



INTERNATIONAL ELECTION OBSERVATION MISSION
Ukraine — Presidential Election, Second Round 7 February 2010

STATEMENT OF PRELIMINARY FINDINGS AND CONCLUSIONS

PRELIMINARY CONCLUSIONS

The second round of the presidential election in Ukraine confirmed the assessment of the first round that most OSCE and Council of Europe commitments were met. This election consolidated progress achieved since 2004. The lack of confidence and the deficient legal framework were at the root of most problems encountered during this election, and constitute an immediate challenge for the new leadership. The professional, transparent and honest voting and counting should serve as a solid foundation for a peaceful transition of power.

The candidates were able to campaign freely in a competitive, yet polarized election environment. The campaign atmosphere was negatively affected by mutual accusations of fraud, last minute amendments to the election law and attempts to remove the heads of key institutions for partisan purposes. The misuse of administrative resources continued and the intertwining of political and economic interests persisted.

Any democratic election depends not only on the conduct of the election process, but also on an adequate, clear and stable legal framework being in place. Therefore, a unified election code should be adopted before holding the next elections. As stated following the first round, amending the election law between two rounds is inappropriate. Newly adopted amendments were presented as a reaction to allegations that one of the candidates would withdraw their members from commissions, thus depriving them of a quorum and disrupting the election. Both candidates used the amendments by either claiming that they would destroy any chance of holding a democratic election or, on the contrary, that they would preserve the process. However, the last minute amendments did not impact the conduct of election day.

Despite shortcomings, the existing legal framework can still provide a basis for holding democratic elections, as confirmed by the first round. However, the provisions in the election law concerning the second round leave important aspects unaddressed and others open to varying interpretations. Legal provisions on transparent campaign financing are necessary.

Notwithstanding the rising political tension, the Central Election Commission continued to operate mostly in a non-partisan manner, and was efficient in organizing the second round. However, it did not clarify the application of important aspects of the law. Some of its actions again lacked transparency.

The media provided voters with an opportunity to make an informed choice. Political talk shows on TV offered voters a variety of opinions and granted the candidates more balanced coverage than the news. The State TV station failed to comply with its legal obligations to provide impartial coverage of candidates and significantly favored one candidate in its newscasts. Voters would have benefited from a debate between two candidates.

Overall, the quality of the voter lists has improved, but in order to eliminate remaining inaccuracies, further efforts are necessary. Specifically, voters added to the lists in polling stations should be included in the state voter register before the next election.

Disturbingly, in the last days of the campaign, pressure was exerted on the judiciary, when the prosecutor started to question the judges who decided election related cases.

The election day was orderly and calm. Our observers assessed the voting, counting and tabulation overwhelmingly positively. The transparency was greatly enhanced by the large presence of observers. Women were well represented in precinct commissions.

PRELIMINARY FINDINGS

Background

On 25 January, the Central Election Commission (CEC) published the final results of the first round of the presidential election. Since none of the candidates received the required 50 per cent of the votes to be elected, a second round was announced between Mr. Viktor Yanukovich from the Party of Regions (PoR), who received 35.32 per cent, and the current prime minister, Ms. Yulia Tymoshenko from All-Ukrainian Union – Motherland, who received 25.05 per cent. The incumbent prime minister was the first woman to enter the second round of a presidential election in Ukraine.

Legal Framework

Despite shortcomings, the existing legal framework can still provide a basis for holding democratic elections, as confirmed by the first round. However, the provisions in the election law concerning the second round leave important aspects unaddressed and others open to varying interpretations. The law contains only one article specifically concerning the second round.¹ It outlines the procedures for the formation of lower-level commissions, as well as voting, counting, the announcement of results and sets some new deadlines, at times inconsistent.² A few other articles of the election law have specific provisions concerning the second round, but the majority do not.³

The CEC has taken the position that since the election law refers to the second round as “repeat voting”, any article of the election law that does not specifically refer to “repeat voting” is not necessarily applicable to the second round. This allowed the CEC to choose which provisions of the election law were applicable to the second round.⁴

Any democratic election depends not only on the conduct of the election, but also on an adequate, clear and stable legal framework being in place before it is called. As the IEOM stated following the first round, amending the election law between two rounds is inappropriate. However, on 3 February, the parliament adopted amendments to the election law to lift the quorum requirement for election commissions to make legally binding decisions. Additionally, if a commission member

¹ Article 85 of the election law.

² For example, while the CEC had to publish official results for the first round by 27 January, candidates who moved on to the second round had to nominate DEC members by 26 January. As well, the voter lists were to be available for public scrutiny at the PECs by 30 January, two days before the deadline to form PECs.

³ Articles which do not specify provisions on the second round include those on complaints and appeals, official observers, duties and authorities of the election commissions.

⁴ On the morning of the election day the CEC issued a clarification on homebound voting allowing two members of the PEC to accompany the ballot box, even though the law requires three members. The KACA ruled that the clarification was illegal, which was later overruled by the High Administrative Court.

does not appear on election day or when a candidate fails to nominate a substitute, the local councils nominate replacements. The amendments did not impact the conduct of election day.

Election Administration

Generally, the election commissions were cooperative and granted the OSCE/ODIHR EOM access to their sessions and documents.

Despite rising political tension, the CEC continued to be efficient and to operate mostly in a non-partisan manner. The CEC showed signs of polarization when five members added dissenting opinions to the official first round results.⁵ The results were fully endorsed by eight members⁶ and the CEC chairperson. In compliance with the law, the CEC held regular sessions open to media, candidate representatives and observers. However, they also maintained the practice of holding closed meetings. The CEC did not give clear instructions to the District Election Commissions (DECs) on whether or not observers have the right to view the electronic processing of protocols.⁷ These issues reduced the transparency of the election process. The CEC met the deadlines set by the election law. As in the first round, the CEC did not clarify the application of important aspects of the law. Furthermore, the CEC did not organize training for the newly formed DECs.

Members of the new DECs and Precinct Election Commissions (PECs) for the second round were appointed based on nominations by the two candidates. Both nominated the maximum seven representatives to each DEC. The CEC appointed the DECs and each candidate received an equal share of leadership positions (chairpersons and secretaries). According to the CEC, some 96 per cent of the 3,150 appointed DEC members had previous election experience. The DECs were generally efficient in meeting deadlines within a tight timeframe while coping with a heavy workload.

Candidates nominated their members to the PECs within the legal deadlines. The formation of the commissions went smoothly with leadership positions being divided equally. PECs were operational in time for voter list verification.

Voter Registration

The voter lists for the second round contained 36,518,290 voters, an increase of 215,817 compared to the first round final voter lists. About 400,000 voters were added to the voter list on the first round election day. Changes to the voter lists were only partly entered into the voter register, due to the fact that the procedures for transmitting data on voters added to the lists were adopted late and were not applied in a uniform manner. In addition, 21 DECs only partly submitted the information to the register maintenance bodies (RMBs). As a result, some voters had to re-apply to be added to the voter lists for the second round. Some RMBs failed to check whether voters added to voter lists on election day were legitimately added to the lists.

On election day the number of registered voters at the opening of the polls was 36,461,481. At the closing of polls, the number of voters was reported as 36,612,254.⁸

⁵ CEC members nominated by Bloc of Yulia Tymoshenko (BYT) and Our Ukraine.

⁶ CEC members nominated by PoR, Communist Party of Ukraine and Socialist Party of Ukraine.

⁷ According to the election law, observers can be present during the determination of the results by the DECs. Point I, 3.2, xiv of the Council of Europe Venice Commission Code of Good Practice in Electoral Matters stipulates that "... results must be transmitted to the higher level in an open manner."

⁸ This does not include voters registered in foreign precincts.

Campaign Environment

The candidates were able to campaign freely in a competitive, yet polarized election environment. Campaign methods included the use of billboards, posters and leaflets, although to a much lesser extent than during the first round. Candidates also held rallies and set up campaign tents. They were most active in areas where the third placed candidate from the first round received significant support.⁹

The campaign atmosphere was negatively affected by mutual accusations of fraud, last minute amendments to the election law and attempts to remove the heads of key institutions for partisan purposes. Institutions with an important role to play in the election process became engulfed in a pre-election power struggle. For instance, the issue of who the legitimate head of the High Administrative Court is remained unresolved and politicized. Also, there were unsubstantiated claims about 1.5 million extra ballots to be printed illegally, connected to attempts to replace the head of the ballot printing house and to seize the printing house. Furthermore, the parliament removed the Minister of Interior who was subsequently reappointed as acting Minister by the Cabinet of Ministers.¹⁰ Amendments to the election law adopted a few days prior to the election day contributed to political tension and added to the existing climate of mistrust and suspicion. The amendments were presented as a reaction to allegations that one of the candidates would withdraw their members from commissions, thus depriving them of a quorum and disrupting the election. Both candidates used the amendments by either claiming that they would destroy any chance of holding a democratic election or, on the contrary, that they would preserve the process.

The misuse of administrative resources continued and the intertwining of political and economic interests persisted. During the second round, Ms. Tymoshenko continued blurring the distinction between her state function and role as presidential candidate.¹¹ She was warned by the Kyiv Administrative Court of Appeals (KACA) for abusing administrative resources.¹²

At times both candidates used harsh rhetoric in their campaigns. A leaflet with anti-Semitic and xenophobic content was distributed in western Ukraine, calling for voters not to vote for Ms. Tymoshenko because of her alleged Jewish origin. This constitutes a breach of OSCE commitments.¹³

Disturbingly, in the last days of the campaign, pressure was exerted on the judiciary. The High Judicial Council and the General Prosecutor's Office began several investigations into the actions of the KACA, especially targeted at judges who presided upon election-related cases. Judges were ordered to appear at the prosecutor's office to explain their rulings. A proposal was submitted to dismiss five judges who sat on election-related cases and a resolution was introduced in the parliament to dismiss the Head of the Supreme Court.¹⁴

⁹ Mr. Tihipko received 13.05 per cent of the vote. His votes were concentrated in Kyiv city, Dnipropetrovsk, Odesa, Zaporizhzhia and Kharkiv.

¹⁰ Both the attempts to fire the head of the printing house and the reappointment of the Minister of Interior were halted by the courts. The Minister of Interior was previously warned by a court for campaigning for Ms. Tymoshenko and for having the police interfere in the electoral process.

¹¹ As observed by the OSCE/ODIHR EOM on 24 January in Cherkasy, 27 January in Khmelnytsky and 28 January in Kherson. At each of these events Ms. Tymoshenko campaigned and distributed ambulances or school buses in her capacity as presidential candidate. In Kharkiv the governor sent out official invitations to students for a meeting with the prime minister, which turned out to be a campaign event.

¹² On 20 January, Ms. Tymoshenko gave a press conference using the Cabinet of Ministers resources, which the KACA found to be illegal campaigning.

¹³ The OSCE Copenhagen Document, paragraph 40.

¹⁴ This resolution was introduced by PoR members of parliament.

The Media

The CEC complied with its obligations to provide free airtime and print space on state-owned national and municipal radio, television and in newspapers. The law required *UTI*, the state-owned TV station with nationwide coverage, to organize a live debate between the two contestants. *UTI* scheduled the debate, however Mr. Yanukovich decided not to participate.¹⁵

The media generally provided voters with an opportunity to make an informed choice. Political talk shows on private and state owned TV stations offered the public a variety of opinions and an opportunity for candidates to discuss policy issues. Overall, they granted candidates more balanced coverage than newscasts and the journalists made an effort to provide an equal amount of time to the contestants. The widespread practice of politicians paying for coverage in political talk shows remained a concern, and the OSCE/ODIHR EOM noted a varying quality of journalism. Direct interference from TV station owners prompted some prominent talk show hosts to begin producing their own programs, thus providing them with some degree of independence.

In the newscasts, most TV stations with nation-wide coverage favored one candidate or the other.¹⁶ The state-owned TV station *UTI* failed to provide impartial coverage¹⁷ by devoting 65 per cent of the campaign coverage¹⁸ in newscasts to Ms. Tymoshenko, while Mr. Yanukovich received 35 per cent coverage. *Channel 5* significantly favored Ms. Tymoshenko by devoting 66 per cent of their campaign coverage to her. *Ukraine TV* displayed a bias in favor of Mr. Yanukovich, devoting 63 per cent of campaign air time to him, while *Inter* showed a more balanced approach. On *ICTV* Mr. Yanukovich received more campaign coverage than his opponent due to the fact that *ICTV*'s newscasts did not distinguish coverage between Ms. Tymoshenko's institutional role and her role as a candidate.¹⁹

Election Day

On election day, voting was conducted in an orderly, professional and transparent manner across the country in a calm atmosphere. IEOM observers assessed the voting process as good or very good in 98 per cent of the polling stations visited. Commission members managed the process in a professional manner without serious violations or incidents.²⁰ Voting at special polling stations (prisons, hospitals) was assessed less positively.

The large presence of domestic and international observers in polling stations throughout election day enhanced the transparency of the process. Party or candidate observers were present in 9 out of 10 polling stations visited, and observers from civil society in 4 out of 10. The last minute amendments did not have an impact on PEC composition which were fully staffed throughout the day. Two-thirds of all PEC chairpersons were female.

¹⁵ In case one candidate refuses to take part in the debate, the other candidate is automatically granted the air time for campaigning. As a result, Ms. Tymoshenko appeared on *UTI* for 100 minutes during prime time hours.

¹⁶ The media monitoring covers the period from 26 January – 2 February.

¹⁷ Article 64.4 of the election law prohibits state and municipal mass media to "give preference to (candidates) in any form during the election process".

¹⁸ The figures in this section refer to candidates' campaign coverage, excluding candidates' coverage of institutional duties. Figures refer to air time devoted to candidates in a positive and neutral tone.

¹⁹ This confirms that newsworthiness is not the criteria for coverage and the different approach of TV stations on how to cover candidates with institutional positions differ due to a lack of clear guidance in the law.

²⁰ In DEC 111, voting was shortly interrupted in polling stations 88, 95, 120 and 121 after bomb threats, but resumed when no explosives were found. In DEC 134, polling station 54 changed location due to a lack of heating. The secretary of PEC 26 in DEC 85 was found deceased outside the polling station in the morning presumably after suffering a heart attack.

In 12 per cent of polling stations visited, the IEOM noted voters who did not find their names on the voter list being sent to court or RMBs, or to a lesser extent, to a DEC for inclusion in the voter lists. In other cases PECs were adding voters to the lists by their own decision. Some 1.4 million voters (3.9 per cent of the total number of voters) were registered to vote by mobile ballot box, about 220,000 voters more than in the first round. In some instances, the inadequate folding of the ballot paper did not fully protect the secrecy of the vote. The preliminary voter turnout in the second round was 69.05 per cent, a slight increase compared to the first round.

Polling stations closed on time. While some minor procedural problems were noted, IEOM observers assessed the count as good or very good in 95 per cent of polling stations visited. Protocol forms pre-signed by PEC members were observed in 8 per cent of the polling stations. Results were not put on display in 7 per cent of polling stations. The validity of the ballots was decided upon in a consistent manner. The counting process was transparent and in most polling stations observers received a copy of the results protocol upon request. In almost all cases observed, the protocol was taken directly to the DEC by at least two PEC members and the chair.

Preliminary assessment of the tabulation by IEOM observers was good or very good in 86 per cent of DECs visited. Problems reported include PEC protocol figures not always adding up. Domestic observers were largely present at the DECs visited. As in the first round, IEOM observers did not have access to the electronic processing of results in one third of the DECs visited. A significant number of complaints were filed with the DECs.

*This statement is also available in Ukrainian.
However, the English version remains the only official document.*

MISSION INFORMATION & ACKNOWLEDGEMENTS

Kyiv, 8 February 2010 – The second round of the presidential election is assessed for its compliance with OSCE and Council of Europe commitments for democratic elections, as well as with Ukrainian legislation. This statement should be considered in conjunction with the Statement of Preliminary Findings and Conclusions issued on 18 January, after the first round of voting. This statement is delivered prior to the completion of the election process. The final assessment of the election will depend, in part, on the conduct of the remaining stages of the election process, including the tabulation and announcement of results and the handling of possible complaints and appeals. The OSCE/ODIHR will issue a comprehensive final report, including recommendations for potential improvements, some eight weeks after the completion of the election process. This statement will be reported to the Standing Committee of the OSCE Parliamentary Assembly (PA) at its next meetings. The delegation of the Parliamentary Assembly of the Council of Europe (PACE) will present its report at the next plenary session of the Assembly in Strasbourg.

The OSCE/ODIHR Election Observation Mission opened in Kyiv on 24 November 2009 with 23 experts in the capital and 60 long-term observers deployed throughout Ukraine. On election day, about 600 short-term observers were deployed in an International Election Observation Mission (IEOM), including 413 OSCE/ODIHR short-term observers, a 69-member delegation from the OSCE PA, a 37-member delegation from the PACE, a 16-member delegation from the NATO PA and a 13-member delegation from the European Parliament (EP). In total, there were observers from 45 OSCE participating States. The IEOM observed voting in some 2,000 polling stations out of a total of 33,667, counting in 194 polling stations and tabulation in 150 DECs.

Mr. Joao Soares (Portugal), President of the OSCE PA and Head of the OSCE PA delegation, was appointed by the OSCE Chairperson-in-Office as Special Coordinator to lead the short-term OSCE observer mission. Mr. Mátyás Eorsi (Hungary) headed the delegation of the PACE, Mr. Pawel Kowal (Poland) headed the EP delegation, and Mr. Assen Agov (Bulgaria) headed the delegation of the NATO PA. Ambassador Heidi Tagliavini (Switzerland) is the Head of the OSCE/ODIHR Election Observation Mission.

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