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Checklist for compliance with international standards and good practices preventing misuse of administrative resources during electoral processes at local and regional level

Monitoring Committee

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Summary

The checklist for compliance with international standards and best practices preventing misuse of administrative resources during electoral processes at local and regional level aims to complement general guidelines, in particular Congress Resolution 402(2016) and explanatory memorandum on “the misuse of administrative resources during electoral processes: the role of local and regional elected representatives and public officials”.

It provides for concrete guidance and tools to better understand the phenomenon of misuse of administrative resources during electoral processes and assess different kinds of situations related to it.

More specifically, the checklist identifies risk areas of potential misuse of administrative resources during electoral processes, aims at assessing the implementation of the legal framework as well as legal remedies and sanctions, provides guidelines for identifying and qualifying specific instances of misuse, including on the local and regional level and deals with concrete preventive action focusing on the grassroots level with the adoption of voluntary declarations, codes of conduct and awareness-raising activities.

¹ Chamber of Local Authorities / R: Chamber of Regions
EPP/CCE: European People's Party Group in the Congress
SOC: Socialist Group
ILDG: Independent Liberal and Democratic Group
ECR: European Conservatives and Reformists Group
NR: Members not belonging to a political group of the Congress

Introduction

This checklist² is based on and aims to complement, inter alia, the 2016 “Joint Guidelines for Preventing and Responding to the Misuse of Administrative Resources during electoral Processes” prepared by the Venice Commission and OSCE/ODIHR, the 2013 Venice Commission “Report on the Misuse of Administrative Resources During Electoral processes as well as the 2016 Congress Resolution 402(2016) and Explanatory Memorandum “The Misuse of administrative resources during electoral processes: the role of local and regional elected representatives and public officials”. It also takes into account the arsenal of Council of Europe programmes and action for the fight against corruption and, more specifically, the European Code of Conduct for the political integrity of local and regional elected representatives³ and recent Congress recommendations⁴, which include dimensions relevant to the present report.

The misuse of administrative resources is a subtle and complex subject. What appears to be a misuse in one system, such as the use of State vehicles during the election campaign, might be quite legitimate in the tradition of a different State system – it partly depends on the level of awareness and transparency. Thus, if all stakeholders are aware of the dangers of misuse of administrative resources, and if the use of State resources during the elections is transparent and in line with existing rules, then some practices may not be considered as an issue.

Given the complexity of the phenomenon of misuse of administrative resources, the present report aims at providing a checklist, in particular to:

- A. identify risk areas of potential misuse of administrative resources during electoral processes in general and with special focus on the legal framework;
- B. assess the implementation of the legal framework as well as legal remedies, sanctions, transparency and enforcement;
- C. identify and qualify specific instances of misuse, including on the local and regional level;
- D. deal with preventive action with special focus on the grassroots level, including the adoption of voluntary declarations, codes of conduct and awareness-raising activities.

The checklist aims at broad application and should be of general use for local and regional elected officials, election observers, experts, civil society, as well as for the broader public. In doing so, it aims at raising awareness among these target groups regarding the issue of a misuse of State resources. Therefore, the checklist puts forward questions of particular relevance for election observers.⁵ In a longer-term perspective, different versions of the checklist could be published with the aim of targeting other specific groups.

The checklist uses the definition of such misuse adopted by the above-mentioned texts:

‘Administrative resources’ include: ‘human, financial, material, *in natura* and other immaterial resources enjoyed during electoral processes by both elected representatives [incumbents/candidates] and representatives of the public sector deriving from their control over public sector staff, financings, allocations and access to public facilities. It also entails resources enjoyed in the form of prestige or public presence that stem from their position as elected representatives or public officers and which may turn into political endorsements or other forms of support.’⁶

2 The Checklist was prepared with the contribution of Christian Binder, Professor of International Law, Department of European, International and Comparative Law, University of Vienna, Austria. It also takes into account recommendations put forward by the Venice Commission and OSCE/ODIHR in the Joint Opinion on the Congress’ draft checklist, which was adopted by the Council of Democratic Elections and the Venice Commission in March 2017.

3 Congress Recommendation 60(1999).

4 Congress Recommendation 375(2015) on criteria for standing in local and regional elections and Recommendation 383(2015) on conditions of office of elected representatives

5 The questions of particular relevance for election observers can be found in the annex of the document.

6 See Venice Commission, Report on the Misuse of Administrative Resources During Electoral Processes (16 December 2013), CDL-AD(2013)033, para. 12; Venice Commission/OSCE/ODIHR Joint Guidelines for Preventing and Responding to the Misuse of Administrative Resources During Electoral Processes (14 March 2016), CDL-AD(2016)004, par. 9.

In general, the checklist strives for a broad application, throughout the entire electoral cycle. The prohibition of misuse of administrative resources is directly related to neutrality and impartiality in the electoral process; equality of treatment between different candidates and parties in relation to administrative resources; and a level playing field between all stakeholders, including incumbent candidates.

Hence, misuse is most likely to occur during the period of the election campaign (inter alia, in relation to blurring lines between State and party; the incumbent's use of human resources (civil servants, public employees) or his/her use of financial and material resources (official vehicles, public premises, telecommunication) for campaign purposes and the mixing of campaign and official duties; the exertion of pressure on (public sector) employees and civil servants; the obstruction of campaigning of opposition parties; a disproportionate focus on the incumbent (notably in State-owned media and in public service broadcasting corporations). Moreover, problems might also arise on Election Day as undue influence may be exerted on voters. A more general issue regarding misuse of administrative resources relates to the lack of effective complaint mechanisms, inadequate or disproportionate sanctions and deficient enforcement of the legislation.

In accordance with the Congress' mandate by the Committee of Ministers of the Council of Europe to observe local and regional elections (Statutory Resolution CM/Res(2011)2), particular focus is laid on the grassroots' level. In this respect, instances of misuse of State resources at the local and regional level have their own distinguishing characteristics and may be more likely to occur given the intrinsic link that local and regional elected representatives maintain with the community in which they are living.

On the one hand, local and regional elected representatives have community-specific functions which make them potentially liable to particular types of misuse, as for example, decisions on zoning, land use and procurement contracts. They have specific responsibilities with regard to local government staff reporting to them. Also, local and regional elected representatives usually have their personal ties to the territorial community in which the election takes place.

In addition, local elected representatives and/or civil servants/municipal employees frequently have election-related functions during the electoral campaign and afterwards (c.f. with regard to their involvement in electoral commissions and, more generally, within the election administration), which may make them particular prone to misuse. Moreover, local and regional elections are generally less publicized than national elections and are therefore open to less public scrutiny (by international observers, the media, etc) and potentially more vulnerable to abuse of administrative resources. This warrants a special interest and focus on the local and regional level.

When confronted with the misuse of administrative resources, a distinction may be expedient between the – more *general and abstract* – likeliness or probability for misuse to occur, in comparison to *specific incidents* of misuse. Conversely, when confronted with *particular instances of misuse*, there is a need to identify the particular instances and to assess the seriousness of such misuse. These two areas will be addressed in different sections of the checklist. More particularly, the checklist aims at identifying, at first, general areas of risk concerning the legal framework and its implementation (in the broad sense) (sections A and B). Then, a roster of criteria to identify and qualify the seriousness of specific instances of misuse will be provided (section C). Finally, activities and measures to prevent misuse of administrative resources will be proposed with special focus on preventive action at the grassroots level (section D).

A. General risk areas concerning the misuse of administrative resources during electoral processes with special focus on the legal framework

1. Adherence to general principles of rule of law, fundamental human rights and freedoms and other preconditions for genuinely democratic elections

General requirements are necessary to tackle the misuse of administrative resources, including the adherence to general principles of the rule of law and fundamental rights and freedoms. These guarantees provide for checks and balances and a control of governmental authorities. They are thus as such a safeguard against misuse of resources. Further requirements are the necessary impartiality and the neutrality of civil servants, public employees and (semi-)public entities as well as observance of the principles of equality and non-discrimination. These safeguards are equally relevant for the national and the local and regional level. The degree of adherence of a State to the mentioned principles and guarantees is – as such – an indicator of the probability of occurrence of any misuse of administrative resources during electoral processes.

REFERENCE POINTS TO ASSESS THE SITUATION

Rule of law⁷

- Are there legal safeguards in place against arbitrariness and abuse of power by public authorities?
- What is the source of such guarantees? (Constitution, general/specific legislation, statutory law, case law)
- Does the law provide for clear legal restrictions or limitations to discretionary powers, in particular when exercised by the executive in administrative action (concerning electoral processes, possible restrictions include safeguards to prevent conflicts of interest while appointing members of election management bodies, clear procedures for the allocation of areas where campaigning activities are allowed and the authorisation of rallies, detailed criteria for the allocation of administrative resources for campaigning as well as for equitable media access for all candidates)?
- Are clear and understandable procedures in place to implement these legal provisions?
- When discretionary powers are given to public authorities, is there judicial review of the exercise of such powers?
- Are public authorities required to provide reasons for their decisions in an adequate manner, in particular when they affect the rights of individuals?

Political freedoms

- Are basic human rights, e.g. the rights to freedom of expression, assembly and association, guaranteed?
- What is the source of such guarantees (Constitution, general/specific legislation)?
- Under which circumstances can such freedoms be limited?
- Are there limitations to these rights for civil servants and/or public employees?
- How can an individual appeal against the limitation of his or her rights?

Impartiality and neutrality of the public and semi-public sector

- Does the legal framework set clear criteria and procedures for the delineation of constituency boundaries? Do the provisions ensure that the delineation process is open, transparent and consensus-based?
- Does the legal framework contain requirements for civil servants and public employees to act impartially (in general and, in particular, during electoral processes)?

⁷ This report focuses on the areas which are of specific relevance for the misuse of administrative resources, i.e. prevention of abuse of powers. Other areas include aspects such as: legality, legal certainty, equality and non-discrimination and access to justice. See Council of Europe, Venice Commission, The Rule of Law Checklist, 2016.

- Are there restrictions in civil servants' and public employees' support of political parties or candidates?
- Are there restrictions in civil servants' and public employees' roles during elections (with regard to the election board, election commissions etc.)?
- Does the legal framework provide for the equitable treatment of all parties and candidates by public or semi-public entities (e.g. State-owned media)?
- Does the legal framework establish the balanced coverage of election campaigns by State-owned media and by public service broadcasting corporations?
- Does the legal framework provide for the non-involvement of election officials, judges, prosecutors, police and the military in electoral campaigning?

2. International standards and instruments relevant to any type of elections including at the local and regional level

Adherence to international instruments, which contain standards to tackle the misuse of administrative resources, is a further safeguard against possible misuse of such resources. Through the ratification of treaties, States accept legally binding international standards. In case of non-compliance, they incur State responsibility.

Relevant standards to tackle the misuse of administrative resources are incorporated in treaties at global and at regional level (so called "hard law"). It is important to assess if a State has ratified treaties such as the International Covenant on Civil and Political Rights (ICCPR) or the European Convention on Human Rights (ECHR) and its Protocol No 1 which provide for relevant standards for genuine elections and the right to political participation. More specific instruments establish respective State obligations, such as the UN Convention Against Corruption (UNCAC), the Council of Europe's Criminal Convention on Corruption (ETS No 173) and the Council of Europe Civil Law Convention on Corruption (ETS No 174). Further standards for the local and regional level are contained especially in the Additional Protocol to the European Charter of Local Self-Government.

Additional relevant documents comprise "soft law" instruments, which include political commitments by states in the framework of international organisations, such as the OSCE Copenhagen Document or the Council of Europe recommendations on common rules against corruption in the funding of political parties and electoral campaigns or media coverage. Likewise, documents such as the Venice Commission Code of Good Practice in Electoral Matters, the Venice Commission and OSCE/ODIHR Joint Guidelines for Preventing and Responding to the Misuse of Administrative Resources during Electoral Processes, the OSCE/ODIHR and Venice Commission Guidelines for Political Party Regulation as well as the OSCE/ODIHR Handbook for the Observation of Campaign Finance are important.

Although these are not legally binding instruments, they are persuasive as relevant soft law standards. Consequently, while a State cannot be held accountable in case of non-compliance, soft law standards contain political commitments and good practices, which provide for relevant guidance in the respective fields.⁸

The degree of acceptance of specific standards and good practices by a State is thus an indicator for its commitment to tackle instances of misuse of administrative resources.

⁸ Note that partly, the argument was made that the relevant documents would codify existing customary law (see F. Evers, 'OSCE Election Observation. Commitments, Methodology, Criticism', 15 OSCE Yearbook 2009, 235, 236; C. Binder, 'Anything New Since the End of the Cold War? or International Law Goes Domestic: International Electoral Standards and Their Legitimacy', 27 Anuario Espanol de Derecho internacional 2011, 437, 457).

REFERENCE POINTS TO ASSESS THE SITUATION

Commitment of States to binding international legal instruments including standards to tackle the misuse of administrative resources

Have States ratified the following treaties and therewith committed themselves to abide by the standards incorporated?⁹

Treaties/ Hard Law Standards

- ICCPR (Article 25, right to political participation)
- ECHR (Article 6/fair trial), Article 3 Prot. 1 to the ECHR (right to free elections)
- United Nations Convention against Corruption (articles 7,17 and 19 (abuse of functions))
- Council of Europe Criminal Law Convention on Corruption (ETS No 173)
- Council of Europe Civil Law Convention on Corruption (ETS No 174)
- Additional Protocol to the European Charter of Local Self-Government on the right to participate in the affairs of a local authority (CETS No. 207)

Commitment of States to soft law standards

Have States politically committed themselves to the following instruments?

- 1990 OSCE Copenhagen Document
- Council of Europe recommendations on common rules against corruption in the funding of political parties and electoral campaigns or media coverage
- European Code of Conduct for the political integrity of local and regional elected representatives (Recommendation 60(1999))
- Congress' recommendations on criteria for standing in local and regional elections and on conditions of office of elected representatives (Recommendation 375(2015) and Recommendation 383(2015))
- Congress' Roadmap of activities for preventing corruption and promoting public ethics at local and regional levels
- Congress' Resolution on the misuse of administrative resources during electoral processes: the role of local and regional elected representatives and public officials RES402(2016)
- Venice Commission Code of Good Practice in Electoral Matters
- Venice Commission Code of Good Practice in the Field of Political Parties
- Venice Commission and OSCE/ODIHR Joint Guidelines for Preventing and Responding to the Misuse of Administrative Resources during Electoral Processes
- Venice Commission and OSCE/ODIHR Guidelines on Political Party Regulation
- OSCE/ODIHR Handbook for the Observation of Campaign Finance

3. How does the relationship between international law and domestic law look like?

In addition to the respective international standards and good practices, the relationship between international and domestic law is of particular importance to identify and assess general areas of risk concerning the misuse of administrative resources in a specific State.

Accordingly, the relevance of international standards and good practices on the misuse of administrative resources in the domestic field is to be taken into account. Does domestic legislation provide for the effective implementation of international instruments at the national level?

⁹ The principle of *pacta sunt servanda* (agreements must be kept, Art 26 VCLT) presupposes that a State may not invoke the provisions of its internal law as justification for its failure to perform a treaty (Art 27 VCLT) or to respect customary international law. While there is no obligation of how international law should be implemented in the domestic legal order, international obligations are binding in that far that a State incurs international State responsibility if it does not abide by its international obligations; a State engages its political responsibility if it does not abide by its (non-binding) obligations (cf. OSCE Copenhagen Document).

REFERENCE POINTS TO ASSESS THE SITUATION

- Does the domestic legal system ensure compliance with binding international instruments/relevant hard law standards of relevance in the context of instances of a misuse of administrative resources (such as UNCAC)?
- Do national laws provide for the implementation of the relevant international guarantees (for example, is the intentional abuse of functions for the purpose of obtaining an undue advantage established as criminal offence as required by Article 19 UNCAC)?
- Do internationally persuasive instruments/soft law instruments such as the 1990 Copenhagen Document play a role in the domestic political discourse? (are they referred to, for example, in Parliamentary debates?)
- What is the relevance of soft law-documents (such as the Venice Commission Code of Good Practice in Electoral Matters) which provide for guidance and good practices on the misuse of administrative resources in the domestic field (are they referred to as relevant yardsticks, e.g. at ministerial level)?

4. How is the misuse of administrative resources regulated in the domestic legal framework?

The regulation of misuse of administrative resources in the domestic legal framework can be *explicit* or *implicit*.¹⁰ On the one hand, laws can explicitly provide for a general prohibition of the misuse of administrative resources. If so, this is usually done with focus on the election campaign. In the same way, specific instances of a possible misuse may be addressed, such as the prohibition of bribery of voters or restrictions on campaigning by certain groups of persons (e.g. civil servants, public employees) to avoid conflicts of interest.

Also, implicit provisions aiming at countering instances of misuse of administrative resources can be included in domestic legislation, such as through the establishment of guarantees (e.g. requiring a level playing field for all candidates; or by generally sanctioning breaches of official duties by electoral commissions) which are relevant safeguards against any abuse. Of course, explicit and implicit regulation may occur cumulatively.

Relevant legal provisions (explicit and implicit) to prevent the misuse of administrative resources relate to all phases of the electoral cycle/process, to rules for standing in elections, to the electoral campaign, Election Day and the post-electoral phase. They deal with particular groups such as voters, civil servants, politicians, the military or the police and contain specific regulations for the media or campaign and party financing.

Alternatively, the misuse of administrative resources may also be addressed through voluntary codes of conduct and through self-regulation. The central question is if adequate commitments were made and if relevant stakeholders abide by these commitments.¹¹

REFERENCE POINTS TO ASSESS THE SITUATION

Generalities of domestic legislation

- Is there (are there) written law(s) or provisions on misuse of administrative resources specifically?
- Is the stability of the law(s) ensured? (are laws on misuse of administrative resources stable insofar as they are only changed with fair warning?)¹²
- Is accessibility to the law(s) ensured for those concerned? (are relevant legislative acts published before entering into force? are they easily accessible, e.g. free of charge via internet/official bulletin?)

¹⁰ See 2013 Report of the Venice Commission on the misuse of administrative resources in the national laws of different countries. In this report, the Venice Commission distinguishes between explicit and implicit regulation, a distinction which is upheld here.

¹¹ See respectively, the 2016 Venice Commission/OSCE/ODIHR Joint Guidelines, para. 1.7.

¹² See respectively, Venice Commission Code of Good Practice in Electoral Matters II.2.b; Venice Commission Interpretative Declaration of the Code of Good Practice in Electoral Matters on the Stability of the Electoral Law (CDL-AD(2005)043).

- Does the legal framework regulate what is allowed and what is forbidden during the different phases of electoral processes in a clear and predictable manner (is consistency guaranteed in application of the law in respect of different instances of misuse)?

Explicit regulations in relevant domestic laws¹³

- Is there a general legal regulation to prevent the misuse of administrative resources (does such prohibition apply throughout the electoral cycle or only during election campaigns)?
- Are there provisions aiming at the neutrality of civil servants, public employees, people who enjoy the prestige of public office and similar groups (judges, military, etc.) during electoral processes (are they protected against pressure accordingly)? Are there provisions in the electoral code aiming at preventing the misuse of public equipment and premises?
- As regards this neutrality of civil service, are there rules related to conflicts of interest ensuring that private interests are not put before public interests?
- As regard to candidates, does the law establish conditions for standing in elections to avoid conflicts of interest for certain groups of persons (civil servants, public employees) (e.g. is the function performed a reason for ineligibility to prevent conflicts of interest? Are relevant measures such as the stepping down, unpaid leave or suspension from office foreseen)?
- As regards the electoral campaign, are there prohibitions of campaigning or supporting incumbents/candidates by civil servants and public officials, in order to ensure a level playing field between candidates?
- Is provision made for a clear separation between the State and political parties? More specifically are there provisions on party pluralism and an equitable treatment of political parties as well as a separation of State and party budgets?
- Are there provisions which aim at the protection of voters (to prevent pressure exercised on them; the bribery with gifts during the election campaign and on Election Day etc.)?

Implicit regulations in relevant domestic laws¹⁴

- Do laws generally provide for the integrity of the electoral process and ensure the equality of opportunity for candidates and parties (is there a level playing field for electoral contestants)?
- Is general provision made to outlaw bribery and corruption (such as the prohibition to give undue advantages to voters or to promise public employment)?
- Is there legal provision for the protection of whistle-blowers to avoid intimidation and harassment?
- Is there an adequate legal framework related to the conduct of campaigning in a free and fair atmosphere?
- Are there rules for party and campaign financing (relevant guarantees may include transparency requirements, audits by independent bodies, etc.)?
- Do laws provide for the neutrality of State-owned media and public broadcasting corporations during the election campaign?
- Do laws provide for an unimpeded and non-discriminatory media access for all political parties and candidates in State-owned media? (media access can be provided on the basis of either strict and proportional equality)
- Are breaches of official duties by members of electoral commissions sanctioned?
- Is there specific regulation made to prevent the misuse of administrative resources at the local and regional level (c.f. do laws require neutrality of civil servants in local communities and municipal employees)?

¹³ The different options mentioned hereafter may apply cumulatively.

¹⁴ The present questions are chosen by way of example. Of course, they may apply cumulatively. Also, other relevant prohibitions may exist which are not mentioned here.

Misuse of administrative resources dealt with by codes of conduct and self-regulatory mechanisms¹⁵

- Is there a code of conduct, which deals with the misuse of administrative resources?
- What is the level of detail of the relevant codes of conduct?
- Are there any (informal) sanctions provided for in case of violation (public warnings, calls for order)? Is the implementation of codes of conduct monitored in any way?
- At which levels of government do such codes of conduct and self-regulatory measures apply (national, regional, local etc.)?

B. Implementation of the legal framework, general remedies and sanctions

It is not enough that States have ratified the relevant treaties and undertaken political commitments and that domestic laws establish rules against the misuse of administrative resources (explicitly or implicitly). A further aspect is, of course, compliance with relevant guarantees at all stages of the electoral process. Accordingly, domestic laws shall be adequately implemented and enforced.

The implementation of and compliance with domestic laws to prevent the misuse of administrative resources requires an impartial and non-discriminatory implementation of relevant laws without distinction between the incumbent and other candidates as well as between parties in power and the opposition parties in all areas of relevance: voter registration, candidate registration, the election campaign, party and campaign financing, the media, and also the Election Day. It further presupposes clear rules and criteria to guide relevant conduct (open and transparent procedures) as well as more general transparency requirements. Independent monitoring and audit institutions to detect instances of misuse *ex officio* are of further relevance, especially in the field of campaign and political party financing and media access.

Finally, the question of effective complain mechanisms about the misuse of administrative resources and access to independent and impartial bodies to deal with violations has to be looked at. Also, the existence of adequate, proportionate and predictable sanctions is crucial.¹⁶ All these rules have to be adequately enforced. In line with these considerations, in section B, the implementation and compliance with the relevant domestic guarantees shall be addressed.

REFERENCE POINTS TO ASSESS THE SITUATION

Implementation of the legal framework

- Is there equality of opportunity and equal treatment before the law (of parties/candidates)?
- Are there effective measures taken against the misuse of State resources?
- Are there mechanisms to prevent, correct and sanction the abuse of discretionary powers?
- Is candidate registration handled in a non-discriminatory way (is there a level playing field between the candidates)?
- Is there compliance with campaign regulations concerning the misuse of administrative resources (relevant campaign regulations are understood broadly, they may relate to rules on campaign financing and the allocation of places for campaigning, but may also require the general separation between the State and political parties)?
- Are there clear procedures for the allocation of administrative resources for campaigning in order to ensure compliance?
- Are there clear guidelines for the implementation of campaign financing regulations to ensure equality of opportunity and non-discrimination?

¹⁵ Apart from relevant domestic provision, also (non-binding) codes of conduct and voluntary self-regulation etc. may be effective means to tackle the misuse of administrative resources.

¹⁶ Likewise, procedural guarantees and transparency requirements are crucial to address and prevent the misuse of administrative resources.

- Are there clear regulations with regard to public procurement (especially during election campaigns to prevent the allocation of government contracts etc. for personal gain or to the advantage of political parties)?¹⁷
- Is there compliance with media regulations (is there equitable treatment of all parties and candidates by State-owned media and public service broadcasters? is an adequate access to the media, in general, ensured)?¹⁸
- Are there clear procedures for a representation of party representatives and candidates in the media on a non-discriminatory basis?
- Is objective information as regards political competitors provided for?
- Are the laws and rules to prevent the pressure on/bribery of voters on Election Day adequately implemented and complied with?

Transparency

- In relation to transparency, especially as regards party and campaign financing but also as regards media access - are there any reporting obligations?
- Are there audits by independent bodies as regards compliance with the relevant obligations?

Remedies, complaints and appeals

- Is there an effective and timely system of complaints and appeals?
- Is there access to independent and impartial complaint institutions (e.g. election commissions) with final appeal to court in cases of misuse?
- Are remedies provided for in timely and adequate manner?

Audits, oversight and monitoring

- Are there further oversight institutions (e.g. ombudspersons) where complaints may be brought to?
- Are there independent audit and oversight institutions to monitor compliance with rules of relevance in relation to the misuse of administrative resources ex officio¹⁹, as regards campaign and political party financing²⁰ as well as media access?
- Do the relevant bodies have sufficient competences, resources and staffing to ensure that they perform their auditing and monitoring functions in a timely, effective and comprehensive manner?
- Are the communication and the flow of information between audit authorities, electoral management bodies and other equivalent bodies, in particular at the grassroots' level, ensured in order to facilitate transparent decision-making and to make monitoring more effective?
- Are persons who bring instances of misuse to the attention of public authorities (c.f. whistle-blowers) adequately protected to avoid intimidation, harassment, dismissal or violence?

Sanctions and enforcement

- Are there adequate and predictable sanctions provided for in cases of infringements of the rules on the prohibition of the misuse of administrative resources (are the sanctions proportionate to the offence committed)?
- Is the misuse of administrative resources made an electoral offence?

¹⁷ For example, full transparency as regards procurement, public tender should be provided for etc.

¹⁸ Note that this equitable treatment of electoral campaigns by the media –as well as the other media related questions in this section –can only be assessed based on reliable media monitoring processes, which imply that the respective countries have appropriate institutions able to monitor media access and equality

¹⁹ Relevant areas include access to the media on equal footing; compliance with the regulation of campaign and political party financing etc.

²⁰ A further, related question: are there reporting requirements by political parties and candidates on the origin and purpose of financial transactions to facilitate the detection of potential misuse?

- Are civil servants and public employees who are engaged in misuse subject to disciplinary, administrative and/or criminal sanctions?²¹
- Are steps taken to prevent, identify, investigate and prosecute instances of the misuse of administrative resources for campaign purposes and instances of pressure on or intimidation of voters?
- Are serious instances of misuse of administrative resources for campaigning established as criminal offence?
- Is there legal provision that funding which provides for illicit advantage has to be returned to State/regional/municipal budget?
- Can the misuse of State resources be a ground for setting aside the result of the election?
- Is the implementation of sanctions against the misuse of administrative resources effectuated independently from political power?

Compliance with the relevant standards at the local and regional level²²

- Do local authorities, when having particular roles in the electoral process, act impartially (e.g. as members of polling station election commissions; in enforcing campaign or Election Day-related regulations)?
- Has there been discrimination of opposition candidates by local authorities during the election campaign (e.g. as regards the assignation of places for campaigning and the advertising surface)?
- Have specific promises been made by local and regional authorities in their area of competence, which would qualify as an abuse (c.f. when running as incumbents or in support of a particular party or candidate, with regard to, for example, zoning, land use or public procurement)?
- Has pressure been exercised on civil servants and municipal employees by local authorities (c.f. with regard to the possibility of losing a job or prospects of employment)?
- Have there been instances of intimidation or bribery of voters by local authorities?

C. Qualification of specific instances of a misuse of administrative resources during electoral processes including at local and regional level

In addition to the identification of general risk areas in relation to the misuse of administrative resources,²³ the identification and qualification of specific incidents of misuse is also of relevance. It will be part of the present section C of the checklist. This seems warranted for various reasons.

First, there is a need of criteria for particular instances of misuse of administrative resources since the exact dividing line between “acceptable” and “impermissible” forms of any use of administrative resources is situation-specific and depends on the circumstances of each case. There is no “one fits all”-rule. Rather, an individualised assessment shall be made for each possible instance of misuse of administrative resources. This is complicated further by the sometimes-difficult distinction between the illegitimate/inappropriate misuse of administrative resources, which constitutes an unfair advantage for the incumbent or the party in power, and the legitimate/necessary exercise of government functions. In fact, measures to prevent the misuse of administrative resources may imply limitations to the exercise by State institutions of some of their functions, especially in the pre-electoral period. These limitations may hamper the functioning of such institutions.

²¹ Sanctions may range from formal warnings to monetary penalties over reduction in public financing to criminal prosecution.

²² As stated, misuse of administrative resources at the local and regional level has its own distinguishing characteristics. Local and regional authorities have community related tasks which require specific attention to particular instances of misuse. These include general functions, e.g. as regards decisions on zoning and land use. Likewise, functions in the election campaign, for example the distribution of places for campaigning or information on campaign related events which is sometimes directed to local authorities, give them some possibility to influence the electoral process. On Election Day, local and regional authorities may sit as members of polling station committees/commissions or may be involved in the enforcement of the prohibition of campaign activities. The special link of local and regional authorities to their respective communities and the close ties between local and regional authorities, civil servants and municipal employees are of further relevance. These specificities have to be taken into account especially when assessing the compliance with the domestic legal framework.

²³ See sections A and B above.

Second, measures to address a misuse of administrative resources may imply restrictions of fundamental freedoms (of expression, assembly etc.) of certain groups of persons (e.g. of civil servants to campaign or restrictions to stand as candidates). The possible encroachments on the human rights of these groups may call for proportional measures in the fight against misuse.

The impact and consequences of measures against misuse have to be taken into account accordingly when qualifying the misuse of administrative resources and calling for action against it. The following questions should contribute to the detection of instances of misuse in specific situations. They should also help to assess the seriousness of particular cases and further the identification of "ideal" measures to counter them. In particular, domestic measures to counter misuse of State resources will have to be assessed in relation to their impact on the functioning of State institutions as well as on fundamental rights. Indeed, such measures will affect the legitimate exercise of governmental functions and the encroachment on civil servants' and public employees' fundamental rights to varying extents.

REFERENCE POINTS TO ASSESS THE SITUATION

Consequences of any restrictions on the use of administrative resources vs. degree of impact /encroachment upon fundamental/individual/human rights and the functioning of State institutions.

- Is the method used by the respective country in question rather to limit fundamental rights in order to avoid misuse of administrative resources or does it provide for wide access to administrative resources but on equal terms to all candidates?
- To what extent do measures countering the misuse of administrative resources affect on fundamental rights? More particularly, how far do limitations go in order to safeguard the equitable treatment of the contestants and in order to ensure the neutrality of the State and its administration?
- How gradual are measures related to the incompatibility of certain public functions with candidacy (c.f. prohibition to campaign while in office, temporary suspension or even a resignation from office when standing for elections)?

(Self) governmental functions and illegitimate use of administrative resources²⁴

- How shortly before the Election Day does the alleged misuse occur?
- How closely is it linked to the election campaign of the incumbent or a particular candidate or party?
- To what extent is the alleged misuse necessary for the continuity and efficiency of (self)government work (to what extent is it related to the exercise of (self)government functions, is it indispensable/necessary/unimportant to (self) government work and can it be postponed until after the elections without detriment to the local community/region/ State functioning)?
- Conversely, to what extent do measures to prevent the misuse of administrative resources imply limitations to the exercise by State institutions of some of their functions, especially in the pre-electoral period?
- Does the alleged misuse concern long-term measures which have been foreseen for considerable time (have such measures been part of a (self)governmental programme or have they been introduced ad hoc, in the context of the campaign)?
- If major announcements are made during election campaigns, is this due to unforeseen circumstances, such as natural disasters or emergencies?
- If appointments to public bodies are made during the election campaign, are they essential?

²⁴ Rules to prevent the misuse of administrative resources have to be examined against their impact on the necessary continuity and efficiency of (self)government work. Accordingly, long-term projects or urgent measures must be distinguished from activities, which are mainly election campaign related. While the former activities are generally acceptable and even required, mainly campaign related measures should be prevented.

The seriousness of misuse of administrative resources

- What is the amount of administrative resources allegedly misused during electoral processes?
- How often does it occur?
- How does the overall confidence of voters in electoral processes look like?
- Are there only isolated incidents of misuse or is it a continuous practice?

The degree of awareness concerning problems and instances of a misuse of administrative resources

- How is the awareness within the political sector and the public administration as regards instances of misuse of public resources?
- Is there ability and willingness to recognise the problem and to change practices of possible misuse?
- How does the awareness within civil society look like?
- Do the media exercise their "watch dog function" (c.f. is there independent media reporting about concrete cases of misuse)?
- Is there a general awareness raising effort made for counter this phenomenon?

Complaints and appeals avenues, monitoring and sanctions

- Are there effective remedies in place in cases of alleged instances of misuse (e.g. is there an effective system of appeals before impartial tribunals/courts; are instances of misuse investigated in an effective, timely and impartial manner)?
- Are independent monitoring institutions in place to assess compliance with the relevant (campaign financing, media etc.) regulations ex officio and are they sufficiently resourced to be effective?
- Are there effective and independent NGOs to assess compliance with the relevant (campaign financing, media etc) regulations?
- Are there proportionate, adequate and predictable sanctions?
- What is the graduation of sanctions in cases of misuse?
- Are the sanctions properly applied or is their application problematic?
- Can the misuse of administrative resources result in setting aside the result of the election?

Local/regional level

- Are additional safeguards in place at local/regional level to prevent the misuse of State resources in view of the particular relationship of a local authority to the community (c.f. monitoring/oversight bodies which target especially the local and regional level)?
- Does a misuse of administrative resources at grassroots' level have particular (severe) consequences given the special relationship between the local and regional authority and the community where the election takes place?

D. Preventive action to counter the misuse of administrative resources with special focus on the grassroots level

It is an essential first step to detect, identify and then classify instances of misuse as proposed in section C. In addition, action to prevent misuse is required as complementary measure. Respective action relates to the following parameters: an appropriate legal framework and adequate implementing regulations, the necessary political will and effective awareness raising activities. Moreover, the existence of civil society and media pressure entails scrutiny and accountability with regard to those who are responsible of the prevention of misuse and those who commit such malpractice. Particular action may be required – in line with the principle of subsidiarity – for the local and regional level to prevent specific cases of a misuse of administrative resources.

REFERENCE POINTS TO ASSESS THE SITUATION

Generalities

- Does the legal framework outline what is allowed and what is prohibited during electoral processes (cf. concerning the prohibition of non-essential appointments during campaign periods, as regards the holding of a public mandate while standing in elections etc.)?
- Is the legal framework sufficiently clear?
- Is the legal framework adequately detailed and concretised by regulations of competent institutions to address the misuse of administrative resources?
- In coherence with the subsidiarity principle, are there clearly defined circumstances in which it is preferable for action to be taken by competent institutions at local or regional, rather than national level, in order to efficiently tackle the misuse of administrative resources, in line with the general legal framework?

Political will and strengthening of checks and balances

- Are restrictions on the misuse of administrative resources implemented in good faith? For example, are civil servants and public employees protected against hidden sanctions and intimidation? Is the principle of neutrality promoted in relation to the respective stakeholders (political parties, State institutions, public servants, electoral management bodies) as regards compliance with their professional duties?
- Do codes of conduct and charters of ethics complement the general legal framework to prevent misuse of administrative resources?
- Are there measures undertaken to further the development of a public ethos culture (e.g. public campaigns to pinpoint corruption, and the misuse of public resources)?
- Is there public acknowledgement for the role of civil society as public watchdog to report on instances of misuse of administrative resources?
- Are there measures to further the development of independent and pluralistic media, which can function as public watchdog (e.g. through subventions/financial support of smaller media outlets)?

Information, awareness raising and training

- Is training on relevant standards and practices provided to the relevant stakeholders (c.f. electoral management bodies, political parties, candidates, election observers)?
- Are there internal instructions and training of civil service on the necessarily non-partisan conduct of the executive branch?
- Are there awareness raising activities for all stakeholders of civil society?

Specific measures at local and regional level

- Have measures been adopted to strengthen the implementation of the legal framework to address the misuse of administrative resources, in line with the principle of subsidiarity (c.f. monitoring and audit institutions at the local and regional level)?
- Have codes of conduct on ethical behaviour for local/ regional authorities and municipal employees been established to counter the misuse of administrative resources?
- Are codes of conduct – where they exist at different levels of government - applied uniformly within the country?
- Have information and awareness-raising activities been conducted at the level of local and regional authorities to prevent, in particular, instances of misuse in the context of elections?
- Are there measures in place to strengthen ethical conduct at local and regional level (c.f. trainings for newly elected mayors, councillors, governors etc.; information packages for professional newcomers in local and regional bodies)?
- Is adequate transparency and control provided for at the local/regional level (e.g. through the requirement of double signatures; through the establishment of relevant data bases/track records of decisions taken; through open tender in public procurement etc.)?
- Are measures in place to protect civil servants, municipal employees including teachers and educators against pressure and intimidation?

Conclusions

Over the last years, cases of misuse of administrative resources during electoral processes have been highlighted by many international observers. Despite the fact that it is widespread, it seems that this type of malpractice has made its way into the established European political culture. It can be found in emerging democracies and in the countries with a long-standing democratic tradition.

Due to the specific and close link that exists in the field between incumbents, candidates, public employees and voters, misuse of administrative resources is of particular concern at the local and regional level. It prevents the creation of a level playing field in elections and undermines the right of all candidates to stand for election on an equal basis. At the same time, the right of voters to make their choice without being unduly influenced is at stake. More generally, citizens and voters have a right to expect integrity, transparency and commitment from those who stand in elections.

In order to strengthen the trust between local and regional elected representatives and citizens, the Congress has engaged in a Roadmap of activities for preventing corruption and promoting public ethics at the grassroots' level. With regard to the specific context of elections, Resolution 402(2016) has been adopted on the Misuse of administrative resources during electoral processes and the role of local and regional elected representatives and public officials. The present checklist for compliance with international standards and best practices is a logical consequence of this work and feedback on earlier drafts was received from the Venice Commission, OSCE/ODIHR and IFES in order to facilitate the implementation of international standards and best practices locally.

APPENDIX: Questions of particular relevance for election observers

Election observers are a particularly important group that observe/detect instances of misuse of State resources. Accordingly, the following questions have been excerpted from the checklist above to provide specific guidance to observers to identify instances of misuse of State resources in the field. These questions should be understood according to the relevant explanations provided for in the checklist.

Legal framework & Implementation/Enforcement

- Is there a legal regulation – explicit or implicit – to prevent the misuse of administrative resources (e.g. by requiring an equitable treatment of all parties and candidates by public or semi-public entities including State owned media)?
- Are there provisions that ensure the neutrality of civil servants and similar groups in particular during the election campaign? Are there provisions in the electoral code aiming at preventing the misuse of public equipment and premises?
- Are these rules adequately implemented and enforced?
- Are independent monitoring institutions in place to assess compliance with relevant (media, campaign financing) regulations? Are procedures transparent?
- Is there an effective and timely system of complaints and appeals? Are there proportionate, adequate and predictable sanctions?
- Is there a code of conduct that deals with the misuse of administrative resources? Is the implementation of the code of conduct monitored in any way?

Seriousness of instances of misuse of administrative resources

- What is the amount of administrative resources allegedly misused?
- How often does it occur?