

INTERIM REPORT No. 2
9 – 22 December 2009

23 December 2009

I. EXECUTIVE SUMMARY

- Less than a month before election day, the parliament is considering another set of amendments to the election law that would amend provisions on voter lists, mobile voting and results protocols, including limiting the possibility to make changes in the voter lists on election day.
- The Central Election Commission (CEC) continues to pass decisions within the legal deadlines. The CEC holds closed pre-session meetings without candidate representatives, observers and journalists, in violation of the law. This decreases the transparency of the CEC's activities.
- The CEC has, thus far, managed to maintain an image of independence, despite working in a complex political environment. This includes an unaddressed and incomplete legal framework, and a 2010 state budget that has not yet been approved. So far, the CEC has only received 0.6 per cent of its budget for the election.
- The District Election Commissions (DECs) are operational, but their activity is negatively affected by a lack of funds, limited experience of some commissioners, their large size and an absence of rules of procedures. The DECs have established 33,584 precincts in the country and the CEC has established 113 precincts abroad.
- The preliminary voter lists contain 36,310,809 voters; a total of 522,485 duplicates have been removed so far. Provisions of the current law allowing for introducing changes in the voter lists on election day continue to raise concern.
- The election campaign is gaining momentum. It is highly visible across the country in billboards and posters. All candidates have been able to campaign freely. At times, certain candidates have merged their official duties with campaign activities. The campaign has been more dynamic in the western Ukraine. The tone of the campaign is becoming increasingly negative.
- Initial media monitoring results of campaign coverage within news programs have revealed different approaches in how TV channels determine when a candidate is acting in an official capacity versus as a candidate. Paid political advertising on TV stations with national coverage has been extensively used by the main contenders.
- The CEC rejects most complaints by letter on technical or jurisdictional grounds instead of taking formal decisions on complaints, which deprives stakeholders of the right to further appeal CEC decisions. The courts have rejected the CEC's stance on the issue of the proportional distribution of leadership positions in the DECs. They ruled that the proportionality principle applies to all stages of the appointment of such positions.

II. LEGAL FRAMEWORK

Draft amendments have been introduced in parliament to modify the Law on the Election of the President (hereinafter, election law). It is a more limited set of amendments than those rejected on 2 December. The new amendments would affect the sections of the law dealing with the voter register, mobile voting, results protocols and determination of final results.¹ The amendment on the voter register suggests deleting the provision that allows changes to be made up to one hour before the polls close and replacing it with a provision that would close the voter lists two days before election day. The amendments are currently on the parliamentary agenda and are to be heard on 24 December.

A new anti-corruption law that takes effect on 1 January will be applicable to members of District Election Commissions (DECs) and Precinct Election Commissions (PECs). It will prohibit them from being in a supervisory relationship with other commission members whom they are related to or with whom they share a household.² The law may affect the composition of PECs as approximately one million people will staff them. A violation of this law in the formation of DECs and PECs could lead to challenges to their decisions. The plenary session of the Supreme Court in November decided to challenge provisions from the anti-corruption law in the Constitutional Court.

III. ELECTION ADMINISTRATION

The Central Election Commission (CEC) continued to adopt decisions and clarifications within the legal deadlines. They adopted the form and text of the ballot and rules for considering complaints by the DEC, among other things.

The CEC has, thus far, managed to maintain an image of independence, despite working in a complex political environment. This includes an unaddressed and incomplete legal framework, and a 2010 state budget that has not yet been approved. However, these circumstances have led to the situation when the CEC has not yet clarified the application of certain inconsistent provisions of the law, which is one of its responsibilities. This may negatively impact the performance of lower-level commissions.

The law on the CEC stipulates that the commission must act in an open and public manner and adopt all of its decisions in open sessions. However, the CEC holds closed pre-session meetings without candidate representatives, observers and journalists. According to the CEC these meetings are held to discuss the agenda, agenda items and draft decisions so that a coordinated CEC position can be reached and presented at the open session. The open sessions then become the forum where decisions are simply announced, but not debated. This violates the law³ and decreases the transparency of the CEC's activities.

On 18 December, the CEC issued an appeal to the president, parliament and government stressing the urgent need for financing of the elections. Thus far, the CEC has only received 0.6 per cent of its approved 2009 budget.⁴

¹ The draft law is sponsored by two members of parliament from BYT, one from Our Ukraine, one from People's Party and one independent. The following articles have been suggested for amendment: 32-36 on voter lists, 77 on mobile voting, 79-84 on protocol of the PECs and determining the results of the election.

² This includes spouse, children, parents, grandparents, grandchildren, adoptive parents and children.

³ Article 28.1 of the election law; articles 2.2, 4.1, 4.3 of the law on the CEC; articles 1.4, 10.1 and 13 of the rules of procedure of the CEC. All concern the requirements that CEC sessions, deliberations and activities be conducted openly.

⁴ See at the CEC webpage; http://www.cvk.gov.ua/news/news_18122009.htm.

All DEC members are operational and appear to be on track in their preparations, with legal deadlines being adhered to thus far. DEC members have completed the delimitation of precinct boundaries based on proposals from local authorities. They have established 32,087 regular polling stations. Additionally, 1,497 special polling stations have been created in hospitals and prisons, as well as 113 polling stations abroad. The deadline for appointment of PEC members, based on candidate nominations, was 21 December.

The training of the DEC chairpersons, deputy chairpersons and secretaries has been completed. The fact that parliament may make legal and procedural changes after DEC training sessions have already been held is of concern.

DEC membership is based on political nominations and leadership positions are distributed proportionally. This system does not necessarily ensure that a nominee's knowledge and experience are taken into account in either case. Combined with the large size of the DEC members and the fact that their sessions are not regulated by uniform rules of procedures, this at times leads to chaotic sessions.⁵

While most DEC members were satisfied, some of the DEC members expressed discontent with the level of operational support and cooperation from the local administration.⁶ DEC members have yet to receive funds for their work from the CEC. DEC members have been relying on credit or members' private funds until now.

Thus far, 386 DEC members have been replaced, including 123 of the 675 leadership positions. In 16 cases the CEC selected replacements with a different candidate affiliation, leading to a distortion of the proportionality principle. Three CEC decisions were successfully challenged in court and the CEC stated that it would respect the proportionality principle in future replacements, while past replacements would not be reviewed.

Of the 7,414 DEC members, 52.4 per cent are female. Among DEC leadership positions, women represent 43.6 per cent of the chairpersons, 45.3 per cent of the deputies, and 76.2 per cent of the secretaries.

IV. VOTER REGISTRATION

The preliminary voter lists contain 36,310,809 voters. Thus far, a total of 522,485 duplicates have been removed, while 174,784 entries are still under scrutiny as potential duplicates. On 16 December the state voter register (SVR) department of the CEC completed dividing the voter register by polling station. Two printed copies of the preliminary voter lists have been sent to each DEC. One copy remains with the DEC and the other is transferred to the respective PECs where it will be accessible no later than 27 December for public inspection and updates.

The CEC issued several clarifications on aspects of the voter registration. Among other things, it specified that requests for modifications of the lists must be decided by PECs without interrupting the voting process. However, under the new set of amendments to the election law submitted to parliament, inclusion and exclusion of voters on election day would require a court decision, while PECs would only be allowed to correct minor misspellings and typographical errors.

Under current rules, a voter may apply for a voting address different from his/her temporary or permanent residence address.⁷ Thus far, some 96,500 voters have registered a second address. A

⁵ For instance DEC members 160, 172, 176.

⁶ As found in DEC members 29, 57, 86, 91, 149, 168, 180, 184, 185, 186, 187, 188, 195, 212 and 225.

⁷ Article 8.2 of the law on SVR.

potential problem arises if such a voter first votes based upon his/her voting address, and then later approaches a PEC or court applying for inclusion on a second voter list based on proof of residency. Neither PECs nor the courts have the means to confirm whether voters have been omitted from voter lists by mistake or have been removed by their own request.

The OSCE/ODIHR EOM visited 82 of 755 register maintenance bodies and observations indicate they have adequate working conditions and equipment and that officials appear well trained.

V. THE CAMPAIGN

The election campaign is gaining momentum and is highly visible across the country in billboards and posters. Campaigning in the media, public rallies, leafleting, pop concerts and door-to-door canvassing are also common. All presidential candidates seem to enjoy free campaigning throughout the country. OSCE/ODIHR EOM observations indicate that the campaign, thus far, has been more dynamic in the west and south-west than in the rest of the country. However, the tone is becoming more negative, with frequent critical exchanges between candidates. The OSCE/ODIHR EOM received reports of illegal defamatory campaign material being circulated.⁸

The OSCE/ODIHR EOM has met 13 of 18 presidential candidates or their campaign managers.⁹ Their main concerns relate to insufficient funding for election administration (due to the absence of a 2010 state budget), accuracy of the voter lists, alleged vote buying schemes, use of administrative resources in campaigns and the independence of election commissions, including on election day. Some candidates express a lack of confidence in the judiciary.

The OSCE/ODIHR EOM noted that presidential candidates in executive positions had difficulties in distinguishing between their campaign activities and official functions. At a campaign event in Kyiv region on 16 December, Prime Minister and candidate Ms. Yulia Tymoshenko handed out land certificates to village councillors for distribution in the villages. Prior to the start of the event, Bloc of Yulia Tymoshenko (BYT) campaign materials were distributed to participants.¹⁰ The press also reported that Ms. Tymoshenko or her campaign representatives were handing out land certificates to voters.

A complaint was filed over this issue with the DEC 95 by two of the DEC members alleging a violation of articles 64.1.2 and 64.6 of the election law.¹¹ The DEC passed a resolution acknowledging the violation and forwarded it to the CEC. The complainant's main objection was that campaign activity took place in a state administration building and was, thus, an abuse of administrative resources.¹²

⁸ The OSCE/ODIHR EOM reports from Kyiv, Zaporizhzhia and Kirovohrad.

⁹ Yuriy Kostenko, Volodymyr Lytvyn, Oleksandr Moroz, Oleksandr Pabat, Vasyl Protyvsikh, Oleh Riabokon, Serhiy Ratushniak, Lyudmila Suprun, Petro Symonenko, Oleh Tiahnybok, Viktor Yanukovych, Arseny Yatsenyuk, and Viktor Yushchenko.

¹⁰ The OSCE/ODIHR EOM observations in Kaharlyk, Kyiv Oblast.

¹¹ According to these articles participation in the pre-election campaign of state executive bodies and bodies of local self-government, their officials, and officers is prohibited. It is prohibited to conduct a pre-election campaign that is accompanied by giving money to voters or providing them with goods, services, works, securities, credits, or lotteries on preferential terms or free of charge.

¹² The Tymoshenko campaign filed a suit in the local court to prevent the DEC from sending the resolution to the CEC. The court granted the Tymoshenko campaign relief and cancelled the resolution stating that DEC members are not allowed to file complaints as per article 91 of the election law.

VI. MEDIA

On 4 December the OSCE/ODIHR EOM started monitoring five TV stations with nationwide coverage¹³ and five newspapers circulated nationwide.¹⁴ Initial findings indicate that in the period between 4 and 19 December, 8¹⁵ of 18 presidential candidates purchased airtime for their campaign on the monitored TV stations. Mr. Yanukovych had 58 per cent¹⁶ of the total paid political airtime on TV station *Inter* and 43 per cent on *Ukraina TV*. Ms. Tymoshenko bought 46 per cent of paid political advertising time on *Channel 5* and 55 per cent on *UTI*. Other candidates bought considerably less paid airtime on the TV stations monitored.

The monitored TV stations largely followed their legal obligation to separate political advertisement from news and programming and to specify it as such. However, the OSCE/ODIHR EOM noted a case of political advertising in favour of candidate Tihipko that was not announced as such. The broadcast was shown during primetime on *ICTV* on 13 December and lasted 20 minutes.¹⁷

While paid advertising does not provide for equal opportunities among contestants since it depends on the financial means of individual candidates, the election law provides for equal airtime and space for candidates in state-owned media outlets. State-owned TV station *UTI* provides free airtime for presidential candidates; the CEC defined a schedule on 19 November through the drawing of lots. Free airtime provides lesser-known candidates with the opportunity to present their platforms. This, however, is undermined by the low viewership of *UTI* and the fact that five of the main candidates have refused to participate in TV debates on *UTI*.¹⁸

Initial media monitoring results of campaign coverage within news programs have revealed different approaches in how TV channels determine when a candidate is acting in an official capacity versus as a candidate. The election law does not provide clear guidance for journalists to separate coverage of a candidate's official duties from his/her campaign activities.¹⁹ This leaves it up to the journalists to decide and depends on their professionalism, autonomy and the TV station's internal self-regulation. The lack of a clear definition may encourage candidates with official roles to disguise campaign activities within the framework of their official activities to gain additional and unfair media coverage.

VII. COMPLAINTS AND APPEALS

The Courts

The term in office of the head of the High Administrative Court (HAC)²⁰ is set to expire on 24 December. A dispute has arisen concerning the nomination process and whether or not the present head should be re-nominated. The Law on the Judiciary, which governs the nomination

¹³ Including *Channel 5*, *ICTV*, *Inter*, *Ukraina TV* and *UTI*.

¹⁴ *Den, Fakty I Komentarii, Segodnya, Ukraina Moloda* and *Uryadoviy Kuryer*.

¹⁵ Yuriy Kostenko, Volodymyr Lytvyn, Oleh Tiahnybok, Serhiy Tihipko, Yulia Tymoshenko, Viktor Yanukovych, Arseniy Yatsenyuk and Viktor Yushchenko.

¹⁶ A total airtime of 1 hour and 27 minutes of paid advertising during the monitored period.

¹⁷ Contacted by the OSCE/ODIHR EOM on 16 December, *ICTV* management admitted they had made a mistake by not labelling the broadcast as political advertisement.

¹⁸ Article 62 of the election law provides candidates with the right to participate in a 60 minutes debate with one other candidate. The schedule and candidate "pairs" were determined by the CEC on 15 December.

¹⁹ Article 58.3 of the election law stipulates that coverage of candidates carrying out their official duties (without comments of a campaign nature) should not be considered as campaigning. The law does not define "campaign nature".

²⁰ The HAC hears appeals on election related complaints and is the court responsible for hearing cases concerning the results of the election.

process, initially gave the president the authority to nominate the HAC head. In 2007, a Constitutional Court decision abrogated this authority; shortly after the Judicial Council passed a decision giving themselves this authority. To date, the parliament has failed to pass a law clearly spelling out the appointment process.²¹ The Judicial Council voted to re-nominate the current head of the HAC, but the Supreme Court has publicly challenged its authority and is calling for a new head to be nominated. As of yet, no final resolution has been reached.

The Kyiv Administrative Court of Appeal (KACA) has handled 56 election-related complaints. The HAC has considered 47. Of note are two complaints filed in the KACA by President and candidate Mr. Viktor Yushchenko's representative regarding the proportional distribution of DEC leadership positions which are guaranteed to all presidential candidates by article 23.8 of the election law.²²

In both cases, Mr. Yushchenko's initial nominee to the DEC was named to one of the leadership positions and later voluntarily resigned. The CEC replaced them with a member appointed by a different candidate. Mr. Yushchenko's representative filed a complaint with the KACA arguing that article 23.8 obliged the CEC to respect the proportionality principle throughout the election process, therefore giving them the right to re-nominate. The CEC argued that article 23.8 only applied to the initial formation of DEC's and it could decide on subsequent replacements without adhering to this proportionality principle.

In both cases, the KACA ruled in favour of Mr. Yushchenko. The court cited CEC data showing that after the replacement appointments were made, Ms. Tymoshenko had 45 leadership positions and Mr. Yushchenko - 40, while initial appointments provided both with 41. The CEC was ordered to name Mr. Yushchenko's nominees to the vacated leadership positions. Subsequently, the HAC upheld the KACA decisions in both cases.²³

The OSCE/ODIHR EOM observations to date have found very few complaints filed in the local and regional administrative courts.²⁴ Several courts have stated that a lack of financial and human resources are a hindrance to hearing election-related cases. This is further exacerbated by the short timeframe for hearing cases.

CEC and DEC's

The CEC continues to reject most complaints by letter on technical or jurisdictional grounds instead of taking formal decisions. This deprives stakeholders of the right to further appeal CEC decisions. When it does take a formal decision there is little discussion in the session as the deliberations are taking place in closed meetings that are held before each public session. According to the CEC website, they have only concluded six cases by formal decision.²⁵ Clerical errors in the filing of complaints as well as the five-day deadline have been noted as reasons to deny cases.

²¹ The OSCE/ODIHR EOM was informed that BYT was planning to introduce a law to officially give this authority to the Judicial Council.

²² As noted in the OSCE/ODIHR's Interim Report No. 1, dated 15 December 2009, the election law does not specify what this proportionality should be in relation to. In practice, the CEC has respected this proportionality both at a national as well as at a regional level.

²³ The CEC has lost another case on this same issue in the KACA involving candidate Tihipko.

²⁴ A total of five complaints were filed at the 12 District Administrative and 4 regional Courts of Appeal visited by the OSCE/ODIHR EOM thus far.

²⁵ The OSCE/ODIHR EOM made several requests for updated numbers on complaints and decisions from the CEC, but no accurate information was supplied. The OSCE/ODIHR EOM was told that only 36 complaints were filed as of 16 December, which would mean that only 1 complaint was filed since 4 December when the CEC indicated that there were 35 complaints.

The vast majority of the 225 DEC's have been visited by the OSCE/ODIHR EOM and thus far five complaints have been filed. These complaints involve the placement of campaign materials, production of false campaign material, and a voter not being on the SVR.

Ministry of Interior

The Ministry of Interior has registered 58 election-related violations. The reported incidents include the destruction of posters and campaign material. There were also several incidents of scuffles between campaign workers involving Mr. Yanukovich and Ms. Tymoshenko supporters. In most cases, those involved were charged with administrative offenses.

VIII. DOMESTIC AND INTERNATIONAL OBSERVERS

As of 16 December, the CEC has registered 335 international observers. The European Network of Election Monitoring Organizations (ENEMO) opened its mission in Ukraine with a core team of 6 members and 50 long-term observers (LTOs). Other international organizations to deploy election observers include the Inter-Parliamentary Assembly of the Commonwealth of Independent States (67 observers), For Fair Elections (91 observers), and the Ukrainian Congress Committee of America (31 observers). Domestic non-partisan observer groups, including Committee of Voters of Ukraine (CVU) and the domestic NGO "OPORA" continue their election monitoring in the field, accredited as journalists, as the election law does not provide for domestic observation.

IX. OSCE/ODIHR EOM ACTIVITIES

During the reporting period, the OSCE/ODIHR EOM continued its regular activities, meeting with state officials, the election administration, campaign representatives, court officials, media representatives, and civil society. Ambassador Heidi Tagliavini, Head of the OSCE/ODIHR EOM met 13 of the 18 candidates (or campaign managers). She also met with Mr. Jerzy Buzek, the President of the European Parliament; both stressed their commitment to closely co-operate in the observation of the upcoming presidential election. The mission has briefed representatives of the diplomatic community and international organizations accredited in Ukraine. LTOs deployed throughout the country continue to observe electoral preparations and the campaign in the regions and are preparing for the deployment of short-term observers.

As noted in the OSCE/ODIHR's Interim Report No. 1, the incoming OSCE Chairman-in-Office, Kazakhstan, has designated Mr. João Soares, President of the OSCE Parliamentary Assembly, as Special Co-ordinator to lead the OSCE short-term observers. The European Parliament, the Council of Europe and NATO parliamentary assemblies also intend to send delegations for election day observation.