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(VENICE COMMISSION)

AND

OSCE/OFFICE FOR DEMOCRATIC INSTITUTIONS AND HUMAN RIGHTS

(OSCE/ODIHR)

JOINT OPINION

**ON THE DRAFT AMENDMENTS TO THE LAWS
ON ELECTION OF PEOPLE'S DEPUTIES AND
ON THE CENTRAL ELECTION COMMISSION AND
ON THE DRAFT LAW ON REPEAT ELECTIONS
OF UKRAINE**

**Adopted by the Council for Democratic Elections
at its 45th meeting
(Venice, 13 June 2013)
and by the Venice Commission
at its 95th Plenary Session
(Venice, 14-15 June 2013)**

**on the basis of comments by
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I. Introduction

1. On 5 April 2013 the Minister of Justice of Ukraine, Mr Oleksandr Lavrynovych, requested the Venice Commission and the OSCE/ODIHR to comment on the text of the draft Law of Ukraine “On Amendments to Particular Laws of Ukraine as regards Improvement of Law on Issues of Holding Elections” (hereinafter, the “draft electoral law”) and the draft Law “On the Repeat Elections of People’s Deputies (Members of Parliament) of Ukraine to the Verkhovna Rada of Ukraine (Ukrainian Parliament) of the VII Convocation in Particular Single Mandate Constituencies in Relation to the Impossibility to Establish Trustworthy the Vote Returns and Results of People’s Deputies of Ukraine Elections on 28 October 2012” (hereinafter, the “draft law on repeat elections”), CDL-REF(2013)025).

2. The draft laws were prepared to address previous recommendations of the OSCE/ODIHR and the Venice Commission and, in particular the OSCE/ODIHR Election Observation Mission (EOM) Final Report on Ukraine 28 October 2012 parliamentary elections and the 2011 Joint Opinion of the Venice Commission and the OSCE/ODIHR on the Draft Law on Election of People’s Deputies of Ukraine (CDL-AD(2011)037). The Minister of Justice provided to the Venice Commission and the OSCE/ODIHR a comparative table of comments on recommendations contained in the OSCE/ODIHR EOM Final Report on Ukraine 28 October 2012 parliamentary elections explaining which recommendations the Ministry believed could not be taken into account (the comparative table is included in the CDL-REF(2013)025). This joint opinion takes into consideration the information provided by the Ministry of Justice.

3. This joint opinion is based on unofficial English translation of the laws on Elections of the People’s Deputies of Ukraine (hereinafter parliamentary electoral law) and the law on the Central Election Commission (the CEC law), as well as on the above mentioned draft laws provided by the Ukrainian authorities. The reviewed translations consist of the following texts included in the CDL-REF(2013)025: (1) the draft law on repeat elections; (2) a table of amendments to articles in the draft CEC law; (3) a table of amendments to articles in the draft electoral law; and (4) a table of comments on recommendations made in the OSCE/ODIHR EOM Final Report on the 28 October 2012 parliamentary elections in Ukraine. This joint opinion cannot guarantee the accuracy of the translations reviewed, including the numbering of articles, clauses, and sub-clauses. Any legal review based on translated laws may be affected by issues of interpretation resulting from translation.

4. The Venice Commission and the OSCE/ODIHR received further amendments to the electoral legislation on 15 May 2013 (CDL-REF(2013)028). The text of these further amendments has been taken into consideration in the elaboration of this joint opinion.

5. Prior joint opinions of the Venice Commission and the OSCE/ODIHR¹ as well as numerous election observation reports from previous OSCE/ODIHR and Parliamentary Assembly of the Council of Europe (PACE) election observation missions in Ukraine provide the background for understanding the development of the electoral legislation in Ukraine.² The draft laws incorporate a number of previous recommendations of the OSCE/ODIHR and the Venice Commission. However, the proposed reform does not address some of the key recommendations.

¹ All OSCE/ODIHR and Venice Commission joint opinions on the Ukrainian legal framework can be found at: <http://www.osce.org/odihr/elections/ukraine> and <http://www.venice.coe.int/countries/ukraine>.

² All OSCE/ODIHR election observation mission reports can be found at: <http://www.osce.org/odihr/elections/ukraine>. All PACE reports can be found at: <http://assembly.coe.int/defaultE.asp>.

6. This opinion should also be read in conjunction with the following documents:

- Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE (29 June 1990);
- Code of Good Practice in Electoral Matters. Guidelines and Explanatory Report, adopted by the Venice Commission at its 52nd session (Venice, 18-19 October 2002), CDL-AD (2002)023rev;
- International and regional documents which are binding on Ukraine;
- Previous assessments and joint OSCE/ODIHR and Venice Commission opinions noted herein;
- Final reports of the OSCE/ODIHR election observation missions noted herein; and
- PACE election observation reports noted herein.

7. A delegation of the Venice Commission and the OSCE/ODIHR travelled to Kyiv on 25 April for a working level meeting with representatives of the Ministry of Justice of Ukraine and interlocutors in charge of drafting the amendments. The representatives of the European Union Delegation in Kyiv, the Council of Europe office in Ukraine and the OSCE Project Co-ordinator in Ukraine were also present at the meeting.

8. This opinion does not comment on the legislative processes which resulted in the draft laws. However, as stated in the 2011 Joint Opinion on the Draft Law on Election of People's Deputies of Ukraine, "it is an established principle that legislation regulating fundamental rights, such as the right to genuine elections should be adopted openly, following public debate, and with broad support in order to ensure confidence and trust in electoral processes. In the process of drafting electoral legislation a broad consensus on the main rules is particularly important since electoral legislation should not favour the interests of one political party. A broad public consultation process encourages public trust and confidence in electoral outcomes."³

9. This opinion is provided with the goal of assisting the authorities, political parties, and civil society in Ukraine in their efforts to develop a sound legal framework for democratic elections.

10. This opinion was adopted by the Council for Democratic Elections at its 45th meeting (Venice, 13 June 2013) and by the Venice Commission at its 95th Plenary Session (Venice, 14-15 June 2013).

II. Executive Summary

11. Although the draft laws incorporate some previous recommendations of the OSCE/ODIHR and the Venice Commission, this reform introduces only limited amendments to the electoral legislation. A comprehensive electoral reform, which would imply amending and harmonizing the different pieces of electoral legislation, would be necessary. This would include further revision of the legal framework and incorporation of remaining recommendations of previous OSCE/ODIHR reports and joint OSCE/ODIHR and Venice Commission opinions.

12. Positive changes made in the draft electoral law include:

- Providing criteria for the establishment of single-mandate districts;
- Requiring the CEC to publish on its website the list of single-mandate districts, including their numbers, boundaries, and

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See Joint Opinion on the Draft Law on Election of the People's Deputies of Ukraine, CDL-AD(2011)037, para. 8.

- addresses of the respective district election commissions (DECs);
- Increasing the authority of the DEC's in the administration of single-mandate districts, although it should be subject to the CEC oversight;
- Requiring election commissions to notify representatives of parties or single-mandate candidate of mistakes and inaccuracies in registration documents and allowing their correction until the day after having been notified by the election commission of the need to re-submit corrected documents;
- Requiring election commissions to not only "consider" decisions but to also "discuss" decisions at sessions in order to avoid that election commissions met and took decisions "behind closed doors", a practice that was noted as an issue during the 2012 parliamentary elections;
- Limiting temporary changes in voter registration so that concerned voters will only receive a ballot for the nationwide proportional representation election on election day despite having requested a temporary change to vote outside their single-mandate electoral district, thus addressing potential fraud;
- Introducing requirements for reporting on the origin and use of campaign funds before election day and for publication of these reports on the CEC website;
- Including provisions intended to result in less biased coverage of the elections by the media and to reduce privileges given to government candidates over other candidates.

13. However, key issues and recommendations raised in prior joint opinions of the Venice Commission and the OSCE/ODIHR, as well as in OSCE/ODIHR final reports remain unaddressed in the draft laws. Consideration should be given to addressing these recommendations before the draft laws are submitted to parliament. These include:

- The mixed system of 225 single-mandate districts and 225 proportional representation mandates is retained in the draft electoral law, although it has reintroduced deficiencies already noted in previous joint opinions and in the OSCE/ODIHR report on the 2012 parliamentary elections;
- Limitations on the right to be a candidate, which exclude anyone convicted of a deliberate crime, regardless of the severity of the crime committed;
- A five-year residency requirement for candidates, which is excessive and unreasonable;
- A lack of affirmative measures to increase the participation of women in elections;
- The need to adopt a single unified electoral code to ensure that uniform procedures are applied to all elections;
- Lack of pluralism in the election administration due to positions on DEC's and PEC's remaining with parties holding parliamentary mandates, limiting non-parliamentary parties to participating in a lottery for the distribution of the remaining vacant positions and excluding independent candidates entirely from representation on election commissions;
- Lack of independent monitoring of campaign finance as well as a lack of effective, proportionate and dissuasive sanctions for violation of campaign funding provisions;
- Certain limitations to the right to freedom of expression;
- Maintaining the maximum number of voters per precinct at 2,500, which is very high;

- Provisions which enable PECs to declare the results invalid based on arbitrary standards of abuse, which may establish an acceptable level of fraud.

14. In the framework of this joint opinion, the Venice Commission and the OSCE/ODIHR offer recommendations for consideration by the authorities of Ukraine in support of their efforts to improve election-related legislation and bring it more closely in line with OSCE and Council of Europe commitments and international standards. However, it must be emphasised that, in addition to further amendments to the legislative framework, full and effective implementation of the law is necessary in order to ensure conduct of elections in line with international standards.

III. Comments on the Text of the Draft Electoral Law

A. Electoral System, Suffrage Rights and Basic Principles

15. As the 2011 Joint Opinion of the OSCE/ODIHR and the Venice Commission noted,⁴ Ukraine has used three different electoral systems in the last 15 years for electing members of the parliament, including (1) electing all members in single-mandate districts, (2) electing all members by a closed list proportional system, and (3) a mixed system electing 225 single-mandate members and 225 members from party lists in a nationwide proportional representation contest. The mixed system of 225 single-mandate districts and 225 proportional representation mandates is retained in the draft electoral law. The OSCE/ODIHR in its final report on the 28 October 2012 parliamentary elections stated that most interlocutors complained about the electoral system, which re-introduced deficiencies that were already noted when it was previously used. As stated in the 2011 Venice Commission and OSCE/ODIHR Joint Opinion

“The choice of an electoral system is the sovereign right of each state; however it should be decided and agreed upon through broad and open discussions in the parliament with the participation of all political forces. Since the draft law re-introduces the system used in the 1998 and 2002 parliamentary elections, it should take account of the shortcomings of the electoral process identified by the national and international experts and observers during those elections”.⁵

16. The legal threshold for the allocation of mandates in the nationwide proportional component of the elections is five per cent. As stated in the 2011 Joint Opinion, this threshold, combined with the ban on the formation of electoral blocs and the choice of a mixed system, “does not facilitate the access of different political forces to parliament.”⁶ In Resolution 1705 (2010) of the Parliamentary Assembly of the Council of Europe, the Council of Europe called upon member states to “consider decreasing legal thresholds that are higher than 3 per cent”. *The Venice Commission and the OSCE/ODIHR recommend that consideration be given to decreasing the five percent threshold stipulated in the parliamentary electoral law.*

17. The draft electoral law does not contain any affirmative measures to increase the participation of women in elections. In its final report on the 2012 parliamentary elections, the OSCE/ODIHR recommended to consider the introduction of a gender requirement for nomination of party lists as a temporary measure to increase the participation of women in

⁴ See Joint Opinion on the Draft Law on Election of the People’s Deputies of Ukraine, CDL-AD(2011)037, pages 6-7, para. 19.

⁵ See Joint Opinion on the Draft Law on Election of the People’s Deputies of Ukraine, CDL-AD(2011)037, para. 22.

⁶ See Joint Opinion on the Draft Law on Election of the People’s Deputies of Ukraine, CDL-AD(2011)037, para. 125.

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elections.⁷ This recommendation is consistent with the provisions of Article 4 of the Convention on the Elimination of All Forms of Discrimination against Women, which has been ratified by Ukraine, and the principles of the Council of Europe.⁸ *The Venice Commission and the OSCE/ODIHR recommend that consideration be given to adding appropriate text in the draft electoral law for mandatory gender quotas for party lists presenting candidates for the proportional representation component of the parliamentary elections.*

18. *Consideration should also be given to encouraging political parties to promote women's participation in elections through legal provisions for campaign and political party finance.* Allocation of public funds for campaigns based on party support for women candidates is an appropriate mechanism for encouraging political parties to nominate more women candidates in light of the requirement for special measures as stated in Article 4 of the Convention on the Elimination of All Forms of Discrimination against Women.

19. It was noted in the OSCE/ODIHR final report on the 2012 parliamentary elections that the manner in which single-mandate districts were established negatively impacted the potential representation of some national minorities. The OSCE/ODIHR recommended respecting the rights of national minorities in the establishment of single-mandate districts as well as special mechanisms to promote national minority participation. Article 18.2.3 of the draft electoral law states the boundaries of single-mandate districts "shall be defined with due account of the interests of the members of territorial communities and density of population at respective territory of the national minorities". There is no additional clarifying text for the implementation of this provision. It is not clear whether this provision only prohibits dilution of national minority voting strength through the division of national minority voting populations into separate districts or affirmatively requires the concentration of national minority voting populations in single-mandate districts. *The Venice Commission and the OSCE/ODIHR recommend that additional clarifying text, explaining exactly what is intended by the phrase "shall be defined with due account" and how the text is to be implemented, be included in Article 18 of the draft electoral law.*

20. The parliamentary electoral law stipulates in Article 9.1 that the right to be elected is subject to a five-year residency requirement. This residency requirement is excessive and unnecessary. In principle, a length-of-residence requirement may be imposed on nationals for local and regional elections only, and the requisite period of residence should not exceed six months. A longer period may be required only to protect national minorities.⁹

21. The Venice Commission and the OSCE/ODIHR are aware that the five-year residency limitation is based on Article 76 of the Constitution of Ukraine. The Ministry of Justice explained that any previous recommendation concerning candidacy requirements cannot be addressed because the change necessitates amendment of the Constitution of Ukraine. However, two issues should be taken into account in this respect: Ukraine is in the process of revising its Constitution and, therefore, such an amendment could be introduced. Secondly, there are international obligations that are binding on Ukraine. Ukraine has ratified the International Covenant on Civil and Political Rights (ICCPR) and the European Convention on Human Rights (ECHR). The fundamental right of suffrage is contained in Article 25 of the ICCPR and Protocol 1, Article 3 of the ECHR. General

⁷ See OSCE/ODIHR Election Observation Mission Final Report on the 28 October 2012 parliamentary elections, page 37.

⁸ See, e.g., Recommendation 1899(2010), on "Increasing women's representation in politics through the electoral system", which encourages countries with proportional representation systems to consider the introduction of mandatory gender quotas for party lists.

⁹ Code of Good Practice in Electoral Matters, I 1.1 c iii-iv: iii. a length of residence requirement may be imposed on nationals solely for local or regional elections; iv. the requisite period of residence should not exceed six months; a longer period may be required only to protect national minorities.

Comment No. 31 on the Nature of the General Legal Obligation Imposed on States Parties to the Covenant, adopted by the Human Rights Committee on 29 March 2004 (2187th meeting), clearly states: “Although article 2, paragraph 2 [of the ICCPR], allows States Parties to give effect to Covenant rights in accordance with domestic constitutional processes, the same principle operates so as to prevent States parties from invoking provisions of the constitutional law or other aspects of domestic law to justify a failure to perform or give effect to obligations under the treaty.” The Constitution of Ukraine allows both the executive and legislative branches of government to submit proposals for amending the Constitution. *The Venice Commission and OSCE/ODIHR recommend the necessary legal changes be made to Ukraine’s domestic law to give effect to Ukraine’s obligations under Article 25 of the ICCPR¹⁰ and Article 3 of Protocol I to the ECHR.*

22. Article 9.4 of the parliamentary electoral law prohibits anyone who has been convicted of a “deliberate” crime from being nominated or elected as a member of parliament unless their sentence has been expunged. This provision denies passive suffrage rights based on a conviction for any “deliberate” crime, regardless of the nature or severity of the crime committed. The denial of suffrage should occur only where a person has been convicted of committing a crime of such a serious nature that forfeiture of political rights is indeed proportionate to the crime committed.¹¹ *Therefore, the Venice Commission and the OSCE/ODIHR recommend that this restriction be narrowly defined to apply only to a person convicted of specified crimes that are so serious that forfeiture of suffrage rights satisfies the principle of proportionality.*

23. The draft amendments concern only the elections for the parliament in Ukraine. It, therefore, does not meet the Resolution of the Parliamentary Assembly of the Council of Europe 1755 (Paragraph 7.1.1) of 10 October 2010 and the OSCE/ODIHR and the Venice Commission long-standing recommendation that all electoral rules should be codified in a single unified electoral code to ensure that uniform procedures are applied to all elections. The explanations provided by the Ministry of Justice state that the electoral legislation in Ukraine, although not contained in a single unified code, meets the principles of universal, equal, free, secret, and direct suffrage. The Venice Commission and the OSCE/ODIHR agree that achieving these principles is necessary for genuinely democratic elections. Unified electoral codes can facilitate the realisation of these principles by ensuring consistency in legal text and implementation of law. *The previous recommendation for harmonising all laws regulating different types of elections and unifying those in a single electoral code remains applicable to Ukraine.*

B. Territorial Organisation of Elections

24. Article 18 of the draft electoral law requires the establishment of one nationwide electoral district, which includes the entire territory of Ukraine and the “election district abroad”, and 225 single-mandate electoral districts, all of which are established by the CEC. The deviation in the number of registered voters in any single-mandate district cannot exceed 12 per cent from the average number of voters calculated in regard to all single-mandate districts.

¹⁰ Residency requirements must always be reasonable. See General Comment No. 25: The right to participate in public affairs, voting rights and the right of equal access to public service, 07/12/1996, CCPR/C/21/Rev.1/Add.7.

¹¹ See Article 25 of the ICCPR and Article 3 of Protocol I to the ECHR. See also judgments of the European Court of Human Rights in *Scoppola v. Italy (No. 3)* [GC], no. 126/05, 22 May 2012 and *Hirst v. The United Kingdom (No.2)* [GC], no. 74025/01, 6 October 2005; Paragraph 24 of the 1990 OSCE Copenhagen Document which provides that “participating States will ensure that the exercise of all the human rights and fundamental freedoms will not be subject to any restrictions except those which are provided by law and are consistent with their obligations under international law”; Paragraph 1.1(d.iv) of Council of Europe, Venice Commission, Code of Good Practice in Electoral Matters, Guidelines for Elections, (2002), page 8.

25. Article 18 of the draft electoral law requires the CEC to respect the following principles when establishing boundaries of single-mandate electoral districts: (1) the 12 percent deviation rule noted above; (2) the boundary of each district must be a “closed-loop line” which “separates its territory from the territories of other (neighboring)” electoral districts; and (3) “interests of the members of territorial communities and density of population at respective territory of the national minorities” must be taken into account. These principles provide criteria, which were not included in the current version of the electoral law. *The inclusion of the above criteria in the draft electoral law is an improvement and addresses previous recommendations of the Venice Commission and the OSCE/ODIHR.*

26. The criteria established by Article 18 are improvements, addressing previous recommendations. However, as noted earlier in this joint opinion, the text in Article 18.2.3 (“shall be defined with due account of the interests of the members of territorial communities and density of population at respective territory of the national minorities”) should be clarified to ensure its proper implementation. It is not clear whether this provision only prohibits dilution of national minority voting strength through the division of national minority voting populations into separate districts or affirmatively requires the concentration of national minority voting populations in single-mandate districts. *The Venice Commission and the OSCE/ODIHR recommend that additional clarifying text, explaining exactly what is intended by the phrase “shall be defined with due account” and how the text is to be implemented, be included in Article 18 of the draft electoral law.*

27. Article 18 of the draft electoral law also requires the CEC to publish on its website the list of single-mandate districts, including their numbers, boundaries, and addresses of the respective district election commissions for the districts. *This requirement addresses a previous recommendation of the OSCE/ODIHR and the Venice Commission.* An existing requirement that such information be published in national and regional media has been retained in the law. These provisions are positive measures for the improvement of transparency in the establishment of single-mandate districts.

28. The CEC is required to make a decision on the change of boundaries and single-mandate districts not later than 175 days prior to the day of voting. As there are already existing single-mandate districts and the CEC only has to adjust boundary lines for existing districts as opposed to creating 225 new districts, *consideration should be given to increasing the number of days in the draft electoral law to give political parties and candidates additional time to become familiar with the demographics of electoral districts prior to elections.*¹²

29. According to Article 19.3 of the parliamentary electoral law, voting is conducted in electoral precincts, which can have between 20 to 2,500 voters. The OSCE/ODIHR and the Venice Commission have previously recommended reducing this number to ease the problem of overcrowding in polling stations.¹³ While any reduction in the number of voters per precinct will have financial implications, the authorities should consider if these would be outweighed by the positive impact that reducing the number of voters would have on the practical aspects of ensuring universal suffrage.

¹² The Code of Good Practice in Electoral Matters establishes in point II.2.B that “fundamental elements of electoral law, in particular the electoral system proper, membership of electoral commissions and the drawing of constituency boundaries, should not be open to amendment less than one year before an election, or should be written in the constitution or at a level higher than ordinary law”. In point I.2.2.v, the Code establishes that issues relating to the distribution of seats should be reviewed “preferably outside election periods”.

¹³ See Joint Opinion on the Draft Law on Election of the People’s Deputies of Ukraine, CDL-AD(2011)037, page 9, para. 31.

C. Election Commissions

30. The three-level system of election administration, which consists of the CEC, District Election Commissions (DEC) and Precinct Election Commissions (PEC), is maintained in the parliamentary electoral law. The system is hierarchical with the CEC having supervisory authority over the lower-level commissions. It has been previously recommended that the registration of candidates in the single-mandate districts be conducted by the DEC, provided that the CEC enjoys strong regulatory functions with regard to candidate registration and has the right to overrule unsound decisions of the DECs. This recommendation is partially addressed by the draft laws as the DECs are given authority in the areas of election administration and candidate registration for the registration of candidates in the single-mandate districts. However, the proposed amendments contain no provisions for CEC oversight of candidate registration by the DECs. *In line with previous recommendations, the draft electoral law should be revised to provide the CEC with strong regulatory functions with regard to candidate registration and the right to overrule an unsound decision of the DEC on candidate registration.*

31. Article 26.7 of the parliamentary electoral law provides that a person may be appointed to be the head, deputy head or secretary of a DEC only if he/she has completed training for managerial positions of a DEC established by the CEC. In addition the secretary must have command of the state language to the extent necessary for the management of the records of the DEC. These are positive provisions, which should increase professionalism in these positions on the DEC.

32. Article 13 of the parliamentary electoral law states that parliamentary elections should be prepared and conducted in a public and transparent manner. The Venice Commission and the OSCE/ODHIR have previously recommended the inclusion of more specific transparency mechanisms in the law to achieve this general principle of transparency. *Both the draft electoral law and draft CEC law include provisions that address several previous recommendations of the OSCE/ODIHR and the Venice Commission for greater transparency in the work of the election administration and in making results public. Examples are noted below.*

33. Articles 10.1 and 12.1 of the draft CEC law require the CEC to not only “consider” decisions but to also “discuss” decisions at its sessions. This should address the concern noted by the OSCE/ODIHR in the final report on the 2012 parliamentary elections that CEC meetings and decisions were held “behind closed doors.” Similar requirements for election commission “discussions” are found in Article 33.10 of the draft electoral law for DECs and PECs.

34. Article 30.3 of the draft electoral law should also enhance transparency as it requires Acts of the CEC, which have legal character, to be published prior to the election process. However, this provision requires publication only “where possible”. It is not clear what circumstances would make publication “not possible”, except for the date and time of the decision. *It is recommended that the phrase “where possible” be clarified so that the provision is effective and cannot be arbitrarily applied by the CEC.*

35. Transparency has also been enhanced by adding observers from non-governmental organisations to the list of persons authorised to be present for CEC meetings. This addition is included in Article 4.2 of the draft CEC law. *This is a positive amendment to the CEC law.*

36. Article 31.20 introduces a requirement for DECs to submit to the CEC “information on the applications and complaints lodged” and “results of their review”. *This is a positive measure which should increase transparency and addresses previous recommendations for increased transparency in election administration.*

37. The Venice Commission and the OSCE/ODIHR have previously recommended increased pluralism in election commission membership in order to enhance the impartiality and independence of the election administration. Although the draft law includes revised provisions in Articles 27.2 and 29.3 for nomination of members to the DEC and PECs, this recommendation is not addressed. Only parties already holding parliamentary mandates are guaranteed positions on the DEC and PECs while non-parliamentary parties can only participate in a lottery for the distribution of the remaining vacant positions. *Thus the Venice Commission and OSCE/ODIHR recommendation for increased pluralism in election administration remains unaddressed.*

38. The Venice Commission and the OSCE/ODIHR have previously recommended reducing the maximum and minimum numbers of PEC members to promote consensus and orderly meetings. This would improve the work of the PECs and also address the issue of overcrowding in PECs on election day, especially considering the large number of voters in some PECs and the size limitations of polling stations.¹⁴ *This recommendation remains unaddressed.*

39. Each party nominating members to the DEC and PECs is entitled to a share of the managerial positions (Articles 27 and 28), which is proportional to the number of commission members selected from the party nominees. The procedure for the lottery for the distribution of the managerial positions among the parties is to be determined by the CEC. The parliamentary electoral law also requires that the procedure results in approximate evenness of territorial distribution of the managerial positions filled by each party. The revised Article 27.3 now requires lotteries to be conducted for each electoral district as opposed to a single nationwide lottery for all districts. *This amendment changes the prior CEC practice of a single lottery performed simultaneously for all DEC and is a positive amendment.*

40. Article 34 of the draft electoral law gives party representatives the right to be present at meetings of the CEC with an advisory vote. It also lists those individuals who may be present at CEC meetings without permission, which include candidates and their proxies, official observers, both domestic and international, and mass media. The article also makes it clear that the same individuals have the right to be present without invitation at meetings of the DEC and PECs including for counting and tabulation.

41. Article 35 of the draft electoral law specifies that election commissions maintain written documents. Minutes, decisions, resolutions, reports, and protocols are some of the types of written documents identified in the Article. It requires that some of these documents, but not all – such as minutes, be made publicly available through various means of publication. However, all documents prepared by election commissions, including minutes, should be made available to the public. *The OSCE/ODIHR and the Venice Commission recommend that all election administration documents, including minutes, decisions, resolutions, reports, and protocols be made available for public inspection at the relevant election commission headquarters and published on the CEC website.*

42. The recommendation for complete transparency in the written documentation of election commissions is addressed partially. Article 35.5 of the parliamentary electoral law mandates that any decision of a commission be publicly available on the information stand of the commission no later than the morning after the day it was adopted.

43. Article 35 also specifies the information that needs to be included in all decisions of election commissions. This should ensure that complainants are supplied with the information necessary to appeal a decision of a commission and should promote

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See Article 83.3, small election precincts shall be no less than 50 square meters, medium PECs 75 square meters and large PECs 90 square meters.

consistency in the substantive content of decisions.

D. Voter Lists

44. The preliminary voter lists are compiled by the State Voter Register maintenance bodies pursuant to the Law on the State Voter Register. Articles 39-44 of the parliamentary electoral law regulate the updating of the compiled preliminary voter lists, which is done in accordance with procedures approved by the CEC. A copy of the voter list is transferred to the PEC to be posted for public inspection by voters. Under Article 40.3 of the parliamentary electoral law, a voter can request a change to his/her own data or to any other voter's data. Although the Law on the State Voter Register provides for notification to a voter of changes in personal data after the changes are made, there is no requirement in either the draft electoral law or the Law on the State Voter Register for a voter to be notified if his or her voter's data is challenged by another voter. It would be a better practice to notify a voter of an application to change the voter's personal data prior to the change being made. *The OSCE/ODIHR and the Venice Commission recommend that the electoral law be amended to require that a voter be notified and have the opportunity to respond to challenge a request for a change in the voter's personal data.*

45. The CEC is responsible for the register's content and maintenance. The State Voter Register department of the CEC manages the software, technical support and security of the information on the register, while register maintenance bodies throughout the country enter the data.

46. Problems were noted in the 2012 parliamentary elections where voters who would be away from their residence on election day requested to change their voting place to targeted single-mandate electoral districts.¹⁵ The CEC passed a decision during the 2012 parliamentary elections to allow voter changes only within the single-mandate electoral district where the voter was registered. The OSCE/ODIHR recommended in its final report on the parliamentary elections that the electoral law should be amended to prevent temporary changes in voter registration where the change would allow the voter to vote outside of his or her current single-mandate district. Several amendments address this recommendation by allowing voters to make a temporary change to vote outside their single-mandate electoral district, but only allowing these voters to vote in the nationwide proportional representation election on election day.

47. Article 42.2 of the parliamentary electoral law provides that any change or adjustment to the voter lists on election day must be made on the basis of a court judgment. Under Article 42.7, PECs may only correct inaccuracies related to misspelled names, errors in the date of birth, number of the building or apartment provided that it is obvious that the person on the list is the same one who has come to vote.

48. The Law on the State Voter Register and the parliamentary electoral law contain provisions which should safeguard against multiple voting and other possible fraud related to the voter list. These should improve the accuracy of the voter list if implemented in a comprehensive and consistent manner. This includes requiring relevant state agencies and institutions to provide updated data to the State Voter Register maintenance bodies to verify the preliminary voter lists and that the register maintenance bodies act as the central collector of information on all changes to the voter lists.

¹⁵

See OSCE/ODIHR Election Observation Mission Final Report on the 28 October 2012 parliamentary elections, page 11.

E. Financing of Elections

49. The parliamentary electoral law requires that all campaign expenses must be paid from the official electoral fund account of the political party or single-mandate district candidate. The account must be opened no later than the tenth day following the registration of the political party list or as a single-mandate district candidate. Each electoral fund must have a designated manager who is responsible for overseeing compliance with the law in the expenditure of funds.

50. The Venice Commission and the OSCE/ODIHR have previously recommended the introduction of a reasonable campaign spending limit. Article 48.1 of the draft electoral law limits the amount of a political party campaign fund for the national proportional representation list election to 100 million UAH.¹⁶ The limit for the campaign fund of a single-mandate district candidate is 4.5 million UAH.

51. Voluntary donations from natural persons to a political party cannot exceed 400 minimum wages (about 42,000 EUR) and to a single-mandate candidate 20 minimum wages (about 2,100 EUR).¹⁷ Donations from foreign citizens, anonymous donors and non-natural persons are prohibited.

52. Article 50 of the parliamentary electoral law requires the bank to return to the party any unused funds based on a request from the party after the elections. On the other hand, any unused funds in the account of a single-mandate district candidate shall be transferred to the state budget. There appears to be no logical reason for the unequal treatment of a political party's unused campaign funds and those of a single-mandate district candidate. *The Venice Commission and the OSCE/ODIHR have previously recommended that this discriminatory practice be ended.*

53. Article 48.9 of the parliamentary electoral law prohibits any payments from the campaign electoral fund after 18:00 hours on the day prior to election day. This may prove to be too restrictive as candidates and political parties must have time to pay invoices and other bills that may arrive after the deadline. It would seem more appropriate to prohibit any new expenses or invoices for campaign activity that occur after the deadline.

54. The manager of the campaign fund must submit a financial report on a form approved by the CEC no later than on the fifteenth day after election day for political parties and the tenth day after election day for single-mandate district candidates. This report must be posted on the CEC website. As previously recommended by OSCE/ODIHR and the Venice Commission the law should require full disclosure, before and after the elections, of sources and amounts of financial contributions and the types and amounts of campaign expenditures. The additional amendments to the parliamentary electoral law take account of this recommendation. Articles 49.5 and 49.6 provide that the campaign manager files provisional financial reports on the use of resources 30 days prior to election day for parties and 20 days for single-mandate district candidates to the CEC and to the DEC's respectively. This provisional report on the origin and use of resources of the electoral fund shall be published on the CEC website. Timely disclosure of campaign finance information to the public before elections provides important and useful information to voters and increases transparency of the process. *The Venice Commission and the OSCE/ODIHR therefore welcome these new disclosure requirements.*

55. Oversight over the adherence by electoral subjects to legal requirements on reporting on the receipt and use of electoral funds is exercised by the CEC. However, there is no indication as to what action the CEC is obligated to take in relation to the reports and no deadline is envisaged for reviewing them. The draft electoral law does not establish any

¹⁶ The exchange rate at the moment of drafting the document was 1 EUR: 10.95 UAH.

¹⁷ A minimum wage is 1,147 UAH, which is about 105 EUR.

liability for failure to submit reports and only requires the CEC or the relevant DEC to report violations to “relevant law-enforcement bodies, which shall hold an inquiry and react in accordance with the law.” The additional amendments sent to the Venice Commission and the OSCE/ODIHR on 15 May 2013 propose several other changes in this respect; Article 50.7 establishes that the manager of the electoral fund must refuse contributions that are not in conformity with the law. The CEC and the DEC’s will exercise a ‘selective control’ over the receipt, accounting and use of resources of parties or candidates in single-mandate constituencies according to Article 50.9, under the procedure established by the CEC jointly with the National Bank of Ukraine and the central executive power. Finally, Article 61 introduces the failure to submit financial reports or the entry of invalid data as possible reasons for issuing a warning to candidates. *There is no further specification whether these actions could lead to cancellation of registration.*

56. As stated by the Council of Europe Committee of Ministers in their Recommendation 2003(4): “States should provide for independent monitoring in respect of the funding of political parties and electoral campaigns. The independent monitoring should include supervision over the accounts of political parties and the expenses involved in election campaigns as well as their presentation and publication.” The law has been improved in this respect, as certain provisions regarding monitoring of funding of electoral campaigns, as well as new provisions concerning the possible consequences for not complying with transparency requirements in funding of independent candidates and political parties were introduced. There is no specific definition, however, of dissuasive sanctions for violation of campaign funding provisions. Monetary penalties imposed against violators, either in the form of the loss of public funding or the assessment of fines, are common dissuasive sanctions. *The introduction of public funding, which has been previously recommended, would not only address the recommendation but also create a potential mechanism for enforcing sanctions for campaign finance violations. Irregularities in financial reporting, non-compliance with financial-reporting regulations or improper use of public funds should result in the loss of all or part of public funds for the party.*

57. The OSCE/ODIHR final report on the 2012 parliamentary elections noted shortcomings in Ukraine’s campaign and political party finance regulations previously identified by the Council of Europe’s Group of States against Corruption (GRECO).¹⁸ The OSCE/ODIHR final report also notes that Ukraine’s party finance regulations fall short of the standards and recommendations of the Guidelines for Political Party Registration put forward jointly by the Venice Commission and the OSCE/ODIHR. As a result, the OSCE/ODIHR final report recommended: (1) more detailed content for campaign finance disclosures; (2) greater frequency in filing of reports; (3) more equitable conditions for campaign finance; (4) more detailed regulations for sanctions and accountability; (5) clear procedures for enforcement and designation of a single body responsible for enforcement of violations; (6) the introduction of a reasonable campaign limit on spending; and (7) consideration of the introduction of public funding for political parties with a threshold level of support. The provision of Article 48.1 of the draft electoral law setting limits on campaign expenditures and new amendments on submission of provisional reports before election day and their publication on the CEC website, as well as on the possibility of issuing warnings for not respecting campaign funding rules are positive amendments. *However, the need remains to address numerous recommendations aimed at improving the regulation of campaign finance.*

¹⁸

See OSCE/ODIHR Election Observation Mission Final Report on the 28 October 2012 parliamentary elections, page 18. See also GRECO “Evaluation Report on Ukraine: Transparency of Party Funding”, 21 October 2011, available at: [www.coe.int/t/dghl/monitoring/greco/evaluations/round3/GrecoEval3\(2011\)1_Ukraine_Two_EN.pdf](http://www.coe.int/t/dghl/monitoring/greco/evaluations/round3/GrecoEval3(2011)1_Ukraine_Two_EN.pdf).

F. Nomination and Registration of Candidates

58. According to Article 52 the nomination of candidates begins 90 days prior to election day and ends 79 days prior to election day. Parties have the right to nominate a list of candidates in the nationwide election district. Candidates in the single-mandate districts can be nominated by parties or they can be self-nominated. Candidates who are not members of any party may nonetheless be nominated by a party and appear on the list of that party. Candidate lists for the nationwide district are registered with the CEC. The draft electoral law removes CEC responsibility for registration of single-mandate candidates and places it with the relevant DEC. DEC registration of single-mandate candidates partially adopts a previous recommendation. However, the proposed amendments contain no provisions for CEC oversight of candidate registration by the DECs. *In line with previous recommendations, the draft electoral law should be revised to provide the CEC with strong regulatory functions with regard to candidate registration and the right to overrule an unsound decision of the DEC on candidate registration.*

59. The parliamentary electoral law does not allow political parties to form electoral blocs to present candidates in the elections. *Unless there is a legitimate reason for banning the formation of electoral blocs, and due to the threshold of five percent for mandate allocation, consideration should be given to allowing political parties to form electoral blocs to present candidates in the elections, as previously recommended by the Venice Commission and the OSCE/ODIHR.*¹⁹

60. Article 60 of the draft electoral law provides grounds for refusing candidate registration, including errors and inaccuracies in nomination papers as well as substantive failure to meet the requirements for candidacy. The OSCE/ODIHR final report on the 2012 parliamentary elections noted that “441 nominees were not registered, mostly on the grounds that necessary documents had not been provided; many were rejected for minor omissions, which is at odds with paragraph 24 of the 1990 OSCE Copenhagen Document.”²⁰ The OSCE/ODIHR recommended that the law include notification mechanisms to ensure that prospective candidates are informed of mistakes or omissions to allow them to make timely corrections in order to be registered. This recommendation is addressed with the new Article 60.3 which requires the relevant election commission to “immediately notify the party’s representative” or “MP candidate” of mistakes and inaccuracies. Candidates are allowed until “the next day following the receiving of the respective notification of the election commission” to re-submit corrected documents.

61. A financial deposit equivalent to 2,000 minimum wages (about 210,000 EUR) is required from parties who nominate a list and a deposit equivalent to 12 minimum wages (about 1,260 EUR) is required for single-mandate candidates. Only parties who participate in the distribution of mandates and single-mandate candidates who win a seat are entitled to a return of the deposit. All other deposits are transferred to the state budget.

62. The requirement for a financial deposit could lead to lower participation by smaller political parties and self-nominated candidates who do not have the personal or party resources to risk losing the deposit. *Unless there is a legitimate election-related reason for this requirement, consideration should be given to lowering the amount of the financial deposit to ensure broader participation of parties and individuals in elections as candidates.*

63. Article 60 lists the grounds upon which the CEC and DECs shall refuse registration of candidates. The decision on refusal must contain a complete list of the grounds for refusal

¹⁹ See Joint Opinion on the Draft Law on Election of the People’s Deputies of Ukraine, CDL-AD(2011)037, paras. 17 and 70.

²⁰ See OSCE/ODIHR Election Observation Mission Final Report on the 28 October parliamentary elections, page 14.

and must be delivered to the party representative or person who submitted the documents.

64. A candidate's registration may be cancelled by the election commission that registered the candidate for any of the reasons listed in Article 61.4. Eight separate grounds are stated for cancellation of registration, including that the candidate has been found guilty of committing a "deliberate" crime. This issue has already been discussed and is subject to a recommendation of the Venice Commission and the OSCE/ODIHR. *The OSCE/ODIHR and the Venice Commission recommend that this restriction be narrowly defined to apply only to a person convicted of specified crimes that are so serious that forfeiture of suffrage rights satisfies the principle of proportionality.*²¹

G. Media and Information Support of Elections

65. Although the draft electoral law states positive general principles for media access and for providing information to voters, such as in Article 63.1, it fails to state specific and detailed procedures for assuring balanced coverage.

66. Article 63.1 of the parliamentary electoral law states, as a general principle, that voters shall be given the possibility to access diverse, objective and unbiased information that is necessary to make a deliberate, informed and free choice. The law requires that when distributing information on the election, all election commissions, mass media, governmental institutions and bodies and civic associations do so in an unbiased, unprejudiced, balanced, reliable, complete and accurate manner. Article 13.4 of the parliamentary electoral law also states, as a general principle, that all reporting on the elections by mass media, both private and public, must be done in an unbiased manner. It also states a general guarantee of unrestricted access for the mass media to all public events relating to the elections, meetings of election commissions and premises of election precincts on election day.

67. Despite the requirements of Articles 13.4 and 63.1 of the law, the OSCE/ODIHR noted numerous problems related to media coverage during the 2012 parliamentary elections. In its final report on the 2012 parliamentary elections, the OSCE/ODIHR recommended to require more balanced coverage in media regulations, political pluralism in media coverage, and not giving candidates with government positions privileged media treatment over other candidates.²² The OSCE/ODIHR also recommended greater clarity in identifying the body responsible and the applicable procedures for enforcement of sanctions for media violations as well as that media monitoring results compiled by independent NGOs be used for adjudicating complaints of media violations.

68. Article 66.6 of the draft electoral law adopts the recommendation of the OSCE/ODIHR for use of media monitoring results compiled by NGOs in adjudicating complaints of media violations. This provision specifically states "the National Council for Television and Radio Broadcasting of Ukraine may use monitoring materials provided by civic organizations registered according to law-established procedure, statutes of which envisage activities on monitoring and observation of election process."

69. Article 66 also has new language which (1) requires mass media to "report on election information according to facts and not allowing misrepresentation of information"; (2) prohibits mass media "to distinguish between subjects of election process or to give them privileges"; (3) limits the share of broadcasting time of parliamentary parties and their candidates to "not more than 30 per cent from the average amount of broadcasting time";

²¹ See the Code of Good Practice in Electoral Matters, point I.1.1.d.(iii) and the European Court of Human Rights judgments in this respect, cited in footnote 11.

²² See OSCE/ODIHR Election Observation Mission Final Report on the 28 October 2012 parliamentary elections, pages 34, 36-7.

(4) requires equal broadcast time for participants in paid TV and radio election debates and discussions. These provisions partly address the OSCE/ODIHR recommendations. It is clear from Article 66.6 of the draft electoral law that “National Council on Television and Radio Broadcasting of Ukraine oversees and ensures compliance with the requirements of this Law as regards the participation of the media and news agencies in providing information and conducting election campaigning.” *This is a positive amendment that addresses the OSCE/ODIHR recommendation to identify the body responsible for enforcing media rules.*

70. Article 72.1 of the draft electoral law requires that electronic mass media must set and publish their rates for political advertising 90 days before election day. Under Article 71.8, no changes to these rates are allowed for the duration of the campaign. Nor can media outlets offer or grant discounts to candidates and parties. A mass media organisation that provides space for campaigning to one candidate or party cannot refuse to offer space to any other candidates and parties on the same terms.

71. Broadcasters are prohibited from commenting on or assessing the content of election campaigning, the activities of the party or candidate in any form within 20 minutes before and after the broadcasting of a campaign spot under Article 72.9 of the parliamentary electoral law. This provision impacts on the freedom of expression of the broadcasters and appears overly restrictive. *The Venice Commission and the OSCE/ODIHR recommend to carefully reconsider this provision.*

72. Article 74.18 of the draft electoral law bans campaigning in foreign mass media that operate on the territory of Ukraine and in mass media registered in Ukraine in which the share of foreign ownership exceeds fifty percent. As presenting a candidate’s platform to voters is an inextricable part of the right to be elected, this provision should be reconsidered. The restriction also appears to violate citizens’ right to receive and impart information regardless of borders as set out in paragraph 26.1 of the OSCE Moscow Document.²³ OSCE participating States also commit themselves “to take all necessary steps to ensure the basic conditions for free and independent media and unimpeded transborder and intra-State flow of information, which we consider to be an essential component of any democratic, free and open society.”²⁴

73. Article 67.4 of the parliamentary electoral law provides a blackout period during which opinion polls cannot be published by the media during the 10 days before elections. *Consideration should be given to further reducing the blackout period so that voters can continue to receive information closer to election day.*²⁵

H. Election Campaign

74. The OSCE/ODIHR final report on the 2012 parliamentary elections provides a lengthy list of examples of the abuse of state resources in the elections. This list includes examples of: “the use of official events, meetings, or public works to promote the party or its candidates; the active participation of local or regional officials in candidate meetings during working hours; public workers being required to attend meetings with candidates;

²³ Document of the Moscow Meeting of the Conference on the Human Dimension of the CSCE, 10 September 1991: the participating States “consider that the print and broadcast media in their territory should enjoy unrestricted access to foreign news and information services. The public will enjoy similar freedom to receive and impart information and ideas without interference by public authority regardless of frontiers, including through foreign publications and foreign broadcasts. Any restriction in the exercise of this right will be prescribed by law and in accordance with international standards”.

²⁴ Paragraph 26 of the OSCE 1999 Istanbul Document.

²⁵ See e.g. the Council of Europe Recommendation on Measure concerning Media Coverage during Election Campaigns 1999, para. 3.2 and Recommendation of the Committee of Ministers of the Council of Europe on media coverage of election campaigns 2007.

newspapers or websites of regional or local authorities containing materials in support of candidates or attacking the opposition; and planned rallies or meetings of opposing candidates being denied, cancelled or otherwise obstructed without a justifiable reason.”²⁶ This occurred despite the general requirement in Article 11 of the current electoral law that the election process provide for the “unbiased treatment of parties”.

75. In its final report on the 2012 parliamentary elections, the OSCE/ODIHR recommended stronger institutional mechanisms for dealing with the abuse of state resources in elections and holding accountable those responsible. The final report also calls on political parties to be more responsible and to take their own initiatives to prevent these abuses. Other than Article 74.11 of the draft electoral law, which requires the publication of warnings issued by the National Council for Television and Radio Broadcasting regarding media law violations, and Article 74.4, which prohibits state authorities from being involved in election campaigns, the draft electoral law contains no strengthened institutional mechanisms to deal with the prevalent problem of the abuse of state resources. *The Venice Commission and the OSCE/ODIHR recommend the draft electoral law be revised to address this recommendation.*

76. As noted above, the amendments to Articles 74.4 and 74.11 do not fully address the recommendation for stronger institutional mechanisms for dealing with the abuse of state resources during elections and holding accountable those responsible. Publication of a warning on TV and radio and prohibiting state authorities from being involved in election campaigns is only a first step. Article 74.8 of the draft electoral law prohibits the use of candidates, political parties, and campaign messages, including their names, images, and symbols, in “commercial and social advertising”. *This amendment expands Article 74.8, which already prohibited “placing political advertisements in the same bloc with commercial or social advertisements”. It remains to be seen what effect this amendment will have in future elections.*

77. Article 69.8 of the parliamentary electoral law requires local self-government and local executive bodies to allocate places for posting of campaign material. Although it may be assumed the general principle of equal treatment of candidates applies here, it would be better if the article stated that places must be allocated on an equal basis.

78. Election campaign activities are almost invariably a manifestation of an individual’s right to freedom of expression and/or association. Ukraine is obliged under the European Convention for the Protection of Human Rights and Fundamental Freedoms to ensure those rights to everyone within its jurisdiction.²⁷ Any restriction on these rights must be strictly necessary and proportionate in a democratic society. *It is difficult to reconcile Article 74.1, which prohibits foreign nationals and stateless individuals from expressing opinions during campaign activities, with these principles. It is not clear why such a blanket restriction would be necessary in a democratic society.*

79. Article 69 of the draft electoral law requires, when requested by a political party or single-mandate district candidate, that the CEC or DEC permit the posting of information posters and campaign materials in the regional language or minority language of the party or candidate. This amendment partially addresses a previous recommendation that official electoral information should be available in minority languages in areas where they are widely spoken. The amendment partially addresses this recommendation because the provision is only applicable when a request is made by a political party or candidate. However, this issue may be additionally addressed by Article 69.5, which incorporates by reference the Law of Ukraine “On the Principles of State Language Policy” to include requirements of the referenced law for campaign materials.

²⁶ See OSCE/ODIHR Election Observation Mission Final Report on the 28 October parliamentary elections, page 16.

²⁷ Articles 1, 10, and 11 of the convention.

I. Guarantees of Activities of Parties, Candidates and Observers

80. A political party that has registered candidates in the nationwide election district is entitled to have a representative in the CEC who participates in an advisory capacity. Such a political party is also entitled to have up to five authorised representatives in the nationwide district and two in each single-mandate district. Authorised representatives in single-mandate districts also participate in an advisory capacity in the respective DEC. A representative of a party and an authorised person have the right to be released from their work or service duties without pay and with the agreement of the employer or organisation.

81. Party representatives are granted broad rights under Articles 75.13 and 75.14 of the parliamentary electoral law. Specifying these rights clearly and comprehensively should lead to the promotion of transparency and increase confidence in the electoral process.

82. The rights of a party representative include the right to be present at all CEC meetings, to receive the agenda and materials prior to the date of the meeting, to participate in discussions and access all documents and minutes. They can also familiarise themselves with all communications between the DECs and the CEC on the result of voting and are entitled to obtain copies of election commission protocols. Authorised representatives represent the interest of the parties and candidates in relation to other electoral subjects. They can participate in meetings of DECs and PECs and be present at the PEC during voting and vote counting.

83. Official observers from political parties, candidates or NGOs have broad and comprehensive rights, which are detailed in Article 77.9. One troubling provision allows official observers to “take necessary measures within the limits of legislation to stop illegal actions during the voting and vote counting at the election precinct”. This right is very broad and could potentially be abused by some electoral subjects. It would be better to provide that official observers should immediately notify the PEC, DEC, CEC or other relevant authorities if they observe actions they believe to be illegal rather than take action themselves.

84. Article 79.6.5 of the draft electoral law provides that official observers from foreign states and international organisations shall be entitled to copies of protocols on the delivery of ballots to and from DECs, results of the counting, tabulations of results, and “other documents” in cases provided by the law. *This is a positive amendment that addresses a previous recommendation of the OSCE/ODIHR and the Venice Commission.*

J. Voting, Counting and Establishment of Results

85. The parliamentary electoral law provides detailed provisions for delivery of election materials to polling stations, voting, counting, and the establishment of results. Sufficient security measures are in place to assure the integrity of the ballots before election day. Transparency is guaranteed throughout the process of delivery and transfer of the ballot papers through the creation of a clear chain of custody with the use of ballot acceptance and delivery documents. All these documents must be made public.

86. There are provisions that allow voters who are blind and/or physically unable to vote to invite a third person into the booth to help them exercise their right to vote. The list of people who are excluded from helping another voter is comprehensive and logical.

87. Homebound voting is allowed under Article 86 for those voters who are “incapable of moving independently because of age, physical disability or state of health.” An application for homebound voting must be filed with the PEC no later than at 20:00 hours on the Friday before election day. The excerpted voter list for homebound voting must be posted at the PEC for public inspection on the day before voting.

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88. While Article 85.11 requires each PEC to prepare a security document showing the number of ballot papers taken by the PEC members responsible for homebound voting and the names of these members, there is no guideline on the number of ballots to be taken. This guidance should be provided. *Ideally, this number should include all voters registered on the relevant excerpt from the voter lists as well as a small specified number of spare ballots to allow for the possibility of spoiled ballots.*

89. The system of homebound voting, which has been constructed with the necessary security measures, helps to uphold Ukraine's commitment to the *UN Convention on the Rights of Persons with Disabilities*.²⁸

90. The PEC may declare the results in its precinct invalid if infringements of the law have occurred that make it impossible to determine the will of the voters. Article 92 provides three grounds for this, which all refer to a minimum percentage of abuse that must occur before the provision becomes effective: in the case of illegal voting (i.e. voting by proxy, voting by those who are not eligible to vote, multiple voting) the level of abuse must exceed 10 per cent of the number of votes; in the case of destruction or damage to a ballot box that makes it impossible to determine the content of the ballots the number of such ballots must exceed 20 per cent of those who received ballots; and if the number of ballot papers in the ballot box exceeds the number of voters who received ballots by 10 per cent. Such arbitrary standards of impermissible abuse are hard to justify. They establish an acceptable level of fraud, which is not compatible with the conduct of proper elections. As a matter of principle election results should be invalidated if the level of fraud or misconduct was such that the will of the voters cannot be determined.²⁹ *The OSCE/ODIHR and the Venice Commission recommend that these provisions be reconsidered. This has been a long standing recommendation of the Venice Commission and OSCE/ODIHR.*

91. Article 94.17 of the draft electoral law allows the DEC, after a recount of the ballots, to declare the results in a PEC invalid. In the case of the DEC's declaration of invalidity after a recount, the DEC tabulates the results regardless of the number of polling station results that have been excluded due to invalidity. In the 2012 parliamentary elections abuse of this provision was observed, which led to numerous recounts by DEC's and subsequent declarations of invalidity.³⁰ It was also observed that ballots in some of these instances appeared to have been tampered with in the DEC premises and the invalidation of PEC results by the DEC changed losing candidates into winning candidates. Article 94.17 of the draft electoral law becomes more problematic when applied with Article 94.16, which allows the DEC to declare PEC results invalid in case of non-admission of observers or authorised representatives of candidates and parties. *Articles 94.16 and 94.17 should be carefully considered due to the past experience of abuse that allowed DEC's to adopt decisions that resulted in changes of the election results.*

92. *The Venice Commission and the OSCE/ODIHR recommend that all provisions in the draft electoral law for invalidation of results be revised to establish clear guidelines and procedures for invalidation that are based on objective criteria and not arbitrary percentages.*

93. Article 96¹ of the draft electoral law creates a separate provision for establishing the results in election precincts abroad. The procedures for preparing the protocol and the contents are similar, but not identical, to existing Article 96 for in-country single-mandate districts. However, point 8 of Article 96¹ of the draft electoral law states that it is "forbidden

²⁸ The Convention was signed by Ukraine on 24 September 2008, see Article 29.A.i.

²⁹ Code of Good Practices in Electoral Matters, CDL-AD(2002)(023-rev.), II.3.3.e recommends that "the appeal body must have authority to annul elections where irregularities may have affected the outcome."

³⁰ See OSCE/ODIHR Election Observation Mission Final Report on the 28 October 2012 parliamentary elections, page 30.

to declare the elections invalid in the abroad election precincts". This provision, as written, suggests that results from election precincts abroad, even if proven to be the result of fraud, must be accepted and considered in tabulations. This provision is inconsistent with previous recommendations of the Venice Commission and the OSCE/ODIHR that mechanisms be in place for invalidation where irregularities may have affected the outcome. *The Venice Commission and the OSCE/ODIHR recommend that Article 96¹ be revised to be consistent with other provisions for invalidation in the draft electoral law.*

94. The OSCE/ODIHR final report on the 2012 parliamentary elections noted that the tabulation of results was a lengthy process that should be improved. In this regard, the OSCE/ODIHR made several recommendations for improving the process for tabulation of results, including: (1) simplifying the procedures for results tabulation; (2) increasing the number of personnel entering election results in computers at the DEC; (3) authorizing the CEC and DEC to amend results protocols to correct evident mistakes and inaccuracies; and (4) establishing clear deadlines for delivery of election results in the law.³¹

95. Some of these OSCE/ODIHR recommendations have been adopted. Article 91.12 of the draft electoral law establishes a deadline of 24 hours from the end of a PEC meeting for delivery of results protocols from the PEC to the DEC. Article 94.7 gives authority to the DEC to make corrections to a PEC results protocol "In case of any corrections, mistakes or inaccuracies discovered in protocol which may be fixed up without re-counting of votes or putting any amendments into resolitional part of the protocol" upon making a decision to take such action.

96. The CEC establishes the results of the election in the nationwide and single-mandate districts no later than on the tenth day following election day. The content of the CEC protocols must immediately be published on the CEC website. The Venice Commission and the OSCE/ODIHR have previously recommended that the law should include a specific requirement that all PEC and DEC protocols are also published on the CEC website. This would substantially enhance transparency and public confidence in the election process. It would also promote compliance with paragraph 7.4 of the OSCE Copenhagen Document. Although Article 94.9 of the draft electoral law requires the publication of preliminary results on the CEC website, the recommendation concerning the publication of detailed preliminary results, including all data from the PEC protocols, has not been adopted. *The OSCE/ODIHR and the Venice Commission reiterate the recommendation that all data from all PEC and DEC protocols, both preliminary and final, be published on the CEC website in a timely fashion to inform voters and enhance transparency.*

K. Complaints and Appeals

97. Previous joint opinions of the Venice Commission and the OSCE/ODIHR, as well as the final reports of OSCE/ODIHR, have expressed concerns about the complexity of the system for adjudicating electoral disputes. There has been improvement in the system for resolving electoral disputes over the course of amendments since 2004. *However, as noted by the OSCE/ODIHR final report on the 2012 parliamentary elections, the problem of complexity remains and "a significant number of complaints were rejected on procedural grounds, such as being filed with the wrong body, which testifies to this shortcoming."*³²

98. Filings with the "wrong body" are due to the filing options presented to a complainant. First, determining the substantive nature of the complaint is necessary as the nature of the complaint determines where the complaint should be filed. However, as many electoral

³¹ See OSCE/ODIHR Election Observation Mission Final Report on the 28 October 2012 parliamentary elections, page 32.

³² See OSCE/ODIHR Election Observation Mission Final Report on the 28 October 2012 parliamentary elections, page 25.

complaints may have overlapping issues and may involve the conduct of an election commission as well as that of a candidate or political party, alternative forums for filing are presented to the complainant. Secondly, some complaints, such as one involving the inaction of a DEC, can be filed with either a court or the CEC. The OSCE/ODIHR and the Venice Commission have previously expressed concerns that a contributing element of the complexity in the current complaint system is the concurrent jurisdiction and alternative filing possibilities created in Article 108. It has been a long-standing recommendation of the OSCE/ODIHR and the Venice Commission to clarify the concurrent jurisdiction of election commissions and courts over electoral disputes. The draft electoral law retains this concurrent jurisdiction in Article 108. An amendment to Article 108.10 does require a court to inform the CEC of “initiation of the proceedings or reject (sic) to initiate the proceedings in the case”. This amendment appears to only require the court to inform the CEC as to whether the court will exercise jurisdiction over the complaint. The amendment does not eliminate the existing concurrent jurisdiction for electoral complaints and jurisdiction stays with the election commission until it affirmatively relinquishes jurisdiction by “returning” the complaint to the complainant under Article 108.11. Concurrent jurisdiction, in theory, is eliminated once the court informs the election commission and the election commission acts upon the information. Practice in the 2012 parliamentary elections, though, shows this process was flawed. *The recommendations for elimination of concurrent CEC/court jurisdiction over DEC related complaints and simplification of the process for resolving electoral disputes remain.*³³

99. Article 108.9 of the draft electoral law does expand the list of persons and organizations that “may be challenged in court according to the procedure specified by the Code of Administrative Proceedings in Ukraine.” However, expanding the list of potential defendants that “may be challenged in court” does not reduce the current complexity existing in the complaint and appeals system.

100. The complaints and appeals system should be transparent, with the publication of complaints, responses, and decisions. Transparency provides assurance to complainants and voters that electoral malfeasance has been corrected as well as serving as a potential deterrence to future misconduct. This principle is partially implemented with Article 31.2.20 of the draft electoral law, which requires each DEC to submit to the CEC “information on the applications and complaints lodged” and “results of their review”. Transparency in the determination of rights in legal proceedings is an established principle and consistent with Article 129 of the Constitution of Ukraine which counsels for “openness” and preservation of evidence in the determination of rights. *The Venice Commission and the OSCE/ODIHR recommend that complaints, responses, and decisions of all election commissions be published on the CEC website to enhance transparency in the resolution of electoral disputes.*

IV. Comments on the text of the Draft Law on Repeat Elections

101. The draft Law “On the Repeat Elections of People’s Deputies (Members of Parliament) of Ukraine to the Verkhovna Rada of Ukraine (Ukrainian Parliament) of the VII Convocation in Particular Single Mandate Constituencies in Relation to the Impossibility to Establish Trustworthy the Vote Returns and Results of People’s Deputies of Ukraine Elections on 28 October 2012” establishes the procedures for conducting repeat elections in those single-mandate districts where it was not possible to establish the results for the 2012 parliamentary elections. This draft law requires the CEC to take a decision on repeat elections no later than 15 days after the law enters into force. The law also incorporates the deadline for nomination of candidates.

102. It should be noted that Article 5 of the draft law for repeat elections excludes some of the training requirements for members of election commission members. *The Venice*

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See the Code of Good Practice in Electoral Matters, point II.3.3.C.c.

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Commission and the OSCE/ODIHR recommend that consideration be given to retaining all training requirements for election commission members unless administrative and logistical reasons justify this departure from the usual requirements for repeat elections.

103. Article 4 of the draft law for repeat elections provides for official observers from foreign states and international organisations. Article 4 states that such observers have all rights, in addition to the rights stated in the parliamentary election law, to obtain copies of protocols on the transfer of ballots, voting results, and tabulations. This is a positive provision.

104. It is understood that the provisions for formation of DEC's and PEC's defined by the parliamentary electoral law shall apply for the repeat elections. According to the law commission members are nominated by political parties whose parliamentary faction is represented in the current convocation of the parliament and by electoral subjects. The composition of the parliament has changed; the factions are not the same ones which nominated election commission members for the 2012 parliamentary elections. It should be clarified which convocation of the parliament and which factions have the right to nominate commission members.

V. Conclusion

105. The draft electoral law provides detailed regulations for parliamentary elections. It incorporates a number of recommendations previously made by the Venice Commission and the OSCE/ODIHR.

106. The draft electoral law includes a number of improvements. These improvements have been duly noted in this joint opinion and several of the most important improvements are stated in the Executive Summary.

107. However, some key previous recommendations contained in OSCE/ODIHR reports and in previous joint opinions of the Venice Commission and the OSCE/ODIHR remain unaddressed in the draft electoral law. These recommendations are noted throughout this joint opinion and are listed in the executive summary, stressing that the Venice Commission and the OSCE/ODIHR regret that this reform process does not comprehensively amend and harmonize different laws regulating electoral legal framework, as well as it lacks overall inclusiveness and transparency.

108. At times the draft law is overly complex and could be improved by stating provisions more clearly so that they are clearly understandable to all stakeholders in an electoral process. The complexity of the draft electoral law reinforces the need for codification of all election legislation into a single unified law.

109. The Venice Commission and the OSCE/ODIHR stand ready to assist the authorities of Ukraine in their efforts to create a legal framework for democratic elections in conformity with OSCE commitments, Council of Europe and other international standards for democratic election.