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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

DRAFT OPINION

**ON THE DRAFT LAW AMENDING
THE LAW ON ELECTION OF PEOPLE'S DEPUTIES
OF UKRAINE
PRESENTED BY PEOPLE'S DEPUTIES LAVRYNOVYCH
AND PORTNOV**

on the basis of comments by

**Mr Peter PACZOLAY (Member, Hungary)
Ms Angelika NUSSBERGER (Substitute member, Germany)**

**This document has been classified restricted on the date of issue. Unless the Venice Commission decides otherwise, it will be declassified a year after its issue according to the rules set up in Resolution CM/Res(2001)6 on access to Council of Europe documents.*

1. Introduction

1. *In December 2008 the Venice Commission was asked to prepare an opinion on the draft amendments to the law on elections of People's Deputies of Ukraine presented by the Members of Parliament Messrs A. Portnov and O. Lavrynovych (CDL(2009)016).¹*

2. *The Commission named Mr Péter Paczolay and Ms Angelika Nussberger rapporteurs and asked them to provide their comments on the draft law.*

3. *On 4 February 2009 the rapporteurs were invited to participate in a round table on the amendment of the electoral legislation in Kiev on the basis of six different drafts presented. Six of the seven drafts make proposals to introduce a regional element to the electoral system since the missing link between the candidates included in the party tickets and the regional electorate is considered to be a major deficiency of the existing system. The seventh proposal presented by Mr. A Portnov and Mr. O. Lavrynovych does not address this problem, but proposes other changes.*

4. *The following opinion is exclusively based on the draft proposed by Mr. Portnov and Mr. Lavrynovych.*

5. *It is important to note, according to the authors of the draft law due to the current political situation in Ukraine it is not likely that the electorate system will be changed in 2009.*

6. *The following draft opinion prepared by Mr Péter Paczolay and Ms Angelika Nussberger was adopted by the Commission in Venice at its .. Plenary Session (Venice, ... 2009).*

2. The present electoral system in Ukraine and previous Venice Commission opinions on the electoral legislation in Ukraine

7. The electoral system in Ukraine has already undergone several modifications and amendments. At present, the legal basis for organising parliamentary elections is the Law of Ukraine "On Elections of People's Deputies of Ukraine (VVR 2004, N 27-28, p. 366) amended by the Law of Ukraine on making amendments to the law of Ukraine on elections of people's deputies of Ukraine of 7 July 2005.

8. The Venice Commission analysed both the 1998 parliamentary elections law (CDL(1999)051) and the Ukrainian Law on Elections of People's Deputies of 2001, and the draft amendments to this law.² Some of the recommendations of these opinions were not taken into account by the authorities.

9. On 25 March 2004 the Ukrainian parliament adopted the new Law on Election of People's Deputies of Ukraine, replacing the law that was in force since 2001. The new law introduced an election system with pure proportional representation, replacing the previous mixed system whereby half of the MPs were elected from single mandate constituencies. On 7 July 2005, the

¹ Registration number 3150.

² CDL-INF(2001)022 Opinion on the Ukrainian Law on Elections of People's Deputies, Adopted by the Verkhovna Rada on 13 September 2001, adopted by the Venice Commission at its 48th Plenary Meeting (Venice, 19-20 October 2001); CDL-AD(2004)001 Opinion on the Draft Law on Election of People's Deputies of Ukraine, (Draft introduced by people's deputies M. Rudkowsky and V. Melnychuk) adopted by the Venice Commission at its 57th Plenary Session (Venice, 12-13 December 2003); CDL-AD(2004)002 Opinion on the Draft Law on Election of People's Deputies of Ukraine (Draft introduced by people's deputies S. Havrish, Y. Ioffe and H. Dashutin) adopted by the Venice Commission at its 57th Plenary Session (Venice, 12-13 December 2003)

parliament adopted a new version of the law on the election of members of parliament (technically, the new law only made amendments to the law adopted in 2004). This law, except for a few provisions, came into force on 1 October 2005.

10. The law introduced two major changes to the electoral system:

- 450 seats were filled by proportional representation in one nationwide constituency;
- threshold for securing seats in the proportional vote was reduced from 4% to 3%.

11. In 2005 together with OSCE/ODIHR the Venice Commission adopted an opinion on the 2004 Law (Opinion CDL-AD(2006)002rev) criticizing both the fact that the law is over regulating some areas of electoral administration and some specific provisions such as the restrictions imposed on the mass media for the coverage of election campaign and sanctions for the violation of election campaign rules.³

12. Since then the existing system was also strongly criticized by some of the political forces in the country mostly on the grounds that it failed to produce a stable majority in the parliament. Several attempts were made by different members of the parliament to introduce draft amendments to the law aiming both at creating a stable majority in the parliament and at ensuring a better regional representation.

13. By January 2009 there were eight different draft laws on elections of the MPs prepared by different political parties. The examined draft is one of these proposals.

3. General description of the draft presented by A Portnov and O. Lavrynovych

14. One of the interesting features of the draft is the fact that its authors represent opposite political parties: Mr A. Portnov is from the ruling Bloc of Yulia Tymoshenko and Mr O. Lavrynovych represents the main opposition party, the Party of Regions. The proposal would amend the Law of Ukraine *On election of people's deputies of Ukraine* by introducing an electoral system which would mostly benefit the two major political parties in the country.

15. Mainly the Portnov/Lavrynovych draft focuses on one major aspect, namely the creation of a new system for the redistribution of the seats in the Verkhovna Rada between the parties elected with a special electoral rule assuring to the winning party the majority of the seats in the Parliament. In this context it could be useful to remind that according to the Constitution the Verkhovna Rada is composed of 450 deputies (Article 76 of the constitution: "The constitutional membership of the Verkhovna Rada of Ukraine is 450 National Deputies of Ukraine") and that for adopting a law the supporting vote of at least 226 deputies is necessary.

16. The draft preserves the present proportional representation in one nationwide constituency but introduces two-round elections. It keeps the three-percent threshold to get into the legislative organ. The basic new rule is contained in the revised Article 1:

³ CDL-AD(2006)002rev Opinion on the law on elections of people's deputies of Ukraine adopted by the Council for Democratic Elections at its 15th meeting (Venice, 15 December 2005) and the Venice Commission at its 65th plenary session (Venice, 16-17 December 2005) on the basis of comments by Messrs Jessie PILGRIM and Joseph MIDDLETON (Experts, ODIHR), Mr Angel SANCHEZ NAVARRO (Substitute Member, Spain), and Mr Taavi ANNUS (Former Member, Estonia)

“The first round of elections to the Verkhovna Rada of Ukraine shall be held on a population basis. The seats shall be distributed among the political parties (blocs) whose tickets have gained as the result of voting in the election of deputies not less than three percent of votes of the voters who have taken part in the poll. The final returns of election to the Verkhovna Rada of Ukraine shall be determined in the second round in which the two parties (blocs) which have gained the maximum number of votes in the first round shall take part.”

17. The political party (bloc) which has won in the second round gets two hundred and twenty six seats i.e. the majority of the constitutional composition of the Verkhovna Rada of Ukraine. This means that the winning party automatically gains the majority of seats in the parliament (226).

18. The remaining seats (224) are divided between the party (bloc) which has taken the second place in the second round of elections and the other parties (blocs) that have passed the three percent threshold, in proportion to the results of the first round of elections.

19. In case the two parties running in the second round receive the same number of votes, the 226 seats are allocated to the party that gained more votes at the first round of the elections.

20. Furthermore the new draft fixes some time-limits in a new manner. It also regulates details for the inclusion and exclusion of candidates on the tickets of the political parties.

21. This bonus system that resembles a solution used at French regional elections would seem rather unusual for national elections. As the Venice Commission report on electoral systems (overview of available solutions and selection criteria) by Christophe Broquet and Alain Lancelot:

“77. Bonuses are mandates granted to the most successful list before the distribution of seats strictly speaking is carried out. They are principally used for local elections. In the French regional elections, a bonus equivalent to one quarter of the seats is given to the list which ends up in the lead in the conclusive round. For elections to the Corsican Assembly, three bonus seats are granted. Likewise, half the seats are granted directly to the leading list in the case of municipal elections in municipalities of more than 3,500 inhabitants. Bonuses can sometimes exist in other forms. For instance, the 1953 Italian Act provided that linked lists obtaining more than 50% of the votes were to receive 64.5% of the seats. Consequently, these bonuses enable government majorities to be conferred on assemblies and hence avoid the necessity of bargaining with extremely minority parties.”⁴

Legal assessment of the modifications proposed

22. The overall aim of the modifications suggested by the examined draft is to guarantee the formation of a stable government based on a parliamentary majority in Parliament. Due to the political situation in Ukraine it is not to be expected that any of the existing parties can win an absolute majority in elections based on the existing proportional single nation-wide constituency system. Governments built on coalitions are seen to be fragile. Therefore the draft proposes to “artificially” create an absolute majority within the Verchovna Rada. The means proposed to achieve this aim is to proceed in two election rounds.

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See CDL-AD(2004)003.

23. In the first election round the parties allowed to send their representatives to Parliament are identified: Those receiving less than three percent of the votes will not get any seat in the Verchovna Rada. Such a “3% - clause” is also contained in the present law (Article 1 para. 4); most of the drafts for a new election system in Ukraine stick to this rule as well. In comparison to other electoral systems a “3%-clause is rather low, but perfectly acceptable in order to ensure a wide participation of different political forces in Parliament.

24. In the first round the final returns of the election are not yet determined. The results of the first round are decisive for the determination of the two strongest parties that are allowed to participate in the second round and for the determination of the percentage of votes received by the parties having attained over 3% of the votes.

25. A second round of elections will not be held if one of the parties has gained sufficient number of votes in order to get two hundred and twenty six or more mandates of People’s Deputies of Ukraine, i.e. an absolute majority.

26. The second round is conceived as an exclusive competition between the two strongest parties. The party that wins the second round will receive two hundred and twenty six seats in the Verchovna Rada.

27. Although, as a matter of fact, such a system might make it easier to establish a stable government, it has many disadvantages that are especially relevant in the context of the political situation in Ukraine.

28. As the system creates an “artificial absolute majority”, the real support for a political party existing among the voters is not mirrored in the distribution of the seats. In the first round several parties might have comparable results, e.g. 14%, 15% and 16% of the votes. If the party having received 15% of the votes wins the majority in the second round, it will be represented by more than 50% of the deputies of the Rada. The final results thus distort the real results achieved in the first round. Such electoral system might be problematic in the light of a number of international electoral standards.

29. Furthermore, in a new democracy in which the mobilisation of the voters is not easy and the participation in elections is generally comparatively low, it is not recommendable to preview two rounds of elections. Those who have voted for a party in the first round that was not selected for the second round might stay away from the second round. Therefore the final result might be based on a very low turn-out of voters.

30. The political system in Ukraine is based on a very marked division concerning political preferences between Western Ukraine on the one hand and Eastern and Southern Ukraine on the other hand. If one party has to win the absolute majority on the basis of the electoral system, a balanced representation of the different regions cannot be achieved. Therefore such a system cannot be seen adequate to strengthen the unity of the country.

31. Last but not least, such a system is not very transparent for voters without special knowledge in election systems.

Conclusions

32. The round table on the electoral system in Ukraine organised with the support of the Venice Commission on 4 February 2009 in Kiev has shown that reform of the existing electoral system is needed since the present system is deemed not to be satisfactory in many respects. The Portnov-Lavrynovych-draft is focused on the idea of changing the electoral system in such a way as to guarantee that one political party gets the absolute majority of the seats in the Verchovna Rada. The aim of achieving clear outcomes in parliamentary elections facilitating the

formation of a stable government is very important. Nevertheless, the means chosen do not seem recommendable for the specific political situation in Ukraine as the voters' will would not be adequately reflected in the distribution of the seats in the Verchovna Rada. For Ukraine it seems to be especially important to guarantee a fair reflection of different voters' interests in the different regions of the country. Therefore any reform should aim at reinforcing the regional representation and a closer link between voters and elected Members of Parliament. This aim is not likely to be achieved by the electoral system proposed in the Portnov-Lavrynovych-draft. The proposed election system would most probably lead to a further polarisation between two major political blocs and exacerbate the division within the country. Moreover, the proposed distribution of seats seems to be alien to the known electoral systems and solutions used in Europe and could be problematic in the light of the existing European standards in the field of elections.