



Office for Democratic Institutions and Human Rights

UKRAINE

PRESIDENTIAL ELECTION

17 January 2010

OSCE/ODIHR NEEDS ASSESSMENT MISSION REPORT

21-24 September 2009



Warsaw
8 October 2009

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I. INTRODUCTION

Following the calling of a presidential election for 17 January 2010, the OSCE Office for Democratic Institutions and Human Rights (ODIHR) undertook a Needs Assessment Mission (NAM) to Kyiv from 21 - 24 September 2009. The OSCE/ODIHR NAM included Mr. Nicolas Kaczorowski, Head of the OSCE/ODIHR Election Department, Ms. Lusine Badalyan, OSCE/ODIHR Election Adviser, and Mr. Gilles Saphy, External Election Expert.

The purpose of the OSCE/ODIHR NAM was to assess the pre-election environment and the preparations undertaken for the presidential election, and to present recommendations on possible OSCE/ODIHR observation of the election. The OSCE/ODIHR NAM met with various state officials, the election administration, and representatives of political parties, the media, civil society and the international community. A list of meetings is included as an annex to this report.

The OSCE/ODIHR would like to thank the Ministry of Foreign Affairs (MFA) for the invitation to observe the 17 January presidential election. They, in conjunction with the OSCE Project Co-ordinator in Ukraine, lent invaluable assistance in organizing the OSCE/ODIHR NAM. The OSCE/ODIHR is also grateful to all interlocutors met with during the mission.

II. EXECUTIVE SUMMARY

Following the expression of different opinions by the president and the *Verkhovna Rada* (parliament) regarding the date of the upcoming presidential election, the parliament eventually set the date for 17 January 2010, after a ruling by the Constitutional Court.

The current political landscape in Ukraine is characterized by confrontation between the legislative and executive branches as well as tensions between the president and the prime minister, once former “orange coalition” allies. This comes against a background of economic and financial crisis. Both the president and the prime minister have publicly blamed each other for the political crisis and the economic difficulties of the country. The work of the parliament has been paralyzed and it has not therefore been able to pass many important laws, including the state budget.

The official election process starts on 19 October. Some ten individuals have already announced their intentions to stand. Although the official campaign has not yet started, some prospective candidates are already actively campaigning.

New controversial amendments to the legal framework for the presidential election were passed on the initiative and with the support of the Bloc of Yulia Tymoshenko (BYT) and the Party of Regions (PoR). Many amendments raised significant concern among interlocutors and mark a step backwards. Certain provisions are not in line with international standards and good practice. Of particular concern are new provisions that limit the right to lodge complaints and

to challenge election results. Other amendments may undermine the integrity of the election process. The president vetoed the amendments, after which parliament overturned the veto. Currently there are two appeals before the Constitutional Court challenging the constitutionality of certain new provisions in the election legislation.

Election commissions operate at three levels: the Central Election Commission (CEC), 225 District Election Commissions (DECs) and some 38,000 Precinct Election Commissions (PECs). Provisions regulating the work and the formation of DECs and PECs were also amended considerably, providing each candidate with the right to nominate two members to each level. While this provision can ensure pluralism, a number of other amendments may undermine the stability of commissions and may negatively affect the integrity of their work. These include the elimination of quorum requirements for decision-making and the reintroduction of requirement of residency in a respective district for a commission member. This requirement was previously abolished after the problematic first and second rounds of the 2004 presidential election, to allow for the exchange of commission members among different regions, which played an important role in building confidence and safeguarding the integrity of the election process.

Ukraine has completed the first stage of the establishment of a permanent State Voter Register (SVR). The initial review of voter register data was completed on 15 September. While the creation of the SVR raises expectations for an improved election process, an amendment which allows voters to apply for inclusion on voter lists in polling stations on election day raises concerns and creates an increased potential for irregularities.

There is a diverse media landscape in Ukraine that allows for a broad range of views to be conveyed, and citizens enjoy wide-ranging pluralism in both broadcast and print media. While the OSCE/ODIHR NAM interlocutors noted improvement in media freedom, media at local and regional levels seem to have largely remained under the influence of regional and local administrations, which often own them. Concerns regarding the influence of certain political and economic groups on media remain.

Regrettably, the new amendments to the election law do not provide a framework for domestic non-party observers. The OSCE/ODIHR has stressed the importance of domestic non-party election observation in its previous reports, in line with Paragraph 8 of the 1990 OSCE Copenhagen Document, to enhance transparency, accountability and confidence at all stages of an election process.

Based on the findings of the OSCE/ODIHR NAM, in particular the concerns expressed with regard to amendments to the legal framework, the voter register, election commissions, and possible irregularities on election day, and the interest expressed by interlocutors in the deployment of OSCE/ODIHR observers, the OSCE/ODIHR NAM recommends the deployment of a standard Election Observation Mission (EOM) to Ukraine to assess the 17 January 2010 presidential election for its compliance with OSCE commitments, other international standards and domestic legislation. Such an OSCE/ODIHR EOM would require the deployment of a core team of experts as well as the secondment by participating States of 56 long-term observers (LTOs) and 600 short-term observers (STOs).

III. FINDINGS

A. POLITICAL CONTEXT

The Ukrainian parliament initially passed a resolution calling for the presidential election to be held on 25 October 2009. This act was appealed by the president to the Constitutional Court, which ruled on 13 May that the resolution was unconstitutional.¹ Subsequently, on 23 June, the parliament set the date for 17 January 2010.

The election is taking place in the context of economic and political crises. Disagreements between the president and the prime minister have stalled the appointment of several key ministers.² In addition, the president has publicly blamed the prime minister for deepening the economic crisis and has criticized her agreement with Russia to settle the January 2009 gas dispute. The prime minister, in turn, has blamed the president for Ukraine's current situation. Meanwhile, the parliament is not functioning; since the summer, the Party of Regions (PoR) has blocked its work and key legislation, such as the budget, has stalled.³

During the summer, the Bloc of Yulia Tymoshenko (BYT) and PoR engaged in negotiations to create a "grand coalition". However, the PoR chairperson, Viktor Yanukovich, quit the negotiations for reasons that were not publicly disclosed. Nevertheless, BYT and PoR deputies voted together on a number of important laws, including amendments to the presidential election law.

Some ten individuals have declared their intention to stand. They include: Volodymyr Lytvyn, parliamentary speaker and leader of the Labour Party, Petro Symonenko, leader of the Communist Party, Boris Tarasyuk, a former foreign minister, Serhiy Tihipko, former head of the national bank, Yulia Tymoshenko, leader of BYT, Viktor Yanukovich, leader of PoR, Arseniy Yatsenyuk, former parliamentary speaker, former foreign minister and leader of the Front of Changes movement,⁴ and the current president, Viktor Yushchenko.

The election process, as such, officially begins on 19 October with candidate nominations. The registration of candidates should be completed by 13 November. Nevertheless, certain prospective candidates have already commenced campaigning; this is not prohibited by law.

All political parties that the OSCE/ODIHR met during the NAM (except PoR) raised concerns over recent amendments to the election law. Parties also opined that the economic crisis is likely to dominate the upcoming campaign. Many, however, did not think that the crisis would affect campaign spending. Some stakeholders expressed a lack of confidence in the election administration due to its political composition. Concerns were also expressed regarding the quality of the voter register, with indications that it might become an issue during the campaign.

¹ The Ukrainian constitution (Art. 103) states that presidential elections should take place on the last Sunday of the final month in the fifth year of a president's term. The current president was elected on 26 December 2004 and took office on 23 January 2005.

² The Kyiv district administrative court also suspended presidential appointments of 16 regional and district state administration heads on appeal from the Cabinet of Ministers. The court argued that the president made the appointments without prior consultation with the cabinet. The constitution stipulates that heads of local state administrations shall be appointed or removed from office by the president upon the proposals of the Cabinet of Ministers.

³ PoR is demanding an increase of the minimum wage and of social benefits.

⁴ The NAM was informed that a political party will be registered in October on the basis of this movement.

B. LEGISLATIVE FRAMEWORK

The legal framework regulating presidential elections includes the constitution,⁵ the Law on the Election of the President of Ukraine (hereinafter, election law),⁶ the 2004 Law on the Central Election Commission, the 2007 Law on the State Voter Register,⁷ criminal and administrative-procedural code provisions, and other legal acts, as well as CEC instructions and decisions.

According to the constitution, the president is elected to a five-year term. Any citizen over the age of 35 who has the right to vote, has resided in Ukraine for the ten years prior to election day, and who has a command of the state language may be elected president.

On 24 July, the parliament adopted amendments to the legal framework. The two main authors of the amendments came from BYT and PoR, and these two parliamentary fractions secured enough votes to adopt the amendments. On 18 August, the president returned the amendments to parliament with reservations and suggestions. On 21 August, the parliament overrode the president's veto with 325 votes.⁸ The president then refused to sign and, in line with constitutional provisions, the parliamentary speaker signed the amendments.

Many are of significant concern and mark a step backwards in comparison with the previous legislation. Some new provisions are not in line with international standards and good practice. In addition, most past OSCE/ODIHR recommendations have not been addressed.

Major changes have included limiting the right to appeal election results. Specifically:

- Precinct Election Commission (PEC) and District Election Commissions (DEC) results cannot be challenged;
- Results cannot be challenged to the Central Election Commission (CEC). Even in the event that a complaint is lodged with the CEC, the amendments dictate that the CEC would not consider these complaints before adopting the election results;⁹
- The deadline for the courts to adjudicate complaints was reduced from five to two days; if a court does not consider the complaint within two days, it may be disregarded.

Amendments concerning final results are problematic. The amendments provide that the CEC is not required to adopt election results by an official decision as a collegial body, but rather only has to draft "minutes". In addition, there is no obligation to publish the results in the official gazette.¹⁰ Under the new provisions, a candidate may be installed the day after the CEC's announcement of results, further reducing the possibilities of legal redress.

Further, according to the new amendments, if a DEC does not receive results from certain PECs within five days it can approve the results without taking into account those votes. Consequently, final results could potentially exclude a significant number of votes, in breach of international standards.

⁵ This was adopted in June 1996 and last amended in December 2004.

⁶ This was adopted in 2004 and last amended in July 2009. The amendments entered into force on 10 September, after being signed by the parliament speaker and published in the official gazette.

⁷ Last amended in July 2009.

⁸ The constitution (Art. 94) stipulates a 2/3 majority to overturn a presidential veto; i.e., 300 votes.

⁹ See Art. 84.7 of the election law.

¹⁰ Publication of results in official gazettes is viewed as part of the official announcement of results. This provides citizens with public notice and allows for possible legal challenges.

The amendments reduced the electoral period from 120 days to 90 days, consequently changing many deadlines in the election law. Although this may reduce the election budget, the amendments also shorten the deadlines for filing and adjudicating complaints. This may adversely affect the dispute resolution process.

Campaign funds may be established from candidates' private funds, funds donated by the party or bloc that nominated the candidate, and from voluntary contributions from individuals; importantly, independent candidates may not receive donations from political parties. The current law has been amended to remove a campaign spending limit. Another major change is the considerable increase of the candidate deposit from 500,000 UAH (about 40,000 EUR) to 2,500,000 UAH (about 200,000 EUR). A new provision also allows for the deposit to be returned only to those candidates that contest the second round.¹¹ The amendments only speak of the situation in a potential second round and are silent on whether a winner in the first round is entitled to get his or her deposit back. Provisions requiring the collection of support signatures for candidacy have been removed from the law, as well as the possibility to vote with absentee voting certificates.

On 14 September, the president appealed to the Constitutional Court contesting the constitutionality of some amendments to the election legislation. A similar appeal was filed to the Constitutional Court by 48 members of parliament. No timeframe is specified for the consideration of such appeals. If the Constitutional Court finds these amendments unconstitutional, it is possible that the election law may be amended again prior to election day. No interlocutors however anticipated a full revision of the law, but only those provisions that have been challenged before the court. Consequently, many of the problems are expected to remain outstanding.

C. ELECTION ADMINISTRATION

The election administration for presidential elections operates at three levels: the CEC, 225 DEC, and some 38,000 PECs. The CEC comprises 15 members, appointed to a seven-year term. This appointment is made by parliament, upon nominations from the president, which are based on suggestions made by the parliamentary fractions.

According to the recent amendments, each presidential candidate has the right to nominate two members to each DEC and PEC. While this provision can address the need for pluralism and multi-party participation in the conduct of elections, an important safeguard for openness and transparency, it may result in an exceedingly high number of commission members. New provisions entitle each candidate to a proportional number of chairpersons, deputies and secretaries on commissions. However, there are no provisions for a geographical distribution of positions for each candidate, which might be necessary in the Ukrainian context. Additionally, the requirement that a nominated commission member should permanently reside within the DEC territory prevents an exchange of election members between regions, initiated as a confidence building mechanism after the first and second rounds of the 2004 presidential election. This mechanism played a considerable role in promoting the integrity of the 2006 and 2007 parliamentary elections.

¹¹ The previous law returned deposits to candidates that succeeded in winning 7 per cent of the vote. The OSCE/ODIHR has previously recommended that this threshold be reduced to 3 per cent.

The powers of DEC's and PEC's may be terminated if either a higher election commission or a court decides that the commission has violated the law. New amendments have changed the voting rules for removing commission members from 2/3 of total membership to 2/3 of members present. They have also eliminated the quorum requirements for commissions to take decisions; all decisions on election day are now taken by a simple majority of members present.

Interlocutors underscored to the OSCE/ODIHR NAM that these changes may result in greater instability in the election administration and may create the potential for abuse. Additionally, as expressed by some interlocutors, the provisions may create incentives for the re-appearance of the practice of so-called 'technical candidates', nominated with the sole purpose of controlling commissions.¹² The CEC expressed concerns that a large number of candidates would result in large PEC memberships, which may hamper both the training of commissioners and PEC effectiveness.¹³

The law provides that polling stations may range from 50 to 3,000 voters. As already noted in past OSCE/ODIHR reports, 3,000 voters in a polling station is high and may unduly burden PECs. Problems with processing such a high number of voters may also arise.

The law also allows out-of-country voting. It is anticipated that commissions will be formed in Ukrainian diplomatic missions and consular offices abroad.¹⁴

D. VOTER REGISTRATION

Following the 2007 parliamentary elections, Ukraine initiated a State Voter Register (SVR) on the basis of a new Law on the State Voter Register. Previously, voter lists were created on an ad hoc basis for each election.¹⁵ The OSCE/ODIHR NAM was informed that the CEC was finalizing the establishment of this SVR.

According to this law, the CEC is the custodian of the SVR and is responsible for its compilation and maintenance. State Register Maintenance Bodies (RMBs) were established in each of the 755 *rayons* (districts) and cities of Ukraine. Updated information for the SVR is supplied by state institutions. The main provider of data is the Ministry of Interior and the ministry is tasked with providing regular updates on all changes with regard to identification, citizenship and residence registration of voters. Certain data is also provided by the Ministry of Justice, by penal institutions, military and other bodies.

According to the CEC, the primary update of the SVR was completed on 15 September and, as prescribed by law, RMBs will now update the SVR on a quarterly basis.¹⁶ During the initial check, the CEC sent individual SVR data to each voter, together with contact details on where they could apply for changes. Some 10,000 voters applied. In addition, some 164,000 double entries have been remedied, according to the CEC.¹⁷

¹² There were numerous allegations during the 2004 presidential election that some parties supported the nomination of unknown 'technical' candidates to control commissions, as candidates had the right to appoint commission members.

¹³ The CEC informed the OSCE/ODIHR NAM that the CEC has budgeted for 30 possible candidates, resulting in PECs as large as 60 members (assuming all candidates nominate 2 members to each).

¹⁴ According to the Ministry of Foreign Affairs, some 400,000 voters are registered abroad at this stage.

¹⁵ The establishment of a permanent electronic voter register was one of the OSCE/ODIHR's long-standing recommendations.

¹⁶ The next update will be completed by 5 December 2009.

¹⁷ Double entries can only be removed after confirmation from the Ministry of Interior.

The SVR comprises approximately 36.5 million voters, a decrease of about one million from the 2007 elections. As prescribed by law, on 18 September all parties represented in parliament received copies of the SVR.¹⁸ They are empowered to address the relevant RMBs if they find errors. Voter lists will be posted in polling stations for public scrutiny 20 days prior to election day, permitting voters to check their data and apply for corrections.

The recent legal amendments also affected provisions regulating the SVR. As a result, a voter can now apply for inclusion on the voter list on election day up to one hour before the end of voting. The voter can apply either to the respective PEC or DEC, to the RMB or to a court. This amendment jeopardizes the stability and possible integrity of the SVR. It may also create an additional burden for the election administration on election day. This change also creates increased possibilities for irregularities. At the same time, an amendment to the criminal code, which can be interpreted to cover multiple voting only in the same polling station, potentially removes criminal liability for voting twice in different polling stations.¹⁹

E. MEDIA

Ukraine has a diverse media landscape, providing a broad range of views, and citizens enjoy wide-ranging pluralism in both broadcast and print media. According to OSCE/ODIHR NAM interlocutors, the situation with media freedom has improved since the 2004 presidential election; currently, there is no direct interference in private media on the part of the state. However, media at the local and regional levels seem to have largely remained under the influence of regional and local administrations, which often own them.

Private television, which enjoys national coverage, provides generally pluralistic coverage of all political forces, organizing different political talk shows and programmes.²⁰ Nonetheless, there are concerns regarding the influence of certain political and economic groups on media, and allegations of payments made for certain coverage exist.

The state broadcast media comprises TV channel *UT 1*, several national radio stations, regional state TV channels, and media controlled by local governments. There are also two national state newspapers: *Uradovy Kurier* and *Golos Ukrainy*. The establishment of public service television has, thus far, not progressed.

No major changes have been made to provisions regulating election campaigning in the media. The election law requires that all pre-election campaigning in the media is to be conducted in compliance with the principle of equal conditions for all candidates. As for private media, the equal opportunity principle pertains to equal pricing for all. TV and radio stations are required to publish estimated costs of one minute of air time and to send this information to the CEC. Media outlets that provide one candidate with air time or print space cannot refuse to provide airtime and space to other candidates on the same conditions.

¹⁸ Candidates will also have the right to receive a copy of the SVR after being registered by the CEC.

¹⁹ Article 158¹ of the Criminal Code states that “repeat voting at a polling station by a voter entails a financial penalty from 100 to 300 untaxed minimum citizens’ incomes or correctional labour for up to two years or restraint of liberty for the period of up to three years”.

²⁰ Among the main private national channels are *ICTV*, *1+1*, *Inter*, Channel 5, *STB*.

State and municipal TV and radio channels should provide each candidate with free air time, at the expense of the state budget.²¹ There is a very detailed and stringent regulation on the distribution of air time and when and how this time should be used. The CEC does not anticipate conducting any media monitoring during the election campaign.

F. ELECTION OBSERVATION

Regrettably, new amendments to the election law do not provide a framework for domestic non-party observers. The OSCE/ODIHR has expressed the importance of domestic non-party election observation in its previous reports, in line with Paragraph 8 of the OSCE 1990 Copenhagen Document, to enhance transparency, accountability and confidence at all stages of an election process.²²

There are active civic groups in Ukraine which have significant experience in election observation. Some civic groups informed the OSCE/ODIHR NAM about their intention to register as journalists in order to observe the election, as many civic groups did in 2004. However, journalists have restricted access to the election process and cannot, for instance, obtain copies of results protocols.

Representatives of political parties, candidates, and international observers have full access to all stages of the organization and conduct of elections.

IV. CONCLUSION AND RECOMMENDATION

All interlocutors met with during the OSCE/ODIHR NAM underscored the need to observe the upcoming election. Based on the findings outlined in this report and the concerns expressed by stakeholders regarding the legal framework, the voter register and potential problems with election commissions, the OSCE/ODIHR NAM recommends the deployment of a standard Election Observation Mission (EOM) to Ukraine to assess the 17 January 2010 presidential election for its compliance with OSCE commitments, other international standards, and domestic legislation. The OSCE/ODIHR plans that the EOM should be operational by the end of November to ensure adequate observation of all stages of the process.

In addition to a core team of experts, the OSCE/ODIHR EOM should also include a voter registration expert, due to the concerns expressed with regard to the SVR. In line with OSCE/ODIHR standard methodology, the EOM will also contain a media monitoring element. Considering the concerns expressed, media monitoring will not only concentrate on nationwide media, but will monitor some of the regional and local media. The OSCE/ODIHR will request the secondment of 56 LTOs to allow for one team of two LTOs in each of the 24 regions (*oblasts*) and two teams in two major urban centres. In addition, the secondment of 600 short-term observers will also be requested of participating States to ensure a wide and balanced geographic coverage of the country for the observation of election day proceedings. Similar arrangements are envisaged in the event of a second round.

²¹ No less than 30 minutes on the state TV channel and 45 minutes on national radio channels, as well as 20 minutes on regional TV and radio channels.

²² The Law on Elections of People's Deputies contains provisions on domestic non-party observation.

ANNEX: LIST OF MEETINGS

State and Election Authorities

Ministry of Foreign Affairs

Mr. Oleksandr Kupchyshyn, Deputy Minister of Foreign Affairs
Mr. Ivan Novitskyi, Head of Division, Consular Service Department
Ms. Yevhenia Filipenko, Head of OSCE division, Department of the UN and other international organizations
Mr. Oleg Prenzelevych, Head of Deputy Minister's Office

Ministry of Interior

Mr. Igor Repeshko, Head of the State Department for Citizenship, Immigration and Registration of Physical Persons
Ms. Alla Chernichenko, Deputy Head of the State Department for Citizenship, Immigration and Registration of Physical Persons

Ministry of Justice

Ms. Valeria Lutkovska, Deputy Minister of Justice
Ms. Valentyna Kunda, Head of the Department for Citizens' Civil Status
Ms. Larysa Ivanova, Deputy Head of the Department for Citizens' Civil Status
Mr. Serhiy Yuryev, Head of the Human Rights Section of the Constitutional and Administrative Law Department
Mr. Vladyslav Gurtenko, Head of the Section of the Department for International Legal Cooperation
Ms. Liliya Oleksyuk, Deputy Director General of the Information Centre State Enterprise of the Ministry of Justice

Presidential Secretariat

Mr. Igor Popov, Deputy Head of President's Secretariat, Representative of the President in Parliament

Central Election Commission

Ms. Zhanna Usenko-Chorna, Deputy Chairperson
Mr. Andrii Magera, Deputy Chairperson

Committee on State Development and Local Self-Government of the Parliament

Mr. Yuri Kluchkovsky, Deputy Head of the Committee

Political Parties²³

Bloc of Yulia Tymoshenko

Mr. Andriy Shkil, Member of Parliament

Movement Front of Changes

Dr. Olexander Scherba, Foreign Policy Adviser

²³ The OSCE/ODIHR NAM requested meetings with representatives of all parliamentary fractions.

Our Ukraine

Mr. Roman Bezsmertnyi, Head of the Central Executive Committee

Party of Regions

Mr. Nikolai Azarov, Member of Parliament, Head of the Committee for Finance and Banking

Media

ICTV

Mr. Oleksandr Bogutskyi, Director General

Radio Era

Mr. Roman Chaykovskiy, Head of Information Department

UT 1 TV Channel

Mr. Ihor Fedoriv, Editor-in-Chief

Civil Society and International Organizations

Civic Network, OPORA

Ms. Olha Ajvazovksa, Informative Director

Committee of Voters of Ukraine

Mr. Oleksandr Chernenko, Chairman of the Board

International Republican Institute (IRI)

Mr. Chris Holzen, Director

National Democratic Institute (NDI)

Mr. Scott Persons, Senior Political Party and Parliamentary Program Officer

Diplomatic Community

Representatives of Embassies