

**INTERIM REPORT No. 3
23 December 2009 – 3 January 2010**

8 January 2010

I. EXECUTIVE SUMMARY

- The 2009 funds for the preparation of the election were eventually transferred to the Central Election Commission (CEC) on 25 December, some two months after the legal deadline. District Election Commissions (DECs) are to return unspent funds for 2009 having little time to spend it.
- On 24 December, parliament adjourned until after the 17 January election without considering amendments to the election law that would have affected sections dealing with the voter register, mobile voting, results protocols and determination of final results.
- The CEC continues to work efficiently, meeting deadlines. The commission maintains its practice of holding closed pre-session meetings and rejects many complaints on technical grounds. Frequent changes in the composition of DECs and Precinct Election Commissions (PECs) negatively affect their work.
- The DECs have transferred the preliminary voter lists to the respective PECs, where they are available for public scrutiny until 10 January. The lack of a clear procedure and instructions for adding a voter to the voter list on election day by a PEC decision and a failure to regulate it through CEC instruction, PEC manuals and other training materials in a consistent manner remains of concern.
- The campaign environment continues to be generally calm, however, three cases of arson targeting campaign premises and one burglary of a campaign office took place. Alleged defamatory campaign material is in circulation in several regions. The frontrunners have increased their campaign activities, while other candidates are significantly less visible.
- All five nationwide TV stations monitored by the OSCE/ODIHR EOM in their newscasts clearly favoured one or the other of the main candidates in terms of the amount of airtime and tone devoted to covering their campaign. Broadcasters allow candidates to influence the content of newscasts, thus undermining the fundamental principles of fairness, balance and impartiality in the news.
- The new head of the High Administrative Court has still not been appointed. This has caused confusion over who is actually administering the court. This could potentially be used to question the legitimacy of any decision on challenges to the election results especially as the issue has become more politicized.

II. ELECTION ADMINISTRATION

According to article 38.4 of the Law on the Election of the President (hereinafter, election law) the election funds should have been transferred to the Central Election Commission (CEC) by 22 October 2009. However, the 2009 funds for the elections were transferred to CEC on the evening of 25 December. Funds unspent by 31 December are returned automatically to the state treasury.

On 29 December, the Cabinet of Ministers of Ukraine¹ approved the 2010 election funds, expected to be transferred in the coming days.

On 24 December, parliament voted to adjourn until after the 17 January election without considering amendments to the election law that would have affected sections dealing with the voter register, mobile voting, results protocols and determination of final results.

The CEC continued to adopt decisions as required by the law in conformity with the legal deadlines. The CEC approved District Election Commission (DEC) and Precinct Election Commission (PEC) result protocol forms on 28 December, after the training of PEC members had begun. The result protocol forms include space for all figures required by law, but not for all figures that are counted in the polling station.

The CEC continues the practice of holding closed pre-session meetings. On one occasion, while addressing complaint regarding a presidential candidate's actions, the CEC began the discussion in public, then paused the session and held a closed meeting before resuming the session to vote on the issue.

The DECs are active in replacing PEC members who resign, supervising the activities of PECs and distributing election materials to PECs including preliminary voter lists. A few DECs remain hampered by the lack of proper working conditions and disorganized sessions.²

Between 25 and 28 December, the state treasury transferred the allotted 2009 funds to DECs accounts. Since their formation in late November and until these transfers, the DECs have functioned based on credit and members' own contributions. The lack of funds negatively impacted the activity of several commissions. As a consequence, a few DECs were delayed in delivering the preliminary voter lists to PECs due to a lack of transport, in purchasing the PEC stamps, or in printing or paying for the publication of their documents within the deadlines.³ Moreover, DECs had to spend 2009 funds by 31 December, but due to technical mistakes in justification documents, not all were able to. By the end of the year, DECs spent around 80 per cent of the 2009 funds, the remaining 20 percent will be returned to the state budget.

The DECs used different methods of distributing PEC leadership positions. While most used the required electronic system⁴ in the allocation of positions, some did so manually, by drawing lots or as a result of negotiations with candidate proxies.⁵ DEC 173 used a different formula than the one provided by the CEC, allegedly to ensure the appointment of experienced members to the leadership positions. As a result, even given a similar number of nominations, Mr. Yanukovych received 39, Ms. Tymoshenko 38, and Mr. Yushchenko 33 while Ms. Bohoslovska, Ms. Suprun and Mr. Tihipko received only 2 such positions each.

¹ The cabinet of ministers adopted an administrative decision to allocate funds for the organization of election, since parliament has not approved a state budget so far.

² No heating in DEC 206, no safe in DEC 4, no photocopier in DECs 86 and 185, no internet connection in DECs 1 and 59. Disorganized sessions were found in DECs 22, 59 and 147. Further, the secretary of DEC 69 is under investigation by the Security Service of Ukraine for possible involvement in the embezzlement of DEC funds, collusion to commit electoral fraud with a technical official and preparation of falsifying DEC documentation. These allegations only surfaced when the new chair, the third following two resignations, took office.

³ Problems delivering preliminary voter lists at DEC 160, purchasing PEC stamps at DEC 9, 163 and 164 and document production at DEC 4.

⁴ *Vibory* online automatic data system is used for transfer and data processing for DECs and the CEC. It is used for several purposes including for distributing leadership positions in the DEC and PEC formation, for financial and salary payment purposes as well as for transmission of preliminary election results.

⁵ DECs 86 and 101 had technical difficulties in accessing the *Vibory* system. DECs 5, 22 and 197 distributed positions manually. DECs 4, 6, 9, 100 and 205 drew lot while DECs 94 and 99 negotiated distribution.

The PEC formation is an ongoing process characterized by frequent replacements of members, especially in leadership positions, due to member resignations.⁶ Reasons for resignations vary and include the distance to the PEC, insufficient remuneration, possible loss of the right to unemployment benefits, perceived workload, especially for leading positions, and poor health. Some members were transferred to PECs located closer to their homes. Finally, some candidates nominated the same person to multiple PECs, or both as a PEC member and observer.⁷ Some PECs are not fully operational due to a lack of quorum or absence of chairperson caused by resignation.⁸

The official training of PEC members is organized by the OSCE Project Co-ordinator in Ukraine (PCU) together with the CEC. The CEC produced and distributed comprehensive DEC and PEC manuals at trainings conducted by local implementing partners.⁹ Generally the training sessions observed were evaluated as efficient.¹⁰ Some candidates organized trainings for their own PEC members.

III. VOTER REGISTRATION

Splitting the state voter register (SVR) into voter lists for each precinct ran smoothly. Voter lists for some 1,000 PECs (3 per cent of the total number of PECs) were reprinted due to technical mistakes, mainly due to inaccurate attribution of addresses to precincts.

By 27 December, the DECs transferred the preliminary voter lists to all PECs, where they are accessible for public scrutiny.¹¹ The legal deadline for submitting updates to the preliminary voter lists is 10 January. In practice, however, the cut-off date for input is 8 January as the register maintenance bodies (RMBs) and the CEC SVR department will need two days for processing the updates and splitting the SVR into final voter lists for the 32,087 regular polling stations. The discrepancy between the legal and technical deadlines shortens the period for public scrutiny of the preliminary voter list.

With the establishment of the SVR, election administration has made considerable efforts to decrease the number of multiple registrations of voters. A total of 592,805 duplicates have been removed, while 144,627 entries remain under scrutiny.¹² The SVR contains 36,298,991 voters. So far, 108,321 voters have registered a voting address different from their address of residence. This is the first election in which the voters registered at special polling stations in hospitals, prisons or detention centres will be removed from the voter list at the precinct they were initially registered at.

The lack of a clear procedure for adding a voter to the voter list on election day by a PEC decision remains of concern.¹³ The CEC instruction and manual for PEC members fail to fully

⁶ Some examples include DEC 9, where 40 per cent of the PEC members had resigned; DEC 192, 30 per cent; DEC 159, 25 per cent; DEC 176, 16 per cent.

⁷ The same person was nominated to multiple locations or functions as observed in DECs 4, 37, 39, 69 and 158.

⁸ Lack of quorum affected 44 PECs of 176 in DEC 125; 10 PECs of 83 in DEC 176; 4 PECs of 78 in DEC 106. No chairperson in function at 13 PECs of 229 in DEC 86. Further on lack of heating or electricity affected PECs in DECs 4, 120, 197 and 210.

⁹ Approximately 80,000 PEC chairpersons, deputy chairpersons and secretaries will be trained. The CEC produced 5,000 DEC manuals, 100,000 PEC manuals, 100,000 flowcharts of election day procedures and 80,000 training CDs. The PCU and CEC have already organized trainings for over 2,600 DEC members.

¹⁰ Conditions not conducive for training were observed in DECs 64 and 100.

¹¹ One or two day delays delivering the preliminary voter lists to PECs occurred in DEC 37, DEC 102, DEC 151 and DEC 160 due to logistic or financial problems.

¹² Voter list data as of 2 January provided by CEC SVR department.

¹³ Article 35.2.4 of the election law allows for amendments to the final voter list by PEC decision.

address the issue, only reminding them that the PEC must take decisions of this kind without interruption of the voting process. In the video made for PEC training purposes, PEC members are advised to direct voters with such requests for inclusion to a court. In the CEC manual, the PEC is encouraged to contact the RMB before taking its own decision on inclusion, in an attempt to prevent multiple entries but the manual does not address how the PEC will do this in practical terms.

The CEC clarification on the compilation and update of the voter lists was contested in court by Ms. Tymoshenko's representative to the CEC.¹⁴ The Kyiv Administrative Court of Appeal (KACA) partially satisfied the claim and annulled the provisions that: a) relieved homebound voters from the requirement of filing a complaint in person; b) allowed a "pension certificate" and "other" documents to be used to prove that a voter was homebound; c) and allowed the PECs to include voters in the final voter list based on a passport with a stamp proving that the voter resides within the respective boundaries of the PEC. The High Administrative Court (HAC) upheld the decision of the KACA. According to the final text, an application for homebound voting filed at a PEC may only be supported by a certificate issued by a hospital.

IV. THE CAMPAIGN

During the reporting period frontrunners increased their campaign activities, while other candidates, including some who are well-represented on election commissions, are significantly less visible.¹⁵ However, levels and types of campaign activities of particular candidates differ considerably. The campaign remained frequently focused on the personalities of leading candidates rather than being issue driven. When issues are raised they include constitutional changes, corruption, the economy and decentralization of power.

The campaign environment continues to be generally calm. A few incidents have resulted in complaints being filed or criminal investigations. Three cases of arson targeting local Yanukovych campaign premises have been reported in Zaporizhzhia, Ivano-Frankivsk and Poltava. A burglary of a Tymoshenko campaign office took place in Dnipropetrovsk. Alleged defamatory campaign material is in circulation in several regions.¹⁶

From the monitored media, the OSCE/ODIHR EOM noted five prominent instances of candidates in their official capacity engaging in campaign activities in contradiction with the law.¹⁷ This blurred coverage offers candidates with official roles an unfair advantage over their opponents.

A complaint was filed by candidate Protyvsikh's representative to the CEC alleging that candidate Tymoshenko had violated the law by campaigning during an official function as the prime minister and had used her subordinates, office transport and other official resources while campaigning.¹⁸ The CEC found that this was a violation of the election law and issued Ms. Tymoshenko a warning for this activity.

¹⁴ CEC Decision 475 of 12 December 2009.

¹⁵ Out of 40 rallies observed by the OSCE/ODIHR EOM, 16 took place in the western regions, 12 in the central regions, 9 in the eastern regions and 3 in the southern regions. Out of 18 candidates, the most visible are Mr. Lytvyn, Mr. Tihipko, Ms. Tymoshenko, Mr. Yanukovych, Mr. Yatsenyuk and Mr. Yushchenko.

¹⁶ The OSCE/ODIHR EOM reported on alleged defamatory campaign material from Chernihiv, Dnipropetrovsk, Khmelnytsky, Lutsk, Odesa and Poltava.

¹⁷ Ms. Tymoshenko (Uryadovyy Kurier 23 December, Fakty and komentarii 28 December and Inter TV 29 December) and Mr. Yushchenko (UT1 24 December, Fakty and komentarii 27 December).

¹⁸ Article 64.1.2 and 64.15 of the election law. The complaint alleged that during a working visit on 17 December to Chernihiv, Ms. Tymoshenko engaged in campaign activity when during her address to citizens she made remarks about Mr. Protyvsikh in connection with the election.

On appeal to the KACA the warning was cancelled. The KACA found that since this was an official trip of the prime minister the actions of Ms. Tymoshenko could not be characterized as campaign activity. The court also found that even if they could be considered campaign activity the CEC is not the body mandated to consider complaints against executive bodies.¹⁹ Lastly, the court stated that since the CEC produced no evidence of which subordinates or resources had been used, their decision was illegitimate. On 31 December the HAC upheld the KACA decision cancelling the CEC warning against Ms. Tymoshenko.

The General Prosecutor's office in Kyiv oblast opened an investigation against the Tymoshenko campaign regarding the distribution of land certificates as an alleged violation of article 64.6 of the election law (bribery of voters).²⁰ In Poltava, the prosecutor opened an investigation against the mayor following a disruption of the TV signal during a live transmission of the campaign speech being given by Mr. Yushchenko in Poltava.

The OSCE/ODIHR EOM observed violations of other campaign regulations, including engagement of officials in the pre-election campaign²¹ and provision of services, such as free legal aid, to voters by candidates' local campaigns or parties linked to these campaigns.²² On 25 December, some 60 teachers at a school in Zhytomyr attended a regular staff meeting, where election material provided by the Yushchenko campaign was available and two films listing achievements during the presidency of Mr. Yushchenko were shown.²³

V. MEDIA

The election law does not empower the National Broadcasting Council (NBC), the supervisory body vested with the resources and mandate to oversee the electronic media, to provide effective remedies or impose sanctions when media-related violations occur during the electoral period.²⁴ The CEC is mandated to address media issues, but has not issued any clarifications concerning the conduct of mass media during the pre-election campaign. Furthermore, the CEC refers complaints related to the mass media during the pre-election campaign to the courts.

Editors in chief of private broadcasters informed the OSCE/ODIHR EOM that candidates influence the content of newscasts. This undermines the fundamental principles of fairness, balance and impartiality in the news, in contradiction with basic professional ethics.²⁵ Such access is determined on the basis of an agreement between the candidate and the TV station's management.²⁶ This practice rather than professional considerations of newsworthiness define which candidates receive coverage in the news. This effectively deprives the journalists of editorial autonomy. The understanding by some interlocutors that the election law allows for

¹⁹ According to the election law such complaints should be considered by courts.

²⁰ The Prosecutor's General Office is investigating 5 allegations of bribery of voters by different campaigns.

²¹ On 26 December, the OSCE/ODIHR EOM observed the head of the oblast state administration in Poltava appearing on stage at a Yushchenko rally together with the candidate. The Kherson Governor has allegedly stepped down to lead the local Yushchenko campaign but in some instances reverted back to his role as governor, i.e. by calling an official press conference to address a crisis caused by harsh weather conditions.

²² Moroz campaign in Kharkiv; Tymoshenko campaign in Dnipropetrovsk and Kerch; Yanukovych campaign in Dnipropetrovsk, Kerch, Ternopil; Yatsenyuk campaign in Kerch.

²³ The OSCE/ODIHR EOM observed the meeting at school #26 and was informed that similar meetings had taken place at further six schools in Zhytomyr.

²⁴ Article 70 of the Law on Television and Radio Broadcasting defines the NBC as the supervisory body for the provisions on media coverage in the election law. However, the NBC is only empowered to sanction for violations of the broadcasting law, but has not exercised this authority.

²⁵ Council of Europe's Recommendation R (99) 15 on media coverage of election campaigns.

²⁶ Such agreement may be made on a paid or unpaid basis at the discretion of the TV station management.

campaign coverage in the news based on an agreement between the candidate and the broadcaster is problematic.²⁷

Monitoring results of candidate coverage during nationwide prime-time newscasts from 4 December 2009 to 3 January 2010, excluding coverage of candidates in their institutional role, display a bias in regards to the quantity of time devoted.²⁸ The state-owned *UTI* and *Channel 5* devoted a majority of airtime of campaign coverage in newscasts to Mr. Yushchenko and Ms. Tymoshenko,²⁹ while the TV stations *Inter*, *Ukraina TV* and *ICTV* favoured Mr. Yanukovich.³⁰ Out of 18 candidates, 13 received less than 2 per cent coverage in newscasts on the monitored TV stations. In comparison, monitoring results of the total airtime devoted to candidates in newscasts, including coverage of them in their institutional roles, on *ICTV and Inter* display more balanced coverage of Mr. Yanukovich, Ms. Tymoshenko and Mr. Yushchenko.³¹ This shows that newsworthiness is not the criteria utilized in determining coverage of candidates and an inability to distinguish between coverage of a candidate's institutional and campaign role.

The above mentioned findings are also substantiated by the qualitative monitoring results, which assess the tone of campaign coverage in newscasts. Coverage of the candidates Tymoshenko, Yanukovich and Yushchenko on the state-owned *UTI* was predominantly of a positive tone. On *Channel 5*, coverage of Ms. Tymoshenko was 79 per cent positive in tone, while coverage of Mr. Yanukovich was 47 per cent positive in tone. On *Ukraina TV*, 45 per cent of campaign coverage for Ms. Tymoshenko and 36 per cent of coverage of Mr. Yushchenko was of a negative tone, while Mr. Yanukovich received 12 per cent coverage in a negative tone. On *Inter*, 98 per cent of the coverage of Mr. Yanukovich was of a positive and 0 per cent of a negative tone.

VI. COMPLAINTS AND APPEALS

The Courts

The new head of the HAC has still not been appointed. The current head's term expired on 24 December and he has issued an order naming himself the acting head. Under the Law on Judiciary the first deputy becomes the acting head.³² This has created confusion over who is actually administering the court and may affect the credibility of any decisions made by the HAC concerning the results of the election.³³

The KACA has received 93 election related complaints and the HAC 72 appeals. In one case the KACA upheld a decision of the CEC terminating the authorities of the chair of DEC 59 based on two DEC decisions to replace her because of incompetence.

²⁷ Article 61.9 stipulates that "airtime at the expense of the funds from the campaign fund of a candidate shall be provided on the basis of an agreement between the candidate and the broadcaster. Provision of airtime without such agreement shall be prohibited."

²⁸ The monitored TV stations are: *Channel 5*, *ICTV*, *Inter*, *Ukraina TV* and *UTI*.

²⁹ 30 per cent and 28 per cent on *UTI* and 28 per cent and 21 per cent on *Channel 5* respectively.

³⁰ On *Inter* 30 per cent of the campaign coverage was devoted to Mr. Yanukovich, while *Ukraina TV* and *ICTV* devoted 29 per cent and 35 per cent respectively to this candidate. All other candidates received less than 20 per cent campaign coverage on the mentioned TV stations, except Mr. Lytvyn receiving 26 per cent campaign coverage on *Ukraina TV*.

³¹ On *Inter* the above mentioned candidates received 21 per cent, 25 per cent and 27 per cent respectively, while on *ICTV* 26 per cent, 30 per cent and 14 per cent respectively.

³² Article 41.5 of the Law on Judiciary.

³³ The OSCE/ODIHR EOM has also received reports that the issue has become politicized and may be used by the candidates to challenge any HAC decision on the results.

A complaint was filed concerning a member of the CEC who turned 65 years of age in March 2009 and therefore could no longer exercise his authorities as a member of the CEC.³⁴ The KACA ruled in favour of the complainant and ordered that the CEC member not take part in any further CEC sessions and annulled the resolutions adopted by the CEC on 12 December because the member had taken part in their adoption.

The HAC partially overruled the KACA maintaining the part of the order that the CEC member not participate in any further CEC sessions but cancelling the part that annulled the CEC resolutions because they were adopted according to the law. Parliament should have terminated the member's authorities before the court did, however, until now they have not acted.

Although the number of complaints in the regional courts has increased, cases concerning the campaign activity of the candidates remain low. Several complaints have been filed concerning administrative issues with the DEC's and the formation of election precincts. In one case Mr. Yatsenyuk's proxy filed a complaint in the Donetsk District Administrative Court against the decisions of DEC 42 on the establishment of the election precincts. The court partially upheld the complaint and ordered the DEC to revisit the issue because of the failure to include some buildings as well as for having included some street names without the corresponding building numbers.

Despite the fact that Article 91 of the election law explicitly allows proxies to file complaints, in two cases a district administrative court rejected complaints because they were filed by presidential candidate proxies.³⁵

CEC and DEC's

The CEC continues to make formal decisions on a small number of the complaints filed. According to the CEC 75 complaints have been filed to date; of those the OSCE/ODIHR EOM has reviewed 32 were rejected either because the complainant did not comply with the technical requirements in filing the complaint or because they were submitted outside the time frame for filing complaints. Thirteen were resolved by formal decision; the majority of the decisions did not deal with the substance of the complaint.³⁶ The short time frame for filing election-related complaints continues to deny many complainants the opportunity to be heard.³⁷ This is compounded by the CEC's strict interpretation of the time frame.

A complaint filed by candidate Tihipko's representative to the CEC was rejected as untimely even though the DEC did not release the decision referred to until the fourth day. When the representative tried to file the complaint on the fifth day between four and five pm, she was told that the register office had stopped working for the day and thus was not allowed to register the complaint. She went the next day to register the complaint but was told it was untimely.

According to OSCE/ODIHR EOM observations there are still very few complaints being filed with the DEC's concerning campaign activities. Topics of the complaints filed include the borders of electoral precincts not being delineated on time, DEC chairpersons not notifying members of meetings and mistakes in applications for PEC membership.

³⁴ Article 30.2 and 30.4.2 of the election law.

³⁵ Kirovohrad District Administrative Court.

³⁶ The OSCE/ODIHR EOM cannot explain the discrepancy in the total numbers as the information was gathered from the CEC and its website.

³⁷ Venice Commission and OSCE/ODIHR Joint Opinion on the Law on Amending Some Legislative Acts on the Election of the President of Ukraine at: http://www.osce.org/documents/odihr/2009/10/40858_en.pdf.

Law and Order

The Ministry of Interior (MoI) has registered 107 election-related violations from 19 October to 31 December. Of those 48 were for hooliganism, 17 for campaign material published in violation of the law, 5 arsons, 7 bribery of voters, 3 loss or theft of an official stamp, 1 damage of property and 11 other. Of these offenses, 39 were aimed against the campaign of Mr. Yanukovich and 30 against the campaign of Ms. Tymoshenko. Fifteen criminal cases have been initiated and 18 administrative offenses charged. In 30 cases the MoI refused to initiate a criminal case.

The Prosecutor General's Office has received 26 requests, 14 considered by the Prosecutor General and 12 submitted to other agencies or regional prosecutor's office. The 27 regional prosecutor offices have received 73 requests. Issues included the coercion of voters, abuse of office by state authorities, bribery of voters, false campaign activities and three arsons of campaign offices.

VII. OSCE/ODIHR EOM ACTIVITIES

The OSCE/ODIHR EOM continues to observe the final stage of the election preparations and campaign and is preparing for the deployment of over 500 short-term observers seconded by the OSCE participating States for election day observation as well as a large number of Members of Parliaments of OSCE participating states.

The OSCE/ODIHR EOM, the OSCE Parliamentary Assembly, the Parliamentary Assembly of the Council of Europe, the European Parliament and the NATO Parliamentary Assembly will join efforts for the observation of election day proceedings.