

# WILL UKRAINE CHANGE THE LAW ON LOCAL ELECTIONS?

## AN UPDATE ON LEGISLATIVE INITIATIVES AND DEBATES<sup>1</sup>

### EXECUTIVE SUMMARY

In their post-election agreement, Ukraine's coalition parties committed to reforming local election legislation in the first half of 2015, ahead of local elections that are due in October 2015 according to the constitution. Parliament is racing to get new legislation passed before the end of the current parliamentary session in July. These reforms are complicated by the parallel process of constitutional reforms in which decentralisation figures prominently. The two reforms need to be aligned.

The current law on local elections, which has been seriously criticised for not meeting international standards, was signed by President Yanukovich on 27 July 2010 and was first used in the October 2010 elections. 2014 amendments addressed some of the shortcomings, particularly on candidate registration and observation. Still significant reform of the current law is needed to address procedural issues and introduce the new electoral system.

The reform of the electoral system and specifically elimination of majoritarian elections is one of the key demands of the Euromaidan movement and is the focus of the coalition agreement commitments. The majoritarian system is associated with fraud and manipulation and seen by many to be more susceptible to vote-buying and abuse of administrative resources. It appears that many see a proportional system as a panacea to the corruption problem,

but it is not likely that this reform alone would have a dramatic effect on electoral corruption if not coupled with reforming other aspects of the law and wider governance reforms, for example party and campaign financing. The proposed draft did not include the right of independent candidature. This is at odds with the democratic aspirations of the Euromaidan movement and contrary to commitments made under the OSCE.

In recent weeks, several draft laws on local elections were discussed. One draft was the result of the work of an expert council established by the Speaker of parliament. Civil society, leading election law experts and international advisers worked with the members of parliament to develop the draft. The public process behind the draft is commendable. If another draft becomes the basis of further discussions, a similar approach should be taken when developing it into a final draft.

In view of the huge pressure for reforms the current rush to change the law is understandable although it continues an unfortunate Ukrainian tradition of amending election legislation just months before election day. The legal framework for the local elections needs to be clear before the start of the election period to allow sufficient time for the training of election officials and the education of voters and election participants. If significant changes are made before the elections, it would be important to conduct an in-depth post-election review to identify shortcomings and to agree on more reforms well ahead before the following elections.

There is particular urgency to clarify voting arrangements for those displaced by the conflict in the East and those living in areas adjacent to the areas outside government control. Decisions need to be made on how to address these issues in either the law on local elections or on special legislation for

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<sup>1</sup> This briefing paper was written by Meaghan Fitzgerald, Election Law Expert, with contributions from Michael Meyer-Resende, Executive Director of Democracy Reporting International.

the particular circumstances in the Donetsk and Luhansk region. Discussions on the implementation of the Minsk II Agreement are also ongoing, including on local elections in the territories of Donetsk and Luhansk.

## 1. POLITICAL CONTEXT

Following parliamentary elections on 26 October 2014, five of the six parties in the newly formed Ukrainian parliament (Verkhovna Rada) signed an agreement committing to undertake key reforms. As a coalition they agreed to reforms demanded by the Euromaidan movement and instrumental to continued cooperation with European partners. Along with promises of constitutional and rule of law reform, the 'Coalition Agreement' included a commitment to electoral reform starting in the first half of 2015. It stipulated the introduction of open list proportional systems for both parliamentary and local elections, and the mayors of large cities to be elected by absolute majority.<sup>2</sup>

The Ukrainian Constitution requires that elections for local councils and mayors must take place the last Sunday in October of the fifth year of the council and mayor's mandate, which would mean 25 October this year.<sup>3</sup> As a result, the newly elected parliament had to act quickly to introduce new legislation, particularly, if they wanted to also introduce a new electoral system. With the window closing for introducing significant changes in election legislation, significant efforts to finalise discussions and produce draft legislation were seen only recently.

Discussions around reform of local election legislation are taking place simultaneously with the constitutional reform process that includes decentralisation as a key theme. The key aims of decentralisation are a simplification of the structure and more local and regional autonomy in policymaking and resource allocation as well as stronger public participation and representation at those levels. These two reforms need to be aligned. Some experts propose that the status of the bodies to be elected in October can be addressed in transitional provisions of the amended constitution. It is also clear under current legislation that once a new territorial unit is formed new elections will be necessary for the respective local self-government body.

## 2. CURRENT LEGISLATION

The current law on local elections was adopted in July 2010, just three months before the October local elections.

The current law was signed by Yanukovich in 2010. Its text as well as the way it was implemented in the 2010 elections was highly criticised for not meeting international standards. The electoral system and the law in general was seen as causing if not facilitating many of the irregularities that took place in the 2010 election.<sup>4</sup> Beyond the electoral system, there were problems in the formation and decision-making procedures of election commissions, the ban on political party participation through party blocs, limitations on domestic observation, insufficient time for campaigning, lack of transparency or sufficient regulation of campaign financing, and limitations on the right to dispute the process.<sup>5</sup> Further, serious issues were noted with voting, counting and tabulation procedures.

In addition to highlighting the deficiencies in the law international experts also noted, "the Law was drafted and adopted in a non-transparent manner and involved virtually no public debate."<sup>6</sup>

The law was amended in 2014 to address some of the procedural issues identified in the 2010 elections, incorporate recommendations on the law and most importantly at the time, to harmonise the local election law with the law on presidential elections. Amendments introduced additional measure to protect the secrecy of the vote, increase the rights of observers from Ukrainian non-governmental organisations, address the competencies, composition and authority of election commissions, and liberalise candidate registration and deregistration procedures.<sup>7</sup>

While 2014 amendments went a long way to harmonise local election legislation with other election legislation and bring the law in closer compliance with international standards, still significant reform is needed to address procedural issues and introduce the new electoral system. Further, methods of combatting fraud and manipulation procedural safeguards of the election process should be considered.

## 3. ESTABLISHMENT OF A PARLIAMENTARY EXPERT COUNCIL

In February 2015, Speaker of the Verkhovna Rada, Volodymyr Groysman, established an expert council to address the coalition agreement commitment to reform legislation for local elections. The expert council includes members of parliament representing various fractions, election law experts, representatives of civil society organisations working on election issues and international governmental and non-

<sup>2</sup> See a description of the Ukrainian coalition agreement available at: <http://www.osw.waw.pl/en/publikacje/analyses/2014-11-26/ukrainian-coalition-agreement>.

<sup>3</sup> Article 141 of the Constitution.

<sup>4</sup> IFES Review and Analysis of the 2010 Local Election Law, 1 July 2013. Available at: <http://ifes.org/Content/Publications/White-Papers/2013/Ukraine-IFES-Review-of-Local-Election-Law.aspx>.

<sup>5</sup> Ibid.

<sup>6</sup> NDI, "Ukraine Local Election Law Analysis" August 2010. Available at: [https://www.ndi.org/files/Analysis\\_2010\\_Ukraine\\_Local\\_Election\\_Law.pdf](https://www.ndi.org/files/Analysis_2010_Ukraine_Local_Election_Law.pdf).

<sup>7</sup> Opora, "Local Elections – Without Quality Law," 8 April 2014. Available at: <http://oporaua.org/news/4459-miscevi-vybory-bez-jakisnogo-zakonu>.

governmental organisations advising on elections in Ukraine.<sup>8</sup> The council initially met in February to discuss views on how to proceed with the reform of the law on local elections. It soon became clear that the format of the group (too many members) and the structure of their meetings (individual statements from each member rather than discussions) was not effective and unlikely to produce tangible results. As a result, in April at the council's second meeting, a smaller expert drafting group was formed from the council members to prepare a draft law on local elections.

This group took as a starting point the draft prepared for the Association of Cities by former member of parliament and election law expert, Mr. Yuri Kliuchkovsky. The draft is said to be largely based on the proposed unified election code (covering also presidential and parliamentary elections), first drafted in 2010, and the Venice Commission comments on the draft.<sup>9</sup>

In the beginning of April, Mr. Groysman committed to presenting a draft law by the end of May that includes a proportional open list system.<sup>10</sup> At the same time, according to the local interlocutors there is a draft prepared by a member of parliament Ruslan Knyazevich, who is reportedly close to the President. The presence of another draft from those loyal to the President cast some doubts on the status of the expert council draft and the intentions of key reformers. There has been no public information or discussions on the Knyazevich draft. Additional drafts were presented in the meantime (see below).

On 26 May, the expert council met in its full composition to discuss the working group's draft. Despite hopes that the council would discuss the two drafts and come to an agreement on how to proceed with the drafts, there was no discussion of the Knyazevich draft. The Speaker however strongly supported the expert group draft and clearly stated that the draft should be registered and he is confident that it will receive the necessary votes. Following the expert council meeting, there was speculation that Knyazevich may decide not to register his draft at all.

## 4. OPTIONS FOR CHANGING THE LAW ON LOCAL ELECTIONS

Changes to the legal framework for the local elections can be introduced either through the adoption of a new law or by amending existing legislation. Currently there is general

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<sup>8</sup> The order of the Speaker from 18 February 2015 and a list of members is available at: <http://zakon2.rada.gov.ua/laws/show/225/15-pr>.

<sup>9</sup> European Commission for Democracy Through Law (Venice Commission), "Opinion on the Draft Election Code of the Verkhovna Rada of Ukraine," No. 593/2010, Strasbourg, 20 December 2010, CDL-AD(2010)047. Available at: <http://vota.te.gob.mx/content/ukraine-draft-election-code-verkhovna-rada-ukraine>.

<sup>10</sup> UNIAN, "Groysman: Verkhovna Rada to adopt law on local elections for open lists by end of May," available at: <http://www.unian.info/politics/1064474-groysman-verkhovna-rada-to-adopt-law-on-local-elections-for-open-lists-by-end-of-may.html>.

consensus that new legislation on local elections is needed, however, many doubt that new legislation will be passed before the end of the current parliamentary session. These doubts are based on concerns that a consensus on the electoral system to be used cannot be reached, that parliamentarians may get bogged down in debating details of the law and momentum will be lost or the simple fact that a number of alternative drafts are presented will result in reverting back to the current law. As a result, many feel that a likely scenario is now amending of the existing legislation. In this case, the drafts laws would be set aside and discussion of a new law would resume only, if at all, when the elections are imminent.

Still, the clear preference amongst parliamentarians, election law experts, and civil society working in the field of elections has been to start from a clean slate and introduce completely new legislation.

## 5. TIMELINE FOR PROPOSING NEW LEGISLATION

On 13 May, a draft law on local elections was presented on behalf of the Batkivshchyna faction in parliament.<sup>11</sup> Following the submission of a draft law, legislators have 14 days to submit alternative drafts before the relevant committee reviews the submissions and puts forward a draft for the first reading. In this case alternative drafts must be registered by 29 May. In a press conference given on 20 May, members of parliament set out the following timeline for the review of and voting on proposed local election legislation:

13 May – Batkivshchyna faction draft was registered in the Verkhovna Rada

29 May – Deadline for alternative drafts to be registered

4 June – Committee expected to present draft for consideration (1st Reading)

18 June – Deadline for submitting any proposed amendments

1 July – Committee presents second draft incorporating amendments

2 July – Vote on the draft law expected.

The timing of passing any legislation is a key aspect of ensuring effective reform and minimising procedural issues on election day. With the local elections scheduled for 25 October, the official campaign period begins by the end of August (two months prior to election day, according to the law). The current parliamentary session is expected to conclude in the middle of July but may be extended until the end of July. If a new law or amendments to the old law are not passed before the end of the current session, changes will be made to the legal framework after the campaign period has already begun, a practice that Ukraine is all too familiar with. Significant amendments to the laws on presidential and

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<sup>11</sup> No. 2831 available at: [http://w1.c1.rada.gov.ua/pls/zweb2/webproc4\\_1?pf3511=55092](http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=55092).

parliamentary elections were made shortly before elections, within the official campaign period.

All stakeholders agree that any changes to the electoral system for local elections will mean that significant efforts will be needed to train election commission officials and to educate voters on the system and the mechanics of voting. Some question whether it is already too late to implement such trainings and whether a change at this stage is the best option for Ukraine, as a messy, poorly-prepared election process may be a worse option than one under the old electoral system.

## 6. DRAFT LAWS

Law No. 2831 submitted on behalf of the Batkivshchyna faction in parliament (Batkivshchyna draft), proposes a proportional system with partially closed party lists for all local councils except village councils. The party lists are fixed for the first five positions and then open. However, the final allocation of mandates is made upon a decision of the nominating political party, in a party conference following the elections. Such a system appears inconsistent with the right to vote, as voters cannot even be sure which individuals they are voting for. Mayors at all levels would be elected by a simple majority.

It is generally accepted that the Batkivshchyna draft has no real traction, and will not be seriously considered by the Verkhovna Rada. It is understood that the draft is a replica of the law that Batkivshchyna intends to propose for parliamentary elections, the proportional allocation of seats from partially closed party lists where the first five positions are fixed.

The draft prepared by the expert council's drafting group (expert group draft) proposes the proportional allocation of seats to parties based on open lists for local councils except in smaller cities, towns, settlements or villages. Parties are able to nominate as many and even more candidates than there are mandates in the multi-mandate constituencies.<sup>12</sup> Where the proportional system is used, voters vote for the party and the candidate of their choosing by filling in the party number and candidate number on the ballot. Parties must receive a minimum of 5 per cent of the votes to obtain seats on the council. Those who favor the Knyazevich draft fear that the expert group's proposal would necessitate a lot of training for election commission members and voter education and lead to a large number of invalid votes.

For mayoral races, the expert group makes a distinction between larger cities (more than 90,000 inhabitants) and smaller cities, towns, villages and settlements. For the larger

cities to be elected mayor candidates must receive an absolute majority or alternatively 20 per cent more votes than the next-best contender, or a second round between the two best candidates is held. In smaller cities, towns, settlements, and villages, candidates are elected by a simple majority.

The Knyazevich draft proposes the proportional allocation of seats for all local councils except village councils. Political parties propose lists at the council level and candidates from the list are assigned by the political party to territorial districts (one per district) where they will compete, essentially meaning the system functions as a closed list. Voters vote for the candidate of their choice and the vote is counted for the party who must pass a minimum 5 per cent threshold of votes to obtain any mandates in the respective council.

Like in the expert group draft, the Knyazevich draft also makes a distinction between larger and smaller cities for mayoral races. The Knyazevich draft defines a large city as having at least 100,000 inhabitants and requires that candidates receive an absolute majority to be elected, or there is a second round; in smaller cities, towns, settlements, and villages, candidates are elected by a simple majority.

The Knyazevich draft has been criticised by members of the expert group who disagree with the duplication of efforts from the same political forces and the lack of public debate on the draft. As for the electoral system proposed, it would give political parties a lot of power, while the voters would have close to no influence on which individuals are elected for a party – essentially a closed list system.

None of the three drafts currently being discussed provide for self-nominated candidates or lists of independent candidates for local councils where the proportional system is foreseen. Not providing for self-nomination by an individual independent candidate, is contrary to OSCE commitments.<sup>13</sup> Given that political parties in Ukraine are weak and that party financing is untransparent, the lack of independent candidature appears to be inconsistent with the Maidan's aspirations.

In addition to the three drafts described above, there is speculation about the opposition block's efforts to prepare legislation on the local elections. While some say that an alternative draft will be submitted by the opposition block, others expect they will present separate legislation specifically addressing voting for internally displaced persons. The opposition block is expected to draw a lot of support in the local elections from the internally displaced population.

Finally, just before the 29 May deadline there was discussion that the Association of Cities will revive their draft. The

<sup>12</sup> The Expert Group Draft does not fix the number of mandates in each multi-mandate district because it includes provisions for allocating more mandates to districts within a council depending on the turnout to ensure the weight of the vote is equal.

<sup>13</sup> Paragraph 7.5 of the 1990 OSCE Copenhagen Document commits OSCE participating States to "respect the right of citizens to seek political or public office, individually or as representatives of political parties or organizations, without discrimination."

Association of Cities draft was the starting point for the expert group but underwent broad changes once the drafting group began working on the text and making concrete decisions on procedures and the system.

While all three drafts are comprehensive laws on local elections covering all procedural aspects of organising elections, the current focus of discussions is on the electoral system. It is generally understood that proposals of a procedural nature from the various drafts will be incorporated into the version that is put forward by the committee. For this to be achieved the preparation of the final draft needs to be open to input from key experts and civil society representatives.

Additional changes currently being discussed in the expert group draft are expected to address the need to decrease the number of deputies, propose a limitation on paid campaign advertising, increase the transparency of campaign financing, improve safeguards to combat vote buying and the manipulation of the results and address procedural issues regarding the deregistration of candidates and the formation of election commissions. Further the expert group draft introduces a system to increase the chances for women to be elected by requiring parties to alternate genders on their lists.

The electoral system is seen by some as setting a precedent for changing the parliamentary election system.

## 7. VOTING IN DONETSK AND LUHANSK

Voting for local self-government bodies in the Donetsk and Luhansk regions is linked to the implementation of the Minsk II agreement and the subject of discussions by the Trilateral Contact Group (TCG). The Minsk II agreement states

*"Based on the Law of Ukraine "On interim local self-government order in certain areas of the Donetsk and Luhansk regions", questions related to local elections will be discussed and agreed upon with representatives of certain areas of the Donetsk and Luhansk regions in the framework of the Trilateral Contact Group. Elections will be held in accordance with relevant OSCE standards and monitored by OSCE/ODIHR."*<sup>14</sup>

On 6 May, the TCG announced the formation of four working groups to work on the "Package of Measures on the Implementation of the Minsk Agreements agreed upon on 12 February 2015."<sup>15</sup> Heads of the working groups were appointed by the OSCE Chairman in Office. One working

group is formed to address political issues, including elections and would be headed by Ambassador Pierre Morel.<sup>16</sup> On 2 May, Vladislav Deinego and Denis Pushilin, who claim to speak for certain areas of the Donetsk and Luhansk oblasts announced their agreement with the proposal to have the working groups led by OSCE appointed representatives but conditioned their acceptance of this arrangement on a review after the first month when they suggest that TCG members consider a rotation of the working group heads.<sup>17</sup>

According to media reports, on May 12 they announced that they submitted proposals on local elections to the TCG.<sup>18</sup>

The latest meeting of the TCG concluded on 23 May in Minsk. The same day the working group on political issues reportedly met to discuss holding elections in the Donetsk and Luhansk region. According to press reports, the working groups will resume their work on 2 June in Minsk.<sup>19</sup>

In Kyiv, there is no public discussion of organising elections in the temporarily occupied territories. Analysts point out that elections cannot be held under Ukrainian law, as required by the Minsk Agreements, because fundamental freedoms cannot be guaranteed and the security of election officials, voters and the vote itself cannot be ensured. Therefore there appears to be a disconnect between discussions in the Minsk framework and discussions on election legislation in Kyiv.

On 12 May, the Verkhovna Rada adopted the Law "On legal regime of martial law."<sup>20</sup> Under the law, martial law can be declared for the entire country or in specific regions and elections cannot be held in areas where martial law has been declared. Some have speculated that the timing of the adoption of the law indicates a political motive related to the upcoming elections. Others refute this suggestion, explaining that provisions for declaring martial law or a state of emergency needed elaboration with current provisions being insufficient for a dramatically different level of conflict than imagined in the past.

<sup>14</sup> Text of the Minsk II Agreement from 12 February 2015 is available at: <http://www.ft.com/intl/cms/s/0/21b8f98e-b2a5-11e4-b234-00144feab7de.html#axzz3bQIIOXpO>.

<sup>15</sup> OSCE, "Joint press statement of Trilateral Contact Group: Trilateral Contact Group launches activities of working groups advancing implementation of Minsk arrangements," available at: <http://www.osce.org/cio/155486>

<sup>16</sup> OSCE, "OSCE Troika urges advancement in political process aimed at solving crisis in Ukraine," available at: <http://www.osce.org/cio/154046>.

<sup>17</sup> "Donetsk, Luhansk republics agree on OSCE coordination of Contact Group's subgroups," 2 May 2015. Available at: <http://en.voicesevas.ru/news/yugo-vostok/4834-donetsk-luhansk-republics-agree-on-osce-coordination-of-contact-groups-subgroups.html>

<sup>18</sup> For more see: "Donetsk, Luhansk republics say election proposals forwarded to Contact Group on Ukraine," 13 May 2015. Available at: <http://en.voicesevas.ru/news/yugo-vostok/5127-donetsk-luhansk-republics-say-election-proposals-forwarded-to-contact-group-on-ukraine.html>

<sup>19</sup> Ukrinform, "Trilateral Contact Group Meeting Ends in Minsk" 23 May 2015. Available at: [http://www.ukrinform.ua/eng/news/trilateral\\_contact\\_group\\_meeting\\_ends\\_in\\_minsk\\_331642](http://www.ukrinform.ua/eng/news/trilateral_contact_group_meeting_ends_in_minsk_331642)

<sup>20</sup> Draft Law No. 2541, <http://portal.rada.gov.ua/en/news/News/108880.html> Submitted for signature by the President on 25 May but still not signed. Article 19 stipulates "Under conditions of martial law the elections of president, parliament and bodies of local-self government as well as local and national referendum" are not allowed.

## 8. ELECTIONS IN UKRAINIAN CONTROLLED AREAS OF DONETSK AND LUHANSK

There is some speculation that elections will not take place at all in the Donetsk and Luhansk oblasts, however, the more widely held opinion is that elections will take place where possible in the Ukrainian controlled areas of the two oblasts. If preparations continue as expected for elections in areas currently under the control of the Ukrainian government a number of issues need to be considered:

- Elections in areas adjacent to the temporarily occupied territories;
- Elections for the Donetsk and Luhansk oblast councils; and
- Voting by internally displaced persons.

There are currently differing views on whether these issues should be addressed in temporary provisions of the law on local elections or in a special law outlining specific arrangements. Either way there is consensus that legislation is needed and should be introduced well in advance of the elections to avoid the practice from the 2014 parliamentary and presidential election when decisions were taken on whether or not elections would proceed in the affected areas only a few days before the election and were not based on clear criteria.

For elections in areas adjacent to the territories outside government control, the expert group is proposing the creation of committee including the CEC and the Cabinet of Ministers to review where elections cannot be held because the process and protection of rights cannot be guaranteed. Criteria for determining in which areas elections cannot be held would be clearly stated in the law.

For the elections of the Donetsk and Luhansk oblast councils, there is currently discussion of two options:

- 1) Not holding oblast level elections until elections can be held throughout the oblast or after the decentralisation process is complete and the status of those territories is set in law; or
- 2) Holding elections where possible, the result of which would be a partially elected oblast council and then pass legislation on the status of these oblast councils.

There currently appears to be more support for not holding oblast level elections in Donetsk and Luhansk but no legislation has been proposed on this issue.

## 9. VOTING FOR IDPS

There is currently over 1.2 million internally displaced persons (IDPs) in Ukraine, significantly more than during the 2014 parliamentary and presidential elections. Because of the sheer number of Ukrainian citizens that may be disenfranchised and the reliance of IDPs on the services of local governments, discussions are ongoing on how to grant voting rights to those internally displaced by the conflict in the East. It is

generally thought that internally displaced persons (IDPs) should be granted voting rights in the upcoming elections but further discussion of the modalities is needed.

Some lawmakers and the expert group support granting IDPs the right to vote for the local government bodies where they are currently residing regardless of official registration in their passport. This would give IDPs a choice in the local government that is providing their services and assistance. IDPs would be able to request the right to vote based on the place of residence listed on their IDP certificate.

In parallel there are ongoing efforts led by Hryhoriy Nemyria, a member of parliament from the Batkivshchyna faction to amend the law, "On the rights and freedoms of internally displaced Persons," adopted by the Verkhovna Rada on 20 October 2014.<sup>21</sup> Amongst the issues that may be considered is the six-month validity of the IDP certificates and the procedures for renewal of IDP certificates, both of which could affect the voter registration procedures for IDPs.

An alternative approach regarding the voting rights of IDPs, was presented by the Committee of Voters in Ukraine (CVU) at a 20 May press conference. CVU proposed that IDPs be allowed to vote for the local government bodies from their place of registration before displacement. For this purpose, special polling stations would be created in areas where there are high concentrations of IDPs. CVU is also proposing that candidates be required to declare if they are subject to lustration in their registration documents so that voters can access that information.

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21 № 1706-VII, available at: <http://zakon2.rada.gov.ua/laws/show/1706-18/page>.

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This briefing paper has been published in the framework of the project aimed at supporting a transparent political reform process in Ukraine. The project is funded by the German Foreign Office. The contents of this publication are the sole responsibility of Democracy Reporting International and Institute of International Relations of Taras Shevchenko National University of Kyiv. They can in no way be taken to reflect the views of the German Foreign Office.

