



Strasbourg, 20 January 2006

Opinion no. 338 / 2005

CDL-AD(2006)002

Or. Engl.

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

OPINION

**ON THE LAW ON ELECTIONS OF PEOPLE'S DEPUTIES
OF UKRAINE**

by
the Venice Commission
and
OSCE/ODIHR

**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)
Mr Taavi ANNUS (Former Member, Estonia)**

TABLE OF CONTENTS

| | | |
|------|---|----|
| I. | Introduction | 3 |
| II. | General remarks | 3 |
| III. | Particular considerations | 5 |
| 1. | General provisions (Section I, arts. 1-14)..... | 5 |
| 2. | Territorial organisation of election of Deputies (Section III, arts. 18-23) | 6 |
| 3. | Election Commissions (Section IV, arts. 24-38)..... | 7 |
| 4. | Voter Lists (Section V, arts. 39-47)..... | 9 |
| 5. | Financial, material and technical provisions for the conduct of election (Section VI, arts. 48-54)..... | 10 |
| 6. | Nomination and registration of candidates (Section VII, arts. 55-64) | 11 |
| 7. | Election campaign (Section VIII, articles 65-71)..... | 12 |
| 8. | Guarantees (Section IX, arts. 72-77) | 14 |
| 9. | Voting procedure and establishment of results of the election (Section X, arts. 78-101)..... | 17 |
| 10. | Extraordinary elections (Section XI, art. 102)..... | 19 |
| 11. | System of appeal of decisions (Section XII, arts. 103-117)..... | 19 |
| 12. | Storage of election documentation and final provisions (Sections XIII, art. 118; and XIV)..... | 21 |
| IV. | Final remarks | 21 |
| V. | Conclusions..... | 23 |
| | Annex 1: Timeline and Deadlines (Regular Elections)..... | 25 |

I. Introduction

1. *Elections to the Supreme Rada (national parliament) of Ukraine are due to take place on 26 March 2006. The principal legislative act governing the elections will be the Law on Elections of People's Deputies of Ukraine ('the Law'), originally adopted in March 2004 but substantially revised on 7 July 2005 (Doc. CDL-EL (2005) 054). Most provisions of the Law came into force on 1 October 2005.*
2. *The current Parliament was elected in March 2002 under a law adopted in 2001. Constitutional amendments in December 2004 extended the term of the Supreme Rada from four to five years.*
3. *In April 2005 the Minister of Justice of Ukraine requested an opinion on the Law on Elections of People's Deputies of Ukraine.*
4. *This draft opinion is based on comments provided by Messrs Jessie Pilgrim and Joseph Middleton (experts of the Office of Democratic Institutions and Human Rights (ODIHR) of the OSCE), Angel Sanchez Navarro (Substitute Member of the Venice Commission, Spain), Taavi Annus (Former member of the Venice Commission, Estonia) and are based on an English translation of the Law provided by the OSCE Project Coordinator in Ukraine.*
5. *The current draft opinion follows previous work by the Venice Commission on the reform of the electoral laws of Ukraine. It is based on:*
 - *The constitution of Ukraine, adopted at the Fifth Session of the Verkhovna Rada of Ukraine on 28 June 1996, CDL (2003) 86;*
 - *The Law of Ukraine on Making Amendments to the Law of Ukraine on Election of National Deputies of Ukraine, adopted by the Verkhovna Rada on 7 July, 2005, unofficial translation by the OSCE Project Coordinator in Ukraine;*
 - *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, 12-13 December 2003, CDL-AD(2004)001;*
 - *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, 12-13 December 2003, CDL-AD(2004)002.*
6. *The joint Venice Commission - OSCE/ODIHR opinion was adopted by the Council for Democratic Elections at its 15th meeting (Venice, 15 December 2005) and by the Venice Commission at its 65th Plenary Session (Venice, 16-17 December 2005).*

II. General remarks

7. *The Ukrainian parliament adopted the Law on Election of People's Deputies of Ukraine on 25 March 2004, replacing the law that was in force since 2001. Among the most significant changes was the introduction of an election system of pure proportional representation, replacing the previous mixed system whereby half of the MPs were elected from single mandate constituencies. On 7 July 2005, the parliament adopted a new law on the election of national deputies (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. The current opinion focusses on the most recently adopted law.

8. For the next elections in March 2006, all 450 seats will be filled by proportional representation in one nationwide constituency. This change was reflected in amendments (Article 3, Chapter XV) to the Constitution adopted in December 2004.

9. The threshold for securing seats in the proportional vote has been reduced from 4% to 3%.

10. The Law provides a very detailed regulation of elections to the Supreme Rada. It draws on recommendations from international organisations and builds on the experience of previous national elections. There are numerous and detailed provisions which aim at enhancing transparency, accountability, and equality between election participants.

11. The Law sets out various deadlines for regular elections. The most important are set out in Annex 1.

12. The Law seems excessively detailed, especially since this is just one of the different laws on elections in Ukraine and that other laws (on Presidential elections, on local elections, on the Central Electoral Commission: see art. 14) are also very detailed and cover a number of similar issues. Given that most of the elements may be generally ruled (right to vote, right to be candidate, procedures of nominating candidatures, system of electoral commissions, voters' lists, principles of publicity and openness, rules of electoral campaigning, procedure for vote and vote-counting, system of appeals, etc) this system leads to a multiplicity of laws, usually complex and inevitably full of redundant provisions, leading to confusion and questions of interpretation. In this respect, it would be technically preferable to enact a unique electoral code, containing the general aspects of any election, and - in different parts of the same body, or in different texts - the particularities of different elections.

13. As for the positive changes in the Law, the introduction of public organisation official election observers (non-partisan domestic observers) is to be welcomed, although it is unfortunate that the accreditation criteria might make it impossible for them to observe the 2006 elections. It is hoped that transitional arrangements will be introduced to facilitate their participation in the 2006 elections.

14. Stability of electoral law is important for ensuring confidence in the electoral process.¹ However, the freezing provision in the Final Provisions of the Law (paragraph 2), which states that amendments may be made to the Law no later than 240 days before the day of election of people's deputies in 2006, may appear excessive.² Given that the Law was only signed by the President on 7 July 2005, this left a window of just one month during which any amendments could be made. This provision is also of uncertain legal effect. This Law has no special status as compared to any law which could be adopted in the future; it would therefore appear that there is nothing to prevent the Supreme Rada from adopting a new law repealing this provision. This part of the Final Provisions could be interpreted as freezing the Law as it now stands for ever - or as long as the law is not totally revised -, not just in relation to the elections in 2006.

¹ *Code of Good Practice in electoral matters* (CDL-AD (2002) 23 rev), II.2.

² Any amendments made prior to 1 October 2005 probably would have been valid, as paragraph 2 of the Final Provisions did not enter into force until that date.

15. Good legislation is of course no substitute for effective implementation. The Ukrainian authorities will need to devote considerable resources towards voter education and specialist training for the judiciary, election administrators at all levels and public employees involved in election processes.

III. Particular considerations

1. General provisions (Section I, arts. 1-14)

16. From 2004, the electoral law sets up a system of proportional representation, with a threshold of 3 % of the votes cast at national level, for parties to gain parliamentary representation. This “simple” rule offers a good example of the general remarks on some repetitions in the text already mentioned in the previous paragraphs of this opinion. Article 1.1 states that: “*Deputies shall be elected on principles of a proportional system*” in a “*national constituency*”; 1.4 establishes that: “*Parties... that obtained at least 3 % of votes given by voters... shall take part in distribution of mandates*”). But practically the same is repeated, in a much more complex way, in different paragraphs of art. 96: “*The seats in the Parliament shall be distributed between the candidates for national deputies on Election lists of political parties... who received over three per cent of votes cast at the election in the national constituency*” (96.3); “*candidates ... of political parties who received fewer than three per cent of votes... shall not be entitled to the seats in the parliament*” (96.4). “*Seats in the Parliament shall be distributed among... list proportionate to the number of votes cast for... political parties...*” (96.5). “*The Central Election Commission shall... establish the total amount of votes cast for the candidates... of political parties... who received over three per cent of votes*” (96.6).

17. The law (Article 9) provides that only a citizen who has resided in Ukraine for the last five years may be elected to the parliament. Under Article 9.4, the passive right of suffrage is denied based on any conviction, regardless of the nature of the underlying offence. In *Hirst v. United Kingdom (No. 2)*³, the Grand Chamber of the European Court of Human Rights held that a blanket restriction on the voting rights of prisoners, “irrespective of the length of their sentence and irrespective of the nature or gravity of their offence and their individual circumstances”, was a violation of Article 3 of Protocol 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms. The Court also observed that Article 3 of Protocol 1 “guarantees individual rights, including the right to vote and to stand for election”. Thus, the *Hirst* case can be logically extended as encompassing the right to stand as a candidate. The *blanket prohibition* in Article 9.4 would appear to be contrary the principles stated in the *Hirst* case. The previous comments of Venice Commission’s experts have criticized this provision, as an unusually restrictive one.

18. The law retains the provision that only parties who have been registered 365 days prior to the voting day may nominate candidates (Article 10). The previous opinions of the Venice Commission have indicated that this limitation seems disproportionate. The nomination of candidates actually starts 119 days before the election day. It should be up to the voters to decide whether a new party is to be taken seriously, and whether their candidates should be accepted.

³ Application no. 74025/01 (6 October 2005).

19. The wording of article 12 seems not to be adequate. Subjects of the election process should possibly be “voters”, “election commissions”, “parties”, “candidates”, and so on; and not “a voter”, “an election commission”, “a party”, “a candidate”... On different grounds, also public authorities may be subjects, in different aspects, of the election process, as the 2001 Law admitted (art. 11.5: “*bodies of state power and bodies of local self-government in cases provided for by this Law*”).

2. Territorial organisation of election of Deputies (Section III, arts. 18-23)

20. The Law sets the number of voters per one polling station from 20 to 2500. The Venice Commission has recommended keeping the number of voters per one station low⁴. Compared to the previous 3000 voters per station it is an improvement. It is recommended that the authorities assess the smoothness of voting and counting procedures in bigger polling stations, in order to determine whether an optimal number has been reached.

21. The new nation-wide, proportional system explains the disappearance of the 10 % deviation-limit among constituencies of the 2001 Law. After all, electoral districts are not constituencies, but just serve to organise elections at a national level, and so population differences are not important in terms of value of the vote. In this respect, the differences between Presidential and Parliamentary elections are reduced, underlining the possibility of using general rules when organising the whole election process (districts, polling stations, register of voters, system of election commissions...).

22. At the same time, according to Article 18 (2), there are 225 territorial election districts. The choice of this number does not seem to be based on the administrative build-up of the Ukrainian territory, but rather on the previous electoral system (225 candidates were elected from a single-member district). As single-member districts are abolished, the number of size of the “election districts” does not play an important role any more. Therefore, the adequacy of the number 225 could be reassessed, especially if it would be possible to distribute electoral management duties logically based on administrative units of the country.

23. The Venice Commission has previously commented on the arguments for and against adopting such an electoral system in a country the size of Ukraine.⁵ It should be stressed that the system does not run counter to the European standards of democratic elections. It is up to the Ukrainian authorities to assess the implementation and consequences of the new electoral system, and draw appropriate conclusions thereof.

⁴ CDL-AD(2004)002 Opinion on the Draft Law on Election of People's Deputies of Ukraine (Draft introduced by people's deputies S. Havrich, Y. Ioffe and H. Dashutin) adopted by the Venice Commission at its 57th Plenary Session (Venice, 12-13 December 2003), par 27.

⁵ See CDL-AD(2004)002 Avis relatif au projet de loi sur l'élection des députés de l'Ukraine (Projet présenté par les députés S. Havrich, Y. Ioffé et H. Dachoutine) adopté par la Commission de Venise à l'occasion de sa 57e session plénière (Venise, 12-13 décembre 2003) and 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).

3. Election Commissions (Section IV, arts. 24-38)

24. Electoral commissions operate at three levels: the Central Electoral Commission ('CEC'), 225 district electoral commissions (DECs) and the precinct (or polling station) electoral commissions (PECs; there were some 33,000 in the 2002 elections). The formation and general powers of the CEC (a permanent body) are addressed in a separate law. There are no qualification requirements for members of DECs and PECs other than a requirement for the secretary to have a command of the state language sufficient to deal with the paperwork (Article 26.6).

25. According to article 25, the district election commission is a legal entity, whereas a polling station commission is not. The precise meaning of this distinction is unclear. Also, it is unclear what is meant by saying that "*the CEC shall not be legal inheritor of district election commission*" (art. 25 (3)). If those provisions are necessary due to the peculiarities of the Ukrainian legal system, they should nevertheless be retained.

26. As for the composition of the commissions - each party or bloc with a faction in the existing parliament is entitled to nominate a representative to each DEC and PEC (Articles 27.3, 28.5). The successive laws have foreseen their recall as a cause of early termination of their membership (arts. 27.3.2 in 2001; 29.3.2 in 2004, and 37.3.2 in 2005). Their main members (chair, deputy chair or secretary) may be censured by two-thirds of the total membership (arts. 27.5, 29.9 and 37.11, respectively). This option makes sure the internal political plurality of these bodies, but does not fit at all to their almost-judiciary functions, as detailed in Section XII (especially, arts. 105 and ff: complaints may be filed to a court or to a election commission, at the complainant's discretion).

27. Remaining seats on the DECs and PECs are distributed amongst other parties and blocs by lot. This creates the potential for an unduly conservative arrangement whereby parties and blocs not represented in parliament will not play a significant part in the administration of elections. It might be useful if the CEC were to monitor the number of positions allocated to representatives of parties and blocs not presently represented in parliament, particularly at the DEC level, so as to establish the actual extent of this phenomenon in the 2006 elections.

28. The chair, deputy chair and secretary of a DEC or PEC may not represent the same party or bloc (Articles 27.9, 28.11). Article 27.10 seeks to ensure that each party or bloc with members in the DECs obtains a 'proportional share' of management positions. This is both a welcome and well-considered attempt to ensure fairness and equal treatment as between election participants.

29. Previous experience suggests that there can be difficulties in filling vacant positions at both DEC and PEC levels. This may be something which is difficult to address by legislation and requires, if possible, an increase in the remuneration paid to DEC and PEC members for their services.

30. The DECs are required, under Article 31.2.10, to assist in conducting and in certain instances organising meetings of candidates and party representatives with voters. Election administration should be left with regulatory, controlling and facilitating functions and not organisational ones as far as the election campaign is concerned. Organising campaign events is not generally, and should not fall, within the duties of election administrators. Once election commissions start getting involved in organising campaign meetings, there are possibilities for

unequal treatment, or at least perception and claims of unequal treatment. This is a task which should be left to the political parties and candidates.

31. Article 33.12 lowers the number of votes needed to pass a decision in a DEC or PEC on Election Day, or when determining the vote tabulation or voting results at the polling station or summing up voting results in the territorial election district, in the event that there is less than two thirds of the commission's members at the meeting of a district election commission or a polling station commission. This is a positive step.

32. The decisions of higher level commissions are mandatory for lower level commissions (Article 33.14). The Law provides various mechanisms by which a superior electoral commission can ensure that a lower level commission complies with its duties. The CEC can convene a meeting of a DEC and a DEC can do the same for a PEC. As an ultimate sanction all members of a DEC or a PEC may be dismissed en masse by the commission which formed that particular commission if the lower level commission has systematically violated the Constitution or laws of the Ukraine (Article 37.1). Other provisions allow individual members of commissions to be dismissed (Article 37.3). Given that dismissal is a drastic step, it may be desirable for the CEC to report after each election each instance in which these powers were exercised and the reasons for their use.

33. A superior electoral commission may quash a decision of a subordinate electoral commission which violates the law or is adopted in excess of the subordinate commission's powers. The subordinate commission's decision may also be declared illegal or cancelled by a court (Article 33.15). These are important powers to ensure legality. It should also be made clear that a superior commission or court may adopt a decision to remedy any unlawful *omission* of a subordinate commission with immediate binding effect. There is a degree of repetition of the rule in Article 33.15 and in Article 110.8. The latter provision makes clear that rather than quashing the subordinate commission's decision, the superior commission may order reconsideration of a particular issue. It would be preferable to address these issues in the same part of the Law.

34. The addition in the last 2005 reform of a new article 34 regulating the issue of who has the "*right to be present at a Commission's meeting*" is also remarkable. Apart from the fact that this question should possibly be regulated outside the law, the extent of this right may put at risk the conditions for the Commissions to perform their function. In effect, granting this right to many subjects (candidates, representatives of parties and mass media, foreign and international observers), combined with the excessively high number of members on these Commissions, may make it very difficult - if not, rightly impossible - to perform their many and important functions, which require continuous debating and decision-making.

35. Article 35.2 of the Law prohibits state and local government bodies from interfering with the election process except as stipulated under the Law. The Law would probably benefit more from having an article devoted to this issue with detailed indications of what is and what is not permitted, supported by appropriate and explicit sanctions in the Administrative and Criminal Codes. It is imperative that the Law makes it clear that all persons not directly involved in conducting the election, *especially* representatives of local government, are excluded from PECs and DEC's *unless* specifically and formally invited to attend by the PEC or DEC.

4. Voter Lists (Section V, arts. 39-47)

36. This Section deserves close consideration. In purely quantitative terms, Chapter V of the 2001 law dedicated to this issue two articles (30 and 31), with 19 paragraphs in total. Four years later, this fifth Section of the 2005 text contains nine articles with more than 120 paragraphs.⁶ Article 31.6 of the 2001 Law establishes that “*the procedure of producing absentee ballots, their delivery..., withdrawal and cancellation of unused... ballots shall be established by the CEC*”, within the temporal framework established by the same paragraph. The 2005 Law dedicates to these absentee certificates one article (number 42), with 24 paragraphs (three of them, divided in sub-paragraphs) in four pages.

37. In the Ukrainian context, a clear difference exists between the concept of ‘voter list’ (‘spysok vybortsiv’) and the concept of ‘voter register’ (‘reestr vybortsiv’). Traditionally, and it is still the case in the 2005 law, ‘voter lists’ are not permanent and are created for each election according to a particular timeframe and methodology. There is an attempt to adopt an entirely new system of ‘voter register’, which would be permanent, computerized and constantly updated. The adoption of a draft Law of Ukraine “On the State Register of Voters of Ukraine” is currently contemplated. In case such a Law would be adopted, the provisions of Section V of the examined Law would have to be reconsidered.

38. Many of the provisions in Section V of the examined Law (Voter Lists) are new. Article 39.1 states that general voter lists must be compiled by 1 October in the year preceding the regular elections (i.e. 1 October 2005 for the next parliamentary elections). As this is one of the few provisions of the Law which entered into force when the revised text was published in July 2005, the lists for next year’s elections should therefore already be compiled.

39. The law now provides that local authorities will establish special ‘working groups for voter registration’ which will compile voter registers with the assistance of various state bodies. There are detailed provisions on how this process will be completed.

40. The working groups for voter registration must present general voter lists for inspection by citizens in accessible premises no later than 1 November in the year preceding the election. The lists are kept accessible for two calendar months (Article 40.2). Whilst this is undoubtedly a valuable mechanism for ensuring accuracy, it would be better if voter lists were made available permanently

41. Citizens are permitted to inspect the general voter list for the territory in which they live to ensure its accuracy and may apply for mistakes and omissions to be corrected (Article 40.5). The Law should make it clear that where an application is made in relation to a third party (not the applicant), the third party must be informed of the application before it is considered, given an opportunity to respond and notified of the result.

42. Similar rules apply to the inspection of precinct voter lists. Requests to correct errors in the precinct can be lodged up to five days before the election (Article 43.5). This is a sensible restriction which will avoid last minute applications and allow the appropriate electoral commission or court sufficient time to consider the application.

⁶ The 2004 Law had in this Chapter V 5 articles, with 44 paragraphs.

43. Article 40.8 provides that the CEC must ensure that the general voter lists are prepared in electronic form. If this is being done, consideration should be given to the compilation of a single national voter list. This would probably require very little by way of additional effort or cost. In any event, as regards data protection, the Law should make clear whether voter lists may be distributed outside the electoral commissions and, if so, on what basis.

44. Precinct voter lists are compiled on the basis of the general voter lists. Under Article 41.3 a voter may be put on a voter list only at one precinct. It may be sensible to clarify that this applies to *regular* precincts. For instance, a voter included on the regular precinct voter list for his home area may fall ill and be treated at a clinic; he might then also be added to the special voter list for that clinic.

45. Voters who will be away from their home area may vote using absentee voting certificates (Article 42). The rules on the use of such certificates have been expanded, in large part to provide mechanisms to prevent abuse. This move is particularly welcome since a failure to control effectively and transparently the printing, distribution and use of Absentee Voting Certificates facilitated the abuse of the system during the 2004 presidential elections.

5. Financial, material and technical provisions for the conduct of election (Section VI, arts. 48-54).

46. The Law as amended contains very detailed rules on campaign finance. A number of questions, however, are left unanswered.

47. The basic rule in the Law on election campaign spending is that all campaign expenses must be paid from the official campaign fund set up by a particular party or bloc (Article 48). The only permissible source of funds for a campaign fund is money from the party or parties forming a bloc and voluntary contributions by identified natural persons. The campaign costs may be financed through a party's election fund, and costs up to 100,000 times the minimum monthly salary, will be compensated through the State Budget for parties who have received at least 3% of the votes. The election fund is created by party "own funds" and contribution of individuals (Art 53(1)). Any single natural person may donate no more than 400 times the monthly minimum wage (Article 53.2); this is approximately 14,400 Euros.⁷ Donations from anonymous donors, foreign citizens, stateless persons and, by implication, juridical persons are prohibited (Article 53).

48. However, in contrast to the Law on Elections of the President of Ukraine, there is *no* maximum size for the campaign fund. Moreover, there appears to be nothing in the Law to prohibit a juridical person, foreign citizen or other entity from making a contribution to the party or parties forming a bloc, and for the party or parties to then transfer the funds to the campaign fund. In this respect, the law's restriction may easily be circumvented.

49. In its original form (March 2004), the Law allocated to the CEC the tasks of overseeing the receipt and use of electoral funds by parties and blocs and the conduct of selective checks (Article 24.9). This task has been removed from the adopted text. This raises the question of who, if anyone, will ensure that parties and blocs comply with the spending rules envisaged by

⁷ The English translation of the Law gives the figure of four times the minimum monthly wage, but this is evidently a mistake; the figure under the 2004 Law is 400.

the Law.⁸ If there are to be mechanisms for regulating campaign finance, it is vital that these are clearly stated in the Law.

50. One of the simplest and most effective ways to promote transparency in campaign spending would be to require publication of the campaign fund accounts, which parties and blocs are required to submit to the CEC after the election (Article 52.6). In order to provide timely and relevant campaign finance information to the public, the law should require full disclosure, *before* and after elections, of sources and amounts of financial contributions and the types and amounts of campaign expenditures.

51. It may be suggested that the Law in force, as the previous ones, set up a system very expensive for the public treasure, which must afford not only the expenditures due to the mere organisation of elections, but also many costs caused for parties and candidates (e.g.: “printing out informational posters of parties..., publication of election programs... in mass media”: art. 49.3). A remark that must be reinforced when considering also the remuneration for (partisan) Commission members, and that may transform elections in a very expensive process. The procedure for the reimbursement of the campaign expenditure should be more clear.

6. Nomination and registration of candidates (Section VII, arts. 55-64)

52. The deadline for parties and blocs to submit their lists of candidates has been brought forward from 65 days before election day under the 2001 Law to 90 days (Article 55.3). This means parties have just 35 days from the day on which the election is called to reach a decision as to whether to form a bloc of parties and thereafter finalise not only its list of candidates but also the order in which candidates appear. This may prove to be very short a period. It will be worth monitoring the situation for the 2006 elections to see whether these new rules cause actual difficulties in the nomination process.

53. Under the 2001 Law, parties and blocs submitting candidate lists in the multi-mandate constituency were required to pay a deposit of 15,000 monthly minimum wages.⁹ In February 2002 the Constitutional Court ruled that this was not an excessive amount and that the rule was not unconstitutional. However, there was evidently a continuing concern that this figure was too high; in its original text (March 2004), the present Law set the deposit at 2,500 minimum wages.¹⁰ In the 2005 text this has been further reduced to 2,000 minimum wages, or approximately 72,000 Euros (Article 59.1). This substantial lowering of the deposit should mean that smaller parties will not be prevented from participating in the election campaign on financial grounds alone.

54. Each candidate for deputy must complete an income and property declaration to the CEC (Article 60.1). Article 60.3 permits the CEC to appeal to the State Tax Administration for verification of the details contained in the declaration. It is not likely that the CEC would check the details of every declaration. It is therefore recommended that the Law sets out those

⁸ The CEC is also no longer required to forwards a report on the spending of state funds on the election to the Account Chamber – see Article 24.12 of the 2004 Law.

⁹ The minimum monthly wage is presently approximately 36 Euros.

¹⁰ The English translation of the 2004 Law (Article 46.1) refers to two and a half minimum salaries, but it is assumed that this should say ‘two and half thousand’.

circumstances in which such checks may be carried out. There is otherwise at least a risk that the discretion may be used selectively against candidates from a particular party.

55. The text also maintains the high degree of intervention in internal party procedures that was already evident in former laws. In this sense, for instance, it seems difficult to accept that a Law must rule the procedures and contents of the agreements among parties to create blocs or coalitions, or the terms of a coalition breakdown as article 56 and 63 do exhaustively. In this sense, for instance, one may wonder why a law must say that “*parties constituting a bloc may pass a decision on election bloc dissolution no later than 35 days prior to the Election Day*” (article 63.7).

56. The same can be said when regarding the intra-party processes to nominate candidates: minimum participation in the party congress, requirements of previous information about such a congress to Central Election Commission and mass media, data of the candidates which have to be indicated by the party (including, once more, data about education, month and year of birth, occupation, etc.). In a free competitive party system, parties are interested in informing public opinion about their activities, but state interference should not be so significant.

57. Article 64 states several grounds that permit cancellation of candidate registration. The sanction of cancellation of registration could be disproportionate, in light of the conduct in the article that can be a basis for cancellation.

58. The provisions of this chapter have to be compared to some other provisions on candidates. For instance, the electoral system does not have provisions on independent candidates. Although the electoral system is a proportional representation system using a single national constituency, such a system does not require the exclusion of independent candidates and it is possible for an allocation formula to provide for independent candidates as well as political parties and blocs. The law should provide the opportunity for an independent candidate to seek office in the national parliament of the country. Paragraph 7.5 of the OSCE Copenhagen Document recognizes the right of citizens to seek political office, individually or as representatives of political parties or organisations, without discrimination.

7. Election campaign (Section VIII, articles 65-71)

- General aspects.

59. Election campaign activities are almost invariably a manifestation of the 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 (Articles 1, 10 and 11 of the Convention). Any restrictions on those rights must be strictly necessary in a democratic society. It is difficult to reconcile with these principles a rule in the Law which appears to prohibit minors, foreign nationals, and stateless individuals from engaging in campaign activities (Articles 2.7, 66.1, 71.1.1). The rule might be used as a basis for preventing parents from attending a political rally with their children or a foreign citizen from expressing his views about a party in a television interview. It is far from clear how such a blanket restriction could conceivably be justified as necessary in a democratic society.

60. Similar concerns arise from Article 71.19, which prohibits election campaigning in foreign mass media and mass media registered in Ukraine with a foreign interest exceeding 50%. It is questionable whether such a rule is in line with the citizen's right to receive and impart information regardless of frontiers as set out in paragraph 26.1 of the OSCE Moscow Document.¹¹

61. Article 71.9 prohibits one from "casting aspersion" on a candidate. This limitation on free expression of speech and political opinions can prevent the development of a robust and vigorous campaign. Outside the context of a political campaign, a government may limit freedom of expression in order to protect the reputation or rights of others.¹² However, in the context of a political campaign in which candidates make a conscious decision to enter the public sphere to compete for public office, a law for the protection of the reputation or rights of others cannot be applied to limit, diminish, or suppress a person's right to free political expression and speech.¹³

- *Particular issues related to campaigning in the mass media.*

62. The Law contains fairly detailed rules to promote equal access to printed and electronic mass media during the election campaign. However, parliament has not taken up the repeated recommendation of OSCE/ODIHR and the Venice Commission of establishing an independent media commission. It is again recommended that such a body is set up to oversee the implementation of this aspect of the Law and promote free, equal and fair access to public broadcasting, and that its membership should be diverse including medial professionals, civil society, judicial bodies, government and political parties.

63. It is further recommended that the Law makes a clearer distinction between private and state-owned mass media. Rules which may be effective in relation to state-owned mass media may be rather less effective when applied to mass media in private ownership.

64. The principle according to which mass media in general cannot refuse to include political advertising from some parties can be problematic (68.9). The principle of equal treatment of all parties must be respected, however there are factual conditions (affecting, particularly, to some private media) which could justify well-grounded denial of participation in political campaigning of political groups whose ideology could be opposed to that of the media.

¹¹ 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'.

¹² See, e.g., Article 10(2) of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

¹³ See, e.g., *Oberschlick v. Austria*, Case No. 6/1990/197/257, European Court of Human Rights (23 May 1991); *Lopes Gomes Da Silva v. Portugal*, Application No. 37698/97 European Court of Human Rights (28 September 2000); *Bowman v. The United Kingdom*, Case No. 141/1996/760/961, European Court of Human Rights (19 February 1998); *Incal v. Turkey*, Application No. 41/1997/825/1031, European Court of Human Rights (9 June 1998).

65. The 2001 provision that “*state-owned or communal mass media as well as their officials, employees and creative staff shall... not be allowed to campaign for or against*” any candidates or parties (art.56.4) was replaced by a prohibition (art.71.6) affecting “*mass media, their officers and officials and creative workers*” in general and not, as the previous one, the “*state-owned and communal*”. This provision, which might have created problems with respect to some fundamental rights – in particular all those that protect freedoms of thought, speech and press, personal freedom and private property rights – was further amended on 17 November 2005 after strong lobbying from journalists, NGOs and media outlets. The new art.71.6 clarifies the question and specifies that the above mentioned persons are “*prohibited from campaigning in favor or against parties (blocs), their candidates for deputies, or distributing information, which bears the characteristic of a political advertisement, either without cost or paid by other sources not foreseen by law, and also distributing any information with the aim of persuading voters to vote ‘in favor’ or ‘against’ a definite subject of the election process*”. Nevertheless, some clarifications could be provided on how this provision will be applied in the case of media outlets affiliated to different political forces.

66. Similar to article 71.6, article 71.10 was further amended on 17 November 2005 following lobbying from journalists, media outlets and NGOs. The amendment transferred the responsibility for the enforcement of the law, and possible consequent imposition of sanctions on media outlets, (art. 71.10) from the CEC and election commissions to the courts. This system is more in line with European standards.

67. Article 71.12 grants a political party, bloc, and candidate for deputy the “*right to reply*” to public information published by the media if the information is “*regarded as false by a party (bloc) or a candidate*”. While the “right to reply” can constitute an appropriate mechanism through which aggrieved parties can obtain the correction of possible inaccuracies, the formulation of article 71 might place an excessive burden on the media as it could allow for a candidate to subjectively regard true information as “false” and, thereby, acquire free media access to “reply” to the information regarded as being “false”.

68. The prohibition on publication of the results of opinion polls during the last 15 days before the elections (Article 71.20) is too long. The period of 15 days should be reduced to a more reasonable duration.

8. Guarantees (Section IX, arts. 72-77)

69. The Law contains numerous mechanisms designed to enhance transparency in the election process, promote accountability and protect ballot security and the secrecy of the vote. These include the following.

- a. Each registered party or bloc is permitted to send a representative to sessions of the CEC during the election campaign (Article 34.1, 72.1). The representative is entitled to participate in the CEC’s proceedings but may not take part in decision making; they have only a consultative role. This does ensure, however, that each party and bloc is represented, has an opportunity to advance the views of the party or bloc and is able to see the documents and materials under discussion by the CEC. It is recommended that the extensive list of rights accorded to party representatives in the CEC should include the right to be notified in advance of CEC sessions (see Article 72.14).

- b. Official observers are permitted to attend most sessions of electoral commissions and to observe all voting and counting processes, including the use of mobile ballot boxes. For the avoidance of doubt, it should be made clear in Article 82.3 that observers are entitled to be present at the vital PEC meeting held no less than 45 minutes before voting begins when the ballot boxes are checked and sealed.
- c. The three PEC members who accompany the mobile ballot box must be representatives of different parties or blocs (Article 84.10).
- d. The presence of representatives of the mass media further serves to enhance transparency in election process.
- e. There are three categories of official observer: those appointed by parties and blocs participating in the election, international observers, and for the first time, observers from (non-partisan) public organisations (Article 34.3.3). This is a particularly welcome development and brings the legislation into conformity with Ukraine's commitments under paragraph 8 of the Copenhagen Document.
- f. The use of detailed protocols and summary tables allows all participants in the process to cross-check results at different levels. The Law requires that a copy of each protocol must be promptly and publicly displayed. Official observers are entitled to a certified copy of results protocols. Although it is clear from Articles 89.9 and 93.10 that international observers are entitled to receive copies of PEC and DEC protocols, this entitlement is omitted from the list of rights set out in Article 77.6, unless of course this is an error in the English translation. If it is not, such a right needs to be inserted.¹⁴
- g. The law establishes an obligation for the CEC to publish on its website a number of key information on ballot papers, absentee certificates, hand over protocols, etc. which significantly improve the transparency of the election administration.¹⁵ Regrettably, the law does not impose the timely publication of detailed results per polling station.

70. The degree of details given in article 72 of the Law on parties' representatives is unusual. Within the Central Election Commission, these representatives do have a right of "advisory vote" (72.1). All party representatives have to be "*approved by the central executive body of a party*" (72.5, hence encroaching upon internal organisation of functions within the party), and may be recalled by the same body (articles 72.5 and 11). Paragraphs 3 and 7 of this same article provide regulation for registering representatives at different levels, almost as detailed as for party applications.

71. It may be underlined that article 73.1, that establishes that candidates have a right to "*release from execution of their work or service*", refers to the possibility of a candidate "who is President of Ukraine or a national deputy". It is evident that both positions cannot be equally

¹⁴ The equivalent provision for party observers and public organisation observers appears in Articles 75.7.8 and 76.11.5 respectively.

¹⁵ In particular, see art. 42.26, art. 79.5, art. 82.13, art. 92.2, art. 94.5, and art. 96.12.

treated: the President is the Head of State, and that institutional position should possibly be kept out of the political struggle about the legislative elections.

72. With respect to provisions on official observers, the text of the law could be improved by avoiding unnecessary repetitions. Instead of defining a set of common rights of all observers, and afterwards the specific rights of the different groups existing among them (observers from parties, from public organisations, from foreign states and international organisations), the law dedicates specific articles to each of these categories, hence repeating the same provisions for all of them (see, e.g., articles 75.1 and 72.2; 75.7, 76.11 and 77.6; 75.9-11 and 76.14-16).

73. Some other points can raise question: the requirement of a two-years-old registration for public organisations to have the right to have official observers, and the extremely detailed ruling of the procedure to nominate observers (including requirements of qualified signatures, seals, notarized copies of the organisation's statutes... aspects that do not need being regulated by law).

74. Indeed, according to the law, a public organisation may only observe an election if this is one of the tasks it was set up to do as indicated in its charter; and if it was registered at least two years prior to election day (Article 76.1). The former rule is not uncommon and is probably designed to ensure that the number of official observers is not too large to impede the work of electoral commissions. However, the latter rule will create undue obstacles for the 2006 elections. As the 2005 amendments provide the first opportunity for non-partisan domestic observation of elections in Ukraine, it might be unlikely that many, if any, existing public organisations will have identified election observation as one of their charter tasks. Rather than exclude domestic observers until 2011, it is highly desirable that transitional provisions are introduced so as to soften the effect of the existing rule and facilitate a role for domestic observers in 2006, thus ensuring more prompt implementation of paragraph 8 of the OSCE Copenhagen Document. Given that the freezing provision in the Final Provisions of the Law will need to be repealed (see above), it is to be hoped that such a transitional provision will be introduced.

75. Official observers are permitted to take photographs and make audio and video recordings of proceedings without violating the secrecy of the ballot. This rule carries an obvious risk that the making of such recordings may in fact undermine voter secrecy or, even more likely, create a sense of intimidation on the part of voters. It is likely that this rule will do more harm than good and it should be deleted from the Law. A rule allowing limited use of cameras by accredited representatives of the mass media would be more appropriate.

76. Article 34 limits the right to attend a CEC meeting without an express invitation or permission to: (1) candidates and authorized representatives, (2) official observers from foreign states and international organizations, and (3) media representatives. As the CEC is the highest electoral administration authority in the country, consideration should be given to permitting a citizen of Ukraine the opportunity to observe the conduct of the CEC in public meetings. Further, there is no reason why domestic non-partisan observers should be excluded from meetings of the CEC.

9. Voting procedure and establishment of results of the election (Section X, arts. 78-101)

77. Before voting begins, each PEC must inform the DEC of the number of voters on the voter list, the number of voters on the mobile voting list and the number of voters included in the voter list on the basis of absentee voters' certificates (Article 82.11). This information must be relayed to the CEC by the DEC no later than 10.00 on election day (Article 82.13). This is part of a process of enhancing accountability in respect of voting with the mobile ballot box and the use of absentee voting certificates. For the avoidance of doubt it may be sensible to indicate what methods of communication may be employed for this purpose by the PEC (the Law already stipulates which methods of communication may be used by DEC's). The Law should also allow candidates, official observers and media representatives to be given this information at the PEC and the DEC. The same applies to similar information required to be forwarded by the PEC and DEC's at the end of election day under Articles 83.13 and 92.2.

78. The draft would not eliminate the option of voting against all candidates. This option is unusual among established democracies. It may strengthen political apathy in the population. It may also provide voters with an illusion that they have meaningfully voted whereas their vote really does not make a difference. It is recommended that this option be removed from the ballot.

79. The 2005 Law now allows for voters to apply to have their name marked for use of the mobile ballot box on the basis of disability or age. This is an improvement on the previous arrangements, whereby infirm voters with serious mobility problems had to register for use of the mobile ballot box for each new election. Applications to use the mobile ballot box for particular elections are still permitted. For the parliamentary elections they must be received by 20.00 on the Friday before election day (Article 84.5). In its 2001 redaction the Law required the PEC members taking out the mobile ballot box to take the number of ballot papers equal to the number of voters included on the special list of voters using the mobile ballot box. This provision appears to have been removed (see Article 84.12). It is suggested that the number include a small specified number of spare ballots in case the voter spoils his/her ballot unintentionally.

80. The rules on the procedures for counting the votes and establishing the results of the elections have been substantially redrafted in the 2005 Law. There are now numerous accountability safeguards in place. The procedures are now more complex (for instance, the number of items of information required on the PEC protocol has increased from 8 to 19) and PEC and DEC members will need additional training especially on this issue. This is also another reason for reducing the maximum number of voters to 2,000 as previously recommended by the OSCE/ODIHR.

81. Article 88.20 refers to a particular reconciliation exercise which the PEC must undertake as part of the vote count. It provides that the PEC *may* recount the ballots if the numbers do not tally. The Law should presumably state that the PEC *must* conduct a recount, and possibly that it may conduct more than one in order to reconcile the numbers.

82. The OSCE/ODIHR final report on the 2004 presidential elections recommended that result protocols should indicate how many voters used the mobile ballot box and how many used absentee voting certificates. This suggestion has been acted upon: both PEC and DEC protocols will now show this data for parliamentary elections (Articles 89.2, 93.1). This is a further welcome step towards accountability in an area of particular concern.

83. Article 90 permits (but apparently does not oblige) the PEC to declare the election in that precinct completely invalid on the basis that there have been violations of the Law, which make it impossible to determine the voters' will. This is a decision which should most probably only be taken by a court.

84. A further difficulty with Article 90 is that one of the bases for such a decision is that instances of illegal voting amount to more than 10% of the number of voters who received ballot papers at that polling station. Such an arbitrary standard of impermissible abuse serves no useful purpose. In effect, it establishes a tolerance level for fraud which cannot be compatible with the proper conduct of elections. As a matter of principle, an election result should only be invalidated by a court if the extent of any fraud or misconduct makes it impossible to determine the true result of the election. It is also questionable whether the 10% standard is consistent with the Supreme Court's 2005 decision invalidating the results of the second round of voting in the Presidential election. In the disputed 2004 Presidential election, the results of which were appealed to the Supreme Court of Ukraine, one of the arguments presented against invalidation of the results of the second round of voting was that the 10% standard had been satisfied for specific polling stations. The Supreme Court rejected this argument and ruled that a remedy for violation of suffrage rights was required by Articles 8, 71, 103 and 104 of the Constitution of Ukraine and Article 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, regardless of whether the 10% standard was satisfied. Thus, retention of the 10% standard in the law appears to be inconsistent with the 2004 decision of the Supreme Court.

85. It is highly desirable that the CEC publishes all the PEC and DEC results on its website in a timely manner. This would provide a substantial enhancement to transparency and public confidence in the election process and promote full compliance with the spirit of paragraph 7.4 of the OSCE Copenhagen Document.¹⁶

86. Article 96 par. 3 establishes that "*those candidates for deputies included to party (bloc) lists, which received three and more percent of votes who took part in the voting in the all-national constituency, receive the right to take part in the distribution of deputies' mandates*". Considering the experience of different countries, thresholds from 3 to 5% are in principle appropriate.

87. Article 98.1 establishes that the parties which have reached the minimum threshold of three per cent of the votes cast, and consequently take part at the distribution of seats, will also have right to the reimbursement of their expenses "in the amount equal to factual expenses but not more than one hundred thousand of minimal salaries". It should be noted that, according to paragraph 7 and 8 of article 98, this reimbursement can take place almost one year after the date of elections. Effectively, "*funds for reimbursement of expenses related to financing election*

¹⁶ The participating States will 'ensure that votes are cast by secret ballot or by equivalent free voting procedure, and that they are counted and reported honestly with the official results made public'.

campaign of parties... shall be stipulated in the Law On the State Budget of Ukraine for the financial year following the year of election of national deputies”, and these “funds for reimbursement... shall be transferred to the account of the respective parties... no later than on the thirtieth day from the day of enactment of” the mentioned Law.¹⁷ A delay that can also mean a financial problem... and which could be especially important in case of extraordinary, and unexpected, elections.

10. Extraordinary elections (Section XI, art. 102)

88. The only article of this chapter serves to rule the whole election process in case elections are convoked “*by the President of Ukraine on the basis and under the procedure established by the Constitution*” (art. 15.3). Such elections “*shall take place on the last Sunday of the 60-day period after publication*” of the Presidential Decree, defining a shorter election process of about 55-60 days (art. 16.3 and .4).

89. In that circumstances, “*the election districts and polling stations situated abroad established for the previous parliamentary elections shall be used*” (102.1); and the “*lists of voters at regular polling stations shall be compiled and produced pursuant to the procedure established*” by the Law “*On the State Register of Voters of Ukraine*” (102.8). For the rest, District Election Commissions shall be established no later than fifty days before the Election Day; regular and special polling stations shall be created no later than 19 days before the Election Day, and Polling Stations Commissions no later than 12 days before the same date.

90. Therefore, before unexpected elections, the Law proposes an alternative model capable of managing the most difficult stages of the election process more skilfully than the regular one. Something that should be taken into account if, in the future, Ukrainian legislature should decide to reform their election procedure.

11. System of appeal of decisions (Section XII, arts. 103-117)

91. The Law includes (since the 2004 reform) a specific section on appeal of decisions. The Law keeps the double, alternative possibility of appealing to an electoral commission or to a court, at the discretion of the plaintiff (art. 105.2), and it foresees appeals against private persons or legal entities (art. 104.3).

92. The law provides a list of persons or bodies who have the right to file a complaint (Article 103) instead of invoking the existence of a violated right, or of a legitimate interest as a ground for appealing. Such an approach is not optimal in some situations. Many countries give the right to appeal decisions of election commissions to any person whose rights have been violated. Under the current text, it is not certain whether the rights of the person or body who files the complaint have to be violated at all (except when the complaint has been filed by a voter). At the same time, some potential persons whose rights may have been violated may not be able to file a complaint, or their rights are at least unclear under the current law (e.g. a potential candidate, or a media organisation).

¹⁷ Article 98, paragraphs 7 and 8 (emphasis has been added), following the system already set up by the 2004 Law (art. 79). It should be remembered that regular elections have to take place “on the last Sunday of March of the last year of authority of the *Verkhovna Rada*” (art. 16.1).

93. A second area of remaining concern is the time limits applicable to complaints. Time limits are of course necessary and there is obvious value in avoiding protracted challenges and litigation pending the determination of the election results. Time constraints should not, however, be so restrictive as to undermine the prospect of achieving a just solution to a legitimate complaint. For instance, complaints must be lodged with an electoral commission or court within five days of the unlawful decision, act or negligence complained of or within even shorter time limits as regards events occurring before or on election day (Article 106). There is a danger that this will lead to injustice where, for instance, the complainant is not immediately aware of the effect of the event complained of or is unable, through no fault of his own, to lodge a timely complaint. Consideration should be given to providing an exception to these time limits and extending the deadline where the complainant could not learn of the violation through the exercise of reasonable diligence and where the interest of justice and the public requires the deadline be tolled due to the inability to learn of the violation before the deadline.

94. It is also important that the CEC does not determine the final results of the election until it has received the rulings on any complaints filed with the electoral commissions and the courts which may have a bearing on the outcome of the election.

95. The law maintains the system where a complaint may be filed in either a court or a higher election commission. This may create the problem that the same issues are being decided by different election appeals bodies at the same time. The election commission may suspend proceedings only if the “same complaint” has been filed in a court (Article 105.4). If different plaintiffs protest against similar violations, the complaints can hardly be considered the “same”. The appeals process should promote a more uniform process of deciding on election complaints. The Code of good practice on electoral matters provides that:

*“It is ... vital that the appeal procedure, and especially the powers and responsibilities of the various bodies involved in it, should be clearly regulated by law, so as to avoid any positive or negative conflicts of jurisdiction. Neither the appellants nor the authorities should be able to choose the appeal body. The risk that successive bodies will refuse to give a decision is seriously increased where it is theoretically possible to appeal to either the courts or an electoral commission...”*¹⁸

96. In order to enhance the transparency of the complaints and appeals process, one simple but possibly very effective measure would be for the CEC to make its register of complaints, including the CEC decision on the complaint, publicly accessible. Where necessary, such materials should guarantee adequate protection of the privacy of individuals involved in the complaint. Such a measure would provide a ready indication of the extent to which complaints are referred to the CEC, the nature of such complaints and the CEC’s approach to dealing with them.

¹⁸ *Code of Good Practice in electoral matters* (CDL-AD (2002) 23 rev), explanatory report, par. 97; cf. the Code of Good Practice, par. II.3.3.c.

12. Storage of election documentation and final provisions (Sections XIII, art. 118; and XIV)

97. The last “ordinary” section of the Law rules the storage of, and the access to, election documentation and other material values, especially in the National Archive Fund and local archive institutions. It is, evidently, a new issue whose inclusion in this legal text seems out of place.

98. With respect to the final provisions, the second one foresees that “*amendments and additions to this Law may be made no later than 240 days before the day of election of national deputies of Ukraine in 2006*”. A rule absolutely respectful of the criterion of stability of electoral laws defended by the Venice Commission,¹⁹ but which may be too rigid, and in practice may cause problems if used with partisan aims.

99. Finally, it may be remarked that this Law declares “null and void” the previous 2004 Law. Nevertheless, in practice it has replaced the 2001 text, given that the Law enacted in 2004 was to enter in force on 1 October 2005, and it has therefore been reformed before that date, which is maintained by this text.

IV. Final remarks.

100. The 2005 amendments address some of the shortcomings pointed out in the Venice Commission opinion on the 2001²⁰ and in the OSCE/ODIHR Final Report on the 2004 presidential elections. Some shortcomings remain, for instance, the need for parties to be registered one year before the elections if they want to present candidates (arts. 10.2 and 55.1 in 2005 text; 38.1 in 2001),²¹ or the limitation of the right to be elected to those who have resided in Ukraine for at least five years (art. 9.1 in 2005; 8.1 in 2001).

101. Areas where the Law would benefit from further reconsideration include the following.

- a. The new general voter lists prepared on a territorial basis in electronic form should be brought together into a national voter list.
- b. The Law should provide the opportunity for independent candidates to seek office in the Supreme Rada, in accordance with Paragraph 7.5 of the OSCE Copenhagen Document.
- c. The Law should provide greater protection for candidate rights, including removing the blanket and indiscriminate prohibition on candidacy for persons who have a criminal conviction and removing the more severe provisions for cancellation of candidate registration.

¹⁹ Idem, point II.2.b and the Explanatory report, points 63 and ff.

²⁰ CDL-INF (2001)22.

²¹ In this respect, and by the way, arts. 10.2 and 55.1 of the 2005 text and 42.1 of the 2004 Law refer to parties registered “no later than 365 days before” the Election Day; whilst the 2001 Law spoke of “one year prior to the day of election” (art. 38.1). One may wonder if it should have been better to maintain this latter expression... given that one out of four years has 366 days.

- d. The Law should clarify the circumstances under which a political party or bloc may re-order candidates or “eliminate” a candidate on the lists after they have been registered.
- e. The Law should expand the category of persons who have the right to observe meetings of the Central Election Commission and include domestic non partisan observers.
- f. Sanctions against media outlets violating the rules during the election campaign should be reviewed.
- g. The provisions on campaign finance should be clarified and expanded. In order to provide timely and relevant campaign finance information to the public, the Law should require full disclosure, before and after elections, of sources and amounts of financial contributions and the types and amounts of campaign expenditures.
- h. Ballot papers should not be corrected by hand once they have been printed. The risk of accidental or deliberate error is obvious and real. If any party or bloc withdraws or is excluded from the electoral process, it would be better for this fact to be widely publicised in the mass media and in posters displayed at polling stations.
- i. There is a danger that the use of video and still cameras by observers from party and other observers may compromise the secrecy of the vote and create an atmosphere of intimidation.
- j. It is recommended to eliminate the option to vote “against all” as it opens the way to votes of uncertain status.
- k. A rule requiring or permitting invalidation of election results where it was found that instances of illegal voting amounted to 10% of the number of voters who received a ballot, is arbitrary and effectively creates a tolerance level for fraud.
- l. Detailed results, in particular PEC results, should be published on the CEC website in a timely manner, ideally as soon as they have been consolidated at DEC level.
- m. The CEC should publish its register of election complaints, with due protection of personal details and information, together with its rulings on the complaints.
- n. It is imperative that amendments are made to the Administrative Violations Code and Criminal Code to provide a range of appropriate sanctions for breaches of the Law.
- o. In order to avoid any conflict of jurisdiction, no choice should be possible between appealing to a superior election commission or to a court.

102. Moreover as general remarks on the implementation of this law the following ones can be suggested:

- a. Resources need to be committed to voter education, not only to develop awareness of the new election system but also to enhance understanding of voters' rights and the procedures for campaigning and voting.
- b. Substantial resources will also be needed to provide specialist training in the working of the new Law. Such training will be needed for the judiciary, election administrators at all levels (including precincts) and State and local government employees whose duties include the facilitation of election and campaign activities.
- c. The legislature will need to pursue an active legislative programme to ensure that other legislative acts provide the mechanisms for the proper implementation and enforcement of the Law. On this point, it is particularly important that appropriate sanctions for breaches of the Law are introduced into the Criminal Code and Administrative Violations Code. At present, the Criminal Code contains extremely limited sanctions for its breach (see Articles 157-59 of the Code).
- d. The detail in which parliamentary elections are now regulated reinforces the need for the codification of all election legislation in Ukraine in a single unified Election Code. In the absence of a Code, it will be difficult to develop consistent practices in the administration of elections, and without consistency it will be difficult to promote public education and awareness of election procedures among election administrators, state and local government employees and the judiciary.
- e. The parliament should consider the repeated recommendation of OSCE/ODIHR and the Venice Commission of establishing an independent media commission.

V. Conclusions

103. The Law of 7 July 2005 N° 2777-IV provides a framework for organising parliamentary elections. As compared to the text adopted in 2004, the Law in its present form is considerably more detailed. A number of new rules have been introduced and many of the existing rules have been expanded. Some of these changes implement suggestions by the OSCE/ODIHR and the Venice Commission.

104. The text of the Law improves regulations on the composition of the election commissions, the organisation of the polling stations, the election campaign, the use of the mobile ballot box, the use of absentee voting certificates, the status of domestic non partisan observers, and some other issues.

105. However, the law still overregulates some areas of electoral administration and a number of its provisions are still controversial. This might create problems as to the practical implementation of the Law during the forthcoming elections to the Rada in March 2006.

Some specific provisions, as for example, restrictions imposed on the mass media for the coverage of election campaign and sanctions for the violation of election campaign rules might not be in line with the Council of Europe's standards in the field of freedom of expression.

106. The Ukrainian legislator should in the future also assess whether the combination of various electoral rules into a single electoral code would be feasible. Many provisions of different laws regulating different types of elections are repetitive. At the same time, discrepancies in procedures may occur due to the complex and extensive nature of those rules. Such inconsistencies should be avoided if at all possible.

Annex 1: Timeline and Deadlines (Regular Elections)

| <i>days before election</i> | <i>event/deadline</i> | <i>article</i> |
|----------------------------------|--|------------------------------|
| 365 | Political party registers in order to nominate candidates | 55.1 |
| 240 | Last date for amendments to the Law | Final Provisions paragraph 2 |
| 1 Oct previous year | General voter lists prepared | 39.1 |
| 125 | CEC announces beginning of election process | 16.2 |
| 120 | Election process begins | 16.2 |
| 119 | First day for nomination of candidates by parties/blocs (Campaign begins for a particular party/bloc as soon as CEC registers its candidates) | 55.3 65.1 |
| 110 | CEC finalises creation of territorial election districts | 18.4 |
| 90 | Last day for nomination of candidates | 55.3 |
| 75 | Resubmission of nominations (CEC must decide on initial application within 7 days) | 62.3 |
| 71 | Consideration of resubmissions of nominations by CEC | 62.3 |
| 68 | Parties nominate DEC members | 27.4 |
| 60 | CEC appoints members of DEC's | 27.1 |
| 50 | DEC establishes precincts | 19.5 |
| 45 | Parties nominate PEC members | 28.6 |
| 35 | DEC's appoints members of PEC's | 28.1 |
| 30 | DEC hands over precinct voter register to PEC | 41.8 |
| 10 | Printing of ballot papers | 79.1 |
| midnight Fri-Sat before election | Campaign ends | 65.2 |
| 0 (Sunday) | Election | |