

Review and Analysis of the Draft Law on the Election of People's Deputies of Ukraine



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I. INTRODUCTION

1. Background

In its 23 June 2011 letter, the Ministry of Justice (MoJ) of Ukraine requested that the International Foundation for Electoral Systems (IFES) review the draft law on Election of People’s Deputies of Ukraine,¹ (referred to as the “draft law” within this analysis). This report was written in response to that request and submitted to the MoJ on 21 September 2011.

IFES notes that the draft law was developed in an atmosphere of considerable uncertainty and mistrust between the Government of Ukraine, political parties and civil society. Numerous concerns regarding the draft law, and the process by which it was created, were raised to IFES by members of opposition parties, civil society, electoral experts and the international community. While IFES has limited the bulk of its review to a technical analysis of the provisions of the draft law and their consistency with international standards and best practices, it could not help but take note of certain concerns.

Among these concerns, two related issues were of particular significance. The first relates to the process by which the draft law was developed. On 2 November 2010, by Presidential Decree No. 1004, a working group was created to “[bring] the election law in conformity with generally accepted international democratic standards and accelerate its codification.” IFES viewed this measure as a positive and inclusive step for a government embarking on a major process of electoral law reform, and accepted an invitation to join the working group. Based on the meetings it attended and reports from other working group members, IFES believes the working group process was flawed and did not satisfy its stated objective of soliciting expert analysis on many aspects of a new unified electoral code.² The rationale behind agenda setting was unclear, the group lacked broad participation, especially in its early meetings, and discussion was often restricted in duration considering the complexity of the issues.

Moreover, while the electoral system itself is the single most fundamental electoral reform topic, this topic was intentionally taken out of the working group process mentioned above. In conversations with the Presidential Administration prior to the formation of the working group, it was confirmed to IFES that the electoral system was viewed as the single most difficult subject on which to reach consensus. IFES’ discussions with stakeholders in Ukraine support this view. IFES recognizes that the system of parliamentary elections is an extremely contentious issue in Ukraine, one where there is not yet unified agreement among political parties. However, if the point of a working group on electoral reform is to involve experts to discuss options and try and build consensus, it would seem counterintuitive to take the issue of greatest debate off the table.

¹ The draft law was submitted to IFES by the Ministry of Justice on 27 May 2011. An English language translation of the Draft Law on the Election of People’s Deputies of Ukraine can be found on www.IFES.org.

² In fact, the aim of the working group appears to have changed from the development of a code to the development of a new parliamentary law. IFES was unable to ascertain why this decision was made. The need for a unified election code has been stressed in a number of election observation reports.

The second issue relates to the choice of an electoral system, itself. A return to a parallel system under which half of the deputies are elected through first-past-the-post elections in single-member districts, and half through proportional representation in a nationwide multi-member district, is the most significant change put forward in the draft law. The draft law also increases the electoral threshold, eliminates the right of blocs to contest seats and removes the voting choice “against all,” among other changes. While these changes are discussed, IFES, in keeping with its standard practice, has chosen not to offer its opinion on whether the proposed system is “good” for Ukraine, or to advocate alternative systems in this review.

However, while the Government of Ukraine has offered a number of seemingly valid reasons for returning to the mixed system,³ IFES shares the concerns expressed by many Ukrainian and international stakeholders regarding the government’s decision to change the electoral system in the present political climate. Electoral systems can always be improved for the better, but given the lack of consensus in the country; the significant impact of the proposed changes on the political landscape; and relatively short timeline for implementing these changes, it is highly questionable whether it makes sense to change the system at the present time. While the newly proposed system may be a legitimate one, there is no major flaw in the current system that would require an immediate change without further discussion.

2. Methodology

IFES’ review and analysis of the draft law proceeded in four phases. First, a basic analysis of the key changes proposed by the draft law was carried out by IFES with the advice and assistance of Ukrainian experts. Second, a detailed review of various sections of the law was conducted by a core group of international experts and IFES staff. Third, IFES compiled a comprehensive analytical review of the draft law, which included additional input from Ukrainian experts. Fourth, the completed draft analysis was sent to a peer review group, consisting of international experts and former election officials. This document incorporates the expertise acquired in each phase of this process.

IFES has based its analysis on international standards and emerging best practices as well as its own experience assisting electoral reform efforts in countries around the world. Where practical, the analysis also refers to prior electoral legislation and related or complimentary legislation of Ukraine. Rather than proceeding article by article, IFES has structured its analysis around major thematic areas within the draft law.

The goal of this exercise was not to criticize the draft law or electoral practice in Ukraine. IFES has intended to identify areas of significant change to Ukraine’s parliamentary election system and practice, and highlight any concerns arising from the text of the draft law. Where appropriate, IFES has offered recommendations to improve the quality of the text and strengthen its consistency with international standards.

³ Annual Address of Ukraine’s President to the Verkhovna Rada (parliament) in Ukrainian. *Modernisation of Ukraine is Our Strategic Choice*. April 2011. pp. 17-19. http://www.president.gov.ua/docs/Poslannya_sborka.pdf.

IFES acknowledges that ultimately the law is a matter for Ukrainians themselves to define.

3. Key Findings

1. The draft law is based largely on the current parliamentary election law (the “current law”), which came into force in 2005, with further amendments.
2. The draft law incorporates a number of positive changes intended to respond to criticisms from international organizations and some improvements adopted from the draft Electoral Code of Ukraine, which was developed by a working group of experts but never adopted. However, the draft law retains some deficiencies from the current law, which have been criticized by international experts.
3. A working group designed to solicit the input of experts did not create meaningful opportunities for discussion of the most important changes proposed in the draft law.

Electoral System

4. The draft law would introduce a mixed electoral system similar to that used in Ukraine in the 1998 and 2002 parliamentary elections, under which half of the 450 seats are elected through closed list proportional representation in a single, national constituency, and half are elected through first-past-the-post contests in single-member constituencies.
5. The draft law increases the electoral threshold from 3 percent to 5 percent, and removes the right of parties to form electoral blocs. In combination with the majoritarian nature of new single-member districts, these changes will adversely affect the electoral prospects of many smaller parties, currently in the legislature. In order to successfully contest an election under the proposed system, these parties would need to coalesce into parties that enjoy broader popular support. This may be difficult in the short time remaining before the next parliamentary election in 2012.

Electoral Constituencies

6. The new system requires the creation of electoral boundaries for the 225 single-member districts. Some concepts that existed in previous election laws with respect to electoral boundaries are absent in the draft law, such as required continuity of districts and the consideration of “communities of interest.”
7. The draft law calls for district boundaries to be announced by the Central Election Commission (CEC) no later than 90 days before the election. That deadline is far too late to allow parties and candidates to adequately plan their election campaigns or allow time for judicial review.

8. The draft law also fails to mandate redrawing districts at a specified time interval, which is problematic if districts are to maintain approximate equality in number of voters. The draft law also includes no provision for public consultation during the delimitation process.
9. The draft law is vague as to how voters abroad will be accommodated within a single-mandate constituency.

Precincts

10. The draft law does not specify a legal basis to determine when temporary overseas precincts should be established, such as the estimated number of voters, petitions by a group of voters or the non-partisan nature of the premises. The draft law appears to leave the decision to the discretion of the Ministry of Foreign Affairs (MoFA) and the CEC.
11. The draft law establishes the size of precincts at between 20 and 2500 voters. The upper limit is relatively high, as it can be difficult to accommodate that many voters at a single precinct on Election Day. The need to reduce the maximum number of voters assigned to precincts in Ukraine has been frequently cited by international observers in past elections.

Election Commissions

12. The procedure in the draft law for allocating seats on election commissions creates the possibility that a party represented in the parliament will have two seats on a given commission while other electoral subjects have none.
13. The draft law allows nominees to election commissions to be rejected without a formal decision. The absence of written reasons explaining a rejection will make it more difficult for such decisions to be appealed.
14. The draft law introduces a requirement that the CEC develop training manuals and, starting after 2012, administer mandatory training programs for the managers of District Election Commissions (DEC). This is a positive step towards the professionalization of election officials.
15. Unlike the current law, the draft law does not allow a party or candidate to recall an election commissioner once he or she has been appointed. While this is consistent with international standards, this change was not universally supported by Ukrainian experts when the working group on the draft law considered the issue.

Registration of Candidates

16. Unlike the current law, which only permits parties registered for at least 365 days to contest the elections, the draft law permits any registered party to do so. This is a positive change, as there was no justification for excluding newer parties from participating in elections.

17. Like the current law, the draft law prohibits candidates who have been convicted of a “deliberate” crime from becoming candidates, without providing clarity in regards to the nature or gravity of the crimes in question. International standards require that sanctions relating to the right to vote or stand as a candidate be proportional to the offence committed.
18. The draft law requires parties and candidates in single-member districts, to post large deposits in order to participate in the election. Deposits are only returned to those who actually win seats. This could act as a significant barrier to participation, especially by independent candidates in single-member districts.
19. The time frames for submission and approval of registration documents in single-member districts are extremely tight. If a DEC finds problems in a candidate's application, it may be difficult to resolve those issues before the registration period concludes.

Observers

20. The draft law allows observers from non-governmental organizations to be registered on the same terms as observers from political parties and candidates. This is a positive change.
21. The draft law appears to remove the ability of observers to file complaints related to violations of the electoral law with election commissions.

Electoral Campaign

22. The draft law removes state support previously provided to election campaigns, including subsidies for campaign expenses and access to state-owned media. This change renders parties and candidates dependent entirely on their own resources and private donations. Implementing this practice before the 2012 elections may present a challenge for parties and candidates of lesser financial means.
23. The draft law relaxes the current law's restriction on campaigning of state employees, provided that such activities take place outside working hours. This change is positive; all citizens are entitled to hold and express political opinions. However, this relaxation of the rules should be accompanied by vigilance to ensure such employees are not subject to pressure to campaign for a particular candidate or party.

Campaign Finance

24. The draft law retains the current system of campaign finance disclosure, which has been largely ineffective due to the vagueness of disclosure requirements; absence of procedures for review and verification of reports; and lack of enforcement mechanisms and sanctions for failure to comply.

25. While the draft law imposes limits on the amounts that individuals may contribute to the campaigns of parties and candidates, the weakness of the disclosure regime means that such limits can be easily evaded.
26. The draft law imposes no campaign spending limits. The introduction of spending limits could help ensure that political participation is within the reach of candidates and parties of modest financial means.

Regulation of Media

27. The draft law includes a number of rules intended to ensure that candidates and parties have equal ability to buy print or broadcast advertising for their campaigns. Provided that they are adequately enforced, such rules are to be welcomed.
28. Media of all kinds are required in the draft law to be “unbiased,” and provide “unprejudiced, balanced, reliable, complete and accurate information” in their coverage of elections. International standards call for print media to be exempt from such requirements. Furthermore, the draft law makes no distinction between private and state-owned media and does not recognize that the former are entitled to editorial independence.
29. The draft law allows a court to ban a publication or revoke the license of a broadcaster for the duration of the election campaign if the media organization commits multiple or a single “gross violation” of the law. This provision is vague, given the seriousness of the sanction contemplated.

Voter Lists

30. The draft law limits the possibility for last minute changes to voter lists, while still affording substantial means of verification prior to Election Day. These changes should help reduce the opportunity for improper or fraudulent manipulation of voter lists, and increase confidence in the electoral process.
31. The draft law retains a provision that permits voters to temporarily change their place of voting without changing their permanent voting address. While there may be valid reasons for this approach, without adequate safeguards it may create the opportunity for multiple voting and strategic registration of voters in closely fought electoral districts.
32. While the draft law clearly contemplates that voters will scrutinize and challenge voter lists, it has omitted wording from the current law that gives them the explicit right to do so.

Voting and Results

33. The draft law introduces a 12-hour voting day; a reduction of three hours from the current law. While acceptable from an international practice perspective, the reduced hours in combination with the large size of some precincts may lead to overcrowding.
34. The draft law allows the invalidation of results in a precinct in the event of certain kinds of fraud and irregularities, but only if 10 percent or more of the ballots cast have been affected. This level of tolerance is arbitrary and has the potential to allow such irregularities to have an influence on electoral results, especially in single-mandate constituencies.

Electoral Dispute Resolution

35. While the draft law does not explicitly say so, Ukraine retains a dual system of electoral dispute resolution under which a person may either file a complaint with the relevant electoral commission or bring the matter before an administrative court. The jurisdiction of each type of body needs to be clarified to reduce the risk of confusion, conflicting decisions on cases of a similar nature and so-called "forum shopping."
36. The draft law also includes a number of changes which weaken the system of electoral dispute resolution compared to the current law, including a reduction of the time limit for filing and adjudicating complaints to two days and the elimination of the ability of election commissions to hear complaints against individual voters and observers.

II. ANALYSIS OF THE DRAFT LAW ON THE ELECTION OF PEOPLE'S DEPUTIES OF UKRAINE

1. Electoral System

By far the most significant change in the draft law as compared to the current law is the introduction of a new electoral system. Currently, all 450 seats in parliament are allocated through closed list proportional representation in a single nationwide constituency. The draft law calls for the election of 225 seats through first-past-the-post contests in single-mandate constituencies, with the remaining 225 seats being elected through closed list proportional representation in a nationwide constituency. Unlike some mixed systems, the outcome of the single-mandate constituency election does not influence the proportional representation component. Instead, the two election methods function as independent or “parallel” systems.

1. This change essentially marks a return to the electoral system that was used in Ukraine during the 1998 to 2002 elections, and one that has been used widely within the region. Ukraine abandoned this particular system after 2002, citing the need to tackle political corruption, strengthen political parties as a form of social mobilization, and prevent the abuse of administrative resources at the local level.⁴ In particular, it was argued that single-member districts were more prone to fraud and improper use of administrative resources to favor candidates connected to local power structures. It is unclear whether these rationales are any less valid now than they were when the current system was introduced.
2. The electoral system for parliamentary elections has been changed multiple times in the relatively brief period since Ukraine gained independence in 1991. While the right of states to choose their own electoral system is unassailable, frequent changes to electoral systems are cause for concern. The Venice Commission *Code of Good Practice in Electoral Matters* specifically addresses this issue in some detail:

63. Stability of the law is crucial to credibility of the electoral process, which is itself vital to consolidating democracy. Rules which change frequently...may confuse voters. Above all, voters may conclude, rightly or wrongly, that electoral law is simply a tool in the hands of the powerful, and that their own votes have little weight in deciding the results of elections.

65. It is not so much changing voting systems which is a bad thing – they can always be changed for the better – as changing them frequently or just before (within one year of)

⁴ See *Transcript of the Plenary Meeting of the Verkhovna Rada of Ukraine*, March 5, 2004, during which the switch from a mixed to a pure proportional system was debated. http://static.rada.gov.ua/zakon/skl4/5session/STENOGR/05030405_18.htm; Kovtunets, V. *Hopes and Illusions of Ukrainian Version of Proportional System*. Legal Newspaper. 2005. № 6 (42).

*elections. Even when no manipulation is intended, changes will seem to be dictated by immediate party political interests.*⁵

3. In addition to changing the types of election to be held, the draft law increases the threshold for the proportional representation component of the electoral system from 3 percent to 5 percent (**Article 97.3**). In other words, a party that receives less than 5 percent of the total votes cast in the national constituency will not qualify to take any of the 225 proportional representation seats. There is no single standard with regard to electoral thresholds. However, as is discussed more fully below, an increase in the threshold to 5 percent, combined with other changes proposed in the draft law, will have a significant impact on Ukraine's political party system and its prospects.
4. The current law allows for political parties to join together into blocs and present a single candidate list for the entire bloc. The formation of blocs allows smaller parties to pool their campaign resources and to combine the votes of their supporters, which can enable them to pass the electoral threshold (set at 3 percent in current law). The draft law contains no allowance for bloc lists, requiring each party to submit its own list of candidates for the nationwide constituency.
5. The single-mandate constituencies introduced by the draft law are plurality or first-past-the-post contests. Simply put, the candidate with the most votes wins, whether or not the candidate wins more than half the votes cast. This contrasts with majoritarian systems that require a run-off election if no candidate wins more than half of the votes. First-past-the-post systems are generally simpler and less costly to implement because additional rounds of voting are never required. However, they have a tendency to result in over-representation more popular parties at the expense of smaller, single issue parties since the latter will rarely receive the most votes in any particular district. As a corollary, first-past-the-post typically results in a relatively high proportion of "wasted" votes, because a candidate can win a seat with significantly less than 50 percent of the vote.
6. The draft law no longer provides voters the option of voting "against all" available candidates. While the number of votes cast in Ukraine "against all" has been relatively low historically, observers have called for the elimination of this option on the basis that it provides voters with an illusory choice that in fact has no impact on the outcome of the election or the allocation of seats.⁶ To the extent that it increases the total number of votes cast, the "against all" option may also increase the number of votes required by a party to pass the electoral threshold, which can work to the detriment of smaller political parties whose support is at or near that level. For these reasons, removal of the "against all" option may be considered positive change.

⁵ Venice Commission. *Code of Good Practice in Electoral Matters*. October 2002. II.2.1.

⁶ Venice Commission. *Comments on the Draft Law on Election of People's Deputies of Ukraine*. CDL-EL(2005)046. July 2005. P. 6.

7. The draft law no longer contains the provision in the current law establishing a 50 percent turnout requirement for “irregular” or pre-term election results to be valid – an amendment introduced into the current law before the 2007 pre-term election. That provision was criticized by international observers at the time.⁷ The removal of such a provision is welcome; a turnout threshold can result in the need to repeat and refinance elections.
8. Taken together, the elimination of electoral blocs, the increase in the threshold and the disproportionality inherent in the first-past-the-post system to be used in single-member districts will make it virtually impossible for many smaller parties to be competitive. This can be expected to drive consolidation of Ukraine’s political party system, which is currently highly fragmented. While such consolidation may be a desirable as a means of building stronger parties and more cohesive parliaments, the timing of these changes may be problematic given Ukraine’s present political landscape. Consolidation among the existing parties will take time to develop, and may be made more difficult by the fact that the *Law on Political Parties* appears to make no provision for mergers. Based on conversations with local experts and parliamentarians, it seems that many of the parties currently represented in parliament as part of a bloc will be unable to coalesce into new structures capable of credibly contesting an election under the system proposed in the draft law prior to the 2012 elections.

Holding an election under the proposed system, before existing political groups have had sufficient opportunity to reorganize into a smaller number of parties enjoying broader support, would likely result in an unusually high number of “wasted” votes cast for parties that fail either to pass the threshold in the nationwide contest or win single-mandate constituencies. As a consequence, the overall results would be less proportional than expected from a system that elects half its seats through proportional representation.

Given this prospect, it might be more practical and fair to apply any serious changes in the electoral system only in subsequent parliamentary elections, and not in 2012. This approach has been identified by the Venice Commission as a basic means of avoiding manipulation, or the perception of manipulation, of the electoral system for partisan advantage:

One way of avoiding manipulation is to . . . stipulate in the Constitution that, if the electoral law is amended, the old system will apply to the next election – at least if it takes place within the coming year – and the new one will take effect after that.⁸

- ***Consideration should be given to delaying any change in the electoral system until further discussion involving all stakeholders results in a reasonable degree of consensus on the subject.***

⁷ OSCE/ODIHR. *Election Observation Mission Final Report, Ukraine Pre-Term Parliamentary Elections*. September 2007. p. 5.

⁸ Venice Commission. *Code of Good Practice in Electoral Matters*. October 2002. Paragraph 66.

- ***If changes to the electoral system along the lines proposed in the draft law are to be adopted, then consideration should be given to delaying the implementation of those changes until the parliamentary elections that follow those expected in 2012.***

2. Election Constituencies

As highlighted previously, the draft law defines a new parliamentary electoral system in Ukraine, one that uses 225 single-member constituencies, and a single 225-member national constituency based on proportional representation. Except for the changes outlined elsewhere in this document, the features of the national constituency are similar to the current law. The introduction of single-member constituencies, however, poses a number of questions.

While there is no universally accepted set of rules on boundary delimitation, there are number of emerging standards and best practices in this field. Combined, these create an overarching normative framework based on equality, impartiality, representativeness, inclusiveness and transparency. These norms generally underlie the formal rules or criteria that countries consider when drawing constituency boundaries.

1. On the whole, with the exception of the principle of equality, the draft law provides little in terms of rules for the delimitation of single-member districts. Instead, it provides that supplementary legislation or procedures will define the process further. The **Transitional Provisions' paragraph 5** of the draft law requires the Cabinet of Ministers to prepare a draft law on the *Territorial Organization of Elections* within 90 days of the passage of the parliamentary electoral law, based on recommendations put forward by the CEC. Until such a law is developed, the CEC is charged with regulating issues pertaining to the territorial organization of the election by its own acts (**Paragraph 7**). In order to enshrine certain rights and best practices in law, consideration should be given to incorporating some further provisions relating to boundary delimitation in the draft law itself, rather than leaving these to a separate law.
2. In systems that use single-mandate constituencies, district boundaries are generally drawn so that districts are roughly equal in population (or voting age population). This equality of the vote principle is established in the *International Covenant on Civil and Political Rights*, Article 25.9 **Article 18.2** of the draft law requires that the "deviation in number of voters in a single-mandate election district shall not exceed ten percent from the approximate average number of voters in single-mandate districts..." A 10 percent deviation is in keeping with international practice,¹⁰ and the aforementioned international commitment to equality in voting strength. It also complies with the Venice Commission's *Code of Good Practice in Electoral Matters*, which indicates that

⁹ General Comment 25 on Article 25 states that: "The principle of one person, one vote must apply, and within the framework of each State's electoral system, the vote of one elector should be equal to the vote of another. The drawing of electoral boundaries and the method of allocating votes should not distort the distribution of voters..."

¹⁰ Countries that use a deviation limit range from "virtually no deviation allowed" (the United States) to as high as a 30 percent tolerance (Singapore).

population deviations should not be more than 10 percent, and should certainly not exceed 15 percent except in special circumstances (such as the protection of a concentrated minority).

3. The draft law is silent when it comes to the circumstances in which the authority devising constituency boundaries (e.g., the CEC) may or should deviate from the average number of voters. The rationale for deviations from equal population should be established in procedure to the extent possible in order to facilitate public acceptance of such deviations, and also to insulate the boundary authority from charges of malfeasance.

In many countries that delimit constituencies, the constitution or electoral law specifies that established borders such as local administrative unit boundaries and “natural boundaries” created by topographical features be taken into account when drawing districts. These principles not only offer guidance to delimitation authorities, they also limit the potential for partisan manipulation of boundaries and can make single-mandate constituencies more identifiable to voters. It may also simply be more practical to limit constituency borders to existing administrative unit boundaries. The current parliamentary election law in **Article 18.2** refers to forming and numbering 225 electoral constituencies “taking into account their administrative and territorial arrangement.” This same article also stipulates that the territorial election constituencies be contiguous.¹¹ However, the draft law makes no reference to these conditions.

- ***Basic guidance on how and in what circumstances the CEC can deviate from the average number of voters in a district (within the 10 percent limit) should be provided in law or, alternatively, in secondary legislation.***
- ***Consideration should be given to including contiguity and use of administrative boundaries as rules for delimitation of single-member districts in the law.***

4. The introduction of a system that includes single-member districts creates challenges for the inclusion of voters abroad. One such challenge is identifying the constituency to which such voters will be assigned. **Article 18.2** of the draft law indicates that voters abroad will be assigned to a single constituency, but is ambiguous as to whether voters abroad are to be assigned their own special constituency, or if they are to be assigned to a constituency with other voters residing in Ukraine. Furthermore, if voters abroad are to be assigned to a constituency in Ukraine, it is unclear how that constituency will be selected. The possibility that a constituency will be selected for partisan reasons cannot be discounted.

The inclusion of a large number of voters residing abroad into an existing district would have a considerable influence on the outcome of the election in that district. The situation is further

¹¹ These electoral constituencies are purely for organizing the election within the single national constituency used for the PR electoral system.

complicated by the fact that many of those voters will likely have no connection to the district to which they are assigned.

5. The draft law also specifically states that the constituency that includes voters abroad may include more eligible voters than would be allowed by the 10 percent rule in **Article 18.2**. Based on the current data from the CEC, the number of voters abroad is 440,412.¹² The inclusion of this number of eligible voters in a single-member electoral district would result in a number of voters greatly exceeding the 10 percent population deviation limit. In turn, this decreases the relative weight of the votes cast in the district.

➤ ***The procedure for assigning voters abroad to an electoral district should be more clearly defined in the law.***

6. The draft law does not refer to the need to consider ethnic, historical or other local characteristics when creating electoral districts. Recognizing such “communities of interest” helps create cohesive districts and can facilitate representation of groups with common political interests, including ethnic minorities. This principle is specifically mentioned in the *International Covenant on Civil and Political Rights*. Such provisions existed in the 1998 *Law on Elections of the People’s Deputies of Ukraine*. **Article 7** of that law required the CEC to take into account the “density of national minority populations” when delimiting constituencies and to ensure that “areas of dense residence of national minorities” would not be divided across constituencies.

➤ ***Consideration should be given to including a requirement in the law that the CEC take communities of interest, including minority populations, into account when creating electoral districts.***

7. The draft law is clear that authority to draw the constituency boundaries rests with the CEC (**Article 18.2**). While international practice varies, this is certainly a legitimate choice.¹³ The CEC should consider establishing an advisory body comprised of experts in various fields relevant to the creation of district boundaries to assist the CEC as it carries out its responsibilities under the law.

8. The various provisions of the draft law define an electoral calendar that is particularly problematic when it comes to drawing boundaries of the single-mandate constituencies. **Article 18.3** of the draft law requires the CEC to publish the boundaries of the electoral districts no later than 90 days prior to an election. On this timeline, it is possible that potential candidates will not know the district boundaries, and thus be unable to fully plan their campaigns, until the very day when the election is called. This timeline is also problematic for the general public, which should

¹² Central Election Commission. *Number of voters within the Autonomous Republic of Crimea, Regions, Kyiv and Sevastopol, Foreign constituency*. August 2011. http://www.cvk.gov.ua/drv/vybortsi/Regions_01092011.rtf

¹³ For an overview of such authorities see Handley, Lisa. *Challenging the Norms of Election Administration: Boundary Delimitation*. 2007. International Foundation for Electoral Systems. pp. 60-62.

be informed of and have the opportunity to comment on constituency formation well in advance of an election. Finally, the timeline suggested does not leave time for judicial review of decisions relating to boundary delimitation before the start of the election period.

9. The draft law also fails to mandate redrawing districts at a specified time interval. **Article 18.1** indicates the districts will exist on a permanent basis but does not mention when they are to be redrawn, if ever.¹⁴ However, **Article 18.2** requires that the population of districts not vary by more than 10 percent from the average. Presumably this means that boundaries would need to be redrawn periodically. The Venice Commission's *Good Practice in Electoral Matters* recommends that this process be carried out at least every 10 years, preferably outside of electoral periods.¹⁵

- ***The boundaries of the 225 single-mandate constituencies envisioned in the law should be defined as soon as practically possible, preferably no later than six months prior to the start of an election period.***
- ***Single-mandate constituency boundaries should be revised periodically to ensure they remain of roughly equal population. Such revisions should take place at regular times separated from any election event.***

10. **Article 18.3** of the draft law specifies that the boundaries of the single-member districts be printed in national and regional media no later than 90 days prior to the day of voting. Except for this formality, the public is guaranteed little information on the creation of constituencies. A public awareness program designed to educate stakeholders about the process would be useful, especially because delimitation can be a very technical exercise and not particularly well understood.

11. The draft law also includes no provision for public consultation during the delimitation process. Both public education *and* public consultation on the creation of constituencies are essential for the transparency and legitimacy of this process. Furthermore, political parties could be kept informed of any redistricting exercises to strengthen their confidence in the delimitation process. The need for public consultation has been emphasized by various institutions dealing with electoral matters, such as the Commonwealth Secretariat and the International Foundation for Electoral Systems.¹⁶

¹⁴ While time intervals for mandating the redrawing of district boundaries range among countries, the predominant choice seems to be every 10 years.

¹⁵ Venice Commission, *Code of Good Practice in Electoral Matters*. October 2002. Paragraph 16.

¹⁶ Commonwealth Secretariat. Paragraph 22 of the Secretariat's 1997 *Good Commonwealth Electoral Practices: A Working Document* states that, "It is important that the general public play a part in the whole process and that the political parties also have an opportunity to respond to proposals before they are finalized..." and proposes a transparency standard: "Constituency boundaries should be drawn in a transparent manner and the procedure should be accessible to the public through a consultation process."

- ***Either the Law or the ensuing secondary legislation (e.g., Law on the Territorial Organization of Elections) should include requirements to adequately inform and consult the public on the creation or changing of constituency boundaries.***

3. Precincts

The draft law defines the process for establishing election precincts similar to the current law with few exceptions. The majority of changes are related to the condensed timeline, which flows down to many aspects of the electoral calendar, and the language required by the introduction of single-member districts.

1. **Article 19.6** of the draft law states that the procedures for “establishment, change, termination and functioning” of precincts shall be determined by a separate law governing the territorial organization of elections.¹⁷ However, the draft law itself does many of these things, and for this reason, the need for this supplementary law with regards to precincts is unclear. Either the draft law should fully govern all issues relating to election precincts, or the majority of such provisions should be regulated by separate law. Dividing them between two pieces of legislation is unnecessary and could lead to contradictions and redundancies.
2. **Article 19.3** establishes that the number of voters in a precinct in Ukraine can be between 20 and 2500 voters. While amendments in 2005 lowered the upper limit from 3000 to 2500 voters, this is still a considerable number of voters for a single precinct, which can cause overcrowding, discourage citizens from voting and complicate and lengthen counting procedures. Both the problems caused by larger precincts, and the need for reducing the total number of voters assigned to a precinct, have been frequently cited by observers.¹⁸ The issue was not widely noted in the 2007 parliamentary election, perhaps because there was only one ballot and the voter turnout was slightly lower than normal. However, it may again surface through the introduction of two ballots under the proposed electoral system.
3. **Article 19.4** of the draft law allows the creation of precincts that exceed the prescribed maximum by up to 10 percent (i.e., to 2750) in certain circumstances. The current law also allows precinct size to exceed the prescribed maximum, but imposes no limit. Presumably, this provision was added to “cap” polling stations at a manageable size. However, this rule comes into effect only when other options, such as creating a new precinct or transferring voters to another precinct, are not available. Higher level election commissions confronted with such circumstances would be faced with a choice of violating the limit in **Article 19.4** or not assigning some voters to a precinct at all. This size limit may also prove problematic when establishing

¹⁷ See also **Final and Transitional Provisions, Paragraph 5** in the draft law.

¹⁸ See for example, OSCE/ODIHR. *EOM Final Report Parliamentary Elections*. March 2006. p. 8; OSCE/ODIHR. *EOM Final Report Parliamentary Elections*. March 2002. p. 21.

precincts abroad, as the number of polling stations that can be established in a country or region may be limited by the host government.

4. **Article 23** of the draft law requires the CEC to publish information relating to the permanent precincts 90 days prior to the day of voting. This should provide voters an adequate amount of time to familiarize themselves with the locations and boundaries of the precincts, many of which presumably have not changed over the years. This provision appears to be an improvement on the current law, which requires publication only 45 days prior to Election Day (**Articles 19.5** and **Article 23.1**).
5. The draft law does not include prohibition of the use of military bases as places of polling as found in **Article 21.5** of the current law. Having military personnel vote in the closest ordinary precinct is common practice and provides a safeguard for the secrecy of the vote of members of the military by mixing their votes together with those of local civilian voters.¹⁹

➤ ***If practical, consideration should be given to reinstating the provision to disallow voting in military bases.***

6. **Article 22.3** of the draft law permits the creation of “temporary” overseas precincts away from diplomatic missions. This provision, while relatively uncommon,²⁰ facilitates suffrage for those voters who reside far from a diplomatic mission. However, **Article 22** does not specify a legal basis to determine when temporary overseas precincts should be established, such as the estimated number of voters, petitions by a group of voters or the non-partisan nature of the premises. The draft law appears to leave the decision to the discretion of the MoFA and the CEC. By contrast, **Article 22.4** of the current law specifies that such precincts are to be created in “big cities of a foreign state where at least 1000 Ukrainian citizens who have the right to vote reside or temporarily stay.”

➤ ***The law should specify not only the procedures but also the criteria for establishing temporary precincts abroad.***

7. The CEC may publish information on the location of special election precincts established under **Articles 21.8** as late as five days before Election Day (**Article 23.3**). This is unchanged from the current law; and the practice may work. However, that time period may be too short for political parties, observers and others to mobilize needed resources associated with an election precinct and commission.

¹⁹ Venice Commission, *Code of Good Practice in Electoral Matters*. October 2002. Paragraph 41.

²⁰ Use of non-diplomatic locations for out of country voting is used most often to accommodate refugee and displaced populations, as discussed in *Challenging the Norms and Standards of Election Administration: Standards for External and Absentee Voting* (Handley, 2007). However, there seems to be a trend towards using such location to serve voters abroad more generally. For example, this practice has been used in Russia in recent elections; in June 2010 Moldova amended the Election Code to establish non-diplomatic precincts due to the large numbers of citizens residing abroad.

4. Electoral Commissions

The draft law outlines a hierarchal system of election administration bodies consisting of Precinct Election Commissions (PEC), District Election Commissions (DEC) and the CEC, itself.

1. **Article 27.2** of the draft law grants the right to nominate members of DEC's to two groups: (1) Parties that have registered parliamentary factions with the apparatus of the parliament; and (2) parties that are electoral subjects.²¹ The draft law gives self-nominated candidates no right to representation on DEC's.

Article 28.4 gives the right to nominate PEC members to those two groups and also to self-nominated candidates in single-member districts.

The draft law stipulates that a DEC (or PEC) shall include one representative from each party that has a registered faction in parliament, provided that a nomination was lodged with the respective commission. Any remaining seats on the DEC (or PEC) shall be filled by no more than one representative from each party (or candidate registered in a single-mandate district) "specified in clause 2 of Part two of this Article" by drawing lots. Since parties represented in parliament will typically be electoral subjects, and since the number of parties contesting the election may well exceed the number of seats on the commission, this provision could grant a party registered in the parliament up to two seats on a given commission, while other parties might have none.

➤ ***The law should only allow a party mentioned under section 27.2(1) to obtain a second seat on an election commission if all other eligible electoral subjects have already received a seat.***

2. **Paragraph 4** of the **Final and Transitional Provisions** establishes a special appointment process for the 2012 elections, under which each registered faction is entitled to representation. This approach favors political parties who formed their own factions over parties who joined together to form blocs, with the latter receiving only a single nomination for all of the parties in the bloc. This is analogous to the nomination process for election commissioners in 2010 local elections.²² The disadvantage in this approach is compounded by the fact that bloc members will no longer be running a single list of candidates, and so the nominee will not be in a position to represent the interests of all parties. Some parties that are currently part of blocs may therefore be unrepresented on electoral commissions.
3. **Articles 27.5** (for DEC's) and **Article 28.7** (for PEC's) of the draft law stipulate that nominating parties should supply somewhat extensive personal information for their nominees, including confirmation of education, occupation, and place of work. Some of these requirements seem

²¹ Article 12 of the draft law defines these as parties which have nominated candidates for members of Parliament.

²² *Statement of the NDI and IFES Pre-Election Delegations to Ukraine's 2010 Local Government Elections*. October 2010. www.IFES.org.

irrelevant and could complicate and potentially delay the nomination process. It also not clear as to how such information can be verified, if at all. These requirements could also potentially lead to the disqualification of candidates based on a failure to provide what may be insignificant details.

4. The draft law stipulates that nominations for members of PECs should be signed by the central management body of the nominating party and nominations should include personal (handwritten) statements of nominees (**Articles 28.6** and **28.7**). This practice ensures that parties maintain a degree of control over the nomination process. However, this benefit should be weighed against the cumbersome nature of the centralized procedure, which could make it more difficult to correct technical errors and omissions within the time constraints of the draft law.²³
5. Another concern related to nomination and appointment of DEC and PEC members is the language “*No special decision shall be required to reject nominees,*” found in several provisions of the draft law.²⁴ Allowing important actions, such as the rejection of election commission members or selection of managerial positions, without a written decision, may hamper the possibility of judicial review,²⁵ which runs contrary to good electoral practice.²⁶ Rejections of nominations due to minor alleged omissions in the nomination papers could be subject to an appeal process. While it may seem unrealistic to appeal the outcome of casting lots, it is not impossible that an infraction to the required procedure may have taken place.
 - ***Consideration should be given to requiring written decisions with respect to the formation of election commissions.***
 - ***The provisions related to appointment of DEC and PEC members should be simplified so that they are not unduly burdensome to electoral subjects.***
6. **Articles 27.10** and **28.11** specify that the head, deputy head and secretary of an election commission must be nominated by three different parties. This provision is an important means of ensuring some parity in commission leadership in light of the potential for two members from the same party to gain seats on the commissions (discussed in paragraph 1). However, the effectiveness of such rules will be undermined if the three positions are appointed by three parties that are different, but are political allies.
7. **Article 30.2** of the draft law introduces a requirement that the CEC publish procedural manuals for the district and precinct election commissioners. While such materials have been published

²³ Within one day of receipt of notification of the errors or omissions (**Articles 27.7** and **28.9**).

²⁴ Draft Law, Articles 27.3, 27.7, 27.9, 28.5 and 28.9; no such language exists in the current law.

²⁵ Draft Law, Article 107, generally allows for complaints regarding “a decision, action or inaction” of an election commission. However, the absence of a written decision may make it more difficult to establish if a decision was incorrect.

²⁶ Paragraph 5.10 in the 1990 OSCE Copenhagen Document provides that “[...] Everyone will have an effective means of redress against administrative decisions [...].”

by the CEC in previous elections, the inclusion of this requirement in the law is a positive development.

8. **Articles 30 and 31** include the training responsibilities of the CEC and DECs respectively. Each is charged with the training of the lower level commission members. Beginning after the 2012 parliamentary elections, the draft law will require persons holding management level positions within DECs to complete a training program organized by the CEC (**Article 26.6**). This new requirement represents a significant step towards the professionalization of election commissions and is a major positive feature of the draft law. However, the actual impact of this provision will depend on the CEC's capacity to implement it, which can only occur when the CEC is provided with stable long term funding dedicated to this purpose.
9. **Article 26.7** of the draft law, which would be in effect for the 2012 elections, requires the CEC to define the training process for persons "seeking to occupy" leadership positions. The provision as written could be taken to imply that the training is a qualification for the position, and that failure to complete or pass the training could be grounds to deny a leadership position to a nominated person. It makes sense to require managers of election commissions to complete training in specified skills and knowledge. However, care should be exercised so that training is not used to exclude certain parties from representation, for instance by limiting the number of persons that can participate in trainings, or by failing to issue certificates of completion.
 - *The procedure for training electoral commissioners should be regulated to exclude any possibility of bias for or against electoral subjects.*
 - *Consideration should be given to including language in the Law that clearly guarantees that the trainings for DECs and PECs be organized in a way that will provide all members of an election commission with the same information, in order that they have an equal start in their work.²⁷*
 - *The Government of Ukraine should ensure that the CEC has adequate funding so that it can fulfill its mandate to train election commission members.*
10. **Article 33.5** of the draft law provides that a meeting of an election commission should be deemed legal if more than half of the commission members are present. **Paragraph 10** of the same article provides that "any decision of an election commission should be adopted [...] by a majority of the members present at the commission's meeting, except in cases provided by this law." In effect, this means that important decisions can be made with the approval of just over one quarter of the members of the commission. While these rules may help ensure that commissions are able to function even if a number of members are absent, they raise some concern that important decisions may be taken without input from almost half of the commission members.

²⁷Venice Commission. *Code of Good Practice in Electoral Matters* provides that "Members of electoral commissions must receive standard training." October 2002. II.3.1.g.

- ***Consideration should be given to increasing the quorum requirements for election commission meetings to two thirds of members. Alternatively, commissions could be required to make certain kinds of decisions by qualified majority.***²⁸

11. Unlike the current law, **Article 37.3** of the draft law does not allow a nominating subject (party or candidate) to recall an election commissioner that it has appointed. It should be noted that during the April 28-29 meeting of the working group established under Presidential Decree No. 1004, some Ukrainian experts expressed support for retaining the power to dismiss election commissioners on the basis that their independence may be comprised through bribery or intimidation. However, this change brings Ukrainian legislation into conformity with international standards which clearly prohibit “at will” dismissal of election commissioners by the electoral subjects that nominated them.²⁹ If nominating subjects are to retain the ability to remove their commissioners, they should be able to do so based only on a demonstrated violation of a requirement to act impartially and professionally, and such a removal should be subject to appeal.

5. Registration of Candidates

The draft law largely retains the approach to candidate registration taken in the current law, with some new sections added to accommodate the addition of the single-member districts. In a few key areas, the draft law has introduced changes that address defects in the current law. However, as is discussed in detail below, the revised timeline established by the draft law for the registration of candidates raises some concerns.

1. Under **Article 9** of the draft law, a person is eligible to be a candidate if he or she has the right to vote, has reached the age of 21, and has resided in Ukraine for the previous five years. However, **Article 9.4** restricts this right for those who have been convicted of a “deliberate” crime. This section is troubling because it makes no mention of the nature or seriousness of the crimes in question. As the Venice Commission makes clear, such provisions should include reference to the principle of proportionality,³⁰ so that suffrage rights are not restricted for trivial reasons.
- ***The Law should be more specific as to the type or category of crimes that would disqualify one from being a candidate. Some degree of proportionality should apply; individuals should be denied the right to stand as candidates for more serious convictions only.***
2. **Article 52.5** precludes persons included in a political party’s candidate list for the national constituency from also being a candidate in a single-member district. Countries that use mixed systems approach this issue in different ways and there is no single ‘best’ practice. In the case of

²⁸ Venice Commission. *Code of Good Practice in Electoral Matters* recommends qualified majority voting for election commissions. October 2002. II.3.1.h.

²⁹ Venice Commission. *Code of Good Practice in Electoral Matters*. October 2002. II.3.1.f.

³⁰ Venice Commission. *Code of Good Practice in Electoral Matters*. October 2002. Paragraph 6(d).

Ukraine, the matter appears to have been settled by the Constitutional Court's ruling that simultaneously running for office in a single-member district and a party list is a violation of the principle of equal suffrage.³¹

3. The procedures for nomination and registration of candidates are set out in Chapter VII of the draft law. These provisions do not include the rule in **Article 10.2** of the current law that only parties that have been registered for at least 365 days may submit a list of candidates. Under the draft law, any registered party may submit a list of candidates. The elimination of this restriction, which serves no valid purpose, is a positive step towards inclusiveness and openness in elections.
4. **Article 56** of the draft law establishes deposits of 2,000 minimum monthly salaries³² (UAH 2,008,000 or USD 251,000) for parties submitting candidate lists and 12 salaries (UAH 12,048 or USD 1,506) for candidates contesting single-member district seats. Deposits are refunded only to those parties or candidates who actually win a seat(s) in the election. International standards discourage candidate registration procedures that entail conditions, deadlines or fees which are unduly difficult to meet, or which give some candidates an unfair advantage over others:

*Monetary deposits should be of a sufficient level to discourage frivolous independent candidates and political parties, but should not be so high as to prevent legitimate political parties or independent candidates from obtaining ballot access.*³³

*...Such practices [payment of monetary deposits] appear to be more effective than collecting signatures. However, the amount of the deposit and the number of votes needed for it to be reimbursed should not be excessive.*³⁴

The deposits set in this case would seem to be in excess of what would be required to discourage frivolous candidates. Furthermore, there appears to be no policy justification for the refund rule, which guarantees that many serious candidates, especially in single-member districts, will lose their deposits. As currently structured, the deposit system represents a significant disincentive to run for office regardless of financial means, and is a serious barrier to participation by candidates and parties of modest financial means.

- ***Consideration should be given to reducing deposit amounts to the lowest level likely to discourage frivolous candidates. Deposits should be refunded to all parties and candidates that make a***

³¹ Decision of the Constitutional Court of Ukraine of 26.02.1998 № 1-пн/1998.

³² The Minimum wage is adjusted several times each year. For the purposes of this report we have used the rate that will be in effect as of December 1, 2011, namely UAH 1004 per month. The rate in effect during the 2012 elections will be slightly different. The USD equivalents are based on exchange rates prevailing during the month of September 2011.

³³ International Institute for Democracy and Electoral Assistance. *International Electoral Standards: Guidelines for reviewing the legal framework of elections*. 2002. p. 51.

³⁴ Venice Commission, *Code of Good Practice in Electoral Matters*. October 2002. Paragraph 9.

credible showing in an election, expressed as a certain percentage of the popular vote. This is especially true for candidates for the single-member districts.

5. **Article 52.1** stipulates that the “nomination of MP candidates shall begin ninety days prior to the day of voting and shall end seventy-eight days prior to the day of voting.” However, **Article 18.3** contemplates that the CEC will publish information about the single-member constituencies as late as ninety days prior to the day of voting. Thus, it is quite possible that political parties and candidates would not know the constituency boundaries prior to the beginning of the twelve day window within which they must submit their nominations. This has the potential to undermine the ability of parties and candidates to make informed decisions about and effectively plan for their participation in elections. By comparison, the current law, under the 120-day election period, in **Article 55, Paragraph 2** provides that “nomination of candidates for deputy shall start one hundred and nineteen days and end ninety days prior to the day of election” – a window for nomination of twenty nine days in an electoral system that does not include single-member constituencies and the requisite boundary delimitation process. As recommended in paragraph 8 in the section on Electoral Constituencies, the proposed timelines for announcement of the boundaries of the single-member constituencies should be reconsidered.

6. The draft law contemplates that candidates in single-member districts will submit their registration documents, including a receipt showing that the deposit amount has been paid into the bank account of the relevant DEC, no later than 51 days before voting. However, under **Article 27.1** of the draft law, DEC’s are to be established no later than 60 days prior to Election Day. Considering that 1) a DEC must hold its first meeting before it can take any further steps; 2) it may take up to three days after being formed to make the necessary registration to obtain legal status (**Article 38.3**); and 3) the DEC then must open a bank account and publish the details of the bank account in a local newspaper, it seems likely that in many districts there will be only 4 or 5 days during which candidates may file registration documents. If a DEC fails to comply with the timetable contemplated in the draft law, the period might be shorter still.

In cases in which a candidate is required to file corrected registration documents, the shortage of time will be still more acute. As noted above, candidates may file registration documents no later than 51 days before the election. Under **Article 59.6** of the draft law, a DEC has four days to make a decision on a registration application. Decisions rejecting an application must be delivered to an applicant, with reasons, the following day (**Article 60.2**). **Article 60.3** requires every DEC to submit its final decisions regarding registration to the CEC 45 days before the election (**Article 60.3**). Considering these deadlines, it is possible that an applicant will have just one day to submit corrected registration documents.

- *Consideration should be given to revising the timelines or processes within the draft law to make registration deadlines more realistic. For example, candidates could be allowed to submit their*

registration documents (except for the receipt, which could be submitted separately) to a DEC before the DEC has obtained legal status and opened a bank account.

7. **Article 61** of the draft law retains the provision in the current law allowing the CEC to issue public written warnings to candidates or parties that violate a number of key electoral rules. However, the draft law does not include a provision analogous to that in **Article 64.1(10)** of the current law, which allows the CEC to cancel the registration of a candidate that has continued, despite receiving warnings, to violate the rules. This change is to be welcomed. The CEC, as a non-judicial body, should not be empowered to impose a sanction as severe as deregistration, except for the technical reasons mentioned in **Article 61.4**.

6. Observers

The draft law describes the rights and obligations of official observers and party and candidate agents and provides for transparency in the conduct of all stages of the election. The provisions of the draft law relating to observers and agents are largely the same substantively as the current law, with a few notable exceptions.

1. **Article 77** establishes procedures for political parties that have registered candidates, candidates in single-member districts, and Non-Governmental Organizations (“NGOs”) to apply for and receive accreditation to field official observers. The procedures for applying are straightforward and the grounds upon which registration may be denied are limited. **Articles 34.2, 34.3** and **77.9** collectively guarantee the right of official observers to be present during all stages of voting and counting, to attend election commission meetings at all levels, to take photographs or make video recordings of anything they see (provided they do not undermine the secrecy of the vote), and to receive upon request copies of protocols (minutes) of election commission meetings, the tabulation of voting results and other documents. These provisions appear to be in keeping with Ukraine’s commitments under paragraph 8 of the 1990 OSCE Copenhagen Document.
2. **Article 77.9** enumerates a number of rights of official observers. Among these, one in particular needs clarification. **Article 77.9(7)** gives observers the right to “take all necessary measures to stop illegal actions during the vote and vote counting [...]”. While observers should be allowed to take “necessary measures” to bring violations to the attention of election commissions and courts, and file complaints, acting personally to enforce the law is inconsistent with their role and responsibilities.
 - ***The meaning of the words “all necessary measures” in Article 77.9(7) should be clarified.***
3. Analogous provisions for the registration of official observers from foreign states and international organizations are found in **Article 78**. The major difference between the two registration processes is that foreign observers receive their observer badges directly from the CEC, which entitles them to observe throughout the country, while domestic observers receive

their registration from DECAs, which would appear to limit their right to observe to the territory of the respective district. As a practical matter, local registration of observers seems sensible. However, the process set out in the draft law seems to render domestic observers slightly inferior to international observers with respect to the areas in which they may observe. This would be inconsistent with the Venice Commissions guidance, which calls for the equality between domestic and foreign observers.³⁵

➤ ***The law should ensure that domestic observers have all the rights of international observers, including the right to observe freely within the whole territory of Ukraine.***

4. The draft law eliminates differential treatment of official observers from NGOs, who will now have the same rights and obligations as political party and candidate observers. This change is positive in that it broadens the role of NGO observers and potentially simplifies the system. Its inclusion in the draft law represents a welcome strengthening of the transparency of the electoral system.
5. As part of the overall reworking of the electoral timeline resulting from the reduction of the election period from 120 to 90 days, **Article 77.2** of the draft law reduces the time period by which NGOs must apply to the CEC for the right to deploy election observers from 90 to 60 days before the election. The CEC is obligated to make a decision regarding the application by an NGO within ten days, as in the current law. This timeline, while abbreviated, should still result in observers being accredited at the same stage of the electoral process, and thus should not impact their ability to carry out their responsibilities.
6. **Article 77.9** of the draft law is similar to a provision of the current law that permits official observers to “address” an election commission or a court regarding a violation of the election law. However, the draft law omits the last clause in the current law, “within the terms envisaged by Article 106 of this law”. **Article 106** of the current law prescribes the procedures for filing complaints with commissions and courts. As regards “addresses” under **Article 77.9(5)** and the related “statements of violation” under **Article 77.9(6)** of the draft law, the form and effect of these actions needs to be further explained in the draft law. As is discussed more fully on page 46 below, this ambiguity, along with changes to the wording of the rules governing complaints, appears to remove the right of observers to file complaints.

➤ ***The law should make it clear that observers may file complaints with election commissions with respect to violations of the electoral law.***

➤ ***With respect to “addresses” and “statements of violations”, the law should provide further information on deadlines for taking such steps, the actions (if any) that an election commission is***

³⁵ Venice Commission. *Guidelines on an Internationally Recognized Status of Election Observers*. December 2009. Paragraph 10.

obliged to take in response, and the remedies (if any) an election commission may impose if it finds that the violation has in fact occurred.

7. Electoral Campaign

The provisions of the draft law governing the conduct of the election campaign by political parties and candidates closely follow those in Chapter VIII of the current law. For the most part, these provisions are consistent with international norms and practices common to the region. As already mentioned, the reduction of the election period from 120 to 90 days is a major change introduced by the draft law, shortening the time available for all stages of the election process. This includes the time for campaigning.

1. A significant change in the draft law is the elimination of any state role in subsidizing or facilitating election campaigning by parties and candidates. The current law provides for state subsidies for electoral campaigns and free and equitable access to state-owned media. International standards neither require public subsidies for election campaigns, nor oppose the raising and spending of private funds for election purposes by political parties and candidates, subject to reasonable limitations and public disclosure. However, the sudden elimination of the established means of public financial support for election campaigns could undermine the ability of some parties and candidates to compete credibly in elections. While political entities should be able to adapt to this change given enough time, it is questionable whether they would be able to do so for the 2012 election.

➤ ***If state financial support of election campaigns is to be eliminated, consideration should be given to continuing such support on a transitional basis for at least the 2012 election so that parties and candidates have time to adjust.***

2. The draft law inexplicably removes a seemingly important provision from the current law. **Article 66** of the current law reads as follows:

*The election campaign is any activity with the aim to urge voters to vote for or against a certain subject of the election process. The election campaign may take any form and use any means that are not in conflict with the Constitution of Ukraine and the laws of Ukraine. **Citizens of Ukraine shall have the right to discuss the election programs of parties (blocs), the political, professional and personal qualities of candidates for deputies freely and all round, and to campaign for or against parties (blocs) and candidates for deputy [emphasis added].***

The analogous provision in the draft law (**Article 68**) reads as follows:

Election campaigning shall mean carrying out any activity aimed at encouraging the voters to vote or not to vote for a particular MP candidate or party that is an electoral subject. Election campaigning may be performed by any means that do not contravene the Constitution of Ukraine and the laws of Ukraine.

It is unclear why the second half of the article in the current law has been removed. The deleted provision would seem to provide protection for important kinds of election-related speech. In particular, explicit protection of the right of citizens to discuss “the professional and personal qualities of candidates” would seem desirable.

➤ ***Consideration should be given to retaining the explicit recognition in Article 66 of the current law of the right of citizens to discuss, debate and campaign for parties and candidates as they so choose.***

3. The draft law relaxes the restriction on political activity by officials and officers of bodies of the state executive power and local-self-governance, law-enforcement bodies, and courts. In the current law such activities are prohibited entirely, unless the person in question is a candidate. However, **Article 73.1.3** of the draft law permits such people to engage in campaign activities of all kinds, provided that such activities take place outside working hours. This could be viewed positively, as all citizens, including employees of the state, should be entitled to hold and express political opinions. However, by granting public employees permission to participate in campaign activities, the law may inadvertently be exposing them to coercion by states employers to participate in campaign activities in support of particular parties or candidates.³⁶ The relaxation on the prohibition on campaigning by public employees should be accompanied by greater vigilance on the part of the authorities, and the courts, against such coercion.

8. Campaign Finance

The draft law includes provisions requiring record keeping and disclosure of campaign contributions and expenditures that are largely the same as those in the current law. While these provisions suggest the intent to bring transparency to campaign finance, they are weak and unlikely to produce any significant progress towards that goal.

Article 45.2 of the draft law requires political parties that register electoral lists with the CEC, and candidates registered with a DEC in a single-member district, to establish and maintain dedicated bank accounts for their electoral funds. Campaign expenditures are to be paid exclusively from funds held in these accounts. Parties and single-member district candidates must also appoint financial managers, who are required to keep records and, within 15 days of voting day, file a financial report on the sources and uses of campaign funds. Financial disclosure is to be made to the CEC in forms prescribed by the CEC. The disclosure documents are to be made publically available on the CEC website. These rules provide the general outline of a potentially viable and transparent system of campaign finance regulation and disclosure. However, the provisions in the draft law are vague or incomplete in a number of key details.

³⁶Such coercion has been documented in Ukrainian elections. See, for example, page 13 of OSCE/ODIHR’s March 2002 *Final Report, Ukraine Parliamentary Elections* in which observers noted, “In a third of constituencies, the EOM received credible reports of intimidation and undue pressure exerted on employees of local administrations, schools, hospitals, universities and State-owned enterprises.”

1. As noted above, the draft law eliminates all sources of state support for electoral campaigns, with the result that parties and candidates must now rely completely on private contributions and their own resources. Article 50.2 limits the amount that an individual may donate to a party to 400 times the monthly minimum wage (UAH 401,600 or USD 50,200) and donations to individual single-member district candidates to 20 times the minimum wage (UAH 20,080 or USD 2,510). The limit for donations to a party is high compared to other countries in the region that impose such limits.
 2. The rules do not govern donations made directly to individuals and political parties before they are registered and open their campaign bank accounts. The Law on Political Parties allows donations to parties from both natural and legal persons, and imposes no limits on such donations. As both parties and individuals are able to donate their own funds to their campaigns, they can easily circumvent both the disclosure requirements and the contribution limits by accepting donations from financial backers before the campaign period and then including such funds in their electoral accounts as "own funds".
 3. The law gives no guidance on what is to be in the financial reports, other than that they should describe "the receipt and use of the electoral funds". Key concepts that must be addressed in any effective system of financial disclosure, such as a clear definition of "donation" and "campaign expense," the threshold above which financial contributors should be identified by name, and rules on the treatment of in-kind contributions, are not dealt with. While the CEC has issued some guidelines for reporting, its ability to regulate in this area is limited under Article 19.2 of the Constitution to those powers specifically delegated to it in the Law on the Central Election Commission and the election law.
 4. Neither the draft law nor the Code of Administrative Offences (Chapter 15-A) include any provision for enforcement or sanctions for failing to file financial disclosure documents. Furthermore, although the CEC may review the financial reports submitted and request clarification, it has no ability to compel cooperation with such inquiries. The CEC also lacks sufficient powers to monitor election campaign spending or to investigate suspected violations of the law.
- ***The system of campaign finance disclosure should cover contributions made at any time prior to or during an election campaign.***
 - ***The rules on financing political parties in the Law on Political Parties should be harmonized with the campaign finance provisions in the Law as regards to sources of and limits to private donations.***
 - ***The law must establish a credible system for the enforcement of rules relating to financial disclosure, including the verification of financial report data, monitoring of the funding of elections and expenditures, and proportionate sanctions for untimely, incorrect or incomplete disclosure.***

5. The draft law imposes no limits on the amount that a party or candidate can spend on an election campaign.³⁷ The Venice Commission's recommendations on this point are clear:

8. In order to ensure equality of opportunities for the different political forces, electoral campaign expenses shall be limited to a ceiling, appropriate to the situation in the country ...

*10. Private contributions can be made for campaign expenses, but the total amount of such contributions should not exceed the stated ceiling.*³⁸

The introduction of spending limits could help ensure that political participation is within the reach of candidates and parties of modest financial means.

➤ ***Consideration should be given to the introduction of campaign spending limits.***

6. Funds from a political party electoral fund that are unused at the end of an election are returned to the party (**Article 50.11**). However, if a single-member district candidate has unused funds after an election (**Article 50.13**), or after the cancellation of his or her registration (**Article 50.14**), then those unused funds are forfeited to the state budget. This would seem to be an unfair treatment of single-member district candidates. As with forfeiture of the electoral deposit of candidates who do not win their seat, this practice creates a disincentive for prospective candidates to compete. At a minimum, candidates should have the option of returning unused funds to their contributors.

9. Regulation of Media

The draft law includes detailed provisions aimed at ensuring equal access to print and broadcast media by all parties and candidates contesting the parliamentary election. The intent of the draft law to ensure an equitable and informative media environment during elections is clear; however, weaknesses in the proposed regulatory scheme raise doubts as to whether these goals can be effectively implemented.

1. The draft law does not provide a clear definition of "media," which makes it difficult to see what kinds of communication are or are not subject to requirements of the law.³⁹ In particular, it is not clear that new media such as internet blogs and social networking are outside the scope of the draft law. The draft law simply refers to the "mass media." Additionally, the draft law does not distinguish between public and privately-owned media, although international standards generally call for different regulatory approaches to the two kinds of media, with state-owned media typically being subject to more stringent controls.⁴⁰

³⁷ It should be noted that Ukraine used campaign spending limits until 2004 when they were abolished, partly in response to opposition concerns that they were being enforced selectively by the authorities for partisan purposes.

³⁸ Venice Commission. *Guidelines and Report on the Financing of Political Parties*. CDL-INF (2001) 8. March 2001. Paragraph 10.

³⁹ Council of Europe Recommendation CM/Rec(2007)15, *On Measures Concerning Media Coverage of Election Campaigns*, includes a definition that may provide a useful model.

⁴⁰ *Ibid.*

2. The draft law creates a regulatory scheme based on equality of access to both private and public media on a paid basis. Both print and broadcast media are required to give all parties and candidates participating in an election equal opportunity to buy political advertising on equal terms. This guarantee of equal access is helpful given the highly politicized nature of Ukraine’s media ownership.
3. Media of all kinds are required in a number of articles in the draft law to be “unbiased,” provide “unprejudiced, balanced, reliable, complete and accurate information,” and offer “equal treatment” in their coverage of elections. It should be noted that while international standards allow such restrictions with respect to broadcast media, they generally call for the editorial independence of print media.
 - ***To avoid the overbroad application of media-related provisions, the Law should include a clear definition of “media.”***
 - ***The law should recognize the editorial independence of print media.***
 - ***The law might also distinguish between public and private media for the purpose of such rules, and give explicit recognition of the need to respect the editorial independence of private media organizations and freedom of the press.***⁴¹
4. **Article 71.4** of the draft law restricts the ability of radio or television broadcasters to comment on or assess the campaign advertising, or the campaign activities, of a candidate or party within 20 minutes of broadcasting campaign programming for that party or candidate. The rationale for this restriction on the freedom and editorial independence of broadcasters is not evident.
 - ***The law should not interfere with the editorial independence of media without a clear and compelling reason.***
5. **Article 71.9** of the current law includes the following provision:

It is prohibited to disseminate deliberately false or defamatory information about a party (bloc) that is a subject of the election

This provision has been changed, in **Article 73.9** of the draft law, to:

*It shall be prohibited to disseminate deliberately false or libelous information, **the false or libelous nature of which has been established judicially**, relating to a party that is an electoral subject or to an MP candidate. [emphasis added]*

⁴¹ This issue is addressed more fully in Council of Europe Recommendation CM/Rec(2007)15, *On Measures Concerning Media Coverage of Election Campaigns*, paragraphs I.3-4 and II.1.

While this change arguably represents an improvement in the law, it should be noted that Ukrainian libel laws have been criticized in a range of international forums, including the European Court of Human Rights, for being insufficiently protective of freedom of the press.⁴² The draft law could, but does not, seek to qualify the application of existing libel laws to election related media coverage in a manner consistent with Ukraine’s commitments to freedom of the press and free and fair elections. Of similar concern, **Article 68** of the draft law has eliminated the guarantee in **Article 66** of the current law that “Citizens of Ukraine shall have the right to discuss the election programs of parties (blocs), the political, professional and personal qualities of candidates for deputies freely and all round [...]”. (see discussion on page 29, above)

6. Article 73.5 identifies certain kinds of speech (e.g. speech that advocates violence or incites inter-ethnic hatred) that are contrary to law during an election campaign. However, it is always possible that such speech may be accidentally broadcast, such as from a live event.

➤ ***The Law should include some protection for media organizations that inadvertently broadcast prohibited speech.***

7. **Article 73.12** of the draft law provides parties and candidates with a right of reply to information published about them that they consider “untrustworthy.” Such rules are not uncommon in international practice. However, this provision could be strengthened by including clearer explanations of the circumstances under which the right of reply may be exercised, establishing the length of reply or correction allowable in different cases, and setting a reasonable timeframe within which a reply should be published.

➤ ***The Law should clarify the rules relating to the right of reply. The Law should also recognize commonly accepted exceptions to the right of reply.***⁴³

8. **Article 73.10** states that if a media outlet repeatedly violates the requirements of the law, or commits a single instance of “gross infringement”, then a court may suspend the license of the media outlet (for broadcast media) or temporarily ban further publication (for print media) until the end of the election process. Given the severity of the sanction contemplated, this provision should be more carefully drawn to ensure that it cannot be employed for anything but the most serious kinds of offences. In particular, clarification is needed as to what would constitute a gross infringement, and what kinds of offences, if repeated, would justify a publication ban or revocation of a license.

➤ ***Greater clarity should be added to Article 73.10. Such measures should only be available to the authorities in response to the most extreme forms of misconduct.***

⁴² *Ukrainian Media Group v. Ukraine*, No. 72713/01, ECHR Judgment of 29 March 2005.

⁴³ Council of Europe Recommendation, Rec(2004)16, *On the Right of Reply in the New Media Environment* contains a list of internationally recognized exceptions.

9. **Article 67** of the draft law includes a number of rules governing the publication of poll results, which are in keeping with international standards and practices as set out in on page 3 of Council of Europe Recommendation CM/Rec(2007)15. However, **Article 67.3** prohibits publication of poll results during the 10 days immediately before Election Day, which may be incompatible with Article 10 of the *European Convention on Human rights*.

➤ ***A period of silence on polling shorter than 10 days prior to the day of voting should be considered.***

10. Voter Lists

While the draft law deals with the compilation, delivery, verification, and amendment of voter lists, important details on those subjects are also found in the 2007 *Law on State Register of Voters of Ukraine* (the “Registry Law”), which was amended significantly in 2010. **Article 7** of the Registry Law provides for the creation and maintenance of a register of voters that records certain information for each voter, including date of birth, a voting address, and a notification as to whether the voter is permanently disabled. The register also records the number of the electoral constituency and election precinct to which each voter has been assigned, based on his or her voting address.

Article 14 of the Registry Law provides for the functioning of a hierarchical system of bodies entitled to administer the Register (the CEC and units of regional state administrations) and to ensure its maintenance (Register Maintenance Bodies or “RMBs”). While this system is led by the CEC, much of the day to day work of maintaining and updating the voter register is carried out by the local RMBs, which are units within raion state administrations, or executive bodies of the city (raion in a city, if the city is divided into raions) councils. Under **Article 39** of the draft law, the local RMBs are required to compile preliminary voter lists for ordinary election precincts, and deliver them to DEC’s no later than 30 days prior to Election Day. No later than 20 days before Election Day, each DEC must deliver the preliminary lists to the PECs for which it is responsible. The preliminary lists do not contain a place for voters’ signature and are for informational purposes only.

1. The draft law in **Articles 40.1** and **43.4** require each PEC to make the preliminary voter list available for public scrutiny on the day after it is received. A voter may challenge inaccuracies in the preliminary voter lists not only with respect to their own data, but also with respect to the data of third parties. Although this provision is helpful in ensuring the integrity of the voter lists, as the Venice Commission has pointed out, it should include some provision so that third parties whose registrations are challenged are informed of the challenge, given an opportunity to respond and notified of the result.⁴⁴
2. While the draft law clearly contemplates that voters will scrutinize and challenge voter lists, it has omitted wording from the current law (**Articles 43.3** and **46.5**) that gives voters the explicit

⁴⁴ Venice Commission and OSCE/ODIHR. *Opinion on the Law on Elections of People’s Deputies of Ukraine* CDL-AD(2006)002, adopted by the Council for Democratic Elections at its 15th meeting (Venice, 15 December 2005) and the Venice Commission at its 65th plenary session (Venice, 16-17 December 2005). Paragraph 41.

right to do so. If the scrutiny and challenge process is to fulfill its purpose, it would seem logical to give voters the explicit right to examine the voter lists. The reasons for this omission are unclear.

3. Under **Article 40.6** of the draft law, an election commission is not empowered to amend either a preliminary or final voter list by its own decision. Instead, an election commission that receives a petition from a voter must either forward an appeal to the State Registry of Voters with the petition of a citizen, or reject it. However, the draft law does not specify the grounds upon which a petition may be rejected. As the PECs and DECs have no access to registry data, it is doubtful that they will ever be able to assess a petition on the merits. For this reason, the draft law should specify that the only grounds upon which an election commission may reject an application is that it is technically incomplete (*e.g.*, it does not provide the full name of the applicant or of the person whose data is being challenged) or is filed after the deadline). In all other cases, the commission should be legally obliged to forward petitions to RBMs for further consideration.

4. According to **Article 42.2** of the draft law, changes to the voter list at an election precinct on Election Day may only be made pursuant to a court decision. However, it should be noted that provisions within the Code of Administrative Adjudication appear to make any changes on Election Day highly unlikely. **Article 173.3** of the Code of Administrative Adjudication specifies that an application seeking to verify a voter list must be filed with administrative court no later than two days prior to Election Day. An administrative court is legally obliged to make a decision in the case within two days after the receipt of a lawsuit, but no later than two days prior to Election Day. This would seem to prevent the possibility of changes in the voter lists on Election Day pursuant to court decisions, except in cases where the decisions were taken before the legal deadline, but not presented to the PEC until Election Day.

The elimination of the provisions in the current law giving PECs to consider petitions for changes to the voter list on Election Day, either on their own initiative or at the request of an RBM is a significant improvement in the legislation that bring Ukrainian practice into conformity with international standards.⁴⁵

5. **Article 42.6** of the draft law states that on Election Day, the head, deputy head, and the secretary of a PEC are entitled to correct inaccuracies and technical errors in the final voter list if it is clear that the voter present at the election precinct is included in the voter list. A similar provision in the current law *on Presidential Elections* has been criticized by the Venice Commission, which noted that the law should set out the acceptable ways that the identity of a

⁴⁵ Venice Commission. *Code of Good Conduct in Electoral Matters*. October 2002. Paragraph 7(iv).

voter as the person indicated on the voter list could “clearly” be established to reduce the possibility of unintentional or purposeful misuse.⁴⁶

6. One issue of concern with respect to voter lists relates to so-called “temporary changes in place of voting without changing election address.” Under **Article 7.3** of the Registry Law, a voter has the right to change his or her place of voting (election precinct) temporarily without changing his or her voting address in the voter registry. A voter who applies to an RMB for a temporary change in place of voting is issued a certificate, which the voter can then present to another RMB to be added to the voter list in his or her temporary voting place.

The procedure for temporarily changing one’s place of voting resembles the absentee ballot system that was associated with abuse during the 2004 presidential elections.⁴⁷ There are not surprisingly then a number of concerns resulting from this system:

- The process of application for and issuance of certificates of temporary change of place of voting, and the entry of voters who hold such certificates into a new voter list, takes place within the State Voter Registry Management Body system, which is not subject to review by electoral observers. While CEC Resolution # 57 dated April 1, 2011 requires each RMB to keep a record of all issued certificates on changing a place of voting, such records are not accessible by election observers or otherwise subject to public scrutiny;
 - It is not clear that there is a reliable system in place to ensure removal of a person who uses a temporary change certificate from the voter list in his or her place of permanent voting, which could permit the voter to vote in both places;
 - Even if the system were perfectly secure, allowing voters to effectively choose the places in which they will vote in a system with single-mandate districts would permit citizens to strategically change their place of voting, so as to influence the outcome of closely fought contests.
- ***The rules allowing temporary changes to places of voting should be reviewed carefully to identify means of increasing transparency and reducing potential weaknesses in the system. The rules should also prevent voters from changing their place of voting for strategic reasons.***

11. Voting and Results

The provisions of the draft law concerning the organization of voting draw heavily on the current law. The majority of new or changed provisions have been added to accommodate key changes introduced

⁴⁶ Venice Commission and OSCE/ODIHR. *Joint Opinion on the Law on Amending Some Legislative Acts on the Election of the President of Ukraine*. CDL-AD(2009)04. July 2009. Paragraph 43.

⁴⁷ OSCE/ODIHR *Election Observation Mission Final Report, Ukraine Presidential Election*, 31 October, 21 November and 26 December 2004, Page 3.

by the draft law or electoral practice in Ukraine, such as the introduction of single-mandate constituencies, the removal of absentee certificate voting, and the revised voting hours on Election Day. As in other areas of the law, the provisions relating to voting are excessively detailed. Consideration should be given to deleting some of the minor or purely technical provisions and including them in regulations or CEC procedures.⁴⁸

1. While **Article 79** requires the CEC to approve the colors of both the single-mandate and nationwide election constituency ballot papers, nowhere does the draft law specify that two different colors must be used. This omission may simply be an oversight. In any event, the use of differently colored ballots can help ensure that voters are issued correct ballots; observers can verify that the correct ballots were issued, and ballots are not mixed at counting.
2. **Article 79.4** identifies a number of pieces of information that must be included on the ballot, including the date of birth, occupation, and place of residence of candidates. While some instruction may be warranted, ballot design should emphasize clarity and understandability to minimize the number of invalidated and spoiled ballots. As an alternative to printing such information on the ballot, voter educational materials in or outside of voting booths can display information on candidates and parties.
3. Neither **Article 80** (printing of ballot papers) nor **Article 77.9** (rights of observers) affords observers and representatives of parties not currently represented in parliament the right to monitor the production of ballots. Allowing them to do so would increase transparency and trust in the process.
4. The obligation of states to provide for voter education is recognized in a number of international documents.⁴⁹ **Article 82.7** of the draft law specifically delegates responsibility for the printing of instructional materials for voters to the 225 DECs, with guaranteed funding from the state budget. While this approach has merit, such decentralization may give rise to issues of quality control and consistency, which are especially significant for a national election. These concerns were noted with regard to a similar arrangement for such materials in the local elections.⁵⁰
5. **Article 84** of the draft law changes voting hours to 8:00 to 20:00 from 7:00 to 22:00 in the current law. This is a significant change and voter education efforts should be made to ensure citizens are aware of the new (more limited) hours. Article 25 of the International Covenant on Civil and Political Rights states that “every citizen shall have the right and opportunity (to vote)...

⁴⁸ Examples are numerous but include: provisions relating to polling station size and the number of ballot boxes within a polling station (although the number of booths has been removed in the draft Law), much of the detail in closing and counting procedures, and instructions on packing electoral materials.

⁴⁹ For example, The Inter-Parliamentary Council’s Declaration on Criteria for Free and Fair Elections calls on states to “initiate or facilitate national programmes of civic education, to ensure that the population are familiar with election procedures and issues; *The International Convention on Civil and Political Rights*, General Comment 25, states that “Voter education and registration campaigns are necessary to ensure the effective exercise of article 25 rights by an informed community.”

⁵⁰ *Statement of the NDI and IFES Pre-Election Delegations to Ukraine’s 2010 Local Government Elections*. October 2010. www.IFES.org.

without unreasonable restrictions.” A 12-hour voting window is a reasonable timeframe on Election Day to enable citizens to come and vote. However, given the large size of some precincts (potentially up to 2750 voters), the reduced hours may result in crowding and lengthy queues. For example, a polling station designed to accommodate 2,400 voters would need to process 200 voters (or 400 votes) per hour in order to do so.

6. **Article 84.12** of the draft law states that, at closing time, “only those voters present in the premise for voting shall be allowed to vote.” An extension of voting hours is explicitly prohibited. As the draft law brings forward by two hours the end of the voting period, it is possible that an unusually high number of voters will arrive at polling stations in the final hour(s) of voting. As a consequence, voters may be unable to enter the premises to vote before 20:00. If the practice on Election Day will be to provide voters in the queue at the time the polling station closes at 20:00 the opportunity to vote, then that intention should be made explicit in the law.
7. The draft law retains the “home voting” system in the current law, which allows voters to have a ballot brought to their home without providing any documentation that would demonstrate sickness, disability, old age or other justifying reason. While home voting is an important means of accommodating those who are disabled,⁵¹ it need not be provided for those who would prefer to vote from home for personal convenience. By not requiring documentation from those wishing to vote from home, the risk that home voting will be used to support fraud is increased.⁵²

➤ ***Consideration should be given to restricting home voting to those who can provide documentation that would demonstrate a need to do so.***

8. There are a number of apparent contradictions in the provisions establishing responsibility for particular tasks, particularly in the closing procedures. The draft law clearly indicates responsibilities of the chairperson, deputy chairperson and secretary. In some steps language is added to indicate that the function could be performed by the person “presiding at the meeting” or acting as “secretary at the meeting.” Presumably this was done to enable the commission to function in the absence of these individuals. However, these provisions appear to have been added to the text inconsistently. The responsibility for the secretary (or any individual) to enter all information into the vote counting protocol has been notably removed from this section of the draft law.⁵³ However, when referring to entering information into the protocols elsewhere in the draft law, the secretary is identified as the responsible party, albeit inconsistently.

⁵¹ As a signatory to the *UN Convention on the Rights of Persons with Disabilities*, Ukraine has an obligation to promote access by the disabled to the electoral process.

⁵² Venice Commission. *Code of Good Conduct in Electoral Matters*, provides that “The use of *mobile ballot boxes* is undesirable because of the attendant serious risk of fraud. Should they nonetheless be used, strict conditions should be imposed to prevent fraud...” October 2002. Paragraph 40.

⁵³ In **Article 85.3** of the current law the secretary is given this role.

➤ ***The Law as it relates to authorities charged with executing key procedures should be carefully reviewed for consistency.***

9. **Article 91.1** of the draft law allows a PEC to recognize voting in the precinct as valid if certain discrepancies and irregularities with respect to voting, such as multiple voting or ballot stuffing, do not exceed 10 percent of the total number of voters. This level of tolerance is arbitrary and could potentially allow fraudulent votes to influence results, especially in single-mandate constituencies. Also, the wording appears to give the PEC discretion as to whether to invalidate voting, without providing adequate guidance as to the basis upon which such discretion should be exercised. In addition, **Articles 94.12, 95.12** and **97.13** prohibit the invalidation of election results in a particular district or the nationwide constituency. The CEC is obliged to determine and certify election results regardless of the number of precincts declared invalid. This is contrary to international standards, which call for the invalidation of elections in cases where the voters' collective intent is impossible to determine.⁵⁴

➤ ***There should be no tolerated levels of fraud in polling or counting. All such irregularities should be investigated and remedied through established mechanisms of complaints and appeals.***

➤ ***Consideration should be given to allowing the invalidation of results in the entire election or in any constituency or district under circumstances in which it is impossible to determine the will of the electorate.***

10. **Article 93.15** of the draft law allows DEC's to declare voting in a precinct invalid if the conditions in **Article 86.1** are satisfied. This appears to be a drafting error. It seems that the reference should be to **Article 91.1**.

11. While the draft law emphasizes that ballot paper should be "a document of strict accountability" (**Article 79.7**), and describes in considerable detail the procurement, delivery and various handovers during the election process, nowhere is there included provision to secure ballots in tamper-evident bags. Presumably this could be done in a CEC regulation; however, this could be considered an omission given that the draft law generally requires such safeguards.

12. **Article 97.6** refers to **paragraph 19** of the same Article to determine votes cast for parties receiving more than 5 percent. It appears it would more logically refer to **paragraph 18** to obtain this information.

13. **Articles 97, 98** and **99** describe the process of compiling results and releasing them to the public. Notably, the CEC is explicitly granted 10 days to release the results. Emphasis should be on the immediate release of results as soon as practically possible (taking into account the need to resolve electoral complaints and appeals). There is also no reference to obligatory release of provisional results. **Article 97.12** obliges the CEC to publish the results of the nationwide

⁵⁴ Venice Commission. *Code of Good Practice in Electoral Matters*. October 2002. II.3.3.e.

constituency on its website; a similar provision does not exist for the single-mandate constituency results.⁵⁵ While **Article 90.9** requires PECs to post results for the precinct upon the completion of counting, the draft law does not require the CEC to release results by precinct (for example, on its website). Making results available by polling station is an internationally accepted practice and essential for transparency.

- *The Law should require that the CEC publically release the results of the single-mandate constituencies in the same manner as the results of the national contest.*
- *The Law should require the CEC to publicly release results by precinct as soon as it receives the relevant data from a DEC, except in cases where “batching” of precinct results may be needed in order to protect secrecy of the ballot.*

12. Electoral Dispute Resolution

Although it is no longer explicitly recognized in the draft law, Ukraine has a dual system of electoral dispute resolution, under which a person has the option to either file a complaint with a relevant electoral commission, or to apply directly to an administrative court. Therefore, any discussion of electoral dispute resolution under the draft law must take note of the remedies available through the court system. The draft law also includes a number of changes from existing practice which weaken the system of electoral dispute resolution compared to the current law.

Complaints regarding a decision, action or inactions of a PEC or any of its members may be filed with a relevant DEC. Alternatively, a lawsuit regarding this subject matter and against these persons may be lodged with a local general court (raion or city court) acting as an administrative court.⁵⁶ Complaints against a DEC or its members may be filed with the CEC, or a lawsuit may be lodged with a district administrative court. Lawsuits against a decision of the CEC on the final results of the election may be lodged with the High Administrative Court of Ukraine only. A decision of this court is final and not subject to further appeal. Lawsuits regarding all other decisions, actions or inactions of the CEC, as well as actions or inactions of the members of the CEC may be lodged with the Kyiv Administrative Court of Appeal as an administrative court of first instance. A decision of this court acting as court of the first instance may be appealed to the High Administrative Court, the judgments of which are final.

1. **Article 107.10** requires an administrative court to notify the CEC and relevant lower level election commissions when an election-related case is initiated and when it makes a decision. Under **Article 107.11**, election commissions that receive such notices must immediately suspend consideration of any complaints on the same matter. Similar requirements are included in the current law (**Articles 105.3, 105.4**).

⁵⁵ **Article 99.1** states to print the names of elected candidates in certain official newspapers.

⁵⁶ The procedures governing the initiation and adjudication of a case in an administrative court are governed by the *Code on Administrative Adjudication of Ukraine*.

While these rules go some way to reducing the risk that the dual system of dispute resolution will result in confusion, duplication of proceedings or conflicting decisions, they do not eliminate these risks entirely. In particular, the rule in **Article 107.11** against the same matter being heard in different forums will not prevent similar or factually related matters from being considered simultaneously by a court and an election commission. Also, as the Venice Commission has pointed out, these rules will not prevent complainants from strategically choosing the venue in which to pursue a matter (so-called “forum shopping”) in order to gain unfair advantage.⁵⁷ In fact, it is doubtful that any set of rules can completely eliminate these problems so long as the system gives complainants the ability to choose the body to which they wish to complain or appeal. The Venice Commission speaks directly to this problem:

*The powers and responsibilities of the various bodies should be clearly regulated by law, so as to avoid conflicts of jurisdiction (whether positive or negative). Neither the appellants nor the authorities should be able to choose the appeal body.*⁵⁸

Although the current election dispute system in Ukraine is incompatible with the standard noted above, there remains considerable value in allowing certain kinds of complaints to be dealt with by election commissions, which typically will have greater expertise in electoral matters than courts, as well the advantage of proximity to key documents and witnesses. A solution to this problem could lie in a clearer division of jurisdiction between the two types of body.

- ***Consideration should be given to dividing jurisdiction over electoral disputes between election commissions and courts, so that it is clear to which body any particular complaint or appeal must be directed.***
2. Under **Article 107.2** of the draft law, a complaint may be filed with an election commission only against a decision, action, or inaction committed by an election commission or a member of an election commission, political party, and a candidate for parliament. **Article 104.1** of the current law allows complaints to be filed against a much wider range of persons, including:
 - 1) *an election commission or a member of an election commission;*
 - 2) *a body of state authority, a body of local self-government, an enterprise, organization or institution, their officers and officials;*
 - 3) *an association of citizens, except for those decisions and actions that, according to law or the charter (provisions) of the association of citizens, belong to their internal organizational activity or their exclusive competence;*
 - 4) *a mass media outlet, its officers or officials or creative officers;*

⁵⁷ Venice Commission. *Comments on the Draft Law on Election of People’s Deputies*. July 2005, Paragraph 20.

⁵⁸ Venice Commission. *Code of Good Practice in Electoral Matters*. October 2002. Paragraph 97.

5) *other subjects of the election process according to Article 12 of this Law.*

The elimination of the ability of an election commission to hear complaints against state bodies or officials is understandable, given that an administrative court will likely be better placed to deal with the complicated legal issues likely to arise out of claims against state bodies or agents. A court, unlike an electoral commission, also has the power to order relief from or impose sanctions on government officials.

The rationale for the elimination of the ability of an election commission to hear complaints against individual voters and electoral observers (both of which are electoral subjects under **Article 12** of the current law) is less clear. It is not hard to imagine cases of misconduct being carried out by such individuals, including violations of rules on campaigning, and Election Day violations such as vote buying, or voter intimidation inside or outside a polling station. Indeed, the most serious kinds of misconduct will often be carried out by supporters rather than candidates or party officials themselves. It would significantly undermine the ability of electoral commissions to deal with violations for them to be unable to address such behavior, especially in cases requiring immediate remedial action when the administrative court will simply not be able to respond with sufficient speed.

➤ ***Consideration should be given to allowing complainants to file complaints against all electoral subjects.***

3. The draft law shortens the timeline for complaints compared to the existing law. Under the draft law, complaints must be filed within two days of the event being challenged (**Article 108.1**) and decided by the election commission within two days of receipt, subject to some exceptions that make this period even shorter than two days (**Article 110.4 – 110.6**). While quick filing and adjudication of complaints is important for the timeliness of election processes in general, two days may not provide enough time for either filing or adjudication, especially in complex cases requiring supporting documentation. This shortened timeline could undermine the ability of voters and others to assert their rights in the electoral process. The Venice Commission recommends three to five days for both filing and deciding electoral appeals at the first instance.⁵⁹

It also should be noted that under **Article 172.6** of the Code of Administrative Adjudication, election-related complaints must be lodged within 5 days of the alleged violation. The relatively condensed timeline for complaints may have the unintended effect of pushing certain complaints into the courts.

Finally, as the Venice Commission has pointed out with respect to similar provisions in the current law, rigid enforcement of deadlines could result in injustice in cases in which the

⁵⁹ Venice Commission. *Code of Good Practice in Electoral Matters*. October 2002. II.3.3.g.

complainant did not learn of the conduct being complained of until after the deadline for filing complaints.⁶⁰

- ***Consideration should be given to extending the deadline for filing complaints from the proposed two days to three to five days.***
- ***The law should include an exception for cases in which the existence of a violation was not discovered, and could not be discovered through reasonable diligence, within the deadline. In such cases, the time limit might be counted from the time that the complainant learned, or ought to have learned, of the cause.***

4. The meaning of some provisions of the draft law relating to electoral dispute resolution is unclear or ambiguous. For example, **Article 107.1** specifies the persons who may file complaints with an election commission. However, the wording of that section differs from that in **Article 75.7(6)** and **Article 103.1(3)** of the current law, which explicitly mentions the right of observers to file complaints. This change in wording suggests that the drafters intend to restrict the ability of observers to file complaints. This conclusion is supported by the wording in **Article 77.9** which enumerates the powers of an official observer. **Articles 77.9(5)** and **(6)** permit observers to “address the relevant electoral commission or a court regarding elimination of violations of this law if any are observed [... [and]...] draw a statement on violation of the requirements of this Law [...] and file it to the respective election commission or a court.” The corresponding wording in **Article 75.7** of the current law is nearly identical, with the exception that it adds to the end of the text “... **within the terms envisioned by Article 106 of this law**”. [emphasis added]

The deleted text refers to the procedure for filing complaints. This deletion suggests that an “address” or a “statement of violation” will have a status other than that of a complaint, although the draft law does not make it clear what that status would be. The draft law provides no information on the deadline for taking such steps, what steps (if any) an election commission is obliged to take in response, and what action (if any) an election commission may take if it finds that the violation alleged has in fact occurred.

- ***The Law should ensure that observers have the power to file complaints.***

5. A further example of ambiguous or unclear drafting relates to the ability of PECs to hear complaints. **Article 108.3** contemplates that complaints relating to violations which take place during the course of voting will be filed with PECs. However, **Articles 107.7** and **107.8** make it clear that complaints against *political parties* and *candidates* are to be filed with the CEC and DEC, not PECs. Furthermore, under **Article 107.5**, a complaint against a PEC or member of a PEC must be filed with a relevant DEC. Given that **Article 107.2** specifies that complaints may

⁶⁰ Venice Commission and OSCE/ODIHR. *Opinion on the Law on Elections of People’s Deputies of Ukraine*. CDL-AD(2006)002. January 2006. Paragraph 93.

only be filed against an election commission or its members, a political party, or a candidate, is not clear what kind of complaints, if any, the PEC will receive.