

**INTERIM REPORT No. 4
18 – 26 January 2010**

29 January 2010

I. EXECUTIVE SUMMARY

- On 25 January the Central Election Commission (CEC) announced the first round election results and the run-off candidates for the second round, due to take place on 7 February. The CEC posted the results from each polling station by candidate on its website, but not the full set of figures from the Precinct Election Commission (PEC) protocols. Although not required by law, the publication of all data from PEC protocols would allow observers to compare them with their copies of protocols, thus increasing the transparency of the process.
- The CEC practice of holding closed meetings continued during the processing of District Election Commissions (DECs) result protocols when candidate representatives, media and observers were asked to temporarily leave the session so the commission could confer in private. New DECs and PECs must be formed for the second round.
- International Election Observation Mission observers assessed the results tabulation process positively. However, in some 50 of 185 DECs visited, they were denied access to observe the entry of PEC protocols into the computer system.
- Some 390,000 voters were added to the voter lists on election day. The PECs applied different procedures on adding voters to the voter lists on election day. This was caused by contradictory instructions given by the CEC, political parties and inconsistent messages provided during training.
- The two contestants for the second round, Ms. Tymoshenko and Mr. Yanukovich, started some campaigning prior to the official launch of the election campaign, in contradiction to the election law. Mr. Yanukovich has declined to participate in any televised debate with Ms. Tymoshenko.
- The issue of who is the legitimate head of the High Administrative Court (HAC) has not been resolved and has become more politicized. The Constitutional Court has urged the parliament to resolve the issue. The HAC is the designated court to review complaints against the final election results.

II. ELECTION ADMINISTRATION

Tabulation of Results by District Election Commissions

The International Election Observation Mission (IEOM) observed the handover of Precinct Election Commission (PEC) materials and the tabulation of results in 185 of the 225 District Election Commissions (DECs). The process was evaluated positively overall, though at times it was noted to be badly organized or crowded and chaotic due to small premises. Some PEC members were observed correcting protocols at the DECs without a PEC session as required by law. In a few cases they were observed completing blank pre-signed protocol forms. Results from

several PECs were cancelled by DEC's which then performed recounts while two PEC results were invalidated.¹

On several occasions, the Central Election Commission (CEC) assured the OSCE/ODIHR EOM that DEC's were instructed to allow observers access to observe entry of PEC data into the *Vybory* system. On 14 January, the CEC sent a circular to the DEC's requesting them to provide observers with full access to this process. However, on 15 January, the CEC sent a second circular, stating that such observation must be made in compliance with the election law and information protection acts. Due to the lack of clarity of this instruction, on 18 January, 48 DEC's denied the IEOM access to observe data entry into the *Vybory* electronic system, thus preventing the observation of an important part of the process.²

All DEC's submitted their tabulation protocols to the CEC within the five-day deadline. The CEC rejected seven protocols because of technical mistakes; these DEC's amended their protocols within the one-day legal deadline.

Tabulation and Announcement of Election Results by the Central Election Commission

The CEC announced turnout figures throughout election day with a final turnout of 66.72 per cent. Updated preliminary results were released on the CEC website starting on election night. As in previous elections, the CEC posted only partial PEC result protocols which included the votes received by candidate and the number of invalid votes, but no figures on the total number of registered voters or unused ballots. Although not required by law, publishing the full PEC protocol figures would allow observers to verify their copies of the protocols and increase the transparency of and confidence in the process.

The CEC announced the final results of the first round on 25 January. As required by law, the CEC published complete DEC and national result protocols.³ Of the 24,588,268 ballots cast, 405,765 or 1.65 per cent were declared invalid. There were some polling stations where large portions of the ballots cast were invalidated because the PEC did not stamp or sign these ballots as required by law. In some instances, PEC's voted to accept such ballots as valid.

Post Election Day Updates

On 8 January, the Embassy of Georgia requested the accreditation of 2,011 Georgian observers. The CEC failed to issue a decision within the three-day deadline. On election day, the CEC decided to forward the applications to the General Prosecutor's office for investigation, following a complaint from representatives of candidates Bohoslovska, Brodskyi and Moroz on possible violations of laws and of the electoral rights of voters. On 21 January, upon a complaint filed by candidate Suprun, the Kyiv Administrative Court of Appeals (KACA) ordered the CEC at their next session to take a decision on whether or not to accredit these observers. The CEC neglected to consider the issue as ordered and the issue is still pending.

¹ PEC 120-044, with some 100 voters, included more than 10 per cent of the ballots cast without the PEC stamping ballots in advance; PEC 120-027, with some 2,300 voters, did not seal its ballots for delivery to DEC 120.

² This was also the case during *Vybory* system testing exercises on 5 and 11 January.

³ Final results released gave Mr. Yanukovich 35.32 per cent of votes cast and Ms. Tymoshenko 25.05 per cent. They were followed by Mr. Tihopko with 13.05 per cent, Mr. Yatsenyuk with 6.96 per cent and Mr. Yushchenko with 5.45 per cent. The other 13 candidates received less than 4 per cent of the votes. Some 2.2 per cent of voters chose to vote "against all candidates".

On 18 December, the KACA ordered a CEC member to no longer participate in CEC sessions as he had reached the 65 year age limit for serving on the CEC in March 2009.⁴ In the early hours of 17 January, the KACA took a new decision not subject to appeal stating that this member could participate in CEC sessions, based on “new evidence”.⁵ Eventually, on 19 January the parliament approved the presidential request for his dismissal. Two days later, the parliament rejected the president’s proposed replacement.⁶ Thus, for the second round the CEC will only be composed of 14 members.

Election Administration

After announcing the official results of the first round, the CEC set the date for the second round as 7 February and made other decisions, including the financing of the second round, the form and text of the ballot.

The CEC practice of holding closed meetings continues. Furthermore, this occurred during the processing of DEC result protocols when candidate representatives, media and observers were asked to temporarily leave the session so the commission could confer in private.

By law, DEC and PECs were dissolved and are to be re-formed based on new nominations for the second round. On 25 January, the CEC declared Ms. Tymoshenko and Mr. Yanukovych the run-off candidates and they had until 26 January to nominate seven members for each of the DEC.⁷ The CEC has two days to form the DEC. The two candidates are also entitled to nominate up to eight members for each PEC by 30 January. DEC must form the PECs by 2 February. Unlike in the first round, there is no legal provision on the minimum number of members required to form a commission. In addition, the law is silent on how a commission is formed should both candidates fail to nominate members.

Candidates have the right to an equal number of chair and secretary positions in the commissions.⁸ The chair and secretary in a commission may not represent the same candidate. The CEC will not organize training sessions for the newly formed DEC and PECs.

III. VOTER REGISTRATION

At the opening of the polls on election day, the CEC announced that 36,578,590 voters were included in voter lists. This is 276,114 more than the number of voters, who were registered in the state voter register (SVR) at the time of printing the final voter list. The increase can be attributed in part to the late compilation of the voter lists for special polling stations in hospitals, late PEC member replacements serving outside of their home district and citizens being added to the voter list by a PEC.⁹

⁴ Article 30.4.2 of the Law on CEC stipulates that a member of the CEC is to be replaced when reaching the age of 65. The CEC should inform the president, who then informs the parliament about the need for a replacement. The parliament is to formally terminate the duties of such member.

⁵ Under article 177.4 of the Administrative Procedures Code this decision cannot be appealed because it was made between midnight and 6 am on election day.

⁶ Article 30.10 provides that the president has 30 days to nominate a new CEC member for parliament to approve. The law does not indicate the timeline for a second proposal.

⁷ While the CEC had to publish official results for the first round by 27 January (10 days after election day), second round candidates must nominate their DEC members by 26 January (12 days before the second round election day).

⁸ Unlike in the first round, the commissions do not have deputy chairpersons.

⁹ Article 36.2 provides that voter lists for in-patient care institutions are compiled not later than seven days before election day. Given the late deadline, it was impossible to remove names from the voter lists in the precinct of their initial registration in a consistent manner.

The number of homebound voters increased at the time of printing the final voter lists up to 1.2 million, which represents 3.28 per cent of the electorate.¹⁰ In a decision made on the eve of election day the KACA ruled that any voter who applied for homebound voting at a PEC must provide a medical certificate to verify they are unable to come to the polling station.¹¹ This decision was largely ignored by the PECs at the instruction of the CEC. The CEC has announced that all voters who applied for homebound voting in the first round must re-apply to be eligible for homebound voting in the second round.

The final number of registered voters reflected in the CEC results protocol is 36,968,041. As well, 389,451 voters were added to the voter lists on election day. Confusion at the PECs on how voters were to be added to the lists during polling was caused by contradictory instructions given by the CEC and political parties, and inconsistent messages provided during training.¹² In most cases observed by the IEOM, the PECs took decisions on adding voters to the voter lists in accordance with the law; however in some PECs voters were told to go to court, the DEC or the register maintenance bodies (RMBs) to obtain an order for adding them.¹³ According to the DECs, of those turned away, the majority that returned to vote obtained an order from the local court where judges were on duty. The courts mostly handled the cases in an efficient manner and in the majority of cases issued an order to add the voter.

On 19 January, the CEC set procedures for compiling the voter lists for the second round. Apart from the regular institutional updates for January and individual requests submitted to the RMBs, the SVR should incorporate the additions and corrections made to the voter lists during the first round of voting, including those introduced on election day. By 24 January, the DECs had to review the first round voter lists from the PECs and report additions and corrections to the relevant RMB.¹⁴

Two copies of the new voter lists are to be printed and delivered to the DECs by 29 January and must be made available for public scrutiny by the PECs as of 31 January. However, the deadline for forming PECs is 2 February which in practice reduces the period for public scrutiny to three days.

IV. THE CAMPAIGN

According to the election law, the official campaign period for the second round was to begin on 26 January, the day after the CEC announced official results of the first round. Both contestants however decided to start campaigning earlier. Mr. Yanukovich held campaign rallies in Kyiv on 18 January and Kharkiv on 20 January.¹⁵ Similarly, both candidates' early campaign was covered by the mass media.¹⁶

¹⁰ Some 750,000 were initially indicated in the voter lists as homebound voters. Further 450,000 individuals applied to the PECs for inclusion in the homebound excerpts of the voter list.

¹¹ See footnote 5.

¹² The situation was further complicated by a last minute court decision that said PECs could not add voters to the voter lists on election day. Even though this decision only applied to DEC 148, Bloc of Yulia Tymoshenko (BYT) was informing PECs that they must follow it. Some DECs and the CEC instructed the PECs not to follow the court order.

¹³ According to IEOM observations, out of 2,184 PECs visited on election day, 271 informed voters who could not find their name on the list that they had to go to court, the RMB or DEC to be added to the lists. Some 20 out of 225 DECs only reported these data after the expiry of the 24 January deadline.

¹⁵ In the course of this meeting, the head of Mr. Yanukovich's oblast campaign office said that the Party of Regions (PoR) representatives in the PECs and DECs must "work harder to ensure the victory of Mr. Yanukovich in the second round."

¹⁶ Statements by Mr. Yanukovich were reported on *ICTV* on 18 January and *Ukraine TRK, Inter, UTI* and *ICTV* channels on 20 January. Statements by Ms. Tymoshenko were reported on *Inter, Ukraine TRK, UTI, ICTV* and Channel 5 on 20 January.

On 24 January, Ms. Tymoshenko turned a public meeting in Cherkasy into a campaign rally. At the event, she donated 35 vehicles for paramedics to the oblast, thus again clearly using her official duties for campaign purposes. In general, campaign materials from the first round were removed from public places in line with the campaign silence requirement, however, large banners for Ms. Tymoshenko and Mr. Yanukovych were still visible in Kharkiv on and after the 17 January election day.¹⁷ As of yet, none of the candidates who scored more than five per cent in the first round have expressed support for either Mr. Yanukovych or Ms. Tymoshenko.

Mr. Yanukovych has declined to participate in any televised debate with Ms. Tymoshenko, thus limiting voters' opportunity to compare candidates' platforms.¹⁸ Mr. Yanukovych made comments based on gender stereotypes about his opponent in declining to participate in a debate.¹⁹

The 16 candidates who did not garner sufficient votes to enter the second round must submit a financial report on their campaign fund to the CEC by 2 February.²⁰ While first round candidates nominated by a party or bloc may transfer unused funds into party accounts, the State Budget of Ukraine absorbs unused funds from the 10 independent candidates.²¹

In a disturbing development, a group of masked people tried to seize the Kyiv printing house responsible for printing ballot papers on 25 January. The Ministry of Interior eventually took control over the building. The exact circumstances surrounding this event remain unclear. This intrusion took place against the background of continuing allegations of election fraud including the alleged production of 1.5 million unregistered ballot papers and attempts to replace the director of the publishing house. Criminal investigations are underway. The incident may further increase suspicion and distrust and reduce voters' confidence in the election process.

V. COMPLAINTS AND APPEALS

The issue of who is the legitimate head of the High Administrative Court (HAC) has not been resolved and has become more politicized. It is particularly important as the HAC is the designated court to review complaints against the final election results. The Constitutional Court ruled that the Council of Judges did not have the authority to appoint the new head and further stated that none of those who claims to be the head has the authority under the current legislation. The Court urged the parliament to resolve the issue. The General Prosecutor's office has issued an opinion that Mr. Pasenyuk, whose term expired on 24 December 2009, is the head of the court until the parliament acts.²²

¹⁷ This has resulted in the Governor of Kharkiv filing a complaint against Kharkiv City Council.

¹⁸ The state sponsored debate is outlined in article 62.5 of the election law. It further stipulates that should any candidate refuse to take part in this public debate, the airtime shall be given to the other candidate for their free use.

¹⁹ The OSCE/ODIHR EOM observation in Kharkiv on 21 January; Mr. Yanukovych stated "I personally think that she (Ms. Tymoshenko), as a prime minister has to bear responsibility for her word. And if she is a woman, she should go to the kitchen and show her whims there."

²⁰ The losing candidates do not get their 2.5 million UAH nomination deposit back.

²¹ This stipulation has already been criticized in the Joint Opinion on the Law on Amending Some Legislative Acts on the Election of the President of Ukraine (Venice Commission of the Council of Europe and OSCE/ODIHR).

²² Mr. Pasenyuk, whose term expired, is supported by the PoR, General Prosecutor's office, and Presidium of the HAC. The first deputy of HAC Mr. Sirosh is supported by BYT, KACA, Supreme Court, Association of Judges and Council of Judges.

The Kyiv District Administrative Court has banned all public gatherings on Independence Square from 9 January to 5 February based on a request from the Kyiv City Administration.²³ The court ruled that allowing the myriad of organizations which had applied for permission to hold public gatherings would endanger people's health and their rights and freedoms, since the planned gatherings from different political forces coincided in time and place.

To date the OSCE/ODIHR EOM is not aware of any complaints filed challenging the results of the first round. There were 21 cases filed with the KACA after election day, all of which concerned violation of the campaign silence period imposed by the election law. Twenty were returned to the complainant for technical reasons with instructions to rectify the errors before reapplying; none of the complaints have been re-filed. The other case was rejected for failure to specify which right was violated.

On 9 January, a complaint was filed by a proxy of Ms. Tymoshenko with the Shevchenko District Administrative Court in Zaporizhzhia against the regional private TV station *Alex* for broadcasting a film containing false information about the candidate. Ms. Tymoshenko asked that the station be prohibited from broadcasting the film and for the right to reply. The complaint was partially upheld, providing Ms. Tymoshenko air time to refute the allegations made in the film and affirmed by the appeals court on 14 January. This is the first reported case of a candidate asking for the right to reply, alleging false information made on broadcast media.

Through the election period, regional prosecutors received 839 applications. Among them are cases concerning campaign violations, bribery of voters, and voter list composition violations.

VI. OSCE/ODIHR EOM ACTIVITIES

The OSCE/ODIHR EOM remains in country with 19 core team members and 60 long-term observers to observe the second round of the presidential election scheduled for 7 February. The OSCE/ODIHR has requested participating States to second 600 short-term observers for observation of election day. The OSCE/ODIHR EOM will again join efforts with the OSCE Parliamentary Assembly, the Parliamentary Assembly of the Council of Europe, the European Parliament and the NATO Parliamentary Assembly for the observation of election day proceedings.

²³ This ban effectively covers the entire campaign period.