Brief summary of the draft amendments to the Election Code registered in the Rada on May 18, 2020

Background
On May 18, 2020, MPs Oleksandr Kornienko, Alina Zahoruiko, Andriy Klochko, Volodymyr Ivanov (“Servant of the People” faction) and Taras Batenko (“For the Future” MP group) registered in the Verkhovna Rada draft law No 3485 “On Amendments to Certain Laws of Ukraine Regarding Improvement of Election Legislation.” This draft law suggests a number of amendments to the Election Code and related laws, including the Criminal Code, the Code of Administrative Offenses, the Law on Central Election Commission and the Law on Civil Service.

The fact that the draft law was signed only by representatives of the “Servant of the People” and “For the Future” group may indicate that not all factions in the Rada share the proposals for improvement of the Election Code. Other factions may register alternative bills before the two-week deadline from the date of registration of the draft law No 3485 for doing so closes on June 1. It also remains to be seen whether the proposed draft reflects the consolidated position of the entire “Servant of the People” faction, or the position of only some MPs from that faction. Even if this bill passes in the first reading in the first half of June, its adoption into the law may extend into July depending on how many proposals for amendments are submitted to this draft after the first reading.

Draft law No 3485 was prepared by MPs following bilateral consultations with the CEC in May 2020. It was publicly discussed during a Zoom video conference on May 12 organized by the Committee on State Building, Local Self-governance, and Regional and Urban Development. While participants of discussion, including civil society activists, election experts and international stakeholders, expressed a number of concerns and objections to the initially announced amendments, most of them have not been addressed in the registered draft. The draft bill itself is almost the same as presented during the video conference, with just a few exceptions: the amounts of the electoral deposits for certain candidacies in local election have been reduced, and there are new provisions for amendments to the Criminal Code and Code of Administrative Offenses. The lack of change is an unfortunate development. From the outset, changes to key elements of the electoral framework should not happen in the last year before an election in which they are supposed to apply. For public consultations on changes to key elements of the election legislation less than half a year prior to the election to be meaningful, there should at least be broad public acceptance of such changes which ideally should aim to address long standing observer recommendations and raise the credibility and fairness of the elections.

This document suggests a brief analysis of the key provisions in the registered draft that are applicable to 2020 local elections. An in-depth analysis of all provisions of the draft, including proposed changes to the legal framework for parliamentary and parliamentary elections as well as recommendations will be shared by IFES in the near future.

Analysis
Amendments are mostly of the technical in nature and aim to improve election-related procedures for the parliamentary, presidential and local elections. In particular, they suggest to adjust and align
the timelines for key events in the election processes to avoid overlaps. The amendments provide for more extensive use of IT in elections by allowing stakeholders to submit documents electronically when registering candidates and observers, nominating election commissioners or when they report on campaign finance income and expenditure. There are also new provisions to ensure effective public procurement within the narrow election timeframes. It is suggested to decentralize CEC operations by strengthening the role of the CEC regional and local branches in administering future elections. The amendments also strengthen the accessibility of the elections to the voters with disabilities by providing for more extensive use of accessible formats in elections. Finally, they strengthen the independence of the CEC by proposing to remove the provision that allow the Rada to take a vote of non-confidence and dismiss the entire composition of the CEC if supported by a two-third majority of MPs as it happened in September 2019.

However, several amendments are aimed to change the key aspects of the Election Code. Such late amendments of fundamental aspects of election law less than a year before the 2020 local elections is contrary to the Code of Good Practice in Electoral Matters of the Venice Commission. It is contrary to the principle of stability of election law which is a key in a democratic society.

The most significant changes related to local elections include:

- **One reserved seat for the top-candidate** on the open party list. This change would further strengthen the closed list components of the open list proportional representation system introduced by the current code. Such closed list components include the 25 percent barrier for participation in distribution of seats for individual candidates, allocation of part of the seats using the closed list method, and the specific ballot paper format which *de facto* encourages voters to vote for a party list rather than for an individual candidate on those lists;

- **The extended use of the open list proportional system down to the level of city councils with at least 15,000 voters.** Under the provisions of the current code, the open list proportional system is exclusively used to elect oblast councilors and city councilors in oblasts/cities with at least 90,000 voters, all other councils are elected under the single non-transferable vote system (SNTV) which allow for independent candidates. The extension of the open list proportional system excludes independent candidates from contesting most city council elections, as independent candidates are only able to stand under the SNTV system and in mayoral elections. This restricts political competition and may also lead to unnecessary politicization of the city councils. Furthermore, it imposes an additional administrative burden on the territorial and polling station election commissions in small cities with 15,000 or more voters. In smaller cities, election commissioners may not have the professional skill required to administer multiple elections under such a complicated system as the open list proportional system, in which dozens or even hundreds of candidates can potentially compete;

- **The introduction of non-binding requirements to election district boundary delimitation.** The amendments suggest that election constituencies should be of “approximately” the same size; the max deviation from the average number of voters should in each constituency, “as a rule”, not exceed 15 percent. Such non-binding requirements pose a serious risk for gerrymandering if applied in an arbitrary manner. Furthermore, they legitimize violations of the principle of equal voting power of the voters – the “weight” of the vote of voters in some constituencies can be significantly lower than in other constituencies. This is inconsistent with the Venice Commission’s Code of Good Practice in Electoral Matters that recommends max 10 percent deviation from the average, or 15 percent in extraordinary cases;
• **The same party candidate may be nominated for two councils or for two councils and mayor.** This development is understandable from a political point of view as some parties, including Servant of the People, have difficulties identifying sufficient prospective candidates and lack a developed party structures at the local level. However, it may entail a number of problems. For instance, a successful SNTV candidate who wins two seats in different councils, or a seat and is elected mayor, can simply “sell” the additional seats to another candidate. When the number of votes received by the successful candidate is high, this may result in the other candidates getting elected in that constituency with just a few votes; the election of candidates whose support among the voters is negligible may potentially distort the entire election outcome. The possibility of parallel nomination of the same candidate to multiple elections can also result in an increased need to conduct repeated elections, e.g. if successful mayoral candidates opt for taking up the seat they concurrently won in a local council and relinquish their mayoral seat;

• **Oblast party branches are allowed to nominate candidates to the oblast and city councils, while mayoral candidates and candidates to the village, settlement and rayon councils can only be nominated by rayon party branches and not by oblast branches.** While this provision is a somewhat positive development compared to the current code that allows oblast party branches to nominate candidates only to oblast councils, it does not favor small and new parties whose representation at sub-national level is often limited to oblast branches. Given the limited time remaining before local elections, such parties would not be able to establish rayon branches and would thereby be excluded from contesting many local elections;

• **In elections held under the open list proportional representation system, election deposits will be only insignificantly lowered.** The amendments suggest introducing minor election deposits in all SNTV and mayoral elections (varying from 20 percent of the minimum monthly salary (UAH 940) to one minimum monthly salary (UAH 4,770). Despite the fact that the huge size of the electoral deposits in the oblast and city councils elections has been criticized by both national and international stakeholders as it does not correspond to the economic realities of Ukraine and discriminates parties with limited financial resources, the proposed amendments only cut them by four times. The deposit therefore would still be high and act as a barrier preventing parties with limited resources from running in the respective elections;

• **Introduction of the imperative mandate.** Under the proposed amendments, if a candidate is recalled at popular initiative, the seat will be filled with next on the respective party list (the seat remains “property of the party”). Imperative and party administered mandate have been repeatedly criticized by the Venice Commission as elected representatives represent not a particular group of voters who supported them, but rather an electorate as a whole. The imperative mandate is inconsistent with democratic practice also because it poses serious risks of political corruption and seat trading, it strengthens the role of party leadership, and turns the elected into a merely rubberstamps for decisions adopted by the party/faction leadership;

• **MP groups will get representation on the Territorial and Precinct Election Commissions.** Under the proposed amendments, local branches of parties that have an agreement with a parliamentary group registered no later than January 1 of the election year will be allowed to nominate one commissioner for each TEC and PEC, and such commissioner would have a guaranteed seat on commission. Guaranteed representation on each TEC and PEC is also granted to the parties that established factions in the Rada regardless of whether they run in the local elections. The possibility for MP groups to be represented on election commissions is a questionable novelty in Ukraine, especially given that the number of parties who can sign agreements with political groups in the Rada is not restricted at all. The two MP groups
currently registered in the Rada can sign agreements with dozens of parties, and the risk is high that these groups would at times take money from the parties who wish to get representation on the election commissions and who may sell the seats to other election competitors later on. The proposed approach therefore poses a risk that some commissions would be dominated by parties who managed to sign the required agreements with MP groups. This proposal is also discriminatory towards party factions in the Rada which are not allowed to sign any agreements with other parties, in contrast to MP groups;

- **TECs will be established before the launch of the election process.** While such an approach will streamline the timetable for the preparations to the elections and allow TECs to begin their work earlier, it means that the TECs may be composed of representatives of parties that would not necessarily run in the elections. Candidate nomination only starts after the official beginning of the election process and there is no provision that allows appointed members to be removed from commissions if the party that nominated them fails to nominate candidates;

- **Executive positions on election commissions will be distributed among different political forces proportionally but only initially, i.e. based on the nominations at the time of the initial formation.** If later on, one of the commissioners is removed from an executive position, it may not be filled with another nominee of the same party. This approach is understandable as the commission chair/deputy chair/secretary will remain on the commission as an ordinary member, and the party is only entitled to one representative on the commission;

- **The scope of information that must be included into campaign finance reports has been reduced and provisions establishing the electronic campaign finance reporting system have been removed from the code.** Under the current code, campaign financial reports must disclose detailed information on donations and expenses of parties and candidates. The amendments propose to remove these important provisions from the code. This is a step backward in terms of ensuring transparency of campaign finance and implementing longstanding recommendations of the Group of States Against Corruption, the Venice Commission and the OSCE/ODIHR. The removal of provisions establishing the e-reporting system for party/candidate campaign finance income and expenditure would not contribute to make the campaign and political finance oversight by the NAPC effective;

- **The introduction of simplified requirements to vote counting and tabulation protocols.** The draft suggests to narrow the scope of the data that must be included into vote counting and vote tabulation protocols in the local elections. While this new development may contribute to prompt compiling of the respective results protocols and reduce the risks of technical errors, the pros and cons of this approach should be carefully weighted as the proposed simplicity may increase the opaqueness of counting and tabulation procedures and create an unwelcome space for fraud and manipulation with protocol figures;

- **Paving the way for e-vote pilot testing.** The amendments give the CEC wide discretion to run pilot tests of information technology (IT) in elections, including voting machines and result management system, without a particular guidance at the level of law regarding the modalities of such tests. While establishing an electronic result management system and using IT solutions for the document flow between election commissions may indeed contribute to a more effective administering of the elections, any shift to e-voting and/or use of voting machines should be preceded by establishing a solid legal framework that would specify the legal grounds and procedures for tests of the hard and software thereby reducing the risks of fraud, manipulation and cyber security threats;

- **Strengthening the system of sanctions for election related offences.** The Draft Law No 3485 proposes to strengthen the system of administrative sanctions and criminal penalties for
election-related offences. It suggests changes to the Criminal Code and Code of Administrative Offenses aimed to strengthen liability for falsifying nomination documents for election commission membership and candidate nomination, for nominating persons to serve on elections commissions without their consent and for deliberately misleading or manipulating voters e.g. by changing the name, the party affiliation, profession of a candidate etc. so this becomes identical to that of another candidate. The respective changes fully incorporate the provisions of the Draft Law no 8270 registered in the previous Rada convocation that was drafted by the Ministry of Interior and OPORA Civil Network in consultations with the key stakeholders. This is a welcome development.

Summary
While some changes proposed in Draft Law No 3485 may contribute to a more effective administration of the election by addressing flaws in the current Election Code, some suggested changes can hardly be considered a positive development and should be reconsidered. This particularly relates to provisions reducing the transparency of campaign finance, allowing MP groups in the Rada to get representation on the territorial and precinct election commissions, the pilot testing of electronic voting machines without any guidance in the code with respect to such testing, introducing the imperative mandate, permitting candidates to run in multiple local elections under different election systems, and the inclusion of the additional closed list features into the open list system.

Several recommendations suggested by national and international stakeholders still remain to be addressed, including recommendations to review the overall design of the open list system. It is still a problematic issue that seat allocation between the MMCs is based on voter turnout rather than on the registered number of voters, and that closed list features dominate the open list system. Recommendations to ensure better transparency of campaign finance, to make contestants less dependent on wealthy donors, and more effectively regulate election campaigning, including online, still has to be addressed. It is also recommended to extend the deadlines for filing and considering the election-related complaints and introduce mandatory training of election commissioners to ensure a more effective professional election administration. For a more comprehensive list of electoral reform priorities, please see the 2020 IFES-Civil Network OPORA 2020 Roadmap.

IFES will share a detailed analysis of the draft law No 3485 and proposals for its improvement in the near future.

This document was developed by International Foundation for Electoral Systems (IFES) and made possible with funding from the United States Agency for International Development (USAID), Global Affairs Canada, and UK aid. The opinions expressed herein are those of the authors and do not necessarily reflect the views of USAID, nor the governments of the United States, Canada, or the UK.