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**EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW**  
**(VENICE COMMISSION)**

**DRAFT JOINT OPINION  
ON THE LAW ON AMENDING SOME LEGISLATIVE ACTS  
ON THE ELECTION OF THE PRESIDENT OF UKRAINE  
adopted by the Verkhovna Rada of Ukraine  
on 24 July 2009**

**by  
the Venice Commission  
and  
the OSCE/ODIHR**

**on the basis of comments by**

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## I. Introduction

1. *This joint opinion on the Law of Ukraine “On Elections of the President of Ukraine” and “The Law on amending some legislative acts on the election of the President of Ukraine” (“the Election Law”) (CDL-EL(2009)014; cf. CDL-EL(2009)023) is provided by the Organization for Security and Co-operation in Europe Office for Democratic Institutions and Human Rights (OSCE/ODIHR) and the Council of Europe’s European Commission for Democracy through Law (“Venice Commission”) upon a request from the Ministry of Foreign Affairs of Ukraine.<sup>1</sup> Reports from previous OSCE/ODIHR and Council of Europe election observation missions in Ukraine provide excellent background for understanding the historical development of the election legislation in Ukraine.*

2. *This joint opinion is based on an unofficial English translation of the Law “On Amending Some Legislative Acts of Ukraine on Elections of the President of Ukraine” and the Law on Elections of the President of Ukraine. This joint opinion cannot guarantee the accuracy of the translation reviewed, including the numbering of articles, clauses, and sub-clauses. Any legal review based on translated laws may be affected by issues of interpretation resulting from translation.*

3. *This joint opinion is intended to assist the authorities of Ukraine to further develop and improve the legislative framework for the conduct of democratic elections in order to meet OSCE commitments and Council of Europe and other international standards. The Venice Commission and OSCE/ODIHR remain committed to provide assistance to further improve the legal framework for elections in Ukraine. However, the extent to which any amendments to the law can have a positive impact will ultimately be determined by the level of good faith and political will exhibited by state institutions and officials responsible for implementing and upholding the law.*

4. *In addition to the law, this opinion is based on:*

- *an unofficial English translation of the Constitution of Ukraine;*
- *the OSCE/ODIHR Final Report on the 2004 Presidential Election in Ukraine, 31 October, 21 November, and 26 December 2004;*
- *the OSCE/ODIHR Preliminary Recommendations on the 2004 Presidential Election Second Round Re-Run, 26 December 2004;*
- *the Code of Good Practice in Electoral Matters adopted by the Venice Commission, including the Guidelines on Elections (CDL-AD(2002)023rev);*
- *Guidelines for Reviewing a Legal Framework for Elections (Warsaw January 2001);*
- *The Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE (29 June 1990),*
- *The European Convention for the Protection of Human Rights and Fundamental Freedoms (1950), and*

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<sup>1</sup> Although other legislation in Ukraine could affect elections, such as the law on the Central Election Commission, this joint opinion is limited to reviewing the Presidential Election Law as well as amendments to relevant provisions of the Code on Administrative Legal Proceedings and the Criminal Code.

- *Other international and regional legal instruments and political commitments relevant to the conduct of democratic elections.*

5. *This opinion was adopted by the Council for Democratic Elections at its ... meeting (Venice, ... October 2009) and by the Venice Commission at its ... Plenary Session (Venice, ...October 2009).*

## II. Executive Summary

6. On 24 July 2009 the Parliament of Ukraine adopted amendments to some legal acts regulating elections of the President of Ukraine during an extraordinary session in its third and final reading.<sup>2</sup> The amendments introduce a number of important changes to the Criminal Code of Ukraine, the Code of Administrative Legal Proceedings of Ukraine and the Law “On Elections of the President of Ukraine”. Subsequently, the President of Ukraine vetoed the amendments, veto that was overturned by the Parliament. The President and 48 Members of Parliament appealed the law to the Constitutional Court. The decision of the Court is pending as of the time of issuing this opinion.

7. Although the amendments to the Election Law incorporate a number of important recommendations, concerns previously expressed by the OSCE/ODIHR and the Venice Commission remain unaddressed, including candidacy requirements and non-party domestic observers. Furthermore, they raise a number of serious concerns that mark a step backwards in some aspects of the election legislation. In particular, amendments to the law which have negatively impacted its overall effectiveness and which in particular limited the right to appeal election results include:

- Restrictive amendments that undermine the possibility to challenge election results.
- Restrictive amendments regarding electoral dispute resolution that undermine the right of citizens, parties, and other stakeholders to seek effective redress for violations and allow disputes to remain un-adjudicated.
- Provisions governing the determination of final election results by the Central Election Commission which require amendment and clarification.
- Provisions regulating the composition and the work of election commissions that may inject instability in the election administration.
- Excessive requirements for a monetary deposit in order to be a candidate.
- Changes to the voting procedures of electoral commissions that could lead to abuses.
- The possibility to make changes in the voter list up to one hour before the close of the poll.

8. The law contains some positive measures aimed at promoting transparency and accountability and deterring fraud. Notably, the law includes provisions requiring all election commissions to distribute minutes of meetings to official observers and candidates’ representatives. In addition, the law addresses previous concerns over the use of absentee voting certificates, which were subject to fraudulent use in past elections, by removing absentee voting certificates from the law. Problematic provisions requiring the collection of supporting signatures for candidacy have also been removed. Positively, the law also attempts to address previous concerns about an overly restrictive campaign spending limit. However, the total removal of such a limit may have negative consequences.

9. Besides new problematic provisions, there are also significant shortcomings that remain unaddressed. Areas of continued concerns include:

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<sup>2</sup> The draft law N° 4741 adopted in first reading on 1 July 2009.

- Unreasonable restrictions on the right of candidacy.
- Restrictive media provisions that can be applied to limit the full exchange of political views and delivery of campaign messages from candidates to voters.
- The mechanism for appointing members of electoral commissions.
- The requirement of residency qualification in the district for election commission membership.
- Campaign finance provisions which are vague and potentially ineffective.
- The failure of the law to include a role for non-partisan domestic observers.
- Provisions concerning the invalidation of results and recount of votes that should be clarified and amended.

10. It is also regrettable that despite of recommendations of the Parliamentary Assembly of the Council of Europe and OSCE/ODIHR made since the previous presidential elections in 2004 the amendments to the Law on the Elections of the President of Ukraine have not been adopted at an earlier stage. Current amendments are adopted less than six months before the presidential election scheduled for 17 January 2010.

### III. Discussion of the Presidential Election Law

11. This assessment of the Law on Election of the President of Ukraine (hereafter Election Law) analyses three major sets of changes: amendments to the Law on Presidential elections, changes to the Criminal Code and the Code of criminal procedure on criminal liability of members of the electoral commissions and changes to the Code of administrative procedure.

12. As far as the analysis of the changes to the first law is concerned, amendments are grouped according to nine general categories and not in the numerical order in which articles appear in the law. The nine categories include: Nomination and Candidate Registration, Election Administration, Observers and Transparency, Voter Registration, Media Provisions, Campaign Finance Provisions, Campaigning, Voting Procedures, Counting Procedures and Election Results, and Election Disputes.

#### A. Nomination and Candidate Registration

13. It is widely recognised in regional and international instruments that every citizen has the right, free from discrimination and unreasonable restrictions to take part in the conduct of public affairs, directly or through freely chosen representatives, to vote and to be elected at genuine periodic elections, and to have access, on general terms of equality, to public service in his country.<sup>3</sup> The law contains restrictions on candidacy which unduly restrict the opportunity for all citizens to be elected on an equal basis to the office of President. Such limitations on candidacy, as considered below, should ideally be amended to ensure the possibility to exercise this fundamental right.

14. Articles 9.4 and 56.5 include a restriction on candidacy based upon criminal conviction for any "intentional crime." Such a restriction is overly broad as it limits suffrage on the basis of any conviction, regardless of the nature or severity of the crime. While suffrage rights can be limited on the basis of criminal conviction, such restrictions should generally only be enacted in cases of crimes of a serious nature.<sup>4</sup> As such, ***the OSCE/ODIHR and the Venice Commission recommend that the law be amended to restrict candidacy only where a***

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<sup>3</sup> See e.g. International Covenant on Civil and Political Rights, Article 25.

<sup>4</sup> See e.g. Venice Commission Code of Good Practice in Electoral Matters; para. I.1.1.d.

**person has been convicted of committing a crime of such a serious nature that forfeiture of political rights is indeed proportionate to the crime committed.**

15. Article 44.2 of the Election Law requires that political parties be registered for at least one year prior to election day in order to be viable electoral participants and to nominate candidates. This restriction imposes substantial limits on the political activities of parties as it precludes new political parties from participating in the elections. **The OSCE/ODIHR and the Venice Commission reiterate their belief that this article should be amended to lower the requirement for political party formation prior to election day.**

16. Articles 45 and 51 set out requirements on the procedures to be followed by political parties (and election blocs) when they nominate candidates. These provisions should not interfere excessively with the internal organisation of political parties and be limited to what is necessary to ensure internal democracy. In consequence, many of the provisions of these articles should be removed. In particular, Articles 45.2 and 45.3 govern internal party (or election bloc) functions including “the procedure for holding the inter-party congress” (45.3.4), “the procedure for taking decisions” (45.3.6), and “a candidate’s pre-election program” (51.1.3). Further, Article 52.1.1 allows the CEC to deny the registration of a candidate on the basis of “a violation of the procedure established by law for forming the election bloc or nominating the candidate to the post of President of Ukraine.” These articles represent an overly broad restriction on political parties as private associations. **The OSCE/ODIHR and the Venice Commission recommend the revision of these provisions.**

17. Article 49 has been amended to (1) raise the amount of the electoral deposit required to be a candidate for President and (2) raise the threshold of votes required in order for the electoral deposit to be returned to a candidate. Both amendments are of concern. Article 49(1) requires a financial deposit from the party (election bloc) or independent candidate in the amount of 2,500,000 UAH (approximately 206,000 EUR<sup>5</sup>). This financial requirement, which has been increased from 500,000 UAH in previous versions of the law, is significantly high and represents an unnecessary restriction on candidacy, particularly for candidates from small parties or those who choose to contest the elections as independent candidates. Such a requirement is particularly unfounded given the high threshold for refund of this deposit. Article 49.2 appears to only provide restitution of this deposit for the parties (election blocs) and candidates that reach a run-off election. The law only addresses the run-off situation and creates a situation where an outright winner does not even obtain return of the electoral deposit. This has been amended from previous versions of the law which required candidates to win 7% of the vote total for reimbursement. Both the deposit and the threshold for refund in Article 49 seem excessive and could discourage legitimate candidates from seeking office. This is unfortunate as the right to be a candidate and seek office is a fundamental human right guaranteed by international and European human rights instruments.<sup>6</sup> The Venice Commission Code of Good Practice in Electoral Matters states on this issue that “the amount of the deposit and the number of votes needed for it to be reimbursed should not be excessive.” **The OSCE/ODIHR and the Venice Commission urge the amendment of Article 49 to significantly decrease** the amount of the monetary deposit required for candidacy and the prerequisite for refund for this deposit.

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<sup>5</sup> Currency conversion rate accessed at oanda.com, September 9, 2009.

<sup>6</sup> See Article 2 of the Universal Declaration of Human Rights; Article 26 of the International Covenant on Civil and Political Rights; Article 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. See also Paragraphs 7.3 and 7.5 of the OSCE 1990 Copenhagen Document.

18. Concerns previously expressed by the OSCE/ODIHR<sup>7</sup> regarding the high number of signatures proving minimum support for candidacy have been addressed. Previously, Articles 53-55 of the law laid out requirements for the collection of 500,000 signatures of eligible voters to be submitted to the CEC no later than 40 days before election day. These articles have been removed in full and there is currently no requirement for a show of minimum signature support. However, this was undermined by the excessive increase of the monetary deposit.

19. The provisions of the law for correction of defects in candidate registration documents appear contradictory. Articles 52.3 and 52.4 imply that registration documents can be corrected and resubmitted. However, Article 51.4 states that "Documents, submitted to the Central Election Commission...may not be resubmitted." Candidates should not be denied registration based on a procedural or technical defect in registration documents where the defect can be corrected in a timely manner. In fact, the Election Law provides clear language ensuring that nominees for election commission membership not be denied on the basis of "technical clerical errors and inaccuracies" and provides for the correction and resubmission in cases where such inaccuracies are found (Article 23.4). Such language should be extended to include nomination documents for presidential candidates. Candidates must be able to contest elections without undue restriction and should be protected to an equal or even greater extent than provided for nominees to election commission membership. Therefore, ***the OSCE/ODIHR and the Venice Commission recommend that the articles in question be clarified and amended to ensure candidates have an opportunity to revise and resubmit nomination documents in a timely manner when the CEC identifies errors of a technical or administrative nature.***

## **B. Election Administration**

20. The President of Ukraine is elected on the basis of a single, nation-wide constituency encompassing the entirety of the territory of Ukraine (Article 19.1). For administrative purposes, elections within this constituency are governed by three levels of election commissions: the Central Election Commission (CEC), district<sup>8</sup> election commissions (DECs) which are established no later than 50 days prior to an election (Article 23.2), and precinct election commissions (PECs) which are established no later than 26 days prior to an election (Article 24.1). The provisions on the formation of the CEC and most of its powers and duties are set out in a separate law on the CEC, which is not the subject of the present assessment.

21. The commencement of the "election process" (Article 17.3) has been reduced from 120 days to 90 days before election day. This reduction of 30 days has required that all timeframes in the election law be similarly adjusted and reduces the time for election preparation by 25%. Although it is certainly feasible to prepare and conduct credible democratic elections within this time period, observation reports of past elections in Ukraine have noted delays in the appointment and functioning of election commissions. The reduced election calendar has also resulted in shorter deadlines for filing and adjudicating complaints. The deadlines for the filing and adjudication of complaints are extremely restrictive (often within 24 hours of an alleged violation occurring, or only two days after a complaint having been filed). These short deadlines may negatively impact the effectiveness of dispute resolution proceedings.

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<sup>7</sup> OSCE/ODIHR Election Observation Mission Final Report, Ukraine Presidential Election 2004, Section XVI.B.14.

<sup>8</sup> Some of the translated materials use the term "territorial" instead of "district election commission". For the purposes of this joint opinion, the terms "district" and "DEC" are used.

22. Articles 23 and 24 of the Election Law provide each candidate the right to nominate two members to each DEC and PEC. These provisions are intended to address the need for pluralism and multi-party participation in the organization and conduct of elections, which is an important safeguard for openness and transparency in the election process. Importantly, they require that each candidate's representatives be entitled to a proportional number of chair, deputy chair, and secretary positions in commissions. However, these provisions fail to state an appointment process that takes into consideration geographical distribution of such appointments in election commissions (Articles 23.8 and 24.11). This oversight potentially allows for circumvention of the law through careful geographical weighting during the appointment of positions. ***The OSCE/ODIHR and the Venice Commission recommend that these provisions be amended to ensure balanced distribution of chair, deputy chair and secretary positions at regional and local levels.***

23. The right to nominate members to election commissions is restricted by residency requirements imposed as a condition to membership. Articles 23.6 and 24.9 impose a requirement that a member of a DEC or PEC be a voter "residing within the territorial election district or the locality, on the territory of which the district is situated". This requirement may limit the ability of some candidates to nominate commission members in localities where the candidate has little support. However, regardless of the level of support a candidate has in the locality, the candidate has the right to be represented in an election commission, as well as a legitimate interest in the accurate counting and tabulation of voting results. Further, when this requirement is considered with the lowered voting requirements for expulsion of an election commission member (discussed below) the possibility is created for excluding a candidate from having any nominees in election commissions in some localities. This undermines the right of a candidate to make nominations for election commission members and may diminish public confidence in the accuracy of the results. ***The OSCE/ODIHR and the Venice Commission recommend that the residency requirements of Articles 23.6 and 24.9 be accordingly removed from the law.***

24. Overall, the articles regulating election administration lack sufficient requirements for the exercise of independence and impartiality on the part of election commissions. The sole reliance on candidate representatives to administer elections, depending on the political context, can impede the development of an independent, professional, and efficient election administration. While party and candidate representation in election commissions is often an important safeguard to ensure that the opinions of all candidates can be heard in the election administration, this must be balanced with the obligation to ensure that all aspects of voting be politically impartial and administratively effective.<sup>9</sup> ***As suggested by the OSCE/ODIHR 2004 Election Observation Mission to the Ukraine Presidential Election,<sup>10</sup> provisions regarding the creation of election administration bodies at all levels should be revised to include specific notification of requirements for impartiality in the conduct of administrative duties.***

25. Under Article 30.2 the powers of an election commission may be terminated if either a higher election commission or court decides the commission has violated the law. Termination of an election commission is not an appropriate response to such a finding and may open the door to abuses. Like any other institution, an election commission may make mistakes. The election commission should only be terminated in cases where the violations are serious, deliberate and/or repeated. This will require a careful assessment by the

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<sup>9</sup> Report on the Participation of Political Parties in Elections adopted by the Council for Democratic Elections and the Venice Commission. CDL-AD(2006)025, paras. 19-20.

<sup>10</sup> OSCE/ODIHR Preliminary Recommendations, Ukraine Presidential Election Second Round Re-Run, 26 December, 2004.



superior electoral commission or court. ***The OSCE/ODIHR and the Venice Commission strongly recommend that Article 30.2 be accordingly amended.***

26. Article 30.9 is amended to lower the voting requirement for termination a DEC and PEC membership or entire commission from 2/3 to 2/3 of the members present. The Venice Commission Code of Good Practice in Electoral Matters states on this issue that, "[i]t would make sense for decisions to be taken by a qualified majority (e.g. 2/3 majority), so as to encourage debate between the majority and at least one minority party."<sup>11</sup> This amendment also raises concern about maintaining stability in the membership of the election commissions during the administration of elections. Although this provision is not *per se* problematic, this amendment may negatively impact the administration of election processes.

27. Article 20.6 provides that election precincts are formed by the DEC on the basis of a "submission of executive committees" of local government. However, this article fails to state whether these proposals are binding on DEC's. ***The OSCE/ODIHR and the Venice Commission recommend that this provision should be clarified to clearly state that the DEC establishes precincts on the basis of non-binding proposals.***

28. Article 20.9 establishes polling stations of three sizes: small, medium, and large. Respectively, polling stations may range in size from 50-500 voters, 500-1,500 voters, and 1,500-3,000 voters. Previous assessments of the electoral framework in Ukraine have found polling stations with 3,000 voters to be an administrative burden which decreases the effectiveness of voting operations.<sup>12</sup> The OSCE/ODIHR 2004 Election Observation Mission Final Report has recommended this maximum number of voters be decreased to improve efficiency of election commissions. Further, the law governing parliamentary elections in Ukraine requires a maximum of 2,500 voters per station (and the OSCE/ODIHR has called for a still greater reduction).<sup>13</sup> ***The OSCE/ODIHR and the Venice Commission recommend the law be amended to provided that, in places where the required resources are available, the number of voters allocated to a polling station be decreased to a more manageable number, such as between 1,000 and 1,500. Ideally this amendment would be likewise reflected in the law governing parliamentary elections to allow for consistency and ease of administration, particularly in cases where multiple elections are held on a single day.***

29. Positively, the law has been amended to remove the system for absentee voting certificates to be issued to voters. This system had previously been proven susceptible to high levels of fraud and its removal should help to deter multiple voting and ensure an effective electoral process respecting the will of the people.

30. Inclusion in the law of compulsory training for all members of the election commissions of regular and special polling stations should be considered. Such training has been enacted in the draft law governing parliamentary elections.<sup>14</sup> A similar provision in the law governing presidential elections may potentially increase the effectiveness and professionalism of election commissions at all levels.

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<sup>11</sup> Par. 80.

<sup>12</sup> See also the joint Venice Commission OSCE/ODIHR opinion on the Law on the election of the people's deputies of Ukraine of 2006 (CDL-AD (2006) 002rev), para. 20.

<sup>13</sup> OSCE/ODIHR Election Observation Final Report, Ukraine Pre-Term Parliamentary Elections September 30, 2007, Section XVI.G.28.

<sup>14</sup> Draft Law No. 3366, 'About Election to The Parliament Of Ukraine,' Article 30.4.

31. Article 30.2 appears to grant a nominator of an election commission member the unlimited right to remove the member at any time even if the member has been performing his or her duties in a professional and legal manner. Such a provision can subject election commission members to political pressure and threats of removal should the commission member vote on issues contrary to “instructions” given by the nominator. This is not a good practice as commission members should act impartially without regard to the political motivations of the nominator. Persons who hold positions in the election administration must be completely free from political influence or pressure. The Venice Commission Code of Good Practice notes: “The bodies appointing members of electoral commissions must not be free to dismiss them at will.”<sup>15</sup> ***The Venice Commission and the OSCE/ODIHR strongly recommend that the law be revised to provide that a member of an election commission can only be dismissed for failure to fulfil the member’s legal duties imposed by the election legislation.***

32. In line with international instruments and guidelines,<sup>16</sup> as well as recommendations of the OSCE/ODIHR Election Observation Mission to the 2004 presidential election, it should be considered to include legal provisions for the development of election and campaign materials in languages other than Ukrainian which are commonly spoken within Ukraine. While Ukrainian is the sole official language of the state, such provisions could help facilitate the effective participation of all citizens in the political process on an equal basis.

### C. Observers and Transparency

33. The Election Law contains numerous mechanisms designed to enhance transparency in the election process and promote accountability, including the provision of results protocols to official observers and candidates’ representatives (Article 79.7-8, Article 82.15-16) and the public posting of election results at the PEC (Article 79.7) and DEC levels (Article 82.15). These mechanisms are positive measures that can potentially deter fraud and increase public confidence in the electoral results.

34. Articles 66 through 70 provide that representatives of political parties, candidates, and international observers and organisations have full access to the process of the organisation of presidential election and the processing of the election results. This includes the right to observe the pre-election period, a limited right to participate in sessions of the election commissions, and the right to observe voting (at the polling station and in the use of mobile ballot boxes) and the processing of the results. However, the law specifies that the rights of observers will be terminated after “the Central Election Commission has determined results” (Article 68.2). This provision is overly restrictive and should be reconsidered. Observers should be able to freely conduct activities through the resolution of all electoral disputes.

35. Importantly, Article 70.5.1 allows observers to be present at meetings of election commissions. This right is further extended in Article 28.22, which requires that documents and minutes of election commission meetings be made available to observers and candidate representatives. Article 28.11 allows the election commission to deprive such persons from attending commission session if they “unlawfully obstruct its conduct.” While this exclusion can be considered necessary in the light of administrative burdens associated with the electoral process, the law should provide clear guidance on what constitutes “unlawful obstruction” so as to promote transparency and prevent abuse of this provision.

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<sup>15</sup> See Venice Commission Code of Good Practice in Electoral Matters, II 3.1 f.

<sup>16</sup> The Council of Europe Framework Convention for the Protection of National Minorities (Articles 10.2, 15), the Venice Commission Code of Good Practice in Electoral Matters, I.3.1.b.iii. In addition, Paragraph 32.5 of the 1990 OSCE Copenhagen Document states that “persons belonging to national minorities have the right [...] to disseminate, have access to and exchange information in their mother tongue”.

36. In addition, Article 28.11 has been amended to lower the voting requirement in election commissions for the removal of an authorized observer from 2/3 of the total commission membership to a majority of the members present. Although a majority voting requirement is generally acceptable, it is of concern that the new provision can be used to limit transparency and exclude authorised observers without justification.<sup>17</sup> ***The OSCE/ODIHR and the Venice Commission recommend not lowering the voting requirement in election commission for the removal of an authorised observer.***

37. The Election Law does not provide for domestic non-partisan observers. ***The OSCE/ODIHR and the Venice Commission urge that the law be amended to provide broad rights of observation for domestic non-partisan observer groups. It should be noted that such an amendment has already been proposed for the draft law governing parliamentary elections.***

38. All official observers are expressly given the right to take photographs and make film and audio recordings (Articles 69 and 70). This is an unusual and seemingly unnecessary provision. Filming voters as they go to the polling booth and ballot box could have an intimidating effect and may diminish the secrecy of the vote. ***The Venice Commission and the OSCE/ODIHR recommend that this provision be carefully considered, particularly in regard to its potential effect on voters and secrecy of the vote.***

39. Article 70.5.5, which regulates the rights of international observers, should be clarified. This provision limits the ability for international observers to conduct press-conferences by requiring such conferences to comply “with the requirements of the legislation of Ukraine”. Neither what such requirements entail nor the reason for their inclusion is clear, particularly when considered in the light of universally recognised principles of freedom of speech and expression. It is of concern that this phrase could be misinterpreted or applied to suppress the public statements by international observers. Further, Article 70.5.6 permits international observers to establish groups of observers “subject to approval by the Central Election Commission”. It should not be necessary for the CEC to approve the operational and organisational activities of international observers. It is also of concern that this phrase could be misinterpreted or applied to limit the activities of international observers. ***The OSCE/ODIHR and the Venice Commission recommend that these phrases be deleted from Articles 70.5.5 and 70.5.6***

#### **D. Voter Registration**

40. The adoption of the 2007 Law on State Voter Register of Ukraine changed the process of compiling voter lists for elections in Ukraine. While historically voter lists were created in an ad hoc manner for each electoral process, the new law mandated the establishment of a national electronically housed voter register. The bodies appointed with the upkeep of this register, the State Voter Register Maintenance Bodies, are now responsible for the creation and dispersal of voter list. The Law on State Voter Register is not the focus of this assessment. However, there remain several points in the Election Law relevant to voter registration that should be carefully considered.

41. Citizens are permitted to inspect the draft voter list at their respective PEC headquarters to ensure its accuracy and may apply for mistakes and omissions to be corrected (Article 32.3). This right includes the ability to issue written statements about inaccuracies involving third parties. The law should make it clear that where an application is made in relation to a

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<sup>17</sup> This amendment also presents concerns in regards to effective and accountable election administration. It should be considered both in terms of its impact on transparency and its potential effect on effective and impartial election administration.

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 resulting decision.

42. Voters may file written complaints concerning inaccuracies in the voter list from its initial display at the PEC premises (no later than 19 days prior to elections in accordance with Articles 31.8 and 32.1) for a time period ending one hour before the end of voting (Articles 32.5 and 32.6). Article 32.5 allows such a complaint to be filed with a PEC or other election commission. Article 32.6 allows such a complaint to be filed with a local court. Although this amendment creates a greater opportunity for the exercise of the right to vote, it also creates increased opportunities for fraud.<sup>18</sup> The rule allowing to change voters' lists on the election day should be reconsidered.<sup>19</sup>

43. The PEC chairperson, deputy chairperson, and secretary have the right to correct inaccuracies and technical errors in the voter list on election day if "it is clear that it is the same voter who came to the polling station to vote that is included on the voter list" (Article 35.8). The implications concerning difficulties in its implementation should be considered. At least, the law should set out the acceptable ways that the identity of a voter as the person indicated on the voter list could "clearly" be established. The current provision is vague and presents a real possibility of unintentional or purposeful misuse. The OSCE/ODIHR has previously recommended the revision of this provision.<sup>20</sup> Such a recommendation is repeated here.

## E. Media Regulations

44. Article 11.2.6 of the law requires equal access for candidates to "mass media". Further, Article 13.4 requires the "mass media" to cover the election process in an objective manner, and Article 60.1 requires equal conditions for candidates during the campaign "in the mass media of all forms of ownership". These provisions are very broad and some qualification is required in relation to privately owned mass media. Generally, there is recognition that different rules apply for public and private media. Greater obligations can be placed on "state-owned" media, such as the requirement to provide free time to candidates. "Private" media generally cannot be compelled to present a political message or provide political coverage. Although private media can be required to provide equitable access and conditions to paid political advertising, the provisions of the Election Law go well beyond this basic principle. ***The OSCE/ODIHR and the Venice Commission recommend that these provisions be amended to limit the obligation to provide election coverage and equal access to State mass media and the regulation of private media be limited to the area of paid political advertising and reasonable provisions related to the publication of opinion polls.***

45. Article 62 severely restricts the number of candidate debates permitted on television by limiting each candidate to one debate in a three hour period. Article 62 is contrary to international standards and OSCE commitments regarding freedom of opinion and expression.<sup>21</sup> This Article creates an overly burdensome limit on freedom of expression by prohibiting all media, including private media, from allowing candidates to engage in debates

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<sup>18</sup> See the Code of good practice in electoral matters (CDL-AD(2002)023rev), I.1.2. Moreover, no choice should be given between appealing to a higher election commission or to a court (Code of good practice in electoral matters, II.3.3.c).

<sup>19</sup> See the Code of good practice in electoral matters (CDL-AD(2002)023rev), I.1.2.iv. i.f.

<sup>20</sup> OSCE/ODIHR Election Observation Preliminary Recommendations, Ukraine Presidential Elections Second Round Re-Run, December 26, 2004, Recommendation 4, p. 3.

<sup>21</sup> See e.g. Article 19 of ICCPR; Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms; para 7.7 of Copenhagen Document.

in media beyond a single occasion during one three hour period. This suppression of the exchange of political views during an election is unwarranted. It is true that according to the case-law of the European Court of Human Rights the freedom of expression may be limited before elections (*Bowman v. Great Britain*<sup>22</sup>); however, the regulation in Ukraine goes far beyond what may be “necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary”. ***The OSCE/ODIHR and the Venice Commission recommend that Article 62 be reformulated so that candidate debates are not so severely restricted.***

46. Article 64.12 bans campaigning in “the foreign mass media, which operate on the territory of Ukraine.” This restriction implies that candidates would be barred from issuing campaign statements or advertisements aimed at Ukrainian voters residing abroad. The ability to present a candidate’s platform to voters is an inextricable part of the right to be elected. If such a provision unduly limits the ability of candidates to reach voters residing abroad, then it should be reconsidered. More generally, such a rule would also appear to violate the citizen’s right to receive and impart information regardless of frontiers as set out in paragraph 26.1 of the OSCE Moscow Document.<sup>23</sup> ***The OSCE/ODIHR and the Venice Commission recommend to reconsider this provision.***

47. The 15-day pre-election ban on publishing opinion polls is unusually long (Article 64.13). ***The OSCE/ODIHR and the Venice Commission recommend that this silence period for opinion polls be significantly shortened to be brought in line with internationally accepted principles for the length of such silence periods.***<sup>24</sup> The amendment of this provision is particularly important given the law on parliamentary elections has reduced the length of the ban on publication of opinion polls to 24 hours.<sup>25</sup> Ideally, the laws on presidential and parliamentary elections should contain similar provisions on limitation of publication of opinion polls.

## **F. Campaign Finance Provisions**

48. Campaign finance provisions are included in the law in Articles 37-43. As indicated by the OSCE/ODIHR Election Observation Mission Final Report to the 2004 presidential election, “Regulations covering campaign finance issues should be strengthened to improve the transparency of funding of candidates’ election campaigns, with data on candidates’ campaign donations and expenditure made publicly available.” In particular, while the law currently requires the submission of financial reports in the post-election period (Article 42.4), it does not specify that these reports be made publicly available. Further, the law provides no specific regulations on what information should be included in financial reports.

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<sup>22</sup> See case of *Bowman v. the United Kingdom (141/1996/760/961)*.

<sup>23</sup> 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”.

<sup>24</sup> See e.g. the Council of Europe Recommendation on Measures concerning Media Coverage during Election Campaigns (Rec(2007)15), para. I.8.

<sup>25</sup> Draft Law No. 3366, ‘*About Election to the Parliament of Ukraine*,’ Article 67.18.

49. The Election Law has been amended to remove a spending limit for campaign expenditure. While the OSCE/ODIHR has previously recommended an increase in the spending limit for elections,<sup>26</sup> the total removal of spending limits may be counterproductive. The removal of the spending limit, coupled with the 2,5 mln. Ukrainian hryvnas (approximately 206,000 EUR) electoral deposit (reimbursable only to the winner or the two run-off candidates), may limit presidential candidacy to a handful of wealthy elite. Although a candidate may be able to pay the electoral deposit, the candidate's chance of success may be significantly diminished by a wealthy opponent unconstrained by any legal limit on spending. A candidate should not be forced to rely on political party structures for financial support since both OSCE commitments and the International Covenant on Civil and Political Rights recognize the right to be a candidate independently of political party affiliation or support. ***The OSCE/ODIHR and the Venice Commission recommend consideration of reinstating a spending limit which can help ensure a level playing field while being sufficiently high to allow for the free conduct of campaigning.***

50. Article 43.1 regulates the creation of campaign funds for candidates in presidential election. This article permits campaign funds for candidates to come from three separate sources. One of these sources – political party contributions – is limited to a candidate nominated by a political party. Paragraph 7.5 of the OSCE 1990 Copenhagen Document provides that citizens have the right “to seek political or public office, individually or as representatives of political parties or organizations, without discrimination”. Further, a political party should have the right to provide financial support to an independent candidate in an election where the political party has not nominated its own candidate. In practice, therefore, this article discriminates against independent candidates as well as against small parties who have not nominated a candidate for election but should nonetheless enjoy the right to support a candidate, financially and otherwise. ***The OSCE/ODIHR and the Venice Commission recommend that the limiting phrase “of the party (parties that are members of the election bloc) that nominated the candidate” in Article 43.1 be reformulated so that an independent candidate can receive financial support from political parties.***

51. Article 43.11 discriminates against independent candidates in regard to the treatment of unused campaign funds. While candidates nominated by a party (election bloc) have an opportunity to transfer unused funds into party accounts at the end of the electoral process, the unused funds of independent candidates are absorbed by the State Budget of Ukraine. ***The OSCE/ODIHR and the Venice Commission recommend that this discriminatory provision be corrected.***

52. The termination of all disbursements from the campaign funds on the eve of the election (Article 41.10) may be excessively cautious and raise practical difficulties. Some service providers may not submit their invoices until after the election. There is no reason that they should not be paid provided that a sensible and enforced regime of financial supervision is in place. ***The OSCE/ODIHR and the Venice Commission recommend that this provision be amended accordingly.***

53. In Article 50.1 candidates seeking registration are required to submit a property and income statement not only for themselves but also for their family members. However, the law does not define which persons are “family” members. This is a term that should be clearly defined in the law as there are legal consequences for violation of the law.

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<sup>26</sup> OSCE/ODIHR Election Observation Mission Final Report to the 2004 Ukraine Presidential Elections, Section XVI.D.25.

## G. Campaigning

54. The law limits the right to engage in the pre-election campaign to citizens of Ukraine who have the right to vote (Article 2.3). This limitation is contrary to international and regional legal commitments which obligate the state to ensure that all persons within their territorial jurisdiction have the right to freedom of expression, association, and speech, which encompasses the right to promote and support candidates and political parties, regardless of whether the person possesses the right to vote.<sup>27</sup> Further, since a person must be 18 years of age to vote, the limitation required by this article is contrary to the United Nations Convention on the Rights of the Child.<sup>28</sup> ***The OSCE/ODIHR and the Venice Commission recommend that this limitation be removed from clause 3 of Article 2. Articles 58.2, and 64.1.1 should also be amended so that foreign citizens and stateless persons residing in Ukraine have the right to freely express their opinion and to associate during the election campaign although they are non-citizens.***

## H. Voting Procedures

55. The Election Law provides detailed rules on the format, content, preparation and storage of ballot papers and on the procedures for voting and the processing of ballot papers. It also treats ballot papers as sensitive material and establishes safeguards to guarantee its protection. These are positive measures which should reduce the risk of uncertainty and inconsistencies in the conduct of the election.

56. The Law establishes in its article 2 par. 6 specific rules for voting of citizens of Ukraine residing abroad, specifying that only persons registered in Ukrainian consulates can vote. Considering the important number of Ukrainian nationals residing abroad the corresponding provisions of the law could be further elaborated and establish specific procedures that could facilitate the registration of voters who reside in localities other than the capital (i.e. with no Ukrainian consulate).

57. The responsibilities of the PEC includes making changes to the printed ballot papers (Article 27.1.6) as determined by the CEC, (presumably to reflect the withdrawal of a candidate or party from the election after the ballot papers have been printed). However, no mark of any kind should be made on ballot papers in order to avoid the danger of accidental or deliberate crossing out of the wrong name. Further, manual markings will never be entirely uniform and their use may help to identify ballot papers and compromise the secrecy of the ballot. Instead, in case of withdrawals from the election, the electoral commissions should publicise that fact by written and other announcements before polling and inside the polling stations. ***The OSCE/ODIHR and the Venice Commission recommend that Article 27.1.6 be deleted from the law.***

58. The law contains detailed provisions regarding “control coupon[s]” created for every ballot issued to a voter (Article 71.6). These removable coupons include the type and date of elections, the number of the district and number of the election precinct, space to insert the ordinal number at which the voter appeared in the voter register and the signatures of the voter and issuing election commission member (Articles 74.9 and 77.8). While such a provision is designed to ensure the security of the polling procedures and dissuade fraudulent voting, its utility may be undermined by the implications such a system potentially has on secrecy of the ballot. Consideration should be given to whether the inclusion of this

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<sup>27</sup> See e.g. Paragraph 26.1 of the OSCE 1991 Moscow Document; Article 19 of the Universal Declaration of Human Rights; Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. See also Articles 24, 34, and 36 of the Constitution of Ukraine.

<sup>28</sup> The United Nations Convention on the Rights of the Child provides in Articles 13-15 full protection of the freedoms of expression, assembly, and association to children as well as adults.

information may unintentionally allow for a ballot to be linked back to a particular voter. In particular, these articles require clarification to ensure that there is no possibility for a commission member to use “his/her surname, initials and signature on the designated place” as a form of later identifying a cast ballot to a voter.

59. Article 71.4 requires that candidates are listed on the ballot in alphabetical order. Consideration should be given to drawing lots for candidate order on the ballot, which is a fair way of the distribution of the candidate names in the ballot.

60. The OSCE/ODIHR recommended in their 2004 Election Observation Mission Final Report that “The option to vote “against all” candidates be removed from the ballot.” The final report states that, as a matter of principle, voters should be encouraged to vote *for* their preferred candidate or party, and thereby take responsibility for the body which is being elected. Therefore, Article 71.4, which requires election ballots to include the option of checking a box indicating “I do not support any candidate to the post of President of Ukraine” should be reconsidered and potentially removed.

61. Importantly, the law takes steps to ensure that all citizens, including persons with disabilities, may effectively participate in public affairs through the exercise of their suffrage rights. The system of mobile voting, which has been carefully constructed with necessary security provisions, is commendable for its role in ensuring this right and upholding Ukraine’s commitment to the *UN Convention on the Rights of Persons with Disabilities*.<sup>29</sup> However, Article 77.6 requires that PEC members who conduct mobile voting should take only “election ballots in the quantity equal to the number of voters”. Ideally, this number should include all voters registered on the relevant “voter register extract” in addition to a small specified number of spare ballots to allow for the eventuality of a user of the mobile ballot box spoiling his/her ballot.

62. Article 77.1 allows a voter to wait until the eve of elections (12 hours before voting begins) to request a mobile ballot. This places an undue burden on election commissions, which should have more time to plan for mobile voting. This is particularly important given concerns over the potential for fraud in the process of mobile voting which necessitates deterrent measures including careful administration of the process. The Venice Commission Code of Good Practice in Electoral Matters states on this issue that, “mobile ballot boxes should only be allowed under strict conditions, avoiding all risks of fraud.”<sup>30</sup> ***The OSCE/ODIHR and the Venice Commission recommend that the deadline for requesting a mobile ballot be adjusted to provide more time for election commissions to plan for secure mobile voting.***

## **I. Counting Procedures and the Determination of Results**

63. Article 80.1 permits the PEC to declare the election in the polling station completely invalid. The basis for such a decision is that there have been violations of the law which make it impossible to determine the voters’ will. This is a decision which should probably only be taken by higher levels of the election administration and ideally by a court charged with the resolution of election related issues. Consequently, it would be a better practice to simply note all irregularities in the PEC and DEC protocols, leaving decisions concerning

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<sup>29</sup> The United Nations General Assembly Convention on the Rights of Persons with Disabilities was signed by Ukraine on 24 September 2008. Article 29.A.i requires that “persons with disabilities can effectively and fully participate in political and public life on an equal basis with others, directly or through freely chosen representatives, including the right and opportunity for persons with disabilities to vote and be elected, *inter alia*, by ensuring that voting procedures, facilities and materials are appropriate, accessible and easy to understand and use.”

<sup>30</sup> I.3.2.vi.



invalidation in a particular polling station to be made only by the CEC or a court after consideration of all relevant protocols.

64. A further difficulty with Article 80.1 is the provision which allows for invalidation of the polling station results if the number of ballots found in the ballot boxes exceeds the number of voters by ten percent. Such an arbitrary standard of impermissible abuse serves no useful purpose. In effect, it establishes a legal tolerance level for fraud of up to 9.99%, which cannot be compatible with the proper conduct of elections. Invalidation of election results should be possible only where it is shown that electoral violations raise valid questionability as to the reliability of the results. It is also questionable whether the 10% standard is consistent with the Ukraine Supreme Court's 2005 decision invalidating the results of the second round of voting in the presidential election. In the disputed 2005 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 not 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 2005 decision of the Supreme Court. ***The OSCE/ODIHR and the Venice Commission recommend that repeal or careful amendment to this provision occur at the earliest opportunity.***

65. Article 78.12 refers to "the absentee voting certificates." However, the procedure for allotting absentee voting certificates has been removed from the law. This article should be amended accordingly to remove the reference to absentee voting.

66. The procedure for counting ballots in mobile ballot boxes is of concern (Article 78.21). The procedure requires that all ballots in a mobile ballot box be invalidated if the number of ballots in the mobile ballot box exceeds the number stated on the control sheet. This provision treats voters unequally and discriminates against mobile voters because this invalidation requirement does not appear in the law in reference to regular ballot boxes. To ensure equal suffrage, the same counting rules must apply to all voters.<sup>31</sup> Further, the existence of one ballot too many is not a sufficient justification for invalidating all mobile ballots. The better practice is to apply the same rule for addressing discrepancies in the number of ballots to all types of ballots.

67. The provisions for a count of the ballots by PEC members during the initial count should be clarified. Article 78.29 provides that each member of the PEC "shall during the vote count have the right to check or to check-count the respective election ballots." The scope and limits of this right should be better defined, particularly as recounts should only be conducted transparently and in such a way as to not interfere with the orderly conduct of poll closing and vote tabulation.

68. An amendment to Article 83.8 states:

"The district election commission has to establish the election results in the territorial election district not later than on the fifth day after the election day regardless of the number of polling stations in the respective district as to which a decision was adopted to recognize

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<sup>31</sup> See Paragraph 7.3 of the OSCE 1990 Copenhagen Document; Articles 2 and 21 of the Universal Declaration of Human Rights; Articles 25 and 26 of the International Covenant on Civil and Political Rights.

the election results invalid. Election results in the territorial election district may not be recognized as invalid.”

69. The new article 83.8 provides that the district commission has to establish the voting results no later than on the fifth day after the election regardless of whether results from all polling stations have reached the DEC. This provision would allow to establish an election result without taking into consideration the votes of a considerable part of the electorate. Furthermore, the tabulation of the results at the DEC level, which may therefore not take into account the results in all polling stations located in the district, “may not be recognized as invalid”.<sup>32</sup> ***The OSCE/ODIHR and the Venice Commission strongly recommend to revise Article 83.8.***

70. Article 84.3 states that “A candidate is considered to be elected on the day of election of the President of Ukraine when he/she received more than one half of the votes cast by the voters who took part in voting.” This article, as previously indicated by OSCE/ODIHR Election Observation Mission Reports<sup>33</sup>, should be revised to read “one half of all the valid votes cast”.

71. An amendment to Article 86.2 removes the requirement to publish the election results in two official gazettes. This may be a cost saving measure and it is likely that electronic media provides extensive coverage of election results. However, the amendment may have a negative impact on some citizens and is, thus, noted. More problematic, however, is that the prior version of Article 86 (titled “Official Announcement of Election Results”), implies that publication in these two gazettes is part of the process of announcement of the official results, which provides the public of notice of the results and thereby triggers the possibility for legal challenges. This amendment may negatively impact the effectiveness of any legal challenge to the election results. ***The OSCE/ODIHR and Venice Commission recommend that this provision be revised.***

72. An amendment to Article 84.3 of the Election Law removes the requirement that the CEC take a “decision” declaring the elected President and the requirement of a CEC “protocol” on the results. The amendment only requires that the CEC “draws minutes” on the election of the President. It is an important measure to ensure public confidence that CEC prepares a detailed protocol of election results. Ideally, such a protocol would provide details on all categories of ballots in a summary table with results broken down to the polling station level so that all results can be traced from the lowest level of voting through the final tabulations. ***The OSCE/ODIHR and the Venice Commission recommend that Articles 84 and 86 be amended to require the CEC to prepare and publish such a summary table. Transparency would be further established, as previously indicated by the OSCE/ODIHR, through requirements that the CEC publish all results down to the polling station level on its website.***

## **J. Election Disputes**

73. There have been significant amendments to the Election Law and the Code of Administrative Legal Proceedings, which present serious concerns regarding election dispute resolution. These amendments have injected uncertainty concerning the right and ability for election results to be challenged and are discussed below in detail.

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<sup>32</sup> Point 3.3. e of the Venice Commission Code of Good Practice in Electoral Matters states “The appeal body must have authority to annul elections where irregularities may have affected the outcome. It must be possible to annul the entire election or merely the results for one constituency or one polling station.” It was because of tracked changes, when changes were accepted the numbers were corrected.

<sup>33</sup> OSCE/ODIHR Election Observation Mission Final Report, Ukraine Presidential Elections 2004, Section XVI.I.58.

74. According to the new amendments to the Code of Administrative Legal Proceedings there is no opportunity to challenge the determination of the election results by a precinct or a district election commission (the provisions of the Code are analysed more in detail below) (see the amended Article 109). Taken in conjunction, these amendments seem to imply that election results can only be challenged after the final tabulation by the CEC. This raises a further concern as an amendment to Article 84.7 of the Election Law appears to limit the CEC's ability to consider any fraud occurring at lower level commissions on or after election day. The mentioned amendment to Article 84.7 states:

“Complaints related to the organisation and conduct of elections of the President of Ukraine, decisions, action or inaction of election commissions and members thereof, state authorities, local self-government bodies, enterprises, institutions, establishments and organisations, their officers and officials, documents and actions of associations of citizens except for those that pursuant to the law or the statute (provisions) of such association of citizens belong to its internal organizational activities or its exclusive competence, action or inaction of the mass media, their officers and officials, as well as other subjects of the election process on the election day and the following days of the election process are not submitted to the Central Election Commission. When such complaints are submitted, the Central Election Commission leaves them without consideration. Submission of such complaints does not impede establishment of the results of election of the President of Ukraine and their announcement”.

75. This provision indicates that the CEC cannot take into consideration any complaint that presents allegations of fraud, even fraud that brings the legitimacy of the election results into question, when the complaint is submitted on election day or the days thereafter. In other words, the CEC is legally obligated to determine the results in disregard of credible allegations suggesting that the results are not legitimate. In such a situation, the CEC is no longer an important state institution ensuring the legitimacy of election results, but rather is a mere mechanical functionary adding numbers on paper. This is of concern because it is a reversal of the very legal principle that required the judicial remedy for the fraudulent conduct in the 2004 presidential election. In 2004, the Supreme Court of Ukraine noted, among other things, that 65 complaints were pending with the CEC at the time the CEC decided the official election results.<sup>34</sup> The Supreme Court noted that it was impossible to establish the will of the voters (election results), in part, due to the pending and unresolved 65 complaints filed with the CEC.<sup>35</sup>

76. As discussed in paragraph 74 of this document, an amendment to Article 84.3 of the Election Law removes the requirement for the CEC to take a “decision” declaring the elected President and the requirement of a CEC “protocol” on the results. The amendment only requires that the CEC “draws minutes” on the election of the President. Arguably, this hinders the right to challenge the election results because there is no formal decision to appeal. This argument is supported by the experience of 2004 presidential election, when the CEC itself decided to “leave without consideration” complaints challenging DEC

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<sup>34</sup> See OSCE/ODIHR Election Observation Mission Final Report, Ukraine Presidential Election 31 October, 21 November and 26 December 2004, at page 32.

<sup>35</sup> *Id.*

protocols because they were not “decisions” or “acts”, but simply “mathematical calculations”.<sup>36</sup>

77. An amendment to Article 176.6 of the Code of Administrative Legal Proceedings states: “Decisions, action or inaction of election commissions, including decisions of the Central Election Commission on establishing the election results, may be appealed pursuant to the procedure provided for in Article 172 of this Code.” However, based on the amendment to Article 84.3 of the Election Law, it is not clear that the CEC determination of the election results is an event that can be appealed under the Code of Administrative Legal Proceedings, as it may not be considered a formal “decision” or “act.”

78. In consequence, it is not clear to what extent the final election results are subject to a legal challenge. It would appear that the DEC results cannot be challenged as to their substantive content and that the substantive content of the DEC results must be accepted by the CEC. This may imply that CEC tabulation can only be challenged when it contains a mathematical error in the summarisation of the DEC results, not on the basis of concerns of legitimacy of the tabulated results themselves. These are matters that require careful clarification. It is necessary that the law ensures an effective system for the redress for alleged violations of suffrage rights and guarantees that the election results properly reflect the will of the Ukrainian people. ***The OSCE/ODIHR and the Venice Commission urge the Ukrainian authorities to revise the law in order to provide an effective system of appeals, in conformity with international standards.***<sup>37</sup>

79. The provisions on deadlines within which complaints must be submitted (Article 94) may benefit from reconsideration. Complaints concerning alleged violations occurring in the pre-election period must be filed within five days of their occurrence. Complaints concerning alleged violations occurring before polling day must be lodged by the end of the day before the election (Article 94.3), while complaints concerning alleged violations occurring on the election day must be submitted to an election commission by the end of polling, and to a higher election commission or court at the end of the day following the election (Article 94.4). Clearly this is inadequate as lodging an appeal takes time. In many cases it may be practically impossible to lodge an appeal within these time periods, particularly if the violation is not discovered or communicated immediately. The deadlines presently envisaged create an obvious risk of injustice. While there is 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. ***The OSCE/ODIHR and the Venice Commission recommend these deadlines be carefully revised.***

80. Although there is some form of a right to appeal a “decision” of the CEC to the Higher Administrative Court of Ukraine, there is no guarantee of an adjudication of the appeal on its merits. The new Articles 99.4, 99.5 and 99.6 of the Election Law state:

4. Powers and authorities of the court as provided for in Article 117 of the Code of Administrative Legal Proceedings of Ukraine may not be applied by courts to the disputes related to designation, preparation and conduct of elections.

5. The court is to consider and resolve the administrative cases provided for in this Law within two days after the end of voting at polling stations.

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<sup>36</sup> See OSCE/ODIHR Election Observation Mission Final Report, Ukraine Presidential Election 31 October, 21 November and 26 December 2004, at page 24.

<sup>37</sup> Cf. Code of Good Practice in Electoral Matters (CDL-AD(2002)023rev), II.3.3.

6. The claims that were not considered by the court within the period provided for in paragraph 5 of this Article are left without consideration.

81. These provisions are of concern as they (1) might be applied to limit the scope of relief available in court; (2) establish a very short deadline; and (3) allow a court to ignore a complaint after two days and leave the complaint “without consideration”. This is problematic. While timely resolution of electoral disputes is fundamentally important, the proposed timeline is overly restrictive and will likely unduly limit the ability for all electoral stakeholders to have their claims addressed as appropriate. The need to provide an effective remedy for all violations of suffrage rights and to guarantee a fair and public hearing before an impartial court<sup>38</sup> should outweigh such a stringent guideline on the timing of dispute resolution. ***The OSCE/ODIHR and the Venice Commission strongly recommend that these provisions be removed or revised.***

#### **IV. Changes to the Code of administrative procedure of Ukraine.**

82. As it has been mentioned in previous paragraphs, it appears that there is no opportunity to challenge the determination of the election results by a precinct or a district election commission. Article 109 of the Code of Administrative Legal Proceedings previously listed three exemptions to a court’s exercise of jurisdiction. An amendment to Article 109 has now added the following fourth exemption: “4) an application concerning the minutes of the territorial (district) election commission on establishing the election results in the election district during the elections of the President of Ukraine, people’s deputies of Ukraine, as well as the minutes on the results of vote-tallying at a polling station, has been submitted.” This suggests that lower election commission results cannot be challenged by a complaint. In addition the amendment to Article 172.4 of the Code of Administrative Legal Proceedings, states: “The minutes of a territorial (district) commission on establishing the election results in a respective election district during the elections of the President of Ukraine, people’s deputies of Ukraine, as well as the minutes on the results of vote-tallying at a polling station may not be contested in a court.” Further, an amendment to Article 18.4 of the Code of Administrative Legal Proceedings, states: “The Higher Administrative Court of Ukraine is to act as the first instance court with regard to the cases concerning establishment of the election results or the results of the all-Ukrainian referendum **by the Central Election Commission.**” (emphasis supplied here).

83. New amendments to Article 177 of the Code of Administrative Legal Proceedings seem to exclude any possibilities of review of decisions of the administrative courts by the Supreme Court of Ukraine. This addition might be problematic since it reduces the possibilities to review the decisions of administrative courts and electoral administration.

84. When one attempts to construe all the existing legal provisions and amendments to the Code of Administrative Legal Proceedings and the Election Law together, they appear contradictory and raise concern that the provisions will be applied restrictively to limit remedies. It is of concern that many legitimate complaints will be “left without consideration”. The Supreme Court of Ukraine noted in its 2004 decision, reversing the CEC determination of election results, that a state has the obligation under international human rights instruments to provide an effective remedy for violations of suffrage rights. It does not appear, based on the current legal provisions for challenging election results, that there is a mechanism for providing an effective remedy to challenge the presidential election results. It is 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

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<sup>38</sup> See, for example; ICCPR, Articles 2(3), 14; European Convention on Human Rights, Articles 6, 13.

which may have a bearing on the outcome of the election. This provision should be clearly articulated in future iterations of the law. ***The OSCE/ODIHR and the Venice Commission strongly recommend that these provisions be revised in order to ensure an effective system of appeal.***

## **V. Changes to the Criminal Code of Ukraine**

85. Article 158<sup>1</sup> of the Criminal Code, which has been amended, imposes criminal liability for “repeat voting at a polling station by a voter”. This text can be interpreted to impose liability only when the voter votes more than once in the same polling station. **The OSCE/ODIHR and the Venice Commission recommend that this article be amended to clearly state that multiple voting, whether in the same polling station or several different polling stations, results in criminal liability for the offender.**

## **VI. Conclusion**

86. This joint opinion of the Venice Commission and the OSCE/ODIHR on the Law on Elections of the President and the Law on Amending Some Legislative Acts on Election of the President of Ukraine is provided with the intention of assisting the authorities in their stated objective to improve the legal framework for democratic elections, and to bring the law more closely in line with OSCE commitments, Council of Europe and other international standards for the conduct of democratic elections.

87. However, the recent amendments raise significant concerns and some important aspects regulating the presidential elections can be considered as a step backwards compared to previous legislation. Some of these amendments are not in line with international standards and good practices, and should be revised taking into consideration the recommendations stated in this review. Some problematic areas of the legislation previously underscored by the OSCE/ODIHR and the Venice Commission remain unaddressed.

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