



Office for Democratic Institutions and Human Rights

## UKRAINE

### PRESIDENTIAL ELECTION

31 October, 21 November and 26 December 2004

OSCE/ODIHR Election Observation Mission Final Report



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**UKRAINE**  
**PRESIDENTIAL ELECTION**  
**31 October, 21 November and 26 December 2004**

**OSCE/ODIHR ELECTION OBSERVATION MISSION FINAL REPORT<sup>1</sup>**

**I. EXECUTIVE SUMMARY**

Following an invitation from the Ministry for Foreign Affairs of Ukraine, the OSCE Office for Democratic Institutions and Human Rights (OSCE/ODIHR) observed the 2004 presidential elections in Ukraine. The OSCE/ODIHR Election Observation Mission (EOM) was deployed in late August 2004, and in response to the developing circumstances, the deployment of the OSCE/ODIHR EOM was extended until mid-January 2005. For the three election days, 31 October, 21 November and 26 December, the OSCE/ODIHR EOM joined efforts with delegations of Members of the OSCE Parliamentary Assembly (OSCE PA), the Parliamentary Assembly of the Council of Europe (PACE), the European Parliament (EP) and the Parliamentary Assembly of the North Atlantic Treaty Organization (NATO PA), all invited by the authorities, to form an International Election Observation Mission (IEOM). The election process was assessed for compliance with OSCE Commitments, and Council of Europe and other international standards for democratic elections.

The 2004 presidential election in Ukraine was a highly competitive contest, which offered voters a genuine choice between a plurality of candidates. While the 31 October (first round) and 21 November (second round) votes failed to meet a considerable number of OSCE Commitments, Council of Europe and other international standards for democratic elections, the 26 December repeat second round vote brought Ukraine substantially closer to meeting them. The improvement was most clearly demonstrated in the media coverage, the overall conduct of the campaign and the transparency in the CEC performance, including the immediate publication of polling station results. These measures stand in stark contrast to the previous votes, and demonstrate that when a clear political will is evident to conduct an election in line with OSCE commitments, much can ultimately be achieved in a short time period.

While 24 candidates contested the election, pre-election polls clearly indicated that only two of them, Viktor Yushchenko, representing the policies of a clearly defined political opposition, and Viktor Yanukovich, the incumbent Prime Minister, enjoyed extensive popular support. Two other candidates led parties that overcame the 4% representation threshold in the 2002 parliamentary elections: Petro Symonenko (Communist Party), and Oleksandr Moroz (Socialist Party). The election had a pronounced regional dimension. Viktor Yushchenko derived support in western and some northern regions, while Viktor Yanukovich enjoyed support in the east of the country, and in southern regions and Crimea. Central regions were to be keenly contested by both candidates.

In the run-up to the first and second rounds of voting, the campaign was largely rancorous, divisive and offered unequal opportunities for candidates to convey their messages to the electorate. There were substantiated reports that Mr. Yanukovich's campaign abused state resources, and there were a number of corresponding reports that state employees and students were being coerced or

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<sup>1</sup> This report is also available in Ukrainian and Russian. However, the English version remains the only official document.

intimidated to support his candidacy. Fundamental freedoms necessary for a meaningful election process were at times restricted. Notwithstanding the challenges to civil and political rights, the main candidates were able to convey their messages, albeit in a constrained environment. In the run-up to the 26 December election, campaign conditions were markedly more equitable than previously. Significantly fewer reports were received that voters were pressured in their electoral choices. There was a marked decline in reported instances of the misuse of State resources in the campaign. However, on a few occasions, campaign events were disrupted, occasionally in a violent manner.

During the run-up to the first and second rounds of voting, the media, including the state media, demonstrated an overwhelming bias in favour of Mr. Yanukovich. Media coverage was constrained by the reported issuance, by authorities, of so-called '*temnyky*', which appeared to constitute guidelines on how to report on certain issues, and therefore could result in a form of censorship. The performance of the media changed dramatically during the run-up to the repeat second round. During that period the media coverage of the election was more balanced and provided voters with opportunities to make an informed choice. Journalists reported that *temnyky* were no longer in use.

Following the second round, peaceful popular protests against perceived election fraud broke out. As the election progressed, citizens were more confident in asserting their rights. The stand taken by journalists against censorship and constraints on freedom of expression was broadly based and effective. The authorities demonstrated an appropriate level of restraint and did not use force against peaceful protestors.

The 2004 Presidential Election Law (the law) represents, overall, an improvement over previous legislation. However, notable areas that require further improvement include: the absence of a proper status for non-partisan domestic observers, discrimination against independent candidates, campaign-related provisions that limit civil rights, and failure to clarify the role of police during the elections. On 8 December, the Parliament adopted amendments to the law with temporary effect, to reduce the potential for electoral abuse.

During the run-up to the first and second rounds, major shortcomings were evident at all levels of the election administration. The CEC and a large number of Territorial Election Commissions (TECs) were not transparent or politically neutral in the administration of the electoral process. The most notable deficiencies of the CEC include its reluctance to grant legal redress against improper administrative decisions and violations of the electoral law, and its failure to make available a transparent and detailed tabulation of election results. Overall, the CEC did not administer the election effectively, and thereby did not ensure the integrity of the process. During the run-up to the repeat second round vote, such deficiencies were addressed in a generally adequate manner. Overall, the newly appointed CEC administered the election process in a distinctly more transparent and professional manner.

The functioning of Territorial Election Commissions (TECs) and Polling Station Commissions (PSC) was significantly affected during the run-up to the first and second rounds, by the registration of a large number of candidates not enjoying significant popular support (so-called "technical candidates"), whose representatives often effectively formed a 'majority bloc' with Mr Yanukovich's representative within these commissions. A significant number of TECs lacked independence from local government structures and the selection of PSC chairs in many districts strongly favoured Mr Yanukovich. The dismissal of hundreds of PSC members appointed by the opposition on the eve of the first and second election rounds caused confusion and severely lessened the transparency of the process. Only during the run-up to the second round repeat vote

was the election administration reshuffled by Parliament, in order to eliminate such artificial majorities, which had previously affected the functioning of TECs and PSCs.

Voter lists compiled by local government authorities<sup>2</sup> contained numerous errors and omissions. Local government bodies, TECs and PSCs were inconsistent in their approaches to registering voters and updating the lists. On 31 October, a relatively large number of voters were turned away from polling stations because their names did not appear on the lists, lessening the ‘universality of the vote’.

As regards the conduct of polling on both 31 October and 21 November, it was observed as having taken place in a generally calm atmosphere, although tensions and violations were reported more often on the 21 November round of voting. In particular, observers reported the following irregularities: a failure to ensure the secrecy of the vote; the presence of large numbers of police and other unauthorised persons in polling stations during polling and tabulation of results; some instances of voters being “bussed” from polling station to polling station; ballot box stuffing; a variety of serious irregularities in the use of Absentee Voting Certificates (AVCs), which allow voters to cast their vote in a polling station other than the one they are registered in, including forged certificates and multiple voting; and examples of implausibly high voter turnout figures. All these factors contributed to undermining the credibility of both the first and second rounds of the election. While the 26 December repeat second round marked significant improvements, as reported by international observers, some problems noted on previous election days, such as the presence of police and other ‘unauthorised persons’, disregard for the secrecy of the vote and incidences of implausible polling station results persisted. Generally, respect for procedures improved.

Throughout the election, the Supreme Court played an important role in granting relief for electoral violations. It overturned a number of questionable decisions of the CEC in the run-up to the second round repeat vote. In general, its proceedings were open and transparent. On 3 December, in a significant ruling, the Supreme Court decided to invalidate the decision of the CEC determining the election results of the 21 November second round, and ruled that in order to restore the rights of the election participants, the second round must be repeated.

After the repeat second round, Mr Yanukovich lodged an appeal with the Supreme Court against the CEC’s determination of the election results which granted the victory to Mr. Yushchenko. The Court’s failure to permit Mr Yanukovich the right to present certain witnesses during his appeal against the results of the repeat second round was regrettable, and resulted in Mr. Yanukovich’s claims that his right to a fair hearing were impinged upon.

Civil society played a crucial role during the election. An array of domestic NGOs were highly active in promoting citizens’ rights. As the election progressed, citizens were more confident in asserting their rights. The stand taken by journalists against censorship and constraints on freedom of expression was effective in improving the conditions for fair media coverage.

The OSCE/ODIHR offers a number of recommendations for consideration by the authorities of Ukraine, in order to address the shortcomings identified. The Office stands ready to support Ukraine in its stated goal of conducting elections in line with OSCE commitments.

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<sup>2</sup> Executive Bodies of villages, City Councils, District Councils, Settlement Councils, etc.

## II. INTRODUCTION AND ACKNOWLEDGEMENTS

On 18 March 2004, the Parliament (the Verkhovna Rada) called for the presidential election to be held on 31 October 2004. In accordance with its OSCE commitments, Ukraine invited the OSCE/ODIHR to observe the process. An OSCE/ODIHR EOM was established on 31 August 2004, headed by Ambassador Geert Hinrich Ahrens (Germany). It consisted of 57 election experts and long-term observers (LTOs) based in Kyiv and 20 regional centers across Ukraine. Following the annulment of the second round results, the OSCE/ODIHR EOM was enlarged to 77 election experts and LTOs. On all three rounds of election, the OSCE/ODIHR EOM was joined by the OSCE PA, the PACE, the EP and the NATO PA to form the International Election Observation Mission (IEOM).

Mr Bruce George (UK), President Emeritus of the OSCE PA, was designated by the OSCE Chairman-in-Office to lead the short-term observers in each of the three election rounds. The OSCE PA deployed 47, 31 and 92 parliamentarians respectively on each of the three election days.

Mr Doros Christodoulides (Cyprus), led the PACE delegation for the first two rounds, and Mr Tadeusz Iwinski led the PACE delegation for the repeat second round. The PACE deployed 46, 21 and 37 parliamentarians respectively on each of the election days.

Mrs Jane Cordy (Canada), led the delegation of 25 parliamentarians from the NATO PA for the 31 October polling, Mr Lucio Malan (Italy) led the NATO PA delegation of 8 parliamentarians for the 21 November second round, and Mr Pierre Lellouche (France) led the NATO PA delegation of 27 parliamentarians for the repeat second round.

Mr Marek Siwec (Poland) led the first two EP delegations comprising 15 and 9 members of the European Parliament, and Mr Jacek Saryusz-Wolski (Poland), Vice President of the European Parliament, led the EP delegation of 16 parliamentarians for the repeat second round.

On 31 October and 21 November, the IEOM deployed 636 and 563 observers, respectively, from 33 OSCE participating States. On 26 December, 1,372 observers were deployed from 46 OSCE participating States, making the EOM the largest ever deployed by the OSCE/ODIHR.<sup>3</sup>

## III. BACKGROUND

The 2004 presidential election was the fourth since Ukraine regained independence in 1991. The outgoing President, Leonid Kuchma, served two terms. He was first elected in 1994 when he defeated Leonid Kravchuk, incumbent President then, and again in 1999 after defeating Petro

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<sup>3</sup> Other international organizations, non-governmental organizations and individual states deployed large numbers of observers, particularly on the second and third election day contests, following their own respective approaches. The largest of the other observer groups were the European Network of Election Monitoring Organizations (ENEMO), the Commonwealth of Independent States (CIS), the National Democratic Institute, the International Republican Institute, the Ukrainian Congress Committee of America, the Ukrainian Canadian Congress, among others. The CEC maintained a web-accessible list of observers giving a cumulative total of the number of accredited foreign election observers through the 2004 electoral process. As the process went into the second and repeat second rounds, some 12,000 observers were accredited. However, it was not possible to determine how many observers were indeed deployed.

Symonenko, leader of the Communist Party.<sup>4</sup> In December 2003, notwithstanding the two-term limit established by the Constitution, the Constitutional Court ruled that President Kuchma was eligible to stand for a third five-year term.<sup>5</sup> However, he decided not to stand in the 2004 election.

According to the Constitution, the President enjoys wide-ranging powers. Amendments to the Constitution were proposed on a number of occasions in the run up to the 2004 presidential election. Essentially, the intent was to reduce presidential powers and strengthen those of the legislative branch. However, the proposed amendments never secured a parliamentary majority. Consequently, it was anticipated that the winner of the 2004 election would enjoy the same wide-ranging powers enjoyed by his predecessor.

The presidential election was contested by 24 candidates. However, in the run up to the election, polls indicated that only two candidates, Viktor Yushchenko and Viktor Yanukovych, enjoyed extensive popular support.

Mr Yanukovych, the incumbent Prime-Minister, was nominated by the Party of Regions and enjoyed the support of the parliamentary majority led by the “For United Ukraine” bloc, and of President Kuchma. Mr Yushchenko was the leader of the parliamentary opposition and a former Prime-Minister between December 1999 and spring 2001. He stood as a ‘self-nominated’ (independent) candidate, supported by two parliamentary factions, the ‘Our Ukraine’ bloc and ‘the Yulia Tymoshenko’ bloc, which formed the ‘Peoples’ Power’ coalition.

Two other candidates led parties that overcame the 4% representation threshold in the 2002 parliamentary elections: Petro Symonenko (Communist Party), and Oleksandr Moroz (Socialist Party). Other prominent candidates included Nataliya Vitrenko (Progressive Socialist Party), former Prime Minister Anatoly Kinakh and the Mayor of Kyiv, Oleksandr Omelchenko. Seventeen other candidates were also registered.<sup>6</sup>

Viktor Yushchenko enjoyed considerable support in the western and partly in some northern regions. Viktor Yanukovych’s political base was in the east of the country, where the ‘For United Ukraine’ bloc polled best in 2002. In addition, Mr Yanukovych enjoyed support in southern regions, particularly Crimea. The central regions were keenly contested by both candidates.

#### **IV. LEGAL FRAMEWORK**

##### **A. APPLICABLE LEGISLATION AND ELECTION SYSTEM**

The elections were conducted under the Constitution of Ukraine, which was last amended in June 1996, the Presidential Election Law (hereafter Election Law), which came into force in April 2004, and the Law on the CEC, which was adopted in June 2004. The decisions and resolutions of the CEC are also important and have legal standing.

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<sup>4</sup> The OSCE/ODIHR concluded that the conduct of the 1999 election “failed to meet a significant number of OSCE election related commitments”.

<sup>5</sup> The decision was based on the argument that President Kuchma had served only one term under the 1996 Constitution. The Constitution previously in force also set a two-term limit.

<sup>6</sup> The other candidates were (in alphabetical order): Oleksandr Bazyluk; Bohdan Boiko; Mykhailo Brodskiy; Leonid Chernovetsky; Andriy Chornovil; Ihor Dushin; Mykola Hrabar; Roman Kozak; Sergiy Komisarenko; Dmytro Korchynsky; Vladislav Kryvobokov; Volodymyr Nechyporuk; Oleksandr Rzhavsky; Mykola Rohozhynsky; Vasyi Volga; Oleksandr Yakovenko; and, Yuri Zbitnev.



The Presidential Election Law received significant support in Parliament, with only three MPs voting against its adoption. On 8 December 2004, following the disputed second round election, Parliament adopted ‘temporary’<sup>7</sup> amendments to the Election Law.

The election system provides that a candidate needs over 50% of all votes cast, in order to be elected in the first round. If no candidate receives the required minimum share of the vote, then a second round is held between the two top-scoring candidates.

## **B. EVALUATION OF THE LEGAL FRAMEWORK**

The election law represents an improvement over the previous electoral legislation and overall provides an adequate framework for the conduct of democratic elections. However, in the run up to the 31 October and 21 November rounds of voting, the law was often applied restrictively by election commissions and lower courts showing a lack of impartiality and commitment to hold democratic elections.

While the law incorporated a number of OSCE/ODIHR recommendations as set out in previous Final Reports, it addressed a limited number of concerns. Specifically, it increases transparency by permitting official observers to accompany mobile ballot boxes, granting observers’ the right to receive copies of TEC and PSC results protocols and requiring their public display. However, the law lacks detail on key aspects of the process and the unnecessary complexity of some provisions might have hampered its implementation. Finally, some provisions are at odds with OSCE commitments and international standards. For example, the Election Law restricts election domestic observation to ‘partisan’ observation carried out by representatives of the candidates, contrary to paragraph 8 of the OSCE Copenhagen Document<sup>8</sup>.

Some legal provisions grant candidates nominated by political parties certain advantages and exemptions not available to self-nominated candidates<sup>9</sup>. This is discriminatory towards independent candidates and therefore challenges Paragraph 7.5 of the OSCE Copenhagen Document.

In Articles 57 to 64, which regulate the electoral campaign, the law attempts to define campaign activities and describes which of these are legally permissible. However, not all possible campaign activities or campaign materials are described and, at times, vague terminology is employed, and can be circumvented<sup>10</sup>. Elsewhere, some articles could unduly limit the right to express a political opinion or support a candidate<sup>11</sup>.

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<sup>7</sup> These amendments were to apply only to the repeat second round of the 2004 Presidential election and would cease being in force after the announcement of the final results.

<sup>8</sup> Other legislative shortcomings regarding electoral observation include: the failure to provide for observation at polling stations abroad by international observers; the failure to grant observers the right to obtain copies of election documents and the failure to specify what qualifies a person to observe the process as a representative of “mass media”.

<sup>9</sup> For example, parties nominating candidates do not have to comply with certain restrictions on campaign activities and self-nominated candidates are denied the right to receive campaign contributions from political parties.

<sup>10</sup> For example, Article 58 provides that “official notices” related to “official duties” of candidates, who are simultaneously government officials, are not considered as campaigning, but the law does not define either of the terms. Through issuing “official notices”, Mr Yanukovich, who was serving as Prime Minister, circumvented restrictions on campaigning.

<sup>11</sup> For example, Articles 58 and 59, which regulate the campaign materials on public buildings could, if applied restrictively, limit the right of individuals to support a candidate through the displaying of material on other forms of property, *i.e.*, using a sticker or ribbon on a private vehicle.

Article 2 limits the right to engage in the pre-election campaign to citizens who have the right to vote. This limitation is contrary to OSCE commitments and international standards. Every person has the right to free expression, association and speech, which encompass the right to promote and support candidates and political parties, regardless of whether the person possesses the right to vote.<sup>12</sup> Further, since a person must be 18 years of age to vote, this limitation is contrary to Articles 13, 14 and 15 of the United Nations Convention on the Rights of the Child.

Article 64 prohibits campaigning in “foreign mass media”. This violates the principle that a citizen has the right to receive and impart information regardless of frontiers.<sup>13</sup> OSCE participating States recognize that citizens have the right “to receive and impart information and ideas without interference by public authority regardless of frontiers, including through foreign publications and foreign broadcasts”.<sup>14</sup>

The law regulates the media during the campaign, but fails to define adequately the terms used. For example, Article 11 requires equal access for candidates to “mass media”, Article 13 requires the “mass media” to cover the election process in an objective manner and Article 60 requires equal conditions for candidates during the campaign “in the mass media of all forms of ownership”. However, the law does not set out how a specific media is defined as a “mass media”.

The law does not distinguish between State and private media. State media has a stronger obligation to impart neutral and balanced information than privately owned media. While it is generally accepted that private media can be legally required to provide equal access and equal conditions for paid political advertising, and should provide balanced coverage in news programs, private media should not be compelled to provide ‘political coverage’. Hence, the existing provisions during the election period may be too expansive, if applied to the private media.

According to the law, after the list of candidates has been approved, any candidate wishing to withdraw from the contest must apply in writing to the CEC at least 5 days before the election, which may ‘de-register’ the candidate.<sup>15</sup> The law provides that the CEC must begin the printing of ballot papers not later than 10 days before the election, and that in cases where candidates are de-registered, the PSCs stamp ballot papers accordingly. The requirement that up to 40 million ballots must be changed by hand raises the real potential of human error or malpractice.

The law does not set out the circumstances in which the police may be present in polling stations, nor does it describe the role of police in the transport of electoral material, including ballots and protocols, between polling stations and TECs after the count.

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<sup>12</sup> See Paragraph 26.1 of the OSCE 1991 Moscow Document; Paragraph 26 of the OSCE 1999 Istanbul 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>13</sup> See Article 19 of the Universal Declaration of Human Rights; Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms; Articles 34, 36, and 57 of the Constitution of Ukraine. In addition, foreign media have the right to advertise (including political ads) across borders except for alcohol, tobacco, pornography, and hate language. See European Convention on Transfrontier Television (ETS 132 1989 and Protocol) 171 1998).

<sup>14</sup> See Paragraph 26.1 of the OSCE 1991 Moscow Document. The principle was reiterated in the 1999 Istanbul Document.

<sup>15</sup> Candidates that withdraw forfeit their deposit but retain their representatives on the TECs and PSCs.

Article 80 provides that a polling station's results may only be declared invalid if electoral irregularities (including: proxy voting, voting by ineligible voters, multiple voting, damaged ballot boxes and too many ballots in the box) "exceeds ten per cent" of the polling station turnout. These criteria appear arbitrary, as a variety of other serious violations could occur. Furthermore, the '10% threshold rule' appears to establish a 'tolerance level' of fraud. Significantly, the law does not envisage a situation where electoral fraud might occur at a lower level, which makes it impossible to determine the winner<sup>16</sup>.

Article 78 is of concern, as it requires that all ballots in a 'mobile ballot box' be invalidated if the number of ballots found in the box exceeds the number of ballots stated on the control sheet. There is no similar provision regarding ballot boxes in polling stations, hence, the provision treats voters unequally. Furthermore, the existence of one ballot too many is not a justification for invalidating all the ballots in the box.

The law does not ensure the transparent tabulation of election results. It does not oblige the CEC to publish TEC results listing all PSC results either on its website or in the official gazette. Therefore, voters, candidates and observers are unable to verify that the election results were "reported honestly" as required by Paragraph 7.4 of the OSCE Copenhagen Document.

## **V. ELECTION ADMINISTRATION (31 October and 21 November)**

### **A. STRUCTURE AND COMPOSITION**

A three-tiered election administration organized the presidential election. The Central Election Commission (CEC), appointed on 17 February 2004 for a 7-year term, is the only permanent election administration body in Ukraine. It is composed of 15 members chosen by the President from a list proposed by parliamentary political groups. The Parliament must approve the CEC composition by a majority of votes. All but four of its members were new to the post. Serhiy Kivalov was elected as Chairperson by the members of the CEC at its first session.

Based on proposals from the registered candidates, the CEC appointed 225 Territorial Election Committees (TECs) and supervised their work. The TECs organized the election in the 225 election districts and appointed members to more than 33,000 Polling Station Committees (PSC), who administered polling on the election days. Each candidate was legally entitled to nominate two members to each TEC and PSC. The TECs were instructed to maintain a balance among candidate nominees in allocation of the PSC Chair, Deputy Chair and Secretary positions. At PSC level, candidates may also nominate two observers. Thus, almost one hundred persons had the right to be present, either as administrator or as observer, in polling stations on 31 October and 21 November. This created a concern that both TECs and PSCs might be too large to operate effectively. Members of TECs and PSCs appointed by all first round candidates retained the legal right to remain on these bodies for the second round. Therefore, the composition of TECs and PSCs would only be finalised once the CEC had approved the candidate list, at a late stage in the process.

Significantly, the composition of TECs and PSCs was affected by the registration of a large number of presidential candidates who were often referred to as 'technical candidates' due to their limited public recognition. Their ability to propose, unaided, a total of up to 66,000 PSC members appeared

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<sup>16</sup> Such a situation occurred after the 21 November election. As a result, the Supreme Court had to fashion a legal means to call for a repeat of the second round.

improbable. It is noteworthy that many of these candidates campaigned against Mr Yushchenko rather than to promote their own platforms. While both frontrunners were reputed to have such backing from other candidates, Mr Yanukovich appeared to be the main beneficiary of the ‘technical candidates’, as their appointees frequently allied themselves with those appointed by Mr Yanukovich, giving him a *de facto* majority on election commissions.

It became evident that many of the appointments to TECs and PSCs were not in accordance with provisions of the law that require that candidates’ appointees to election commissions must, before their appointment, confirm in writing their willingness and availability to take up the post. Observers reported that many TEC members were unaware of which candidate sponsored their appointment<sup>17</sup>.

## **B. PERFORMANCE OF THE CENTRAL ELECTION COMMISSION**

The potentially positive effect that new legislation might have had on the election was negated by the manner in which it was applied by the CEC. CEC sessions were open to observers, candidate representatives and the media. Most CEC decisions taken in the run up to the 31 October vote were adopted unanimously, a notable exception were decisions on complaints which were often divisive. Nevertheless, the CEC performance lacked transparency and the CEC did not display a genuine will to conduct democratic elections. The main shortcomings of the CEC included:

- General reluctance to grant relief on complaints and failure to provide an effective mechanism for legal redress in cases of electoral violations;
- Failure to fulfil adequately its supervisory role over TECs and give them clear guidance; as a result, TECs applied the law inconsistently and on occasions selectively;
- Failure to build confidence by conducting a convincing voter information programme;
- Failure to clarify the role of police in regard to polling station procedures, despite the unfortunate events in Mukacheve in April 2004<sup>18</sup> and assurances offered thereafter;
- Inconsistent, non-transparent and controversial implementation of legal provisions including conflicting deadlines in determining polling stations for voting abroad, in particular those intended to be established in the Russian Federation;
- Failure to provide data on the number of ballots issued to each TEC, as well as to polling stations located outside Ukraine, despite submission of a written request by the OSCE/ODIHR EOM;
- Failure to establish transparent and accountable procedures for printing dissemination and use of Absentee Voter Certificates (AVC), and to provide data to the OSCE/ODIHR EOM on the number of AVC forms printed and issued to voters, despite several written requests;
- Diverging announcement of the CEC and of its Chairman, prior to the first round, on the total number of ballots printed;

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<sup>17</sup> This phenomenon was even more evident at PSC level, where some persons were appointed to more than one PSC and others were not even aware that their names had been submitted. Observers in three TECs (in Odessa, Kyiv and Crimea) received reports that the local branches of the state administration provided names of PSC members to TECs rather than the candidates’ official representatives, thereby contravening the law.

<sup>18</sup> The OSCE/ODIHR sent a two-person team to Mukacheve (southwest Ukraine) on 17-19 April 2004, to attend the 18 April mayoral election in this town. This visit was not an observation mission as such, due to its limited scope. Serious and numerous violations occurred during this election, including attacks of a polling station where the OSCE/ODIHR team attended the count, despite the massive presence of uniformed police in all polling stations. In addition, all original polling station protocols disappeared from the Territorial Election Commission (TEC) during the election night.

- Modification, during tabulation of the first round results, of records of the numbers of ballots issued to TECs, in order to reconcile them with the numbers of ballots reported as having been received by TECs in their protocols;
- Failure to provide information to the EOM on the number of voters added to the voter lists in each district between both rounds, despite submission of a written request;
- Failure to publish all PSC-level results for the first two election rounds, despite assurances given to the EOM that it would do so.

### C. CANDIDATE REGISTRATION

The election law provides for a two-stage registration process. Initially, each prospective candidate is required to pay a registration fee of 500,000 UAH (approximately € 80,000), refundable if they get more than 7% of the votes or the candidate withdraws no later than 30 days before election day, and submit registration documents to the CEC. Twenty-six candidates were originally registered by the CEC by the 6 August deadline. Eighteen candidates were denied registration, mostly for failure to submit registration documents according to the legal provisions.

In addition, the law required that, before 20 September, prospective candidates submit at least 500,000 valid signatures supporting their nomination. The signature collection process was controversial. Observers in 15 of Ukraine's 27 regions received allegations that citizens, particularly public sector employees, were put under duress to confirm by signature their support for particular candidates<sup>19</sup>. Interlocutors claimed that without such manipulations, many candidates would be unable to collect the necessary 500,000 valid signatures. The opposition claimed that the state administration had been used to manufacture signature sheets on behalf of the so-called 'technical candidates'<sup>20</sup>.

The CEC was required by law to verify the correctness of all signatures submitted. However, the law does not describe how this process should be conducted, and the CEC did not provide proper procedural clarifications. Thus, the issue was left unregulated. While the law grants the CEC more time to complete the process than the previous presidential election, the task of verifying some 13,000,000 signatures within a 10-day period presented the CEC with a considerable challenge. OSCE/ODIHR EOM observers reported that the signature verification process appeared superficial and could not check multiple entries. The list of candidates for the 31 October vote was finalized on 30 September, by which time two candidates had withdrawn from the race.<sup>21</sup>

### D. OUT OF COUNTRY VOTING

Art.20.5 of the election law provides that polling stations may be created in "diplomatic and OTHER official representations and consular offices of Ukraine abroad, and in military units located outside the borders of Ukraine". In early September, the CEC established 113 polling stations abroad, all located in diplomatic and consular offices. Although the law sets a deadline of 10 October for the

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<sup>19</sup> In Poltava, a hospital employee lodged an official complaint that for been threatened with dismissal in case of refusal to sign in support of Mr Yanukovich. In Khmel'nytsky observers confirmed three similar cases. Most victims alleged that they signed at the behest of their workplace supervisors, often in local government structures.

<sup>20</sup> According to the first round results, the 16 'least-scoring' candidates received together less than 500,000 votes, whereas these candidates claimed to have submitted a combined total exceeding 10,000,000 signatures. Mr Nechyporuk, the lowest placed candidate, received only 6,141 votes, almost one hundred times less than the 579,389 signatures, which he claimed were submitted to the CEC.

<sup>21</sup> Hrihory Chernysh and Vitaly Kononov.

compilation of the voter lists abroad, neither the CEC nor the MFA were able to inform the OSCE/ODIHR EOM, in advance of the election, how many citizens were registered as voters abroad<sup>22</sup>.

Apart from exceptional cases (see below), the law does not provide for any other polling venues abroad. Yet, on 27 August, the CEC issued Resolution 415, which introduced the possibility of establishing polling stations outside these specific locations, where there is an “emergence of places where voters densely reside”, provided that some preconditions are met, including the submission of necessary documentation by the Ministry of Foreign Affairs before 18 October.<sup>23</sup> By that date, the CEC approved only 10 additional polling stations abroad established in premises other than the diplomatic offices of Ukraine.

Finally, in addition, the election law also provides (art.20.10) that in “exceptional cases”, a new polling station (hereafter termed ‘exceptional polling station’), including abroad, may be created no later seven days before polling, i.e. 23 October. On the night of 23 October, in the hours just before the deadline passed, the CEC considered a proposal to create 420 exceptional polling stations in the Russian Federation in the framework of Resolution 415. However, it became evident that the CEC had not considered the validity of the required supporting documentation. At the insistence of opposition MPs, access was granted to scrutinise documents, and it was revealed that 379 of the 420 proposed polling stations did not meet the requirements as set out in CEC Resolution 415. After heated discussions in the CEC, with violent clashes occurring outside in the early hours of 24 October, the CEC unanimously voted to establish 41 exceptional polling stations in the Russian Federation.

Subsequently, on 28 October, the Supreme Court overturned the CEC’s decision and cancelled the establishment of all polling stations in the Russian Federation, except for the four that were located in diplomatic offices.

#### **E. ABSENTEE VOTING CERTIFICATES (AVCS)**

According to the Election Law, a polling station commission (PSC) may issue an AVC to a voter registered to vote in the respective PSC, if he/she will be away from his/her place of residence on Election Day. In such cases, the name of the voter should be deleted from the PSC’s voter list, and on Election Day, should be added to the voter list of the polling station where the voter chooses to vote<sup>24</sup>.

In general, the CEC did not ensure the transparency of use of AVCs, or establish controls to prevent their misuse. Prior to the first round, the CEC did not even announce the total number of AVCs printed. Afterwards the opposition alleged that AVCs were widely misused, and that large-scale multiple voting had occurred. Prior to the second round, the CEC responded to these problems by changing the paper on which the AVCs were printed, but did not take any steps to improve the

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<sup>22</sup> The MFA informed the EOM that some 200,000 voters were duly registered with diplomatic and consular offices abroad. Interlocutors assessed that as many as 7,000,000 Ukrainian citizens reside outside the country.

<sup>23</sup> CEC Resolution 415 states that, in order to create election precincts abroad, outside of a diplomatic office, the following documents have to be provided by the MFA to the CEC: a written agreement of the Government of the host country, a confirmation of the availability of adequate voting premises and a personal statement of at least 20 eligible voters regarding the need for the establishment of a polling station.

<sup>24</sup> During the elections of 2002, similar legal provisions were abused and the OSCE/ODIHR recommended that: “The use of absentee certificates should be severely restricted or further regulated to prevent abuse”. While the election law attempted to address this recommendation, it failed to prevent misuse of AVC.

accounting of these sensitive documents. On 17 November, the CEC announced that approximately 1.5 million AVCs were printed for the second round

In the run up to the 21 November election, observers reported that some public employees were coerced into applying for AVCs and then pressured to hand these blank AVC's over to their work supervisors, thereby depriving them of the ability to vote. In addition, on 21 November, OSCE/ODIHR EOM observers submitted a number of reports that persons were bussed from one polling station to another and voted on multiple occasions using AVCs. The CEC failed to respond to a number of requests by the EOM for information about printing, dissemination and use of AVCs, after both rounds of vote.

#### **F. PERFORMANCE OF TERRITORIAL ELECTION COMMISSIONS (TECs)**

OSCE/ODIHR EOM observers met with all 225 TECs. Most reported that TECs had sufficient material resources to conduct their work, but some 24% lacked sufficient finances. In general, the TECs were efficient and familiar with the legal provisions. However, in a number of TECs, the Chair, Deputy Chair and Secretary all lacked the experience and technical knowledge necessary to manage TEC sessions effectively. Some 36% of TEC Chairs had not served on a TEC previously, and 10% of TECs had problems in achieving a quorum necessary to take valid decisions. Observers also received allegations that some TEC members were excluded from meetings in a similar percentage of TECs, and reported a high degree of discrimination against Mr Yushchenko's representatives on TECs and PSCs over the course of the first two election rounds.

In general, TECs did not perform their tasks in a politically neutral manner. Observers reported that a significant number of TECs lacked independence, for example, in 69 of the TECs visited, observers received allegations that unauthorised persons, mostly from local government structures, interfered with TECs work.<sup>25</sup>

Many TECs did not conduct their activities transparently. In 34 TECs, observers received reports that some members were not granted access to the commission's documents.

Opposition party representatives, particularly in eastern regions, frequently complained that TEC members appointed by some of the so-called "technical candidates" formed a majority bloc and passed controversial decisions, including on the appointment of PSC Chairs. In several TECs, unofficial 'working groups' ran TECs and were able to take decisions due to a generally passive approach by the rest of the TECs' membership.

The process of forming PSCs was at times contentious<sup>26</sup>. Observers received many complaints that PSC members nominated by opposition candidates were discriminated against.<sup>27</sup> Several complaints on this issue were filed with the CEC, which granted relief only in some cases.

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<sup>25</sup> The local State Administration in Crimea issued an instruction to TEC 9 on the assignment of staff for PSCs. Such interference is expressly prohibited. In this case, the TEC refused to follow the instruction.

<sup>26</sup> For example, in Cherkassy region, one TEC took a decision to appoint PSCs without a quorum and thereby knowingly contravened a CEC instruction

<sup>27</sup> Opposition parties also claim that, where their nominees had been appointed as Chairs, Deputy Chairs or Secretaries, they were frequently assigned to rural PSCs or smaller election precincts. Observers reported that more than half of the TECs experienced serious difficulties in selecting PSC chairpersons and in 38% of TECs, they assessed that the selection of chairpersons was biased in favour of Mr Yanukovych and against Mr Yushchenko.

## **G. PERFORMANCE OF POLLING STATION COMMISSIONS PRIOR TO ELECTION DAY**

According to the law, an election commission can function only when two-thirds of its appointed members are present at a session. While this arrangement vests a degree of decision making authority with the minority on the commission, with a view to ensure a broader agreement, it also permits a minority group the possibility to deliberately block the decision making process. In a few instances, observers reported that the latter had occurred. In early October, a large number of appointed PSC members resigned or refused to take up their duties. During this period, many PSCs failed to take valid decisions due to the lack of a required quorum, while others were left with fewer than the legal minimum of 12 members appointed. In addition, the instability in membership of TECs and PSCs created uncertainty in the run up to the election. This may also have hampered the timely and effective training of PSCs.

## **H. VOTER REGISTRATION**

Ukraine does not yet have a countrywide computerised register of voters. The law requires local government authorities to prepare preliminary voter lists from a variety of sources: passport offices, housing committees, tax offices and local branches of the Ministry of Interior. However, little coordination appears to exist between these bodies. According to law, the 'preliminary' voter lists have to be prepared by 1 July 2004, and should be transferred to TECs by 25 September, which in turn forward the lists to PSCs.

The PSCs are required to make the voter lists "available for general [public] familiarisation", to add the names of those omitted and to make corrections as necessary. However, few PSCs interpreted the legal provisions as a requirement that they publicly display voter lists. This factor, together with non-uniform performance of TECs and PSCs across Ukraine, may have hidden from public notice the scale of inaccuracies in the voter lists that later became apparent; in addition, delays lessened the time available for citizens to verify their records or request a correction.

Prior to the first round, in almost 40% of election districts, observers received reports directly from TECs and PSCs on a variety of inaccuracies in the voter lists, such as inclusion of names of deceased persons, failure to reflect changes of citizens' residency, instances of multiple registrations, large numbers of misspelling of names of citizens or streets and a few examples where all voters living in the same building were omitted from lists. Such inaccuracies raised questions about the accuracy of the source used to compile the voter lists, and representatives of the opposition expressed concerns for possible abuse. After the first round, there was widespread recognition that inaccurate voter lists were one of the most significant shortcomings.

On 3 November, Prime Minister Yanukovich instructed government authorities to ensure that correct information concerning the places of citizens' residence be supplied to election commissions during the process of amending the voter lists before the second round. However, while the PSCs had a role in preparing voter lists, the State administration at local level had been primarily responsible for inaccuracies in the original, preliminary lists.

The law requires that voter lists be updated between election rounds by inclusion of names of citizens that came of voting age, and of those that changed residence or died. TECs were also compelled to include the details of those whose names had been added to the voter lists on the 31 October Election Day, through a court certificate or TEC decision.



Lists could only be updated after the CEC had called for a second round of elections. However, the law also required that TECs complete the process by 11 November. As the CEC called for a second round on 10 November, the TECs had virtually no time to comply with their obligations. Nevertheless, observers reported that in a few election districts TECs, PSCs and local government bodies started to update the lists on their own initiative prior to the announcement of the second round.<sup>28</sup> After the distribution of the amended lists to the PSCs, voters had one week to request registration, verify their entry or request correction of their entry.

Despite the adoption of CEC Resolutions 155 and 1177 on procedures to amend voter lists between the election rounds, observers reported non-uniformity in the approach taken by different TECs, PSCs and local authorities<sup>29</sup>. They also reported that citizens were not very active in checking the lists, despite a number of public information programmes conducted at local level by TECs. However, in the majority of election districts, PSCs went door-to-door to check the lists. Prior to the second round, many TECs were unwilling or unable to provide data on the number of voters registered between the rounds.

## VI. PARTICIPATION OF WOMEN

Of the 24 candidates who contested the first round, only one, Nataliya Vitrenko was female. Yulia Tymoshenko, though not a candidate, played an important role during the campaign and the political crisis that followed the November 21 election. In January 2005, Victor Yushchenko appointed Ms Tymoshenko to the post of Prime Minister. However, in general, women are underrepresented in senior public positions and only 5% of the deputies are women.

Observers found that women were reasonably represented on TECs. For the 31 October and 21 November rounds of voting, some 35% of TEC chairpersons and 73% of TEC secretaries were women. As in 2002, the majority of PSC chairpersons were women (some 56%). However, only two women were appointed to the CEC for the first and second rounds, while a third was appointed for the repeat second round.

## VII. NATIONAL MINORITIES

According to the State Statistics Committee of Ukraine, in 2001, it was estimated that Ukrainians represented 77.8 percent of the population of Ukraine. Russians are by far the largest minority (17.3 percent in 2001), with each other minority (including: Crimean Tatars, Byelorussians, Greeks, Romanians, Bulgarians, Hungarians and Poles) accounting for less than 1% of the population<sup>30</sup>. National minority issues did not play a discernable role in the presidential election campaign, except for issues on the use of the Russian language.

According to the Constitution, Ukrainian is the only State language. However, the Constitution also guarantees “the unfettered development, use and protection of Russian and other languages of

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<sup>28</sup> For example, TECs in Kharkiv, Zaporizhia, Poltava, Donetsk, Ivano-Frankivsk and Zakarpatska regions.

<sup>29</sup> In Odessa and Zaporizhia observers questioned the commitment of the election administration to produce accurate voter lists.

<sup>30</sup> State Statistics Committee of Ukraine, “All-Ukrainian Census of the Population 2001.

national minorities [...]”<sup>31</sup> Russian is widely spoken by many Ukrainians, and Mr Yanukovych’s campaign platform included the proposal that it be made Ukraine’s second State language. This was broadly popular in the areas with predominantly Russian speakers (the east and south); areas in which he was already expected to perform well.

Ballots and voter information materials were not available in any languages other than Ukrainian. Observers noted that in some regions, the transliteration of voters’ data from Russian into Ukrainian, for the purpose of compiling the voter lists, caused administrative difficulties and led to errors in the spelling of citizens’ names, which may have necessitated some of these voters appealing to TECs on 31 October to have their voter list entry corrected before they could vote.

## VIII. ELECTION CAMPAIGN (30 August-21 November 2004)

The nature of the election campaign prior to the first and second rounds raised serious concerns regarding the Ukrainian authorities’ commitment to hold democratic elections. A variety of significant shortcomings in the campaign were observed, running contrary to paragraphs 5.4, 7.6, 7.7 and 7.8 of the 1990 OSCE Copenhagen Document. The authorities did not attempt to create conditions that ensure a free expression of opinions. Although these concerns were set out in the IEOM’s preliminary statement after the first round of voting, the State authorities did not take remedial action, and continued to lend strong support to Mr Yanukovych. Consequently, the campaign was unequal and unfair.

### A. CAMPAIGN ENVIRONMENT AND TONE

While voters were offered a real choice among a wide variety of candidates, the electoral campaign, which began on July 3 and continued until 25 December, was rancorous and divisive, and inflammatory material and rhetoric were frequently noted. These factors fuelled existing political tensions and the two campaigns became increasingly polarised. Fortunately, only a few serious incidents of campaign-related violence were reported. Yet a number of events during the pre-election period heightened tension between the opposition and the pro-Government bloc. These included:

- An explosion in a Kyiv market in late August, that caused serious injuries and one fatality, and was followed by the detention of individuals, who were allegedly members of the Ukrainian National Party (part of the Our Ukraine bloc); Viktor Yushchenko’s campaign strenuously denied the involvement of its supporters in the incident. Subsequently, the charges were dropped;
- The poisoning of Mr Yushchenko<sup>32</sup> seriously affected his health, and subsequently impacted upon his campaign.
- On 24 September, in western Ukraine, Viktor Yanukovych was struck in the chest by an egg. Despite having no apparent injury, he was hospitalised for some hours. Mr Yanukovych blamed “Yushchenko’s entourage” and nationalists, a charge they denied.

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<sup>31</sup> As noted in the OSCE/ODIHR Final Report on the 2002 parliamentary elections, “the United Nations Human Rights Committee recommended that the authorities should ensure that national minorities in Ukraine enjoy the use of their own language in accordance with the International Covenant on Civil and Political Rights”.

<sup>32</sup> On 21 September, he addressed Parliament and accused the authorities of involvement in the poisoning. Also, he reminded Parliament of the suspicious deaths of other public figures in recent years and asserted that the State authorities were using the secret services and law enforcement bodies to retain political control. International medical experts confirmed in December that Mr. Yushchenko had been poisoned with dioxin.

- Comments made by opposition figures that if the election results were perceived to be falsified, mass protests would be held. This prompted fears of the possibility of an escalation of post-election tensions.<sup>33</sup>
- On 17 November, Mr Yanukovich's campaign manager implied that he would call 30-40,000 miners from eastern Ukraine to "defend the CEC".<sup>34</sup>

Despite having endorsed his candidacy, President Kuchma did not actively campaign for Mr Yanukovich, although he took no action to prevent or condemn the obvious misuse of State resources in favour of the incumbent Prime Minister. However, he did comment on the campaign environment, stating that the campaign was "outside the bounds of human decency".

## B. CAMPAIGN ACTIVITY AND VISIBILITY

Prior to the first round, the campaigns of Mr Yanukovich and Mr Yushchenko were the most active. Yet during the early stages of the campaign, Mr Yanukovich had a much higher visibility through a near monopoly of large billboard advertisements. At local-level, opposition parties ('Our Ukraine', Socialist Party and Communist Party) complained to observers of the considerable difficulty they faced in securing sites for their campaign advertisements<sup>35</sup>.

As the campaign progressed, Mr Moroz and Mr Symonenko, and to a lesser extent Mr Chernovetsky, Ms Vitrenko and Mr Kinakh gained some, albeit limited, visibility. The campaigns of other candidates, most of whom lacked country-wide campaign structures, were very limited.

The use of 'negative' campaign material, often purporting to represent one candidate but designed to discredit him, was a source of frequent complaint from a number of campaign headquarters. While negative campaign material was aimed at both major candidates, Mr Yushchenko was targeted systematically<sup>36</sup>. Most of the material was of anonymous or unclear origin, and at times its content was inflammatory. Many examples failed to comply with the legal provisions, which require that the size of the print run and printing house must be indicated on the posters.

Viktor Yanukovich held campaign rallies throughout the country, during which he promoted the Government's economic policies, the increase of pensions, which became effective in September, and his proposal to make Russian an official State language.

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<sup>33</sup> In early September, President Kuchma addressed the Special Forces of the Ministry of Interior, informing them that creation of social tensions that threatened public order would not be tolerated.

<sup>34</sup> On 19 November, Mr Yanukovich stated that he did not support such an approach.

<sup>35</sup> Some observers received allegations that billboard space was granted to Mr Yanukovich at favourable rates unavailable to other candidates, and that advertising companies refused to rent advertising space to place the opposition candidates' posters. In 21 of the 27 regions, observers noted examples of Mr Yanukovich's campaign material being prominently displayed on public buildings (e.g. in Poltava, Donetsk, Kharkiv, Khmel'nytsky, and Zakarpatska). Observers reported that campaign material in favour of Mr Yushchenko was displayed on public buildings in two regions. In Ivano-Frankivsk region, observers reported that police were used to guard Mr Yanukovich's posters.

<sup>36</sup> Un-sourced campaign material frequently portrayed Mr Yushchenko as a hard-line Ukrainian nationalist with an anti-Russian bias. Propaganda that was falsely represented as Mr Yushchenko's campaign material, called for expulsion of Russians from Crimea, and rumours circulated that Russian-speakers would face discrimination in the event of his victory. Mr Yushchenko or his campaign did not articulate such ideas. However, they had some resonance in the eastern and southern regions and further polarised the election campaign.

Viktor Yushchenko's ill health decreased his ability to campaign effectively for four weeks prior to the first round. However, Yulia Tymoshenko held campaign events in his support. A major theme in Yushchenko's campaign was the characterisation of the Government as corrupt, and the need to enact anti-corruption measures if Ukraine was to join the European Union, a major policy objective of the Yushchenko campaign.

### C. ROLE OF STATE STRUCTURES

During the first and second round, there was a widespread disregard for the fundamental distinction between the State and partisan political interests, which violates paragraph 5.4 of the OSCE Commitments. In 24 regions, observers reported that State structures at local level were campaigning in favour of one of the candidates. In 22 of these regions, they campaigned in favour of Mr Yanukovich<sup>37</sup>. In 18 regions, Mr Yanukovich had a campaign office in a public building<sup>38</sup>. In two cases, observers were able to establish that rent was not paid for the facilities, and in five regions observers confirmed that rental terms were not equal for all candidates.

In eastern regions, Mr Yanukovich's campaign made extensive use of documents described as 'Social Contracts', which were promoted by some civic organizations. Through these, citizens made requests to Mr Yanukovich to improve their living conditions<sup>39</sup>. However, it remained unclear how NGOs or the candidate could meet voters' requests without the support of the State administration and finance, and whether State structures responded to citizens' requests in advance of the election.

On occasions, the State administration interfered in the electoral process. Some observers reported that law enforcement and justice bodies pressured or harassed TEC and PSC members after the first round. For example, in Ivano-Frankivsk, Chernivtsi, Khmel'nytsky and Ternopil regions, where Mr Yushchenko gained a commanding majority in the official first round results, local prosecutors opened criminal cases against TEC officials on insubstantial or questionable grounds.

After the announcement of the first round results on November 10, President Kuchma relieved from their position 15 local administration officials in regions and districts where Mr Yushchenko had performed well. These removals from office were officially made "in connection with transfer to other duties" as stated in the relevant presidential decrees. In addition, observers received reports of local officials having signed undated letters of resignation or faced recrimination due to Mr Yanukovich's perceived poor showing in some areas.<sup>40</sup>

In the run up to the second round, observers reported that a number of administration officials, such as University Rectors and managers of public utilities, instructed workplace subordinates to vote for Mr Yanukovich. In Zaporizhia, observers reported that police officers were checking voter registration records and asking voters for whom they would vote.

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<sup>37</sup> In other cases, observers reported that State officials at local level, some of who had taken leave from their duties, organized the Yanukovich campaign at local level, for example, state officials in Luhansk and Crimea.

<sup>38</sup> Two such examples for Mr Yushchenko were recorded

<sup>39</sup> In Dnipropetrovs'k, a Yanukovich campaign worker informed an EOM observer that her role was to assist people e.g. in receiving overdue salaries. In Luhansk, one civic organization endorsed Mr Yanukovich as its candidate and 'adopted' a Social Contract between him and 700,000 workers and their families. In return, the workers were encouraged to support Mr Yanukovich.

<sup>40</sup> The Governor and Deputy Governor of Poltava region.

#### D. CHALLENGES TO CIVIL AND POLITICAL RIGHTS

While the main candidates, or their supporters, did hold a number of campaign events prior to the first and second rounds, fundamental freedoms necessary for a meaningful election process were at times infringed upon. Some of the opposition parties' local branches claimed that they were unable to campaign effectively due to harassment of their campaign staff and supporters.

Observers directly witnessed or received credible reports of disruption and obstruction of some opposition campaign events, on occasion by State authorities. Other notable restrictions on citizens' civil and political rights included the use of law enforcement officers to impede the free movement throughout the country to opposition campaign events. Furthermore, the rights to peaceful assembly were not always respected, and on occasion, the freedom of association was infringed upon<sup>41</sup>.

Of greatest concern were persistent and widespread reports, some of which were verified by OSCE/ODIHR EOM observers, that pressure to support Mr Yanukovich was exerted on certain groups of citizens, including students and public sector employees. This included pressure to sign Mr Yanukovich's candidate petition (or those of 'technical candidates'), attend his campaign events and vote in his favour, or face adverse consequences. Such pressures were also exerted on citizens to cease their political activity for opposition candidates. EOM observers verified many of these reports as accurate. In other cases it was not feasible to verify the allegation, but observers found the allegations to be credible<sup>42</sup>.

The acts of coercion, intimidation and obstruction noted by EOM observers violate paragraph 7.7 of the Copenhagen Document which states that campaigning be: "conducted in a fair and free atmosphere in which neither administrative action, violence, nor intimidation, bars the candidates from freely presenting their views and qualifications, or prevents the voters from learning and discussing them, or from casting their vote free of fear of retribution".

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<sup>41</sup> Prior to the first round, Mr Yushchenko's airplane was refused permission to land in six cities, preventing him from campaigning. Mr Yushchenko's campaign attempted to broadcast a large rally held in Kyiv to cities across Ukraine, but in Kharkiv, unidentified persons violently attacked a truck carrying media broadcast transmission equipment. EOM observers were shown film appearing to show the police diverting a bus carrying passengers to block the truck's path. In Severodonetsk and Simferopol, pro-Yushchenko campaign stands were destroyed. In Khmel'nytsky Region, on several occasions the police stopped buses carrying Yushchenko supporters to a rally. Other types of campaign obstruction were reported in Rivne and Odessa regions. In Kirovohrad and Luhansk, prior to the second round, pro-Yushchenko campaign activities were repeatedly disrupted by the police without cause, and in Mykolaiv region pro-Yushchenko campaigners and an opposition MP were detained and roughly treated by the police for handing out orange ribbons.

<sup>42</sup> In Zhytomyr, EOM observers reported that teachers were told by the senior staff at a university to instruct students that their attendance at a gathering celebrating international peace was mandatory. When the event happened, it appeared to be a Yanukovich campaign rally. Similar instructions were issued to students in Poltava and Sumy regions; In Khmel'nytsky, on 9 October, the day that Yulia Tymoshenko spoke at a campaign event in the city, students were instructed to leave Khmel'nytsky to celebrate 'Ecology Day'; In Donetsk, EOM observers reported that some PSC members nominated by opposition candidates were asked to resign from the PSC under threat of dismissal; In Volyn, Lutsk and Lviv, immediately prior to the second round, EOM observers reported that firemen, policemen, tax officials, customs officials, teachers, health workers and some private sector factory workers, had been asked by their supervisors to apply for, and then hand over AVCs, the retention of which would have prevented these persons from voting, thereby compromising suffrage rights. In Sumy, citizens were arrested and imprisoned for attempting to check the first round election results posted at a polling station. Inmates at Kopchintsy prison in Ternopil were told that they had to deliver a 90% vote for Yanukovich to retain the possibility of early release, family visits and privileges.

## **E. DEVELOPMENTS PRIOR TO THE SECOND ROUND**

According to law, candidates in the second round cannot begin their campaigns before the CEC has called for a second round contest to be held. As the CEC used the full time permitted before announcing the final election results (and subsequently the second round), the candidates subsequently had only nine days in which to campaign.<sup>43</sup>

After the first round, Oleksandr Moroz agreed to back Mr Yushchenko in the second round in exchange for Mr Yushchenko's support for constitutional reform. Anatoliy Kinakh, Leonid Chernovetsky and Oleksandr Omelchenko also backed Mr Yushchenko. President Kuchma, Nataliya Vitrenko and Metropolitan Vladimir of the Ukrainian Orthodox Church's Moscow Patriarchate endorsed Viktor Yanukovych. Petro Symonenko urged his supporters to vote against both second round candidates.

During a meeting with the EOM after the first round, the Yanukovych campaign claimed that voters had been bribed and intimidated into voting for Mr Yushchenko, and that massive electoral fraud had occurred in western Ukraine using identity documents of Ukrainian citizens residing abroad. However, at local level, EOM observers did not receive allegations that voters were intimidated to vote for Mr Yushchenko, except for one regarding misuse of identity documents. No evidence supporting these claims was provided.

## **IX. MEDIA AND ELECTIONS**

### **A. BACKGROUND**

Approximately 1,200 television and radio companies, and some 15,000 printed media, are registered across Ukraine. Television is the most influential source of news and information. However, only the State-funded television network, *UTI*, has state-wide coverage. The privately owned TV channels, *I+I* and *Inter*, reach approximately 95% of Ukraine.<sup>44</sup> Other private channels include: *ICTV*, *STB* and *Novy kanal*, and the Donetsk-based *TRK Ukraina*. All broadcast to major cities. The opposition-leaning TV *Channel 5* reaches approximately 35-40 % of the country. Local TV stations are found in almost all regions. There is a wide range of State-funded and private print media distributed mainly in urban areas and providing diverse views.

### **B. REGULATION OF THE MEDIA DURING THE ELECTION CAMPAIGN**

Article 34 of the Constitution protects the freedom of thought, speech, expression and belief. Articles 57-64 of the Election Law provide detailed regulation for the electronic and print media during the pre-election campaign, *inter alia* providing all candidates with free and paid for broadcast time and print space on a fair, equitable and non-discriminatory basis.

The law requires "mass media" to provide objective coverage of the election process, without favouring particular candidates. However, the OSCE/ODIHR EOM found that many media did not respect this legal requirement.

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<sup>43</sup> On 6 November Mr Yushchenko held a rally in Kyiv, the Yanukovych campaign filed a complaint with the CEC, which found that the Yushchenko campaign had violated the law.

<sup>44</sup> *I+I* is a joint venture partly owned by US Central Media Enterprises. *Inter* is a joint Russian-Ukrainian venture.

The law requires that State media treat all candidates equally and Article 64.4 permits the temporary suspension of a mass media outlet that gives preference to a candidate “in any form during the election process”. The CEC has the authority to apply to a court in such cases. However, no action was taken by the CEC against *UTI* and no sanctions were imposed despite the channel’s clear bias in favour of Mr Yanukovych prior to the 31 October and 21 November votes. Thus, the CEC did not meet its obligation to ensure fair conditions for campaigning. However, on a few occasions, Article 64.4 was applied to local State-funded newspapers, not at the initiative of the CEC.<sup>45</sup>

### C. FREEDOM OF THE MEDIA

Despite the pluralistic media environment, prior to the election, a number of concerns were raised over media freedoms in Ukraine, including by the OSCE Representative on the Freedom of the Media. Concerns included tight control over the political content of news coverage on the main TV channels through the so-called ‘*temnyky*’ (guidelines), which instructed editors about events and views to cover, and how to cover them, while omitting others. Allegedly, the *temnyky* began to appear after the 2002 parliamentary elections and were issued by the State administration. *Temnyky* constrain the public’s access to balanced information and *de facto* are a form of censorship, despite prohibition of censorship under Article 15 of the Constitution.

While the EOM was not able to fully verify the allegations that *temnyky* were issued by the State administration, a detailed analysis of prime time news devoted to domestic events on *UTI*, *Inter*, and *I+I* revealed that, prior to the first round, almost 43% of these were presented in a conspicuously similar manner. This raised the question of editorial freedom for these channels<sup>46</sup>, and contributed to the protest of journalists.<sup>47</sup>

In a positive step and in contrast to previous election campaigns, prior to the 31 October vote, the State Tax Administration announced it would not conduct any investigations of media outlets until after the elections. However, in the run up to the first and second rounds, observers received credible reports, especially at regional level, that media faced significant obstacles, including printing and distribution problems and serious intimidation<sup>48</sup>.

Channel 5 was the only significant TV channel to cover Mr Yushchenko favourably. However, in the run up to the first round, the channel experienced or claimed a range of difficulties in reaching

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<sup>45</sup> In Vinnytsia region a court temporarily suspended the publication of the *Vinnytska Gazeta* for publishing an article critical of Petro Symonenko. Inconsistently, the same court only issued a warning to another local State-funded newspaper, which wrote a number of articles promoting Mr Yanukovych and several articles criticizing three other candidates.

<sup>46</sup> Of 1104 news items analyzed, 474 were assessed as focusing on similar themes, events, or issues. For the second round, 44% of items were strikingly similar.

<sup>47</sup> On 28 October, more than 40 journalists of *Inter*, *ICTV*, *Novy kanal* and *NTN* TV channels issued a statement against censorship on their TV stations, accusing the authorities and some of the owners and managers of “ignoring important events or twisting facts”. Seven journalists from the *I+I* TV’s newsroom resigned for similar reasons. By the end of November, 346 journalists from a variety of TV channels signed this statement. Another thirteen journalists of *UTI* main news program drafted an “editorial policy agreement” aimed at ensuring accurate and balanced news coverage and to limit pressure on journalists or TV company management. However, the management of *UTI* refused to sign the document.

<sup>48</sup> In Poltava, the Dnipropetrovs’k-based newspaper, *Litsa*, found half of its print run (about 17,000 copies) destroyed by unknown individuals shortly after it was printed; In Donetsk, a privately owned newspaper, *Ostrov*, reported that numerous print houses in Donetsk refused to publish the paper and that the biggest distributors, *Donetsk Post Office* and *Soyuz Pechat* cancelled their contracts with *Ostrov*. In Kyiv, the staff at two private opposition leaning newspapers reported receiving death threats by telephone.

its audience<sup>49</sup>. On 25 October, many employees of *Channel 5* began a hunger strike, demanding the authorities to stop harassment of their channel, and for the courts to reverse their decisions. The hunger strike terminated on 2 November after all their demands were met. *Channel 5* did not report similar problems in reaching its audience after the first round.

#### **D. MEDIA MONITORING (3 SEPTEMBER TO 20 NOVEMBER)**

The EOM monitored six TV channels with state-wide coverage, two channels with partial state-wide coverage, the main newscasts of a number of regional TV channels and nine daily newspapers.<sup>50</sup> Using a well-established qualitative and quantitative analytical methodology, the EOM evaluated whether the media provided impartial and balanced coverage of the political contestants and campaign issues. Media monitoring took place over two periods, 3 September – 29 October (prior to the first round) and 2-20 November (prior to the second round).

Most media outlets monitored failed to provide impartial and fair coverage of the main candidates' election campaigns and few TV stations provided the opposition with airtime to challenge the political opinions of office holders. While there was basic information about all the contestants in the elections, political debate was rare. Consequently, the public was not sufficiently informed on their political programmes and issues at stake in the election.

In September and October, and to a slightly lesser extent in November, the main electronic media failed to serve as a forum for discussion, where political opinions might be exchanged freely. In general, Mr Yanukovich refrained from conventional campaign discourse, and media reported extensively on his official duties as Prime Minister, in particular on *UTI*, *Inter* and *1+1*. Furthermore, reports on his activities were at times of dubious news value and blurred the distinction between official duties and campaigning.

Prior to the first round, the major TV channels tended to present the election as a 'two-candidate' contest, failing to devote a significant amount of airtime to either Mr Moroz or Mr Symonenko. A number of less well-known candidates, such as Messrs. Bazyliuk, Zbitnev, Kozak and Yakovenko, aired campaign spots criticising Mr Yushchenko rather than promoting their own candidacies. Other anti-Yushchenko advertising with unclear sponsorship also appeared on the main TV channels.

During a one-week period after the first round, most media actively covered the activities and opinions of the two second round candidates. While voters were provided with a wider range of views, *UTI*, *Inter* and, to a lesser extent, *1+1* continued to exhibit clear bias in favour of Mr Yanukovich and against Mr Yushchenko. Some other TV channels granted access to more diverse political opinions (*STB* and *Novy Kanal*). One covered favorably Mr Yushchenko and negatively Mr Yanukovich (*Channel 5*).

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<sup>49</sup> These included broadcasting problems in Donetsk, Poltava, Odessa, Lviv, Zakarpatska, Sumy, Kharkiv and Crimea where most channel's viewers could only receive its programmes via satellite; claims that cable operators, acting under the pressure from the state authorities at local level, were partially or fully removing *Channel 5* from their packages; claims that applications to expand coverage in various regions had been turned down on political grounds (the charge was denied by the competent State bodies); claims that in Lviv, unknown persons attempted to destroy *Channel 5*'s transmitter; freezing of its bank account from 15-27 October by order of a Kyiv district court; and a decision by the Economic Court of Appeal to invalidate its license in Kyiv.

<sup>50</sup> Television: *UTI*, *Inter*, *1+1*, *ICTV*, *STB*, *Novy Kanal*, *TRK Ukraina* and *Channel 5*. Newspapers: *Uriadovy Kurier (State)*, *Golos Ukrainy (State)*, and privately owned *Facty I Komentarii*, *Segodnia*, *Den*, *Silski Visty*, *Ukraina Moloda*, *Zerkalo Tyzhna* and *Vechirni Visti*.



## UT1

Prior to both election rounds, the State-funded television *UTI* complied with its legal obligation to allocate equal amounts of free airtime to all candidates. In a positive development, *UTI* aired public information advertisements, produced by a well-known NGO, the Committee of Voters of Ukraine.<sup>51</sup> Significantly, the channel broadcast some debates between candidates. However, in the run up to 31 October vote, their significance was diminished by the decision of the two front-running candidates and five others not to participate. Prior to the second round, for the first time in 10 years, a televised debate between the two main presidential candidates took place. After the debate, *UTI* aired a one-sided and biased ‘round table’ discussion programme in which only supporters of the Prime Minister participated.

Outside the free campaign airtime and debates, *UTI* openly promoted Mr Yanukovich and reported critically on Mr Yushchenko. In its news and current affairs programmes, the channel discriminated against the main opposition candidates and failed to provide impartial and equal coverage<sup>52</sup>. In general, *UTI* was selective and failed to provide a variety of opinions on political and electoral issues. A significant amount of airtime was allocated to persons and subjects that reflected favourably on the incumbent government, while critical opinions were largely ignored.<sup>53</sup>

In displaying a clear bias in favour of the incumbent Prime Minister, *UTI* comprehensively failed to meet its legal obligation to provide balanced treatment to all candidates during the election process, and violated paragraph 7.8 of the 1990 OSCE Copenhagen Document.

### Private TV Channels

Prior to the first round, the private TV channels *I+I* and *Inte*, focused their political coverage on the activities of Mr Yanukovich, mostly in his capacity as Prime Minister<sup>54</sup>. However, after the 31 October vote, especially prior to the announcement of official election results, *Inter* provided the opposition with more airtime.

Before 31 October, *ICTV* also favoured Mr Yanukovich. Mr Yushchenko was heavily criticized on *ICTV*'s, and *I+I*, main current affairs programmes. *STB* and *Novy Kanal* aired a greater diversity of political opinion, especially in the run up to 21 November, when they, together with *ICTV*, provided the opposition with more airtime, including ‘direct speech’. The opposition used this opportunity to challenge the political opinions of its opponents and present its platform. *Channel 5* was the only significant TV channel to give wide-ranging and favourable coverage to Mr Yushchenko and a

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<sup>51</sup> In some regions of eastern Ukraine, observers reported that a few pro-Yanukovich NGOs placed misleading campaign advertisements that were misrepresented as public service slots.

<sup>52</sup> During the first monitoring period, Mr Yanukovich received 64% of *UTI*'s prime time news coverage (dealing with political and campaign issues), of which the EOM assessed 99% as positive or neutral in tone. In the three-weeks preceding the second round, Mr Yanukovich received 84% of similar airtime. In sharp contrast, prior to the first round, Mr Yushchenko received only 21% of such airtime, of which 54% was negative. During the campaign for the second round, this figure fell to 16%, of which 46% was negative.

<sup>53</sup> On 3 November, a presenter of the main *UTI* evening news programme refused to read a statement by Mr Yanukovich's campaign headquarters on the issue of TV debates, saying that if it were aired it would also be necessary to present the opinions of the opposition candidate. He was dismissed.

<sup>54</sup> *Inter* allocated 50% of its prime time news coverage on political and campaign issues to the Prime Minister, which was overwhelmingly positive in tone. Prior to the second round, this figure rose to 71%. Conversely, prior to the first round, Mr Yushchenko received 26% of similar airtime, which was mostly negative, and 29% during the second round campaign. *I+I* adopted a similar line of support for Mr Yanukovich.

critical approach towards Mr Yanukovych. However, its potential audience was far less than that of the other main television networks. *TRK Ukraina* was unstinting in its support of Mr Yanukovych.

### Print Media

The print media provided a plurality of views but demonstrated strong favouritism for or against a particular candidate. The State-funded newspaper *Uradovij Kurier* met its legal obligation to distribute free space equally among the candidates. However, outside of the free space, the paper granted Mr Yanukovych a near monopoly of its political and election reporting, which was mostly positive in tone. In almost all of this coverage, Mr Yanukovych was presented as Prime Minister. *Golos Ukrainy*, also State-funded, offered its readers a more balanced political picture, and in the run up to the second round was, at times, critical of Mr Yanukovych.

The privately owned newspapers *Facty*, *Segodna* and *Den* also gave preferential treatment to the incumbent Prime Minister, although during November, the latter was more balanced. In contrast, Mr Yanukovych was strongly criticized in three privately owned newspapers *Ukraina Moloda*, *Vecherny Visty* and *Silsky Visty*. These newspapers provided favourable coverage to Mr Yushchenko. The private weekly, *Zerkalo Nedely*, offered a roughly similar volume of coverage to both Mr Yanukovych and Mr Yushchenko, but was much more critical of the Prime Minister.

### Regional Media

Out of 16 regional television stations monitored prior to the first round, 10 gave clear support to Mr Yanukovych.<sup>55</sup> Prior to the first round, observers received allegations that in 16 regions a number of candidates could not secure access to local media outlets. In 11 regions, allegations were made that opposition-leaning media was obstructed by the State authorities at local level. In 21 regions, allegations were made that the local media was biased against the opposition and favoured Mr Yanukovych. One case of local media bias in favour of Mr Yushchenko was verified.

## X. DISPUTES, COMPLAINTS AND APPEALS PRIOR TO 21 NOVEMBER

The Election Law provides that a broad range of interested parties may file formal complaints against various electoral subjects. Complaints against a decision, action or lack of action, may be filed with either an election commission or a court. Applicable legal standards and rules on evidence vary between the two, and while granting precedence to courts, allow for the pursuit of the same complaint in different fora. A decision on a complaint can be appealed to a superior election commission or a higher-level court.

Prior to the 31 October round of voting, the majority of formal election complaints were filed with the CEC. Most of these related to the formation of PSCs and election precincts, illegal campaigning by candidates, state institutions and election commission members, and violations of the law by

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<sup>55</sup> Prior to the second round, 14 regional TV stations were monitored. Eight gave clear support to Mr Yanukovych. In Zaporizhzhya, the State-funded TV allocated 100% of its political and election prime time news coverage to the incumbent Prime Minister, with an exclusively positive or neutral tone. A similar monopoly was noted on a State-funded TV station in Odessa in the run up to the second round. Conversely, during both rounds the State-funded broadcaster in Ivano-Frankivsk, *TV Galichina*, provided 63% and 67% of exclusively positive or neutral coverage to Mr Yushchenko.

mass media. Many were rejected on procedural grounds without consideration of their merits, particularly regarding media violations and illegal campaigning.<sup>56</sup>

Although the CEC has the power to act on its own initiative when it obtains knowledge about a violation of the law, the CEC did not take a proactive role in this regard. Moreover, while over 350 complaints were filed with the CEC before 31 October, the OSCE/ODIHR EOM is only aware of 16 cases where it granted relief, thereby denying candidates and voters an effective means of legal redress.<sup>57</sup>

The Supreme Court heard appeals against decisions of lower courts and the CEC. In general, the Court was more active in addressing legal violations than the CEC. Its proceedings were open and transparent. All parties could present evidence and legal arguments in support of their claims. However, the manner in which the arguments were heard by the different judicial panels was not always consistent. For example, in one case concerning an appeal of a decision taken by a lower court of appeals, the Supreme Court did not allow lawyers to make arguments on behalf of the parties to the case, since the Election Law did not specifically provide for such representation. This decision ran counter to other cases where legal counsel was permitted to present arguments, a right established in the Civil Procedure Code and paragraph 13.9 of the 1989 OSCE Vienna document.<sup>58</sup>

The Supreme Court rejected a number of complaints on procedural grounds. In a significant ruling, it decided that a complaint alleging violations of the media-related provisions or illegal campaigning must be filed by the candidate or the party or bloc nominating him or her, and not by his or her proxy.<sup>59</sup> Thus, self-nominated candidates, such as Mr. Yushchenko, were put in an inferior position as potential complainants.

However, the Supreme Court recognised that candidate proxies do have the right to file complaints related to decisions, action or lack of action of an election commission. Candidate proxies filed numerous complaints against the CEC and various TECs. The Supreme Court overturned some CEC decisions, and in a number of complaints against state-wide media, it ordered the CEC to exercise its jurisdiction. It ruled against the CEC in a substantial number of cases, in particular when the complaint concerned the CEC's lack of action, including failure to respond to complaints.

After the first round of voting, the majority of election complaints were once again filed with the CEC. The CEC was passive in addressing alleged violations of the law and rejected most complaints on procedural grounds without considering their merits. A large number of complaints concerned the accuracy of TEC results protocols, which had recorded numbers of votes cast exceeding the numbers of ballots issued to the TECs. In all such cases, the majority of the CEC members voted to 'leave without consideration' these complaints, arguing that TEC protocols are not 'decisions' or 'acts' of an election commission, but simply "mathematical calculations".

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<sup>56</sup> The CEC assumed that all Mr Yanukovych's coverage was related to official duties, failing to consider that some could be deemed 'campaigning'. In addition, it failed to take action against *UTI*, despite the channel's failure to respect the law. In one case, the CEC refused even to view video evidence supporting the complaint.

<sup>57</sup> The CEC, citing the Election Law's failure to list complaints as documents that must be made available to official observers, declined a request for EOM observers to receive copies of complaints and decisions. Hence, the exact number of complaints filed with the CEC is not known. Nevertheless, the EOM has obtained copies of complaints from other candidates and political parties as suggested by the CEC and as permitted by law.

<sup>58</sup> The latter provides that in order to guarantee the effective exercise of human rights, "the right to a fair and public hearing within a reasonable time before an independent and impartial tribunal, include[s] the right to present legal arguments and to be presented by legal counsel of one's choosing".

<sup>59</sup> The complaint, filed by the proxy of Yushchenko against Yanukovych and the Party of Regions, alleged illegal campaign activity.

The Supreme Court's decisions on cases heard between the first and second rounds of voting appeared to be consistent with applicable legal provisions.

## **XI. CIVIL SOCIETY AND DOMESTIC OBSERVERS**

Civil society demonstrated a high level of interest and engagement of the citizens of Ukraine and their commitment to a democratic process. Following the first round, citizens in many regions seemed more confident in exercising their basic right of free expression.

Although candidates and parties nominating candidates can appoint observers in each polling station, legislation does not permit domestic non-partisan organizations to observe the process. This is contrary to OSCE commitments. Nevertheless, the Committee of Voters of Ukraine (CVU) deployed thousands of "observers" on each of the election days, accredited as journalists. With a few exceptions, CVU "observers" were able to monitor the process without hindrance. However, as journalists, they do not have observers' rights, such as to receive a copy of the PSC protocol.

## **XII. OBSERVATION OF THE 31 OCTOBER AND 21 NOVEMBER ELECTION DAYS**

### **A. ELECTION DAY, 31 OCTOBER 2004**

On the eve of the first round, four TECs<sup>60</sup> dismissed a significant number of PSC members appointed by the opposition. The timing of the dismissals was questionable, confusing and lessened the transparency of the process in these districts. While appeals were lodged against the dismissals, and some PSC members were re-instated, most appeal decisions were taken too late for their substance to be communicated to the PSCs and polling was conducted without their presence. Some 15% of observers reported that PSC members had been dismissed or ejected on Election Day.

On 31 October and 1 November, IEOM observers submitted 2,578 report forms from polling stations, as well as a large number of narrative reports. In general, observers were granted access to polling stations. However, PSCs in seven election districts denied observers entry.<sup>61</sup>

Despite the charged pre-election environment, large numbers of citizens voted in a generally calm atmosphere. Concerns expressed by interlocutors prior to Election Day, to the effect that polling would be disrupted by PSC members not appearing for work or leaving their posts, did not materialise. Most PSCs members co-operated with each other, and tried to apply correctly the polling procedures.

Notwithstanding their generally positive assessment, some 6% of observers assessed the voting process as bad (5%) or very bad (1%). There was a regional variation in the assessment. Polling was considered better in western regions (4% negative assessment) than in eastern regions (10% negative assessment).

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<sup>60</sup> Election districts 51 (Donetsk), 100 (Kirovohrad), 114 (Luhansk) and 138 (Odessa).

<sup>61</sup> Election Districts 41, 54, 55 (Donetsk), 71 (Uzhgorod), 106 and 107 (Luhansk) and 210 (Chernihiv). At PSC 6 in election District 106 (a prison), observers were only granted access after the vote had finished. During the second round, a similar situation arose at a prison in Odessa (TEC 136 PSC 4).

Observers assessed the accuracy of voter lists as bad or very bad in approximately 20% of polling stations visited. Citizens were often turned away from polling stations because of misspelling of their names in the voter lists.<sup>62</sup> On Election Day, citizens omitted from the lists can apply to a local court for a certificate confirming their right to vote. Some TECs also issued decisions enabling voters to register. On average, 800 citizens applied to each of the 225 TECs to be registered or to correct an error in their entry.<sup>63</sup> Observers reported that some courts charged voters a fee for the issuance of certificates, while others did not.

The secrecy of the vote was not assured in some 28% of polling stations visited and ‘violated’ in 4%. ‘Group voting’ was noted in 13% of polling stations visited. Although ‘open voting’, where voters show their marked ballots, was rare, observers reported a few gross violations of the right to a secret ballot, when voters were compelled to show their marked ballots before depositing them in the ballot box.<sup>64</sup> The use of a transparent ballot box in conjunction with the failure of the law to require voters to fold their marked ballots also adversely affected the secrecy of the vote.<sup>65</sup>

Observers reported a relatively high incidence of polling stations with over 3,000 registered voters, which is the legal limit. Such a high number of voters represented a significant challenge to PSCs. Observers assessed that some 9% of polling stations were inadequately laid out to conduct polling, and they reported overcrowding in 12% of polling stations visited.

The law does not regulate clearly the authority of police to be present in polling stations on Election Day or their role in transporting election material<sup>66</sup>. Observers reported that police were present in 62% of polling stations without a clear reason. In addition, observers reported that relatively large numbers of other unauthorised persons were present. In 4% of observers’ reports, unauthorised persons interfered or directed the voting process.<sup>67</sup>

Other problems included some 8% of polling stations having a number of ballots 10% in excess of the number of registered voters, whereas 3% of polling stations had 10% fewer ballots than the number of registered voters. About 70,000 ballots had to be reissued to polling stations, because some PSCs in 8 election districts had incorrectly marked one of the candidates as withdrawn.

According to observer report forms, some 3% of votes were cast outside the polling station through the mobile ballot box and some 4% of voters had their names added to voter lists on election day, either through an AVC, a court certificate or a TEC decision. However, as the protocols do not compel PSCs to record these items separately, it is not possible to know the official figures for those voting through an AVC, at home, or by virtue of a court certificate or TEC decision.

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<sup>62</sup> At PSC 97 in TEC 96 (Kyiv) some 500 people were omitted from the list. In Khmel’nytsky, observers estimated inaccuracies on the voter lists at 40%. In Ivano-Frankivsk one TEC estimated that 20% of names were mis-spelt.

<sup>63</sup> Yet, many omitted voters did not apply. Observers reported crowds of citizens attempting to receive a TEC decision or court certificate in elections districts 109, 200, 216 and 222. A demonstration of an estimated 1,500 people took place in election district 166 (Ternopil) protesting against omission of names in the lists.

<sup>64</sup> This was systematic at the polling station for students at the Technical University in Sumy (TEC 160, PSC 68) and occurred at the behest of University staff. It also occurred at TEC 2 (PSC 44) in Simferopol.

<sup>65</sup> During the second round at TEC 123, PSC 103 (Lviv), an official instructed soldiers not to fold their ballots.

<sup>66</sup> Prior to the election, a Deputy Minister of Interior informed the EOM that police would be present in polling stations only at the request of the PSC Chairperson. However, it appeared that PSCs were not aware of this.

<sup>67</sup> In Donetsk, observers reported the presence of groups of young men with armbands who were described as ‘private security’. In election districts 65 and 60 (Zhytomyr) local State officials were directing the election process in some polling stations.

Counting was observed in 187 polling stations; in 8% of these it was assessed as bad and 1% - as very bad. Counting took place in a generally calm atmosphere, although tension was reported more frequently than during voting (9% of polling stations). PSCs adherence to the correct procedures was variable<sup>68</sup>. Observers lacked confidence in the accuracy of the count in 5% of reports.

## **B. ELECTION DAY, 21 NOVEMBER 2004**

On 10 November, the CEC issued a clarification to TECs regarding the circumstances in which PSC members can be relieved of their duties. However, on the eve of the second round, TECs in nine regions abused the legal provisions and dismissed hundreds of opposition-nominated PSC members.<sup>69</sup>

On 21-22 November, IEOM observers submitted 2,489 report forms on the opening of polling stations (249 forms), voting (2,095 forms) and the counting (145 forms). Once again, voting generally took place in a calm atmosphere, but the environment and atmosphere in which the poll was conducted deteriorated compared to 31 October. Tension was reported in 7% of polling stations visited, also a higher incidence than on 31 October. In a few election districts, observers reported an atmosphere of intimidation. Some 3% of PSCs (71 cases) were uncooperative with EOM observers.

Observers' overall evaluation of the conduct of the poll was slightly worse than on 31 October, with 7% assessing it as bad or very bad. However, there was a regional variation. Polling in western and northern regions was assessed negatively in 5% of reports and 11% and 9% respectively in central and eastern regions.

Despite the fact that the CEC reported exceedingly high turnout in some eastern regions, for example over 96% in the entire Donetsk region, overcrowding was reported as less of a problem in the east of the country (4% of polling stations) than in the north (13% of polling stations). In general, polling stations were less overcrowded than on 31 October.

Generally, ballots were issued to voters in accordance with the legal provisions. However, observers noted that the procedures were less scrupulously followed than in October (2% violation versus 1% previously). A few observers reported that ballots were not signed or stamped by PSCs thereby rendering them invalid.<sup>70</sup> Other problems were similar to those reported on 31 October, for example, the secrecy of the vote was violated in 4% of polling stations, campaign material was visible inside or outside 7% of polling stations, police were present in 59% of polling stations and at least one PSC member had been dismissed in every sixth PSC. In 4% of visits, unauthorised persons were interfering or directing the polling process. Some observers reported that candidate observers were filming inside polling stations, and that at times this was intrusive and even constituted intimidation of voters.

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<sup>68</sup> Some 10% of PSCs did not secure the voter list, 20% of PSCs failed to check ballots for a PSC stamp and PSC members' initials, some 7% of PSCs were inconsistent in determining the validity of ballots cast for different candidates. A relatively high number of PSCs (25, or 14%) had difficulty in completing the protocol of results. In 12 PSCs (9%), members were not given copies of the results protocol, as is their legal right. Some 13% of polling stations did not display the results protocol as required by law.

<sup>69</sup> This occurred in Kirovohrad, Donetsk, Zakarpatska, Zaporizhia, Kyiv, Khmel'nytsky, Odessa, Luhansk and Volyn. In TEC 109 (Luhansk), 153 opposition PSC members were dismissed on 18 November.

<sup>70</sup> In TEC 103 PSC 120 (Kirovohrad region) almost 10% of ballots were "void" due to this phenomenon. At TEC 153, PSC 88 (Poltava), approximately 60 ballots out of 355 votes cast were void for the same reason. Observers at TEC 138, PSC 38 (Odessa) reported that the failure to sign ballots appeared deliberate. Similar concerns were reported in TEC 156 PSC 201 (Rivne).

IEOM observers reported serious shortcomings or concerns much more frequently than on 31 October. Indeed, the number of observations and reports received by observers from domestic interlocutors of serious violations rose from 3% to 9%. A regional variation was apparent with this figure rising to 16% in central regions and 11% in the south. A particular phenomenon was the ‘bussing’ of voters from one polling station to another. Observers reported 24 cases and received 44 additional reports from other sources.<sup>71</sup> Five cases of ballot stuffing were observed.<sup>72</sup>

On 21 November, far fewer voters were turned away than on 31 October. While this could be considered a positive development, the fact that neither the CEC nor a large number of TECs were able to provide EOM observers with data on the number of voters registered between the election rounds raised serious concerns.<sup>73</sup> The absence of publicly available data on the number of registered voters lessened the transparency of the process.

Despite the inclusion of an unspecified number of additional voters on the lists between the election rounds, a high number of names were also added to voter lists on Election Day (approximately 5% of all voters casting ballots).<sup>74</sup> The vast majority of these persons used AVCs to register and vote. Information supplied by observers indicated that AVCs were most frequently used in southern regions and fewest in western regions. In view of the abuse of AVCs verified by long-term observers prior to the election, concern existed that AVCs were abused on Election Day, as confirmed by short-term observers<sup>75</sup>.

Other anomalies were also noted, particularly in eastern regions. According to observers’ reports, it appeared that 4% of the voters country-wide had cast ballots through a mobile ballot box (i.e. outside the polling station). However, in the east (Donetsk, Luhansk and Kharkiv) this figure averaged over 7%, and in some cases figures were suspiciously high<sup>76</sup>, suggesting that it would

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<sup>71</sup> At TEC 136 PSC 75 (Odessa), located in a hospital, observers reported that many voters were not patients. However, they voted and then departed collectively by bus.

<sup>72</sup> In TEC 101 PSC 120 (Kirovohrad), where observers saw 20-30 ballots folded together in the ballot box. Similar incidents occurred at TEC 109 PSC 107 (Luhansk) and TEC 85 PSC 28 (Ivano-Frankivsk).

<sup>73</sup> Some TECs were able to furnish EOM observers with data. However, in some of these cases, other concerns arose due to the inexplicably high numbers of new voters added, for example TEC 61 (Donetsk) where 12,000 voters were added between the first two election rounds.

<sup>74</sup> In Kherson, observers at TEC 188 PSC 12 reported that many persons were added to voter lists on Election Day without a TEC decision or court certificate. At TEC 123, 67 (Lviv) official candidate observers from Donetsk who had traveled to Lviv before Election Day were allowed to register to vote without even an AVC. A similar situation was reported at TEC 07, PSCs 4 and 19 in Crimea. This was in violation of the law.

<sup>75</sup> In Ternopil (TEC 167) Zhytomyr (TEC 69) Crimea (TEC10) and Chernihiv (TEC 212), observers saw forged AVCs; In Khmel’nytsky (TEC 190, PSC 8), observers reported multiple voting with AVCs, which had been printed with an identical serial number. A similar report was received from Odessa (TEC 142, PSC 30); In Kharkiv (TEC 179) and Luhansk (TEC 116) observers reported busses full of persons voting using AVCs; In Zaporizhia, observers gathered clear evidence of systematic multiple voting through AVCs in (TEC 76, PSCs 80, 85 and 86); In Sumy (TEC 165, PSC 32) observers reported that 68 persons not resident in the area travelled together by bus to a remote polling station and cast ballots with AVCs; and in Crimea (TEC 2, PSC 44) 240 persons voted by AVCs, of which 199 voted during a one hour period when opposition candidate representatives had left the polling station. In this case, all AVCs were issued by 5 PSCs in election district 10. Observers reported that the signatures on the additional list appeared very similar.

<sup>76</sup> In a few exceptional cases, some PSCs in the Donetsk region claimed that over 30% or all voters had cast ballots outside the respective polling station through a mobile ballot box. In TEC 52, PSC 19 over a third of all voters voted with the mobile box; in TEC 41, PSC 2 402 voters were on the mobile list and in PSC 55 over 500 on the mobile box list; in PSC 55, observers reported that the signatures on the mobile list looked “suspiciously alike”; in PSC 7 the Chairperson, supported by the TEC Chairperson, refused observers’ request to view the mobile list. A similar request was denied to opposition PSC members at a polling station in TEC 52. At TEC 101 PSC 118 (Kirovohrad), observers noted that of some 2,200 registered voters; approximately 200 had requested to vote at home. Many of the requests appeared to have been written by the same hand.

represent a serious challenge to the PSCs to actually visit all the voters at home. Elsewhere, a few observers reported cases where the number of citizens requesting the mobile box had risen dramatically compared to 31 October.<sup>77</sup> On occasions, PSC members from the opposition were prevented from accompanying the mobile box.<sup>78</sup>

As for voting, observers' assessment of the counting process was worse than on 31 October, with 12% assessing the process negatively. The PSCs organization of the count was assessed poorly in 15% of polling stations. In 14% of polling stations visited, the PSCs did not pack and seal the voter list before the opening of the ballot box as required by law. Unauthorised persons, including police and local state officials, were present in almost half of the polling stations visited. In 7%, PSC members were unable to scrutinise ballots and in 19% - the PSC did not post the protocol publicly as required by law. Once again ballots were inconsistently declared invalid<sup>79</sup>. On a number of occasions, observers reported implausible turnout figures<sup>80</sup>.

### **XIII. TABULATION AND ANNOUNCEMENT OF RESULTS (31 October and 21 November)**

#### **A. TABULATION OF RESULTS AT TECs**

Observers' findings on the first two election days were very similar. The organisation of the results' tabulation was assessed as 'bad' or 'very bad' in 21% of TECs visited and 17% of TECs lacked transparency. Observers were denied access to scrutinise PSC protocols in a similar number of TECs and were denied access to the computerised tabulation system in almost a third of all TECs<sup>81</sup>. Observers lacked confidence in the accuracy of the tabulation in some 15% of TECs and assessed the process as 'poor' or 'very bad' in 12%.

Serious violations were reported to EOM observers in 11% of TECs visited. Election material was received 'unsealed' in 14% of TECs. By law, this should have resulted in an automatic recount of all ballots for the PSC. A further 10% of reports indicated that election material was inadequately secured by TECs after its arrival from PSCs. PSCs were seen completing or amending protocols in almost half of the TECs visited.<sup>82</sup> Unauthorised persons were present in some 38% of TEC buildings. The majority were police officers, although local state officials were also observed. In a few cases, they were directing or interfering in the work of the TEC.

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<sup>77</sup> In TEC 130, PSC 95 on 31 October, 49 voters had requested to vote at home, whereas the PSC reported that 330 requested to vote at home on 21 November.

<sup>78</sup> This was reported fairly frequently. In TEC 131, PSC 139 25% of voters were included on the mobile list.

<sup>79</sup> At TEC 82, PSC 32 (Zaporizhia) the validity of ballots lacking a stamp and signature varied depending on which candidate was marked. At TEC 60, PSC16 (Donetsk) observers witnessed a PSC member invalidating ballots cast in favour of Yushchenko by adding a second mark. At TEC 61, PSC 17 (Donetsk) observers saw votes for Yushchenko counted for Yanukovych. At TEC 153, PSC 14 (Poltava) the TEC had inverted the figures on a PS protocol where. Yushchenko was originally leading. In TEC 161 (Sumy) observers gathered documentary evidence that the results from PSCs 132, 140 and 154, were incorrectly entered in the TEC protocol, with hundreds of votes shifted from Yushchenko to Yanukovych.

<sup>80</sup> TEC 52, PSC 33 (Donetsk) with 1,284 registered voters of which 1,271 voted; TEC 52, PSC 41 with 1,329 voters of which 1,324 voted.

<sup>81</sup> During the first round, at TECs 71 and 74 in Zakarpatska, observers were prevented from entering the TEC premises by a group of young men, despite the presence of police.

<sup>82</sup> In one example reported during the second round, the results protocols for TEC 30 PSC 2 were either blank or filled with a pencil, even though they had been signed by PSC members.



The tabulation process encountered serious difficulties in at least 15 TECs, including particularly disturbing events in TEC 100<sup>83</sup>. In some central regions the tabulation was seriously delayed.

## **B. TABULATION OF THE RESULTS BY THE CEC**

The Election Law does not establish a deadline for TECs and PSCs to complete and submit their results protocols to the CEC and does not oblige the CEC to publish results by polling stations.

The CEC is granted 10 days to determine official election results after the first round and 15 days after the second round. The law requires that official results are tabulated by the CEC based on protocols compiled by the TECs. The results must be published in the Official Gazette no later than 3 days after they are established. Thereafter, the President should be inaugurated within 30 days.

The CEC established a computer network connecting its server to each of the 225 TECs. This system was used for both the 31 October and 21 November elections.

Starting on the early morning of 1 November, the CEC began to provide partial, unofficial, aggregate results on its website, based on data sent electronically by TECs. On 2 November, when 97.6% of the results had been processed and were giving Mr Yanukovych a slender lead, the system stopped tabulating PSC results. The CEC, claiming technical malfunction and ruling out any possibility of fraud, dismissed the Head of the IT Department and established a working group to investigate the matter. The opposition claimed that this was a ploy to deny Mr Yushchenko the leading position, and that the partial results released by the CEC were false. In addition, they alleged that more AVCs were used than issued.<sup>84</sup>

On 1 November, the CEC began tabulating the official election results using TEC protocols. On 10 November, the CEC announced the results of the 31 October election. No candidate had secured the majority of votes required for victory. Therefore, the CEC announced a second round election to be held on 21 November. However, in contrast to unofficial preliminary results, the official results placed Mr Yushchenko as the leading candidate with 39.87% of the vote compared to Mr Yanukovych's 39.32%. The only other candidates who scored over 1% were: Mr Moroz (5.81%), Mr Symonenko (4.97%) and Ms Vitrenko (1.53%). While the CEC published TECs results, it failed to comply with its often-stated intention to publish all PSCs results. The CEC also failed to publish the number of ballots printed and delivered to election commissions.

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<sup>83</sup> In TEC 100 (Kirovohrad), where a large number of PSC members were illegally dismissed on the eve of the election, or barred from polling stations on Election Day, election material was observed being transported to local state administration offices during the tabulation. Tabulation was stopped at an early stage because a large number of TEC members were not present. On 9 November the CEC decided to dismiss the entire membership of TEC 100 for failing to carry out its duties, and the day after it also decided to invalidate election results for the entire election district arguing that the TEC protocol was "not produced in accordance with the law". Before the results were invalidated, preliminary unofficial results gave Mr Yushchenko a lead in this district. Results from TEC 100 were excluded from the official state-level results. The Supreme Court overturned the CEC's decision and noted that the CEC had violated the suffrage rights of voters at 128 polling stations. The Court obliged the CEC to tabulate the PSC protocols itself and to amend the official results accordingly. The Court also noted that invalidation of election results could only occur at the level of the PSC, and only in cases where the limited grounds stated in the Presidential Election Law were established. The CEC failed to comply with this order, until mid-December, after a new CEC was appointed.

<sup>84</sup> While the CEC did announce the number of AVCs printed, it provided no data on the number issued to voters or on the number of persons who voted using AVCs. The law does not require the CEC to reconcile this data.

The CEC did not attempt to improve the security of its computer system in advance of the second round. Once again the opposition alleged that the results were manipulated. Implausibly, the CEC announced that turnout in the Donetsk region exceeded 96%. During the Supreme Court's consideration of the appeal against the final results, it became evident that turnout figures for Donetsk had been increased, on occasions after the close of polls.

On 24 November, during a chaotic session, the CEC announced final election results giving Mr Yanukovych 49.46% of the vote to 46.61% for Mr Yushchenko. Prior to announcing the results, the CEC failed to consider a large number of official complaints filed by the Yushchenko campaign. Four CEC members refused to sign the official protocol of results. In a significant ruling, the Supreme Court forbade the CEC to proceed further with the publication of the results, thereby blocking the procedure of inauguration of the new president.

#### **XIV. POST-ELECTION EVENTS (22 NOVEMBER – 4 DECEMBER)**

##### **A. DEVELOPMENTS AFTER THE 21 NOVEMBER VOTE**

On election night, Mr Yushchenko called his supporters to gather in Kyiv's Independence Square and other locations around the country. As preliminary results showing a narrow Yanukovych lead were released by the CEC, Mr Yushchenko, charging electoral fraud, requested his supporters to remain in Independence Square until their claimed electoral victory was recognised. The hasty CEC's decision to declare Mr Yanukovych the winner deepened the emerging crisis. Demonstrators blocked access to Government and presidential administration buildings. Socialist Party leader Oleksandr Moroz and former Prime Minister Anatoliy Kinakh joined Our Ukraine and the Yulia Tymoshenko blocs into a "Committee for National Salvation".

During the mass demonstrations that followed the flawed second round, civil society played a crucial role. Hundreds of thousands of citizens gathered in Kyiv to protest against the irregularities and manipulation of the electoral process. They were supported by a number of non-governmental organizations, many of which were active both before and after the election days.

Tensions remained high over the following two weeks, but the protests remained calm. The State authorities respected the right of citizens to peaceful assembly throughout the period of demonstrations, which followed the second round and law enforcement bodies refrained from using force. Channel 5 TV publicised the protests state-wide.

Parliament met frequently during the crisis. On 27 November, it adopted a resolution invalidating the election results announced by the CEC. It also passed a no-confidence motion in the CEC and adopted a Resolution to call on the President to dismiss the government.

On 26 November, a roundtable process was initiated with participation of international mediators<sup>85</sup>, with the aim of keeping the unfolding crisis<sup>86</sup> from further deteriorating. On 1 December, the

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<sup>85</sup> The roundtable included: the two candidates, President Kuchma, Speaker Lytvyn, OSCE Secretary General Kubis, European Union High Representative for the Common Foreign and Security Policy Solana, Polish President Kwasniewski, Lithuanian President Adamkus, Polish Minister of Foreign Affairs Cimoszewicz (also Chairman of the Committee of Ministers of the Council of Europe) and Speaker of the Russian Duma Gryzlov.

<sup>86</sup> A number of regional governments, predominantly in western Ukraine, announced that they would not recognize Mr Yanukovych as President. Some even adopted Resolutions recognizing Mr Yushchenko as President. Conversely, in eastern and some southern parts of Ukraine, regional governments reacted with

participants signed a document which included, *inter alia*, commitments by the parties to abide by the anticipated ruling of the Supreme Court, to refrain from using force and adopt amendments to the Election Law and the Constitution regarding the division of power between the President and Parliament.

## **B. SUPREME COURT DECISION OF 3 DECEMBER 2004**

The most significant complaint adjudicated after the second round concerned Mr Yushchenko's challenge to the CEC resolution establishing the final election results. The hearing of the complaint was televised and lasted five days during which five CEC members, including the Deputy Chair, testified. The Court's consideration of the complaint was open and transparent. All parties had the opportunity to present evidence and legal arguments.

In its ruling of 3 December, the Court found, *inter alia*, that CEC members had not been given an adequate opportunity to scrutinise documents submitted by TECs prior to the CEC's determination of the final results<sup>87</sup>. The Supreme Court concluded that the CEC acted unlawfully in determining the final election results and established that a number of significant violations of the law and the Constitution had taken place before, during and after the 21 November<sup>88</sup>.

The Court ruled that it was impossible to establish the will of voters and the election results. Therefore, it was necessary to restore the rights of the election participants by holding a repeat second round vote. The Court ordered the CEC to call for a repeat vote, to be held on 26 December. On 4 December, the CEC complied with the Supreme Court's ruling.

## **C. AMENDMENTS TO THE ELECTION LAW**

Following the Supreme Court ruling, on 8 December, the Parliament adopted temporary amendments to the Election Law with a view to reduce the potential for new election fraud. The amendments would only apply to the repeat second round of voting, and required, *inter alia*, the appointment of a new CEC<sup>89</sup> and reformation of TECs and PSCs. Parliament appointed the new CEC, while TECs and PSCs were to be formed based on an equal number of members, Chairpersons and Secretaries appointed by the two candidates. In addition, the amendments provided for enhanced transparency of the election process<sup>90</sup> through the mandatory release of

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indignation to the Kyiv-centred protests. And on November 28, at a conference in Severodonetsk (Luhansk) attended by Mr Yanukovich, some regional Governors began discussing proposals for the autonomy of some eastern regions, if Yushchenko won.

<sup>87</sup> These documents included TEC protocols, dissenting statements made by TEC members, and election-related complaints. Sixty-five complaints were pending with the CEC at the time it decided the official results. This fact was withheld from some CEC members. It remained unclear who was responsible for withholding the information. The Court also found that, at the time the CEC determined the final election results, court cases concerning complaints made at PSC and TEC-level were still ongoing.

<sup>88</sup> These violations affected areas including: voter registration, the issuance and use of AVCs, media and campaign regulations, composition and functioning of commissions, mobile voting, PSC protocols and transport to TECs.

<sup>89</sup> On 6 December, the OSCE/ODIHR issued preliminary recommendations relevant to the conduct of the repeat second round vote. Many of these were reflected in the amendments adopted by the Parliament.

<sup>90</sup> The amendments enhanced control over ballot papers and AVCs, and restricted the criteria for qualifying for mobile voting. They also allowed the PSCs to make minor corrections to voter lists on election day (e.g. spelling of voters' names); granted candidate representatives the right to receive a copy of voter lists before election day, limited the registration of voters on election day to those in possession of a court certificate, limited the number of documents that voters could produce to prove their identity to the *propiska* (internal

important information such as the number of voters registered in each polling station, of those who applied for mobile voting, or an AVC.

## **XV. REPEAT SECOND ROUND VOTE**

### **A. PERFORMANCE OF THE RECONSTITUTED ELECTION ADMINISTRATION**

Immediately after adopting amendments to the election law, Parliament dissolved and reappointed the CEC. All parliamentary factions were able to propose and to vote on each CEC member. Four members including the former CEC Chairperson, all nominated by Mr. Yanukovich's Party of Regions, failed to receive sufficient votes for reappointment.

The newly reconstituted CEC administered the election process efficiently and with significantly more transparency, providing promptly all required data<sup>91</sup>. On 16 December, it also complied with the Supreme Court order to re-calculate the first round election results by including TEC 100 (Kirovohrad), which had been annulled by the former CEC.

Most observers reported that, in the limited time available, the appointment of TECs went remarkably smoothly. Similarly, almost half a million PSC members were appointed within tight deadlines. Nevertheless, observers reported that some 12% of TECs experienced difficulties reaching a quorum to take valid decisions and a poor level of 'collegiality' was reported in almost 32%.

### **B. VOTER LISTS**

Parliament decided that the lists prepared for the 31 October election, supplemented with citizens added to the lists on 31 October through a decision of a court or a TEC, should be re-used. Yet insufficient time was available for local government authorities and the election administration to correct inaccuracies and errors in the voter lists, and for citizens to check their entries or register to vote. In addition, despite clear formulation of the legal amendment and a CEC clarification sent to TECs on 21 December, some TECs and PSCs were uncertain about which lists should be used for the repeat second round. Observers reported some cases where PSCs used the lists prepared for the 21 November election in parallel with those prepared for the 31 October election.

### **C. CAMPAIGN FOR THE REPEAT SECOND ROUND ELECTION**

The campaign for the repeat second round officially commenced on 5 December. Its conduct brought Ukraine substantially closer to meeting OSCE commitments. In contrast to the two previous campaign periods, fundamental freedoms and civil and political rights were largely respected.

While campaign conditions were much more equal, overall the campaign was more low-key. However, taking into consideration the wide-ranging and highly visible civil and political activity that followed the second round, the campaign never truly ceased, and each candidate's supporters remained highly mobilized. During the campaign period, the two candidates confronted each other

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<sup>91</sup> identity document), military card, temporary ID card and prison certificate. The amendments also enhanced the rights of observers  
Such as the numbers of registered voters, voters requesting to vote at home, and AVCs printed, distributed and issued.

sharply. This was particularly visible during the presidential debate broadcast live on TV on 20 December, in which a new format permitted the candidates to put questions directly to each other.

Mr Yanukovich took a leave of absence as Prime Minister, and focused his campaign mostly in the east and south of Ukraine. During the run up to the 26 December repeat vote, Mr Yanukovich presented himself as being in opposition to both President Kuchma and Mr Yushchenko. In the final week of the campaign, Mr Yanukovich repeatedly called for the repeal of amendments to the election law that restricted AVCs and voting at home, which he characterised as an infringement of voters' rights.

In the run up to the repeat election, international medical experts verified that Mr Yushchenko had been poisoned by dioxin. Mr Yushchenko asserted publicly that he was sure he had been poisoned at the behest of Ukrainian authorities. The Yushchenko campaign released new television advertisements and public statements about citizens' ability to receive education in and use the Russian language, and Mr Yushchenko stressed the importance of good relations with Russia, which he hoped would improve under his future leadership. His supporters organized a convoy of cars travelling from city to city, termed the 'freedom train', predominantly in areas that had supported Mr Yanukovich during previous rounds.

Compared to the periods prior to 31 October and 21 November election rounds, significantly fewer observers received allegations that State employees, and others dependent on the State for their livelihood, were pressured in their choice of candidate.<sup>92</sup> Observers in western, northern and central regions did not receive any reports of challenges to citizens' civil and political rights. EOM observers did not detect any widespread misuse of State resources prior to the repeat election.

Nevertheless, as in previous rounds, inflammatory campaign material of unclear provenance (and therefore illegal) was also produced. While this was less widely distributed than previously, campaign material that linked Mr Yushchenko to Nazism went far beyond acceptable norms of free speech.<sup>93</sup>

#### **D. MEDIA MONITORING (4-24 DECEMBER 2004)**

After the flawed 21 November election, a number of significant changes in the media's presentation of political and electoral issues had gradually occurred. The EOM found that during the run-up to the 26 December vote, the media covered the campaign in a much more balanced manner.

During this period, the media offered voters a diverse range of views and a number of journalists informed the EOM that the main TV networks no longer followed '*temnyky*'. Observers received far fewer allegations that the State structures at local level obstructed opposition-leaning media. As Mr Yanukovich had taken a leave of absence from his position as Prime Minister, he no longer derived as much media attention.

*UTI* complied with a CEC decision to allocate free campaign airtime to both candidates. A televised candidate debate took place on *UTI* and was broadcast live by other TV channels. The

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<sup>92</sup> From 15 September to 31 October, EOM observers received over 80 allegations that citizens were pressured to support a candidate. These reports were received in 16 of the 27 regions. From 1-21 November, EOM observers received over 40 such allegations in 12 regions, many of which observers were able to verify. From 13-26 December, EOM observers received seven such allegations in four of the regions.

<sup>93</sup> Distributed at a Yanukovich rally in Odessa.

format of the debate provided both candidates with an opportunity to directly exchange views. *UTI* offered both candidates generally equal conditions to convey their messages<sup>94</sup>.

*Inter* and *I+I* offered viewers a plurality of views, and in its prime time news programmes, *Inter* presented even-handed and impartial coverage of both contestants. While *I+I* provided both with a similar amount of airtime, it tended to favour Mr Yushchenko. *ICTV* and *Novy Kanal* were generally balanced, whereas *STB* broadcast marginally more positive coverage of Mr Yushchenko. Significantly, all these channels provided both candidates and their supporters with airtime to challenge their rivals' opinions.

*TRK Ukraina* continued to demonstrate an overt bias in favour of Mr Yanukovich and against Mr Yushchenko. Conversely, *Channel 5* continued to favour Mr Yushchenko. The type of negative campaign observed during the previous rounds of election was much less in evidence.

*Uriadovy Kurier* continued to favour Mr Yanukovich, but less massively than before, and the tone of the paper's coverage was better balanced.

#### **E. RESOLUTION OF ELECTION DISPUTES (4-25 DECEMBER)**

After the 3 December decision of the Supreme Court, few formal complaints were filed, mostly from Mr Yanukovich. In one case lodged with the CEC, he alleged that Mr Yushchenko's campaign had been funded by American sources, which would be a violation of the electoral law. On 22 December, the CEC rejected the complaint, as no evidence was provided. In addition, Mr Yanukovich filed two complaints with the Supreme Court seeking to reverse CEC resolutions regulating the printing of ballots. Both complaints were rejected<sup>95</sup>.

The most significant complaint was filed with the Constitutional Court and challenged the 8 December amendments to the electoral law, arguing that they restricted citizens' suffrage rights (by restricting voting at home) and the freedom of movement (by limiting the use of AVCs). On 25 December, the day before the election, the Constitutional Court ruled that the amendments were constitutional, with the exception of the amendment limiting the right to vote at home to citizens with a "first category" disability (persons who are unable to take care of themselves and require daily assistance from others). The Constitutional Court ruled that this provision was too restrictive and ordered the CEC to take the necessary measures to implement the Court's ruling. Yet insufficient time to inform all PSCs and voters may have led to confusion as regards which category of voters would actually qualify for mobile voting.

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<sup>94</sup> During the third monitoring period, it provided Mr Yanukovich with 57.5% of its political and election prime time news coverage, of which 35% was evaluated as positive and 57% as neutral. During the same period, Mr Yushchenko received 42.5% of similar airtime, of which 28% had positive and 60% neutral connotations.

<sup>95</sup> The first challenged the CEC resolution establishing monitoring committees to supervise ballot printing at two printing houses, arguing that the resolution was passed before President Kuchma signed an amendment to the law permitting ballot printing in a second print house. The Court rejected the complaint because the CEC resolution did not harm the interests of Mr Yanukovich. The second complaint challenged the CEC resolution to print 38,113,075 ballots, arguing that this number was insufficient. The complaint was rejected because the number of ballots ordered was the same as for the first round and because more than 10,000,000 ballots were left unused during both previous election rounds.

## F. ELECTION DAY, 26 DECEMBER 2004

On 26-27 December, IEOM observers submitted 5,920 report forms. Observers were deployed to over half of the TECs to observe proceedings throughout election night. Other observers visited TECs and followed events until the early hours of the morning.

The bi-partisan PSC members generally co-operated well. Overall, observers assessed the process much more favourably than the two previous rounds<sup>96</sup>. Observers noted the persistence of some problems, such as presence of police and, other ‘unauthorised persons’, instances of failure to assure the secrecy of the vote (particularly in eastern regions), and the sporadic presence of campaign material.

While voters in 5% of polling stations visited did not always produce identity documents before receiving a ballot, polling procedures were generally respected. Observers reported few serious violations. However, in 3% of polling stations (5% in eastern regions and 6% in southern regions) they received allegations that serious violations had occurred. A higher number of formal complaints were filed at polling stations in the east and south of Ukraine than the national average.

Observers reported that relatively few citizens applied to have their names added to voter lists on Election Day (0.3% of all registered voters). Once again, some citizens, although fewer than on 31 October, were turned away from polling stations because their names did not appear on voter lists.<sup>97</sup> However, in Donetsk, observers noted cases where voters’ names were added to voter lists without court order. Some 7% of observers assessed the accuracy of lists as poor or very bad, a figure similar to 21 November. Inaccurate lists were more frequently reported in southern regions (13%) and Donetsk (12%).

The overwhelming majority of PSCs had received information on the legislative amendments passed on 8 December (96%), yet as insufficient time was available to inform all PSCs and voters of the above mentioned Constitutional Court’s ruling on mobile voting, some citizens may have had trouble in exercising this right. Some TECs, PSCs and Local Government Authorities provided transport for the elderly and disabled to enable them to vote in polling stations. According to data released by the CEC, some 590,000 voters (1.6% of registered voters) requested a mobile vote of whom some 90% voted. However, observers noted a few cases where an unusually large number of citizens had apparently requested to vote outside the polling station.<sup>98</sup>

Whereas on 21 November almost 11% of reports assessed the vote count as poor or very bad, on 26 December the corresponding figure had fallen to 7%. However, a clear regional variation was noted with observers in southern (11%), eastern (10%) and central (10%) regions assessing the process much less favourably than in northern (2%) and western (3%) regions. This pattern was also apparent in observers’ assessment of the polling environment, organisation of the count,

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<sup>96</sup> Only 3% assessed the conduct of voting as bad. This figure rose to 5% in eastern regions. In contrast to previous rounds, no mass expulsions of PSC members occurred immediately prior to Election Day. On Election Day, far fewer PSCs had a member ejected or dismissed (5% versus 15%). Tension in polling stations was reported half as often compared to 21 November (3% versus 7%). Observers reported no violent incidents.

<sup>97</sup> Observers in Lviv, Kirovohrad, Donetsk and Crimea reported that residents of entire buildings were omitted from voter lists.

<sup>98</sup> In TEC 39, PSC 2 (Dnipropetrovs’k), TEC 143, PSCs 57, 7, 47 and TEC 136 PSC 64 (Odessa), TEC 184 PSC 72 (Kharkiv). Overall, the largest concentrations of mobile voters were found in Donetsk and Luhansk, where it was reported that 160,000 citizens requested to vote at home (3% of registered voters). Ternopil, Volyn and Poltava also had higher than average numbers. In Kyiv, only 0.4% of voters requested it.

understanding of the procedures and the accuracy of the results as reported. Generally, respect for counting procedures improved as did observers confidence in the accuracy of PSC-level results<sup>99</sup>.

#### **G. TABULATION AND ANNOUNCEMENT OF ELECTION RESULTS**

IEOM observers submitted 194 reports covering the work of the TECs on election night. Overall, observers assessed the vote tabulation process much more positively than on the two previous occasions. Only 4% assessed it negatively (12% in October and 13% in November). The transparency of the process improved significantly (only 2% reporting negative findings compared to 17% in both previous rounds). However, IEOM observers were denied access to scrutinize PSC protocols in 9% of TECs and were not able to scrutinise the computerised tabulation process in 14% of TECs. In general, the organisation of the tabulation also improved. Nevertheless, it was assessed as bad in 11% of reports. Problems reported by observers were similar to those noted previously<sup>100</sup>.

In an attempt to prevent tampering with the preliminary results figures, the CEC established a telegraph/teletype system that was used in parallel to the existing computer system. The CEC began announcing preliminary results before midnight on Election Day and posted on its website PSC-level results. The speed and transparency with which election results were announced stood in marked contrast to the previous two election contests. Prior to announcing the final election results, the CEC considered all outstanding complaints and appeals and individually approved each of the 225 TEC-level protocols. On 10 January 2005, the CEC announced the official election result according to which Mr Yushchenko obtained 51.99% of the votes, and Mr Yanukovych 44.2%.

Because the CEC published PSC level results, the EOM was able to conduct a basic analysis of the results. Of 33,075 PSC protocols posted, 736 showed a turnout exceeding 99%. Of these 736 PS, 180 had more than 500 voters. Such figures are usually perceived as highly implausible<sup>101</sup>.

#### **H. RESOLUTION OF ELECTORAL DISPUTES**

After 26 December, Mr Yanukovych filed almost 100 complaints with the CEC. The majority were rejected on procedural grounds. However, the CEC did consider a complaint that challenged the election result, but found the evidence presented by Mr Yanukovych to be unconvincing and rejected the complaint. This and other CEC decisions were appealed to the Supreme Court, which also rejected the appeals, mostly on procedural grounds.

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<sup>99</sup> Only 2% did not pack and seal the voter list as required by law (14% in November). In general, PSC members were free to examine ballots. However, in 8% of polling stations, PSCs did not determine the validity of ballots consistently. This was noticeable in eastern regions where such shortcomings were noted in 16% of PSCs visited. In 6% of polling stations PSCs did not complete the protocols in ink, in 10% PSC members did not receive a copy of the protocol and in 17% the results were not posted publicly, most often in central regions.

<sup>100</sup> These included: election material arriving in unsealed packages (7% - most frequently in eastern regions), unrest at the TEC (13%), PSCs completing protocols at the TEC rather than the PSC (10% nationwide, 18% in western regions), protocols with different results for the same PSC (5% nationwide, 11% in eastern regions and 8% in central regions), and protocols and election materials being left unsecured (27% nationwide, 40% ) In general, these shortcomings were reported less frequently than on 31 October or 21 November. Observers received reports of violations from other sources in 19% of TECs, most frequently in eastern regions (31%).

<sup>101</sup> The PSCs concerned were spread across the country. In Donetsk region there were a higher number of improbable results, followed by Odessa. In total, Mr Yanukovych received 168,040 votes from polling stations above 99 %, while Mr Yushchenko received 100,503 votes. In 93 of these polling stations, Mr Yanukovych did not receive a single vote, while Mr Yushchenko did not receive a single vote in 62 polling stations.



On 14 January 2005, Mr Yanukovich filed a complaint to the Supreme Court challenging the CEC results, claiming that ‘systematic fraud’ had taken place throughout Ukraine, which made it impossible to determine the ‘will of the voters’. In addition, Mr Yanukovich claimed that the 8 December ‘temporary’ amendments which limited ‘mobile’ and ‘absentee’ voting, had deprived many voters of their suffrage rights. Mr Yanukovich’s legal team attempted to present Mr Davydovich, the newly appointed and current Chairman of the CEC, as a witness, but did not convince the Court that the CEC Chairman’s testimony could support the complaint. Mr Yanukovich complained that his right to a fair trial, guaranteed by Art.6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, was denied because he had not been given a fair opportunity to present relevant witnesses. Mr Yanukovich succeeded in presenting the testimony of only one CEC member, Mr Donchenko, who believed that many voters had been disenfranchised by the 8 December amendments that restricted voting at home and the use of AVCs.

The Court rejected the complaint on 20 January. However, the Supreme Court’s decision appeared to have been known publicly and was published in the media before it was announced officially in the courtroom in the presence of the parties. This disregard for legal procedure furthered Mr Yanukovich’s claims that his complaint had not received fair consideration.

## **XVI. RECOMMENDATIONS**

With parliamentary elections scheduled in the first half of 2006, attention should be focused on the reforms necessary to address the shortcomings and weaknesses of the election framework identified in this report. The OSCE/ODIHR offers the following recommendations, with a view to support the stated goal of Ukraine to meet the election related OSCE commitments. The OSCE/ODIHR stands ready to assist the authorities and civil society of Ukraine in achieving this goal.

### **A. LEGAL FRAMEWORK AND OSCE COMMITMENTS**

1. Some of the Amendments to the Election Law adopted on 8 December 2004, which only applied to the repeat second round of voting, proved efficient in limiting the potential for abuses, and should be retained in a revised framework.
2. Serious consideration should be given to strengthening the legal framework in order to prevent undue pressure on vulnerable groups, particularly public sector workers and students, in their electoral choices. Such practice violates paragraphs 5.4 and 7.7 of the Copenhagen Document.
3. Action is required to prevent the abuse of state administrative resources during election campaigns, in order to comply with paragraph 7.6 of the Copenhagen Document.
4. The law should permit observation of the election process by domestic non-partisan election observers, in accordance with paragraph 8 of the Copenhagen Document. Such groups should be granted the same rights and responsibilities as official international observers.
5. Legal provisions or restrictive interpretations of the law by the Courts, that discriminate against independent candidates – stronger restrictions on their campaign activities than to those of parties, limitations of their ability to lodge complaints - should be changed as they

- currently infringe upon paragraph 7.5 of the Copenhagen Document and should be removed from the law.
6. The law should require the CEC to post on its website all PSC results prior to the determination of final election results. This would assist interested parties in verifying if the results have been reported accurately and honestly; a requirement set out in paragraph 7.4 of the Copenhagen document.
  7. Action is required to ensure that the secrecy of the vote is uniformly respected in accordance with paragraph 7.4 of the Copenhagen Document. Requiring voters to fold their ballots twice before leaving the polling booth might improve ballot secrecy.
  8. Greater effort is required to ensure fair access for candidates to the media, in particular State media, to present their political platforms as set out in paragraph 7.8 of the Copenhagen Document.
  9. Article 64.12 of the Election law violates the principle that citizens have the right to receive and impart information regardless of frontiers as set out in paragraph 26.1 of the OSCE Moscow Document. Article 64 should be amended accordingly.
  10. All courts should permit parties in election-related disputes (election commission members, candidates, voters) to have their case represented by lawyers who they have entrusted to present their arguments in court, as this right is established in the Civil Procedure Code and paragraph 13.9 of the OSCE Vienna document (1989).
  11. Those who have engaged in electoral fraud should be held accountable according to the law, and due consideration should be given with regard to the fitness of persons convicted of either actions or inactions that have resulted in electoral fraud, to serve on election commissions in the future.

## **B. CANDIDATE REGISTRATION AND WITHDRAWAL**

12. The law could set a deadline before which ballots should not be printed and after which candidates may not formally withdraw.
13. It is advisable that ballots, once printed, should not be amended by hand, as this opens the possibility for deliberate manipulation or unintentional human error.
14. The number of signatures required to register as a candidate should be reduced to a maximum of one percent of the registered voters, in line with the best practices of the Council of Europe. The procedures for the CEC to verify the signatures should be set out in law.
15. The legal framework should stipulate the penalties for the proven falsification or fabrication of signatures supporting a candidate registration.
16. The threshold for refunding a candidate's financial deposit should be reduced to 3%; equivalent to the support required for a party list to be represented in parliament.

### C. VOTER REGISTRATION

17. In view of the upcoming 2006 parliamentary elections, this issue should be addressed as a matter of urgency. It is recommended that an in-depth review of voter and civil registration take place, in which all stakeholders are consulted.
18. Serious consideration should be given to establishing a permanently updated, centralised register of citizens, from which voter lists are thereby extracted. Rights and responsibilities of various agencies involved should be set out, with a view to securing the confidentiality of the personal data of citizens.
19. Voter lists should be available for citizens to check entries periodically, not only during election periods.
20. Consideration should be given to amending the legislation to provide a reasonable deadline before Election Day, after which lists cannot be amended. The establishment of the deadline should balance the need to respect eligible citizens' right to be registered, with the need to assure the integrity of the process.
21. Should a future election take place according to the current provisions for voter registration, and to ensure that PSCs follow a uniform approach, the law should set out in detail the responsibilities of local executive authority and PSCs in updating voter lists.

### D. ELECTION CAMPAIGN

22. It is advisable to set out which 'campaign' activities are impermissible. Any restriction should be limited to the campaign period and should not impinge upon the right to express political views.
23. Penalties applicable to a violation of campaign-related provisions should be proportionate to the offence. The actions or behaviour of candidates should not be grounds for de-registration, except where criminal action has occurred and subsequent conviction results in de-registration.<sup>102</sup>
24. Article 2 of the Election Law limits the right to engage in the campaign to citizens who have the right to vote. Every person has the right to free expression, association and speech. This includes the right to promote and support candidates and political parties, regardless of whether the person has the right to vote. Consequently, the article should be amended to ensure respect for these rights.
25. Regulations covering campaign finance issues should be strengthened to improve the transparency of the funding of candidates' election campaigns, with data on candidates' campaign donations and expenditure made publicly available.<sup>103</sup> In addition, consideration

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<sup>102</sup> On 5 November, the CEC Chairman, Serhyi Kivalov, warned that the CEC has the authority to withdraw a candidate's registration if found to have campaigned illegally.

<sup>103</sup> For example: which persons or groups may legitimately make donations to candidates' election campaigns, possible limits on the size of such donations, how 'in kind donations' are accounted for, requirements on candidates to disclose the source of campaign funds and their campaign expenditure, the manner in which these

should be given to increasing campaign spending limits while placing reasonable limits on the size of individual donations and those given by “legal entities”. It is necessary to establish by law which State body has responsibility to regulate campaign finance issues.

26. If certain State owned resources may be legitimately used during a campaign, the law should ensure that adequate recompense is made to the State budget for such usage and that the resources are available to all candidates on equal terms. To enhance the public perception of a clear separation between State and partisan activity, it is advisable to proscribe the displaying of campaign or partisan material in or on government buildings.

#### **E. MEDIA**

27. The State authorities should move ahead promptly with its plans to transform State broadcasters into an independent public service media that will develop an impartial, objective and informative editorial line, and whose reporting will be balanced including during an election period.
28. An independent media council with a clear mandate to oversee and control free, equal and fair access to the public broadcasters should be created. Its membership should be diverse, with a non-partisan composition including media professionals, civil society, judicial bodies, the government and political parties.
29. The Election Law should be amended to require the publicly funded media and private broadcasters to provide fair and balanced coverage of parties in the news and current affairs programmes. However, the right of private media to editorial comment and critical analysis should be respected.
30. A statutory body (possibly the National Council for Radio and TV Broadcasting) with a clear mandate should ensure respect for media related provisions, including the equitability of broadcasters’ campaign related coverage and to take prompt and effective action against serious legal violations. Establishing a programme to systematically monitor the media during an election campaign period would assist the statutory body in this task.
31. The media-related provisions of the Election Law fail to clearly distinguish between State and private media. Additionally, it does not define the various forms of media including ‘mass media’ to which many articles refer. These shortcomings should be rectified.

#### **F. ELECTION ADMINISTRATION**

32. The parliament should consider streamlining and simplifying the election legislation through introducing an ‘Election Code’. This would ensure that all types of elections are held under similar conditions and administrative procedures. The law should include unambiguous provisions detailing, in an exhaustive manner, the circumstances when a member of any election commission can be replaced.
33. The law should be amended to ensure inclusive composition of election commissions, reflecting the current political reality, and which would permit them to operate in a

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expenditure accounts are scrutinized, the body with responsibility to verify candidates’ accounts and, what penalties exist for violating the various campaign finance provisions.

professional manner, free from political interference. All members should undertake their tasks as impartial administrators. No party or political interest should be in a position to control the functioning of the election administration. Members should be required to resign their seat in the relevant assembly upon taking their position in an election commission.

### Central Election Commission

34. The CEC should use the powers granted to it by law to decide more transparently and effectively on complaints and appeals. Where campaign-related provisions have been seriously violated, the CEC should refer the matter to the public Prosecutor for further investigation. The transparency of the CEC should be enhanced and its register of complaints should be publicly accessible.
35. The CEC, possibly in conjunction and consultation with other State bodies, the media and expert civil society groups, should conduct a voter information programme *inter alia* regarding voter registration and polling procedures.
36. Greater transparency in the production and distribution of ballot papers is required. A body similar to the 'Supervisory Committee', established for the 26 December election, could oversee the printing of ballots as well as of other sensitive material, e.g., protocols and AVCs. The procedures for ballot printing and distribution should be regulated, either in law or by a Resolution of the CEC. The procedures should prevent the printing of 'surplus' ballots, additional to those stipulated by the CEC. Information on the number of ballots printed and distributed to each TEC should be made publicly available.

### Territorial and Polling Station Commissions

37. While it is quite common for the intermediate and lower levels of the election administration to rely to some extent on the support of the local government executive for their operations, it is preferable that TEC have sufficient resources to operate independently of local government structures.
38. If the choice of a party-based nomination is made for TEC/PSC, the law should elaborate a method for the allocation of Chair and Secretary positions in an inclusive manner.
39. TEC sessions should provide their decisions to local media for publication, and provide copies to election stakeholders and observers without delay.
40. Both TECs and PSCs should receive thorough and consistent training to improve their adherence to correct procedures, particularly relating to the counting of ballots.
41. It is advisable to retain the provision contained in the 8 December 2004 amendments to the Election Law setting a deadline after which PSC members cannot be dismissed.
42. To improve confidence in out of country voting, it is not advisable to establish new polling stations close to Election Day. To improve the transparency of the process, it is advisable to set deadlines for candidates to appoint PSC members and observers at a reasonable interval after the establishment of polling stations abroad. Full transparency is required in the voter lists for polling stations abroad.

43. The election law should clarify, in an exhaustive manner, the circumstances in which police may be present inside polling stations and TEC premises. Security arrangements at the CEC and TECs should respect the need for transparency in the electoral process, while maintaining security for their personnel and premises.

#### **G. POLLING PROCEDURES AND ELECTION DAY**

44. The law requires that the number of registered voters in any given polling station does not exceed 3,000. However, this number should be reduced, and the overall number of polling stations increased accordingly, in order to ensure more efficient and orderly polling and counting procedures.
45. It is recommended that the law employs different terms for ‘void ballots’ (those lacking a PSC stamp or signature or those with an incorrect PSC number) and ‘invalid ballots’ (those where the intention of the voter is unclear) and that PSC protocols include the figures as two separate items.
46. PSC level protocols should include data on the number of voters (i) that registered on Election Day through a court certificate or TEC decision (ii) that used mobile voting and (iii) that used an AVC.
47. The CEC should be required by law to reconcile the numbers of AVCs printed, distributed, issued and used. In addition, the law should incorporate additional safeguards to prevent misuse of AVCs. Consideration should be given to retaining some of the amendments concerning AVCs adopted on 8 December, for instance that an AVC should state the election district in which the citizen will vote and the designation of special polling stations for voters using AVCs.
48. Parliament should review provisions concerning mobile voting. The law should facilitate the exercise of suffrage by all citizens, while assuring the integrity and transparency of the process.
49. Provisions that provide for continuous video recording and surveillance inside polling stations should be seriously reconsidered with a view to be abolished, so as not to compromise the secrecy of the vote or confidence in the process, and eliminate a potential factor of intimidation towards voters.
50. The CEC and TECs should keep records of the number of protocols printed and distributed. Consideration should be given to including serial numbers on each protocol, with a separate number for each copy given to candidate representatives. Unused protocols should be invalidated by PSCs before the transport of election materials to the respective TECs.
51. The procedures for counting ballots should permit the establishment of the number of ballots cast in both the conventional ballot box and the mobile ballot box, and these two sets of figures should be entered separately into the respective polling station protocol to reflect the total number of ballots cast. Once the total number of ballots cast has been established, the ballots from the conventional ballot box and the mobile ballot box should be mixed together before the commencement of the vote count to determine the overall polling station results.

## H. TABULATION OF RESULTS

52. A deadline should be established for PSCs to deliver their protocols to TECs, and for TECs to deliver their protocols to the CEC. These deadlines should be compatible with the time necessary to hear and rule effectively on any complaints or appeals prior to finalising TEC level results.
53. The CEC should retain the use of telegraph (or fax, to ensure “direct” communication between TECs and CEC), retaining a second line of communication to receive preliminary results from the TECs.
54. The law should incorporate amendments to the legislation that require the CEC, TEC and PSCs to announce prior to election day: the number of voters registered, the number of citizens’ requests for mobile ballot box, the number of citizens that received AVCs, and those registered to vote with AVCs.

## I. OTHER RECOMMENDATIONS

55. The ‘10% violation threshold’ established by Article 80 is arbitrary and should be removed from the law. Invalidation of election results should be possible where a Court has proven electoral violations that prevent determination of the election outcome. The election law should provide clear guidance on the circumstances in which ballots should be recounted and the procedures to be applied, such that full transparency is assured.
56. The police should receive training on their role during the election period, including on election day, in order to ensure respect for citizens’ fundamental freedoms throughout the election process. The Ministry of the Interior should elaborate unambiguous guidelines in close cooperation with the CEC.
57. Although Ukrainian is the sole State language, to facilitate the participation by all citizens on an equal basis, consideration should be given to the provision of certain electoral material in other languages that are widely spoken.
58. Only ‘valid votes’ should be taken into consideration in determining the outcome of any election, since invalid and votes “against all” fail to express political choices.
59. The option to vote “against all” candidates should be removed from the ballot. 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. Votes “against all” are usually unequal to votes “for” a party list or candidate.

## ANNEX: ELECTION RESULTS

Source: Central Election Commission official website (www.cvk.gov.ua)

First Round Results:CEC / 16.12.04			Second Round Results:CEC / 24.12.04		
Candidates	Votes	%	Candidates	Votes	%
V. Yushchenko	11 188 675	39.9	V. Yushchenko	14 222 289	46.61
V. Yanukovich	11 008 731	39.26	V. Yanukovich	15 093 691	49.46
O. Moroz	1 632 098	5.82			
P. Symonenko	1 396 135	4.97			
N. Vitrenko	429 794	1.53			
A. Kinakh	262 530	0.93			
O. Yakovenko	219 191	0.78			
O. Omelchenko	136 830	0.48			
L. Chernovetsky	129 066	0.46			
D. Korchynsky	49 961	0.17			
A. Chornovil	36 278	0.12			
M. Hrabar	19 675	0.07			
M. Brodskiy	16 498	0.05			
Y. Zbitniev	16 321	0.05			
S. Komisarenko	13 754	0.04			
V. Volga	12 956	0.04			
B. Boiko	12 793	0.04			
O. Rzhavsky	10 714	0.03			
M. Rohozhynsky	10 289	0.03			
V. Kryvobokov	9 340	0.03			
O. Bazyluk	8 963	0.03			
I. Dushin	8 623	0.03			
R. Kozak	8 410	0.02			
V. Nechyporuk	6 171	0.02			
Against All Candidates	N/A	1.98	Against All Candidates	N/A	2.31
Void (Invalid)	N/A	N/A	Void (Invalid)	N/A	1.59
Total Votes	28 035 184	99.85	Total Votes	30 511 289	99.97

Repeat Second Round Results:CEC / 10.01.05		
	Votes	%
V. Yushchenko	15 115 712	51.99
V. Yanukovich	12 848 528	44.20
Against All Candidates	N/A	2.34
Void (Invalid)	N/A	1.45
Total Votes	29 068 971	99.98



## ABOUT THE OSCE/ODIHR

The Office for Democratic Institutions and Human Rights (ODIHR) is the OSCE's principal institution to assist participating States "to ensure full respect for human rights and fundamental freedoms, to abide by the rule of law, to promote principles of democracy and (...) to build, strengthen and protect democratic institutions, as well as promote tolerance throughout society" (1992 Helsinki Document).

The ODIHR, based in Warsaw, Poland, was created as the Office for Free Elections at the 1990 Paris Summit and started operating in May 1991. One year later, the name of the Office was changed to reflect an expanded mandate to include human rights and democratization. Today it employs over 100 staff.

The ODIHR is the lead agency in Europe in the field of **election observation**. It co-ordinates and organizes the deployment of thousands of observers every year to assess whether elections in the OSCE area are in line with national legislation and international standards. Its unique methodology provides an in-depth insight into all elements of an electoral process. Through assistance projects, the ODIHR helps participating States to improve their electoral framework.

The Office's **democratization** activities include the following thematic areas: rule of law, civil society, freedom of movement, and gender equality. The ODIHR implements a number of targeted assistance programmes annually, seeking both to facilitate and enhance State compliance with OSCE commitments and to develop democratic structures.

The ODIHR monitors participating States' compliance with OSCE human dimension commitments, and assists with improving the protection of **human rights**. It also organizes several meetings every year to review the implementation of OSCE human dimension commitments by participating States.

Within the field of **tolerance** and **non-discrimination**, the ODIHR provides support to the participating States in implementing their OSCE commitments and in strengthening their response to hate crimes and incidents of racism, xenophobia, anti-Semitism and other forms of intolerance. The ODIHR's activities related to tolerance and non-discrimination are focused on the following areas: legislation; law enforcement training; monitoring, reporting on, and following up on responses to hate-motivated crimes and incidents; as well as educational activities to promote tolerance, respect, and mutual understanding.

The ODIHR provides advice to participating States on their policies on **Roma and Sinti**. It promotes capacity-building and networking among Roma and Sinti communities, and encourages the participation of Roma and Sinti representatives in policy-making bodies. The Office also acts as a clearing-house for the exchange of information on Roma and Sinti issues among national and international actors.

All ODIHR activities are carried out in close co-ordination and co-operation with OSCE participating States, OSCE institutions and field operations, as well as with other international organizations.

More information is available on the ODIHR website ([www.osce.org/odihr](http://www.osce.org/odihr)).