

POST-ELECTION INTERIM REPORT
8 – 20 February 2010

23 February 2010

I. EXECUTIVE SUMMARY

- On 14 February, the Central Election Commission (CEC) announced the final results of the 7 February second round of the presidential election and declared Viktor Yanukovych winner with 48.95 per cent of the vote against 45.47 per cent for Ms. Tymoshenko with a turnout of 68.81 per cent. All 15 CEC members signed the final results protocol; however, five members added a dissenting opinion.
- On 15 February, the Tymoshenko campaign filed a challenge to the final election results with the High Administrative Court (HAC) alleging that the vote on 7 February was conducted with many violations that made it impossible to determine the will of voters. The hearing on the complaint commenced on 19 February in the HAC with 49 judges sitting as a panel. On 20 February after one full day of proceedings, Ms. Tymoshenko withdrew her complaint and the court granted her request.
- The inauguration of Mr. Yanukovych is scheduled for 25 February. Negotiations are ongoing in parliament to either preserve the coalition behind the incumbent government, or to form a new one, which may result in the election of a new government and prime minister.

II. ELECTION ADMINISTRATION

All 225 DEC's submitted their tabulation protocols to the Central Election Commission (CEC) within the five-day deadline. The CEC rejected 26 District Election Commission (DEC) tabulation protocols due to technical mistakes and these DEC's amended their protocols within the one-day legal deadline. The CEC was in permanent session from election day until they announced the official results. As in the first round, the session was suspended several times when candidate representatives, media and observers were told to temporarily leave the session so the commission could discuss the protocols privately.

The CEC announced the final results on 14 February even though such an item was not on their initial agenda. Following the announcement, the CEC went into a closed meeting and upon return all 15 members signed the final results protocol, while five of them added dissenting opinions.¹ The main issues presented in these opinions were: the CEC not considering all the complaints submitted; the CEC announcing the results while complaints were still to be decided by the courts; and the CEC not having properly considered 226 dissenting opinions to 53 DEC tabulation protocols. The results were fully endorsed by the CEC chairperson and nine members.²

Turnout in the second round was announced as 68.81 per cent, 2.3 percent higher than the first round. The final result gave Mr. Yanukovych 48.95 per cent of votes cast and Ms. Tymoshenko

¹ As in the first round, the five dissenting opinions were presented by those nominated by the Bloc of Yulia Tymoshenko (BYT) and Our Ukraine.

² CEC members nominated by the Party of Regions (PoR), the Communist Party, the Socialist Party and the People's Party.

45.47 per cent. Some 4.36 per cent votes were cast “against all candidates”, which was double the number in the first round. Of the 25,493,529 ballots cast, 1.2 per cent were declared invalid, compared to 1.65 per cent in the first round.

III. POLITICAL CONTEXT

The parliament voted to hold Mr. Yanukovich’s inauguration on 25 February.³ This occurred despite the pending court decision on Ms. Tymoshenko’s challenge to the election result and amidst a deepening rift between the two main political forces in the country. In this atmosphere, negotiations are ongoing in the parliament to either preserve the current coalition, or to form a new one. Should a new coalition be formed, it may result in the removal of the current government and the election of a new one, including the prime minister.⁴ Should either of these options fail, snap parliamentary elections would be constitutionally required.⁵ Against this backdrop, on 17 February the parliament postponed local elections initially scheduled for 31 May 2010 and did not set a new date.⁶

IV. COMPLAINTS AND APPEALS

During the post election period, Ms. Tymoshenko’s campaign filed hundreds of complaints against the actions of the Precinct Election Commissions (PECs) and DECAs in areas where Mr. Yanukovich received a majority of the vote.⁷ The complaints asked for recounts of specific PECs, the recount of every PEC in some DECAs and the invalidation of the entire vote in some PECs.⁸ The basis for the complaints included: the adding of voters to the voters list on election day by the PECs which she claimed was illegal;⁹ the CEC clarification on homebound voting which was adopted at 08:00 on election day and allowed two commissioners to accompany the mobile ballot box even though the election law called for three;¹⁰ the failure of some PECs to require a medical certificate from homebound voters; and the organized bussing of voters to the polls.¹¹

The complaints were rejected by the PECs and the DECAs or were left without consideration. Subsequently, Ms. Tymoshenko filed the complaints with the CEC. On 14 February, the same day that the official results were announced, the CEC rejected all the complaints in one consolidated decision; some on technical grounds and others due to a lack of sufficient evidence.

³ On 19 February the parliament terminated Mr. Yanukovich’s parliamentary mandate at his own request with a view to his upcoming inauguration as President of Ukraine.

⁴ According to the Law on Regulations for the Verkhovna Rada (signed on 10 February by the president), a coalition must have an absolute majority of the members of parliament. On 17 February, and with a deadline of ten days, the speaker of the parliament requested the incumbent coalition to confirm its majority status in parliament by collecting a list of signatures of all its members. Some members of parliament challenged the retroactive impact of this law.

⁵ See article 83 of the Constitution.

⁶ Ms. Tymoshenko disagreed with the postponing of local elections and has declared her intention to appeal to the Constitutional Court.

⁷ Autonomous Republic of Crimea, Donetsk, Dnipropetrovsk, Kirovograd, Luhansk, Mykolaiv, Odesa, Uzhgorod and Zaporizhzhia.

⁸ This claim was based on alleged violations of Article 80.1 of the election law, which allows for the invalidation of the vote in a PEC when there is a 10 per cent margin of alleged fraud.

⁹ According to the election law PECs are allowed to add voters to the voter lists on election day.

¹⁰ Both candidates challenged this clarification in the Kyiv Administrative Court of Appeals, which resulted in two opposing decisions. The HAC ruled that it was legal to have two commissioners. See article 77.4 of the election law.

¹¹ The claim was that this was tantamount to offering a bribe to the voter in violation of Article 64.6 of the election law.

Consequently, Ms. Tymoshenko filed 46 complaints with the Kyiv Administrative Court of Appeals (KACA) challenging the CEC's decision and asking the court to order the CEC to reconsider their decisions and grant the relief requested. She argued that the CEC had not considered the substance of the complaints and challenged this as inaction by the CEC. The court consolidated the 46 complaints for one hearing and rejected them on 15 February. The High Administrative Court (HAC) upheld the decision of the KACA in rejecting the complaints.

On 15 February, the Tymoshenko campaign filed a challenge to the final election results with the HAC and the next day the HAC suspended the CEC announcement declaring the final results. This decision had no practical effect and was routine for courts to make when considering complaints.¹² The court did not grant the request to cancel Mr. Yanukovich's inauguration scheduled for 25 February.

In her complaint Ms. Tymoshenko alleged that the vote on 7 February was conducted with many violations of the electoral process, which made it impossible to establish the results of the countrywide vote reliably and therefore the court must order a third round. In addition to the reasons for the complaints at PEC and DEC levels, she also claimed that the secrecy of the vote was violated in homebound voting because of the presence of two commissioners and observers; that the CEC continually acted illegally in issuing instructions and clarifications that either violated or expanded the election law and in not considering all of the complaints filed against the DEC and PEC protocols before announcing the results.

The hearing on the complaint filed by Ms. Tymoshenko commenced on 19 February in the HAC with 49 judges sitting as a panel. In a sign of transparency, it was originally announced that the entire hearing would be broadcast live on TV. The first part of the hearing was broadcast but was then suspended based on an objection from the representatives of Mr. Yanukovich.

On 20 February, on the second day of the court hearing, Ms. Tymoshenko filed a motion requesting that her complaint challenging the election result be withdrawn. This was after the HAC had denied her request to call as witnesses members of PECs, DEC's and observers. After five hours of deliberations, the HAC granted Ms. Tymoshenko the motion to withdraw her complaint.¹³ Ms. Tymoshenko stated that she would not challenge the result in any other court. On the same day, President Yushchenko congratulated Mr. Yanukovich as the legitimately elected President of Ukraine and signed the decree for his inauguration.

V. OSCE/ODIHR EOM ACTIVITIES

On 18 January and 8 February the International Election Observation Mission, which was a joint undertaking of the OSCE/ODIHR, the OSCE Parliamentary Assembly, the Parliamentary Assembly of the Council of Europe, the NATO Parliamentary Assembly and the European Parliament, issued Statements of Preliminary Findings and Conclusions. The OSCE/ODIHR will issue a comprehensive final report, including recommendations for the consideration of the authorities approximately two months after the completion of the election process.

¹² It is unclear whether the court could suspend the final results announcement as it is not a CEC decision and therefore should have no legal effect. See Venice Commission/ODIHR Joint Opinion, point 72, page 18, CDL-AD(2009)040.

¹³ The HAC quoted Article 155 of the Code of Administrative Proceedings according to which the court can suspend a case if the plaintiff has filed a motion to withdraw it or leaves the court without due reason. Ms. Tymoshenko and her lawyers left HAC shortly after filing the motion.