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

**JOINT OPINION  
ON THE DRAFT LAW NO. 3366  
ABOUT ELECTIONS TO THE PARLIAMENT  
OF UKRAINE**

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

**adopted by the Council for Democratic Elections  
at its 29<sup>th</sup> meeting (Venice, 11 June 2009)**

**and by the Venice Commission  
at its 79<sup>th</sup> Plenary Session  
(Venice, 12-13 June 2009)**

**on the basis of comments by**

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### **I. Introduction**

*1. This joint opinion on the Draft Law No. 3366 About Election to the Parliament of Ukraine ("draft law") is provided by the Organization for Security and Co-operation in Europe's Office for Democratic Institutions and Human Rights (OSCE/ODIHR) and the Council of Europe's European Commission for Democracy through Law ("Venice Commission") upon a request from the Ukrainian Parliament Committee on State Building and Local Self-Governance. This joint opinion comments on the most recent version of the draft law (CDL(2009)084). Earlier opinions<sup>1</sup> of the OSCE/ODIHR and the Venice Commission, as well as numerous election reports from previous OSCE/ODIHR and Council of Europe observation missions in Ukraine, provide excellent background for understanding the historical development of the election legislation in Ukraine. This draft law continues to incorporate recommendations for improvement. The most significant change is the introduction of a new electoral system. The system proposed in the draft law provides for 450 parliamentarians to be elected under a form of proportional representation that uses territorial election districts, including a foreign territorial election district where ballots are cast by out of country voters. Under the proposed system, most members of parliament will be elected from national lists, with the mathematical possibility for individual political*

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<sup>1</sup> See Opinion on the Law on Elections of People's Deputies of Ukraine, CDL-AD(2006)(002), prepared by the OSCE/ODIHR and the Venice Commission (Opinion 338/2005 (Strasbourg/Warsaw 20 January 2006) and Joint Opinion on the Law on State Registers of Voters of Ukraine, CDL-AD(2007)026, prepared by the OSCE/ODIHR and the Venice Commission (Opinion 438/2007 (Strasbourg/Warsaw 55 June 2007).

*party candidates to be elected within an in-country territorial election district from a territorial list.*

*2. The draft law includes provisions that could improve on the legislative framework for parliamentary elections in Ukraine. Although the draft law addresses some important previous recommendations offered by the OSCE/ODIHR and the Venice Commission, the provisions related to the proposed electoral system, prohibition of independent candidates, limitations on candidacy rights are of concern. These are areas that should be improved with additional revisions to the draft law.*

*3. It should also be noted that any positive impact the draft law may have in conducting the election process, in line with OSCE commitments and other international standards for democratic elections, will ultimately depend on the level of political will exhibited by the political parties and authorities of Ukraine to implement the election legislation in good faith.*

*4. This opinion is based on an unofficial English translation of the draft law. The translation reviewed consists of 173 articles of text on 189 pages.*

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

- an unofficial English translation of the Constitution of Ukraine,*
- the OSCE/ODIHR Final Report on the 2007 Pre-term Parliamentary Elections in Ukraine, 30 September 2007 OSCE/ODIHR Election Observation Mission Report,*
- the OSCE/ODIHR Final Report on the 2006 Parliamentary Elections in Ukraine, 26 March 2006,*
- the OSCE/ODIHR Final Report on the 2002 Parliamentary Elections in Ukraine, 31 March 2002,*
- the OSCE/ODIHR Final Report on the 1998 Parliamentary Elections in Ukraine, 29 March 1998,*
- Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE (29 June 1990),*
- European Convention for the Protection of Human Rights and Fundamental Freedoms (1950), and*
- the Code of Good Practice in Electoral Matters adopted by the Venice Commission, including the Guidelines on Elections (CDL-AD(2002)023rev).*

*6. This opinion was adopted by the Council for Democratic Elections at its 29<sup>th</sup> meeting (Venice, 11 June 2009) and by the Venice Commission at its 79<sup>th</sup> Plenary Session (Venice, 12-13 June 2009).*

## **II. Executive Summary**

7. The draft law provides very detailed regulation of elections to the Verkhovna Rada (parliament). The draft law has clearly taken into consideration a number of recommendations of the OSCE/ODIHR and the Venice Commission. There are numerous and detailed provisions to enhance transparency, accountability, and establish processes for voting, counting, and tabulation of results.

8. Although the draft law has a number of positive features, and incorporates previous recommendations of both the OSCE/ODIHR and the Venice Commission, there are fundamental areas in the draft law that should be addressed with further revisions. These fundamental areas include, among other issues, provisions that allow the presentation of candidatures other than those of political parties, for instance, voters' coalitions.

9. In addition to addressing the above fundamental areas, adoption of the following recommendations would improve the draft law:

- The text of the draft law is overly complex and could be further improved to ensure that persons who are not electoral experts can understand how elections are to be conducted and how their representatives are elected to parliament;
- The complexity of the draft law reinforces the need for the codification of all election legislation in Ukraine in a single unified code;
- The draft law should require that detailed results, including Precinct Election Commission (PEC) results, should be published on the Central Election Commission (CEC) website in order to enhance transparency;
- In order to provide timely and relevant campaign finance information to the public, the draft law should require full disclosure, before and after elections, of sources and amounts of financial contributions and the types and amounts of campaign expenditures;
- There is a danger that the use of video and cameras by observers from party and other observers may compromise the secrecy of the vote and create an atmosphere of intimidation, and this provision should be removed.

### III. Discussion of the Draft Law

#### A. Nomination and Candidate Registration

10. The Draft Law links tightly candidatures to parties (Article 10). Article 53.1 establishes that the party can nominate a person, who is a member of this party or non-partisan. This respects the principle of not requiring persons to be members of parties to stand for office. However, the problem is that only parties may present candidatures and this raises some additional limitations: Paragraph 7.5 of the OSCE Copenhagen Document recognizes the "right of citizens to seek political or public office, individually or as representatives of political parties or organisations, without discrimination". Whilst the option for a "democracy of parties" is totally congruent with European standards, the Draft law should include provisions that ease the eligibility of citizens, without diminishing the option for structured candidatures. Hence, the possibility of having candidatures which respond to the model of coalition of voters under the same requirements of submission of candidatures as standard political parties will contribute to enhance fairness of electoral process This requires changes in article 10.2.

11. Article 10.2 of the draft law requires that political parties be registered for at least a year prior to election day in order to participate in the election. This long and stringent restriction imposes substantial limits on the right to participate in elections with no obvious benefits or justification. ***The Venice Commission and the OSCE/ODIHR recommend that this time period should be reduced.*** Additionally, the Draft Law should provide for associative subjects other than political parties (for

instance, coalitions) that allow the participation of citizens in specific elections in the same conditions as political parties.

12. Each candidate for deputy must complete an income and property declaration (Article 56.1). Article 56.3 permits the district election commission to request the State Tax Administration for verification of the details contained in the declaration. It is not likely that the election commission would check the details of every declaration. *As has been previously recommended by the OSCE/ODIHR and the Venice Commission, the law should provide objective and reasonable criteria on which such requests for verification should be made.* Inclusion of reasonable and objective criteria would prevent abuse of this article and selective use against candidates from a particular party.

13. Article 9.4 prohibits the candidacy of a citizen convicted of any “deliberate” crime unless such conviction has been served and pardoned under the procedure established by the law. Under Article 9.4, the passive right of suffrage seems to be denied as a result of any conviction, regardless of the nature of the criminal offence. Broad legal provisions which restrict suffrage rights of general categories of groups of persons without consideration of specific facts unique to the person are not in line with good international practice. Paragraph I.1.d of the Council of Europe Venice Commission Code of Good Practice in Electoral Matters provides that the deprivation of the right to stand as candidate could be based on a “criminal conviction for a serious offence”, and also states that “the proportionality principle must be observed”.<sup>2</sup> *The Venice Commission and the OSCE/ODIHR recommend that consideration be given to amending the law in line with the principles of “proportionality” and “seriousness” of offence stipulated in the Venice Commission Code of Good Practice in the Electoral Matters.*

14. The OSCE/ODIHR and the Venice Commission had previously expressed concern about a provision in the existing law that could be applied to allow a political party to “eliminate” or re-order a candidate on a list after the list had been registered. In a positive development, this provision is not found in the draft law. However, the draft law retains in Article 59.1.2, the provision which allows a political party to remove a nominated candidate from a list up until 15 days before the election. *The Venice Commission and the OSCE/ODIHR again recommend that this provision be carefully considered.*

## **B. Electoral System**

15. The draft law establishes a new electoral system for the parliament of Ukraine. A brief overview of the system is appropriate and helpful.

### Electoral districts

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<sup>2</sup> Paragraph I.1.d/4 of the Code of good practice of Electoral Matters (CDL-AD(2002)023rev) provides that in cases of deprivation of the right to vote and to be elected:

- i. provision may be made for depriving individuals of their right to vote and to be elected, but only subject to the following cumulative conditions:
  - it must be provided for by law;
  - the proportionality principle must be observed; conditions for depriving individuals of the right to stand for election may be less strict than for disenfranchising them;
- ii. The deprivation must be based on mental incapacity or a criminal conviction for a serious offence.
- iii. Furthermore, the withdrawal of political rights or finding of mental incapacity may only be imposed by express decision of a court of law.

16. Article 1 of the draft states that “The parliamentary election is held on the basis of proportionate system in which members of parliament are elected in multi-mandate territorial election districts as well as in the national election district in the manner prescribed by this Law.” Similarly, Article 18 states: “The parliamentary election is held in the national multi-mandate election district that includes the whole territory of Ukraine that is divided into multi-mandate territorial election districts and a foreign election district that incorporates all foreign polling stations created in compliance with Article 22 of this Law.”

17. According to Article 18.2, the CEC decides on the creation of the multi-mandate territorial election districts no later than six months after the law comes into force. Under Article 18.3, the number of mandates for each territorial election district should be at least eight and no more than 12. The process for designing districts seems thought for avoiding malapportionment (i.e. keeping relatively stable the proportionality of votes/seats). The option of drawing districts rather than establishing them on the basis of some pre-existing territorial units may leave ground for temptations of “gerrymandering” (i.e. an arbitrary design of districts to favour specific votes concentration).

#### Candidates

18. Article 53 states that a political party must nominate candidates in at least two thirds of the territorial election districts and the national election district in order to participate in the elections. This provision may discriminate against regionalist parties or parties representing territorially established minorities. The maximum number of candidates permitted for a territorial election district list is the number of mandates to be elected in the territorial election district. The minimum number of candidates a political party is required to include on the list of candidates in the territorial election district is one candidate. All candidates on the political party list for the territorial election district must also be included on the political party list at the national level.

19. Unfortunately this draft law does not provide for a possibility for individuals to be elected as independent candidates to Parliament. This problem was already mentioned in previous joint opinions by the Venice Commission and OSCE/ODIHR on the electoral legislation of Ukraine. This practice is inconsistent with Paragraph 7.5 of the OSCE Copenhagen Document which specifies the right of citizens to seek office individually or as candidates of political parties.

#### Allocation of mandates

20. The electoral system combines the traditional vote to individual candidatures with party list. The result is a *sui generis* variant of preferential voting. According to Article 74, the ballot for territorial election districts in Ukraine will have a “space for the voter to enter the ordinal number of the parliamentary candidate the voter casts their vote for in the complete parliamentary candidates’ list in the territorial election”. However, for the foreign election districts, the ballot will have a “space for the voter to enter the ordinal number of the party for the parliamentary candidates’ election list the voter casts their vote for”.

21. Article 84 regulates the counting of ballots. For territorial election districts in Ukraine, votes are counted for candidates, while in the foreign election district the votes are counted for the political parties. Allocation of mandates is addressed by Articles 91, 92, and 94. A legal threshold of two percent (2%) is established by Article 94.3: “The entitlement to the participation in the distribution of the deputy mandates shall be acquired by the parliamentary candidates entered in the election list of the

parties in the territorial election districts and in the national election district, provided that no less than two per cent of the votes of all the voters, who took part in the voting within the national election district, have been cast for the parliamentary candidates from this party within the national election district." The minimum threshold is known in many European electoral regimes and their purpose is systematically to avoid an excessive fragmentation of parliaments. Combined with preferential voting, it may create the possibility for a candidate to reach the electoral quota within a territorial election district, thereby winning a mandate in the candidate's own right, but not be allocated a mandate if the candidate's political party did not reach the two percent (2%) threshold nationally. This limitation does, however, not contradict European standards.

22. When Articles 91, 92, and 94 are read together, it would appear that mandates are allocated to political parties that have reached the two percent (2%) threshold nationally, after individual mandates are distributed to candidates who have valid votes equal to or greater than the electoral quota in the respective territorial election district (provided those candidates are from a political party that reached the 2% threshold nationally). Then, according to Article 94.10, five candidates designated from each political party (to the extent the political party has won the mandates) are given the next mandates "**irrespective of the number of votes cast for every one of them in the respective territorial election districts (territorial election district) in the order determined by the parliamentary candidates' election list in the national election district**". This language gives preferential treatment to these five candidates over all other candidates. After the preferential mandates are awarded to the five chosen by the political party, then the rest of the mandates are awarded to political party candidates (who did not reach the electoral quota in a territorial election district) based on their respective remainders. Although lengthy, the relevant text of Article 94.10 should be carefully considered and is given below:

First and foremost, the parliamentary candidates shall be recognized elected deputies, if the numbers, received as a result of dividing the number of the votes cast for every one of them within the territorial election district by the electoral quota of the territorial election district, are bigger than one or equal one. These deputies shall be recognized elected in the territorial election districts.

Within the received remainder, the number of deputies elected in the territorial election districts is subtracted from the number of mandates, which the party received within the national election district. The parliamentary candidates entered into the parliamentary candidates' election list from the party in the national election district at the first five ordinal numbers in the amount, which cannot exceed the received remainder and be bigger than five. Such parliamentary candidates are recognized elected irrespective of the number of votes cast for every one of them in the respective territorial election districts (territorial election district) in the order determined by the parliamentary candidates' election list in the national election district. While determining the respective parliamentary candidates, the candidates who were elected deputies in the territorial election district, shall not be counted. The parliamentary candidates entered into the parliamentary candidates' election list in the national election district registered at the first five ordinal numbers, who are recognized elected deputies, shall be considered elected in the national election district.

The number of deputies elected in the territorial election districts and the number of parliamentary candidates entered into the parliamentary candidates' election list in the national election district under the first five

ordinal numbers, who are recognized elected, is to be subtracted from the number of mandates the party has obtained within the national election district. Within the received remainder, the parliamentary candidates entered into the party election lists are recognized elected whose numbers, defined in the order established in point 3 part six of Article 91 of this Law, are less than the corresponding numbers defined for other parliamentary candidates entered into the same party election lists, in the amount that equals the received remainder. Should these numbers, defined for two or more parliamentary candidates from such a party be equal, the one recognized elected shall be the parliamentary candidate, for whom the remainder between the number of votes necessary to be elected in the territorial election district, in which they were nominated, is less than the remainder for the parliamentary candidates from the same party, for whom the remainder was defined analogically and whose numbers determined in the order established in point three part six of Article 91 of this Law and point 21 part one of Article 94 of this Law are equal. The parliamentary candidates entered into the party election lists, for whom the numbers defined in the order established by point three part six of Article 91 of this Law and point 21 part one of Article 94 of this Law are less than the corresponding numbers defined for other parliamentary candidates entered into the same party lists and who are recognized elected deputies, shall be recognized elected in the respective territorial election districts.

23. The system for allocation of the mandates favours the first five names at the national level by concentrating mandates on them irrespective of the number of personal votes obtained by each of these. Two opposing principles act here: first, the individual candidates as the accumulator of votes at the territorial level. Second, candidates must unavoidably belong to a certain party or electoral list. The allocation system resolves this privileging what could be called "party designated candidates" (i.e. the first five candidates which, reasonably, will coincide with top leadership) of the national lists over eventually most voted local candidates. The system is certainly a peculiar one but cannot be considered an illegitimate one. Article 53.7 establishes that:

All parliamentary candidates included on the party's election lists in the territorial election districts are included on the party's election list of parliamentary candidates in the national election district. Persons not included on the party's election lists in the territorial election districts are not included on the party's election list of parliamentary candidates in the national election district.

24. However the proposed electoral system gives preferential rights to the top five candidates of each political party. If mandate allocation is to be based on the individual performance of candidates in obtaining votes then this rule should apply equally to all candidates. The proposed special treatment of the top five candidates on the list violates the fundamental principle of non-discrimination and equal treatment before the law.

25. Hence, the names included at the national level are the sum of those of territorial constituencies and the candidates are elected in different territorial constituencies. Secondly, the order of priority of the parliamentary candidates in the party's election list in the national election district is determined at the party's congress (meeting, conference). This means that electors know beforehand who are the top five candidates in every list and, hence, their vote is influenced by this fact.



26. Finally, the text of the allocation rules is very complex and difficult to understand. As an example, Article 91.6.3 consists of a single sentence of 164 words in the English translation. ***The Venice Commission and the OSCE/ODIHR recommend that consideration be given to revising the draft law to more clearly state the allocation rules so that persons who are not electoral experts can understand how their representatives are elected to parliament.***

### **C. Election Administration**

#### *Election Commissions*

27. Election commissions operate at three levels: the Central Electoral Commission (CEC), district electoral commissions (DECs) and the polling station (or precinct) electoral commissions (PECs); of which there were 33,974 created for the 2007 pre-term parliamentary elections (excluding those opened for out-of-country voting). The formation and general powers of the CEC (a permanent body) are addressed in a separate law. There are no qualification requirements for members of DECs and PECs other than a requirement for the secretary to have a command of the state language sufficient to deal with the paperwork (Article 25.6). However, provisions do limit participation in a DEC to remove potential conflicts of interest (disallowing participation of parliamentary candidates, candidates proxies, members of local government, court employees, law enforcement, and other state employees) (Articles 25.3 and 25.4).

28. The deadline for nomination of party representatives to DEC positions is, as per Article 26.5, eighty days prior to the election. However, Article 26.1 provides for the same eighty days deadline for which the CEC should establish the DEC. A simultaneous deadline for DEC nominations and establishment of DECs by the CEC might cause some administrative difficulties. Consideration should be given to allowing the CEC additional time for establishing the DEC.

29. Each party or bloc with a faction in the existing parliament, or who had a faction in the parliament immediately preceding the existing parliament, is entitled to nominate representatives to DECs (Article 26.2). PEC representatives may be nominated from "parties that are election process subjects" (Article 27.4).

30. The chair, deputy chair and secretary of a DEC or PEC may not represent the same party or bloc (Articles 26.11, 27.15, and 28.11). However, these Articles provide for the exceptions in cases where insufficient nomination by parties makes the fulfilment of this requirement impossible. While Articles 26.11, 27.15, and 28.11 seek to ensure that each party or bloc with members in the DECs obtains a "proportional share" of management positions, this laudable attempt to ensure fairness and equitable treatment may be difficult to implement in practice.

31. The decisions of superior election commissions are mandatory for subordinate commissions. The draft law provides various mechanisms by which a superior election commission can ensure that a subordinate commission complies with its duties. The CEC can convene a meeting of a DEC and a DEC can do the same for a PEC. As an ultimate sanction, all members of a DEC or a PEC may be dismissed en masse by the commission which formed that particular commission if the subordinate commission has systematically violated the constitution or laws of Ukraine (Article 36.1). Other provisions allow individual members of commissions to be dismissed (Article 36.3). Given that dismissal is a drastic step, it may be desirable for the CEC to report after each election each instance in which these powers were exercised and

the reasons for their use. The system of reporting should be developed in line with reporting requirements for election commissions currently iterated in Article 34 of the draft law.

32. Article 36.3.2 appears to grant a nominator of an election commission member the unlimited right to remove the member at any time, even if the member has been performing his or her duties in a professional and legal manner. Such a provision can subject election commission members to political pressure and threats of removal should the commission member vote on issues contrary to possible instructions given by the nominator. The Venice Commission has expressed in its Code of Good Practice in Electoral Matters (Point 77) that recall of electoral commissions is not an acceptable practice. Commission members must act impartially without regard to the political motivations of the nominator. This has also previously been noted by the OSCE/ODIHR and the Venice Commission.<sup>3</sup> Persons who hold positions on the election administration must be completely free from political influence or pressure. The Venice Commission Code of Good Practice notes: "The bodies appointing members of electoral commissions must not be free to dismiss them at will."<sup>4</sup> ***The Venice Commission and the OSCE/ODIHR recommend, consistent with the international and European principles and the Code of Good Practice, that the draft law be revised to provide the grounds when a member of an election commission can be dismissed.***

33. A superior election commission may invalidate a decision of a subordinate election commission which violates the law or is adopted in excess of the subordinate commission's powers. The subordinate commission's decision may also be declared illegal or cancelled by a court (Article 32.15). These are important powers to ensure legality. It should also be made clear that a superior commission or court may adopt a decision to remedy any unlawful *omission* of a subordinate commission with immediate binding effect. There is a degree of repetition of the rule in Article 33.15 and in Article 113.8. The latter provision makes clear that the CEC or the courts, rather than necessarily invalidating the decision of a lower election commission, may order reconsideration of an issue or action by a lower commission which occurred on voting day or during counting and results tabulation. It would be preferable to address these issues in the same part of the law.

34. DEC's are required, under Article 30.2.9, to assist in conducting and in certain instances to organise meetings of candidates and party representatives with voters. Election administration should be left with regulatory, controlling and facilitating functions and not organisational ones as far as the election campaign is concerned. Organising campaign events is not generally, and should not fall, within the duties of election administrators. This is a task that should be left to political parties and candidates. This has been previously noted by the OSCE/ODIHR and the Venice Commission. As the provision remains unchanged in the draft law, its reconsideration should be carefully considered in future amendments.

35. Article 3.5.2 of the draft law prohibits state and local government bodies from interfering with the election process except in cases provided by the law. While this is undoubtedly an appropriate rule, the extent of the potential problems in this area justifies a more carefully articulated prohibition. Previous recommendations have

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<sup>3</sup> See, for instance, Joint Opinion on Draft Amendments to the Electoral Code of the Republic of Armenia (CDL-AD(2006)026) and Joint Opinion on amendments to the Electoral Code of the Republic of Armenia CDL-EL(2007)003rev

<sup>4</sup> See Code of Good Practice in Electoral Matters, II 3.1 f.

suggested that the law would benefit from having an article devoted to this issue with detailed indications of what is and what is not permitted, supported by appropriate and explicit sanctions in the Administrative and Criminal Codes. It is imperative that the Law makes it clear that all persons not directly involved in conducting the election, *especially* representatives of local government, are excluded from PECs and DEC's *unless* specifically and formally invited to attend by the PEC or DEC in order to resolve a particular problem and only until such problem is resolved. This recommendation remains.

#### *Creation and Equipping Polling Stations in Ukraine and Abroad*

36. Amendments adopted in 2005 reduced the maximum number of voters at each polling station from 3,000 to 2,500. The Venice Commission and OSCE/ODIHR have suggested a further reduction in polling station size to help eliminate overcrowding. While any further reduction clearly has cost implications, these may be outweighed by the positive impact smaller polling stations will have on ensuring the practical implementation of universal suffrage. Reduction in the maximum number of voters for a polling station warrants consideration.

37. The creation of foreign polling stations requires, as per Article 22.1, the number of voters determined on the basis of the State Voter Register that reside in a foreign state to exceed nineteen. Further, the Ministry of Foreign Affairs is required to submit a statement on the liquidation of permanent foreign polling stations in case of decrease of the number of voters in the respective state below twenty voters (Article 22.5). While the creation of foreign polling stations is notable for its clear intent of extending enfranchisement to all possible voters, practical concerns may make it impossible for foreign polling stations to be established in all foreign states. Consideration may be given to other ways of ensuring franchise for voters residing abroad.

#### **D. Observers and Transparency**

38. The draft law contains numerous laudable mechanisms designed to enhance transparency in the election process, and promote accountability. The presence of representatives of the mass media and the guarantee of unhampered access to all election related events as well as sessions of election commissions and polling stations on election day further serves to enhance transparency in election process.

39. Each registered party is permitted to send a representative to sessions of the CEC during the election process (Article 68.1). The representative is entitled to participate in the CEC's proceedings but may not take part in decision making; they have only an advisory role. This does ensure, however, that each party is represented, has an opportunity to advance the views of the party, and is able to see the documents and materials under discussion by the CEC. The OSCE/ODIHR and the Venice Commission have previously recommended that the list of rights accorded to party representatives in the CEC should include the right to be notified in advance of CEC sessions. This recommendation remains.

40. There are three categories of official observer: those appointed by parties participating in the election, international observers, and observers from (non-governmental) public organisations (Article 70). This is a particularly welcome innovation first found in the 2005 legislation, which has helped to bring the legislation into conformity with Ukraine's commitments under paragraph 8 of the Copenhagen Document. However, consideration should be given of having all such observers apply for registration through the Central Election Commission rather than through

respective DECs, in order to ensure that accreditation is offered for the entire national territory, not only a specific territorial region, respecting the observers right to free movement throughout Ukraine during the elections.

41. Official observers are permitted to attend most sessions of election commissions and to observe all voting and counting processes (Article 71.7, 72.11, 73.6), including the use of mobile ballot boxes (80.12). While such access implies that observers can also be present at the polling station prior to opening on election day, to avoid any misinterpretation it should be made clear in Article 78.3 that observers are entitled to be present at the vital PEC meeting held no less than 60 minutes before voting begins when the ballot boxes are checked and sealed.

40. Unchanged from the existing legislation is the provision that official observers are permitted to take photographs and make audio and video recordings of proceedings without violating the secrecy of the ballot (Articles 71.7.2, 72.11.2, and 73.6.4). This rule carries an obvious risk that making such recordings may in fact undermine voter secrecy or, even more likely, create a sense of intimidation on the part of voters. It is likely that this rule will do more harm than good and it should be deleted from the draft law. A rule allowing limited use of cameras by accredited representatives of the mass media would be more appropriate.

41. One simple but possibly very effective measure to enhance transparency<sup>5</sup> would be for the CEC to make its register of complaints, including the CEC decision on the complaint, publicly accessible. Where necessary, such materials could be made anonymous to protect the privacy of individuals involved in the complaint. Such a measure would provide a ready indication of the extent to which complaints are referred to the CEC, the nature of such complaints, and the CEC's approach to dealing with them.

## **E. Voter Registration**

42. The adoption of the 2007 Law on State Register of Voters of Ukraine changed the process of compiling voter lists for elections in Ukraine. While historically voter lists were created in an ad hoc manner for each electoral process, the new law mandated the establishment of a national electronically housed voter register. The State Voter Register Maintenance Bodies are now responsible for the creation and dispersal of voter lists. While the creation of this register fulfils a long standing Venice Commission and OSCE/ODIHR recommendation, there remain several points in the Law relevant to voter registration that should be carefully considered.

43. Citizens are permitted to inspect the draft voter lists at their respective PEC headquarters to ensure its accuracy and may apply for mistakes and omissions to be corrected (Article 39.3). This right includes the ability to issue written statements about inaccuracies involving third parties. The draft law should make it clear that where an application is made in relation to a third party (not the applicant), the third party must be informed of the application before it is considered, given an opportunity to respond, and notified of the resulting decision.

44. Voters may file written statements concerning inaccuracies about the voter lists from its initial display at the election commission headquarter (no later than 25 days prior to elections in accordance with Article 38.7) to PECs until 17 days prior to

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<sup>5</sup> Ukraine ratified the United Nations Convention against Corruption on 31 October 2006. Article 13(a) requires measures be taken towards "enhancing the transparency of and promoting contribution of the public to decision-making process."

election day (Article 39.6). However, Article 39.7 also sets out a process according to which voters can file written complaints directly to the State Voter Register Maintenance Body. For these complaints voters are only given two days (“only after the end of the time period defined by part six of this Article, but no later than fifteen days prior to election day”). It is unclear in the draft law why there are two separate filing procedures to these two bodies, and furthermore, why the timeline for filing complaints directly to the maintenance body is so short. It is recommended to clarify and harmonise these provisions.

45. PEC chairperson, deputy chairperson, and secretary have the right to correct inaccuracies and technical errors in the voter lists on election day if “it is clear that it is the voter who arrived at the polling station for voting that was included on the voter list.” The implications concerning difficulties in its implementation should be considered. At minimum, the draft law should set out the acceptable ways that the identity of a voter as the person indicated on the voter list could “clearly” be established. The current provision is vague and presents a real possibility for unintentional or purposeful misuse.

46. Article 39.16 sets a time limit of no later than ten days prior to election day for the filing of complaints as to the decisions, actions or inactions of a Voter Register Maintenance Body. This is a sensible restriction which will avoid last minute applications and allow the appropriate electoral commission or court sufficient time to consider the application. However, it is noted that the deadline for filing a complaint has been increased from five days provided in the current law. If the five day deadline has not proven in past electoral processes to be overly burdensome, then it is not clear why this has been changed to ten days. There also appears to be a discrepancy within Article 30, which, after defining the time limit as ten days, states that “complaints submitted in eight days prior to election day shall be considered immediately.” The deadline for filing complaints should be clarified.

47. Under Article 38.3, a voter may be included in a voter list only at one polling station. It may be sensible to clarify that this applies to *regular* polling stations. For instance, a voter included on the regular polling station voter register for his home area may fall ill and be treated at a clinic; he might then also be added to the special voter register for that clinic. Particular provisions have been put into place to ensure this does not allow for duplicate voting (Article 41).

## **F. Media Provisions**

48. The draft law contains fairly detailed provisions to promote equal access to print and electronic mass media during the election campaign (for example, Article 62.8). However, the draft law does not include the repeated recommendation of OSCE/ODIHR and the Venice Commission of establishing an independent media commission. ***The Venice Commission and the OSCE/ODIHR again recommend that such a body is set up to oversee the implementation of this aspect of the Law and promote free, equal and fair access to public broadcasting***<sup>6</sup>. Such a body's membership should be diverse and pluralistic.

49. ***The Venice Commission and the OSCE/ODIHR further recommend*** that the draft law makes a clearer distinction between private and state-owned mass media, generally referred within the law simply as “mass media”. Rules which may be

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<sup>6</sup> Unimpeded Access to the Media on a non-discriminatory basis is provided for by the Copenhagen Document, Paragraph 7.8

effective in relation to state-owned mass media may be rather less effective when applied to mass media in private ownership. However, it is commendable that the draft law extends the principle of equal access from state owned media outlets to include private media, as long as such laws are narrowly constructed as to not impinge on freedom of expression.

50. Article 67.9 prohibits one from “Spreading deliberately inaccurate or slanderous information about a party that is the election process subject or a parliamentary candidate.” This limitation on freedom of speech and expressing political opinions prevents a robust and vigorous campaign, which is critical in a democracy. While the intent of Article 67.9 is understandable, it is extremely difficult if not impossible to determine the deliberate nature of inaccurate information, possibly resulting in spurious application. Additionally, outside the context of a political campaign, a government may limit freedom of expression in order to protect the reputation or rights of others. Furthermore, Article 67.25 implies that the media outlet, in addition to the speaker of the remarks, is responsible for such statements. This provision would effectively undermine the Media’s right to free expression and their role as an information disseminator.

51. Article 67.6 requires that “the mass media, their elected official, officeholder and free-lance workers are prohibited to propagate for or against parties, parliamentary candidates, or to spread the information, which has signs of political advertisement...” Such a broad restriction raises a question of compatibility with the right to editorial independence of the media.<sup>7</sup> Article 67.6 should be considered for revision to respect the right of editorial independence.

52. Article 67.12 grants a political party and candidate for deputy the “right to reply” to information published by the media if the information is “deemed unreliable by the party or a parliamentary candidate”. This article places an impermissible burden on the media as it allows for a candidate to subjectively determine the “reliability” of information and, thereby, acquire free media access to “disprove” the information. Furthermore, the restriction that such a “disproval shall not be disproved” unduly limits the access to this right of reply to the party who first forwards a claim of “unreliability”.

53. Article 67.17 bans campaigning in “the foreign mass media, which are functioning on the territory of Ukraine, and in the mass media registered in Ukraine, in which the share of foreign property exceeds fifty per cent.” This restriction implies that candidates would be barred from issuing campaign statements or advertisements aimed at Ukrainian voters residing abroad. The ability to present a candidate’s platform to voters is an inextricable part of the right to be elected. If such a provision unduly limits the ability of candidates to reach voters residing abroad, then it should be reconsidered. Such a rule would also appear to violate the citizen’s right to receive and impart information regardless of frontiers as set out in paragraph 26.1 of the OSCE Moscow Document.<sup>8</sup>

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<sup>7</sup> See e.g. Principle 3(b) of the Resolution on Journalistic Freedoms and Human Rights; 4<sup>th</sup> European Ministerial Conference.

<sup>8</sup> Document of The Moscow Meeting of the Conference on the Human Dimension of the CSCE, 10 September 1991: The participating States “consider that the print and broadcast media in their territory should enjoy unrestricted access to foreign news and information services. The public will enjoy similar freedom to receive and impart information and ideas without interference by public authority regardless of frontiers, including through foreign publications and foreign broadcasts. Any restriction in the exercise of this right will be prescribed by law and in accordance with international standard”.

54. The draft law significantly lowers the silence period during which opinion polls cannot be published by the media. This change is a positive improvement that adopts a previous recommendation of the OSCE/ODIHR and the Venice Commission. The previous silence period was during the last 15 days before elections. Under the draft law, the restriction comes into effect at 24:00 hours on the Friday before Election Day (Article 67.18). This change reflects previous recommendations and has brought the restriction of publication of opinion polls in line with internationally accepted principals for the length of a silence period.<sup>9</sup>

### **G. Campaign Finance Provisions**

55. The draft law stipulates that all campaign expenses must be paid from the official campaign accounts of the political party or the political party candidate in the territorial election district, which are to be set up by a minimum of 50 days prior to the election day (Articles 45 and 46). The only permissible sources of funding for a political party campaign fund are money from the party or voluntary contributions by identified physical persons. Any single physical person may donate no more than 400 times the monthly minimum wage to a political party campaign fund (Article 49.2). The only permissible sources of funding for a political party candidate campaign fund are money from the political party campaign account, voluntary contributions of physical persons or the candidate's own personal funds in an amount not to exceed eight times the monthly minimum wage (Article 50). Donations to the political party campaign fund from anonymous donors, foreign citizens, and stateless persons are prohibited (Article 49.3).

56. Parties, which win at least one mandate, are entitled to reimbursement based on their actual campaign expenditures up to a prescribed limit (Article 96.1).<sup>10</sup> The CEC is entitled to reject a request for reimbursement if it discovers evidence that the party violated the rules on campaign spending (Article 96.3). This sanction may prove overly harsh if the violation in question is minor and it would be a better practice that reimbursement should be refused only in cases of serious violations of the campaign funding rules. A variety of appropriate administrative sanctions should also be available to ensure that remedies are proportionate to the violation.

57. According to the draft law the CEC, in accordance with procedures developed by the CEC and the National Bank of Ukraine, is tasked with organising control over the receipt and use of electoral funds by parties no later than ninety days prior to elections (Article 49.10) This task is delegated to the DEC's for controlling over the funds of specific parliamentary candidates as per Article 50.9.

58. According to Article 49, contributions which exceed the maximum limit allowed, or contributions which are voluntarily refused by the party, are returned to the contributor. If an attempt to return such contributions fails, then the money will be allocated into the State budget of Ukraine. However, per Article 49.8, contributions made by persons with no legal right to contribute are not returned to the attempted contributor. Rather, they are allocated directly to the State budget of Ukraine. This provision seems to constitute, in practice, a sanction for improper contribution without first providing an investigation or legal judgement. The provision should be amended to come in line with the standard practice of attempting to return the money to the

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<sup>9</sup> See e.g. the Council of Europe Recommendation on Measures concerning Media Coverage during Election Campaigns" 1999, para. 3.2. See also Recommendation of the Committee of Ministers of the Council of Europe on media coverage of election campaigns of 2007.

<sup>10</sup> The limit is 100,000 minimum monthly wages (Article 96.1).

contributor, or should allow for legal procedures to substantiate the improper nature of this contribution prior to the forfeiture of such funds to the State budget.

59. One of the simplest and most effective ways to promote transparency in campaign spending would be to require publication of the campaign fund accounts,<sup>11</sup> which parties and candidates are required to submit to the CEC, through their fund administrators, no later than fifteen days after the election (Article 47.6). In order to provide timely and relevant campaign finance information to the public, the law should require full disclosure, *before* and after elections, of sources and amounts of financial contributions and the types and amounts of campaign expenditures. Given that the CEC is to publish other relevant election documents in national and regional media, this provision could easily be enacted without a heavy administrative or cost burden. This information can also be published on CEC web page.

## **H. Campaign Period**

60. Election campaign activities are almost invariably a manifestation of the individual's right to freedom of expression, peaceful assembly and/or association. Ukraine is obliged under the European Convention for the Protection of Human Rights and Fundamental Freedoms to ensure those rights to everyone within its jurisdiction.<sup>12</sup> Any restriction on these fundamental rights must be strictly necessary in a democratic society. It may be difficult to reconcile with these principles a rule in the draft law which appears to prohibit foreign nationals and stateless individuals from expressing opinions during campaign activities (Articles 2.9, 62.1, 67.1.1). It is not clear how such a blanket restriction is strictly necessary in a democratic society.

61. Notably, restrictions on youth from engaging in campaign activities do not appear in the draft law. This is a positive change from the previous electoral legislation, which restricted the campaigning activities of youth.

## **I. Voting Procedures**

### *Ballot Papers and Ballot Security*

62. Article 76 of the draft law contains very detailed rules on the printing and distribution of ballot papers, which are intended to protect the security of the ballot, ensure that all ballots are accounted for from one stage of the election process to the next, and deter abuse. Such provisions seem to have been carefully adopted to be both adequate and simply applied. Ballot papers are transported in the protection of an employee of the Ministry of Interior and a clear chain of custody is determined through the creation of "ballot-acceptance delivery" documents, the transparent publication of such documents, and signing of security seals in each location where ballots are housed.

63. Articles 74.2 and 74.3 incorporate details relating to the printing of ballot papers which were first introduced in amendments to the Presidential Election Law in December 2005. All ballot papers must now have the number of the polling station and territorial district printed on them.

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<sup>11</sup> See *e.g.* United Nations Convention against Corruption, Art. 7(3); Venice Commission, Guidelines on the Financing of Political Parties' Adopted 9-10 March 2001, para. 12 (CDL-INF (2001) 008).

<sup>12</sup> Articles 1, 10, and 11 of the Convention.



64. The draft law contains detailed provisions regarding “control coupons” created for every ballot issued to a voter and to be retained by the PEC member in charge of ballot issuance (Article 79.3). These removable coupons include the number of the territorial district (or notification of foreign election district), number of the polling station, space to insert the ordinal number at which the voter appeared in the voters register and the signature of the voter and issuing election commission member (Article 74.9). While such a provision is designed to ensure the security of the polling procedures and dissuade fraudulent voting, its utility may be undermined by the implications such a system may have on secrecy of the ballot. Consideration should be given to whether the inclusion of this information may unintentionally allow for a ballot to be linked back to a particular voter.

65. The draft law has taken into consideration concerns previously expressed by the Venice Commission and the OSCE/ODIHR about election commission members amending ballots by hand after ballot printing to reflect candidate withdrawals. Such a practice is highly undesirable due to the risk of accidental or deliberate error and the provision has rightly been omitted from the draft law.

#### *Procedures for the Conduct of Voting*

66. Before voting begins, each PEC must inform the DEC of the number of voters on the voter list and the number of voters on the mobile voting list (Article 78.13). This information must be relayed to the CEC by the DEC no later than 24:00 hours on election day (Article 78.14). This is part of a process of enhancing accountability in respect of voting with the mobile ballot box and the use of absentee voting certificates. For avoiding any doubts, it may be sensible to indicate what methods of communication may be employed for this purpose by the PEC (the draft law already stipulates which methods of communication may be used by DEC). The draft law should also allow candidates, official observers and media representatives to be given this information at the PEC and the DEC. The same applies to similar information required to be forwarded by the PEC and DEC at the end of election day.

67. The draft law takes significant and noteworthy steps in ensuring that all citizens, including person with disabilities, may effectively participate in public affairs through the exercise of their suffrage rights. The possibility of mobile voting with necessary security measures in place is commendable for its role in ensuring this right and upholding Ukraine’s commitment to the *UN Convention on the Rights of Persons with Disabilities*.<sup>13</sup>

68. The draft law contains detailed provisions on voting with the mobile ballot box and security measures taken in this regard. However, while Article 80.11 requires each PEC to prepare a security document showing the number of ballot papers taken by the PEC members responsible for mobile voting and the names of these members, there is no clear guideline on the number of ballots to be taken out for mobile voting. Guidance about the number of ballot papers to be taken out should be provided. Ideally, this number should include all voters registered on the relevant

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<sup>13</sup> The United Nations General Assembly Convention on the Rights of Persons with Disabilities was signed by Ukraine on 24 September 2008. Article 29.A.i requires that “persons with disabilities can effectively and fully participate in political and public life on an equal basis with others, directly or through freely chosen representatives, including the right and opportunity for persons with disabilities to vote and be elected, inter alia, by: Ensuring that voting procedures, facilities and materials are appropriate, accessible and easy to understand and use.”

“voter register extract” as well as a small specified number of spare ballots to allow for the eventuality of a user of the mobile ballot box spoiling his ballot.

69. All polling stations are authorised to have ballots equal to the total number of registered voters plus two percent (Article 74.11). Such a provision provides for the unintentionally spoiling of ballots by voters who then must request another ballot. Article 79.11 details the process for spoiling a ballot and the issuance of a new ballot to a voter. The article appears detailed and well-formulated in regards to ensuring spoiled ballots are easily identified as such to prevent possibilities of duplicate or fraudulent voting. However, Article 79.11 states that “It is not allowed to give out the election ballots instead of the spoiled one repeatedly”. It would be better for the draft law to specify a numeric limit to how many times a voter could request a new ballot, as the term “repeatedly” leaves much room for subjective interpretation by individual polling officials and likely unequal application of the law.

70. Article 79.12 states that “At twenty o’clock the polling station election commission chairpersons shall announce the end of the election, after which only the voters present in the voting room have the right to vote”. It is common practice that voters who arrive at the polling station after the close of voting should be turned away, while voters in line at the polling station prior to the close of voting are able to cast ballots. Given the high maximum number of registered voters per polling station (2,500 as defined by Article 19.3) and historical instances of long voting lines in Ukraine, the terminology of this article should be clarified as to the meaning of “voting room”. All voters in line both inside and outside the polling station at 20:00 hours should be allowed to cast ballots. Possibly, the indistinct nature of this provision is due to the translation. The article should be checked in its original language text and only modified as necessary if the original language text is similarly unclear as is the English translation.

## **J. Counting Procedures and Election Results**

71. Article 83 refers to a particular reconciliation exercise which the PEC must undertake as part of the vote count. It provides that the PEC *can* recount the ballots if the numbers do not tally. The OSCE/ODIHR and the Venice Commission have previously raised the issue of whether this text should state that the PEC *must* conduct a recount and that it may conduct more than one in order to reconcile the numbers. Article 83 should be considered again.

72. Article 86 permits the PEC to declare the election in the polling station completely invalid. The basis for such a decision is that there have been violations of the law which make it impossible to determine the voters’ will. This is a decision which should probably only be taken by higher levels of the election administration and ideally by a court.

73. A further difficulty with Article 86 is that one of the bases for such a decision is that the number of ballots found in the ballot boxes exceeds the number of voters by ten percent. Such an arbitrary standard of impermissible abuse serves no useful purpose. In effect, it establishes a tolerance level for fraud which cannot be compatible with the proper conduct of elections. As a matter of principle, an election result should only be invalidated if the extent of any fraud or misconduct makes it impossible to determine the true result of the election. It is also questionable whether the 10% standard is consistent with the Supreme Court’s 2004 decision invalidating the results of the second round of voting in the Presidential election. In the disputed 2004 Presidential election, the results of which were appealed to the Supreme Court of Ukraine, one of the arguments presented against invalidation of the results of the

second round of voting was that the 10% standard had been satisfied for specific polling stations. The Supreme Court rejected this argument and ruled that a remedy for violation of suffrage rights was required by Articles 8, 71, 103 and 104 of the Constitution of Ukraine and Article 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, regardless of whether the 10% standard was satisfied. Thus, retention of the 10% standard in the law appears to be inconsistent with December 2004 decision of the Supreme Court. Repeal or careful amendment to this provision should occur at the earliest opportunity.

74. After the vote count, a record form at a foreign polling station will be transmitted via technology to the CEC immediately (Article 87.6). While this practice will ensure timely aggregation of vote totals, the provision should be clarified to ensure that the original (first and second copies) of the vote count record serve as the document of record, not the electronic version.

75. It is highly desirable that the CEC publishes all the PEC and DEC results on its website. This would provide a substantial enhancement to transparency and public confidence in the election process and promote full compliance with the spirit of paragraph 7.4 of the OSCE Copenhagen Document.<sup>14</sup>

76. The system of reception of election material and the checking of PEC results is defined by Article 90. In its Final Report on the 2006 Parliamentary Elections in Ukraine, the OSCE/ODIHR recommended that the system of results aggregation (notably at the DEC level) be simplified. Both the Venice Commission and the OSCE/ODIHR have previously noted that the number of items of information required on PEC protocols has increased dramatically with each amendment to the election legislation (this number stands at 17 in Article 85.2 of the draft law (Article 85.2 represents an increase from eight items in 2004). Thus, it will be necessary to ensure that adequate training is provided to all PEC and DEC members to ensure they understand the technical nuances of completing the necessary vote count protocols.

## **K. Election Disputes**

77. Time limits for election disputes are necessary and there is value in avoiding protracted challenges and litigation pending the determination of the election results. Time constraints should not, however, be so restrictive as to undermine the prospect of achieving a just solution to a legitimate complaint. Article 109 requires that complaints must be lodged with an electoral commission or court within five days of the unlawful decision, or within even shorter time limits as regards events occurring before or on election day. There is a risk that a deadline will lead to injustice where the complainant, through no fault of his own, is unable to lodge a timely complaint. Consideration should be given to providing an exception to these time limits and extending the deadline where the complainant could not learn of the violation through the exercise of reasonable diligence and where the interest of justice and the public requires the deadline be extended

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

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<sup>14</sup> The participating States will 'ensure that votes are cast by secret ballot or by equivalent free voting procedure, and that they are counted and reported honestly with the official results made public'.

79. Another area of remaining concern is that the draft law maintains the system where a complaint may be filed in either a court or a higher election commission. This may create the problem that the same issues are being decided by different election appeals bodies at the same time. The election commission may suspend proceedings only if the “same question” has been filed in a court (Article 108.4). If different complainants protest against similar violations, the complaints can hardly be considered the “same”. This unclear definition of the appropriate channels for dispute resolution may not only impact the efficacy of the resolution process (possibly through the duplication of efforts), but should also be revised due to principles which urge prohibition on the opportunity for complainants to ‘forum shop’.<sup>15</sup>

80. The draft law, in Article 114, awards a right to appeal in all cases and extends this right to appeal to third persons not involved in the initial hearing of a case, but who were directly impacted by the alleged violation. Strict time limits (an appeal must be filed within two days of a decision and the appeal must be heard within the following two days) ensure the continued efficacy of the dispute resolution system and, in this iteration, the right to appeal is likely to increase the fairness of the electoral process. Such a system, as it appears in draft law, is notable for its commitment to ensuring the timely resolution of election disputes.

#### **IV. Conclusion**

81. The draft law provides a thorough technical foundation for the conduct of elections and incorporates some previous recommendations of the Venice Commission and the OSCE/ODIHR. However, the draft law can and should be further improved.

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

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<sup>15</sup> See e.g. Explanatory report of the Venice Commission Code of Good Practice in Electoral Matters, adopted by the Venice Commission at its 52<sup>nd</sup> Plenary Session (Venice, 18-19, October 2002) 3.1(97).