election Commission where financial reports are filed in violation of legal requirements; in cases of illegal contributions, the fine shall equal twice the contribution amount(see Article 212-21 of the Code of Administrative Offences).
- **Criminal sanctions** may, pursuant to Article 159-1 of the Criminal Code, be imposed upon responsible officials within parties (amounting to two to seven years’ imprisonment for basic violations, and up to 12 years for serious violations by an organised group or for repeated offences). Individual donors or responsible officials of legal entities who make “a contribution to a party by a person not qualified to make a large contribution, provid[e] financial (material) support for campaigning, national or local referendum campaigning in a large volume [more than double the permitted maximum donation] or by a person not entitled to do so” (Article 159-1 par 2) are subjected to a prison term of five to seven years. In addition, filing a deliberately false statement (Article 159-1, par 1) is now an offence punishable by two years of imprisonment.

51. According to the draft amendments, Article 159-1par 2, unlike par 1, covers not only a deliberate commission of the offence, but also a violation of the law without intent. In this context, it is reiterated that the violation of this provision leads to a minimum of five years of imprisonment. At the same time, ignorance of the contribution limits or other requirements for contributions could easily lead to situations where donors violate the law without intent. To

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<sup>69</sup> *Op. cit.* footnote 15 (CoE Recommendation 2003/4).

<sup>70</sup> The tax-free minimum income differs from the monthly minimum wage. Para 5 of the Transitional Provisions of the Tax Code of Ukraine stipulates that the tax free minimum employed for the purpose of administrative sanctions is UAH 17.



ensure that the sanctions set out in the proposed changes to the Criminal Code are proportionate to the violation committed, and that only serious violations result in harsh criminal sanctions, the draft amendments should be changed, so that only deliberate violations are covered by Article 159-1 par 2.<sup>71</sup> The draft amendments should thus clarify that Article 159-1 par 2 sanctions deliberate unauthorised or excessive contributions. The relevant decision-makers in Ukraine should also discuss whether to lower the minimum punishment stipulated by the new Article 159-1 of the Criminal Code.

52. Similarly, the amended Article 96-9 of the Criminal Code, which states that a legal person committing violations of Article 159-1 pars 2-6 of the Criminal Code shall be liquidated by a court, would appear to constitute a disproportionate and inconsistent provision. The automatic liquidation of a legal person, including both companies and political parties, irrespective of the evaluation of the severity of the offence on a case-by-case basis, is not compatible with international standards.<sup>72</sup> Moreover, it is not apparent why the deliberate receipt of a donation from a person not authorised to contribute to party finances should *per se* result in more dire consequences than, e.g., the deliberate filing of false information with regard to party finance.

53. 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.<sup>73</sup> Criminal sanctions should only be imposed for serious violations of financial regulations, which undermine public integrity.<sup>74</sup> 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.<sup>75</sup> Notably, the current draft amendments specify administrative sanctions for “violation of the presentation procedure of the financial statement of sources and use of campaign funds, a party statement of property, income, expenses and financial liabilities” in Article 212-21 of the Code of Administrative Offences. At the same time, the “filing of deliberately false information in a statement of property, incomes, expenses and financial liabilities of a party or a financial statement of sources and use of campaign funds of the party, local organisation of a party, election candidate, and also a deliberate failure to submit such reports within the prescribed period” are made punishable in Article 159-1 of the Criminal Code. This bears the risk that double penalties of criminal and administrative nature could be imposed, and the draft amendments should thus be revised to mitigate this risk. In finalising the draft amendments, the authorities should give consideration to clarifying the statute of limitations for violations of financial regulations. Consideration could be given to expanding, when necessary, the statute of limitations for violations until one year after the financial reports become public.

54. Additionally, the new Article 159-1 pars 2 and 3 of the Criminal Code makes the donation of large contributions made by persons unauthorised to make such contributions or the deliberate receipt of such contributions a punishable offence. The note provided at the end of Article 159 par 6 of the Criminal Code explains that a large contribution is a contribution “twice or more times as much as the maximum amount of a contribution for the party support or the maximum amount of the financial (material) support for election or referendum campaigning”. Where the determination of the amount of a contribution requires a degree of evaluation (e.g., when it comes to intangible assets and non-monetary benefits), the draft amendments should clarify who will be responsible for evaluating the value of these contributions.

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<sup>71</sup> *Op.cit.*, footnote 16, par 217 (OSCE/ODIHR and Venice Commission Guidelines on Political Party Regulations).

<sup>72</sup> *Ibid.*, par 225, 227.

<sup>73</sup> *Ibid.*, par 225.

<sup>74</sup> *Ibid.*, par 217.

<sup>75</sup> See European Court of Human Rights, *Grande Stevens and Others vs. Italy*, 4 March 2014.

## 7. Banning of Political Parties

55. The current version of Article 5 of the Political Parties Law states that a political party can be banned by decision of the Supreme Court. In the draft amendments to this provision, the sentence indicating the competence of the Supreme Court is deleted. While there is no clear international practice indicating that parties can only be banned by the highest court in the country,<sup>76</sup> the reasons for such deletion are not apparent. It is recommended to consider retaining reference to the Supreme Court, since the deleted provision currently acts as an additional institutional safeguard against potential misuse of Article 5. Such safeguards are especially important given that, in Ukraine, the circle of persons entitled to request the ban of a party is unusually wide pursuant to Article 21 of the Political Parties Law.<sup>77</sup>

## 8. Deadlines

56. The draft amendments include extensive reporting, notification and publication obligations (see paras 42-49 above). This is generally welcomed as an important step to ensure transparency in campaign and political party financing in line with Article 7 par 3 of the UN Convention against Corruption. While it is positive that the law stipulates deadlines, not only for the benefit and legal security of political parties and regulatory bodies, but also for media, civil society and the general public to get prompt access to relevant information and to allow them to conduct their own analyses, the deadlines contained in the draft amendments appear to be too short.<sup>78</sup> The administrator of a party's running campaign fund shall, for example, submit a final financial report on the use of funds no later than on the seventh day after the election (Article 42 par 4 of the Presidential Election Law and Article 49 par 5 of the Parliamentary Elections Law). 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 fulfil 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).

57. Additionally, the draft amendments also do not give the regulatory bodies sufficient time to conduct a detailed analysis of the respective reports submitted by the parties. For example, the Presidential Elections Law stipulates that the administrator of a political party's accumulation fund shall submit an interim financial statement to the Central Election Commission and the NAPC five days prior to election day (new Article 42 par 5 of the

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<sup>76</sup> Whereas in Germany, only the Constitutional Court can ban a party (Article 21 par 2 of the German Basic Law), in the Netherlands, for example, a district court can take this decision (Article 2: 20 of the Dutch Civil Code).

<sup>77</sup> Article 21 of the Political Party law states that "[a] court may rule to ban a political party, upon the submission of the central body of executive power carrying out state policy in the sphere of state registration (legalization) of associations of citizens, other civil formations, or the Prosecutor General of Ukraine, in case of violations of any requirements regarding the formation and operation of political parties set forth in the Constitution, this and other laws of Ukraine". In contrast, in Germany, for example, only the parliament, the government and the Federal Assembly could request the ban of a party; exceptionally, a Federal State government is also entitled to request a ban in case of a party which only operates in a certain state (Article 43 Federal Constitutional Court Act); in the Netherlands, only the Public Prosecutor's Office is entitled to request such a ban (Article 2:20 of the Dutch Civil Code).

<sup>78</sup> This has already been noted by the OSCE/ODIHR earlier; see *op. cit.* footnote 9, pars 12-19 (2014 OSCE/ODIHR Opinion).

Presidential Election Law), which shall then be analysed by the Central Election Commission. The Commission shall publish its analysis no later than two days before the election (new Article 42 par 6 of the Presidential Election Law). This deadline does not seem to be feasible if the Central Election Commission's task is to analyse and verify all information provided by all parties campaigning in an election. The deadlines in the draft amendments should therefore be adapted to allow for sufficient time so that both political parties and regulatory bodies are able to fulfill their legal obligations.

58. At a minimum, the draft amendments would have to define what is meant by the term "analysis" in relation to reports and what elements such analyses should include, at a minimum, both in pre- and post-election reporting. In general, reporting obligations should be proportional and should not place an undue burden on political parties.<sup>79</sup> If stakeholders choose to retain the existing tight deadlines, then this means that the initial reports submitted will be limited in terms of content and comprehensiveness. In this situation, the draft amendments should clarify that additional complaints can be submitted after the deadline and that regulatory bodies are allowed to request additional clarifications or documents and to conduct necessary enforcement action.

## 9. Additional Remarks

59. The current Article 43 par 11 of the Presidential Election Law states that funds not used by a candidate nominated by a political party shall be returned to the party upon request, whereas unused campaign funds of a self-nominated candidate shall be transferred to the national budget. The draft amendments do not revise this provision. As mentioned on various previous occasions by OSCE/ODIHR and the Venice Commission, there appears to be no justification for this differential treatment.<sup>80</sup> This potentially discriminatory practice should thus be removed from Article 43 par 11 of the Presidential Election Law. It should be replaced with a provision that either states that in such cases, any candidate, whether self-nominated or nominated by a party, can apply for the transfer of unused campaign funds, or state that unused campaign funds are automatically transferred to the party (if applicable) or to the candidate (in cases of self-nomination) without them having to apply for such transfer.

60. 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.

61. This joint opinion specifically welcomes the inclusion of a new Article 17-5 (1) into the Political Parties Law, which states that 10% of the annual funding for political parties' statutory activities shall be equally divided between those political parties that included both men and women into every group of three candidates on their electoral lists in the latest parliamentary (both regular and extraordinary) or local election. This provision is in line with Article 4 of the Convention on the Elimination of All Forms of Discrimination against Women<sup>81</sup>, Council of Europe Recommendation (2003)3 and pars 178 and 191 of the OSCE/ODIHR and Venice

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<sup>79</sup> OSCE Handbook for the Observation of Campaign Finance (2015) available at <http://www.osce.org/odihr/elections/135516?download=true>, page 39.

<sup>80</sup> *Op. cit.* footnote 8, par 52 (Joint Opinion on the Draft Amendments to the Laws on Election of People's Deputies and on the Central Election Commission and on the Draft Law on Repeat Elections of Ukraine); *op. cit.* footnote 9, par 40 (2014 OSCE/ODIHR Opinion).

<sup>81</sup> The CEDAW was ratified by Ukraine on 12 March 1981 and the Optional Protocol to the CEDAW, on 26 September 2003.

Commission Guidelines on Political Party Regulation.<sup>82</sup> However, Article 17-5 (1) of the Political Parties Law mentions local elections while the statutory activities of political parties are only funded “if its list of candidates won at least 3% of votes at the latest regular or extraordinary parliamentary election held in the national electoral constituency” pursuant to Article 17-3 of the Political Parties Law. Both provisions are inconsistent. It is recommended to extend some funding for political parties which promote the participation of women also at the local level. This would be in line with the spirit of the 2014 Law on Local Elections which requires 30% of candidates in local elections to be female.

62. Finally, legislation should attempt to strike a balance between public and private funding in order to avoid over-dependency on one source of funding.<sup>83</sup> In this context, it is not clear whether a full financial impact assessment has been carried out to analyse the capital required to ensure proper public funding of political parties, as well as effective oversight over financial matters of parties and distribution of funds. Policy-makers and other stakeholders in Ukraine should ensure that such a comprehensive financial impact assessment is carried out. Additionally, an impact assessment should also be conducted into the potential effect of public funding on the independence of parties. It is essential that public funding does not limit or interfere with a political party's independence.<sup>84</sup>

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<sup>82</sup>Council of Europe Committee of Ministers Recommendation (2003)3 on balanced participation of women and men in political and public decision making available at <https://wcd.coe.int/ViewDoc.jsp?id=2229> at Appendix A 4.

<sup>83</sup>*Op. cit.* footnote 16, par 176 (OSCE/ODIHR and Venice Commission Guidelines on Political Party Regulations).

<sup>84</sup>*Op. cit.* footnote 15, Article 1 par 4 (CoE Recommendation 2003/4).