



INTERNATIONAL ELECTION OBSERVATION MISSION

Ukraine — Presidential Election, 17 January 2010

STATEMENT OF PRELIMINARY FINDINGS AND CONCLUSIONS

PRELIMINARY CONCLUSIONS

The first round of the 17 January presidential election in Ukraine was of high quality and showed significant progress over previous elections. This election met most OSCE and Council of Europe commitments. Civil and political rights were respected, including freedom of assembly, association and expression. Election day was conducted in an efficient and orderly manner.

This election saw a diverse field of candidates representing alternative political views, offering a genuine choice to the electorate. Candidates were able to campaign freely across the country without impediment. The campaign period was generally calm and orderly. Unsubstantiated allegations of large-scale electoral fraud negatively affected the pre-election atmosphere and voters' confidence. In contradiction with the law, administrative resources were misused by candidates in official positions. More transparent campaign financing is necessary during the pre-election period.

By voting in large numbers and freely expressing their will, Ukrainians have shown the desire to decide on the course of the country. The intertwining of political and economic interests had a negative influence and undermined public confidence in the political process, posing a challenge for Ukraine's leadership.

Election rules have to be set clearly and should not be a permanent subject of discussion. Regrettably, a unified election code has not yet been adopted in Ukraine. The existing election law as amended in August 2009 was a step backward compared to previous legislation. As a result, the legal framework remains unclear and incomplete. Last minute court decisions contributed to a lack of clarity in the procedures. However, if implemented in good faith and in a non-restrictive manner, the legislation could provide a basis for holding democratic elections.

Freedom of expression significantly improved since 2004. Overall, the pluralistic media environment offered voters a variety of information about leading presidential candidates and their platforms. The media was subject to heavy financial pressures and economic interests. The coverage by the electronic media was often not determined on the basis of newsworthiness, but rather as a result of candidates paying to appear in the news or current-affairs programmes.

Despite a delay in funding, the election commissions were generally efficient in meeting tight deadlines while coping with a heavy workload. The Central Election Commission (CEC) mostly operated in a non-partisan and collegial manner, although in a highly polarized political environment. The CEC did not fully address the shortcomings of the law, at times leaving the District Election Commissions (DECs) and Precinct Electoral Commissions (PECs) without proper guidance. Some actions of the CEC lacked the required transparency.

In a positive development, for the first time a State Voter Register was established and the election and state administration made considerable efforts to decrease the number of multiple registrations of voters and to improve the overall quality of voter lists.

Throughout the campaign, candidates rarely used the legal means available to them in the electoral legislation to address their complaints. The administrative courts adjudicated election-related cases in a timely and transparent manner, meeting tight deadlines and providing plaintiffs effective remedies. The CEC did not address complaints in a transparent manner and answered most of them without a formal decision, thus denying access to effective remedies.

The presence of domestic observers significantly increased transparency. Non-governmental organizations monitored the elections despite the fact that they were not permitted by the election law to register their members as observers.

Women were well-represented in the leadership positions of the election administration.

The election day was orderly and calm. Voting and counting was assessed as overwhelmingly positive by observers.

PRELIMINARY FINDINGS

Background

The political landscape in Ukraine is characterized by confrontation between the legislative and executive branches as well as tensions between the president and the prime minister, former “orange coalition” allies. Both the president and the prime minister have publicly blamed each other for causing the political and economic crisis.

A lack of quorum or the opposition hindering parliamentary sessions paralyzed the work of parliament. As a result, important laws were not adopted, including the 2010 state budget. The constitutionality of the date of this election set by the parliament was contested by the president. Following the ruling by the Constitutional Court, the parliament eventually established the date for 17 January 2010.

Election System and Legal Framework

The President of Ukraine is elected for a five-year term. In case no candidate wins more than 50 per cent of votes cast in the first round, a second round takes place three weeks later between the two candidates with the most votes.

The Constitution and the Law on the Election of the President of Ukraine (hereinafter election law) provide for universal, equal and direct suffrage by secret ballot.¹ Regrettably, a unified election code has not yet been adopted in Ukraine. The election law, adopted in 2004, as amended in August 2009 represented a step backward. The Council of Europe and OSCE/ODIHR reviewed the law and concluded that although the amendments incorporated a number of previous recommendations, many remained unaddressed. They also noted that some amendments raised serious concern and did

¹ Other relevant legislation include the Law on the CEC, the Law on the State Voter Register, the Law on Political Parties, and some provisions of the Code of Administrative Proceedings and the Criminal Code.

not comply with OSCE and Council of Europe commitments.² Some of the concerns include electoral dispute mechanisms, the possibility to make changes in the voter lists up to one hour before the close of the poll, the mechanism for appointing members of electoral commissions, and campaign finance provisions.

The Constitutional Court ruled several of the amended provisions unconstitutional, thereby addressing some of the concerns raised in the joint opinion related to limitations on the right to challenge result protocols in courts. The Court also nullified provisions *inter alia* requiring all members of District Election Commissions (DECs) and Precinct Election Commissions (PECs) to live within their respective district or precinct and provisions that required citizens residing abroad to be listed in the consular registry in order to exercise their right to vote.

In general, the election legislation included significant shortcomings. Incomplete, inconsistent and ambiguous provisions frequently led to confusion. Nonetheless, if implemented in good faith and in a non-restrictive manner, the legislation could provide an adequate basis for holding democratic elections.

Election Administration

The election administration is comprised of the Central Election Commission (CEC), 225 DECs, and 33,695 PECs. Despite the late disbursement of funds, the election commissions generally worked efficiently and met the deadlines required by the law.

The CEC operated in a non-partisan manner despite the complex political environment. Although the CEC was responsible for clarifying how to apply election-related laws, most CEC clarifications simply repeated the provisions of the law and did not further clarify the inconsistent or incomplete aspects of the law.³ These shortcomings left the DECs and PECs without proper guidance.

The CEC performed its work in a relatively open manner by holding regular sessions open to the media, candidate representatives and observers. However, the CEC members also held closed meetings at which the agenda and draft decisions were discussed so that a coordinated position could be reached and presented. The official sessions therefore became the forum where many decisions were just voted upon, but not debated. These actions were not in conformity with the law and decreased transparency.⁴

Overall, the CEC members worked collegially but the commission became polarized as election day approached. This first surfaced during discussions on numbering candidates on the ballot and continued over the issue of homebound voting and the procedure for amending the voter lists on election day. These controversies were further highlighted by the opposing press statements made by the chair and other members of the CEC.

Despite legal requirements, the CEC did not produce any voter education programs on the rights and obligations of voters, voting procedures, and the complaints and appeals procedures.

² The Council of Europe Venice Commission and OSCE/ODIHR Joint Opinion on the Law on Amending Some Legislative Acts on the Election of the President of Ukraine (CDL-AD (2009)040) http://www.osce.org/documents/odihr/2009/10/40858_en.pdf.

³ Such issues include homebound and out of country voting, complaint procedures, making changes to the voter lists on election day and the conduct of mass media.

⁴ Article 28.1 of the election law; articles 2.2, 4.1, 4.3 of the law on the CEC; articles 1.4, 10.1 and 13 of the rules of procedure of the CEC. All concern the requirements that CEC sessions, deliberations and activities be conducted openly.

The DEC and PECs were appointed based on candidate nominations with each candidate having the right to two representatives per commission. Based on the number of nominations, candidates had a right to proportional representation in leadership positions (chairperson, deputy chair and secretary). The proportionality principle at the DEC level was initially respected. However, in the case of subsequent replacements of commissioners, the CEC decided that the proportionality principle did not need to be respected. Upon a court's request, the CEC reconsidered three such replacements, but did not change their initial decision.

The DEC appointed the PECs by the legal deadline using different methods to allocate PEC leadership positions. The CEC data indicated that four candidates were overrepresented nationwide in the PEC leadership positions.⁵ The appointment of PECs was difficult and characterized by a high number of PEC members who resigned and who were moved from one PEC to another. Reasons for resignations included insufficient remuneration and perceived workload, especially for leadership positions. The process was also affected by some candidates nominating the same person to multiple PECs or both as a PEC member and observer.⁶

Due to the late transfer of the 2009 DEC budget funds, the DEC were forced to function based on credit and members' own contributions.⁷ This negatively impacted a few commissions, as they were delayed in delivering provisional voter lists to PECs, in purchasing the PEC stamps, or in printing and publicizing their documents.⁸ Some DEC chairs expressed discontent with the level of operational support and cooperation from the local administration.⁹

Despite difficulties, the DEC were generally efficient in meeting deadlines within a tight timeframe while coping with a heavy workload. The candidates did not always take into account knowledge and experience during the nomination of lower level commissioners, specifically to leadership positions. This combined with the large number of members and the fact that commissions were not regulated by uniform rules of procedures at times led to chaotic sessions.

Some PECs were not fully operational by the deadline, due to a lack of quorum or a resignation of the chairperson.¹⁰ Others were hampered by poor working conditions.¹¹ This was of concern, as these PECs were late in providing public access to the provisional voter lists.

The OSCE Project Co-ordinator in Ukraine together with the CEC trained DEC and PEC members.¹² In addition some candidates organized trainings for their own PEC members.

⁵ For 222 out of 225 DEC, as of 16 January; Mr. Yanukovich was over-represented by 13 per cent, Ms. Tymoshenko by 12 per cent, Mr. Yatsenyuk by 9 per cent and Mr. Yushchenko by 5 per cent. With similar number of nominations, Ms. Suprun was under-represented by 9 per cent.

⁶ As observed in DEC 4, 37, 39, 69 and 158. In DEC 95 and 169 the same person was nominated by different candidates.

⁷ For example, DEC 24 to 29, 36, 38, 39, 146, 147, 152, 172, 175 and 176.

⁸ For instance problems delivering preliminary voter lists at DEC 96, 149, 150, 160, purchasing PEC stamps at DEC 9, 91, 163 and 164 and document production at DEC 4.

⁹ DEC 1, 4, 29, 57, 59, 91, 149, 180, 206 and 225.

¹⁰ Lack of quorum affected 44 PECs of 176 in DEC 125; 10 PECs of 83 in DEC 176; 4 PECs of 78 in DEC 106. No chairperson in function at 13 PECs of 229 in DEC 86.

¹¹ A lack of heating or electricity affected PECs in DEC 4, 120, 197 and 210.

¹² Approximately 2,600 DEC and 80,000 PEC chairpersons, deputy chairpersons and secretaries were trained and 5,000 DEC and 100,000 PEC official manuals were distributed.

Voter Registration

Previously, voter lists were created anew for every election. For the first time a State Voter Register (SVR) was established and voter lists were extracted from the SVR. The SVR was compiled on the basis of voter lists used in the 2006 and 2007 elections. In September 2009, initial verification took place and voters were sent a personal notification with a request to report back on any inaccuracies.

The SVR contains 36,302,473 voters.¹³ Since the SVR was created, over eight million inclusions, exclusions and corrections were made, of which one million directly addressed citizens' requests. A total of 651,975 duplicates have been removed, while 103,254 entries remain unresolved. From 27 December, the preliminary voter lists were made accessible for public scrutiny.¹⁴ The final voter lists were delivered to the PECs by 14 January as required by law.

The procedures to add voters on the voter lists on election day and the documents required to apply for homebound voting created controversy. The Kyiv Administrative Court of Appeals (KACA) decision clarified these two issues in conformity with the law and the High Administrative Court of Appeals (HAC) confirmed the decisions. On the eve of the election, the KACA reversed their initial decisions. They reintroduced the requirement that only voters with a medical certificate could be listed as homebound. They also upheld the decision of one DEC that instructed PECs not to make changes to the voter lists on election day but to refer these citizens to the court. Both decisions cannot be appealed.¹⁵ On election day, the CEC communicated to the PECs that its decisions would govern the process on election day, because new court decisions were not in conformity with the election law.

Candidate Registration

Candidate registration was inclusive and resulted in a diverse field of candidates representing alternative political views and offering a genuine choice to voters. In order to be registered each presidential candidate had to submit a comprehensive list of documents and forms to the CEC, along with a financial deposit of 2.5 million UAH (approximately 208,000 EUR).¹⁶ The CEC registered 18 candidates who were nominated by parties, electoral blocs and through self-nomination (independent).¹⁷ The CEC rejected 40 applications based on various grounds. Eighteen nominees challenged their denial of registration. The appeals were rejected by the KACA.

Campaign Environment

The campaign was low-key and took place in a generally calm environment. It was visible across the country with billboards and posters, public rallies, leafleting, concerts, campaign tents and door-

¹³ Data as of 10 January.

¹⁴ One or two day delays delivering the preliminary voter lists to PECs occurred in DECs 37, 102, 151 and 160 due to logistical or financial problems.

¹⁵ According to Article 177.4 of the administrative procedure code, decisions taken between midnight and 6 am on election day cannot be appealed.

¹⁶ The deposit will only be refunded to the two candidates who qualify for the second round of voting.

¹⁷ The CEC registered: Inna Bohoslovska, independent; Mykhailo Brodskyi, independent; Anatoliy Hrytsenko, independent; Yuriy Kostenko, Ukraine People's Party; Volodymyr Lytvyn, People's Party; Oleksandr Moroz, Socialist Party of Ukraine; Oleksandr Pabat, independent; Vasyl Protyvsikh, independent; Serhiy Ratushniak, independent; Oleh Riabokon, independent; Lyudmila Suprun, People's Democratic Party; Petro Symonenko, Bloc of Leftist Parties; Oleh Tiahnybok, All-Ukrainian Union - Freedom; Serhiy Tihipko, independent; Yulia Tymoshenko, All-Ukrainian Union - Motherland; Viktor Yanukovich, Party of Regions; Arseniy Yatsenyuk, independent; Viktor Yushchenko, independent.

to-door canvassing. All presidential candidates were able to campaign freely and without impediment. Levels and types of campaign activities of candidates differed considerably. Unsubstantiated allegations of large-scale electoral fraud negatively affected the pre-election atmosphere and voters' confidence.

The OSCE/ODIHR Election Observation Mission (EOM) noted that some presidential candidates abused their official positions and misused administrative resources for campaign purposes, which contradicts the election law. This offered them an undue advantage over their opponents. Both Ms. Tymoshenko and Mr. Yushchenko were warned by the CEC for campaigning during official working visits.¹⁸

In a clear case of violation of the campaign regulations, the governmental Pension Fund of Ukraine sent official letters to all pensioners, explaining that the law sponsored by the opposition Party of Regions would not raise pensions to the extent they claimed. The letter then explained that the current government was able to preserve the increase even during the economic crisis and promises further increases in 2010. There was also a letter sent to depositors of Rodovid Bank, recently nationalized, which contained campaigning on behalf of Ms. Tymoshenko. This blurs the distinction between state and political party that is prescribed by paragraph 5.4 of OSCE Copenhagen Document.

The cabinet of ministers, under the direction of the prime minister, ordered that the PECs who accept homebound voting applications without a medical certificate¹⁹ would not be paid and threatened them with criminal liability. She has also ordered the Ministry of Interior to verify all applications concerning homebound voting. This directly involved the government in the election process which is against the law. On the eve of election day these actions were declared illegal.

Other isolated incidents occurred, including arson and burglary of campaign premises, destruction of billboards or dissemination of anonymous inflammatory campaign material.²⁰ A few incidents resulted in complaints or criminal investigations. Candidate Mr. Ratushniak frequently used nationalist, xenophobic and anti-Semitic rhetoric in his election campaign.²¹

Participation of Women

The Constitution provides for equality between women and men in public and political life. In addition, the Law on Equal Opportunities for Women and Men specifically provides for equal rights and opportunities in the election process. There were three women among the 18 registered presidential candidates, including the incumbent prime minister. Within the CEC, 4 out of 15 members are women, including one of the two deputy chairpersons and the secretary. Women chaired 98 of the 225 DEC's (43.6 per cent) and two thirds of the polling stations visited.

¹⁸ Ms. Tymoshenko's warning was cancelled by the court, however the court did not address the substance of the CEC decision and the warning was cancelled on technical grounds. The KACA cancelled the warning against Mr. Yushchenko on the grounds that he was not personally informed of the session at which the warning was issued and that the CEC produced no evidence of which administrative resources the president allegedly used for campaigning.

¹⁹ It is not required by the law.

²⁰ Cases of arson targeting local Yanukovich campaign premises have been reported in Zaporizhzhia, Ivano-Frankivsk and Poltava. A burglary of a Tymoshenko campaign office took place in Dnipropetrovsk. The OSCE/ODIHR EOM LTOs reported on alleged inflammatory campaign material from Chernihiv, Dnipropetrovsk, Khmelnytsky, Lutsk, Lviv, Rivne, Odesa and Poltava.

²¹ For instance the distribution of materials against candidate Mr. Yatsenyuk.

Participation of Minorities

The majority of citizens are ethnic Ukrainians (77.8 per cent), while Russians form the most sizeable minority (17.3 per cent). The remaining five per cent of the population are Belarusians, Moldovans, Crimean Tatars, Bulgarians, Hungarians, Romanians, Poles, Jews and Roma.²² Ukraine ratified the Council of Europe “Framework Convention for the Protection of National Minorities” (1998) as well as the “European Charter for Regional or Minority Languages” (2006). Official voter information and election material was available only in Ukrainian.²³ Some candidates, however, produced campaign materials in minority languages in a direct attempt to reach out to these communities.

The Media

Media coverage of the election campaign is mainly regulated by the election law that provides candidates with direct access to media through paid and free air time. Only a few articles refer to the editorial coverage of the campaign, not providing journalists with rules requiring fair, balanced and impartial coverage in news and current affairs programs on television.²⁴ The election law prohibits only state and municipal media from showing preference to any candidates. Some aspects of the law remain unclear and there is no requirement for relevant guidelines to be issued. This allowed candidates to interpret the law to their benefit.

Freedom of expression significantly improved since 2004. Overall, the pluralistic media environment offered voters a variety of information about leading presidential candidates and their platforms. The media was subject to heavy financial pressures and economic interests. Most private media broadcasters, however, showed editorial bias reflecting political views of their ownership. The coverage by the electronic media was often not determined on the basis of newsworthiness, but rather as a result of candidates paying to appear in the news or current-affairs programmes.²⁵ Journalists informed the OSCE/ODIHR EOM observers that as a result of this they were not always able to work according to the highest professional standards.

Media monitoring results of campaign coverage within newscasts have revealed different approaches in how TV stations determined when a candidate was acting in an official capacity or as a candidate. This had a significant impact on the total amount of air time devoted to campaign coverage in newscasts for candidates with official positions on different TV channels.²⁶

All five nationwide TV stations monitored by the OSCE/ODIHR EOM clearly favoured various main candidates in their newscasts. This can be seen both in terms of the amount of airtime devoted to covering their campaign and the tone of coverage.²⁷ The state-owned TV station *UTI*, that has low viewership, provided free air time and debates to all presidential candidates, as required by

²² 2001 census; Information of the State Committee of Statistics of Ukraine
<http://www.ukrcensus.gov.ua/eng/results/general/nationality>.

²³ See General Comment No. 25 adopted by the UN Human Rights Committee (1996) on para. 25 of the UN International Covenant on Civil and Political Rights: “Information and materials about voting should be available in minority languages.”

²⁴ As stipulated by the Council of Europe’s Recommendation no. R (99) 15 on Measures Concerning Media Coverage of Election Campaigns.

²⁵ Editors in chief reported this practice as widespread which applies to other formats such as current affairs programs and political debates as well.

²⁶ Article 58.3 states that official notices during the election process (which are not of a campaign nature) about the activities of candidates carrying out their official duties shall not be considered part of the pre-election campaign. The law does not define “campaign nature”.

²⁷ The monitored TV stations are *Channel 5*, *ICTV*, *Inter*, *Ukraina TV* and *UTI*.

law.²⁸ This channel also broadcast ample information about the candidates through political talk-shows. However, its news coverage was biased in favour of the incumbent prime minister and president.²⁹ Presidential debates would have enhanced a voters' ability to compare platforms.

While *Channel 5* displayed a bias in favour of Ms. Tymoshenko and Mr. Yushchenko,³⁰ other private TV stations *Ukraina TV*, *ICTV* and *Inter* favoured Mr. Yanukovich in tone and time devoted to his campaign coverage.³¹ Out of 18 candidates, 11 received less than 1 per cent coverage in newscasts on the monitored TV stations. Regional media monitoring results also showed a bias for particular candidates.³²

The National Broadcasting Council (NBC), the supervisory body vested with the resources and mandate to oversee the electronic media, is not empowered to provide effective remedies or impose sanctions when media-related violations occur during the electoral period. The CEC, the body resolving issues related to media issues, instead of considering media-related complaints as required by the law, referred them to the courts. Furthermore, the NBC which monitors the broadcast media does not report to the CEC on a regular basis, which would enable the CEC to act when the NBC records a violation, regardless of whether the CEC has received any complaints.

Complaints and Appeals

The majority of the decisions on election-related complaints were made by the administrative courts. They adjudicated cases in a timely, efficient and transparent manner. Courts were able to adhere to the two-day timeframe for deciding cases even facing a lack of resources and the holiday period. Most of these complaints were challenges to CEC decisions on procedural or administrative matters. Very few dealt with alleged campaign violations by the candidates. The KACA and HAC were transparent and provided access to all required documents.

The CEC made formal decisions only on a small number of the complaints filed. They did not deal with the substance of most complaints, rejecting them either because the complainant did not comply with the technical requirements in filing them or because they were submitted late.

The CEC's strict interpretation of the requirements for filing complaints was problematic and led to many complainants not being heard. In general, the CEC did not address complaints in a transparent manner and answered most of them without a formal decision, thus denying access to effective

²⁸ The election law does not set limitations on the amount of paid political advertising; it is only constrained by the candidate's financial resources. During the monitored period from 4 December – 15 January, 10 of 18 candidates purchased air time for political advertising on monitored TV stations with nation-wide coverage.

²⁹ The state-owned *UTI* devoted 30 per cent of the total campaign coverage in newscasts to Ms. Tymoshenko and 28 per cent to Mr. Yushchenko respectively. Mr. Yanukovich received 8 per cent of the campaign coverage in newscasts on *UTI*. These figures exclude coverage of a candidate's institutional role.

³⁰ *Channel 5* devoted 25 per cent to Ms. Tymoshenko and 25 per cent to Mr. Yushchenko respectively, while Mr. Yanukovich received 12 per cent of the total air time devoted to campaign coverage within newscasts.

³¹ On *Ukraina TV* 37 per cent of the campaign coverage was devoted to Mr. Yanukovich, while *ICTV* devoted 35 per cent to this candidate. *Inter* favoured Mr. Yanukovich to a lesser extent with 29 per cent of campaign coverage devoted. Other candidates received less than 21 per cent of the campaign coverage on the mentioned TV stations. These figures exclude coverage of a candidate's institutional role.

³² The monitored state and privately owned regional TV stations are Donetsk *ODTRK* and Channel 27 in Donetsk, Odesa *ODTRK*, Lviv *ODTRK* and *UT3* Zakhid in Lviv, and *DTRK* Krym and *TRK* Chernomorskaya in Crimea.

remedies.³³ There also appeared to be a practice by the CEC and some DEC's to place administrative hurdles in the way of complaints being heard.³⁴

Domestic and International Observers

The presence of domestic observers significantly increased transparency. Candidates were active in nominating observers to follow the electoral process. In addition, non-governmental organizations monitored the election despite the fact that the law does not allow them to register as observers, contrary to paragraph 8 of the OSCE Copenhagen Document. As in past presidential elections, such observers applied for accreditation as journalists, who have fewer rights to access the electoral process than observers. They for example cannot obtain copies of result protocols. Domestic observers stated that they were unhindered in their work.

Election Day

Election day was calm and voting was conducted in an orderly and transparent manner. IEOM observers assessed the voting process as good or very good in 97 per cent of polling stations visited. The CEC reported voter turnout at some 67 per cent based on preliminary data.

Most polling stations opened on time or with minor delays due to protracted opening procedures.³⁵ Significant delays of four or five hours were noted in Sumy oblast where polling stations waited for a new supply of ballots following the unauthorized use of "withdrawn" stamps, as well as a lack of quorum in some polling stations in Kyiv oblast.³⁶

A last minute court decision rejected by the CEC led to different procedures being applied for voters who were not in the voter lists. In most cases, the PECs referred such voters to the court, the DEC's or the Register Maintenance Bodies for inclusion into the voter list. In contrast, the IEOM received significantly fewer reports of PECs which decided to include such voters on the list based on their own decision, as instructed by the CEC.

The secrecy of the vote was largely respected, though group voting was observed in 4 per cent of the polling stations visited. IEOM observers noted three cases of voters taking a photo of their ballot inside the voting booth, which could potentially indicate a vote buying scheme.³⁷ Circumstances in and around polling stations were rated very positively.

IEOM observers noted a number of crowded polling stations (7 per cent), mainly due to small premises and the presence of a large number of PEC members and domestic observers. The transparency of the process was assessed as good or very good in 96 per cent of the cases. Civil society representatives were present in 18 per cent of the polling stations observed, while observers representing candidates were present in nearly all polling stations visited (98 per cent).

The counting process was assessed as good or very good in 95 per cent of reports, without regional variations. Although some procedural errors were observed during the count, these did not appear to

³³ See Paragraph 5.10 of the OSCE Copenhagen Document "everyone will have an effective means of redress against administrative decisions, so as to guarantee respect for fundamental rights and ensure legal integrity."

³⁴ For example delaying the publication of decisions, the provision of documents necessary for filing complaints, and delaying the response to the complainant until the last day of the deadline.

³⁵ IEOM observers noted 20 delays in opening and 4 early openings out of 203 polling stations visited.

³⁶ IEOM reports from DEC 91. According to press reports, 22 polling stations in DEC 91 opened after 12:00 hrs.

³⁷ Kyiv DEC 221# PEC #24 and DEC 217 PEC # 16 and Dnipropetrovsk DEC 36 PEC #13.

have an impact on the process. Contrary to the law, the results protocols were not displayed in about 10 per cent of polling stations visited.

Reconciliation and tabulation procedures at DEC's were rated positively in 98 per cent of reports. However, in 48 DEC's observers were not given access to the room where preliminary results were entered into a computer for transmission to the CEC. Transparency was noted as a problem in every sixth DEC. The reconciliation of PEC protocols was generally correct and only resulted in a few recounts.

*This statement is also available in Ukrainian.
However, the English version remains the only official document.*

MISSION INFORMATION & ACKNOWLEDGEMENTS

Kyiv, 18 January 2010 –The assessment was made to determine whether the election complied with the OSCE and Council of Europe commitments for democratic elections, as well as with Ukrainian legislation. This statement of preliminary findings and conclusions is delivered prior to the completion of the election process. The final assessment of the election will depend, in part, on the conduct of the remaining stages of the election process, including the tabulation and announcement of results and the handling of possible post-election day complaints or appeals. The OSCE/ODIHR will issue a comprehensive final report, including recommendations for potential improvements, some eight weeks after the completion of the election process. The delegation of the PACE will present its report at the next plenary session of the Assembly in Strasbourg from 25-29 January.

The OSCE/ODIHR Election Observation Mission opened in Kyiv on 24 November 2009 with 16 experts in the capital and 60 long-term observers deployed throughout Ukraine. The OSCE Parliamentary Assembly (OSCE PA) conducted a pre-election visit on 1-4 November, and the Parliamentary Assembly of the Council of Europe (PACE) conducted a pre-election visit on 24-27 November 2009. On election day, over 800 short-term observers were deployed in an International Election Observation Mission (IEOM), including a 117-member delegation from the OSCE PA, a 45-member delegation from the PACE, a 30-member delegation from the NATO PA and a 10-member delegation from the EP. In total, there were observers from 47 OSCE participating States. The IEOM observed voting in over 2,100 polling stations out of a total of 33,695, counting in 134 polling stations and tabulation in 157 DEC's.

Mr. Joao Soares (Portugal), President of the OSCE Parliamentary Assembly and Head of the OSCE PA delegation, was appointed by the OSCE Chairperson-in-Office as Special Coordinator to lead the short-term OSCE observer mission. Mr. Mátyás Eorsi (Hungary) headed the delegation of the PACE, Mr. Pawel Kowal (Poland) headed the EP delegation, and Mr. Assen Agov (Bulgaria) headed the delegation of the NATO PA. Ambassador Heidi Tagliavini (Switzerland) is the Head of the OSCE/ODIHR Election Observation Mission.

The IEOM wishes to thank the authorities of Ukraine for the invitations to observe the elections, the Central Election Commission for its co-operation and for providing accreditation documents, and the Ministry of Foreign Affairs and other authorities for their assistance and co-operation. The IEOM also wishes to express appreciation to the OSCE Project Co-ordinator in Ukraine and other international institutions for their co-operation and support.

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INTERNATIONAL ELECTION OBSERVATION MISSION

Ukraine — Presidential Election, Second Round 7 February 2010

STATEMENT OF PRELIMINARY FINDINGS AND CONCLUSIONS

PRELIMINARY CONCLUSIONS

The second round of the presidential election in Ukraine confirmed the assessment of the first round that most OSCE and Council of Europe commitments were met. This election consolidated progress achieved since 2004. The lack of confidence and the deficient legal framework were at the root of most problems encountered during this election, and constitute an immediate challenge for the new leadership. The professional, transparent and honest voting and counting should serve as a solid foundation for a peaceful transition of power.

The candidates were able to campaign freely in a competitive, yet polarized election environment. The campaign atmosphere was negatively affected by mutual accusations of fraud, last minute amendments to the election law and attempts to remove the heads of key institutions for partisan purposes. The misuse of administrative resources continued and the intertwining of political and economic interests persisted.

Any democratic election depends not only on the conduct of the election process, but also on an adequate, clear and stable legal framework being in place. Therefore, a unified election code should be adopted before holding the next elections. As stated following the first round, amending the election law between two rounds is inappropriate. Newly adopted amendments were presented as a reaction to allegations that one of the candidates would withdraw their members from commissions, thus depriving them of a quorum and disrupting the election. Both candidates used the amendments by either claiming that they would destroy any chance of holding a democratic election or, on the contrary, that they would preserve the process. However, the last minute amendments did not impact the conduct of election day.

Despite shortcomings, the existing legal framework can still provide a basis for holding democratic elections, as confirmed by the first round. However, the provisions in the election law concerning the second round leave important aspects unaddressed and others open to varying interpretations. Legal provisions on transparent campaign financing are necessary.

Notwithstanding the rising political tension, the Central Election Commission continued to operate mostly in a non-partisan manner, and was efficient in organizing the second round. However, it did not clarify the application of important aspects of the law. Some of its actions again lacked transparency.

The media provided voters with an opportunity to make an informed choice. Political talk shows on TV offered voters a variety of opinions and granted the candidates more balanced coverage than the news. The State TV station failed to comply with its legal obligations to provide impartial coverage of candidates and significantly favored one candidate in its newscasts. Voters would have benefited from a debate between two candidates.

Overall, the quality of the voter lists has improved, but in order to eliminate remaining inaccuracies, further efforts are necessary. Specifically, voters added to the lists in polling stations should be included in the state voter register before the next election.

Disturbingly, in the last days of the campaign, pressure was exerted on the judiciary, when the prosecutor started to question the judges who decided election related cases.

The election day was orderly and calm. Our observers assessed the voting, counting and tabulation overwhelmingly positively. The transparency was greatly enhanced by the large presence of observers. Women were well represented in precinct commissions.

PRELIMINARY FINDINGS

Background

On 25 January, the Central Election Commission (CEC) published the final results of the first round of the presidential election. Since none of the candidates received the required 50 per cent of the votes to be elected, a second round was announced between Mr. Viktor Yanukovych from the Party of Regions (PoR), who received 35.32 per cent, and the current prime minister, Ms. Yulia Tymoshenko from All-Ukrainian Union – Motherland, who received 25.05 per cent. The incumbent prime minister was the first woman to enter the second round of a presidential election in Ukraine.

Legal Framework

Despite shortcomings, the existing legal framework can still provide a basis for holding democratic elections, as confirmed by the first round. However, the provisions in the election law concerning the second round leave important aspects unaddressed and others open to varying interpretations. The law contains only one article specifically concerning the second round.¹ It outlines the procedures for the formation of lower-level commissions, as well as voting, counting, the announcement of results and sets some new deadlines, at times inconsistent.² A few other articles of the election law have specific provisions concerning the second round, but the majority do not.³

The CEC has taken the position that since the election law refers to the second round as “repeat voting”, any article of the election law that does not specifically refer to “repeat voting” is not necessarily applicable to the second round. This allowed the CEC to choose which provisions of the election law were applicable to the second round.⁴

Any democratic election depends not only on the conduct of the election, but also on an adequate, clear and stable legal framework being in place before it is called. As the IEOM stated following the first round, amending the election law between two rounds is inappropriate. However, on 3 February, the parliament adopted amendments to the election law to lift the quorum requirement for election commissions to make legally binding decisions. Additionally, if a commission member

¹ Article 85 of the election law.

² For example, while the CEC had to publish official results for the first round by 27 January, candidates who moved on to the second round had to nominate DEC members by 26 January. As well, the voter lists were to be available for public scrutiny at the PECs by 30 January, two days before the deadline to form PECs.

³ Articles which do not specify provisions on the second round include those on complaints and appeals, official observers, duties and authorities of the election commissions.

⁴ On the morning of the election day the CEC issued a clarification on homebound voting allowing two members of the PEC to accompany the ballot box, even though the law requires three members. The KACA ruled that the clarification was illegal, which was later overruled by the High Administrative Court.

does not appear on election day or when a candidate fails to nominate a substitute, the local councils nominate replacements. The amendments did not impact the conduct of election day.

Election Administration

Generally, the election commissions were cooperative and granted the OSCE/ODIHR EOM access to their sessions and documents.

Despite rising political tension, the CEC continued to be efficient and to operate mostly in a non-partisan manner. The CEC showed signs of polarization when five members added dissenting opinions to the official first round results.⁵ The results were fully endorsed by eight members⁶ and the CEC chairperson. In compliance with the law, the CEC held regular sessions open to media, candidate representatives and observers. However, they also maintained the practice of holding closed meetings. The CEC did not give clear instructions to the District Election Commissions (DECs) on whether or not observers have the right to view the electronic processing of protocols.⁷ These issues reduced the transparency of the election process. The CEC met the deadlines set by the election law. As in the first round, the CEC did not clarify the application of important aspects of the law. Furthermore, the CEC did not organize training for the newly formed DECs.

Members of the new DECs and Precinct Election Commissions (PECs) for the second round were appointed based on nominations by the two candidates. Both nominated the maximum seven representatives to each DEC. The CEC appointed the DECs and each candidate received an equal share of leadership positions (chairpersons and secretaries). According to the CEC, some 96 per cent of the 3,150 appointed DEC members had previous election experience. The DECs were generally efficient in meeting deadlines within a tight timeframe while coping with a heavy workload.

Candidates nominated their members to the PECs within the legal deadlines. The formation of the commissions went smoothly with leadership positions being divided equally. PECs were operational in time for voter list verification.

Voter Registration

The voter lists for the second round contained 36,518,290 voters, an increase of 215,817 compared to the first round final voter lists. About 400,000 voters were added to the voter list on the first round election day. Changes to the voter lists were only partly entered into the voter register, due to the fact that the procedures for transmitting data on voters added to the lists were adopted late and were not applied in a uniform manner. In addition, 21 DECs only partly submitted the information to the register maintenance bodies (RMBs). As a result, some voters had to re-apply to be added to the voter lists for the second round. Some RMBs failed to check whether voters added to voter lists on election day were legitimately added to the lists.

On election day the number of registered voters at the opening of the polls was 36,461,481. At the closing of polls, the number of voters was reported as 36,612,254.⁸

⁵ CEC members nominated by Bloc of Yulia Tymoshenko (BYT) and Our Ukraine.

⁶ CEC members nominated by PoR, Communist Party of Ukraine and Socialist Party of Ukraine.

⁷ According to the election law, observers can be present during the determination of the results by the DECs. Point I, 3.2, xiv of the Council of Europe Venice Commission Code of Good Practice in Electoral Matters stipulates that "... results must be transmitted to the higher level in an open manner."

⁸ This does not include voters registered in foreign precincts.

Campaign Environment

The candidates were able to campaign freely in a competitive, yet polarized election environment. Campaign methods included the use of billboards, posters and leaflets, although to a much lesser extent than during the first round. Candidates also held rallies and set up campaign tents. They were most active in areas where the third placed candidate from the first round received significant support.⁹

The campaign atmosphere was negatively affected by mutual accusations of fraud, last minute amendments to the election law and attempts to remove the heads of key institutions for partisan purposes. Institutions with an important role to play in the election process became engulfed in a pre-election power struggle. For instance, the issue of who the legitimate head of the High Administrative Court is remained unresolved and politicized. Also, there were unsubstantiated claims about 1.5 million extra ballots to be printed illegally, connected to attempts to replace the head of the ballot printing house and to seize the printing house. Furthermore, the parliament removed the Minister of Interior who was subsequently reappointed as acting Minister by the Cabinet of Ministers.¹⁰ Amendments to the election law adopted a few days prior to the election day contributed to political tension and added to the existing climate of mistrust and suspicion. The amendments were presented as a reaction to allegations that one of the candidates would withdraw their members from commissions, thus depriving them of a quorum and disrupting the election. Both candidates used the amendments by either claiming that they would destroy any chance of holding a democratic election or, on the contrary, that they would preserve the process.

The misuse of administrative resources continued and the intertwining of political and economic interests persisted. During the second round, Ms. Tymoshenko continued blurring the distinction between her state function and role as presidential candidate.¹¹ She was warned by the Kyiv Administrative Court of Appeals (KACA) for abusing administrative resources.¹²

At times both candidates used harsh rhetoric in their campaigns. A leaflet with anti-Semitic and xenophobic content was distributed in western Ukraine, calling for voters not to vote for Ms. Tymoshenko because of her alleged Jewish origin. This constitutes a breach of OSCE commitments.¹³

Disturbingly, in the last days of the campaign, pressure was exerted on the judiciary. The High Judicial Council and the General Prosecutor's Office began several investigations into the actions of the KACA, especially targeted at judges who presided upon election-related cases. Judges were ordered to appear at the prosecutor's office to explain their rulings. A proposal was submitted to dismiss five judges who sat on election-related cases and a resolution was introduced in the parliament to dismiss the Head of the Supreme Court.¹⁴

⁹ Mr. Tihpko received 13.05 per cent of the vote. His votes were concentrated in Kyiv city, Dnipropetrovsk, Odesa, Zaporizhzhia and Kharkiv.

¹⁰ Both the attempts to fire the head of the printing house and the reappointment of the Minister of Interior were halted by the courts. The Minister of Interior was previously warned by a court for campaigning for Ms. Tymoshenko and for having the police interfere in the electoral process.

¹¹ As observed by the OSCE/ODIHR EOM on 24 January in Cherkasy, 27 January in Khmelnytsky and 28 January in Kherson. At each of these events Ms. Tymoshenko campaigned and distributed ambulances or school buses in her capacity as presidential candidate. In Kharkiv the governor sent out official invitations to students for a meeting with the prime minister, which turned out to be a campaign event.

¹² On 20 January, Ms. Tymoshenko gave a press conference using the Cabinet of Ministers resources, which the KACA found to be illegal campaigning.

¹³ The OSCE Copenhagen Document, paragraph 40.

¹⁴ This resolution was introduced by PoR members of parliament.

The Media

The CEC complied with its obligations to provide free airtime and print space on state-owned national and municipal radio, television and in newspapers. The law required *UTI*, the state-owned TV station with nationwide coverage, to organize a live debate between the two contestants. *UTI* scheduled the debate, however Mr. Yanukovych decided not to participate.¹⁵

The media generally provided voters with an opportunity to make an informed choice. Political talk shows on private and state owned TV stations offered the public a variety of opinions and an opportunity for candidates to discuss policy issues. Overall, they granted candidates more balanced coverage than newscasts and the journalists made an effort to provide an equal amount of time to the contestants. The widespread practice of politicians paying for coverage in political talk shows remained a concern, and the OSCE/ODIHR EOM noted a varying quality of journalism. Direct interference from TV station owners prompted some prominent talk show hosts to begin producing their own programs, thus providing them with some degree of independence.

In the newscasts, most TV stations with nation-wide coverage favored one candidate or the other.¹⁶ The state-owned TV station *UTI* failed to provide impartial coverage¹⁷ by devoting 65 per cent of the campaign coverage¹⁸ in newscasts to Ms. Tymoshenko, while Mr. Yanukovych received 35 per cent coverage. *Channel 5* significantly favored Ms. Tymoshenko by devoting 66 per cent of their campaign coverage to her. *Ukraine TV* displayed a bias in favor of Mr. Yanukovych, devoting 63 per cent of campaign air time to him, while *Inter* showed a more balanced approach. On *ICTV* Mr. Yanukovych received more campaign coverage than his opponent due to the fact that *ICTV*'s newscasts did not distinguish coverage between Ms. Tymoshenko's institutional role and her role as a candidate.¹⁹

Election Day

On election day, voting was conducted in an orderly, professional and transparent manner across the country in a calm atmosphere. IEOM observers assessed the voting process as good or very good in 98 per cent of the polling stations visited. Commission members managed the process in a professional manner without serious violations or incidents.²⁰ Voting at special polling stations (prisons, hospitals) was assessed less positively.

The large presence of domestic and international observers in polling stations throughout election day enhanced the transparency of the process. Party or candidate observers were present in 9 out of 10 polling stations visited, and observers from civil society in 4 out of 10. The last minute amendments did not have an impact on PEC composition which were fully staffed throughout the day. Two-thirds of all PEC chairpersons were female.

¹⁵ In case one candidate refuses to take part in the debate, the other candidate is automatically granted the air time for campaigning. As a result, Ms. Tymoshenko appeared on *UTI* for 100 minutes during prime time hours.

¹⁶ The media monitoring covers the period from 26 January – 2 February.

¹⁷ Article 64.4 of the election law prohibits state and municipal mass media to “give preference to (candidates) in any form during the election process”.

¹⁸ The figures in this section refer to candidates' campaign coverage, excluding candidates' coverage of institutional duties. Figures refer to air time devoted to candidates in a positive and neutral tone.

¹⁹ This confirms that newsworthiness is not the criteria for coverage and the different approach of TV stations on how to cover candidates with institutional positions differ due to a lack of clear guidance in the law.

²⁰ In DEC 111, voting was shortly interrupted in polling stations 88, 95, 120 and 121 after bomb threats, but resumed when no explosives were found. In DEC 134, polling station 54 changed location due to a lack of heating. The secretary of PEC 26 in DEC 85 was found deceased outside the polling station in the morning presumably after suffering a heart attack.

In 12 per cent of polling stations visited, the IEOM noted voters who did not find their names on the voter list being sent to court or RMBs, or to a lesser extent, to a DEC for inclusion in the voter lists. In other cases PECs were adding voters to the lists by their own decision. Some 1.4 million voters (3.9 per cent of the total number of voters) were registered to vote by mobile ballot box, about 220,000 voters more than in the first round. In some instances, the inadequate folding of the ballot paper did not fully protect the secrecy of the vote. The preliminary voter turnout in the second round was 69.05 per cent, a slight increase compared to the first round.

Polling stations closed on time. While some minor procedural problems were noted, IEOM observers assessed the count as good or very good in 95 per cent of polling stations visited. Protocol forms pre-signed by PEC members were observed in 8 per cent of the polling stations. Results were not put on display in 7 per cent of polling stations. The validity of the ballots was decided upon in a consistent manner. The counting process was transparent and in most polling stations observers received a copy of the results protocol upon request. In almost all cases observed, the protocol was taken directly to the DEC by at least two PEC members and the chair.

Preliminary assessment of the tabulation by IEOM observers was good or very good in 86 per cent of DECs visited. Problems reported include PEC protocol figures not always adding up. Domestic observers were largely present at the DECs visited. As in the first round, IEOM observers did not have access to the electronic processing of results in one third of the DECs visited. A significant number of complaints were filed with the DECs.

***This statement is also available in Ukrainian.
However, the English version remains the only official document.***

MISSION INFORMATION & ACKNOWLEDGEMENTS

Kyiv, 8 February 2010 – The second round of the presidential election is assessed for its compliance with OSCE and Council of Europe commitments for democratic elections, as well as with Ukrainian legislation. This statement should be considered in conjunction with the Statement of Preliminary Findings and Conclusions issued on 18 January, after the first round of voting. This statement is delivered prior to the completion of the election process. The final assessment of the election will depend, in part, on the conduct of the remaining stages of the election process, including the tabulation and announcement of results and the handling of possible complaints and appeals. The OSCE/ODIHR will issue a comprehensive final report, including recommendations for potential improvements, some eight weeks after the completion of the election process. This statement will be reported to the Standing Committee of the OSCE Parliamentary Assembly (PA) at its next meetings. The delegation of the Parliamentary Assembly of the Council of Europe (PACE) will present its report at the next plenary session of the Assembly in Strasbourg.

The OSCE/ODIHR Election Observation Mission opened in Kyiv on 24 November 2009 with 23 experts in the capital and 60 long-term observers deployed throughout Ukraine. On election day, about 600 short-term observers were deployed in an International Election Observation Mission (IEOM), including 413 OSCE/ODIHR short-term observers, a 69-member delegation from the OSCE PA, a 37-member delegation from the PACE, a 16-member delegation from the NATO PA and a 13-member delegation from the European Parliament (EP). In total, there were observers from 45 OSCE participating States. The IEOM observed voting in some 2,000 polling stations out of a total of 33,667, counting in 194 polling stations and tabulation in 150 DECs.

Mr. Joao Soares (Portugal), President of the OSCE PA and Head of the OSCE PA delegation, was appointed by the OSCE Chairperson-in-Office as Special Coordinator to lead the short-term OSCE observer mission. Mr. Mátyás Eorsi (Hungary) headed the delegation of the PACE, Mr. Pawel Kowal (Poland) headed the EP delegation, and Mr. Assen Agov (Bulgaria) headed the delegation of the NATO PA. Ambassador Heidi Tagliavini (Switzerland) is the Head of the OSCE/ODIHR Election Observation Mission.

The IEOM wishes to thank the authorities of Ukraine for the invitations to observe the elections, the Central Election Commission for its co-operation and for providing accreditation documents, and the Ministry of Foreign Affairs and

other authorities for their assistance and co-operation. The IEOM also wishes to express appreciation to the OSCE Project Co-ordinator in Ukraine and other international institutions for their co-operation and support.

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