

Address: VneshExpo Bldg, 25 Turhenivska St., Kyiv 01054, Ukraine
Tel: +38 044 537 79 01/02/03/04
Fax: +38 044 537 79 05
E-mail: reception@eom.org.ua
www.osce.org/odihr

INTERIM REPORT 2 16 -29 September 2004

I. EXECUTIVE SUMMARY

The 31 October presidential election in Ukraine provides voters with a genuine choice and thus far, is a keenly fought contest, with two distinct front runners, opposition leader Viktor Yushchenko and incumbent Prime Minister Viktor Yanukovych. However, early indications exist that candidates might face uneven campaign conditions.

Although presidential candidates seem to be able to fulfill their campaign activities, instances of obstruction of campaign events, in one case (in Kharkiv) involving violence, have been reported by EOM observers. In addition, the EOM has received allegations of pressure being applied to public employees and students to support the nomination process and campaign of Mr. Yanukovych, which raise question about their freedom to support the candidate of their choice.

The campaign environment is becoming increasingly rancorous and polarized. The political discourse has become more charged since the alleged poisoning of Viktor Yushchenko. He made a personal address to Parliament during which he accused the authorities of involvement in the alleged poisoning.

On 24 September, Viktor Yanukovych was struck in the chest by an object, apparently an egg, thrown from a crowd in western Ukraine, after which he fell to the ground and was taken to hospital. Mr Yanukovych blamed "Yushchenko's entourage" and nationalists for the incident.

The activities of Mr Yanukovych continue to dominate the media's campaign coverage, in particular on State-funded channel *UTI* and on nationwide private networks, *Inter* and *1+1*, which have so far have exhibited a clear bias in favor of Mr Yanukovych and against Mr Yushchenko. Credible reports of control over media content, especially television, raise questions about the freedom of some media during the pre-election period.

The CEC holds its session in a transparent manner. Decisions are mostly taken by consensus. However, exceptions to this trend arise when the CEC discusses complaints. While Territorial Election Commissions (TECs) are fully formed, opposition party members complain that members nominated by other candidates are able to form a majority voting bloc. The formation of Polling Station Committees (PSCs) has been contentious. EOM observers received many complaints that members nominated by opposition candidates have been discriminated against in the appointment of PSC Chairpersons.

The Election Law permits the possibility of filing a complaint either with an election commission or a court. This creates an opportunity for inconsistent rulings.

II. THE CAMPAIGN

Environment

The campaign environment is becoming increasingly rancorous and polarized. The alleged poisoning of Viktor Yushchenko, the front running opposition candidate, has charged political discourse. On 18 September, after receiving intensive treatment in Vienna, Mr Yushchenko, appearing unwell, addressed a large rally in Kyiv's Independence Square. On 21 September, Mr Yushchenko made a personal address to Parliament during which he accused the authorities of involvement in the alleged poisoning¹. The Parliament voted overwhelmingly to investigate the matter, while Mr. Yushchenko questioned the sincerity of this decision.

On 24 September, Viktor Yanukovich (Prime Minister and presidential candidate) was struck by an object, apparently an egg, thrown from a crowd in western Ukraine. The object hit Mr Yanukovich in the chest after which he fell to the ground and was taken to hospital.² Early media reports indicated that there was more than one object thrown, although this was not confirmed.³ Mr Yanukovich blamed "Yushchenko's entourage" and nationalists for the incident, which Our Ukraine strongly denied. They countered it as an attempt to discredit Yushchenko's campaign. Soon after, the *Ukraina* TV channel in Donetsk broadcast a rally protesting the attack and showing signs, one meaning of which equated "Our Ukraine" with fascism.

Campaign activities

The campaign is gaining in intensity with Mr. Yanukovich and Mr. Yushchenko remaining the most visible candidates. However, most EOM observers have reported a preponderance of posters for Mr Yanukovich, including some placed on public buildings.⁴ Some opposition parties' campaign teams have complained that advertising companies refuse to rent advertising space to place their posters.

In the eastern regions, Mr Yanukovich's campaign appears very organized. In Donetsk, his campaign is conducting meetings in factories, in cooperation with trade unions. EOM observers report that some local government officials, having taken vacation from their posts, are organizing the Yanukovich campaign at local level, for example in Luhansk region and Crimea. In the west and some central regions, Mr Yushchenko's campaign appears the more organized.

While, thus far, candidates seem to be able to fulfill their campaign activities, some aspects of the campaign environment, including allegations of violence and of obstruction, are troubling. In Zhytomyr, EOM observers reported that teachers were told by the senior staff at universities to instruct students that their attendance at a gathering celebrating international peace was mandatory. When the event happened, it appeared to be a Yanukovich campaign rally. Similar instructions for students to attend events supporting Yanukovich were reported in Poltava, Sumy and Khmel'nytsky. In addition, EOM observers have reported some obstruction of the Yushchenko campaign, for example, in Severodonetsk (Luhansk region), where campaign stands were destroyed, and in Kirovohrad, where a campaign stand was stolen.

¹ He also reminded Parliamentarians of the deaths of other public figures during the last few years and asserted that the authorities were using the secret services and law enforcement bodies to retain political control. He implored these personnel not to use force against the people. He warned the authorities that there would be consequences if they attempted to subvert the electoral process.

² EOM observers visited the hospital and spoke to the senior doctor responsible.

³ The alleged egg thrower, a 17-year old boy, was released from police custody at Mr Yanukovich's request.

⁴ For example: in Poltava, Donetsk, Kharkiv, Khmel'nytsky, and Uzhorod.

The Yushchenko campaign attempted to broadcast the 18 September rally to cities across Ukraine, with varying levels of success. On 17 September, in the eastern city of Kharkiv, unidentified persons violently attacked a truck carrying equipment to rebroadcast Yushchenko's campaign address. The truck driver claimed that his life had been threatened by the attackers. EOM observers, who followed up the incident, have seen video footage appearing to show the police attempting to obstruct the movement of the truck the following day. Later, a bus with passengers blocked the path of the truck in an apparent attempt to impede its progress.

III. ELECTION ADMINISTRATION

The CEC holds its sessions in a transparent manner, with international observers, the media and party representatives in attendance. Information on its work and decisions is available through its highly informative website. During its presence at the CEC, the EOM has observed voting on 143 resolutions. In the overwhelming majority of cases a unanimous decision was taken. However, exceptions to this trend arose when the CEC was discussing complaints.

The formation of TEC's has been completed. EOM observers report that TECs in Luhansk, Donetsk, Kharkiv, Dnipropetrovs'k and Cherkassy seem well prepared while others in some regions lack some necessary material resources or training, for example, in Odessa, Ivano-Frankivsk and Ushgorod regions. In the eastern regions, opposition party representatives frequently complain that the TEC members appointed by some of the less well-known candidates form a "bloc" and thereby control the functioning of the intermediate level of the election administration and PSCs. Some opposition parties have referred to these candidates as "technical candidates".

The process of appointing PSC members has been contentious. EOM observers have received many complaints that PSC members nominated by opposition candidates have been discriminated against, resulting in a lack of political balance in the distribution management positions in PSCs. In Cherkassy, one TEC took a decision to appoint PSCs without a quorum and knowingly contravening a CEC instruction.

Other concerns raised by opposition parties relate to the alleged inaccuracy of voters' lists and the potential for their abuse on Election Day, as well as on procedures for out of country voting. The voters' lists were distributed to TECs on 25 September and, by law, should have been distributed to PSCs on 29 September. The EOM will make an assessment of the process of updating the lists in due course. Thanks to an intervention of the CEC, the question of the access of EOM observers to a TEC located in a military base has been resolved.

Out of Country Voting

Out of country voting remains a controversial issue. The CEC has determined 113 polling stations located abroad, an increase of 23 compared to the Parliamentary elections of 2002, when around 50,000 voters were eligible to vote outside Ukraine and turnout was 42%. In early September, the Ministry of Foreign Affairs informed the EOM that some 200,000 persons are registered with diplomatic and consular offices abroad. However, it is estimated by some local interlocutors that as many as 7,000,000 Ukrainians reside outside the country. Some opposition parties have taken a keen interest in this issue, and to maximize the possibility for these persons to participate as voters. However, it is unlikely that the premises of diplomatic and consular offices, which will serve as polling stations, have the capacity to process large numbers of voters. This issue is also regulated by law, which sets a maximum of 3,000 registered voters per polling station. The

Ministry of Foreign Affairs has asked a number of countries with a sizable Ukrainian population about the possibility of establishing polling stations outside diplomatic and consular offices. The law provides that the CEC can, under “special circumstances”, establish out of country polling stations up to one week before the elections.

On 23 September, supporters of the presidential candidate Dmytro Korchynskyi’s Brotherhood Movement staged a demonstration at the CEC demanding the establishment of polling stations in the Moldovan breakaway region of Transdnistria.⁵

Candidates’ registration – Collection and checking of signatures

Allegations were made to EOM observers on possible undue interference in the collection of signatures. In Poltava Region a hospital employee lodged an official complaint that she had been threatened with dismissal if she refused to sign in support of Mr Yanukovych’s candidate nomination. Similar allegations were received in Khmel’nytsky, where EOM observers have confirmed three instances. The victims alleged that they signed under duress from their work supervisors (public-sector).

Verification of signatures starts immediately after the delivery of signatures to the CEC. A ten-day period separates the deadline for submitting signatures and the date by which the signature verification process must be completed. The task of verifying some 13,000,000 signatures presents the CEC with a considerable challenge. However, once a total of 500,000 signatures have been verified for a particular candidate, all additional signatures are left unverified.

An EOM observer visited the premises where candidate signatures were being verified by 40 CEC staff. Since verification is done manually on a random selected sample, in practice there is a limited possibility to check for multiple entries. Indeed, the formal process appears superficial. CEC officials reported that it takes only one day for the team to verify half a million signatures. Based on this claim, the EOM calculated that if each signature is verified up to the minimum number required, a verifier would have only 2.5 seconds to check each signature.⁶ The EOM noted that the premises used by the CEC for signature verification were shared with the regional headquarters of the Social Democratic Party of Ukraine (United), a party in the pro-Presidential parliamentary bloc.

The list of candidates for the 31 October election will be finalized on 30 September. Currently, the CEC has completed the verification of signatures for 22 candidates. As two candidates have withdrawn from the race⁷, a maximum of 24 candidates will contest the election, subject to any further withdrawals.

After the list of candidates is approved, any candidate wishing to withdraw from the contest must apply in writing to the CEC at least 5 days before the election. According to law, the CEC must begin the printing of ballot papers not later than 10 days before the election. Article 72.7 provides that in cases where the CEC decides to de-register a candidate “PSCs shall enter such changes into election ballots using the relevant stamp”. In 2002, the previous ODIHR EOM noted that: “the

⁵ According to CEC information, during the 2002 Elections, one polling place was established in the region, in the town of Bender-Tighina.

⁶ Estimation based on 40 verification staff working uninterruptedly for 8 hours.

⁷ On September 21, Hrihory Chernysh (Party of Rehabilitation of the People of Ukraine) withdrew from the election, having failed to fulfil the legal requirement to submit 500,000 signatures supporting his nomination. On 23 September, Vitaly Kononov (Green Party) withdrew from the race in order to retrieve his deposit of UAH 500,000 (approximately € 80,000).

requirement that PSCs cross out the names of de-registered candidates by hand led to delays in opening polling stations and in some cases caused serious errors”. Candidates that withdraw from the election forfeit their deposit but retain their representatives on the TECs and PSCs.

IV. MEDIA

So far, *UTI* has complied with its legal obligation to provide free time to all candidates. However, outside the free time, the channel has offered Mr Yanukovich preferential treatment. The EOM’s media monitoring results show that from 3-24 September, *UTI* provided the incumbent Prime Minister with more than 65% of its political and election prime time news coverage. 100 % of this coverage was positive or neutral in tone. By contrast, during the same period, Mr Yushchenko received only 12 % of such airtime, of which 95 % was either neutral or negative in tone. Often, *UTI* covers only certain points of view on political themes, events, and issues while ignoring others. For example, *UTI* provided extensive coverage of the egg-throwing incident in Ivano-Frankivsk. While the event was certainly an unjustifiable incident and also newsworthy, Mr Yanukovich and his campaign team were given airtime by *UTI* during which they accused Mr Yushchenko’s supporters of being responsible. However, *UTI* neglected to provide airtime to the Yushchenko campaign to respond to the allegations. Nevertheless, *UTI*, *Inter* and *I+I* channels all covered Mr Yushchenko’s address to Parliament during which he claimed to have been poisoned in early September.

The most popular private broadcasters *Inter* and *I+I* adopted a similar approach to *UTI*, demonstrating clear support for Mr Yanukovich. EOM monitoring shows that *Inter* allocated 53% of its political and election prime time news coverage to the Prime Minister, of an overwhelmingly positive tone. Conversely, during the same period, the candidate who received the second most extensive coverage, Mr Yushchenko, received only 15 % of similar airtime, which was mostly negative in tone. Oleksandr Moroz (Socialist Party of Ukraine) received some 6% of airtime and Petro Symonenko (Communist Party) received approximately 4% of airtime.

Other private TV channels, *ICTV*, *STB* and *Novy kanal*, have provided slightly more balanced campaign coverage. Channel 5 is the only significant TV station to offer wide-ranging coverage of Mr Yushchenko. However, it is estimated that this station only reaches 35% of the territory of Ukraine, far less than the three main networks.

The print media provides a plurality of views, but each paper shows a strong bias in favor of their preferred candidate. Consequently, voters can only receive information on the different political perspectives and a variety of information on the candidates and their campaigns by reading several newspapers. Outside of the free space, which is distributed equally among candidates, the State-funded newspaper *Uradovij Kurier* has demonstrated its support to Mr Yanukovich by granting him almost 100 % of its political reports which cover registered candidates.⁸ The privately owned newspapers *Facty*, *Segodna* and *Den* also gave preferential treatment to the incumbent Prime Minister. However, another State-funded paper, *Golos Ukrainy*, has offered its readers a more balanced picture of the campaign. In contrast, Mr Yanukovich has been strongly criticized in three privately owned newspapers *Ukraina Moloda*, *Vecherny Visty* and *Silsky Visty*. The private weekly newspaper, *Zerkalo Nedely*, has offered roughly similar level of coverage to both Mr Yanukovich and Mr Yushchenko, but the newspaper was much more critical of the Prime Minister.

⁸ In almost all of this coverage, Mr Yanukovich was presented in his capacity as Prime Minister.

In a positive development, following an instruction from President Kuchma, the Tax Administration announced that they would not conduct any tax investigations against media outlets until after the election period. However, some regional newspapers reported problems with printing and distribution. For example, in Poltava region, the Dnipropetrovsk based *Litsa* newspaper found half of its circulation (about 17, 000 copies) destroyed by unknown individuals shortly after it was printed.

V. RESOLUTION OF ELECTORAL COMPLAINTS

The law allows the possibility of filing a complaint either with an election commission or a court. The possibility of “forum shopping” arises as complainants may take strategic decisions on which forum to lodge complaints, particularly as applicable legal standards and rules on evidence vary between the two.⁹ Furthermore, this possibility can lead to inconsistent rulings. In one case, a complaint was filed with a local court and the CEC. After the case was lost at the local court and subsequently on appeal to the respective court of appeals, the complainant’s case was upheld at the CEC. The losing party appealed to the Supreme Court, which set aside the CEC decision. The legal provision allowing for the dual hearing of cases in different fora does not facilitate judicial efficiency. Furthermore, this problem has contributed to inconsistencies in decisions. The EOM has noted that the CEC has not applied the key provisions of the Election Law regulating the media in the same manner as the Supreme Court.

A substantial number of complaints continue to be filed with the CEC and the courts. The CEC, citing the Election Law’s failure to list complaints as documents that must be made available to EOM observers, declined an EOM request to receive copies of complaints. Consequently, the exact number of complaints filed with the CEC is not known.¹⁰ Nevertheless, the EOM has obtained copies of complaints from other candidates and political parties as suggested by the CEC and as permitted by law.

As an increasing number of complaints are being filed, the Supreme Court is called upon to hear an increasing number of appeals against CEC and court decisions. These appeals are heard by various panels of the Civil Chamber of the Supreme Court (hereafter the Supreme Court), which are appointed by the Chamber’s President. The adjudication of complaints reveals the full complexity of the applicable legislation, and the manner in which the arguments are heard by the different panels is not always consistent. For example, in one appeal of a decision taken by a lower court of appeals, the Supreme Court did not allow lawyers to make arguments on behalf of the parties to the case, since the Election Law did not specifically provide for such representation. This decision on procedure was contrary to other cases observed by the EOM where legal counsel was able to present arguments, a right established in the Civil Procedure Code.¹¹

An overly restrictive interpretation of the election law has also resulted in two decisions by separate panels of the Civil Chamber that have far reaching consequences concerning the filing of complaints regarding media violations. In these cases, both panels ruled that the general provisions of Article 91, which grant a candidate proxy the right to file a complaint, were pre-

⁹ Article 93 of the Election Law grants the courts precedence over an election commission, but this article has not prevented the pursuit of the same complaint in separate fora.

¹⁰ The data in this report is based on the formal decisions (Resolutions) of the CEC. According to this data, the CEC has decided more than 200 complaints since the campaign began.

¹¹ Paragraph 13.9 of the OSCE 1989 Vienna Document, in order to guarantee the effective exercise of human rights, provides that “the right to a fair and public hearing within a reasonable time before an independent and impartial tribunal, include[s] the right to present legal arguments and to be presented by legal counsel of one’s choosing.”

empted by Article 102 governing media complaints and the failure to mention a candidate proxy in Article 102 abrogated the general Article 91 right of a proxy. Under these decisions, only a candidate or political party (bloc) can file a complaint under Article 102 for media violations. As a result of these decisions, it may be practically impossible for an individual to file complaints across the country in the Courts or TECs. Whereas a candidate nominated by a political party or bloc, is not required to personally file these complaints and can rely on the political party or bloc to pursue media complaints. Hence independent candidates may be denied an effective legal remedy for a violation of media-related provisions¹².

Article 64 of the Election Law provides that media are obliged to print refutations concerning articles that “deliberately [present] false information about a candidate...which the candidate considers obviously incorrect”. This article presumes the “guilt” of the media and allows the candidate concerned to determine what constitutes “false information” without having to present any evidence, thereby enabling him or her to act as prosecutor, judge, and jury.¹³ This problem was compounded by the CEC’s application of the law in a manner different to the Supreme Court.¹⁴

VI. INTERDEPARTMENTAL WORKING GROUP

As in earlier elections, the Interdepartmental Working Group to Assist International Observers (IDWG) has been established. This body appears to play a more proactive role than in the past and shows great interest in the activity of the EOM. However, it is too early to make an assessment on its functioning.

¹² The restrictive application of Article 102 of the election law discriminates against self-nominated candidates and denies these candidates an effective legal remedy for violation of media provisions of the law. This discrimination against a self-nominated candidate raises question on its conformity to Paragraphs 7.5 and 7.6 of the 1990 OSCE Copenhagen Document, which require equal treatment for political contestants and there be no discrimination based on affiliation or lack of affiliation with a political party. Further, the failure to provide a self-nominated candidate with a truly meaningful opportunity to seek legal address is contrary to OSCE commitments and international standards; *see, e.g.*, Paragraphs 18.2 to 18.4 of the 1991 OSCE Moscow Document; Article 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms..

¹³ This appears to violate the presumption of innocence, right to fair legal process, and right to legal assistance, all of which apply in a proceeding involving a human right such as free speech and expression.

¹⁴ The Supreme Court ruled that a candidate proxy may not file a complaint under this article while the CEC had already accepted such a complaint filed by a proxy.