



Technical Assessment Report: Out-of-Country Voting in Ukraine

Draft 1

IFES Ukraine | January 2023





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Voters and election administrators face systemic challenges during out-of-country voting organized by Ukraine. The number of Ukrainian forced migrants will likely aggravate them during the first post-war elections as well as new challenges will arise. The technical assessment report suggests a row of recommendations deemed to improve some of the out-of-country election procedures.

The document also argues the need to diversify out-of-country voting mechanisms to enfranchise the maximum number of Ukrainian forced migrants. To consider the most appropriate option(s), the report provides interested stakeholders with a comprehensive overview of all important aspects (especially challenging ones) of three alternatives to Ukrainian in-person in-embassy voting mechanism: expanded in-person voting, postal voting and internet voting. Draft 1 of the report is based on the interviewees' responses, statistics and legislation current as of September 2022 – January 2023. IFES Ukraine may revisit this draft at a later stage based on additional input and/or new information as necessary.

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About IFES Ukraine

In Ukraine, IFES efforts to strengthen democratic progress are supported by the United States Agency for International Development, Global Affairs Canada, and UK aid. To date, these efforts have led to unprecedented progress in:

- ensuring free, fair, and inclusive elections;
- advancing political integrity;
- strengthening Ukraine's digital transformation and cybersecurity resilience;
- championing the political and electoral rights of all Ukrainians;
- fostering informed and engaged citizenship.

FOREWORD

Ukraine's first post-war elections are likely to be the largest administrative, logistical, and operational challenges in the field of elections ever to be held on the European continent in recent history. Such elections will also attract an unprecedented level of attention from international partners and mass media, wherever Ukrainian citizens vote. Ukraine will need to think very carefully about how the electoral rights of citizens will be ensured both on the national territory and outside its borders, in particular, how access to registration and safe voting will be ensured without excessive documentary, administrative, or financial burden.

Being aware of systemic and emerging challenges related to the organization of out-of-country voting and continuing to support democratic institutions and processes in Ukraine, as well as understanding the need for in-advance preparation for the first post-war elections, which will give rise to new challenges for their administrators, political actors and voters, the International Foundation for Electoral Systems (IFES) initiated a technical assessment of the process of organizing out-of-country voting by Ukraine, so as to carry out a thorough analysis of all the risks and opportunities of this process. All key electoral stakeholders in Ukraine were informed about the commencement of the research by an email, which also contained the terms of reference for the technical assessment.

The IFES technical assessment was designed to comprehensively analyze the process of organizing out-of-country voting in elections, so as to identify the main systemic and practical obstacles for the purpose of improving the process of out-of-country voting as a whole, as well as for preventing possible complications during the first post-war elections caused by the exponential increase in the number of voters abroad. It should be remembered that the majority of forcibly displaced out-of-country Ukrainians are women, so that denying ease of election access to out-of-country voters would now disproportionately affect women. The technical assessment report can serve as a starting point for the organization by the Ukrainian authorities of an inclusive process of discussion and consultation on the adoption of the most balanced decision which will ensure the integrity and inclusivity of the out-of-country registration and voting process and the protection of the electoral rights of forced migrants.

The respective research was supported by the main beneficiary of IFES, the Central Election Commission.

The technical assessment lasted for half a year, from the end of June to the beginning of December 2022. The main activities within the framework of the technical assessment included:

- the development of assessment tools, including questionnaires and interview scenarios;
- an analysis of the modern socio-political and demographic context through analyzing statistical data, literature and media;
- advising on international comparative practices and their respective risks, costs, and benefits;
- a review of the current electoral legislation of Ukraine and existing challenges in the practice of organizing out-of-country voting;

- conducting face-to-face and online meetings and interviews with national and international electoral stakeholders;
- writing a report based on the results of the technical assessment;
- presenting the report to the main electoral stakeholders in Ukraine.

The report is based on data from in-depth interviews with Ukrainian and international electoral stakeholders, an analysis of the current Ukrainian legislation and the international best practices, media and observation reports, election statistics, and results of out-of-country voting. In the course of the technical assessment IFES Ukraine met with the Central Election Commission, the Ministry of Foreign Affairs of Ukraine, the Ministry of Digital Transformation of Ukraine, the Public Joint Stock Company “Ukrposhta,” the Central Election Commission of the Republic of Moldova, the Ministry of Foreign Affairs and European Integration of the Republic of Moldova, the National Election Institute of Mexico, the Central Election Commission of the Republic of Bosnia and Herzegovina, and other interested stakeholders.

The report consists of three sections:

- the first section is devoted to analyzing international election standards, the history of implementation of the organization of out-of-country voting by Ukraine and the systemic challenges associated with it, as well as the impact thereon of the current demographic and socio-political situation in Ukraine;
- the second section is an overview of all the main electoral procedures of organizing out-of-country voting, as well as the practical challenges faced by election administrators and other electoral subjects when organizing out-of-country voting; this part also contains specific recommendations for improving the organization of out-of-country voting if the choice of polling procedures remains unchanged;
- the third section substantiates the potential benefits of expanding and/or diversifying out-of-country voting procedures and describes the strengths and weaknesses of other possible methods of organizing out-of-country voting.

At the end of the report, one can find a brief summary of the study and an annex expanding on application of the equal suffrage and non-discrimination principles when determining the scope of electoral rights of Ukrainian voters abroad and methods of their implementation.

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List of Acronyms

CEC – Central Election Commission

DMA SVR MFA – Department of Maintenance and Administration of the State Voter Register, Office of Consular Services, Department of Consular Services, Ministry of Foreign Affairs of Ukraine

ECU – Electoral Code of Ukraine

EMB – Election Management Body

LU – Law of Ukraine

MFA – Ministry of Foreign Affairs of Ukraine

OED – out-of-country election district

OEP – out-of-country election precinct

SVR – State Voter Register

OCV – Out-of-Country Voting

E2E-V – End-to-End Verification

DRAFT

Executive Summary

The right to participate in electoral processes, in particular the right of citizens to elect their representatives, is one of the fundamental civil and political human rights enshrined at the level of the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights. International norms establish the principles of universality, equality, periodicity, secrecy, and freedom of elections. At the same time, international documents do not emphasize the binding nature of ensuring the political rights of expatriates. The only document that touches on such necessity is the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.¹

The European Court of Human Rights has accepted limiting voter choices of expats vis-à-vis voters who reside on the national territory during peacetime.² The General Comment to Article 25 of the International Covenant on Civil and Political Rights also allows the possibility of limiting certain political rights in the presence of reasonable grounds (for example lack of financial resources or impossibility of ensuring the freedom or security of the expression of voters' will abroad, as well as on residence), but the treaty body of the International Covenant on Civil and Political Rights – the Human Rights Committee – emphasizes that “states must take effective measures to ensure that all persons entitled to vote are able to exercise that right.” And democratic states follow this path – the number of countries organizing out-of-country voting is gradually increasing.

Ukraine has an established practice of ensuring active voting rights of citizens living or staying abroad by organizing in-person voting in Ukraine's foreign diplomatic institutions. At the same time, exercising the right to vote abroad is complicated by systemic barriers such as long distances to election precincts, the complex procedure for registering voters who are not on the consular register, queues at polling stations, the impossibility to vote for an MP candidate in the single-member election district to which the voter's electoral address in Ukraine was assigned under the previous election system; and under the new election system, the impossibility to support a specific candidate from a regional electoral list. In view of the aforementioned logistical and organizational problems, one can say that most out-of-country voters are already de facto deprived of the possibility to exercise their right to vote on the election day, since for example, it is burdensome to take a flight from New Zealand to Australia just to vote there.

Moreover, some electoral procedures are written without considering the specifics of out-of-country voting, which makes it extremely difficult to administer them. First, this concerns voter registration procedures, in particular the timeframes both for changing the electoral address and temporary change of voting place without changing the electoral address. At a time when voters can still submit relevant applications, the Ministry of Foreign Affairs of Ukraine (below, the MFA) should already dispatch the first couriers with updated voter lists to out-of-country election precincts (below, OEPs). Also, significant difficulties arise during the formation of precinct election commissions of out-of-

1 Ukraine is not a signatory to the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.

2 Text of the Decision could be found here: <https://www.eods.eu/elex/uploads/files/57ce9db28be81-TIMURHAN%20c.%20TURQUIE.pdf>

country election precincts (below, OEPs' PECs) – political actors do not display an appropriate level of responsibility during the formation of the commissions and often do not nominate enough candidate members to OEPs' PECs and therefore the MFA has to quickly look for candidates complying with the legal requirements. Or for example, the submissions with the names of candidates to the OEPs' PECs must be signed by the Minister of Foreign Affairs, which is difficult due to the short timeframes for proposing substitute candidates to OEPs' PECs as well as the workload and wide range of functional responsibilities of the respective official. The voter lists of some OEPs include as many as 50,000 voters. This report also describes some other practical challenges.

The full-scale Russian aggression against Ukraine affected all spheres of life in the country; worthy of particular mention is the fact that it provoked a wave of forced migration unprecedented since World War II – according to different estimates, from 6 to 8 million Ukrainians became forced migrants fleeing the war. Although not all forced migrants are voters, there has been a significant increase in the number of out-of-country voters and this will have a direct impact on the organization of the out-of-country voting process. In the absence of diversifying legacy OCV procedures, systemic difficulties will deepen and new ones will suddenly be faced by electoral administrators. It will be necessary to address issues such as informing voters and regulating campaigning abroad as well as out-of-country election dispute resolution.

Ukraine can make changes to the current electoral legislation that will improve the electoral process. However, it will be possible to ensure the forced migrants' right to vote only if the out-of-country voting process is adjusted, making the experience of Ukrainian refugees of two key aspects more frictionless – voter registration method and the voting.

On February 24, 2022, the Central Election Commission temporarily suspended the operation of the State Voter Register (below, the SVR), in particular to preserve the integrity and inviolability of voters' personal data. During the full-scale war period, a significant number of voters were displaced within the country, were forced to go abroad, or were forcibly deported to the Russian Federation, which made their electoral addresses irrelevant. At present, the SVR contains no data on voters who have recently reached the age of majority, on persons who have recently acquired citizenship, and on some other categories of citizens.

Regardless of which of the alternative voting methods will be added to embassy voting by Ukraine – extended in-person voting (additional election precincts outside diplomatic institutions), postal voting, or internet voting, their implementation will require changing the voter registration mechanism, namely, a transition from passive registration, wherein the main voters are included in voter lists based on periodically updated data from the SVR, to active registration, when voters must submit a statement of intention to vote abroad, providing information on their place of stay, in particular their out-of-country residential address, and/or contact details including phone number and email address. Further, Ukraine could maintain a permanent address database of overseas Ukrainian voters, as Italy does. The Central Election Commission (below, the CEC) must understand where additional election precincts should be arranged, where envelopes with election documents should be sent to, or who should be at the addressees and what should be the method for sending data for registration on the internet voting platform.

Active registration will enable the EMB to make the electoral process more inclusive by using the respective applications to identify the specific reasonable accommodation needs of voters with disabilities. The introduction of active registration will contribute to improved logistics and more

efficient spending of funds for the printing of ballot papers, since a significant number of voters who are on consular registration and are included in the voter lists fail to come to the polling stations on election day. However, it will be important to properly inform those intending to vote and expecting to find themselves on the voter list by default. Diplomatic institutions will play an important role in informing voters about the change in the registration method.

Eventually, the introduction of new methods of voting and active registration will require changing the mechanism for temporarily adjusting the place of voting without changing the electoral address. Election administrators will need to know in advance where and how many voters are planning to vote. If a large number of voters change the data at the last moment, this may jeopardize the proper conduct of the elections. While the procedure itself expands the rights and opportunities of voters and deserves to remain part of the electoral legislation, its timeframe will have to be revised. The CEC, with the help of the MFA, NGOs, and other stakeholders, should make a significant effort to educate voters.

Ensuring universal suffrage and the legitimacy of elected authorities requires diversifying the voting method to make it more inclusive and accessible to voters. Each of the three alternative voting methods under review – extended in-person voting, postal voting or I-voting – contributes to a greater or lesser extent to the implementation of some or other electoral principles. Ukraine should carefully study each of the methods, including other countries' experience in their implementation and administration, so as to choose the best option for full restoration of democratic development after the end of the war.

Extended in-person voting is similar to in-person voting at diplomatic institutions, except that it can also take place at election precincts established outside diplomatic institutions (below, out-of-extraterritorial election precincts). Countries such as Turkey, Côte d'Ivoire, Cape Verde, the Dominican Republic, Moldova, Bulgaria, and some others practice this voting method to some extent for their out-of-country voters – with varying degree of success. This method is understandable for Ukrainian voters, since from the procedural viewpoint the voting day will not differ from what forced migrants experienced when voting before the war in Ukraine. This method contributes to the transparency of the electoral process, as it enables independent observation of voting and vote counting processes (although its practical implementation in the event of creation of tens or hundreds of out-of-country election precincts is questionable). The implementation of extended in-person voting will not require changes to the Constitution of Ukraine, since one-day voting will be organized.

Extended in-person voting can be organized only if all out-of-country voters receive ballot papers of the same format. This approach is actually provided for by the current legislation, since voters abroad can only vote for a political party in general. On the condition that Ukraine applies a proportional electoral system with open lists, as currently provided by the ECU, Ukraine should consider giving out-of-country voters the right to express their support for a specific candidate from a regional electoral list, since forced migrants (unlike migrant workers who accounted for a majority of Ukraine's out-of-country electorate before the full-scale invasion) had to cross the border to save their lives. The first post-war elections can serve as one of the methods for the reintegration of forced migrants into their respective regions.

The implementation of extended in-person voting requires prior arrangements with the governments and local authorities of other countries, down to the municipal level. The aforementioned states create a small number of election precincts only in countries with a highly concentrated diaspora,

for instance Bulgarians in Istanbul, Cabo Verdans in Lisbon, and Dominicans in New York City. Not all countries allow elections to be held in their sovereign territories. An exception is made for post-conflict countries (not in all cases); however, as a rule, voting is organized in refugee camps. But the Ukrainians are evenly distributed among different regions and municipalities of various countries (although in Germany and Poland a certain number of Ukrainian forced migrants live in refugee camps).³ In view of this, Ukraine will have to create a significant number (dozens or even hundreds) of additional election precincts in countries such as Poland (380 counties), Germany (nearly 400 counties), or the Czech Republic.

If permission to open out-of-extraterritorial election precincts is obtained, the CEC and the MFA (as the de facto main entity nominating candidate members to the OEPs' PECs) will face the challenge of having to create and train election commissions, transport election materials, and especially ensure the security of both election materials and electoral subjects, as the issue of conflict of jurisdictions will arise. In most cases, the foreign countries will provide their own law enforcement officers, who will not be knowledgeable about the electoral procedures and whose presence may scare off forced migrants. If some countries allow Ukrainian law enforcement officers to safeguard the election precincts, it is unlikely that Ukraine will afford sending the required number of persons (organizing and paying for their travel, accommodation, meals, salaries). In addition, the research should be done whether it is possible from the point of view of Ukrainian legislation. Despite its clarity and transparency, extended in-person voting is a very expensive and extremely complex to administer an out-of-country voting method for the number and geographical position of Ukrainians currently abroad.

Ukraine may also consider remote voting implementation options for out-of-country voters, in particular postal voting. Postal voting contributes to universal suffrage, to increasing the inclusivity of elections, and allows voters staying abroad to be assigned to their constituencies in Ukraine and to receive the relevant ballot paper. Postal voting (similar to extended in-person voting) has a paper trail and allows organizing some format of independent monitoring, in particular observation of the counting and if necessary, the recounting of votes. The organization of postal voting does not necessitate creating hundreds of out-of-country precinct election commissions and using this voting method requires no permission from other states.

However, postal voting is also extremely difficult to administer – it requires a high level of coordination between the EMB, the ballot paper producing enterprise, the postal operator(s), the MFA, and diplomatic institutions over a significant period of time. The introduction of postal voting will require changing the timeframes of the electoral process in Ukraine, in particular of the registration of candidates, as well as, most likely, making amendments to the Constitution of Ukraine as regards the organization of early voting. A delay in receiving the ballot papers even by a small number of voters can lead to an essential outcry in social media which will have a negative impact on the level of confidence in the elections as a whole.

Postal voting is more common in countries that have launched it at least a decade ago and have gradually refined its implementation. Moreover, postal voting requires socio-economic conditions that makes vote selling unlikely, because with this method it is impossible for election administrators to supervise whether voters and other electoral subjects observe the secrecy of voting. In the

3 For an example, see: https://zaxid.net/yak_poselyayut_ukrayinskih_bizhentsiv_u_nimechchini_n1542797_a6o https://radiotrek.rv.ua/news/yak-viglyadaie-tabir-dlya-bizhenciv-z-ukrayini-u-polshchi-foto_284532.html

event of postal voting, the EMB must take a very careful approach when printing of all election documentation. For postal voting, the ballot paper format must be reduced. The different formats of the ballot papers for in-country and out-of-country voters will create difficulties in conducting information and educational campaigns, and the success of the elections will largely depend on the EMB's awareness-raising efforts.

Postal voting is the second most popular method of organizing voting for out-of-country voters after in-person voting at diplomatic institutions; but, as a rule, it was implemented in countries with a high level of postal service reliability (and confidence in it) and this was done in a gradual manner. There are a large number of different postal voting organization modalities; the choice of each procedure has both strengths and weaknesses. Before implementing this voting method for out-of-country voters, Ukraine must develop a holistic vision, answering a number of questions, ranging from which institution will mail the ballot papers (for example the CEC in Ukraine or diplomatic institutions abroad) to where the voter's unique barcode must be placed on the outer envelope to prevent double voting. The list of relevant questions, as well as the description of the different modalities, can be found in the relevant section of this report.

Another remote voting method which was reviewed during the technical assessment of the process of out-of-country voting organization by Ukraine is internet voting. This voting method is "voter-friendly," making voting possible for those who find it hard to get to the out-of-country election precinct and for voters who do not have a permanent place of residence abroad where they can reliably receive mail. Similar to postal voting, it allows assigning voters to their constituencies in Ukraine and providing them with the corresponding ballot papers. Unlike extended in-person and postal voting, Internet voting is an easy-to-administer method not requiring significant training or the EMB's coordination with other institutions, provided that a system for online voting is in place. In Ukraine, Internet voting can be organized within the same time slots as regular voting at the election precincts. To that end, the system must allow voters to express their will from 8 a.m. to 8 p.m., host country's local time, on the election day. But in this case the servers will be overloaded and the risk of in-system problems will increase.

However, similar to postal voting, Internet voting takes place in uncontrolled conditions and so it is impossible to guarantee freedom from coercion or to ensure voting secrecy. The EMB may implement safeguards such as the possibility for a voter to change his/her choice during the voting period,⁴ but it may be difficult to explain its mechanism to voters, especially if Internet voting is introduced for the first time or if it is carried out in one day (as provided for e.g. in the Law "On the All-Ukrainian Referendum").⁵

The main argument against introducing this voting method is the lack of a 100% guarantee from external interference in the election results. Substitution of results may go unnoticed by both voters and administrators (or it may never take place). The lack of a paper trail renders it impossible to conduct an independent and publicly visible recount of individual, while such verification is extremely important for countries with a high level of domestic political competition as well as for countries like Ukraine, which is in a state of war with a country that has repeatedly tried to interfere in the results

4 For example, a voter can vote an unlimited number of times during the voting period, changing their choice, however, only the last vote cast is counted.

5 It is worth noting that while the Law "On the All-Ukrainian Referendum" directly provides for the possibility of introducing Internet voting, however, its period should coincide with the organization of voting in Ukraine, while the ECU does not currently provide for such a possibility.

of Ukrainian elections. End-to-end verification (individual as well as universal) should be a mandatory element of the online voting system. However, even its availability does not guarantee full confidence in the election system, because, although voters can check whether their vote was actually cast and counted, they cannot make sure that it really went to the political actor they supported.⁶ Even in the event of proper functioning of the system, lack of confidence can undermine the legitimacy of the newly elected government.

There are however several confidence-building measures that can enhance the acceptability of internet voting: Most importantly, it would not be the only voting method offered. Any voter who prefers to vote in-person at an embassy may do so. Secondly, voters can compare hand-recounted in-person cast results with internet voting results, OCV-country per OCV-country. Most importantly, end-to-end verifiability can allow voters to check online which candidate or party their vote was counted for. Such verification can be confined to controlled environments if vote-buying is feared to be an issue even outside Ukraine.

Globally, there are many examples of the organization of extended in-person and postal voting – and so a lot can be said about potential difficulties for the purpose of avoiding them in the future; but Internet voting is a much less “tested” method of ensuring electoral rights and so can – and certainly does – hold challenges that election administrators, voters and developers may not even be aware of. A critical question for internet voting would be which server would host the results, as well as disaster recovery back-up.

It is difficult to predict which methods voters will favor. Any one of the above methods requires studying the issue of election dispute resolution and liability for violations of electoral legislation abroad as well as conducting an intensive voter education and information campaign.

Globally, there is no single approach to ensuring the exercise of the right to vote abroad; each of the above methods has its own strengths and weaknesses. Since the organization of out-of-country voting during the first post-war elections will be watched by the entire world community and the elections will be regarded as sort of “test” for Ukraine’s preparedness to join the European Union, it is important for Ukraine to choose a method, or a combination of different procedures depending on the host country context, that will allow the largest number of Ukrainians – in particular forced migrants abroad – to exercise their voting right. However, the elections in question should not turn into an “administrative disaster” which will be widely covered in the media and nullify Ukraine’s achievements, including those for which its Heroes paid with their lives.

No matter which method or methods Ukraine will choose to ensure its citizens’ right to vote, it should be the state’s own decision – determined by its resources, experience, and context. At the same time, it is important that the adoption of this decision be preceded by transparent and inclusive consultations involving all the stakeholders. It is obvious that the preparation for the first post-war elections, whenever they are called, should begin at present – with an understanding of all the possibilities and challenges.

⁶ While technically possible, this possibility would leave voters vulnerable to coercion, as someone could demand proof of their vote.

II. Introduction: Justification of the Need for Technical Assessment

1. International Election Norms and Out-of-Country Voting

The right to participate in electoral processes, in particular the right of citizens of some or other state to elect their representatives, is one of the fundamental civil and political human rights enshrined at the level of the Universal Declaration of Human Rights (UDHR) and the International Covenant on Civil and Political Rights (ICCPR). Thus, Article 25 of the ICCPR states, *“Every citizen shall have the right and the opportunity, without any [discrimination] ... and without unreasonable restrictions: (a) To take part in the conduct of public affairs, directly or through freely chosen representatives; (b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors; (c) To have access, on general terms of equality, to public service in his country.”* The monitoring treaty body of the International Covenant on Civil and Political Rights, the Human Rights Committee, emphasizes that *“States must take effective measures to ensure that all persons entitled to vote are able to exercise that right.”*

In practice, however, states face situations where the exercise of political rights is possible but is significantly limited for practical reasons. Thus, under conditions of globalization of political, personal and professional life, spread of democracy throughout the world, and increased migration, one issue that has become particularly topical is the voting rights of refugees, diplomats, military personnel serving abroad and other people temporarily or permanently staying outside their country.

The practice of exercising active voting rights by citizens abroad varies greatly from country to country. Some countries (for example France) grant their emigrant citizens unlimited voting rights identical to those of citizens living inside their own country. Other countries only allow their expatriate citizens to keep voting for a certain number of years after leaving the country. After the expiry of the legally established term, such citizens are no longer entitled to vote in elections in the country of their citizenship (e.g., German citizens can vote for 25 years while living abroad, while Australian citizens can do so for 6 years after leaving the country). At the same time, a number of countries retain the right to vote exclusively for citizens who live directly in the territory of the state, thus limiting the voting rights of emigrant citizens – for instance such restrictions apply in Ireland (with some exceptions).

Provision of out-of-country voting as a component of universal suffrage is a rather debatable topic among both theorists and practitioners in the field of elections. On the one hand, international election norms recognize the fundamentality of the principles of universal and equal suffrage, but on the other hand, they do not rule out one of the classical “limitations” of suffrage: the qualification of residence in a certain territory (thus, the General Comments to Article 25 of the ICCPR recognize that in some cases prohibition of the exercise of

political rights is possible – if it is “justified”).⁷ Moreover, it is also worth noting that the implementation of out-of-country voting is associated with serious technical and administrative challenges that may interfere with ensuring other important principles of suffrage, in particular those of the secrecy of the vote and in some cases free and fair elections.

At present, there are almost no specific international standards emphasizing the need to ensure active voting rights of expatriates. The Refugee Convention, the main international instrument protecting the rights of persons forcibly displaced outside their country of citizenship, dates back to 1951, and hence predates the ICCPR, which defined voting rights, by 15 years.

The only document that indicates this in a certain way is the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, where Article 41 directly specifies that “*Migrant workers and members of their families shall have the right to participate in public affairs of their State of origin and to vote and to be elected at elections of that State, in accordance with its legislation. The States concerned shall, as appropriate and in accordance with their legislation, facilitate the exercise of these rights.*” At the same time, as of August 2022, only 59 states ratified the Convention; 11 more signed, but did not ratify it. It should also be noted that Ukraine is not a party to the Convention. The Convention is also not signed by member states of the European Union (EU), however, all EU member states (with the exception of Malta, which reimburses its citizens the travel to return to Malta for voting) already organize voting abroad for their citizens. Moreover, citizens of EU countries living in the territory of a Member State other than their country of citizenship have the right to vote and be nominated as a candidate in municipal elections and elections to the European Parliament held in their country of residence. The same rules and requirements apply to them as to citizens of that state.

2. History of Implementation of Out-of-Country Voting by Ukraine

As to the history of the implementation of the organization of Ukraine’s out-of-country voting, it was back in the first years of Independence that the legislators provided for the possibility of forming election precincts at Ukraine’s representative offices abroad in order to guarantee the right to vote to Ukrainians staying outside their state. Thus, pursuant to the provisions of Part two, Article 12 of the LU “On the Election of the President of Ukraine”⁸ dated July 5, 1991, and Part two, Article 12 of the LU “On the Election of the MPs of Ukraine”⁹ dated November 18, 1993, such precincts were created based on a proposal from the MFA in accordance with their attribution, as determined by the CEC.

The issue of attribution of out-of-country election precincts was important in view of the fact that during all the elections of the MPs of Ukraine held from 1994 to 2002, electoral systems were used that provided for the nomination of candidates in single-member election districts. In 1994, it was a majoritarian system of absolute majority, while in 1998 and 2002 a mixed electoral system was used, according to which 225 single-member constituencies were formed in the territory of the state to elect 225 MPs while the remaining 225 MPs were elected in the nationwide election district under a proportional system with closed party lists.

In accordance with the established practice and bylaws of that time, the CEC attributed out-of-country election precincts to the election districts formed in the city of Kyiv, the capital of Ukraine. Subsequently, that practice

⁷ Partial cancellation of contractual obligations can be considered acceptable if it is caused by objective reasons, is non-discriminatory, is used to achieve a legitimate goal, is compatible with obligations to observe the rule of law and the conventions, and is also proportionate.

⁸ LU “On the Election of the President of Ukraine” dated July 5, 1991. Access mode: <https://zakon.rada.gov.ua/laws/show/1297-12#Text>

⁹ LU “On the Election of the MPs of Ukraine” dated November 18, 1993. Access mode: <https://zakon.rada.gov.ua/laws/show/3623-12#Text>

was legislatively reflected in Part two, Article 22 of the LU “On the Election of the MPs of Ukraine”¹⁰ dated November 17, 2011, which specified that “out-of-country election precincts shall be established by the CEC at foreign diplomatic institutions of Ukraine and at military units (formations) deployed outside Ukraine, and shall be distributed evenly among all single-member districts being created in the territory of the capital of Ukraine – city of Kyiv.”

Fifty-nine MPs of Ukraine challenged that norm in the Constitutional Court of Ukraine, claiming that “the specified provisions of the Law violated the constitutional principles of equal and free suffrage, the right of citizens to elect and to be elected, failed to provide for equality of opportunities for Ukrainian MP candidates running in single-member election districts and for equality of legal weight of voters’ votes”. In its decision¹¹ of April 4, 2012, the Constitutional Court of Ukraine agreed with their arguments and found the aforementioned provisions unconstitutional. And so, in the 2012, 2014, and 2019 elections of MPs of Ukraine, a mixed electoral system continued to be used; however, out-of-country voters could vote for a political party in the nationwide district, but not for a candidate in a single-member election district.

On December 19, 2019, the Verkhovna Rada of Ukraine adopted a new Electoral Code of Ukraine, which provides for the use of a proportional electoral system with open regional lists in the elections of the MPs of Ukraine. Such regional lists of MP candidates are formed in 25 regions corresponding to the relevant administrative-territorial units in Ukraine.¹² And so, voters staying in the territory of Ukraine on voting day will be able to vote both for a certain party and for an individual candidate in the regional list of candidates. At the same time, out-of-country voters will be able to vote only for a party, since pursuant to Article 138 of the ECU, the OED is not assigned to any of the electoral regions – it is only included in the single nationwide multi-member district. Thus, while Ukrainian citizens abroad are guaranteed the active voting right at the legislative level, it is significantly limited compared to voters staying in the territory of Ukraine on the day of voting. The European Court of Human Rights accepted such limitation of voter choices in the peace-time context of Turkey, but voting rights of forced refugees were not litigated in this case.¹³

Out-of-country voting was also provided for by the 1991 LU “On the All-Ukrainian and Local Referendums,” the 2013 LU “On the All-Ukrainian Referendum” that have been invalidated and is guaranteed by the current (2021) LU “On the All-Ukrainian Referendum.”

According to the current legislation, out-of-country voting is not organized in local elections, since the right to vote in local elections is only vested in those citizens who are members of the respective territorial community according to their place of residence or election address. Voters living abroad are considered not to belong to any territorial community.¹⁴

Thus, Ukraine ensures the voting rights of expatriates in all national elections, as well as during the process of an all-Ukrainian referendum. At the same time, there are no additional requirements for out-of-country voters, such as “the intent to return” or periods of residence abroad – all Ukrainian citizens who have turned 18 on the day of voting, have not been recognized by a court as legally incompetent and are included in the voter

10 LU “On the Election of the MPs of Ukraine”# dated November 17, 2011. Access mode: <https://zakon.rada.gov.ua/laws/show/4061-17/ed20111117#o173>

11 Text of the Decision. Access mode: <https://zakon.rada.gov.ua/laws/show/v007p710-12#Text>

12 With the exception of electoral region No. 16 (“South Region”), which includes the Kherson region, the Autonomous Republic of Crimea and the city of Sevastopol.

13 Text of the decision is here: <https://www.eods.eu/elex/uploads/files/57ce9db28be81-TIMURHAN%20c.%20TURQUIE.pdf>

14 Amendments to the LU “On State Voter Register” have created a new opportunity for Ukrainians who live outside their place of registration, including internally displaced persons, to register to vote at their actual place of residence, including during local elections. It is believed that such voters are already sufficiently integrated into one or another territorial community and have the legal right to influence the decision-making processes in it. To exercise the right to vote, such voters can apply for a change of election address and register to vote where they actually live; this can be done in person or online using an electronic digital signature.

list at an OEP in the country of their stay are eligible to vote.¹⁵ Moreover, in order to successfully exercise the right to vote abroad, voters included in the voter list at an OEP must personally come to the polling station at the foreign diplomatic institution of Ukraine on Election Day and present one of the legally required documents confirming their identity.

3. Systemic Challenges in Organizing Out-of-Country Voting by Ukraine

Although Ukraine's legislation guarantees the exercise of active voting rights to citizens living or staying abroad without additional electoral qualifications, the number of registered voters in the voter lists at the OEPs and the turnout remain traditionally low, varying between 10 and 15%.

According to various estimates, the number of Ukrainians with the right to vote staying abroad in 2019 was about 3 million,¹⁶ but only about 450,000 Ukrainian citizens were entered in the voter lists of the OED during the election of the President of Ukraine and the election of the MPs of Ukraine in 2019. At the same time, the turnout at the March 31, 2019 election of the President of Ukraine and the early election of the MPs of Ukraine on July 21, 2019, was 12.65% and 7.27%, respectively. The turnout was not much higher at the early election of the President of Ukraine on May 25, 2014, which took place against the background of a significant patriotic upsurge caused by the Ukrainians' rejection of the annexation of the Crimea and of Russia's military actions in the east of Ukraine, and at the early election of the MPs of Ukraine on October 26, 2014: in the OED, it was 15.36% and 8.83%, respectively.

An analysis of online media from 2014 to 2021 has revealed a number of critical publications regarding the organization of out-of-country voting during the respective election processes, partially explaining the low activity of registered out-of-country voters.¹⁷

Thus, although the voters whose opinion was presented in freely accessible publications and videos on the Internet spoke positively about the possibility to vote abroad and were willing to exercise their active right to vote, they also mentioned a number of challenges complicating or even rendering impossible that process.

15 Out-of-country voters are included in the voter list at the OEP automatically if they are on consular registration in the host country or if they submit to the relevant PEC of the OEP or to DMA SVR MFA an application for placing themselves on the respective voter list or an application to DMA SVR MFA for a temporary change of the voting place without changing the voting address.

16 "Labor migration: how many Ukrainians worked abroad in 2019-2021", slovuidilo.ua, March 18, 2021. Access mode: <https://www.slovuidilo.ua/2021/03/18/infografika/suspilstvo/trudova-mihracziya-skilky-ukrayincziv-pracyuvaly-kordonom-2019-2021-rokax>

17 When working on the technical assessment of the process of organization of out-of-country voting by Ukraine, the authors also reviewed the 2014 and 2019 reports of the ODIHR Election Observation Mission; however, the reports did not pay any attention to the process of organization of out-of-country voting.

“We, the community of Ukrainians in the cities of Vicenza and Treviso, waited for the Election Day with hope and expectations. We had been preparing for the day of the May 25, 2014 presidential election as if it were a holiday; we had been preparing for that day as one giving us Ukrainians the opportunity to change Ukraine for the better. Many of us came to vote for the first time. We were all aware that it would not be an easy and peaceful day. But never had we expected the abuse¹⁸ that the Ukrainians in Italy experienced from the organizers and the Consulate of Ukraine in Milan.”

Ukrainians from Vicenza and Treviso Complain about the Organization of the Election of the President of Ukraine in Milan, Ukrainska Gazeta, Italy¹⁹

Other relevant publications from the 2014-2021 period mentioned long queues at the polling stations at Ukraine’s diplomatic institutions abroad, in cities of compact residence of the Ukrainian diaspora and labor migrants. In particular, Radio Liberty correspondents observed queues of people wanting to vote in the presidential elections of Ukraine on March 31, 2019, in Prague, Warsaw, London, Brussels, and Tbilisi.²⁰ For example, in Warsaw, Poland, during the March 31, 2019 election of the President of Ukraine “the queue to the polling station at the Embassy of Ukraine was almost 500 m long, stretching all the way to the building of the MFA of Poland.”²¹ According to CEC data, 4,152 voters took part in the voting at the respective polling station.

The “overcrowding” of polling stations abroad was also mentioned by Ukrainian officials at that time; in particular, Commissioner for Human Rights Lyudmila Denysova spoke about the difficulties of out-of-country voting during the April 21, 2019 runoff of the March 31, 2019 election of the President of Ukraine: “People complain about having to stand in line for an hour or two to exercise their right to vote.”²²

Long queues not only take a lot of time, but also lead to the emergence of other problems – related to safety (the need for additional traffic regulation, because a queue can extend far beyond the sidewalk; the necessity for increasing the number of law enforcement officers, etc.) as well as to utilities (availability of toilets, drinking water, waiting places for the elderly or for persons with disabilities). Recent threats to Ukrainian diplomatic missions in Spain could deter voters from staying in line for several hours to exercise their vote there.

Traveling and long distances to polling stations were also repeatedly mentioned as obstacles to participating in the voting. Thus, for instance, a Ukrainian female respondent in Poland noted that “there is no polling station in Wrocław and it is problematic to go to Krakow.”²³ And in Australia – a country covering an entire continent – only one polling station in Canberra is open for Ukrainians. Thus, one female voter noted, “Australia is a very

18 The interviewee likely meant the long queues and the inability to vote on election day due to the large number of voters included in the voter list.

19 “Ukrainians from Vicenza and Treviso complain about the organization of the presidential elections in Milan”, Ukrayinska Gazeta.IT. Access mode: <https://bit.ly/3TkWNvf>

20 “Prague, Warsaw, Brussels, London, Tbilisi: high turnout and queues at polling stations abroad,” Radio Svoboda, March 31, 2019. Access mode: <https://www.radiosvoboda.org/a/29852764.html>

21 “How Ukrainians voted abroad”, LB.ua, April 1, 2019. Access mode: https://lb.ua/world/2019/04/01/423371_yak_golosovali_ukraintsi_kordonom.html

22 “Elections abroad: Ukrainians have to stand in lines to vote”, Syegodnya, April 21, 2019. Access mode: <https://ukraine.segodnya.ua/ua/vybory2019/news/vybory-za-granicey-ukraincam-prihoditsya-stoyat-v-ocheredyah-chtoby-progolosovat-1257256.html>

23 “No more than 10 thousand Ukrainians will be able to vote in Poland”, PolUkr.net, Access mode: <http://www.polukr.net/uk/blog/2019/03/43743/>. In Poland, where, according to various estimates, more than 1 million Ukrainian citizens were living in 2019 and 34,924 voters were included in the voter lists for the March 31, 2019 election of the President of Ukraine, polling stations were opened in 4 cities only: Warsaw, Kraków, Gdańsk, and Lublin, in connection with the requirement of Ukrainian legislation that out-of-country polling stations may only be opened at permanent consular institutions.

big country – and a domestic flight for example from Perth to Canberra costs about 800 AUD per person, not counting other expenses,” “in Australia, it is hard to get to the voting place and people are often insufficiently informed”.²⁴

The single voting day was less often mentioned as an obstacle to participation in elections. Thus, only a few publications cited examples of refusal to vote due to personal circumstances (personal plans or the need to work on Election Day).²⁵

The above list of obstacles is not exhaustive. Moreover, there are also other reasons why voters abroad may refuse to participate in the voting, in particular for fear of “being deported in case of staying abroad illegally,” lack of proper information for out-of-country voters about the electoral process, or expired foreign passports.²⁶ At the same time, most of the mentioned obstacles are of a systemic nature and so they are likely to remain relevant for Ukraine in the future and will be “multiplied” by the consequences of the Russian Federation’s full-scale war against Ukraine if the organization of the voting procedure for out-of-country voters is left unchanged.

4. Impact of Russia’s Full-Scale War against Ukraine on Organization of Out-of-Country Voting

On February 24, 2022, Russia launched a full-scale military offensive, firing artillery, missiles, and bombs at the Ukrainian infrastructure in many oblasts of Ukraine and moving its troops across the Ukrainian-Russian and Ukrainian-Belarusian borders. That same day the President of Ukraine signed Decree No. 64/2022 “On the Imposition of Martial Law in Ukraine” and the MPs of Ukraine approved that document with 300 votes.²⁷ In connection with the introduction of martial law in Ukraine, temporary restrictions on the rights and legitimate interests of legal entities may be imposed, as well as on the constitutional rights and freedoms of man and citizen provided for by Articles 30-34, 38, 39, 41-44, 53 of the Constitution of Ukraine. The CEC, guided by the legislation of Ukraine on martial law, terminated all current electoral processes; and for security and data protection reasons, suspended the operation of the Automated Information and Communication System “State Voter Register” for the period of martial law.²⁸ The CEC also adopted a number of additional decisions, including the suspension of the activities of territorial election commissions in the temporarily occupied territories.

As of the beginning of December, armed clashes between Ukrainian and Russian forces continue, and airstrikes and shelling of civilian infrastructure are causing significant material damage, casualties, and displacement. At the end of October 2022, more than 6.5 million people²⁹ remained internally displaced persons in Ukraine and about 7.8 million Ukrainians³⁰ were forced to settle in Europe, fleeing hostilities. Among the states with which Ukraine borders in the west, according to UNHCR statistics, Poland received the largest number of forced migrants as of mid-November 2022 - 1,497,849 Ukrainian citizens officially received

24 “USA, Canada, Chile, Australia - Ukrainians of the world want their voice to be heard in the elections in Ukraine”, Voice of America, March 20, 2019. Access mode: <https://ukrainian.voanews.com/a/ukraiitsi-v-sviti-ta-vybory/4839568.html>

25 More examples in “No more than 10 thousand Ukrainians will be able to vote in Poland”, PolUkr.net, Access mode: <http://www.polukr.net/uk/blog/2019/03/43743>

26 «Andrii Sybiga on voting abroad» Access mode: <https://www.youtube.com/watch?v=b9ia940bJ1Y>

27 Access mode: <https://www.president.gov.ua/news/prezident-pidpisav-ukaz-pro-zaprovadzhennya-voyennogo-stanu-73109>

28 CEC Regulation dated February 24, 2022 No. 61 “On the temporary suspension of the functioning of the automated information and communication system “State Register of Voters” for the duration of martial law.” Access mode: <https://act.cvk.gov.ua/acts/pro-timchasove-pripinennya-funktsionuvannya-avtomatizovanoi-informatsiyno-komunikatsiynoi-sistemi-derzhavnyi-reiestr-vibortsiv-na-chas-dii-voiennoho-stanu.html>

29 Ukraine — Internal Displacement Report — General Population Survey Round 10 (17 - 27 October 2022), IOM. Режим доступу: <https://displacement.iom.int/reports/ukraine-internal-displacement-report-general-population-survey-round-10-17-27-october-2022>

30 Operational Data Portal, UNCHR. Access mode: <https://data.unhcr.org/en/situations/ukraine>

temporary protection in this country.³¹

According to data of a survey conducted by the consultancy company EWL,³² 94% of Ukrainian forced migrants who crossed the border with Poland are women.³³ Forced migrants mostly settle in big cities. The majority of forced migrants (56%) want to return to Ukraine after the end of the war. Only one respondent in three declares a desire to stay in Poland for longer. In their turn, 12% of the respondents intend to emigrate further. The most frequently mentioned destinations of migration were Germany (26%), the USA (16%), and Great Britain (11%). Considering that there were between 1 and 1.5 million Ukrainian citizens working in Poland before the war and that long queues were observed during voting in Ukraine's foreign diplomatic institutions, the sharp increase in the number of voters will significantly complicate the process of voting.

The runner-up in terms of the number of Ukrainian forced migrants in the European Union is Germany. There, as of mid-November 1,019,789 Ukrainian compatriots officially received temporary protection. The third place belongs to the Czech Republic, with 460,219 Ukrainian citizens registered in the temporary protection program. A significant number of Ukrainian citizens "settled down" in Italy, Spain, Bulgaria – countries with an active Ukrainian diaspora and higher voter turnout compared to other European countries.

Also noteworthy is the situation in the Republic of Moldova – although there are no statistics on the number of Ukrainians under temporary protection programs there, more than half a million Ukrainians crossed the border with that state, which is 1/5 of the population of Moldova itself. Obviously, not nearly all those half a million Ukrainian citizens remain in this country; however, since more than 50,000 voters are included in the voter list at the election precinct at the Embassy of Ukraine to the Republic of Moldova in the city of Chisinau, even a slight increase in the number of out-of-country voters can significantly complicate the organization of voting in that country.

Moreover, according to a UNHCR estimate, about 2 million Ukrainians crossed the border with the Russian Federation;³⁴ however, there are no data on any official temporary protection programs in that country – and Ukrainian media, for example the web portals "Ukrainska Pravda"³⁵ and "Slovo i Dilo,"³⁶ publish reports on abduction and forced resettlement of Ukrainian citizens from the occupied territories to the Crimea and to Russia itself by the Russian authorities. It is worth noting that in 2018 Ukraine closed all polling stations in the territory of Russia.

Even more Ukrainians may resettle if the military escalation continues in the Donetsk and Luhansk oblasts as well as in the south of Ukraine. Others may decide³⁷ to return depending on the security situation in their regions. Public opinion polls³⁸ conducted in July-August 2022 by the Razumkov Center showed that:

- 36% of respondents expressed their intention to return after making sure that it was safe to be in the area where they lived,

31 At the same time, it should be noted that not all citizens who went abroad to escape the war received refugee status or applied for temporary protection programs – and so the number of forced migrants from Ukraine to Poland and to the countries mentioned below in the text is larger than the number of officially registered aid seekers.

32 "Survey by EWL Migration Platform: Almost 2/3 of refugees from Ukraine have higher education and want to find employment," EWL, 12.05.2022. Access mode: <https://ewl.com.pl/en/survey-by-ewl-migration-platform-almost-2-3-of-refugees-from-ukraine-have-higher-education-and-want-to-find-employment/>

33 Note from the technical assessment team: most likely the number derives from the total number of adults.

34 Operational Data Portal, UNCHR. Access mode: <https://data.unhcr.org/en/situations/ukraine>

35 "Russia announced that they have already deported over a million people from Ukraine," Ukrainian Pravda, APRIL 27, 2022. Access mode: <https://www.pravda.com.ua/news/2022/04/27/7342540>

36 "The number of Ukrainians forcibly deported to Russia," slovovidlo.ua, May 9, 2022. Access mode: <https://www.slovovidlo.ua/2022/05/09/novyna/suspilstvo/nazvana-kilkist-ukrayincziv-nasylnno-vyvezenyx-rosiyi>

37 "Return of IDPs and Refugees: What Influences Decisions," Cedoss, 05/04/2022. Access mode: https://cedos.org.ua/researches/povernennya-pereselen_ok-i-bizhen_ok-shho-vplyvaye-na-rishennya/

38 "Attitudes and assessments of Ukrainian refugees (July–August 2022 p.)," Razumkov Center, 08/30/2022. Access mode: <https://razumkov.org.ua/napriamky/sotsiologichni-doslidzhennia/nastroi-ta-otsinky-ukrainskykh-bizhentsiv-lipen-serpen-2022p>

- 35% — immediately after the war ends,
- 13% — a year or a few years after the end of the war,
- 7% — after the company they worked for resumes activity or they are sure that they will find another job at home,
- 11% planned to return in the near future,
- 7% did not plan to return to Ukraine at all (among those who have a permanent job in the host country, such 18%).

88% of those who planned to return to Ukraine answered that after returning they planned to settle in the same region where they lived before the war, 7% — planned to settle in another region (mostly residents of the Eastern region).

It is likely that respondents planning to return will want to participate in political life as voters both in Ukraine and while staying abroad. These citizens also may prefer to vote for candidates on regional electoral lists according to the regions they represent.

On the other hand, the longer the hostilities continue, the higher will be the level of integration of Ukrainian forced migrants in the societies of other countries. Although the volume of assistance in the form of additional payments or free housing is gradually decreasing, the governments of the host countries are trying to stimulate the forced migrants to learn the language and get employed, which helps them to “get fixed” abroad. Some of those who decide to stay abroad will also want to vote in Ukrainian elections and will try to be included in the voter lists at the OEPs.

In recent years, Ukraine made significant progress in the development of democracy – in particular in the organization of elections, which were recognized as competitive and conducted with respect for fundamental freedoms, as stated, for example, in the final report of the ODIHR Election Observation Mission on the 2019 election of the President of Ukraine³⁹ and the final report of the ODIHR Election Observation Mission on the 2019 early elections of the MPs of Ukraine.⁴⁰ The OSCE/ODIHR, however, did not physically observe out-of-country voting of Ukrainians as it is not part of their methodology (contrary to the European Union, which has observed OCV in Tunisia (2014), Lebanon (2018), and Iraq (2021).

After the stabilization of the situation and the abolition of martial law, Ukraine should organize a series of intermediate local election processes and prepare for the elections of the MPs scheduled for the autumn of 2023, as well as for the presidential elections scheduled for the spring of 2024. It is important that Ukraine adheres to all international norms, and considers good emerging practices, during these elections and ensures the voting rights of its citizens, regardless of the logistical, administrative, security and other complications caused by the Russian invasion.⁴¹

This also applies to the organization of out-of-country voting. As a result of the significant increase in the number of voters who left Ukraine to escape the hostilities, specific challenges were added to the systemic problems outlined above – such as the lack of documents required for voting abroad, since in the first days of the war citizens were allowed to present their internal passport when crossing the border,⁴² and lack of

39 Text of the report. Access mode: https://www.osce.org/files/f/documents/8/3/439631_0.pdf

40 Text of the report. Access mode: https://www.osce.org/files/f/documents/6/9/439634_0.pdf

41 If the hostilities and the legal regime of martial law continue, the above-mentioned election processes may be postponed in time; however, in the opinion of the technical assessment team, this does not eliminate the need to prepare for them.

42 “The possibility of crossing the border by citizens of Ukraine with internal passports has been extended,” State Border Service of Ukraine, April 18, 2022. Access mode: <https://dpsu.gov.ua/ua/news/mozhlivist-peretinannya-kordonu-gromadyanami-ukraini-zavnutrishnimi-pasportami-prodovzhenno/>

knowledge of the language⁴³ that will make it difficult for voters to travel to a polling station located in another city.

If Ukrainian refugees are unable to exercise their right to vote, the legitimacy of the newly elected government may be called into question. Moreover, most of the refugees are women with children and elderly persons⁴⁴ – and so if they do not vote, this will lead to the underrepresentation of the interests of these categories of citizens in the newly elected government. It is important to ensure the right to vote for Ukrainian voters staying outside the country as this will strengthen their ties to Ukraine and encourage forced migrants to return home after the end of the war. The entire world community will be watching the organization of out-of-country voting during the first post-war election – and it will become a kind of “test” of the international partners’ confidence in the Ukrainian authorities.

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43 Mentioned earlier public opinion polls conducted in July-August 2022 by the Razumkov Center showed that 65% of forced migrants named the lack of knowledge of the language of the host country as the main problem (it was more often reported by Ukrainian forced migrants in Germany — 80%).

44 For the period of martial law, male citizens of Ukraine aged 18 to 60 were restricted from leaving the country (with some exceptions).

III. Overview of Ukraine's Out-of-Country Voting Organization Procedures and Recommendations

5. Administering the Process of Out-of-Country Voting: Responsible Institutions and Coordination among Them

5.1. CURRENT LEGISLATION AND PRACTICAL CHALLENGES

The organization of preparation and conduct of elections and referendums in Ukraine is entrusted to special collegial bodies – election commissions and referendum commissions. The system of election commissions and referendum commissions is headed by the CEC – it is the highest-level commission in respect of all district and precinct election commissions and district and precinct referendum commissions and it operates on a permanent basis. District and precinct election commissions, district and precinct referendum commissions are temporary bodies formed during the preparation and conduct of the respective elections and referendums. District election commissions and district referendum commissions provide for the organization of preparation and conduct of national elections or an All-Ukrainian referendum within the respective territorial districts; precinct commissions, within the respective election precincts. However, district commissions are not formed in the OED – and their powers are exercised by the CEC, in accordance with the LU “On the Central Election Commission,” the LU “On the All-Ukrainian Referendum,” and the ECU.

On account of this special status of the Commission in the OED, it is the CEC that establishes the voting results within the OED and draws up the corresponding protocol based on the data from the protocols on the counting of votes at the OEPs. The CEC's other powers in the OED include transfer of ballot papers, forms of other documentation, seals and stamps to the PECs of the OEPs and precinct referendum commissions of out-of-country precincts. Since the CEC does not have the ability to transfer election documents directly, this is done through the MFA.

Although the transfer procedure is established by the CEC, the method of transportation is determined by the MFA together with the foreign diplomatic institutions of Ukraine under its subordination. MFA has broad discretionary powers to determine the mode of transportation, which may vary depending on the location of the polling station and the number of voters included in the voter list at the respective OEP.

The MFA also participates in the creation of the OEPs, namely, it submits to the CEC substantiated proposals on the creation, change of boundaries, and liquidation of the OEPs; moreover, during the formation of election commissions it nominates candidate members to the PECs of the OEPs and precinct referendum commissions of out-of-country precincts if no or too few nominations were received by the CEC from the electoral or referendum process subjects. Finally, the MFA's powers also include compiling and updating voter lists at the OEPs. The respective functions, as well as coordination with Ukraine's foreign diplomatic

institutions in the territory of which voting is organized, are entrusted to the Department of Maintenance and Administration of the State Voter Register within the structure of the MFA.

Ukraine's foreign diplomatic institutions contribute to the organization of "on-site" voting. First, they are entrusted with the function of providing the PECs of the OEPs with appropriate premises for organizing their work and conducting voting in accordance with the legal standards for the arrangement of such premises established by the CEC. They must inform voters on their official websites or in some other way accessible to citizens of Ukraine about the time and place of voting, the location of the election commission or referendum commission and the premises for voting, about the procedure and timeframes for applying to the commission, in particular about issues related to inclusion of voters in the voter list at the OEP, the voting procedure and the procedure for filling out ballot papers.⁴⁵ Moreover, the superiors of Ukraine's foreign diplomatic institutions must protect election documentation as well as law and order on the day of voting.

Ukraine's foreign diplomatic institutions also accept from citizens living or staying outside of the country, applications provided for by the Law "On the State Register of Voters," in particular, applications for inclusion in the State Register of Voters, applications for changing the personal data of voters, statements regarding irregularities in the State Register of Voters, requests to the body managing the State Register of Voters, and ensure the transfer of relevant applications and requests to the Department of Management and Administration of the State Voter Register of the MFA (DMA SVR MFA).

In addition, the heads of foreign diplomatic institutions of Ukraine ensure the submission to the DMA SVR MFA of the information necessary to update the database of the SVR, in accordance with the procedure provided for in Article 22 of the Law on the SVR.

It is worth mentioning one more body involved in the process of creation, change of boundaries and liquidation of election precincts, namely, the Ministry of Defense of Ukraine. The legislation provides for the creation of out-of-country election precincts in the territory of military units (formations) stationed outside Ukraine. Such OEPs are established by the CEC based on a proposal of the Ministry of Defense of Ukraine. In such cases, the duty to provide the PECs of the OEPs with appropriate premises for organizing their work and conducting voting lies with the commanders of military units (formations).

At the same time, there is no SVR maintenance body within the structure of the Ministry of Defense of Ukraine. And so, the ECU stipulates that during the formation of lists of Ukrainian citizens who have the right to vote and who are living in the territory of a foreign state during the period of preparation and conduct of elections, the MFA must also include in the voter lists the servicepersons of the military units (formations) stationed outside Ukraine. The Ministry of Defense of Ukraine, in its turn, is obliged to submit monthly to the DMA SVR MFA information about voters who, during the previous month, arrived for service in military units (formations) stationed outside of Ukraine in the relevant territory, and voters, who during the previous month left the military units (formations) of Ukraine stationed outside Ukraine in the relevant territory.

Thus, the organization of out-of-country voting involves, in addition to the election management body, several "non-dedicated" state bodies and institutions under their subordination. Taking into account the short period of preparation for voting day, the respective bodies and institutions must establish good communication on election-related issues early enough. This task is somewhat complicated by the fact that the organizational structure of the CEC Secretariat does not provide for a separate structural unit responsible for the preparation and organization of out-of-country voting – and DMA SVR MFA only has 8 employees at present. One can also say that that Ukraine's foreign diplomatic institutions have no institutional memory as regards organizing the preparation and conduct of elections and referendums on account of permanent employee rotation.

45 When writing the report, the technical assessment team found that the format in which this information is provided by the institutions is not uniform; more than that, it is outdated on the websites of some diplomatic representations.

5.2. RECOMMENDATIONS

Taking into account the exponential increase in the number of voters in the OED in the post-war elections, and a potential steep increase in turnout, justifying the potential introduction of new ways of registering voters and voting, increasing the workload of representatives of the CEC and the Ministry of Foreign Affairs, it is recommended:

- to form a separate structural unit (probably a department) within the structure of the Secretariat of the CEC, which will be responsible for the preparation and organization of voting abroad;
- to increase the number of employees of DMA SVR MFA;
- to create an interdepartmental working group of representatives of the CEC, the MFA, and the Ministry of Defense of Ukraine, which will coordinate the efforts of the relevant bodies to organize voting abroad.

6. Creating and Dissolving Out-of-Country Precincts and Changing Boundaries thereof

6.1. CURRENT LEGISLATION AND PRACTICAL CHALLENGES

For the preparation, organization and conduct of national elections and a national referendum in Ukraine, a single nationwide election district, which includes the entire territory of Ukraine, and the OED are used. Unlike some other countries, in which several OEDs are formed, a single OED is provided for in Ukraine, which includes all the OEPs. According to Article 31 of the ECU, the OEPs are formed by the CEC at:

- Ukraine's foreign diplomatic institutions;
- military units (formations) stationed outside Ukraine.

Pursuant to Part 4, Article 5 of the LU "On Diplomatic Service,"⁴⁶ p. 3 of the Regulations on Foreign Diplomatic Institutions of Ukraine,⁴⁷ Ukraine's foreign diplomatic institutions are as follows:

- Embassy of Ukraine;
- Embassy of Ukraine with the residence of the Ambassador Extraordinary and Plenipotentiary of Ukraine in Kyiv;
- Permanent representation of Ukraine to an international organization;
- Representation of Ukraine to an international organization;
- Mission of Ukraine to an international organization;
- Consular institution of Ukraine (Consulate General of Ukraine, Consulate of Ukraine, Vice-Consulate of Ukraine, and Consular Agency of Ukraine).

The current legal regulation does not provide for the possibility of creating OEPs outside the boundaries of foreign diplomatic institutions of Ukraine or military units. It is also worth emphasizing that the OEPs are not formed at honorary consulates, which are entrusted with the exercise of certain consular functions on behalf of the MFA and in agreement with the host state.

46 LU "On diplomatic service." Access mode: <https://zakon.rada.gov.ua/laws/show/2449-19#Text>

47 Regulation on foreign diplomatic institutions of Ukraine, approved by the decree of the President of Ukraine dated March 15, 2021 No. 99/2021. Access mode: <https://zakon.rada.gov.ua/laws/show/99/2021#Text>

The list of out-of-country election precincts operating on a permanent basis was approved by CEC Resolution No. 118 “On the Creation of Out-of-Country Election Precincts on a Permanent Basis” dated June 25, 2020,⁴⁸ while the procedure for their creation is regulated by the ECU and CEC Resolution No. 116 “On the Procedure for the Creation of Election Precincts on a Permanent Basis, Their Temporary Closing, Liquidation, and Entering Changes in Information on the Created Election Precincts” dated June 25, 2020.⁴⁹

The decision on the creation or liquidation of out-of-country election precincts and/or referendum precincts is made by the CEC based on the submission from the MFA. The said submission is formed by the Department of SVR Maintenance and Administration of the Office of Consular Services at the Department of Consular Services of the Ministry of Foreign Affairs of Ukraine (hereinafter, DMA SVR MFA) using the software of the Automated Information and Telecommunication System “State Voter Register.” The MFA presents the submission to the CEC together with a cover letter on paper or in electronic form. The submission and the cover letter in paper form are to be signed by the Minister of Foreign Affairs of Ukraine or another official in lieu of the Minister and affixed with the appropriate seal. Relevant documents in electronic form are issued in compliance with the requirements established for the creation of electronic documents.

A new OEP must be created outside the electoral process period of the respective election; and the submission must reach the CEC no later than ten days before the beginning of the electoral process of the respective election. However, the CEC may consider a submission for the creation of a new OEP which was received later and, if necessary, as an exception, create a new OEP during the electoral process.

A new OEP can be created in connection with the opening of a new foreign diplomatic institution of Ukraine or the deployment of a new military unit (formation) outside Ukraine, or in other cases of “justified necessity.” The procedure for “selecting” foreign diplomatic institutions for the creation of new election precincts is not regulated by the law. There are no regulatory restrictions on the opening of OEPs – they are created where the MFA can ensure their operation, in particular providing appropriate premises for the PEC and ensuring that the PEC has the required number of members.

In practice, the process of formation and liquidation of the OEPs at diplomatic institutions is organized as follows:

- 1) each year the MFA sends letters to diplomatic institutions regarding the need to make changes to the list of OEPs and/or changes in the information on the existing precincts;
- 2) based on the letters received from the MFA, the ambassadors inform DMA SVR MFA about the need for the creation or liquidation of OEPs and present to the MFA a completed application for the opening/liquidation of OEPs or for changing information on OEPs; the draft applications are developed by DMA SVR MFA;
- 3) based on the submissions received, DMA SVR MFA prepares a unified submission to the CEC on the creation/liquidation of OEPs or changes in information about OEPs and presents it for preliminary approval to the SVR Administrator’s Service at the CEC and to the managing member of the CEC;
- 4) after obtaining the CEC’s preliminary approval, the submission is signed by the MFA and transferred in paper form to the CEC.

DMA SVR MFA also independently monitors changes in information on existing OEPs; however, the Ministry does not establish any specific timeframes for making changes to the list and information about the OEPs.

48 CEC Regulation of June 25, 2020 No. 118 “On the establishment of foreign polling stations on a permanent basis.” Access mode: <https://zakon.rada.gov.ua/laws/show/v0118359-20#n6>

49 CEC Regulation of June 25, 2020 No. 116 “On the Procedure for the Establishment of Election Precincts on a Permanent Basis, Their Temporary Closure, Liquidation, and Amendments to Information on Established Election Precincts.” Access mode: <https://zakon.rada.gov.ua/laws/show/v0116359-20#Text>

In general, DMA SVR MFA tries to do this in advance, so as not to complicate the work directly during the electoral process; but in exceptional cases the CEC allows the creation of new OEPs when the electoral process has already begun.

As to OEPs at military units (formations) stationed outside Ukraine, the Ministry of Defense of Ukraine presents to the MFA its proposals regarding the formation and liquidation of OEPs, so that they will be included in the respective submission of the MFA. Such proposals are presented using the appropriate submission form established by the CEC, signed by the Minister of Defense of Ukraine, and affixed with the seal of the Ministry of Defense of Ukraine.

At present, Ukraine's diplomatic institutions operate in 119 foreign states; at the same time, the CEC created, with its Resolution No. 118 dated June 25, 2020, 102 out-of-country election precincts operating on a permanent basis: 100 at foreign diplomatic institutions and 2 in military units (formations) stationed outside Ukraine (in the Democratic Republic of the Congo and the Republic of Serbia). Moreover, several election precincts were established in countries with a high concentration of Ukrainian citizens, for example 4 in Poland, Italy, and the United States and 5 in Germany. Finally, in some countries where Ukrainian diplomatic institutions are functioning no election precincts were created.

Part four, Article 28 of the ECU sets out the general rules for the creation of election precincts as regards the number of voters; these rules also apply to the OEPs. Precincts are created for 20 to 2,500 voters. At the same time, Part five of this Article establishes that if there are less than 20 voters in the respective territory, respective establishment or institution, the CEC can adopt a decision creating in the respective territory, in the respective establishment or institution an election precinct with a smaller number of voters than the above-mentioned limit. Also, OEPs can be created with more than 2,500 voters. On the one hand, this provision provides for certain discretion, enabling more flexible regulation of the creation of OEPs, but on the other hand, there is a certain reasonable limit to the number of voters whose voting can be provided for by a single PEC.

For example, during the electoral process of the 2019 early election of the MPs of Ukraine, the voter list at OEP No. 900055 (Embassy of Ukraine to Moldova, city of Chisinau) included 51,267 persons,⁵⁰ which, assuming a 100 percent turnout, would mean the need to provide for the voting of more than 71 voters per minute.

In light of the above, it can be stated that OEPs are created without considering the capacity for ensuring the possibility to vote for all persons included in the voter list but based on expectations of a low turnout of out-of-country voters. Although traditionally, the turnout of out-of-country voters was indeed mostly low, after the end of the war in Ukraine the number of voters abroad may increase significantly due to the people who had to leave the country to escape hostilities. Voters may also be more politically active than during the previous election processes, which will make it difficult to forecast the turnout levels and the potential ability of the PECs of the out-of-country precincts to effectively organize voting.

It should be separately emphasized that although the permanent representations of Ukraine to international organizations are regarded as foreign diplomatic institutions, in practice OEPs are not created there, because international organizations are not required to submit information to the SVR and they do not keep consular records – and so they do not register any voters. Moreover, there is no legislative regulation of how the boundaries of the OEP created at Ukraine's permanent representation to an international organization can be demarcated from those of an OEP created at the embassy or consulate "covering" the same territory. This may be an important point in view of the extension of the PEC's powers to the territory of the election precinct, in particular in terms of overseeing compliance with the election legislation.

⁵⁰ Data from the CEC Protocol on the results of voting in the state-wide multi-mandate electoral district within the foreign constituency on the elections of People's Deputies of Ukraine. Access mode: https://cvk.gov.ua/wp-content/uploads/2019/09/protokol_zbvo_zvo_30072019.pdf

An OEP is dissolved in the event of closure of a foreign diplomatic institution of Ukraine, redeployment of a military unit (formation) deployed outside Ukraine; or in other cases based on a submission from the MFA. In practice, decisions to liquidate OEPs can be justified by various organizational, security, or geopolitical reasons. For example, some OEPs in Indonesia and Iran had to be liquidated as it was impossible to form election commissions (not enough citizens were interested in working on the PECs of the OEPs); in some African countries OEPs were liquidated because of the Ebola epidemic; and in Pakistan, due to the inability to ensure security during the election. Moreover, OEPs in the Russian Federation were liquidated in 2018. In the event of liquidation of one of several OEPs, the MFA simultaneously decides on assigning the voters from the precinct being liquidated to one of the remaining OEPs. For example, voters residing in the Russian Federation were included in the voter lists at OEPs in Georgia, Kazakhstan, and Finland, which include the boundaries of the liquidated polling stations. It is unlikely that a large number of Ukrainian citizens living or staying in Russia traveled to neighboring countries to express their will.

The boundaries of out-of-country election precincts are changed by the CEC based on a submission from the MFA, which must contain the number of the election precinct, a description of the new boundaries of the election precinct, and a justification of the necessity for changing the boundaries of the election precinct, with reference to the details of the respective document. The requirements for formalizing such a submission are similar to those pertaining to a submission on OEP creation. The legislation does not provide for any specific grounds or mandatory cases for changing the boundaries of election precincts in the OED. However, the issue of changing the boundaries of election precincts may require clearer legislative regulation if a decision is made to create additional out-of-extraterritorial election precincts (i.e. precincts created outside the boundaries of foreign diplomatic institutions) in countries with a large number of Ukrainian voters.⁵¹

6.2. RECOMMENDATIONS

The process of formation, change of borders, and dissolution of OEPs is quite clear and coordinated. A slight concern may evoke the wide discretionary powers of the MFA regarding the decision to submit proposals to the CEC on the formation, change of boundaries or liquidation of the OEPs in connection with “reasonable necessity,” as well as the burden on the OEP polling commission in the event of the formation of one OEP in a country with a large number of voters and traditionally high turnout. In this regard it is recommended:

- standardize the grounds for the formation of new and liquidation of existing polling stations in order to reduce the level of discretion of the MFA in order to prevent the formation of a larger number of polling stations in countries with political preferences that will contribute to the re-election of the current government;
- to create two PECs at one diplomatic institution in countries with a large number of voters and high turnout (following the example of creating two PECs at the Embassy of Ukraine in Milan, Italy), which can help solve the issue of the burden on the PEC;

Also, to improve the quality and consistency of Ukrainian legislation, it is worth:

- to exclude permanent representative offices of Ukraine at international organizations from the list of institutions at which OEPs can be formed, since they do not keep voter records and do not submit data to the SVR.

51 Challenges and opportunities of introducing expanded in-person voting (outside diplomatic institutions) and other voting methods are discussed in Chapter IV of the Report.

7. Creation and Training of Out-of-Country Precinct Election Commissions and Referendum Commissions

7.1. CURRENT LEGISLATION AND PRACTICAL CHALLENGES

The principle of formation of PECs abroad is the same as in the country. The procedure for the creation of the PECs of OEPs or precinct referendum commissions of out-of-country precincts which provide for the organization of the preparation and conduct of national elections and referendum within the respective precincts in the OED depends on the type of election or referendum.

Thus, the PEC of an OEP for the elections of the President of Ukraine is created by the CEC not later than 18 days before the Election Day; it consists of the chairperson, deputy chairperson, secretary and other members of the commission, totaling no less than nine persons, based on the submissions from the Ukrainian presidential candidates (one candidate member for each PEC), if available, and the submission from the MFA. The MFA must present its submission not later than 21 days before the day of voting. The MFA must nominate enough candidates to provide for the creation of each commission consisting of the required minimum number of members specified above. At election precincts where the number of voters does not exceed 50, the PEC can consist of the chairperson, secretary and two to four commissioners.

The PECs of OEPs for the election of the MPs of Ukraine are created not later than fifteen days before the day of voting and are to consist of the chairperson, deputy chairperson, secretary and other members of the commission – 10-14 persons for small precincts (up to 500 voters); 12-16 persons for medium-sized precincts (from 500 to 1,500 voters); and 14-18 persons for large precincts (1,500+ voters). At the same time, at election precincts with no more than two hundred voters the PEC can consist of the chairperson, secretary and two to four commissioners. The right to nominate candidate members to the PECs of OEPs is vested in political parties whose parliamentary factions are registered with the Secretariat of the Verkhovna Rada of Ukraine of the current convocation; political parties that are subjects of the electoral process having registered MP candidates in the nationwide district (no more than one candidate member for one commission), as well as the MFA. Candidate members nominated by the MFA are included in the PEC of an OEP if not enough candidate members were proposed by other nominating entities.

The precinct commission for an all-Ukrainian referendum of an out-of-country precinct is created by the CEC not later than 18 days before the day of voting, having regard to the proposals of the MFA. The MFA is obliged to nominate enough candidate members to ensure that the respective precinct commissions have at least eleven members. Should it be impossible to create precinct commissions for an all-Ukrainian referendum of out-of-country precincts consisting of the specified number of members, the CEC will create the corresponding precinct commissions of out-of-country precincts consisting of the chairperson, secretary and one to three members of the commission for the all-Ukrainian referendum.

The practice of organizing out-of-country voting shows that the MFA is the main commissioner-nominating entity – as a rule, it nominates enough members for each commission to provide for its minimum composition. Other commissioner-nominating entities are usually interested in proposing only candidates for the top positions.

In the process of selecting candidates and proposing them to the CEC, the MFA faces a number of operational challenges, the main ones being the search for candidates,⁵² and the legally established timeframes for nominating candidate members.

52 For example, there were about 1,700 persons working on the PECs of the OEPs at the 2019 early election of the MPs of Ukraine.

Thus, the PECs of OEPs and precinct referendum commissions of out-of-country precincts can include voters living or staying in the territory of the respective foreign state during the period of preparation and conduct of the election or referendum. As a rule, the MFA looks for appropriate candidate members through diplomatic institutions, which propose including in the submissions employees of Ukraine's foreign diplomatic institutions, complying with the requirements of Article 34 of the ECU (that is, those employees who are not civil servants⁵³), or other citizens of Ukraine having the right to vote and living or staying in the territory of the respective foreign state during the period of preparation and conduct of the election. The latter category is represented by activists and representatives of the Ukrainian diaspora; less often, by family members of employees of Ukraine's diplomatic institutions, since at present most of the family members stay in Ukraine. Members of the commissions are motivated to work by the desire to help as well as by patriotic sentiments. It is worth noting that the remuneration of members of precinct commissions is not an incentive to work on the PECs of OEPs or precinct referendum commissions of out-of-country precincts, as its amount, as a rule, does not even cover the out-of-country commissioners' travel expenses.

Problems of insufficient number of commissioners arise most frequently in summer, as well as when Ukrainian elections fall on national or "foreign" holidays, because a considerable number of potential commission members use this time to visit the Motherland. Moreover, sometimes an obstacle for the selection of candidate members consists in a limited command of the Ukrainian language among expats who have been living abroad for a long time. The staffing of commissions can also be influenced by certain cultural factors of the countries where out-of-country voting is organized. Since traditionally precinct commissions consist primarily of women, in some eastern countries it is hard to recruit staff, because the counting of votes begins after 8 p.m. on the day of voting and can last until late at night and not all men approve of the engagement of their Ukrainian wives in the respective work.

Moreover, there are known cases of "demarches" by commissioners nominated by the MFA, when all members retire simultaneously in case of disagreement with some actions of the commission's leaders who were nominated by other entities. In such cases, the MFA has to urgently look for substitute nominees. This process is also complicated by the legislative norm requiring that the application for the replacement of members of the PECs of OEPs or precinct referendum commissions of out-of-country precincts must be signed directly by the Minister of Foreign Affairs of Ukraine.

It should be noted that the set of election administrators abroad is not as stable as inside Ukraine – on account of rotations and relocations, diplomatic institutions often have no "institutional" memory as to organize out-of-country voting and commissions are mostly staffed with "newcomers"; this makes the issue of training of members of the PECs of OEPs and referendum commissions of out-of-country precincts particularly relevant. Although both the CEC and the MFA provide advisory assistance to members of the commissions during the electoral process and send them relevant training materials, no systematic training of members of the PECs of OEPs and referendum commissions of out-of-country precincts was organized during the entire period of provision of out-of-country voting by Ukraine.

As to the timeframes for nominating candidate members, it is worth noting that the MFA is required by the legislation to nominate candidates within an extremely short period of time – for example in the election of the President of Ukraine candidates have the right to present their submissions no later than 23 days before Election Day and after that the "necessary" minimum number of nominees from the MFA is determined – to be proposed and submitted within two days. In practice, the MFA begins preparing for the creation of the PECs of OEPs before the start of the electoral or referendum process, notifying diplomatic institutions of the need to form relevant submissions, sending them about a month in advance "draft" submissions which are to be filled out by representatives of the diplomatic institutions. During that time, the MFA must check the

⁵³ It is interesting to note that during the 1999 Ukrainian presidential elections civil servants working at foreign diplomatic institutions could be nominated as members of the PECs of OEPs; according to some interviewed stakeholders, this improved the quality of work of the OEPs' PECs.

documents received from the diplomatic institutions and return them for revision if necessary. After receiving all the necessary information, DMA SVR MFA forms and presents to the CEC a unified submission for the appointment of all members of the PECs of all the OEPs or all the referendum commissions of all out-of-country precincts.

7.2. RECOMMENDATIONS

Taking into account that the formation of the OEPs PECs is one of the most difficult procedures of the out-of-country voting organization, complicated by short deadlines, a shortage of qualified personnel and a lack of interest on the part of subjects submitting candidacies to the commissions, it is recommended the following:

- to intensify the CEC's efforts to raise the level of legal awareness and carry out explanatory work with political parties regarding the importance of a responsible attitude to the submission of candidacies to commissions abroad especially in the regard of the first post-war elections;
- to reduce the requirements for the minimum number of members of the OEPs and referenda precinct commissions at small polling stations abroad with up to 500 voters on the voter list to six members (chairman, secretary and four members of the commission);⁵⁴
- DMA SVR MFA to create and administer the Register of commissioners abroad which should facilitate the search for candidates by diplomatic institutions during the election process;
- to revise the terms of formation of the OEP PECs in the direction of increasing them;⁵⁵
- to grant the right to sign submissions of candidatures by the MFA to the Director of the Consular Service Department, which includes the DMA SVR MFA or another responsible person in the structure of the MFA Consular Service Department to speed up the processing of nominations for commissions, as well as for their replacements;
- to organize online training of members of the OEP PECs;
- to reasonably increase the level of payment of members of the OEP PECs.⁵⁶

54 The proposal is based on the following data and calculations: on July 21, 2019, 102 foreign polling stations functioned during the extraordinary elections of People's Deputies of Ukraine. 37 of them had less than 500 voters on the voter list (14 of 37 – less than 200 voters). The largest number of voters voted at the polling station created in Ukrainian military unit stationed in Democratic Republic of Congo – 239 voters out of 265 on the list (turnout 90%) and at the polling station created in the Embassy of Ukraine in Montenegro – 188 voters out of 348 on the Voter list (turnout 54%). When reducing the number of commission members to 6, the average number of voters per hour for two commission members working at one desk (provided two desks are functioning) would be 14 voters per hour in the first case and about 12 voters in the second case, which is not an excessive workload.

55 For example, during the Presidential Elections of Ukraine, all candidates for the post of the President of Ukraine who are nominating candidatures to the PECs, must be registered no later than 50 days before the voting day, meaning that submitting candidatures for the foreign precincts could be organized earlier than the same process for the Commissions within the country.

56 All over the world, the work of commission members is a prestigious volunteer activity rather than a way to earn money. However, the compensation should cover at least part of the costs associated with the transportation of PEC members after the procedure of receiving ballot papers or counting voters' votes, which are often completed in the evening or at night, when public transportation is not available.

8. Out-of-Country Voter Registration and Voter Lists at Out-of-Country Election Precincts

8.1. CURRENT LEGISLATION AND PRACTICAL CHALLENGES

The ground for the exercise by a voter of their right to vote in elections and referendums is the voter's inclusion in the voter list at the election precinct. The voter lists at each election precinct are compiled based on information from the State Voter Register (below, the SVR, the Register), which is maintained in electronic form and has a unified centralized database containing the personal data of all voters of Ukraine, including those living or temporarily staying abroad.

SVR maintenance is entrusted to the Register maintenance bodies. The functions of a SVR maintenance body in relation to voters living or staying outside Ukraine are performed by the respective structural unit of the MFA – the SVR maintenance and administration department. Operations such as entering a voter record into the Register's database, making changes to the Register's personal data, or deleting a voter record from the Register are carried out by authorized employees of the SVR maintenance body in execution of an order issued by the head of the respective Register maintenance body.

Voter records are entered based on documents confirming the acquisition of the right to vote in connection with a person reaching the age of 18; acquisition of Ukrainian citizenship; restoration of legal capacity of a person not included in the Register, or in case of detection of a person not included in the Register who has the right to vote. Changes to the personal data of a voter included in the Register are entered based on documents confirming the respective changes. A Register entry is deleted upon expiry of a 5-year record retention period for a voter who died or whose citizenship of Ukraine was terminated; detection in the Register's database of an entry about a person who is not a voter, or detection of multiple inclusion of a voter in the Register, which fact is confirmed by documents submitted to the Register maintenance body in accordance with established procedure. The said documents can be submitted within the framework of periodic updating of personal data of the Register, application of a person on their own initiative and correction of personal data in the Register.

Periodic updating of personal data is de facto a passive form of voter registration. SVR maintenance bodies update the Register database once a month based on information submitted by officials of the central executive body implementing state policy in the field of citizenship and other entities authorized by law.

Information on out-of-country voters is to be submitted to DMA SVR MFA by the heads of Ukraine's foreign diplomatic institutions; it is related to:

- citizens of Ukraine who will turn 18 in the next month;
- persons who acquired the citizenship of Ukraine in the previous month and received a temporary certificate of a citizen of Ukraine or a passport of a citizen of Ukraine;
- persons whose Ukrainian citizenship was terminated in the previous month;
- citizens of Ukraine with the right to vote who in the previous month were placed on the consular register in the territory of the respective consular district;
- citizens of Ukraine with the right to vote who in the previous month were removed from the consular register in the territory of the perspective consular district;
- citizens of Ukraine who in the previous month changed their last name, first name, patronymic, date or place of birth;

- deceased voters in respect of whom a death certificate or other document was issued in the previous month in the respective territory by a competent body of the respective state.

Foreign diplomatic institutions can submit relevant information on citizens placed on the consular register. However, as of February 24, 2022, before the Russian Federation's full-scale invasion of the territory of Ukraine, only about 450,000 of the approximately 3 million citizens abroad who have the right to vote were entered into the voter lists at the OEPs. The likely reasons for Ukrainians' reluctance to be placed on the consular register include feeling no need to do so; unawareness of the procedure; the need to pay for consular services; and unfounded fears that being placed on the consular register may lead to deportation or to the necessity to pay additional taxes in Ukraine.

It should be noted that in the past foreign diplomatic institutions used to carry out free short-term consular registration of persons who arrived in the country for a short period of time – up to three months. Short-term consular registration data were actively used to form voter lists, but as of today, this type of consular registration is no longer available.

Moreover, information on out-of-country voters is also submitted to DMA SVR MFA by the Ministry of Defense of Ukraine; namely, the Ministry provides information on:

- voters who in the previous month arrived for military service in Ukraine's military units (formations) stationed in the respective territory outside Ukraine;
- voters who in the previous month dropped out of Ukraine's military units (formations) stationed in the respective territory outside Ukraine.

National and international experts have repeatedly made public statements about the SVR's high level of correctness. However, Russia's full-scale war against Ukraine forced the CEC – the SVR administrator – to adopt a decision to temporarily suspend the operation of the SVR for the martial law period, which means, inter alia, the cessation of periodic data updates. Taking into account the unprecedented scale of internal and external migration in connection with the hostilities, destruction of infrastructure, in particular office equipment and documents of entities responsible for submitting information to the Register in the territories with active hostilities, and other circumstances, the updating of SVR data after the end of the war can be quite a problematic task.

The quality of resumption of the Register's operation will largely depend on the degree of proactivity of citizens in checking their inclusion in the Register and the relevance of their data. Despite the existence of a simple mechanism of online self-verification, voters may ignore it because they are accustomed to the "passive registration mechanism."

Moreover, there are a number of problems related to the "active registration mechanism" for both voters and SVR maintenance bodies.

Thus, as of today, the current legislation (the LU "On the State Voter Register" and CEC Resolution No. 96 dated June 2, 2020) provides for submission by voters of the following applications:

- 1) application for inclusion in the SVR of a person living in Ukraine;
- 2) application for inclusion in the SVR of a person living or staying outside Ukraine;
- 3) application for changing personal identification data;
- 4) application for changing the electoral address;
- 5) application for making changes to personal data regarding information on permanent inability to

move independently;

- 6) application for temporary change of the place of voting.

The current legislation does not provide for any time limits for submitting applications for inclusion in the SVR of a person living in Ukraine or living or staying outside Ukraine, or for changing personal identification data. A voter can be included in the SVR or correct their data at any time; but a voter is included in the voter list takes into account the time limits established in particular by Article 43 of the ECU and Article 60 of the LU “On the All-Ukrainian Referendum.” An application for changing the electoral address may be submitted by a voter not later than on the fifth day from the beginning of the electoral process or the referendum process held in the territory within which the voter asks for the determination of their electoral address. The application for temporary change of the place of voting is submitted not earlier than the first day of a particular electoral process or process of an all-Ukrainian referendum and no later than five days (Kyiv time) before voting day in the respective election or all-Ukrainian referendum.

Out-of-country voters can submit relevant applications in person to the foreign diplomatic institution of Ukraine at their place of residence or stay, presenting a passport of a citizen of Ukraine for traveling abroad, a diplomatic passport, a service passport, or a temporary certificate of a citizen of Ukraine. A copy of one of the aforementioned documents is to be attached to the application. Voters can also send the relevant application with a copy of one of the specified documents directly to DMA SVR MFA in electronic form, with a signature equivalent to their handwritten signature, in accordance with the LU “On Electronic Fiduciary Services.” A voter wishing to change his or her electoral address must also provide a document confirming the change of the electoral address, for example, an apartment rental agreement, etc.

It is noteworthy that no supporting documents are required for a temporary change to the place of voting without changing the electoral address. In view of this, for voters who went abroad to escape the hostilities this will be one of the easiest ways to be included in the voter list at an OEP, provided they have the aforementioned identification documents. It is hard to forecast the exact number of such applications in the post-war elections; one can predict, however, a considerable increase in their number.

Voters abroad have no right to submit relevant applications through an authorized person whose powers were formalized in accordance with the law – while such an opportunity is provided for voters in the territory of Ukraine. Thus, for voters not living in the city where Ukraine’s foreign diplomatic institution is located and not using a qualified electronic signature this procedure is complicated by the need to get to the respective institution; and in the context of post-war elections, it may also become unavailable in connection with the lack of the listed documents for voters who have used their internal passport to cross the border.

Although the “services” of authorized persons for transferring applications are usually used by voters who are permanently unable to move independently (and abroad they are de facto deprived of the right to vote as it is not possible to vote at their place of residence or use some alternative method of voting), the transfer of an application through a duly authorized person may also be useful for other population categories with limited mobility, for example women with young children or persons temporarily unable to move independently.

Currently, the legislation stipulates that the head of a foreign diplomatic institution of Ukraine must immediately submit an application to DMA SVR MFA; however, it would undoubtedly be more convenient for the Register maintenance body to receive a summary list with data from the applications rather than each application separately.

Also, a separate challenge for DMA SVR MFA is the absence in the legislation of an explicit list of documents that can be provided by a voter to confirm the change of their electoral address abroad and the lack of requirements regarding certification and translation of such documents. Another problem for both voters and Register administrators is that if a person with an out-of-country electoral address returns to Ukraine, the electoral address will not be automatically changed to a Ukrainian one. Changing the electoral address in

such a case is possible only if the person was placed on the consular register in the territory of Ukraine and later was officially removed from it.

To prepare and conduct voting abroad in elections and referendums, DMA SVR MFA must, based on SVR data, compile preliminary voter lists for each OEP. The preliminary list of voters is forwarded to the PEC of the OEP in electronic form no later than 11 days before voting day. The next day after receiving the preliminary voter list, the OEP's PEC makes it available in paper form for public view in the PEC premises. Printing the preliminary voter list can be a challenge for some PECs of OEPs, as they may not be equipped with printers with the A3 printing function or may have to print an extremely large number of pages of the voters list (for example the list of voters at the OEP in Chisinau, Republic of Moldova, includes about 50,000 voters).

A voter can personally submit an application to correct inaccuracies in the preliminary voter list at an OEP, appending the necessary documents (copies of documents) thereto, to the PEC of the respective OEP at least five days before voting day (Kyiv time); the election commission must consider such application within one day. Such application must be immediately transferred to DMA SVR MFA through the respective foreign diplomatic institution of Ukraine. Previously, the CEC clarified that the respective application was to be submitted in accordance with the LU "On Citizens' Appeals"; however, the LU "On Citizens' Appeals" does not provide for the indication in the application of the place or date of birth and so such an application, submitted that way, does not contain the information required for the voter's inclusion in the SVR.

Taking into account the information provided in accordance with the LU "On the State Voter Register," based on the results of consideration of voters' applications, DMA SVR MFA prepares a corrected voter list. The corrected voter lists are submitted on paper and in electronic form to the PECs of the respective OEPs no later than two days before the day of voting.

During the compilation of corrected voter lists, the biggest problem for DMA SVR MFA in its work with respective applications as well as with applications for temporary change of the place of voting without changing the electoral address is the deadline for their submission. Thus, voters are allowed to submit relevant applications not later than 5 days before the day of voting, that is, before the end of the working hours of the Register maintenance body on Monday of the last week of the electoral process. For example, during the 2019 early election of the MPs of Ukraine, the formation of voter lists for the OEPs was completed at about 11:00 hours on Tuesday of the last week of the electoral process. However, some diplomatic couriers who delivered corrected voter lists had to leave Ukraine already on the night from Monday to Tuesday, so as to be able to deliver the election documents to faraway OEPs on time. This created significant risks of non-inclusion of voters who had decided at the last moment to use the procedure of temporary change of the place of voting without changing the electoral address.

DMA SVR MFA also faces problems when preparing corrected voter lists for the OEPs – due to the fact that, according to the LU "On the State Voter Register," each page of the voter list must be numbered and certified by the signature of the head of the Register maintenance body. Considering that DMA SVR MFA forms voter lists for 102 OEPs – and, as already mentioned, more than 50,000 voters can be included in the voter lists at some OEPs – this norm creates an extraordinary burden on the head and employees of DMA SVR MFA and can lead to errors when preparing the lists. Moreover, excessive burden arises in connection with the requirement that the Register maintenance body's notification of the execution of each action based on the results of consideration of any voter's application must be signed by the head of the Register maintenance body using his or her qualified electronic signature.

8.2. RECOMMENDATIONS

Taking into account the difficulties described, as well as the fact that the operation of the SVR was temporarily suspended by the CEC because of the large-scale offensive of Russia on Ukraine, as well as the fact that a large number of Ukrainian forced migrants have not registered the consular register, it is recommended:

- to provide resources for a large-scale voter awareness campaign abroad on possible ways of inclusion in the voter list at the polling station;
- to exclude from the ECU the provision regarding a voter's application to the OEP PEC or DMA SVR MFA on the update of the data found in the preliminary list, since applications submitted in accordance with the Law "On the State Register of Voters" cover all necessary cases of entering data into the SVR;
- to cancel the provision on providing documents to confirm the electoral address when changing the electoral address in the OED;
- to cancel the fee for temporary consular registration;
- to abolish practice of displaying printed preliminary voter lists on OEP with the simultaneous obligation of the members of the OEP PEC to provide assistance to voters on checking their inclusion in the preliminary list of voters in electronic format on a smartphone or tablet-based electronic poll book;
- to revise the deadlines for voters to submit applications for a temporary change of voting place without changing the election address in the direction of a reasonable reduction;
- to ensure the automatic sending of notifications to the body maintaining the SVR about taking action based on the results of consideration of the voter's application using the electronic services of the SVR without the signature of the Head of the unit maintaining the Register.

9. Transfer, Storage and Return of Confidential Election Materials

9.1. CURRENT LEGISLATION AND PRACTICAL CHALLENGES

To organize out-of-country voting, the CEC must transfer election documentation to the PECs of OEPs, in particular, election ballot papers or All-Ukrainian referendum ballots, forms of vote-counting protocols, other documents and materials (for example, stamps “Withdrawn” if necessary, etc.). The CEC transfers the election documentation to the PECs of OEPs through the MFA in accordance with the procedure established by the Commission. The respective procedure regulates certain aspects of the transfer of election documentation, such as for example the requirements regarding the compilation of a protocol on the transfer of ballot papers. At the same time, the MFA has broad discretionary powers to decide on the method for transferring the documents, the choice of the method being influenced by the OEP’s distance to Kyiv, the volume of election documentation, financial issues, etc.

Election-related strict reporting documents are to be delivered to the OEPs by diplomatic mail:

- professional diplomatic couriers employed by the MFA;
- ad hoc diplomatic couriers, when one of the employees of the diplomatic institution personally collects and transports the documentation from Ukraine to the diplomatic institution or in the opposite direction, from the diplomatic institution to Ukraine;
- captain mail, when the documents are handed over to the captain of a Ukrainian ship or aircraft for further delivery and transfer.

Moreover, other election documentation – copies of CEC resolutions, certificates of members of OEP’s PECs, etc. – can be delivered abroad by ordinary mail. To that end, the MFA uses the services of DHL – an international company for express delivery of goods and correspondence. As regards delivery of election documentation, the MFA does not cooperate with the JSC “Ukrposhta.”

The return delivery is carried out in the same manner as the delivery of election documentation to the OEPs. All election documents are returned at one go.

The election legislation establishes explicit timeframes for the delivery and transfer of all election documentation to the commissions, which makes delivery of election documentation abroad a considerable challenge. Thus, potentially, the election documentation can be delivered late because of a spontaneous strike of airline workers, breakdown of a land vehicle used for transportation, or a natural disaster making it impossible to travel by air, water, or land. Moreover, if election documents are tampered with abroad before the day of voting (for example by affixing the stamp “Withdrawn,” which can sometimes be mistakenly stored in the premises of the PEC of an OEP after the previous election process, to the ballot papers without a corresponding decision of the CEC), the CEC must provide for the production and delivery of a new batch, which causes new logistical and financial challenges.⁵⁷

The legislation provides for the production and transfer of certificates to electoral subjects. In the context of the OED, this refers to the certificate of a member of an OEP’s PEC, which can be issued to a commissioner once they have been sworn in: the certificate, a form approved by the CEC, must be signed by the chairperson of the higher-level commission. The transfer of “singular” certificates of members of OEPs’ PECs in connection with substitution appears to be a significant logistical burden for the CEC and the MFA.

⁵⁷ Thus, according to some stakeholders interviewed during the technical assessment, in the 2019 electoral processes the CEC experienced financing problems related to payment for diplomatic courier services.

In addition, the need to print certificates for PEC members may be reconsidered as a whole. The certificate must confirm a person's authority to work as a member of the PEC. On the one hand, such powers can be verified (if necessary) by publishing the composition of the commission on the website of the CEC (and in the case of voting abroad also on the website of a diplomatic institution) and by requiring the members of the commission to present a document confirming their identity, in case of such a request from the subject of the election process. On the other hand, the presence of a certificate does not guarantee the presence of the authority to work in the PEC, since the electoral law does not require to return the certificate by a member of the commission in case of his or her replacement.

Before 2014, employees of many diplomatic institutions came directly to Kyiv to collect election documents; but this practice was mostly abandoned because of insufficient funding. As a matter of fact, at present a vehicle sent by a diplomatic institution to Ukraine to pick up election documentation in Kyiv can sometimes collect election documentation for other diplomatic institutions located on its route. It is possible that the driver of the vehicle will deliver the election documents of other diplomatic institutions only to a certain point of transfer, where they will be received by employees of the other diplomatic institutions for further delivery to the OEPs' PECs. A similar method of transportation can be used with other types of delivery as well. Thus, for example, the election documentation for the PECs of OEPs located in Australia is delivered to Singapore, where an employee of the respective diplomatic institution comes to pick it up.

It is obvious that the respective schemes of delivery and transfer of election documentation result from responding to logistical and financial challenges; however, the emergence of several "intermediate" links in the process of transportation of election documentation increases security risks and risks of interference, loss, or forgery of election documentation. It is worth noting that, in general, at the point when ad hoc diplomatic couriers transfer election documents to the employees of diplomatic institutions those employees are unprotected; accordingly, there are risks for the safe delivery of the documents and those risks may increase proportionally in the post-war elections. Furthermore, it must be considered that many of Ukraine's foreign diplomatic institutions have no security service and so such a diplomatic institution cannot provide any officers to protect the election documents.

As to ship mail via boat, the possibilities for using it are somewhat limited considering shipment weight restrictions which are capped at the level of about 5 kg – in the past this led to the need to send election documents to the PECs of some OEPs in parts, by several flights (for example, to Barcelona in 2019).⁵⁸

The return delivery (including unused ballots) is carried out in the same manner as the delivery of election documents to the OEPs. All election documents are returned from abroad at once.

9.2. RECOMMENDATIONS

Considering the high cost of delivery of election documents, short deadlines, and complex logistics, it is recommended:

- to provide an opportunity to the OEP PECs with less than 200 voters to print ballots themselves upon the CEC permission in an amount that exceeds the number of voters at the polling station by 0.5 percent;⁵⁹
- to publish the composition of the OEP PECs on the CEC website (and the website of the relevant diplomatic institution) to enable verification of the authority of a member of the commission not depending on a certificate (with the establishment of a legal obligation to present a document

⁵⁸ For example, to Barcelona, Spain, in 2019.

⁵⁹ Similarly to the norm provided for in Part 6 of Article 114 of ECU.

confirming identity by the member of the commission upon request);⁶⁰

- if possible, to provide resources for the safeguarding of election documentation during its transportation abroad;
- to oblige to store election documentation in the premises of OEP PEC under the surveillance of video cameras, which is especially relevant for diplomatic institutions that do not have commandants.

10. Out-of-Country Campaigning

10.1. CURRENT LEGISLATION AND PRACTICAL CHALLENGES

Pursuant to Part one, Article 51 of the ECU, election campaigning is the implementation of any activity for the purpose of encouraging voters to vote or not to vote for a certain candidate or party (party organization) that are electoral subjects. Experts and scholars consider election campaigning as a manifestation of the principles of universal and equal suffrage which are implemented through an election candidate's right to encourage voters to choose them from among others.⁶¹

Campaign information goes beyond technical details and includes elements of candidate/party programs. This information is crucial to ensuring that voters are properly informed and understand who they will vote for. This not only improves the voters' ability to choose their candidates but is also a fundamental element of any free and fair democratic process.

Despite the existence of an open list of legal forms of election campaigning, Ukraine uses a dispositive approach to its legal regulation: campaigning is allowed in any form and by any means that do not contradict the Constitution of Ukraine and the Laws of Ukraine. The ECU contains no special provisions regulating the procedure for out-of-country election campaigning; however, there are restrictions that rule out or impact the ability to campaign abroad.

Thus, participation in election campaigning is prohibited for foreigners and stateless persons, including through journalistic activities or in the form of participation in concerts, performances, sports competitions, other public events held in support of or with the support of a candidate (candidates) or entities nominating candidates. The ban on participation in election campaigning through journalistic activities for foreigners will potentially significantly narrow the circle of mass media and individuals who will be able to cover information about a particular party or candidate as part of the election campaign abroad. Based on the current provision, only Ukrainian citizens could do this. As a result, foreign voters can potentially be less informed about the course of election campaign than voters in Ukraine.

According to the ECU, election campaigning is carried out exclusively at the expense of the election funds of candidates or parties (party organizations) that are electoral subjects. At the same time, accounts of election funds are opened only in the national currency and in banks in the territory of Ukraine.⁶² This can complicate paying for campaign advertising.

Moreover, there are a number of provisions establishing special requirements for the placement of election campaign materials in mass media, in particular requirements for setting tariffs per unit of printed space

60 Considering the CEC's efforts to modernize its IT system, it is possible to envisage the creation of a page on the CEC website with the composition of commissions, which will also contain photos of the members of the PECs of the OEPs.

61 Yarmolenko O. V. Information support for elections: Ukrainian practice and European experience. Dissertation for obtaining the scientific degree of Doctor of Philosophy in specialty "081" - Law. - Odesa Law Academy National University, Odesa, 2020. P. 208. URL: <http://dspace.onua.edu.ua/bitstream/handle/11300/14439/%d0%af%d1%80%d0%bc%d0%be%d0%bb%d0%b5%d0%bd%d0%ba%d0%be%20%d0%b4%d0%b8%d1%81%d0%b5%d1%80%d1%82%d0%b0%d1%86%d1%96%d1%8f.pdf?sequence=4&isAllowed=y>

62 This follows from Part 2 of Art. 93, Part 2 of Art. 150 of the VC of Ukraine in their system connection with Art. 26 and 138 of the Criminal Code of Ukraine.

and unit of airtime for election campaigning at the expense of election funds. If, however, the tariffs are not published within the time frame provided for by the law, placing campaign materials on the air by the respective television and radio organization or in the respective print media is prohibited. At the same time, it is obvious that, most likely, foreign media will not publish the tariffs specifically “for the Ukrainian elections.” Furthermore, Ukraine will not be able to influence offending foreign media who have decided to publish certain campaign materials contrary to the requirements of the Ukrainian legislation.

Also, among other things, during an electoral process mass media, their officials, employees, and creative workers are prohibited from campaigning for or against candidates, parties (party organizations), evaluating their election programs or favoring them in any form in materials and programs not specified by contracts concluded in accordance with the requirements of Part three, Article 55 and Part two, Article 56 of the ECU. Moreover, pursuant to Part 10, Article 57 of the ECU, election campaigning is prohibited in foreign media operating in the territory of Ukraine. Although the said norm does not apply to media operating outside the territory of Ukraine, it is also indicative of an approach that does not tolerate the participation of foreign media in the election campaign process in general. Therefore, compliance with the requirements of the Ukrainian legislation by foreign media abroad (if such opportunity is provided) is questionable, as is the possibility of effectively controlling them.

The practice of conducting campaign activities abroad is limited and selective, as they cannot be as frequent and organized as in the country where the elections are held. The cost of campaigning abroad is usually higher, and it is also difficult to campaign in all the countries and cities where out-of-country voting is to take place.

It should be taken into account that it is unlikely that candidates will be able to campaign at every single out-of-country election precinct. This is confirmed by the examples of countries such as Honduras or the Dominican Republic; despite the fact that out-of-country election precincts are established only in a few countries and political actors are interested in the votes of out-of-country voters, still they mostly do not campaign inside foreign countries or using social networks (blogs, Facebook, Twitter, YouTube, Tumblr or ordinary teleconferences and chats). The latter would be the way to establish a direct dialogue or contact with voters without actually leaving the national territory and would result in lower cost and greater coverage.⁶³

At the same time, it is worth saying that out-of-country campaigning can significantly influence the results of elections; the ability to campaign abroad is, as a rule, higher for candidates representing the current authorities. Thus, the OSCE ODIHR mission emphasized in its report on the observation of the early parliamentary elections in the Republic of Moldova that the President of the Republic of Moldova Maia Sandu carried out a wide range of activities in Moldova and abroad calling on the voters to create a stable parliamentary majority. These activities were perceived by many as campaigning in favor of the Action and Solidarity Party, as she used slogans that were associated by many people with the said party. Accordingly, several complaints were filed against the President’s activities.⁶⁴

Moreover, it is worth remembering that sovereign states are not obliged to allow representatives of political parties of another state to campaign on their territory. For example, during the Iraqi elections in January 2005 neither Turkey nor Canada allowed foreign political parties to conduct election campaigns on their territory. Such different approaches can put voters in different countries in unequal conditions.

Although it will be difficult for the election management body to control the behavior of campaign participants outside the territory of the country where the elections are held (this problem can be particularly acute when

63 Electoral Studies in Compared International Perspective. Voting from Abroad in 18 Latin American Countries. The National Electoral Institute (INE) of Mexico, the United Nations Development Programme (UNDP). 2016. P. 65. URL: https://www.ine.mx/wp-content/uploads/2017/04/VFA_LA.pdf

64 Moldova, Early Parliamentary Elections, 11 July 2021: Final Report. P. 13. URL: <https://www.osce.org/files/f/documents/0/5/508979.pdf>

the electoral procedures take place in refugee camps), the dissemination of information about candidates and political parties is still necessary to ensure that the elections are competitive and equal, that citizens have enough time to perceive and analyze it, and that the expression of voters' will on the day of voting is conscious rather than situational.

10.2. RECOMMENDATIONS

Taking into account the fact that the provision of the opportunity to conduct election campaigning abroad creates significant challenges, of which the main one is the lack of jurisdiction of Ukraine on the territory of other sovereign states and, as a result, the lack of necessary powers on the part of state authorities to monitor compliance with the rules of campaigning in the first post-war elections, while at the same time realizing the importance of campaigning for the competitiveness of the electoral process, it is recommended to:

- conduct a separate study of all the challenges and opportunities of out-of-country campaigning in order to avoid legal uncertainty and comply with all international election standards during the first post-war elections.

DRAFT

11. Voter Education and Awareness and Combating Misinformation

11.1. CURRENT LEGISLATION, PRACTICAL CHALLENGES AND OPPORTUNITIES

The Ukrainian legislation guarantees that voters, including those with visual and hearing impairments, are provided with access to comprehensive, objective, and unbiased information necessary for making an informed free choice. The legislation does not contain the concept or features of information support for elections but provides for its division into types – general and special.

The General information provision includes universal information of a legal or reference nature, which does not concern political parties, their organizations, and candidates: about the electoral rights of citizens and methods of exercising and protecting them, addresses of election commissions and voting premises, date and time of voting, voting procedure and method filling out the ballot paper; the right to appeal violations and responsibility for them, etc.

The electoral legislation does not provide for a separate process or procedure for informing voters in the OED.

And so, the general information support includes informing voters about electoral rights, the voting procedure and other issues related to the exercise of citizens' electoral rights. The CEC publishes on its official website information on relevant issues no later than on the second day of the electoral process. In order to ensure that voters are properly informed, the CEC also provides for the production of posters explaining the voting procedure and the liability for violating the election legislation; then the posters are transferred to the PECs, in particular to the OEPs' PECs through the MFA. Moreover, during the 2020 local elections, in view of the pandemic spread of the acute respiratory disease COVID-19 caused by the SARS-CoV-2 coronavirus, the CEC used international technical assistance funds to provide for the production and transfer to the PECs of information posters that clarified the issues of health protection during the voting. It seems that, with prior planning and the availability of financial resources, appropriate posters, if they are developed for national elections or a referendum, can be provided to the MFA.

At the expense of the State Budget, the CEC can produce and distribute, including through electronic (audiovisual) and printed media, information materials belonging to the category of general information support for elections. It should be noted, however, that the CEC never ordered the publication of election information in foreign media for the purpose of informing out-of-country voters.

Special information support for elections involves informing voters about the registered candidates and certain related issues. At the expense of the State Budget, the CEC, depending on the type of election, provides for the production and transfer to the PECs of the information posters of the Ukrainian presidential candidates or the posters of each party which is an electoral subject. Moreover, during the elections of the MPs of Ukraine, the CEC also provides for the production and transfer to the PECs of the information booklets of each party which is an electoral subject.

The information posters are used to inform voters inside the premises for voting – when abroad, these are located in Ukraine's foreign diplomatic institutions. Voters in Ukraine have better access to the respective information posters because they live near polling stations and receive personal invitations in which, among other things, the address of the polling station is specified, whereas out-of-country voters are geographically more "distant" from their polling stations and so they familiarize themselves with the relevant information, at best, directly on the day of voting.

It is worth noting the distinction between pre-election campaigning and information provision of elections in Ukraine. Although special information provision is not an absolute substitute for a campaign, which allows to spread views about candidates, parties and party organizations to a greater extent, it has its advantages, including the possibility of its effective regulation and controlled implementation by authorized entities, which is quite important when resolving jurisdictional issues during overseas voting.

In this regard, special information support can act as an alternative for informing foreign voters about candidates and parties – subjects of the election process, which will not replace a competitive election campaign, but can nevertheless contribute to a more conscious expression of will with much easier legal regulation (including by concluding international agreements) and control.

During the technical evaluation, a gap in the voter information of foreign voters was revealed. According to the interviewed stakeholders, there is currently no adequate voter information on the procedure for inclusion in the voter list. So, for example, a representative of the Ukrainian diaspora in Moldova noted that “the main systemic problem with informing and educating out-of-country voters is inadequate informing about the specifics of the electoral process, in particular about the voting procedure and the procedure for verifying one’s presence in the voter lists.” The latter statement is also confirmed by the opinion of one of the interviewed former election administrators: “the main problem in the field of out-of-country voter education is their low awareness of the procedure for inclusion in the voter lists at the OEPs.”

On the whole, one can say that, in legal terms (*de jure*), before 2022 the information on Ukrainian voters abroad was provided on a general basis; however, *de facto* it covered significantly fewer voters compared to the number of those informed in the same manner within Ukraine. Ukrainian officials did not use additional channels for informing and educating voters abroad for a variety of reasons – from lack of resources to lack of interest in out-of-country voters in view of their low turnout.⁶⁵ The same can be said about countering misinformation during the electoral process – the IFES technical assessment team was unable to find information on any relevant state campaigns before 2022.

11.2. RECOMMENDATIONS

Considering the importance of informing voters for the possibility of exercising the right to vote, in general, and making an informed choice, in general, it is recommended:

- to develop informational materials on inclusion in the out-of-country voter lists and other aspects of the elections;
- to provide resources for the placement of informational materials for voters in foreign mass media on the basis of contracts, which is provided for in Article 49 of the ECU;
- to conduct negotiations with mobile operators regarding the possibility of mass distribution of messages with information about the elections;
- to use the capabilities of the state application “Diia”;
- to establish connections with volunteer organizations abroad that help Ukrainian forced migrants, in order to spread information about the elections;
- to diplomatic institutions to play a more proactive role in informing citizens abroad about the elections;
- to conduct opinion polling among Ukrainians outside the national territory to understand what voting methods they would favor.

⁶⁵ Nevertheless, members of out-of-country election commissions can sometimes take a proactive position. For example, the head of the PEC of the OEP in Cuba informed voters about the voting by directly calling all citizens of Ukraine who were on the consular register.

12. Conduct of Voting, Counting of Votes and Establishment of Voting Results

12.1. CURRENT LEGISLATION, PRACTICAL CHALLENGES AND OPPORTUNITIES

Voting Day for national elections in Ukraine is determined in accordance with the Constitution of Ukraine and the ECU. Thus, pursuant to the Constitution of Ukraine, regular elections to the Verkhovna Rada of Ukraine are to take place on the last Sunday of October of the fifth year of the mandate of the Verkhovna Rada of Ukraine. Early elections to the Verkhovna Rada of Ukraine are called by the President of Ukraine and are held within 60 days from the day of publication of the decision on early termination of the powers of the Verkhovna Rada of Ukraine. The regular election for the President of Ukraine is held on the last Sunday of March of the fifth year the President of Ukraine's term of office. In the event of early termination of the powers of the President of Ukraine, the election of the President of Ukraine is to be held within 90 days from the day of termination of the President's powers. The ECU also stipulates that voting day (the day of runoff voting in the election of the President of Ukraine in cases specified by the law) is Sunday. Therefore, according to the ECU, direct expression of voters' will in elections in Ukraine takes place within one day, between 8:00 and 20:00 hours. At the OEPs, voting is conducted according to the local time of the state in which the election precincts or referendum precincts are created.

The legislation does not provide for early voting during elections in Ukraine. For Ukrainian voters abroad, this can be an obstacle to exercising their right to vote, since it can take a long time for them to get to the election precinct;⁶⁶ and Sunday can be a working day rather than a day off in the host country (for example in Israel). Although voting within one day has certain advantages from the viewpoint of ensuring security and observing the electoral process, in the event of "disruption" of voting at a specific OEP (e.g. lack of quorum, missing ballot papers, etc.) none of the voters included in the voter list at such OEP will be able to exercise their right to vote, since the legislation does not provide for the possibility of extending the voting period to resolve the problem.

At the OED, voters vote in the OEPs' premises for voting. The premises for conducting voting are located in the territory of Ukraine's foreign diplomatic institutions and in military units stationed outside Ukraine; they must meet the requirements of the ECU and comply with the standards for the arrangement of such premises established by the CEC. These premises must have the following area:

- small precincts – no less than 50 sq. m;
- medium-sized precincts – no less than 75 sq. m; and
- large precincts – no less than 90 sq. m.

However, only a small number of foreign diplomatic institutions are compliant. As an exception, smaller premises can be provided for voting at an OEP, provided that the difference does not amount to more than 50 percent. Such tolerance may result in difficulties during voting at OEPs with a traditionally high voter turnout, as well as in the first post-war elections, when higher activity of Ukrainian voters and hence a higher "inflow" of voters in the premises for voting are expected inside Ukraine and abroad.

Noncompliance with the standards for the arrangement of premises for voting can also increase the risk of transmission of viral infections due to voters crowding in a small area, thus endangering the health of citizens, especially citizens with health disorders who exercise their right to vote abroad in accordance with the general procedure in the premises for voting at an OEP. Moreover, the emergence of a queue on the street near a diplomatic institution may violate the norms of public order in the host country (for example a queue may extend beyond the sidewalk), especially during the period of quarantine measures, when people are not allowed to gather in public places.

66 For example, voters from New Zealand need to fly to the polling station in Canberra, Australia.

The organization of voting, the maintenance of proper order in the premises for voting, and ensuring the secrecy of the expression of voters' will during the voting are entrusted to the PEC; therefore, premises must be provided to the PEC with the possibility of protecting them as well as the ballot papers and other election documentation. Within Ukraine, the police are responsible for security at the polling stations, whereas the security of the premises of the OEPs is to be provided by "commandants" – seconded representatives of the State Border Service of Ukraine who are responsible for the protection of Ukraine's foreign diplomatic missions. It is important to emphasize that not all foreign diplomatic institutions of Ukraine have appropriate security arrangements – and so not all PECs of OEPs can ensure the legally prescribed procedure for the protection of voting premises, the procedure for storing ballot papers or referendum ballots, etc.

The procedures for voting in national elections or a referendum within Ukraine and at the OEPs are mostly the same, except that in the latter case the procedure of voting at the place of voter's stay is not provided for – it cannot be performed at the OEPs for objective reasons. Thus, if a voter is included in the voter list, the ground for the issuance of a ballot paper to that voter is, according to the current legislation, the presentation of a document confirming the identity of the voter and their Ukrainian citizenship. The list of relevant documents is exhaustive and specified in the ECU and the LU "On the All-Ukrainian Referendum." Thus, when voting abroad, a voter can present:

- passport of a citizen of Ukraine for traveling abroad;
- diplomatic passport;
- service passport.

At the OEPs created in states to which citizens of Ukraine are allowed to go with their passport of a citizen of Ukraine, the ground for the issuance of a ballot paper can be the passport of a citizen of Ukraine. However, there are not a lot of such countries. In particular, until February 24, 2022, it was possible to enter Georgia and Turkey with the passport of a citizen of Ukraine in the form of an ID card.

At the same time, due to the humanitarian circumstances resulting from the Russian Federation's full-scale invasion of the territory of Ukraine and owing to the arrangements reached with neighboring countries, citizens of Ukraine were allowed to leave the country under the conditions of the legal regime of martial law in the territory of Ukraine on the basis of the internal passport of a citizen of Ukraine or, in exceptional situations, even without it. The current legislation does not provide a clear answer to the question of whether this gives the voters who took advantage of this opportunity grounds to be given a ballot paper in neighboring countries during an election or referendum upon presentation of their internal passport. If the answer is no, then in order to exercise their right to elect such citizens will have to apply to Ukrainian diplomatic institutions for the production and receipt of a foreign passport.

At present, Ukrainian diplomatic institutions provide foreign passport issuance services; however, since the passports are produced in Ukraine and many diplomatic institutions have not restored their logistics yet, obtaining a foreign passport outside Ukraine can be problematic.⁶⁷ At the same time, diplomatic institutions have been actively issuing another document: identity card for returning to Ukraine, since it is impossible to enter Ukraine from neighboring countries without a foreign passport. This document contains, inter alia, the citizen's photo, last name and first name, as well as date of birth.

After receiving an election ballot paper or a referendum ballot, the voter must personally fill it in the secret ballot booth. It should be emphasized that while the form and content of the ballot paper for voting in the election of the President of Ukraine at polling stations within Ukraine and at the OEPs are the same, the current legislation provides for certain differences in the elections of the MPs of Ukraine.

67 "What documents can you return to Ukraine?", 04/10/2022, Visit Ukraine. Access mode: <https://visitukraine.today/uk/blog/286/z-yakimi-dokumentami-mozna-povernutisya-v-ukrainu>

At present, a proportional electoral system with open lists and voting in multi-member constituencies is used in the Ukrainian parliamentary elections. Parties nominate a national electoral list (with no more than 450 MP candidates) and regional electoral lists. In each of the 25 regions, a party can nominate from five to 18 candidates. All candidates from the national list except for the first nine are also included in the regional electoral lists. Voters in the territory of Ukraine can cast their vote for a party's regional list and also support a particular candidate from the party's corresponding regional list in the electoral region where the voter votes. At the same time, the ECU stipulates that the ballot paper for voting in the elections of MPs in the OED must specify the number of each party determined by the drawing of lots, the full name of the respective party, and the last names and initials of the MP candidates included in the national electoral list under the first nine numbers. The ballot paper for voting in the OED does not contain information about the MP candidates included in a party's regional electoral list. Thus, voters living or staying abroad can only support the entire list of the chosen political party, with no link to a region. This narrows the electoral rights of voters abroad, and also reduces the attachment of forced migrants to their communities.

After the end of the voting, the counting of votes at the OEP begins immediately; it is to be performed openly and publicly, exclusively by the members of the PEC at its meeting, which is to be held in the premises where the voting was conducted. In practice, however, there were cases when observers were involved in the counting of ballot papers at OEPs with a high turnout (in particular during the 2019 Ukrainian presidential election at an OEP in Italy). Except for minor differences in the counting procedure during the elections of MPs of Ukraine resulting from the specifics of the electoral system described above, the counting of votes at election precincts within Ukraine and at the OEPs is performed in the same way.

The counting of votes straight at the polling location increases the accountability of PEC members, however, it can lead to a violation of the principle of secrecy of voting at OEP, where a small number of voters are included in the voter list, since all these people can vote for the same candidate or a political party. Some countries, for example, Georgia, organize the transportation of ballot papers to the central EMB for further counting. And the result of voting at OED, created at the military base, is not announced, but is added to the general protocol.

The content of the protocol for the counting of votes at an OEP must, after its signing by the PEC members, be immediately transmitted to the CEC using technical means of communication, to be followed by mandatory transfer to the CEC through the MFA of the first and second copies of the vote counting protocol, together with other election documentation. The results of voting within the OED are established by the CEC, which acts as the district election commission or the district referendum commission in the OED and therefore draws up the appropriate protocol on establishment of the results of voting within the OED. The procedure for establishing the voting results depends on the type of election or referendum, but in general there are no significant specific features in the OED.

12.2. RECOMMENDATIONS

Given that diplomatic institutions abroad are often unable to provide the OEP PECs with premises that would meet the requirements of the law, the lack of foreign passports on forced migrants' hands, and the importance of equal treatment of voters it is recommended:

- to review the legal requirements for the premises of OEP PECs and the premises for voting abroad;
- to expand the list of documents that a voter can present to receive a ballot abroad by adding an identity card for returning to Ukraine;
- to revise the provisions of the ECU in order to grant the right to voters abroad to vote not only for the list of the chosen political party, but also for a specific candidate in the regional electoral list.

13. Election Dispute Resolution

13.1. CURRENT LEGISLATION AND PRACTICAL CHALLENGES

Effective election dispute resolution (EDR) is one of the necessary tools for ensuring and protecting democracy; therefore, any EDR model should be based on proper democratic practices and protect electoral rights. In Ukraine, there is a mixed system of appealing violations of the electoral legislation, under which any election disputes may be resolved by courts and some by election commissions. The possibility for the plaintiff/applicant to optionally appeal the same violation (e.g., an election commission's inaction) to a court or to an election commission (so-called "forum shopping") is at odds with the recommendations of the Venice Commission on ensuring an effective appeal system, but is based on the provisions of the current Constitution, which allows any violation of the law to be appealed directly to a court. The legislators also took a number of measures aimed at preventing "parallel" consideration of the same dispute by a court and an election commission.

Decisions, actions or inaction of a lower-level commission and actions or inaction of a member of such commission can be appealed to a higher-level commission. Since the CEC acts as the district election commission for the OED, complaints against decisions, actions or inaction of OEPs' PECs can be filed with it. As the district election commission in the OED, the CEC considers disputes regarding violations committed by OEPs' PECs or their members at its meeting which, as a rule, is held at the location of the Commission. The complainant, the respondent and the interested parties specified in the complaint must be invited to the CEC meeting at which the complaint is to be considered. However, members of OEPs' PECs or out-of-country voters are unlikely to be physically present at a CEC meeting in Ukraine. In view of that, the legislation provides for the possibility of using technical means, in particular a video conference mode, for holding such a meeting and participating in it.

The ECU also allows decisions, actions or inaction of the OEPs' PECs and the actions or inaction of their members in a court of law to be appealed. In order to avoid the possibility of simultaneous consideration of the same dispute by a court and the relevant election commission,⁶⁸ the ECU stipulates that in the event of initiation of administrative proceedings on the same issue and on the same grounds as in a complaint filed with an election commission, the election commission must, no later than the next day after receiving the court's notification of the initiation of the proceedings, return such complaint to the complainant without considering it. The court is obliged to send such a notification to the election commission.

Electoral subjects (other than election commissions) and voters whose voting rights or interests regarding participation in the electoral process were violated may also appeal the decisions, actions or inaction of the CEC as the district election commission in the OED. Pursuant to Part three, Article 273 of the Code of Administrative Procedure of Ukraine (below, the CAPU), decisions, actions or inaction of the CEC or its member adopted/committed/perpetrated within the electoral process may be appealed to the administrative court of appeal in the appellate district which includes the city of Kyiv, that is, the Sixth Administrative Court of Appeal (except for decisions, actions or inaction of the CEC regarding the establishment of election results by that Commission, which can be appealed in the first instance to the Supreme Court). This approach to determination of jurisdiction differs from the approach established for appealing decisions, actions or inaction of district election commissions and their members regarding the preparation and conduct of national elections – pursuant to Part four, Article 273 of the CAPU, the respective violations committed by DEC's and their members are to be appealed to the district administrative court at the location of the respective commission.

Likewise, the jurisdiction determination issues are not properly regulated as like some other electoral

⁶⁸ The Venice Commission also emphasizes the need to prevent duplication of competencies of bodies authorized to resolve election disputes.

disputes, for example appeals against decisions, actions or inaction of executive bodies, bodies of power of the Autonomous Republic of Crimea, local self-government bodies, enterprises, institutions, establishments and organizations, their officials and officers. In particular, a claim appealing decisions, actions or inaction of executive bodies, local self-government bodies, their officials and officers is to be submitted to the district administrative court in their locality. The list of bodies whose activity or inactivity can be appealed includes Ukraine's foreign diplomatic institutions at which OEPs were established.⁶⁹ However, this leads to the problem of determining the jurisdiction for appealing the decisions, actions or inaction of the respective diplomatic institution, in view of its out-of-country location. In the event of uncertainty regarding the territorial jurisdiction of an administrative case, the CAPU provides that such case shall be considered by an administrative court of the plaintiff's choice.⁷⁰ Obviously, representatives of the diplomatic institution are unlikely to be able to attend the court hearings in the case in Ukraine.

Another executive body whose decisions, actions or inaction can be appealed in the same manner is the SVR maintenance body at the MFA. Administrative cases regarding changes to SVR data are to be considered, as already mentioned above, by the respective district administrative court at the location of that body. In most cases, out-of-country voters will not be able to come to Ukraine to participate in the court hearing in the courthouse (especially if these voters had to go abroad to escape the war). At the same time, administrative cases regarding updating voter lists are to be considered by the local general court as the administrative court at the PEC's location. However, no national or local general court is assigned to the location of the OEPs' PECs, which means that the administrative case is to be considered by the administrative court of the plaintiff's choice.

In all the cases listed above, electronic access to justice will be almost the only way to exercise the right to legal protection. At present, the Unified Judicial Information and Telecommunication System is used for that purpose and so the protection of electoral rights will depend on its operation. Installing and configuring it in each and every court will contribute to such protection. Moreover, the system's different modules can be used to submit, upon prior registration, court documents affixed with an electronic digital signature. According to forecasts, this is the method of participation in court hearings that will prevail among out-of-country voters.

Moreover, the CAPU allows participation in a court hearing in a video conference mode; thus, parties to a case have the right to participate in a court hearing in a video conference mode from outside the courthouse, provided that the court has the appropriate technical capability, which fact must be mentioned by the court in its decision to initiate proceedings in the case, unless the court finds that the party must attend the court hearing. However, even the CAPU, in Part five, Article 195, warns that the risks of technical inability to participate in a video conference from outside the courthouse, interruption of communication, etc., are borne by the party to the case that has submitted the respective application for participation in such mode. It is worth noting that the Code explicitly requires that a witness, translator, specialist, or expert participate in a court hearing by video conference exclusively from the courthouse.

13.2. RECOMMENDATIONS

The significant increase in the number of voters and the suspension of the operation of the SVR may lead to an essential increase in the number of persons requiring the legal protection of their rights. In view of this, it is recommended that:

69 For example, electoral stakeholders may wish to appeal the non-publication by diplomatic institutions of information on elections which must be published in accordance with the law.

70 The administrative court, at the choice of the plaintiff, also considers the claim regarding the actions or inaction of the candidates, their proxies, the political party, their officials and authorized persons, official observers from the subjects of the election process, since it is submitted to the district administrative court at the place of the act or the place where this act must be committed, and in the case of committing such an offense abroad, it is impossible to determine the territorial jurisdiction of the place where such an act was committed.

- the jurisdiction for the resolution of election disputes involving the participation of subjects located outside the state be clearly determined;
- the full funding and the appropriate logistical basis for the operation of the Unified Judicial Information and Telecommunication System in all courts without exception be ensured;
- a broad information campaign regarding the system usage rules be organized in places of compact residence (stay) of Ukrainians abroad;
- measures be taken, in connection with the increase in the number of out-of-country voters which may lead to a significant increase in the number of complaints to the CEC and in the functional load on the Commission, to strengthen the CEC's organizational and technical capacity for processing them, in particular, to automate the processes of processing and considering such complaints, to develop universal algorithms for resolving standard election disputes, to increase the staff of the CEC's Secretariat, etc.

14. Out-of-Country Observations

14.1. CURRENT LEGISLATION, PRACTICAL CHALLENGES AND OPPORTUNITIES

The CEC is in charge of registration of observers in the OED. Thus, the CEC grants permission to NGOs whose statutory activities include issues related to the electoral process and its observation to have official observers during elections. Accordingly, the CEC registers in the OED only official observers from NGOs that received such permission. The registration of official observers from an NGO is performed at the request of the head of the NGO or another authorized person on the basis of the NGO representative's power of attorney which is to be certified by the seal of the organization. The application for the registration of an official observer in the OED is submitted to the CEC on paper and in electronic form not later than 5 days before the day of voting in the respective election.

Within the same timeframe, a request for the registration of official observers in the OED must be filed with the CEC and signed:

- in parliamentary elections, by the party's authorized person in the nationwide district or the party's representative authorized on the basis of the power of attorney;
- in presidential elections, by the party's authorized representative or proxy of a Ukrainian presidential candidate in the nationwide election district;⁷¹
- during the referendum process, by the authorized person of a subject of the All-Ukrainian referendum process or the head of an NGO.

In the event of registration of official observers in the OED, the CEC provides for the production and issuance to them of a certificate of the respective form no later than on the third day after the filing of the submission. However, the fact that such certificates are produced by the CEC in Ukraine creates additional logistical obstacles to the transfer (transportation) of these certificates to observers staying abroad.

Official observers registered in the OED have the same rights and obligations as other national observers in other constituencies. Such an observer is entitled, inter alia, to take the necessary measures within the limits of legislation to stop illegal actions during voting and counting of votes at the election precinct. If an observer has violated the rules of organization for voting, the respective election commission may adopt, in

⁷¹ At the same time, the legislative list of persons who can sign a request for the registration of an official observer does not include a Ukrainian presidential candidate. However, the latter is in the list of those who can withdraw their official observer.

accordance with the procedure established by the ECU, a motivated decision to deprive such observer of the right to be present at the precinct.

Official observers from foreign states and international organizations are also accredited by the CEC. The ECU allows official observers from foreign states and international organizations to exercise their powers in the territory of Ukraine. A similar provision existed in the LU “On the Elections of the President of Ukraine” (in particular Part four, Article 70 of the said Law). However, the LU “On the Elections of the MPs” stated a different approach, according to which official observers from foreign countries and international organizations could exercise their powers in the territory of Ukraine as well as at the OEPs (Part five, Article 79 of the said law). It should be remembered that the OSCE/ODIHR does traditionally not observe out-of-country voting in person, contrary to the European Union, which has done so in Tunisia (2014), in Lebanon (2018), and in Iraq (2021).

Compared to the previous legislation on the elections of MPs, the ECU does not directly provide for the possibility of international observers carrying out their activities at the OEPs. Moreover, the premises of foreign diplomatic institutions (embassies) in which premises are organized for the PECs and for voting at the corresponding OEPs, or the land plots on which such representative offices are located, or other territory within the boundaries of the OEPs are not Ukrainian territory. Diplomatic institutions, unlike other immovable property of the state abroad, which does not have diplomatic status, in accordance with Article 22 of the Vienna Convention on Diplomatic Relations dated April 18, 1961, and Article 31 of the Vienna Convention on Consular Relations dated April 24, 1963, only enjoy diplomatic immunity, that is, they are inviolable. Such immunity excludes certain issues from the jurisdiction of the host state, but by no means turns the area into Ukrainian territory. Thus, the wording in the ECU regarding the limits of exercise by international observers of their powers can be interpreted to the effect that they do not have the right to conduct observations within the OEPs, since they are not in the territory of Ukraine.

Before the beginning of Russia’s full-scale war against Ukraine, out-of-country electoral process observation was not a priority for national stakeholders, in view of the low voter turnout in the OED and lack of organizational capacity to conduct such observations. As a consequence, many subjects have either no experience or rather limited experience of organizing observations abroad. At the same time, a significant increase in the number of “foreign” voters may lead to an increase in political activity abroad on the part of stakeholders and voters and this will require the organization of long-term observation throughout the entire electoral process – and in some cases even before it begins. This necessitates the recruitment of a significantly larger number of long-term and short-term national observers than during the previous election campaigns. Moreover, the significant increase in the number of Ukrainian voters abroad will potentially enable national stakeholders to more easily find and more quickly engage activists in the processes of observation at the OEPs.

Furthermore, after the end of the armed conflict the conditions of Ukrainians’ stay abroad may gradually become less favorable. In particular, according to the EU Directive, temporary protection for Ukrainians allows them to stay abroad outside the time limits defined by the “visa-free regime,” until March 4, 2023. If the reasons for granting temporary protection do not disappear, temporary protection will be automatically extended twice for 6 months, i.e. until March 4, 2024. If the reasons for temporary protection persist, the European Commission may initiate the extension of temporary protection for yet another year (i.e. until March 4, 2025). In the event of return to the general rules of stay in the EU countries and Moldova which were in effect before the beginning of the war, citizens of Ukraine will be able to stay in these countries only for 90 days within a 180-day period. It is worth noting that the electoral process of a regular presidential election is 90 days; together with the stage of runoff voting, it can be longer, that is, go beyond the 90-day period stay.

14.2. RECOMMENDATIONS

One of the characteristics of democratic elections is their transparency. The participation of election observers is an important guarantee of ensuring transparent elections, although some legal, logistical, and security circumstances may reduce the level of their involvement in voting abroad, therefore it is recommended:

- to stimulate observing of the election process abroad by NGOs, political parties and candidates in the post-war period;
- to ensure the minimum necessary number of observers at the OED and their proper training through cooperation with international and foreign organizations engaged in election observation;⁷²
- to provide in the current election legislation for the possibility of observing by international observers, by revising the legislative provision on limiting the activities of international observers exclusively to the territory of Ukraine;
- if in-person international election observation is desired by Ukrainian authorities, encourage the OSCE/ODIHR to modify its methodology, or consider inviting the European Union to specifically observe OCV in EU Member State host countries (plus in EU associate EO countries Switzerland, Norway and Canada), while the OSCE/ODIHR observes in the national territory.

72 Such cooperation could take various forms, starting from material and technical support, ending with human resources. There are known examples when this problem was solved by involving students, the diaspora and other categories of foreign voters for the observation. For example, an international network of Indonesians, which included mostly students, managed to achieve wide-scale coverage of voting in Indonesian embassies in the 1999 transitional elections, and in the 2020-2021 elections abroad in Moldova, the government communicated extensively with the diaspora.

IV. Options for Ukraine Postwar Out-of-Country Voting Reform

15. The Need for Reform

In-person voting is one of the most widespread ways of exercising the right to vote by voters abroad. This method is used in 109 out of 216 countries and territories that conduct elections.⁷³ In-person voting is also considered one of the most transparent methods of voting, as it allows organized observation of the electoral process. In addition, in-person voting does not require significant efforts to educate voters, because this method is common for voters abroad, including Ukrainian voters who were forced to migrate abroad due to the war. At the same time, in-person voting does not guarantee universal enfranchisement, since in practice only a small number of voters can reach polling sites, especially if only diplomatic missions can be used for polling.⁷⁴

Worldwide, there are no international obligations for the organization of out-of-country voting besides those that bind State parties to the Migrant Worker Convention; however, countries declaring their commitment to the principle of human rights protection should strive to create additional opportunities for the exercise of these rights, in particular, the right to vote. In order to create additional opportunities for voters abroad to satisfy the principle of universal suffrage, a given country must choose a voting method that will allow as many voters as possible to exercise their voting rights. It is important to understand that the method of voting may change depending on the challenges of time as well as on the resources available in the country for organizing out-of-country voting. Thus, world practice shows that the first post-war elections can be organized using ad-hoc procedures enshrined in a special “one-time” law; and later the country can return to the traditional way of organizing out-of-country voting, continue to use post-war innovations, as it is done by Bosnia and Herzegovina, or altogether refuse to organize out-of-country voting, as Afghanistan did in 2005.

Out-of-country voting in post-war contexts aims to enfranchise not only those citizens who have left the home country voluntarily to seek economic opportunities, or reunite with family abroad. On the contrary, post-conflict OCV principally aims to enfranchise refugees who were forced to leave their home country fearing for their life, and not based on their free choice. Keeping forced migrants engaged in post-war political processes increases the likelihood of their eventual return to their home country, which is not necessarily the case for voluntary expats. Debates about what methods to use, and how many resources to allocate to permanent expat voting are hence driven by much less urgency, than considerations around enfranchising refugees of war. It should also be noted that the European Union (and the United States) have consistently advocated for enfranchising refugees in post-conflict elections.

The election stakeholders interviewed during the technical assessment – representatives of the CEC, the MFA, national and international experts, etc. – acknowledge that in-person voting at the election precincts established at diplomatic institutions will not provide sufficient opportunity to vote for all willing voters abroad to register and cast their vote due to factors highlighted in the report. The CEC also enshrined this opinion in the reasoning part of CEC Resolution No. 102 dated September 27, 2022 “On Proposals for Improving the Legislation of Ukraine Aimed at Ensuring the Preparation and Conduct of Elections after the Termination or

⁷³ According to International IDEA. Access mode: <https://www.idea.int/data-tools/world-view/52>

⁷⁴ Report on out-of-country voting adopted by the Council for Democratic Elections at its 37th meeting (Venice, 16 June 2011) and by the Venice Commission at its 87th Plenary Session (Venice, 17-18 June 2011). CDL-AD(2011)022-e. URL: [https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2011\)022-e](https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2011)022-e)

Abolition of Martial Law in Ukraine.”⁷⁵ However, these stakeholders expressed different opinions on which of the voting methods should be implemented for the first post-war elections.

It is worth remembering that each voting method is more conducive to ensuring some principles of enfranchisement and less conducive in respect of other principles, as well as having its strengths and weaknesses. For example, in-person voting contributes to the transparency of the electoral process, but it is very cost-consuming and complex to administer. Postal voting promotes universal suffrage, but it may partially eliminate voting secrecy, if voting secrecy is interpreted as an obligation to be enforced by the state, as opposed to be respected by the voters (as in Switzerland, Germany, Luxemburg, Austria, Australia, New Zealand, or the US); Internet voting can facilitate the convenience of the electoral process, but decrease trust in election results.

Therefore, the Ukrainian “electoral community” should carefully study each of the methods, including the experience of other countries in the implementation and administration of various voting methods, so as to choose the best options for the full restoration of democratic development after the end of the war. At the same time, Ukraine may consider introducing different methods of voting in different countries depending on the context (for example, the introduction of postal voting only for voters in countries with a reliable postal system or expanded in-person voting in countries with a significant number of forced migrants from Ukraine).⁷⁶

In addition to studying the available literature on the issue of providing different voting methods, during the technical assessment the IFES team also conducted in-depth interviews with the CSOs of the Republic of Moldova, Bosnia and Herzegovina and Mexico in order to study the experience of these countries in implementing expanded in-person voting (Moldova), postal voting (Bosnia and Herzegovina, Mexico), and internet voting (Moldova, Mexico). In addition, a number of meetings were also held with international experts who had worked on the organization of out-of-country voting during various post-war elections, so as to get advice on preparing for the first post-war elections in Ukraine.

In this section of the report, the IFES team for technical assessment of the process of out-of-country voting has summarized the lessons learned and advice regarding each voting method – expanded in-person voting, postal voting and Internet voting.

75 CEC Regulation of September 27, 2022 No. 102 “On proposals to improve the legislation of Ukraine, aimed at ensuring the preparation and holding of elections after the termination or abolition of martial law in Ukraine” <https://act.cvk.gov.ua/acts/pro-propozitsii-shhodo-vdoskonalennya-zakonodavstva-ukraini-spryamovani-na-zabezpechennya-pidgotovki-ta-provedennya-viboriv-pislya-pripinennya-chi-skasuvannya-voienogo-stanu-v-ukraini.html>

76 The argumentation as to why the introduction of different methods of voting does not violate the principle of equal voting rights is set out in Appendix 1. “Ensuring equal voting rights and non-discrimination when determining the scope of voting rights of voters in the OED and methods of their implementation”.

16. Out-of-Country Voter Registration Mechanism after the War

On the first day of the full-scale Russian invasion of the territory of Ukraine, the CEC adopted a decision to temporarily suspend the operation of the Automated Information and Communication System “SVR” for the duration of martial law. During that period, there has been no processing of information within the framework of the periodic updating of personal data in the SVR and no voter applications have been considered. After the resumption of the SVR’s operation, the challenge will include not only the extent of restoration work but also, in certain cases, loss of data. It is unlikely that the departments of state registration of civil status acts and other bodies submitting information to the SVR could operate properly in communities most affected by the military actions; documents and hardware storing data could have been destroyed as a result of the hostilities. A significant problem is the impossibility of tracking the crossing of the border with the aggressor country in the temporarily occupied territory or territories where active hostilities are taking place.

In the context of out-of-country voting, the problem consists not only in the failure to process information on voters who entered consular registration during the martial law but also in the fact that a significant number of citizens, who fled Ukraine because of the hostilities, did not register with the consulates at all. Moreover, according to UNHCR data,⁷⁷ a considerable share of forced migrants did not even register for temporary protection programs. All of this will make out-of-country voters “invisible” to the CEC after the resumption of the Register’s operation—especially their physical location.

According to the current legislation, voters wishing to be included in the voter list at an OEP must enter consular registration, or change their electoral address (in this case, voters must provide documents confirming the address of residence abroad), or temporarily change the place of voting without changing the electoral address (no documents confirming the place of voting are required). The latter method will most likely be the most popular one among the forced migrants. However, the analysis of facts presented in the first part of this Report indicates that DMA SVR MFA will not have the capacity to process tens of thousands of voter applications. Moreover, the implementation of any one of the other voting methods reviewed during the technical assessment will require the introduction of an active voter registration mechanism, when voters submit an application to the EMB with a request to be included in the list of voters for the relevant election process (without a corresponding application, voters are not included in the list of voters, and therefore do not vote).

If extended in-person voting is implemented, the EMB will need to know the location and number of voters at each geographic catchment area, wishing to vote before it decides to open additional election precincts and starts planning logistical issues. Should postal voting be introduced, the EMB will have to know a voter’s current mailing address to which the ballot paper should be delivered. In the event of implementation of Internet voting, voters must be informed of the data required to enter the system. Even in the case of development of a system for voting using an electronic signature, which is equivalent to a handwritten signature according to the Law “On Electronic Trust Services,” active registration will be useful for calculating the approximate voter turnout to detect anomalous numbers of votes cast, which may be indicative of problems in the system or external interference.

In view of the high quality of SVR maintenance before the war, as well as the presence of an extensive network of SVR maintenance bodies in Ukraine and the fact that the voting method used inside the country might not change for regular voters, it will likely be necessary to implement an active voter registration mechanism only for out-of-country voters.⁷⁸

⁷⁷ Operational Data Portal, UNHCR. Access mode: <https://data.unhcr.org/en/situations/ukraine>

⁷⁸ Different voter registration mechanisms (passive - within the country and active - abroad) are used in some countries, for example in Mexico.

Since the Law of Ukraine “On the State Voter Register” allows voters to submit electronic applications signed using a qualified electronic signature, which according to the Law “On Electronic Trust Services” is equivalent to a handwritten signature, applications for inclusion in an out-of-country voter list can also be submitted using this tool. It should be noted that the respective technical infrastructure on the SVR website has been prepared and is already functioning.

At present, a qualified electronic signature can be issued remotely to clients of the JSC “CB ‘Privatbank’” or using the “Diia” application (if a voter has an ID card, a biometric foreign passport, or a foreign passport issued after 2015 in the “Diia”). Since not all out-of-country voters use the services of the JSC “CB ‘Privatbank’” or have the state application “Diia,” it is worth preserving the possibility of submitting personal applications to diplomatic institutions, followed by their subsequent transfer to DMA SVR MFA. It is important that the applications be sent to DMA SVR MFA “in bulk,” in an automated manner, rather than one scanned application copy after another.

It is worth noting that in some countries, for example in Bosnia and Herzegovina or in the US⁷⁹ – the process of active OCV registration is carried out by mail – a voter sends to the EMB their application together with a copy of a document identifying the person and a copy of a document confirming the place of registration within the country. No additional protection mechanisms are in place. It is deemed unlikely that lots of letters with forged applications will be sent, since voters will be able to receive a ballot paper only upon presentation of their passport (another legally required document) at the election precinct or upon providing such document when receiving a registered letter. Moreover, the EMB of Bosnia and Herzegovina also publishes lists of out-of-country voters online on its website, so that everyone can check them.

However, the only significant reason for voter registration by mail is the legal requirement for a voter’s “wet” signature. Since a qualified digital signature is legally equivalent to a handwritten signature in Ukraine, postal registration should be avoided as it requires manual data entry unless the postal forms are machine readable through a scanning process.⁸⁰ Although the use of this method may make sense if Ukraine implements voting by mail. This will allow Ukrainians abroad to get to know the work of the host country’s post office.

Voter registration can be carried out in different ways online. For example, the National Electoral Institute of Mexico registers voters using email (copies of a voter’s ID and of documents proving the voter’s residence are to be submitted) and mobile phone number. After registration, the voter logs in the system for Internet voting by entering their password and using the two-factor identification method chosen by the voter at the point of registration (SMS or QR code). An important aspect of this system consists in that in Mexico a SIM card is sold only upon presentation of identification documents. India allows OCV voters to change their voting address online without changing their home residence (EPIC).⁸¹

By contrast, Estonia conducts no pre-registration of voters, as it has an extremely good civil register. All voters can vote online using a national ID card with a built-in qualified electronic signature or “Mobile ID” (an authentication system using mobile phones with special SIM cards that was introduced in 2011). There is no division into “in-country” and “out-of-country” voters.

Online registration can be faster and more convenient, especially for younger registrants who are no longer used to traditional mail. The main advantage of online registration tools is not only the convenience for voters, but also the fact that voters directly log their data into the EMB database, which obviates the need for data entry at backend of the EMB.

Since a voter’s registration for Internet voting can simultaneously be his/her identification (or an element

79 For an example, see Federal Postcard Application used in US <https://www.fvap.gov/uploads/FVAP/Forms/fpca.pdf>

80 The forms will be folded and sent in envelopes, and then they will need to be manually removed from the envelopes and flattened so that they can be scanned.

81 More about the procedure: <https://ecisveep.nic.in/voters/overseas-voters/>

thereof), it should be conducted online, and moreover, this must be done in a well-secured way, in particular using a qualified electronic signature or optical character recognition, for instance of the “machine-readable zone (MRZ)” of the document used for voter identification. The promotion of this tool for the exercise of voters’ electoral rights will also contribute to the digitization of other public services in Ukraine.

The two main arguments for changing the out-of-country voter registration mechanism are, first, the need to determine the physical location of voters abroad, and second, ensuring an increase of the level of inclusiveness of elections. Active registration will enable voters to state their special needs as regards the exercise of the right to vote. An NGO representative addressing the problems of people with disabilities noted that the focus should be on a voter’s need for reasonable accommodation.⁸² In addition, when multiple voting methods are introduced at the same time, active registration will allow the voter to indicate the method they plan to use to express their will, which can help EMB to decide which voting methods to offer and where. Voters can be asked to rank their choice of voting modality.⁸³

The Legislature will have to determine the final date for voter registration and may consider making the overseas voter register available online. Voters should receive a confirmation email or code, once their registration has been approved, and they should be allowed to check their registration and voting address online.

Active registration is instrumental in ensuring up-to-date and valid voter data and place of residence, but its implementation will have to be supported by a broad education and awareness campaign among out-of-country voters regarding the need to be registered within a specified period. A good example of mass educational interventions is Mexico, which has developed a strong electoral identity and disseminates information for voters through many communication channels, addressing not only the diaspora but also relatives of diaspora members inside the country in order to further spread knowledge among citizens.

Considering that according to the data of a sociological survey conducted by the Razumkov Center in July–August 2022,⁸⁴ 85% of Ukrainian forced migrants interviewed said that they received information about events in Ukraine from social networks, 62% of those interviewed also confirmed receiving information from Ukrainian Internet sites, websites and Internet publications, and 59% of interviewed also received information from relatives and acquaintances, the practice of informing relatives of voters in Ukraine with the aim of further transmitting information about forced migrants abroad seems promising.

17. Expanded In-Person Out-of-Country Voting

Ukrainian authorities can provide the opportunity to vote for a larger number of people without changing the method of exercising the right to vote by creating election precincts outside diplomatic and consular institutions in places of dense residence of Ukrainian voters abroad. This practice was called “expanded in-person voting”; it is used in particular by countries such as Turkey (numerous locations in Germany), Ivory Coast (several locations in France), Cabo Verde (several PS in Lisbon), the Dominican Republic (80 PS in New York City), Bulgaria (several locations in Istanbul), Hungary (in Romania) and Moldova (also many locations in Romania). Moreover, additional election precincts were created in 14 countries outside diplomatic and consular institutions at the first post-war elections in Iraq in 2005 to provide for the Iraqi refugees’ right to vote. In particular, in London – the capital of Great Britain – Wembley Stadium was rented for three days for this purpose.

82 The concept of “reasonable accommodation” denotes the principle of overcoming systemic barriers that arise before people with disabilities. Reasonable accommodation can be applied when a person may need help or special conditions to exercise their rights.

83 If for instance only 5 percent of Ukrainian OCV registrants in a given host country opt for in-person voting as their first choice, then it would likely be decided to offer this modality only at the Ukrainian diplomatic mission, while not going through the considerable effort of setting up additional polling stations across the host country.

84 “Attitudes and assessments of Ukrainian refugees (July–August 2022 p.),” Razumkov Center, 08/30/2022. Access mode: <https://razumkov.org.ua/napriamky/sotsiologichni-doslidzhennia/nastroi-ta-otsinky-ukrainskykh-bizhentsiv-lypen-serpen-2022p>

Like any other voting method, expanded in-person voting has its pros and cons, difficulties and opportunities associated with its practical implementation.

To organize out-of-country voting in Ukrainian elections at election precincts outside diplomatic or consular institutions, it is necessary to:

- consider international practice of organizing expanded in-person OCV including reading the decision *Riza vs Bulgaria* of the European Court of Human Rights⁸⁵ which starkly illustrates the many aspects that can go wrong with expanded in-person OCV, and that can discredit the overall conduct of elections;
- make appropriate changes to the ECU, the LU “On the State Register of Voters” and other related normative legal acts, in order to make ground for new electoral boundaries delimitation and assigning voters to newly created ad hoc polling places;
- identify countries and settlements where additional election precincts will be opened;
- make arrangements with the governments of the respective countries for permission to conduct voting outside diplomatic and consular institutions;
- change the boundaries of the election precincts, assigning voters to new election precincts;
- form PECs of these election precincts and conduct training;
- make arrangements for provision or rental of premises for the PECs’ work and for voting;
- sign individual MoUs with each municipality that is requested to host OCV polling places outside of diplomatic missions;
- sign MoUs with relevant police forces to ensure security for polling places;
- either borrow polling material, such as ballot boxes and voting screens from respective municipalities, or procure and ship such material within the relevant custom area, or import the material from Ukraine, and distribute it across Europe. When election supplies are borrowed, they must be returned to the lender, and replaced if damaged;
- inform the relevant voters about their inclusion in the voter lists at the respective election precincts;
- organize the delivery of election materials, as well as the necessary logistical support, in particular ballot boxes, to the relevant election precincts;
- ensure the preservation and integrity of election materials, the safety of PEC members and voters.

Changes in legislation

The introduction of expanded in-person voting requires making changes to legislation, in particular to the ECU and the LU “On the State Voter Register.” It is also possible to enshrine such changes in a special law that will apply only to the first national elections after lifting martial law.⁸⁶ The changes should address the specifics of the creation of election precincts, in particular to the possibility of their establishment outside diplomatic and consular institutions with the consent of the host country, as well as to the specifics of compiling voter lists for the additional out-of-country election precincts, and the conditions under which Ukrainian resident or refugees abroad may apply to register at such polling places. The changes should also provide for the

85 The Text of the Ruling. Access mode: [https://www.eods.eu/elex/uploads/files/5c613ed225f43-CASE%20OF%20RIZA%20AND%20OTHERS%20v.%20BULGARIA%20\(1\).pdf](https://www.eods.eu/elex/uploads/files/5c613ed225f43-CASE%20OF%20RIZA%20AND%20OTHERS%20v.%20BULGARIA%20(1).pdf)

86 This approach is suggested by the CEC in its Regulation as of September 27, 2022 No. 102 “On proposals to improve the legislation of Ukraine, aimed at ensuring the preparation and holding of elections after the termination or abolition of martial law in Ukraine.”

possibility of including voters in the voter list at the OEPs without submitting additional documents about their place of residence.

The legislators may consider the specifics of voter identification, in particular the expansion of the list of documents used for voter identification in connection with the fact that many Ukrainians who were forced to leave the country after February 24, 2022, do not have a foreign passport and that it is difficult to obtain one abroad.

At the same time, legislators can also make additional changes to the legislation, for example introduce a provision on the creation of DEC in countries with a high number of additional OEPs or change the method of delivery of ballot papers, as explained in more detail later in the section.

Determination of places of opening additional election precincts and registering voters

Since expanded in-person voting is one of the most logistically complicated and expensive ways to provide for the exercise of the right to vote by out-of-country voters, Ukraine should decide in advance on the countries and places where additional election precincts will be established.

To that end, a “binding” approach can be chosen, when the CEC will be obliged to create an OEP if, according to the Ministry of Foreign Affairs, the number of voters officially registered in a certain area exceeds a preset limit, for example 500 persons.⁸⁷ This approach will ensure compliance with the principle of equal suffrage, in particular equal opportunities for voters staying in different countries.⁸⁸ However, in view of the traditionally low voter turnout abroad,⁸⁹ even during periods of surge in social and political activity, such approach can be unreasonably expensive. Moreover, there remain obstacles to the exercise of the right to vote by voters who are abroad but have not entered consular registration. They will be able to vote at the selected additional election precinct only if they submit an application for changing the electoral address or an application for temporary change of the voting place without changing the electoral address, and such applications, as already noted in this report, must be submitted to the diplomatic institution in person or online, directly to DMA SVR MFA, using a qualified electronic signature. A voter awareness campaign will require significant efforts, since voters who traditionally voted at a diplomatic institution will have to be informed that their voting place has been changed, and voters who are not on the consular register will have to be provided with a list of the established additional election precincts and an explanation of the mechanism for inclusion in the voter list.

In view of the aforementioned shortcomings of the binding approach, it seems that the decision to open an OEP should be based not only on the number of voters for whom it would be comfortable to vote at an OEP in a certain area, but also on the number of voters actually planning to participate in the electoral process. Such an approach can only be ensured in the event of transfer to the mechanism of active registration of voters abroad.

One of the options for ensuring such an approach may be to allow citizens staying abroad to submit, through the Voter’s Office, a statement of their intention to participate in the electoral process, also indicating their place of stay on the day of voting. In order to ensure that only voters who are allowed to make such a statement submit it, mechanisms for online verification of voter identity should be put in place. To facilitate the verification procedure, several verification options should be provided, in particular using a qualified electronic signature or the BankID service for logging in.

⁸⁷ According to the ECU, the average polling station is formed with the number of voters from 500 people.

⁸⁸ During the in-depth interviews during the technical assessment, Ukrainian stakeholders repeatedly emphasized the importance of observing the principle of equal suffrage.

⁸⁹ Research shows that introducing a more convenient way of voting for voters does not significantly affect turnout. For example: <https://www.rochester.edu/newscenter/should-secret-voting-be-mandatory-yes-say-political-scientists-459082/> This assertion was also confirmed by a technical assessment team meeting with INE Mexico which noted that the transition to online voting did not increase the turnout of foreign voters, although the number of voters who chose this particular method of voting among others increased.

Active registration must be carried out during the electoral process, last long enough for voters to submit such an application, and end a certain time before the beginning of the PECs' creation, in particular (by analogy with the nomination and registration of MP candidates in the Ukrainian parliamentary elections), registration can begin on the first day of the electoral process and end 40-45 days before the voting day.⁹⁰ The period after the completion of voter registration and before the start of nominating candidate members for the PECs should be used by the CEC to determine the locations of the additional election precincts and to notify the entities nominating the PEC member candidates about the number of additional election precincts in each country.

After the expiry of the voter registration period, the CEC must adopt a decision on the creation of additional election precincts. The CEC must determine in advance the criteria for creating an additional election precinct, in particular the size of the territory of the election precinct and the minimum number of applications from voters staying in that territory. At the same time, the MFA should quickly find (make an arrangement on free provision or rental with local authorities or diaspora organizations) premises for the PECs and the polling stations. The premises for the PECs and for voting must be determined before the establishment of the PECs; and their addresses must be published on the SVR website and also be specified in the Office of voters whose electoral address belongs to the territory of such PECs.⁹¹

Changing the voter registration method for deciding on the creation of additional election precincts will also require a large-scale voter education and awareness campaign, since Ukrainian citizens are accustomed to the passive registration mechanism and to high voter list quality that renders their personal intervention unnecessary.

Out-of-extraterritorial status and intergovernmental arrangements

The creation of election precincts outside diplomatic institutions will inevitably raise questions about their legal status from the viewpoint of the host country's legislation.

Out-of-country voting is organized in the territory of foreign states and requires compliance with the principle of state sovereignty. In order to avoid conflicts between the legal statuses of the subjects of legal relations, the world community has developed the concept of extraterritoriality – a special status of individuals and legal entities that do not fully or partially fall under the jurisdiction of the state where they actually stay, but must observe the legislation of the country of their citizenship or registration.⁹²

This special status is achieved through special immunities enjoyed by foreign states or international organizations and their official representatives. As a rule, extraterritoriality extends to foreign states or international organizations in general, as well as to their leaders, representative offices, troops during their movement, military vessels, mission premises and other property. These immunities often exempt the subjects concerned from host country's legal proceedings, police intervention and other coercive measures.

Extraterritorial status is granted to diplomatic institutions, which, pursuant to Article 22 of the Vienna Convention on Diplomatic Relations dated April 18, 1961, and Article 31 of the Vienna Convention on Consular Relations dated April 24, 1963, are inviolable. By establishing election precincts and premises (places) for voting on the basis of extraterritorial diplomatic institutions, the country minimizes security risks and is able to fully exercise its powers regarding the organization and conduct of elections in their territory.

Election precincts established outside diplomatic missions do not have the relevant status, which entails the emergence of civil or private law relations regarding the rental of premises or property, the purchase of

90 For example, the preliminary registration of voters in the Republic of Moldova is 45 days before the day of voting.

91 Options for improving voter information should also be considered, for example, by sending SMS to the mobile phone numbers specified in the registration application.

92 Extraterritoriality. International law. Britannica. Access mode: <https://www.britannica.com/topic/extraterritoriality>

property, the involvement of organizations in the performance of works. Moreover, there will be significant uncertainty regarding responsibility for ensuring the security of the electoral process, as well as jurisdiction in the case of consideration of offenses and resolution of election disputes.

As an example, the gathering of people wishing to vote and waiting for their turn in one place during the organization of out-of-country voting by their country may violate the legislation of the host country regarding:

- the sanitary-epidemiological well-being of the population (in terms of combating the spread of diseases like COVID-19, limiting the noise level);
- freedom of movement (impeding citizens' access to individual premises);
- traffic rules (the queue may extend beyond the sidewalk);
- peaceful gatherings (the holding of which in some countries requires notification or obtaining permission from authorized authorities);
- control and supervision measures (inspections by various state and municipal services);
- special legal regimes (for example, Hungary has introduced the legal state of emergency on its territory on May 25, 2022, in connection with the war in Ukraine; moreover, many countries can use special legal regimes to implement restrictive quarantine measures), etc.

The pandemic, violations of legislation, the politically tense situation in some countries, and high concentration of forced migrants can lead to various kinds of disputes (private law as well as public law ones legal), which will affect the operation of law enforcement and judicial bodies of the host country. Therefore, all these issues will require intergovernmental negotiations and conclusion of agreements. At the same time, the form in which agreements are concluded will be determined on an ad hoc basis depending on the legal system and the sociopolitical situation.

For example, the Republic of Moldova has started creating additional election precincts outside its diplomatic institutions in 2010. During an in-depth interview with the Central Election Commission of the Republic of Moldova and the Ministry of Foreign Affairs and European Integration of the Republic of Moldova, it appeared that the process of approving the conduct of voting outside diplomatic institutions is not formalized by any official intergovernmental agreements.

Once the Parliament has set the date for the next elections, the Ministry begins negotiations with the governments of other countries about the possibility of opening outside of diplomatic mission extraterritorial OEPs in their territory. The process of communication is performed through the exchange of diplomatic notes. First, the Ministry asks whether there is consent on the part of the out-of-country voters' host state, seeking a "yes" or "no" answer. In case of receiving a positive answer, the Ministry consults with the Central Election Commission to determine the number and locations of OEPs in the respective country and then again addresses that country asking for permission to open specific OEPs. For countries that Ukraine has in the past allowed to hold OCV in Ukraine, reciprocity could be invoked. This reciprocity may not extend to OEPs outside Ukrainian diplomatic missions, unless Ukraine had already consented to select host countries setting up OEPs on Ukrainian soil in the past (Hungary, Poland, Romania). Consultations with the local authorities of the host country are also conducted before the opening of the OEPs. Communication with host countries is implemented through diplomatic institutions. The duration of the approval process varies from country to country, but in general, the Ministry has had no problems with approval deadlines.

Some cities, such as New York, Paris and London, have special municipal departments dealing with foreign EMB requests to hold OCV, or even to set up EMBs, but medium size cities in Poland or Germany are not experienced in handling such requests, and might need significant lead-time to respond to requests, and even greater lead-time to fulfill requests.

Afghan and Iraqi refugee populations who were concentrated in specific areas of limited numbers of host countries and therefore easy to map and reach, but Ukrainian war refugees have been evenly distributed among municipalities across Poland and Germany for reasons of resource allocation. This means that expanded in-person OCV for Ukrainians in Poland and Germany, would almost have to replicate the polling center footprint of Polish and German national elections, in order to grant Ukrainians reasonable proximity to voting centers.

When adopting a decision to better ensure the forced migrants' right to vote by organizing additional election precincts, it should be taken into account that some countries are wary of the possibility of opening out-of-extraterritorial election OEPs in their territory. Thus, for example, the opening of additional OEPs by the Republic of Moldova in Germany was allowed only after a long political discussion; and in 2019, Canada rejected the request of the Republic of Moldova to open additional OEPs altogether.

Another example is the 2006 parliamentary elections in Bulgaria. During that electoral process, voting outside diplomatic missions was allowed by Turkey and some other countries, while Greece, North Macedonia and Germany did not allow it. Canada also prohibited voting outside diplomatic missions, preferring instead that Bulgarian "overseas" voters vote by mail.⁹³

Moreover, some countries, e.g. China, do not allow the opening of out-of-extraterritorial OEPs in their territory at all.

Countries that themselves do not grant any type of OCV to their own citizens, such as Malta, Korea, Albania, Montenegro, or Uruguay may not grant, or severely restrict expanded in-person OCV, since they do not want to be perceived to facilitate voting rights for alien residents, while denying those same rights to their own citizens residing abroad. This was for instance the case for the DRC, which refused to consent to other countries holding expanded in-person OCV in its territory, including CAR's war refugees living in camps, since it has until 2022 not granted OCV to its own citizens.

Ukraine's support for the fight against Russian aggression is unprecedented in the world, but the cited examples signal that if the Ukrainian authorities decide that out-of-embassy OEPs must be established, it will be necessary to publicly express the wish to open the respective OEPs long before the date of the elections and to reach preliminary agreements with the countries concerned before the electoral process begins, both at national and sub-national level in host-countries.

Creation of precinct election commissions

The creation of out-of-country election commissions is complicated by a number of different factors, as mentioned above in the report. The adoption of the decision to create additional election precincts will lead to an increase in the number of commissions and hence to the need to nominate more candidate members. Since the main burden of finding candidate members for the OEPs' PECs falls on the Ministry of Foreign Affairs and diplomatic institutions under its subordination, the legislators should provide for a decrease of the minimum number of members of the OEP's PECs to 8.

Since the selection of candidate members for the commissions appears to be a problem for the election management bodies of many states, countries use different methods for staffing the commissions. For example, more often than not employees of diplomatic institutions who are civil servants are appointed to the commissions, or it may even happen that commissioners residing in the country organizing the elections are sent to work abroad. The first approach raised concerns among the stakeholders interviewed during the technical assessment as to the use of administrative resources by the authorities during the elections, while

93 According to the data provided in the DRI article "Out-of-Country Voting: Principles and Practices." Access mode: <https://www.eods.eu/library/DRI.Out-of-Country%20Voting.%20Principles%20and%20Practices.pdf>. The article also notes that Canada has sometimes given permission to other countries to organize voting on its territory outside diplomatic institutions, such as during the aforementioned Iraqi elections and during the 2011 referendum in South Sudan.

the second is quite expensive, Ukraine has to rely on Ukrainians who live abroad and are on the consular register. Moreover, Ukraine could consider engaging “foreign Ukrainians,” i.e. persons of Ukrainian ethnic origin or natives of Ukraine who are citizens of another state or stateless persons, in the work of the OEPs’ PECs.⁹⁴

As the commissioners of the additional election precincts will most likely participate in the organization of voting for the first time, they must receive online training under the auspices of the CEC. The CEC should organize consultative and methodical support for the members of the OEPs’ PECs, taking into account the time zones of the additional election precincts. Since the members of the OEPs’ PECs may have not only have questions about procedural issues but also misunderstandings with local authorities, the CEC should closely cooperate with the MFA to resolve the respective problems. Those candidates may also have to be paid at the respective host country’s wage level in order to attract them to serve as election administrators. Ordinary poll workers in the Netherlands, for instance, are paid 300 eur per day.

Creation of expanded in-person OCV precincts and sub-committees is easy for countries that have permanent large and concentrated expat communities in certain dense urban areas, for instance the Dominican community in New York City, or the Cabo Verdean community in Lisbon or in Boston. Those communities maintain institutional memories, and respective home EMBs maintain expat poll worker rosters. Conversely, for recently displaced refugee communities, volunteers must still be identified and incentivized, and once recruited, they must still be trained.

Security at the polling station

Ballot papers (ballots for voting in the case of a referendum process) are election documents of strict accountability. According to Ukrainian legislation, ballot papers must be stored in the premises of the PEC, in a closed safe or a separate room which was sealed in the presence of more than half of the members of the respective commission. From the moment of delivery of the ballot papers to the polling station, they must be guarded around the clock by a police officer. At OEPs, ballot papers are guarded by the superiors of diplomatic institutions; however, not all diplomatic institutions of Ukraine have superiors. It is unlikely that Ukraine will be allowed to send police officers to OEPs created outside the diplomatic institutions, and it is equally unlikely that the governments of foreign countries will allow Ukrainian police officers to maintain law and order in their territory.

The civil servant in charge of OCV liaison in Paris, for instance, was informed during a meeting with the core team that only French police may secure OEP stations. Overall, cities like London, Brussels, Amsterdam, Madrid, New York, and Lisbon are well prepared to handle Ukrainian requests regarding the expansion of polling premises and will probably even be able to offer voting equipment, because a large number of other countries are also organizing voting there. Conversely, non-capital cities in Poland and Germany that host large numbers of Ukrainian refugees, but no Ukrainian diplomatic mission, are likely ill prepared, or at least unaccustomed to responding to requests for election accommodations, even if they have dedicated social service personnel focal points for Ukrainian refugees.

The experience of the Republic of Moldova shows that security measures during the out-of-country electoral process are mainly provided by the local police. Sometimes local authorities even provide special vehicles for transporting election documents. The election administrators of the Republic of Moldova also ask the PEC members to check the premises of the OEPs for the presence of any suspicious objects and factors that could jeopardize the voting process.

⁹⁴ An overseas Ukrainian is a person who is a citizen of another state or a person without citizenship, and also has Ukrainian ethnic origin or is of Ukrainian origin. Ukrainian ethnic origin is the belonging of a person or his ancestors to the Ukrainian nation and its recognition of Ukraine as the homeland of its ethnic origin. The status of Ukrainians abroad is regulated by the LU «On Ukrainians Abroad,” and the National Commission on Ukrainians Abroad, which is established under the Cabinet of Ministers of Ukraine, and is empowered to grant, refuse or terminate the relevant status.

As to the challenges of ensuring security at the OEPs, it was noted during an in-depth interview with responsible officials of the Republic of Moldova that the local police sometimes ignore the need to obtain the PEC's consent to enter the premises of the OEP. Moreover, voters staying in the country illegally are sometimes afraid to vote (or to present themselves at diplomatic missions to change their voting address) if they see representatives of the local police near the premises, so the officers are usually asked not to stand at the entrance.⁹⁵

In general, the Ministry of Foreign Affairs and European Integration of the Republic of Moldova did not have any particular problems with ensuring the security of the OEPs, except in 2016, when there were disturbances at several election precincts because of lack of ballot papers, but the incidents were stopped without serious consequences.

Since security incidents at election precincts are quite rare, and also taking into account the experience of the Republic of Moldova, Ukraine can store election documents at out-of-extraterritorial OEPs in a closed safe or room, which will be sealed by more than half of the commission members and remain under constant video surveillance. For higher security and confidence, CCTV footage should be available to the general public online. Ukraine should also address law enforcement bodies in advance through the Ministry of Foreign Affairs of the voters' host country with a request to ensure the security of the PEC premises and the voting premises during the organization of the elections. At the same time, Ukraine should provide simple and clear instructions for police officers regarding the main election procedures, as well as a list of rights and responsibilities of commission members, voters, official and international observers, the media, and also candidates and their representatives.

In terms of voter travel to and from extended in-person OCV, many host-countries already allow Ukrainian refugees to use their public transport systems for free, including intercity travel. For those host-countries that do not exempt Ukrainians from public transport fees outright, Ukraine could negotiate an exemption only on election-day. In Brazil, for instance, all public transport is free of charge on election-day.

Delivery of ballot papers

The delivery of election documents of strict accountability, primarily ballot papers, to election precincts established abroad is quite problematic for the election administrators. It requires significant planning efforts, since different delivery methods are used in parallel; is quite costly; and has to be carried out quickly. At the same time, there are fewer opportunities to guarantee the safety of such documentation compared to in-country delivery.

Currently, the electoral legislation provides for the centralized transfer of all ballot papers for voting in the OED from the CEC to the MFA, which then organizes direct delivery abroad. At the same time, the MFA has considerable discretion as to the method of delivery of ballot papers and other election documentation abroad. When creating additional election precincts, the legislators may avoid changing the relevant regulations, allowing the MFA to independently decide how to "distribute" the ballot papers to the OEPs' PECs. However, the question arises as to whether the Ministry of Foreign Affairs will have the ability to organize and coordinate the significantly complicated logistics of transporting election documentation.

Another option for the delivery of ballot papers to out-of-extraterritorial election precincts may be the delivery of all election documentation to the premises of the embassy or consulate in the respective country for the purpose of further organizing its delivery to the premises of the additional election precincts. This approach will facilitate delivery coordination for the MFA and create an intermediate stage for checking the integrity of

⁹⁵ A number of Turkish citizens, for instance, lost their Austrian nationality, because it was shown that they voted in Turkish OCV and thereby violated Austria's ban against dual citizenship. Austrian right-wing actors had somehow obtained a Turkish OCV voter list, and therefore claimed proof that those dual citizenship voters not only retained a dormant Turkish citizenship, but actively exercised rights under their Turkish citizenship.

the ballot papers' packaging and the number of packages with ballot papers. However, the transformation of diplomatic institutions into "hubs" for the further delivery of election documents inside the country will require the creation of district election commissions on their basis and/or the involvement of diplomatic staff.

This begs the question of whether Ukraine's embassies have the warehouse space to store polling material for dozens, if not hundreds of polling stations in countries such as Poland and Germany. Considering that several million Ukrainians are now in Poland, tens or hundreds of polling stations would have to be set up and supplied to accommodate the size of the Ukrainian OCV electorate.⁹⁶ Brazil's diplomatic missions, for instance, were overwhelmed in October 2022 by the doubling of the Brazilian OCV electorate over the past 10 years to now 697,000 voters worldwide, of whom less than half turned out. Predicting turnout, however, is especially difficult with refugees, as opposed to permanent expats.

The creation of district commissions will reduce the influence of the "administrative resource" on the electoral process abroad and the burden on the diplomatic staff. Moreover, the respective commissions can also prepare for the establishment of the OECs' PECs, in particular by looking for suitable premises, informing voters and performing other functions. However, this will imply the need to place two commissions at the same time – the DEC and the OEP's PEC – in one diplomatic institution, and so separate premises will be required. And since the selection of member candidates for out-of-country election commissions is quite problematic and the level of training of the nominated candidates is, as a rule, not high, searching for people wishing to work for two months on extremely difficult and responsible tasks for a very low salary can be a significant challenge for the entities nominating members to the OEPs' PECs.

The involvement of representatives of diplomatic institutions in the transfer process, on the one hand, eliminates the risks associated with the impossibility of having enough members of out-of-country election commissions abroad, but on the other hand, creates an additional workload which is not typical for diplomatic staff. It could be said that such an approach increases the risk of using administrative resource during the organization of elections abroad; however, based on the results of analyzing the conducted interviews, it can be stated that diplomatic employees are de facto deeply involved in the current process of organizing out-of-country voting – from search and selection of member candidates for the OEPs' PECs and transfer of voter applications to DMA SVR MFA to provision of various types of support to commissioners performing their duties – and in the past this did not lead to abuses on the part of the authorities.

It should be emphasized that the creation of additional election precincts will increase the cost of delivery of election documents. And if the delivery is poorly planned, this can lead to a significant increase in the expenses. Some additional election precincts may be established at the border with other countries; delivery of ballot papers through the capital of the host country may not be a rational route.

Another possible approach consists in switching from the delivery of ballot papers to the delivery of special security stamps that can be affixed to ballot papers printed on plain paper at the OEP location. The corresponding stamps are more compact and so their delivery will not require the use of large ground vehicles. The insignificant weight of a batch of stamps will allow them to be transported by captain mail. The cost of the stamps in question will be significantly lower than the cost of the ballot papers. However, such an approach would also require "reforming" the design of the ballot paper in order to place all the necessary information on A4-size paper. In view of the traditionally large number of Ukrainian presidential candidates and political parties competing in parliamentary elections, the approach involving the use of a stamp and A4-size paper is only possible if the numbers of candidates or political parties are printed in such a way that voters can encircle them to express their will.⁹⁷

⁹⁶ Depending on the geographical distribution of Ukrainian voters.

⁹⁷ If appropriate legislative changes are made, this approach could also provide an opportunity for a voter abroad to vote for a specific candidate from the regional list of a political party by entering the candidate's surname, which is currently not provided for by the ECU. However, in order to count voters' votes, it will be necessary to create counting centers in the host countries or transfer ballots to a counting center in Ukraine.

The electoral system will be critical to how difficult it will be to deliver ballots to additional polling stations. Delivering all the different ballot models to all the thousands of additional polling stations is a major challenge, so Afghanistan, Iraq and Sierra Leone temporarily changed their electoral system to a closed-list proportional system in post-war elections. However, subject to the use of the proportional electoral system with open lists, currently provided for by the ECU, Ukrainian forced migrants may seek to vote in their regional constituencies, since they left the country forcibly. What was acceptable to permanent expatriate voters should not be considered satisfactory to temporary forced refugees who intend to return to their native lands.

Cost

According to the organizers of expanded in-person voting for Afghanistan and Iraq 15 years ago, the cost of this method depends on many factors, including the electoral system and whether it will grant the right to vote in the district. For example, the cost of foreign voting during the 2005 Iraqi elections was \$72 USD per voter.⁹⁸ The cost for Ukraine can be calculated only after the operational plan of the election campaign is created, but on average it can be about 20 dollars per vote.

Conclusions

Expanded in-person voting has the same advantages as in-person voting exclusively in diplomatic institutions – the voting procedure is transparent, highly visible in the media and understandable for all electoral subjects. This method allows more voters abroad to exercise their right to vote, removing obstacles related to the cost and duration of the trip to the election precinct in a diplomatic institution. Changing the method of voting from in-person to expanded in-person voting does not require making changes to the Constitution of Ukraine – changes will be only made to the ECU, the LU “On the State Register of Voters” and the CEC’s bylaws.

In the expert literature, one can encounter the opinion that “the organization of out-of-country voting outside the diplomatic institutions can be especially relevant for elections in post-conflict countries or during transitional periods.”⁹⁹ This voting method was used in the first post-war legislative elections in Iraq in 2005 or in Afghanistan in 2004. However, elsewhere in the world there are examples of the use of other methods of voting in post-war conditions, for example postal voting in Bosnia and Herzegovina after the conclusion of the Dayton Agreements in 1995. And not all post-conflict countries expand in-person OCV, Georgia, for instance, did not, even in 2008.

Expanded in-person voting requires advance negotiations with the governments of other countries down to local level. As a result of such negotiations, not all countries can allow the organization of out-of-extraterritorial election precincts in their territory, which endangers the implementation of the principle of equal franchise. In addition, there is considerable uncertainty regarding enforcement – e.g. which country’s law should be applied in the event of an offense at the election precinct.

Expanded in-person voting increases the problem of out-of-country election commissions’ staffing and makes the electoral process cost significantly higher due to the need to transport ballot papers along complicated and long-distance routes; the salary fund of the election commission members is increased; sometimes there is a need to rent premises for voting and there may also be other expenses. Ensuring security during the transportation of ballot papers to additional election precincts and their on-site storage remain an open question. Also, significant efforts are needed to inform voters abroad about the location of the election precincts to which they were “assigned.”

The perhaps greatest complication of expanded in-person OCV is mapping and attributing a highly mobile Ukrainian refugee population to ad-hoc polling precincts. The case study of Bulgaria’s expanded in-person

98 Data from ACE Project. URL: https://aceproject.org/ace-es/focus/fo_core/cre/cry_iq

99 “Out-of-Country Voting: Principles and Practices,” Democracy Reporting International. Access mode: <https://www.eods.eu/library/DRI.Out-of-Country%20Voting.%20Principles%20and%20Practices.pdf>

OCV, and the epic litigation and negative publicity it attracted, illustrates the reputational risks this option comports, especially in light of its all but certain OSCE observation. The fact that the Russian Federation chose setting up improvised expanded in-person polling stations in the occupied Ukrainian Oblasts, with ballot boxes resembling those used by the Ukrainian CEC, all of which was broadcast on international cable news and social networks, could lead to misperceptions of any future Ukrainian process. Any administrative errors or failure could also unnecessarily distract from the perceived Ukrainian democratic readiness to join the European Union.

If the decision is made to change the voting method to expanded in-person voting, the CEC and the MFA should start preparing for the electoral process in advance and also ponder on the ways to reduce the cost of the electoral process (for example by abandoning ballot papers and switching to the use of security stamps). Moreover, the CEC should organize a large-scale campaign to inform voters about the location of the additional election precincts.

DRAFT

18. Postal Voting Abroad

Postal voting delivers and collects ballot papers via a postal operator. Many countries use this method when organizing out-of-country voting and a growing number of countries even allow either all, or at least restricted segments of voters to vote by mail in-country (active duty military, IDPs, seniors, or persons with disabilities, for instance). At the same time, the procedures related to mail voting are significantly different from country to country, and the rules for forwarding international correspondence are subject to the norms of the World Postal Convention.

Out-of-country postal voting may assign each voter to his/her district in Ukraine and provide each voter with the respective ballot paper of his/her home district. Postal voting also may ease voting access for persons with disabilities and makes the electoral process for all out-of-country voters more convenient and affordable in the host country, especially for those Ukrainians who do not reside near a Ukrainian diplomatic mission. The introduction of postal voting might,¹⁰⁰ however, require amendments to the Constitution (to allow early voting), to the electoral legislation, and, most likely, to the just adopted LU “On Postal Communication.”¹⁰¹

Postal voting is difficult for administration because it requires extremely well-planned coordination between EMBs, MFAs, diplomatic missions and postal services in each country. Unlike expanded in-person voting, the introduction of postal voting does not require negotiation and consent of the country, or establishes logistics cooperation with municipalities of other countries. The cost of postal voting varies from the level of the selected postal service and from the form of sending correspondence (simple or recommended dispatch). Since not all Ukrainian foreign voters trust the post office, alternative voting options should be provided, in particular, personal voting in diplomatic missions.

To successfully implement postal voting, it is necessary to analyze all available modalities and choose those that will best meet Ukrainian needs and best fit the Ukrainian current context, in particular:

- which institution will be tasked with sending outbound ballot packs (the CEC, an ad-hoc election commission at each diplomatic mission, or the diplomatic institution itself);
- what size and weight will ballot packs have (which will bear significant impact on production and postage cost);
- which body or institution will receive the completed inbound ballot packs, unseal outer and inner envelopes ensuring the secrecy of the vote, and count the votes (the CEC, a specially created counting center at the CEC, the election commissions at diplomatic missions, or an out-of-country counting center);
- how and where election materials will be printed (in Ukraine or abroad, who will pack the election materials, etc.);
- whether voters will be given the option to have their ballots delivered by email or download them in PDF format, and whether this modality will be offered as a general option, or only in case mail delivery fails;
- which class of mail service will be chosen (ordinary priority mail or registered letter; in the latter case, will the registered mail requirement apply only to the outbound, or also to returning inbound election mail from the voter as well, which requires the voter to visit a post office in the host country to register and post the ballot return, and could thereby cause a drop off in turnout and/or delays in returning ballots);

¹⁰⁰ The Constitutional Court of Ukraine, for example, can decide that postal voting does not violate Article 77 of the Code of Civil Procedure.

¹⁰¹ This Law contains no provisions on the organization of postal voting; however, it neither contains a prohibition.

- what will be the cost of postage and how will the pre-payment for the services be made (will it be done on the basis of direct contracts with foreign countries' postal operators or through the JSC "Ukrposhta," etc.);
- how can the CEC ensure that voters can track their outbound and inbound ballot packs in the mail stream from beginning-to-end, as well as the timely receipt and validation of their ballots by the CEC;
- how can the CEC notify voters who made clerical ballot errors, in order to enable them to cure those errors that would otherwise invalidate the respective postal vote;
- to what extent should electoral time frames be adjusted, i.e. what should be the lead time for dispatching ballot packs to voters, and what is the ballot validity cutoff date for returning inbound ballots? Will actual receipt or postmark establish the cutoff? Are all involved postal services consistently applying postmarks? Will the cutoff date be the day before election-day, election-day itself, or a day fixed after election-day to maximize the number of valid votes cast—which potentially protracts results announcement;
- what is the best ballot and inner/outer envelope design and the most coherent instructions to enable the voter to correctly complete the process;
- since Ukrainians will vote by mail for the first time, and since they will be unfamiliar with the postal system and the location of post offices in their host country, what will be the best choice of media strategy used for voter education to inform Ukrainians abroad about the timeframes and procedures of postal voting;
- how will Ukrainians who change their out-of-country place of residence between the time of voter registration and the time of ballot mail dispatch/receipt be able to notify the CEC of their address change before election mail labels are printed;
- how will election disputes be resolved overseas and how will the electoral process be observed;
- what recourse will registered voters have when they do not receive their postal ballot;
- what is the role and degree of access of party agents and citizen observers, especially in terms of transparency of the mail stream and delivery statistics? Can they observe inside mail sorting facilities?

Sender of the election materials package

For designing the postal voting system, it is important to determine whether the package with the election materials should be sent to the voter from Ukraine or directly from the voter's host country.

The first option – sending from Ukraine – implies the involvement of a postal service operator in Ukraine; it can be either a state company or a private contractor. For example, the EMB of Bosnia and Herzegovina organizes a tender for the purchase of services in which different postal operators participate and which can be won by different postal operators based on the best price offered. In Ukraine, however, the postal services of the state operator are cheaper than the services of private postal companies – and private operators are more focused on the delivery of packages and parcels than letters. The JSC "Ukrposhta" has experience in delivering ballot papers to foreign voters in Ukraine;¹⁰² moreover, it delivers pensions and official correspondence (for example, a claim can be submitted to a court by the JSC "Ukrposhta"'s registered or declared value mail). In view of the above, if a decision is made that ballot papers be sent to out-of-country voters from Ukraine, it is deemed appropriate to engage a state operator in that process.

If the ballot papers are to be sent by mail, the CEC must provide for the printing of ballot papers and the design and production of envelopes/packages with election documentation. The outer envelope should contain the

¹⁰² According to what was said by the JSC "Ukrposhta" representatives at the trilateral meeting of the main team with the CEC and the JSC "Ukrposhta" within the framework of the technical assessment.

voter's postal address and preferably the voter's phone number. Ideally, outer envelopes should be barcoded and visibly colored to facilitate routing, identification and prioritization of voting correspondence in the mail stream. Outbound election mail must be presorted by country and ZIP codes into special containers – 15-20 kg bags or boxes¹⁰³ and transferred to the mail exchange point (place for international mail exchange) of the JSC "Ukrposhta." Thus, the election documentation will be delivered to the JSC "Ukrposhta" in packaged form immediately before overseas flights.

Before being sent, postal correspondence is to be subjected to X-ray customs control. After being transported by air, the election correspondence will be delivered to the foreign countries' mail exchange points and then sorted in the sorting center and transferred to a post office from which it will eventually reach the addressee by last-mile delivery. Until February 24, 2022, mail was exported from Ukraine by 50 flights per day. Because of martial law and closing of the Ukrainian air space, mail is currently exported by truck to European countries for further transportation by air if necessary.

The JSC "Ukrposhta" is a member of the Universal Postal Union along with 192 other national operators. The members of the Union notify each other in an official circular about postal voting and provide examples of envelopes with ballot papers.

The timeframes for delivery out of Ukraine vary depending on the territorial remoteness and the level of quality of postal services in the country concerned. For example, according to the JSC "Ukrposhta," in September and October 2022 the timeframes for the delivery of letters and parcels (from reception at the post office to processing¹⁰⁴ in the destination country, including the customs formalities) were as follows:

Destination country	Up to 14 days	14 -21 days	21-28 days	More than 28 days
Poland	96%	3%	-	1%
Germany	87%	11%	-	2%
Czech Republic	84%	15%	-	1%
Italy	15%	73%	9%	3%
Canada	16%	46%	23%	15%
United States of America	19%	56%	22%	3%

Therefore, sending ballot papers by mail from Ukraine will require changes to the timeframes for the electoral process, in particular for the registration of candidates and political parties, as well as the compilation of a voter list for the postal voting. One of the options for mitigating the impact of the duration of mail delivery on the electoral process timeframes is to send protected voting stamps that the voters will glue to the ballot papers they will print from the EMB website. The respective security element will be sent to voters in advance along with counterfeit-proof bar-coded outer, and blank inner envelopes. The ballot paper itself will be posted subsequently on the website for download and independent printing, after registration of candidates or political parties. However, not all voters abroad have access to a printer; and the very need to perform additional actions to express their will can demotivate voters. New Zealand, for instance, allows voters to print the ballot paper from the Internet once they have registered for voting. It is worth noting that New Zealand does not require ballot security features and the completed ballot paper can be returned in a variety of ways, from fax and mail to personal delivery of the ballot paper to the consular institution. Unique barcoding on envelopes ensures that no voter can cast more than one valid vote, which renders ballot security features redundant.

¹⁰³ Such preparation will provide for the process of bagging dispatch items in 48-72 hours even if there are 2-3 million letters to be handled. For information: a dispatch item is a bag or bags with lots of written correspondence, periodicals, mail, small packages, items with declared value, parcels and empty bags (or a group of parcels not packed in a postal container) sent simultaneously from the point of international postal exchange of one country to the corresponding foreign point of international postal exchange of another country.

¹⁰⁴ The delivery timeframes after the processing in the host country depend on the postal operator of the other country.

In general, the JSC “Ukrposhta” expressed interest in organizing postal voting for out-of-country voters; and it also noted that the level of loss of registered letters and compensation for the lost mail amounts only to 0.23% of the total flow of all export shipments. It should be noted, however, that the definition of “loss” varies: Postal services consider a ballot lost only if it disappears without trace, whereas for voters, candidates and EMBs, a piece of election mail is “lost” if it is delivered or returned after the ballot validity cut-off date. It also should be kept in mind that social media complaints of 1-2 percent of OCV voters, who have not received their ballot pack after 28 days, can easily go viral on social media. The percentage of lost ballots should be regulated by law, which gives grounds for annulment of voting results and holding of re-elections.

The second option to dispatch ballots to voters would send ballot papers from inside the host country. This method provides for the faster delivery of correspondence within the country, but, contrary to what may seem at first glance, it fails to “gain time” for the electoral process, since the ballot papers must still first be shipped to the host country, unless the country allows its diplomatic offices to order the printing of the ballot papers on the spot. The latter is unlikely for a number of obvious reasons, from increased atypical logistical burden on the diplomatic staff to the potential receipt of ballot papers printed in different ways.

Sending ballot papers from diplomatic missions is more appropriate in the event of low quality of functioning and/or low confidence in Ukrainian postal operator. In order to send an envelope with a ballot paper from a diplomatic institution, it will be necessary to:

- engage representatives of diplomatic institutions in that process;
- establish election commissions at diplomatic institutions in advance, entrusting them with the respective responsibility;
- allow voters to download entire ballot packs including inner and outer envelopes from the CEC website.¹⁰⁵

If the task of sending the ballot papers is assigned to the election commissions at diplomatic missions, the timeframes of formation of such commissions should be revised, which will entail a number of other issues related to the work of election commissions:

- What will be the responsibilities of the election commission members in the period after the mailing of the ballot papers;
- will this commission count the votes;
- what will be the type of the commission – district or precinct, or will a new type of election commission in the OED be legally established;
- what will be the remuneration of the election commission members, considering that they have been working for such a long period of time;
- will the election commission issue a new ballot instead of a damaged or lost document;
- what powers will the election commission have regarding the review of the complaint;
- other questions might be con.

Regardless of who will be responsible for sending the ballot papers – the diplomatic institution or the election commission at the diplomatic institution, the issue of paying for communication services will come up.

¹⁰⁵ For example, New York State does this for example, it requires voters to print 4-5 pages and fold and scotch-tape envelopes themselves.

Receiver of completed ballot paper

Ukraine will also have to decide which body or institution will be responsible for receiving the completed, returning inbound ballot papers:¹⁰⁶

- the CEC and/or specially created CEC counting center;
- the diplomatic mission in the voter's host country;
- out-of-country counting center(s).

Completed ballots can be returned directly to the election administration body in the country organizing the election. The timeframes for importing the postal items with the ballot papers will vary from country to country. According to the JSC "Ukrposhta," ballot papers can be prioritized and delivered from countries such as Poland and Germany in about a week (provided an international reply envelope is used), but it can take up to a month for correspondence from distant countries, e.g. New Zealand, to reach Ukraine, as several flights will have to be used and the correspondence will go through several post and customs offices.

It should be noted that the CEC does not have the authority to count votes and (most likely) the ability to count a large number of votes.¹⁰⁷ In this connection, it seems that the sending of completed ballots to the CEC will only be possible if an OCV counting center is established at the Commission. Such an approach is currently used by Bosnia and Herzegovina to process postal ballot papers. Germany uses special postal ballot counting centers at the DEC level, but those count in-country postal absentee votes, and not OCV postal ballots.

For faster delivery of the completed ballot papers to the body responsible for the counting, the approach whereby the correspondence is sent to the address of a diplomatic mission can be chosen. Ukraine's embassies serve 109 countries. For the purposes of ballot paper delivery, the embassy's address must be indicated on the return envelope. The respective letters must be collected and handed over¹⁰⁸ to the election commission which will function at the embassy or consulate. Legislating that return ballots must also be sent by registered mail could slow down and complicate this process, since diplomatic missions would have to sign for each individual return ballot received.

Sending filled out ballot papers makes it possible to count the votes directly in the host country. In the context of post-war elections – the number of ballots in Poland, Germany or the Czech Republic may be so large that continuous counting is impossible. To make this process faster high-speed ballot scanners could be used for counting (like in the USA), but folded postal ballots must first be smoothed by hand for scanning.

Furthermore, the diplomatic institution will have to provide for long-term storage of election documentation with strict accountability, because letters will not arrive simultaneously. Diplomatic institutions have different levels of ability to participate in the organization of out-of-country voting: in countries with a large Ukrainian diaspora population, embassies have a large staff, comfortable premises and superintendents; in other cases, these are small premises with a small number of employees and no guards.

There is also a third option for the recipient, namely, an out-of-country counting center or even several such institutions. The benefits of a counting center include noninterference of representatives of the executive branch of government in the counting of votes, involvement of a smaller number of staff, well-trained personnel, no need to use postal services within the country organizing the elections, faster counting, the possibility of "complex" counting (ballot papers from different districts), the possibility of organizing

¹⁰⁶ Any mailing option can be combined with any reception option depending on the country's needs.

¹⁰⁷ Even if not all voters register for out-of-country voting to vote abroad, the counting of 35,000 votes (in accordance with the previous average turnout for the OED) is a significant challenge for a single institution.

¹⁰⁸ Another question to be considered is: When should the correspondence be transferred to the EMB – immediately after its reception or in a centralized manner, or after the end of the deadline for receiving ballot papers?

independent observation of the counting of votes, and simpler logistics of delivery of ballot papers and other documentation to archives in Ukraine. The main challenge associated with this approach will be the need to agree on the creation of a counting center in the territory of another sovereign state and the safe and timely delivery of ballot papers to the center by the postal services of host countries and of the country where the center is located.

Other states providing for postal voting can combine different ballot paper receiving methods. Australia, Canada and New Zealand provide voters with the opportunity to send their ballot papers either directly to the local constituency in their country or to diplomatic missions and consulates abroad. In particular, Australian voters can send their completed postal ballot papers to the nearest diplomatic or consular institution or even deliver them there in person. In that connection, the Australian Electoral Commission organizes a service for the priority return of such ballot papers to Australia. Alternatively, a voter can send the ballot paper directly to the Australian Electoral Commission in Australia via the respective foreign postal service.

- Can voters drop their completed postal ballots at Ukrainian diplomatic missions in-person, and if so, will diplomatic missions install specially designed and secured ballot drop boxes that can be accessed outside of office hours?
- Can only the voter him/herself drop the ballot, or can political parties “collect” completed postal ballots from voters and deliver them to Ukrainian diplomatic missions in bulk?
- Can Ukrainian refugees cast their OCV postal ballot in person on Ukrainian territory, if they return by election-day?

There are a few other questions about receiving completed ballots that are important to the design of a postal voting system that need to be answered before implementing this method of voting:

- What level of control and access will political parties and candidate representatives, media and observers have over the process, including how political parties and candidate representatives and observers can ensure that legal ballot cut-off dates are met and that late ballots are not considered valid?
- Do all diplomatic missions have working and archival spaces to transparently process up to several hundred thousand votes?
- Can voters drop off their completed ballots in person at Ukrainian diplomatic offices, and if so, will diplomatic missions install specially designed and secure ballot boxes that can be accessed outside of business hours?
- Can Ukrainian foreign voters cast their OCV postal ballot in person on Ukrainian territory, if they return by election-day?
- While mentioned complexities are inherent to any of the choices, they can be mitigated with necessary legislation and proper planning. Also, decision-making should be based on a thorough risk analysis of each of the option and mitigation strategies should be put in place in case of risks materializes, such as political instability in a host country.

Timeframe for early voting

Postal voting cannot be carried out within one day. It takes time both to send the ballot papers to the addressee, and it takes the mail system time to return ballots to the institution that will count the votes. As a rule, it takes 1-2 weeks to export mail from Ukraine to other countries, with small deviations in the amount of correspondence delivered within a month. Import of mail, in case of its prioritization, from nearby countries with good postal service can be carried out in 1-2 weeks, but delivery from remote areas will take up to one month.

Delivery within the host country may be a little faster. It is hard to specify any concrete timeframes, but here are a couple of examples: Italian consular institutions send election materials to voters no later than 18 days before the voting date.¹⁰⁹ Polish consuls send election packages to voters no later than 6 days before the day of voting.

One important question is when the ballot papers should be received in order to be counted: before the day of voting, no later than the day of voting, or also within a certain period after the day of voting. Countries may require that ballot papers be sent in advance of the voting day. In Italy, completed ballot papers are to be sent by post no later than 10 days before the Election Day. In Thailand, completed ballot papers must be received by diplomatic missions and consulates at least 6 days before the Election Day. In the case of Finland, a ballot paper must reach the EMB not later than 19:00 on the Friday before the Election Day (the election takes place on Sunday). “Mail-in votes” of Mexican out-of-country voters must reach the election administration body at least 24 hours before the Election Day. On the other hand, in Australia ballot papers are valid and counted if received within 13 days of the Election Day. Some states in the United States count mail-in ballot papers received within 15 days of the Election Day, but they must be postmarked before Election Day.

Also, it will be necessary to regulate the issue of the timeframe for the reception of ballot papers by the voters, in particular the determination of the “deadline” after which the voter should “sound the alarm bell” and contact the EMB asking for a duplicate of the ballot paper. For example, Italian citizens living abroad and voting by mail have the right to contact the head of the consular institution if they have not received election materials 14 days before the voting date. The consul is to put a mark in the appropriate register and issue a new electoral certificate with a special seal and a new ballot paper. The Ukrainian legislator will need to determine whether the postmark date or the receipt date govern ballot validity. It should be noted that not all postal services reliably postmark all mail.

Form and cost of mailing

Ballot papers can be delivered by ordinary or registered mail. The former does not provide for the tracking and identification of the addressee upon receipt, while the latter involves a tracking number which is received after the presentation of a particular identification document. Some countries, such as Germany, offer tracking barcodes also for non-registered mail. Registering mail is required by law, for instance in Austria, but not in Germany. The list of acceptable ID documents to sign for registered mail is wider than the list of documents giving the right to receive a ballot paper abroad and includes for example a driver’s license and a permanent residence permit. The list may vary from country to country.

Registered mail is delivered exclusively personally to the addressee. If the addressee is not present at the specified address, a printed message will be left – or an SMS message (this method is used more frequently) notifying the addressee that the letter is at the post office. Obviously, such a message will be in the language of the host country. In some countries, a second or third delivery attempt will be made. The recommended mail will remain at the post office for 30 days. If the addressee does not pick up the correspondence, it must be returned to the country of origin. Thus, registered mail enables the identification of the voter before the delivery of the ballot paper.

Return delivery can be at the expense of the voter (for example in Slovakia) or be prepaid. According to the recommendation of the JSC “Ukrposhta,” if prepaid return delivery is organized, an international commercial reply coupon should be used, which also prioritizes the correspondence concerned for other countries.¹¹⁰ Moreover, it is also possible to send the ballot paper with voter identification at the post office, which makes it impossible for the ballot paper to be sent by anyone other than the voter. However, this form of sending is

¹⁰⁹ Italian voters during the last parliamentary election often complained on social media that they did not receive their postal ballots on time or never received them at all.

¹¹⁰ For more information on the international commercial return coupon, see <https://www.ukrposhta.ua/ua/news/57539-mizhnarodnij-kupon-dlja-vidpovidi-zrazka-abidzhan>.

more complicated both for the post office and the voter. It also does not guarantee that the vote will not be “sold” in a controlled environment and that the secrecy of the voting will be respected. At the same time, such a problem may be more acute for forced migrants living in a cluster or in refugee camps rather than individually.

It should be noted that most of the countries using postal voting send ballot papers by regular mail; only a few, in particular Austria and the already mentioned Bosnia and Herzegovina, do so by registered mail. First of all, this results from the high cost of this form of mailing. In the case of Bosnia and Herzegovina, it is 6 euros per one package of election materials.¹¹¹ According to a preliminary estimate (which may vary depending on the volume, package weight, terms of reference, etc.), the cost of one-way delivery by air of a registered letter weighing up to 250 g will be 7.3 USD.

Format of ballot paper and other election documents

As a rule, an envelope with election documents contains:

- a ballot paper;
- an inner envelope for secret voting (without the voter’s identification data); and
- an outer envelope to be sent to the address of the commission / counting institution with a unique barcode for marking the voter off the voter list, and another barcode for tracking the return ballot in the mail stream.¹¹²

Optionally, the package may include instructions on the voting procedure, a brochure with the candidates or other electoral materials. The cost of delivery will be affected by the aggregate weight and size of such mail; however, the active voter registration mechanism should reduce the number of printed ballot papers to the actually needed number.

The filled ballot is first placed in an envelope for a secret ballot (an unspecified envelope), and then an envelope for secret ballot and other election materials, such as a copy of the identity document is placed in a larger reverse delivery envelope. The reverse shipping envelope contains the voter name and the address of the EMB.

The specifics of organizing postal voting will affect the format of the ballot paper. Obviously, Ukraine will not be able to send one-meter-long ballot papers printed on thick special paper in the election materials package. The ballot papers should have a smaller format and a lower weight. Moreover, to simplify logistics and reduce delivery costs during the presidential elections, Ukraine can simultaneously send two ballot papers to voters abroad – one for the first round, with the names of all the candidates, and another, for entering (write-in) the candidate’s name in the event of a second round of voting, as Austria does. Austria also includes both envelopes for the runoff.

The possibility to empower voters to vote in their respective constituencies in the country of origin is an important benefit of postal voting. The printing of different ballot papers can be organized by providing the manufacturing company with layouts of “regional ballot papers” and voter lists, divided in accordance with these regions, for each foreign country. Obviously, the same company should also print the envelopes with voters’ addresses, so that all the election documentation will be packed into those envelopes according to the provided voter lists. All this indicates that ordering postal ballot papers should be an extremely well-thought-out process.

¹¹¹ In total, about 400,000 euros are spent on postal voting in one election in Bosnia and Herzegovina (with the return mailing of the completed ballot paper to the address of the counting center being paid for by the voters).

¹¹² Voters should be able to track their return ballots online for mail status, and EMB receipt and validation status. The mail tracking barcode must be positioned to interact with the respective host-country postal service’s sorting machine barcode readers. The outer envelope may also include a field for the voter PIN and/or a field for a voter signature, if required attesting that the voter has completed the ballot in secrecy.

Observation

The common challenges to early in-person voting and postal voting are the need to ensure observation over a long period of time, collect representative first-hand data, and record violations at all stages of the electoral process. Countries try to ensure the possibility of surveillance in a variety of ways. For example, in the United States, the opening and counting of postal votes is recorded and broadcast online.

In the event of the introduction of postal voting, there will be no direct observation of the expression of voters' will; but it is possible to observe other processes, such as the maintenance of registers of out-of-country voters, the forming of letters sent to voters, the accompanying documents to the ballot papers being sent, the verification of their authenticity, and the counting of votes. However, these processes may occur over a period of time that may be difficult to cover by an observation campaign. Also important for postal voting is the choice of postal operator, since public as well as private operators can be accused of influencing the elections and so the election results may be challenged. Election observers have encountered lack of access to postal facilities in the past. When contracting a postal provider, the CEC should stipulate access for accredited observers (and for CEC staff) to postal sorting and processing facilities in its contract.

In 2016, the Austrian Constitutional Court annulled and ordered a rerun of the second round of the presidential election.¹¹³ The frontrunner had won the runoff by 33,000 votes, but the court found that over 70,000 postal votes were counted in absence of party agents. Since those postal votes had already been commingled with votes cast in person, the entire election – and not only postal voting – had to be annulled and repeated. For the rerun, the glue of outer envelopes came undone, so that fresh envelopes had to be printed and mailed to voters. Nearly half of registered Austrian voters now vote by mail, also in-country. Austria (and New Zealand) also allow voters to drop their postal ballot at any polling station across the national territory on election-day. Each of such ballots must then be repatriated to the respective home-DEC where the voter is registered, which causes exorbitant cost and delay in results announcement in both countries.

Parliament and the CEC will need to consider developing a postal voting system, taking into account the ability of party and candidate representatives and observers to monitor the process.

Mailing safety

In connection with ballot paper mailing, the stakeholders will raise the issue of ensuring the safety of election documentation against forgery, theft, intentional or unintentional destruction. Although mail safety is guaranteed by the law and any tampering with mail is a criminal offense, delivery by mail will be much more decentralized and require the involvement of more people than are currently involved in the MFA's delivery of election documentation abroad.

The aspects to be evaluated also include the physical security of the postal communication terminals. Recalling the destruction by a Russian missile of the "Nova Poshta" LLC terminal in Mykolaiv oblast, it is clear that terminals with election materials can also become a target even after the cessation of hostilities.

After cases of intimidation of employees of diplomatic institutions of Ukraine abroad with letters containing explosives and with animal eyes cut out,¹¹⁴ diplomats can reasonably protest against sending them significant volumes of election correspondence that may contain similar messages.

Election disputes and liability for violating election legislation

Election disputes are a special challenge during the organization of out-of-country voting. As regards the organization of postal voting, the resolution of election disputes is extremely difficult – the issue of jurisdiction

¹¹³ More about the case: https://www.vfgh.gv.at/downloads/VfGH_W_I_6-2016_EN.pdf

¹¹⁴ For example: <https://tsn.ua/svit/posolstvo-ukrayini-v-madridi-znovu-otochila-policiya-scho-vidomo-2214886.html>

is unclear: For example, what should be done if a ballot paper was lost by the postal operator of a third country? Or how can individuals be prosecuted for attempting to bribe voters abroad? This issue requires a separate study.

Conclusions

Countries efficiently use postal voting to ensure the expression of their citizens' will both within the state and abroad.¹¹⁵ It is important to understand that, for the most part, postal voting was introduced in a gradual manner. Postal voting expands voters' capacity by making voting more convenient. It allows providing out-of-country voters with the right to vote in the constituencies to which they are assigned within their country, which is important in the conditions of post-war elections. Moreover, in the event of postal voting a paper trail is kept, which enables independent stakeholders to verify the election results through recounts and audits.

At the same time, postal voting requires significant coordination efforts among different state bodies – the CEC, the MFA, the diplomatic institutions concerned – and the postal operator(s) involved. The introduction of postal voting will also require fundamental changes to the entire electoral legislation as well as likely to the Constitution to adjust the voting timeframes. The mail delivery timeframes significantly affect the overall electoral process timeframes – especially final results announcement deadlines. Postal voting is possible after the implementation of the mechanism of active registration abroad, since the EMB will need to know the current addresses and telephone numbers of out-of-country voters. After registration for postal voting, if the possibility to vote in person at a diplomatic institution is preserved, the respective voters must be removed from in-person voter lists to prevent multiple voting. If electronic poll books are used, however, the EMB can simply count the vote that was received earlier (postal or in-person vote), and thereby mark the voter off this list as having voted.

The CEC should be very careful when planning the printing of all election documents. Most certainly, the ballot paper format should be adjusted for postal voting and the outer envelope size should be trimmed to standard mail sorting format. In addition, it is necessary to study the issue of resolving election disputes and liability for violating election legislation when voting by mail.

The success of postal voting will largely depend on the EMB's awareness-raising efforts and the level of confidence in the postal service as a whole (confidence in the specific operator within the country and the general perception of the involvement of someone other than the EMB in the process of organizing voting). Before making the appropriate decision, it is worth conducting an independent sociological survey on the level of confidence of the Ukrainians, including forced migrants abroad, in the postal office in general and the specific operator in particular. It is no less important to conduct an awareness campaign among political parties and obtain broad public consent to the new voting method, since a party losing the elections may start accusing the CEC and/or the JSC "Ukrposhta" of lack of professionalism or even fraud.

Ukraine should not reject the option of implementing postal voting only because this method is unfamiliar to the Ukrainians and before making the decision on its implementation it will be necessary to answer a series of technical and operational questions outlined above in an inclusive and open manner inviting a wide range of interested stakeholders for a discussion.

¹¹⁵ 53 countries provide postal voting for voters abroad (often along with other voting methods) according to International IDEA: <https://www.idea.int/data-tools/QUESTION-View/1303522>

19. Internet Voting Abroad

Countries and their citizens are increasingly using technology in all spheres of life and in the modern world many normal processes are becoming digital. Elections are no exception – computers, tablets, smartphones and other technologies have become indispensable tools for speeding up vote counting, facilitating access to “electoral services” such as registration of candidates and submission of complaints, or for full transition to an online format in the form of Internet voting.

Internet voting is a voting method in which the voter receives an electronic ballot (a voting form with options for possible answers) through a website or in a certain application. Internet voting is still a new technology with isolated successful cases of use in-country as well as use when organizing voting abroad. Out-of-country Internet voting is rarely used for voting abroad during national elections (for example, Armenia, Estonia, France, Namibia, New Zealand, Mexico) with a few more cases of usage for voting from abroad in federal or municipal elections in a few countries (for example, Australia, the USA, Panama)¹¹⁶. Internet voting is more often piloted or organized specifically for out-of-country voters in general or even for certain categories of out-of-country voters (e.g. US military servicepersons or employees of diplomatic institutions of Armenia).

In Ukraine, Internet voting is widely used for voting for candidates to public councils at state bodies, for the distribution of funds between projects within the framework of a participatory budget, for the managerial bodies of some state institutions, etc. Discussions have been going on for a while in Ukrainian society about the possibility of introducing Internet voting in national elections as well. In particular, Ukrainian President Volodymyr Zelenskyy¹¹⁷ supports the idea of Internet voting in Ukraine, and representatives of the Ministry of Digital Transformation of Ukraine¹¹⁸ repeatedly declared their readiness to implement it. At the same time, the CEC,¹¹⁹ some MPs¹²⁰ and other electoral stakeholders¹²¹ are much more cautious in their statements regarding the possibility of full digitization of the electoral process and talk about Ukraine’s unpreparedness for the introduction of online voting.¹²²

Across the world there are many examples of the organization of advanced personal and postal voting, which allows us to talk a lot about potential challenges in order to avoid them in the future, which was done in the previous two chapters. It is much more difficult to do the same thorough analysis of all potential I-voting challenges as it is a much less “tested” way to ensure voting rights, and thus can (and does) harbor challenges that election administrators, voters, and developers may not even be aware of. Before making a decision on the implementation of Internet voting both for all voters in general and for voters abroad in particular, regardless of the specific technical solution, it is necessary to assess the relevance of the implementation of Internet voting as such, at least according to a number of parameters listed below. This list is not exhaustive.

Cybersecurity and physical security

Security – public confidence in the ability to guarantee the reliability of election results – should be a key factor to consider before implementing an Internet voting system. The ballot can be forged on the voter’s device, on the way to the server, or on the EMB’s server. Hostile foreign countries or other organized groups may secretly alter votes before they are counted.

116 There are a few other examples, but it is difficult to compile an exhaustive list as there are countries which adopt legislation changes, however, never conduct internet-voting (for example, Bahrain) or adopt changes lightning fast (for example, El Salvador which was preparing for the prompt implementation of the i-voting during the assessment).

117 An example is available here: <https://www.ukrinform.ua/rubric-polytics/3010948-vibori-nastupnogo-prezidenta-maut-buti-elektronni-zelenskij.html>

118 An example is available here: <https://www.rbc.ua/ukr/news/onlayn-vybory-ukraine-mintsifre-otsenili-1636961265.html>

119 An example is available here: <https://cvk.gov.ua/zmi-pro-tsvk/golova-tsvk-oleg-didenko-riven-rozvitku-suspilstva-shhe-nedostatniy-shhob-zaprovdzhuvati-golosuvannya-v-interneti.html>

120 An example is available here: <https://nv.ua/ukr/ukraine/politics/chomu-v-ukrajini-ne-vvodyat-cifrove-golosuvannya-eksperti-novini-ukrajini-50208107.html>

121 An example is available here: <http://cvu.org.ua/nodes/view/type:news/slug:zaprovadzhennia-elektronnoho-holosuvannya-v-ukraini-holovni-ryzyky?fbclid=IwAR1fsJJYBTTIyO2CYUMu3zwMG8XS3kyI05mXVJiKHHAMQpNW16VZQjRK5c>

122 An example is available here: <https://zn.ua/ukr/POLITICS/ajvazovska-ne-pidtrimuje-perevedennja-holosuvannja-v-online-format.html>

Some countries (for example, the Netherlands and Norway) abandoned the program of introducing Internet voting after a round of local pilot tests precisely for security reasons. Countries experiencing frequent and sometimes devastating cyberattacks¹²³ must take all necessary measures to strengthen the resilience of their electoral infrastructure, which requires the availability of relevant professionals as well as significant funds.

In addition to cyberattacks, another challenge is to ensure physical security, in the event of a missile attack, of the servers on which the results are to be stored, since there are no guarantees of non-resumption of such attacks even after the end of hostilities. One option is the servers' decentralized disaster-recovery storage (including on the cloud), which should ensure the functioning of the system in case of destruction of several servers due to the operation of the remaining ones.

Even if the missiles do not directly hit the premises with the servers, a significant problem for data preservation can be an emergency power outage resulting from the destruction of critical energy infrastructure objects. For example, Pakistan abandoned plans to introduce Internet voting because of repeated power outages.¹²⁴

One of the ways to mitigate the negative consequences of respective actions can be through the placement of a part of the servers on the territory of Ukraine's diplomatic institutions abroad. However, such a decision would require considerable negotiations with the governments of the countries concerned. Servers can become hostages of political situations, and the CEC will not have control over the relevant equipment for the purpose of forensic audits, which will be under the supervision of representatives of the diplomatic personnel and will also be geographically far from the Commission's location. The question arises as to whether diplomatic institutions will be able to house the relevant, rather voluminous equipment. After all, even a well-hidden server won't be secure if you don't provide the right level of data privacy with proper cryptographic techniques.

Election system and changes to legislation

An advantage of Internet voting consists in that it allows voters to vote remotely for candidates in their home constituencies. While postal voting also provides voters with such an opportunity, Internet voting is easier to administer if a reliable and simple system is built. During a working meeting with IFES, the National Electoral Institute of Mexico noted that the reason for the introduction of Internet voting for voters abroad was the complexity of administering postal voting.

Article 18 of the ECU provides for the possibility to implement innovative technologies, hardware and software, as an experiment or a pilot project, during the organization and conduct of elections; however, such an opportunity is only available for:

- 1) voting at an election precinct using hardware and software tools (machine voting);
- 2) counting of votes using technical means for electronic vote counting; and
- 3) drawing up protocols on vote counting, voting outcomes and results using an information and analytical system.

And so, the implementation of Internet voting will require changes to the electoral legislation, including the ECU. At the same time, the LU "On the All-Ukrainian Referendum" (Article 116) already contains provisions on the procedure for electronic voting in an All-Ukrainian Referendum and establishing its results.

¹²³ Although the Ukrainian system of cyber protection of state bodies performed quite well during the Russian Federation's full-scale invasion of the territory of Ukraine, the CEC repeatedly mentioned numerous attempts to attack the Commission's IT systems during an electoral period.

¹²⁴ As of November 2022, Pakistan was again considering some online voting modalities.

The Constitution of Ukraine clearly defines that voters must express their will within one day; however, countries organizing Internet voting for out-of-country voters provide them with the opportunity to vote early and within an extended period of time (at least five days). In the absence of political will to change the Constitution, one-day voting could be considered, where the voting platform or application would only accept votes from 8 a.m. to 8 p.m. on the national voting day.

The LU “On the All-Ukrainian Referendum” already provides for the corresponding procedure, enshrining in Article 116 that “the date and time of electronic voting must coincide with the date and time of voting by paper ballots at regular and out-of-country election precincts for the All-Ukrainian referendum.” It also follows from that Article that the electronic voting system should be adapted to the time zones of other countries and take into account the change of winter and summer time for some countries, since voting in national elections takes place on the last Sunday of October and March. However, in practice, this would mean that the country would need a powerful and spacy server infrastructure capable of handling millions of voters voting abroad at the same time. If the system fails on the voting day, election administrators will most likely have no way to restore it. This will lead to the need to organize re-elections and restore confidence in the system, in particular, and the election results, in general.

Voter identification

The main prerequisite for the implementation of electronic elections is a reliable electronic identification tool, i.e. how the voting platform or application will “know” that the authorized user is a) a human (rather than malware); and b) has the right to vote. Countries that have implemented Internet voting use different identification methods – from two-factor authentication using a mobile phone number to a digital signature or even a digital signature embedded in an ID card, as in Estonia.

The first option is used in Mexico. Once voters have registered¹²⁵ online in the list of voters residing abroad (LNERE) and have chosen electronic voting as the preferable voting option, they receive an email with the subject “Account for voting in the electronic voting system.” The email contains a link that must be used for first access to the voting platform SIVEI. For voter security, the voter must click on the access link and then SIVEI will display a secret question. To answer the question, the voter must enter the last four digits of the mobile phone number specified during registration in the list of voters residing abroad. Voters then must receive a verification code – for that purpose, they must choose between receiving it via an SMS or by a QR code.

This identification option seems to be less reliable for Ukraine’s out-of-country voters, since:

- not all of the migrants or forced migrants use the services of Ukrainian mobile operators abroad;
- in Ukraine, SIM cards are not linked to a specific individual (no documents are required to buy them); and
- in general, two-factor authentication via SMS is not the most reliable verification method.

For identification, Ukraine should consider using a qualified electronic signature (QES), which is equivalent to a handwritten signature, but this approach is not sufficiently standardized, and the tool is not quite widely used.

To obtain a QES, one must contact an accredited special key certification center. These institutions can be public as well as private.¹²⁶ The extent to which these various institutions ensure safe storage of keys and generally guarantee the reliability of these tools is a separate question. Some aspects of the use of KEP were highlighted in the analytical document of IFES “Study of the feasibility of introducing new election technologies,” published in 2020. It is more convenient for ordinary voters to get a QES at a banking institution

¹²⁵ Active voter registration takes place before each electoral event.

¹²⁶ The list of qualified providers of electronic trust services is available at: <https://czo.gov.ua/ca-registry>

(BankID technology) or via the state application “Diia” (PhotoID technology).¹²⁷ However, the list of banks that are qualified providers of electronic trust services is very limited. Moreover, there are concerns about the way Ukrainians store their QES – thus, according to some data, in 2019 only 8% stored their signatures on secure media, and in 2020 the share rose to 11%.¹²⁸

For full-range use of the “Diia” application, a passport in the form of an ID card is required (such passports have been issued since 2016) or a foreign passport with biometric data (issued since 2015) and a smartphone.¹²⁹ It is not necessary to exchange old-style documents before they expire. Therefore, the simplicity of obtaining and distributing a QES may prevent voters abroad from exercising their right to vote through Internet voting.

Turnout, voter convenience and inclusion

Voter turnout will be extremely important for the first post-war elections. If a large number of voters, including forced migrants, are unable to exercise their right to vote, the legitimacy of the newly elected government will be questioned. Internet voting may seem to be an very attractive solution for increasing the turnout, but, as shown by the practice of implementation of Internet voting by other countries, this usually does not happen. The method of voting is not a significant factor in mobilization of the electorate as a whole. For example, young voters are more concerned with the question why they should vote at all¹³⁰ than how they should do it.

There are exclusions. In France, however, introduction of postal and online voting in 2022 raised the turnout compared to the 2017 election (no online voting) from 19.1 percent¹³¹ to 22.51 percent in 2022.¹³² The overwhelming majority of the voters who turned out in 2022 voted online (over 75 percent), while less than a quarter voted in embassies and less than 5 percent voted by mail. Already in 2012, more than half (55%) of French voters abroad preferred voting via the Internet rather than using other available methods.¹³³

At the same time, Internet voting may turn out to be more convenient for voters who do vote. In particular, during the working meeting representatives of the National Electoral Institute of Mexico noted that the introduction of Internet voting had failed to increase voter turnout abroad; but it increased election convenience, since a larger number of voters (more than half) chose this particular method of out-of-country voting.

Internet voting makes it possible to guarantee the exercise of the right to vote for voters who cannot travel to the polling station for various reasons (disability, seniority, hospitalization, having minor children, work schedule, etc.).¹³⁴ At the same time, however, it can simply exclude from the electoral process other citizens – those who do not have a gadget and/or access to the Internet or whose skills of handling computer equipment and/or smartphones are low.

Usually, this negative aspect has a disproportional impact on older voters, voters living in rural areas and, in some countries, women. However, in the context of Ukrainian out-of-country voting, this appears to be less of a challenge, as people going abroad to work or study tend to have at least a mobile phone and use the Internet to communicate with friends and family members through messengers and other applications.

127 In Estonia, online voting is carried out using a digital signature and “smart” ID cards for identification as well as the Mobile ID technology; however, Ukraine has abandoned the use of the Mobile ID technology on account of its unpopularity.

128 An example is available here: <https://edin.ua/kilkist-koristuvachiv-elektronix-pidpisiv-zrosla-na-69-2/>

129 Interestingly, in Estonia an ID card containing a digital signature is a mandatory document for Estonians living inside the country (in total, over 90% of the voting age population have an ID card), but not so many citizens residing abroad apply for it, continuing to use old documents: https://aceproject.org/ace-en/topics/va/annex/country-case-studies/estonia-more-options-for-external-voting/mobile_browsing/onePag

130 <https://www.samaracanada.com/research/political-leadership/how-parties-mobilize-youth>

131 <https://www.interieur.gouv.fr/Archives/Archives-elections/Elections-legislatives-2017/Elections-legislatives-2017-les-resultats-du-premier-tour-pour-les-Francais-de-l-etranger>

132 <https://www.diplomatie.gouv.fr/fr/services-aux-francais/voter-a-l-etranger/resultats-des-elections/article/elections-legislatives-resultats-du-1er-tour-pour-les-francais-de-l-etranger>

133 https://www.parliament.uk/globalassets/documents/speaker/digital-democracy/FR_Successcase.pdf

134 This statement was confirmed during a working meeting with a representative of the NGO “Fight For Right,” which focuses on ensuring the rights of persons with disabilities, including in electoral processes.

Since forced migrants crossed the border in a desperate escape, taking only the bare essentials with them, their access to computers may be limited. However, as of mid-September 2022, there were about 3.76 million out-of-country subscribers to Ukrainian operators, meaning that at least half of the forced migrants have mobile phones. Moreover, in the first months of the war there were many volunteer and charity initiatives in the host countries to provide forced migrants with mobile communications and the Internet.

For example, in Germany Deutsche Telekom issued free SIM cards with prepaid mobile Internet to Ukrainians affected by the war.¹³⁵ Similarly, volunteers from telephone companies, including Polkomtel and T-Mobile, distributed SIM cards at railway stations in Poland.¹³⁶ Therefore, when implementing Internet voting, it is absolutely necessary to provide for a cross-platform system capable of adapting to smartphone format,¹³⁷ as this will ensure the possibility of exercising the right to vote for the maximum number of voters.

Freedom from coercion

One of the reasons why other countries make Internet voting an early voting method is opposition to controlled voting. A voter can change his/her choice by resubmitting the ballot paper later if the choice was made under someone's influence or coercion. Only the last vote counts. For example, in Estonia a software filter in the system monitors all votes from one "account." In extreme cases, the voter can come to the polling station on the day of voting and vote using a physical ballot. Voting at the polling station cancels the results of the voter's online vote.

However, not all countries allow voters to change their choice online. For example, the National Electoral Institute of Mexico refused to implement such a practice because it was difficult to explain to voters how this safeguard worked and convince them that out-of-country voters actually do not have "many" votes – instead, like all other voters, they only have one.

Since Ukraine has considerable experience in ensuring in-person voting and has never used alternative methods of expressing voters' will, the CEC and other electoral stakeholders in Ukraine may also find it hard to explain to voters the mechanism of operation of the respective safeguard; however, there is no other way to ensure that no one can force the voter to vote for a particular political actor.

Secret ballot

A secret ballot is one of the international electoral rights enshrined in Article 25 of the International Covenant on Civil and Political Rights. Obviously, the EMBs cannot monitor whether voters comply with the relevant requirement when voting online.¹³⁸ Therefore, some US states that have implemented Internet voting for certain categories of voters require signing an affidavit that they respected the secrecy of the ballot. In general, the responsibility for nondisclosure should lie with voters; however, the question arises as to what to do in the event of unauthorized access to a voter's computer by some other person (e.g. by means of malware).

Citizens will provide a large part of their personal information to voter identification and verification systems, which will dictate the need for ensuring voting secrecy by the EMBs as well. Under no circumstances should it be possible for other stakeholders or attackers to determine how a particular voter voted. To resolve this problem, experts recommend using blockchain technology, although doubts are expressed in some Internet publications as to its reliability in the process of ensuring voter confidentiality. To solve this problem, blockchain technology can be used, although there are doubts about its reliability in the process of ensuring

¹³⁵ <https://www.dw.com/en/tech-firms-provide-free-internet-for-ukrainians/a-61364467>

¹³⁶ <https://www.bloomberg.com/news/newsletters/2022-03-07/smartphones-are-a-lifeline-for-ukrainian-refugees>

¹³⁷ For example, in Estonia it is impossible to vote online from a smartphone.

¹³⁸ Or by mail.

the confidentiality of elections among the available professional publications on the Internet.¹³⁹ There is no 100% guarantee that attackers will not be able to “crack the system” one way or another and make public the results of a “roll call vote” after all. End-to-end encryption can anonymize internet votes without the use of block-chain. End-to-end encryption is widely used by online chat applications, such as whatsapp and signal, and it is also used by electronic voting machines in the world’s largest democracies including the United States, India, and Brazil.

Cost

Although the overall cost of electronic elections may be lower than that of traditional voting, it will take several election cycles to amortize the system, in view of the significant need for purchasing licenses for the software platform, conducting training and awareness campaigns, as well as taking security measures. Often, Internet voting leads to unforeseen expenses, e.g. in connection with the need for a developed voter identification infrastructure – production of voter cards, smart IDs with identification keys, etc. – which can be quite expensive, especially when starting “from scratch.” Obviously, Ukraine will also have to face such costs in the event of implementation of online voting for out-of-country voters.

For example, according to the core team assembled during the technical assessment, the estimated contract value (depending on the number of election events, equipment, licenses, services, etc.) for the development of a system for online voting with a one-time password authentication will cost:

- for 10 million voters - from 10 to 15 million US dollars;
- for 30 million voters - from 24 to 36 million US dollars.

The approximate cost of the contract for the development of a system for Internet voting with biometric authentication through a smartphone can be:

- for 10 million voters - from 12 to 18 million US dollars;
- for 30 million voters - from 29 to 46 million US dollars.

These figures do not include costs related to voter education.

Confidence

When introducing electronic voting through the Internet, the main challenge will be the lack of a paper trail, which often acts as a safeguard against falsification (for example, during recounts of voters’ votes). Properly organized independent observation of the vote counting provides a guarantee to voters and other subjects of the election process that the ballots are really counted for the candidates or parties for which they were submitted. When conducting Internet voting, main attention should be paid to ensuring end-to-end verification (E2E-V) — both universal and individual.

Universal verification should allow deciphering votes so that observers and all interested parties have the opportunity to verify, without establishing the content of the will of a particular voter, that:

- there are no “extra» votes in the system;
- that votes cast for certain candidates or parties are counted for them;
- there are no uncounted votes cast in the system.

¹³⁹ Please see an example: D. Jefferson “The Myth of “Secure” Blockchain Voting” <https://www.usvotefoundation.org/blockchain-voting-is-not-a-security-strategy>

Since the technology behind the Internet voting system is extremely complex and relies on advanced mathematical and cryptographic tools, independent observers must be properly trained and understand the operation of the system to perform such verification.

Voters should also be able to individually verify that their vote has been submitted and counted. For example, in Mexico, a voter can receive an electronic voting receipt with the name of the election in which he participated, with a code that will allow him to verify that his vote is stored in the SIVEI Internet Voting System and will be counted. In addition, voters can check whether their voting receipt is found in the list of voting receipt codes published by the EMB, however, this does not resolve the question of checking whether the submitted vote is actually counted for whom it was cast for, otherwise voters may be more vulnerable to coercion. In addition, the vast majority of voters simply will not understand how the voting system works, and such misunderstanding can undermine public confidence in the election.

Some internet-voting platforms now allow voters true E2E-voter verifiability, in the sense that the voter can check whether:

- 1) the vote was received;
- 2) the vote was counted;
- 3) who the vote was counted for (voter choice).

However, technical possibility does not remove the problem of freedom from coercion.

Countries organizing Internet voting provide for the possibility of conducting a control audit (as for example in Mexico or Switzerland) and also provide the stakeholders with sufficient information that will enable them to fully understand the sequence of operations and the mechanism of the voting process; however, this also does not guarantee confidence in such a system on the part of voters as well as political parties.

Since internet-voting is unlikely to be offered as an exclusive choice, but always in combination with another option, audits can compare the results of in-person, postal and internet voting, and thereby detect results outliers or anomalies. Such comparison has for instance inspired confidence in the French 2022 OCV online voting.

The lack of confidence in the electoral process can have a dramatic impact on public recognition of the legitimacy of the elected government. The issue of acceptance of such a system by the general public should be carefully considered; and in case of its implementation, the system will require a broad information and educational campaign for all stakeholders.

Conclusion

The initial stage in the process of considering the possibilities of using electronic technologies for voting and vote counting should be a full-fledged feasibility study and piloting of the new technology in a small constituency before it is applied at the level of mandatory national elections. Technology can become a tool for ensuring greater integrity of elections in the country and so it is important for Ukraine to continue moving in that direction. It is worth remembering, however, that hasty and incorrect use of innovative methods may endanger Ukraine's democratic progress.

Despite the potential spread of remote Internet voting in the future, at present it remains a new approach with isolated examples of successful implementation. In view of the need to guarantee security and confidence in election results, online voting technologies require further improvement; it is because of these two problematic issues that many countries have decided to abandon the use of this method – either based on the results of a feasibility study or after implementing a pilot project.

Taking into account the significant increase in the number of out-of-country voters and the potential impact of such voting on election results in the country, it is deemed too risky to conduct pilot Internet voting tests on out-of-country voters in general, including because their results can be attacked by perpetrators from the aggressor country. However, such a pilot can be organized for certain categories of out-of-country voters, in particular persons with disabilities, or with voters who reside farther than a certain distance away from the closest OCV PEC, since under the current status quo such voters are de facto practically deprived of their voting rights abroad, inasmuch as it is hard for them to get to the polling station on the election day.

Since the implementation of Internet voting will most likely require the involvement of private companies to develop an IT solution, the EMB should conduct a preliminary «market research» in advance, officially inviting all major companies developing systems for Internet voting to make presentations of their technological solutions. The development and implementation of a technical solution will take a considerable amount of time, which, Ukraine most likely will not have after the end of the martial law and the announcement of the election process.

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CONCLUSION

While the Armed Forces of Ukraine continue to inspire the world with their courage, strength and skill, and ordinary Ukrainians with their endurance and dedication to the value of freedom, it is crucial that the continuous development of democracy not be interrupted for a single minute. It is this progress that will be the basis for the post-war reconstruction of Ukraine, the realization of the country's Euro-Atlantic ambitions, the continuation of the important economic and military support from the Western partners, as well as for inspiring democracies around the world.

Since millions of Ukrainians have been forcibly displaced within the country or had to cross the border to save their lives from the unprovoked and unjustified Russian aggression, one of the first serious tests of Ukraine's democratic resilience after the end of martial law (whenever that happens) will be the first national elections. How well that electoral process is organized will be seen by the Western community as an indicator of real preparedness or non-preparedness to join the European Union. Moreover, during the first post-war elections the election administrators and other stakeholders will face old as well as absolutely new challenges. In order to pass this exam, Ukraine needs to decide on how to organize the expression of voters' will both inside the country and abroad.

Obviously, the process of organizing out-of-country voting by Ukraine needs to be adjusted and expanded to accommodate the exponential number of Ukrainians outside of the national territory. First of all, adjustments should focus on voter registration. In order to organize elections, Ukraine needs to know where and how many ballot papers should be delivered. The stakeholders interviewed during the technical assessment said that the "declarative principle" of inclusion in voter lists should be used in the out-of-country election district. The transition from passive to active registration of out-of-country voters requires answers to a number of related questions: What will be the timeframes for the active registration; what documents will be required for inclusion in the out-of-country voter lists; how will applications be submitted; will the citizens on consular register remain in the voter lists by default or will they also have to submit an application; will the procedure for temporary change of the voting place remain the same, and if so, what will be its timeframe?

The second point concerns the expansion and/or diversification of the method of voting since a majority of out-of-country voters are de facto deprived of the opportunity to vote because of the need to make a journey to the polling station (sometimes even to a neighboring country). Providing migrant workers with the opportunity to vote is a good practice, but not an international electoral obligation (since Ukraine did not accede to the Migrant Worker Convention), whereas giving the right to vote to forced Ukrainian migrants after the war is conducive to reintegrating them and keeping them engaged in sociopolitical life in their homeland and to their early return home. Importantly, sociological surveys of forced migrants from Ukraine reveal an extremely high level of desire to return. However, the PECs OEPs at diplomatic institutions in the countries that received the largest number of Ukrainian forced migrants will simply not be able to provide all those wishing to vote with the relevant services, or even physical accommodation.

Thus, Ukraine should also assess the possibility of offering additional alternative methods of out-of-country voting – extended in-person voting at election precincts outside diplomatic institutions, postal voting, and Internet voting. Each of these methods has its strengths and weaknesses. In particular, this report focused on the practical challenges that election administrators will have to face when implementing each of them, so that electoral stakeholders can comprehensively assess their own capacity, the risks and the resources needed to organize out-of-country voting in a way differing from how it was done before the war. It seems that the best option for ensuring the right to vote for the largest number of voters abroad may be a combination of different voting methods for out-of-country voters depending on the context of each host country.

The choice should be solely up to the state of Ukraine; however, it is important that the adoption of any decision be preceded by the creation of a platform on the basis of the CEC and the Verkhovna Rada of Ukraine for conducting transparent and inclusive consultations involving all the stakeholders.

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Appendix 1

Ensuring equal suffrage and nondiscrimination when determining the scope of electoral rights of voters in the out-of-country election district and the methods to exercise them

The principles of equal suffrage and equality before the law/non-discrimination are enshrined not only in Articles 24 and 71 of the Constitution of Ukraine but also in a number of binding international documents, including the International Covenant on Civil and Political Rights (Articles 25, 26) and the European Convention on the Protection of Human Rights and Fundamental Freedoms (below, the ECHR; Article 14, Protocol 12 to the ECHR), which are part of Ukraine's national legislation.

The international documents **lack a general definition of the concept of discrimination**, but this concept is defined in the context of individual forms of discrimination, for example racial discrimination, discrimination of women, etc. Thus, in accordance with Article 1 of the International Convention on the Elimination of All Forms of Racial Discrimination, racial discrimination is defined as any distinction, exclusion, restriction or preference based on race, color, descent which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms. The concept of discrimination against women is similarly defined in Article 1 of the UN Convention on the Elimination of All Forms of Discrimination against Women.

The legislation of many countries often establishes differences in the status (scope of rights, procedures for their exercise) of certain persons. The examples include setting different retirement ages for women and men, establishing certain labor or social rights for women that are not granted to men, certain property, inheritance and other de facto restrictions for the LGBTI community, lustration and other restrictions on employment in connection with previous work (for example membership in certain parties or work in special services, as in the case of Latvia). Accordingly, the question arises as to whether the establishment of such requirements, benefits or restrictions is a form of discrimination in the sense of the aforementioned provisions of international law.

The current Electoral Code of Ukraine also contains a number of provisions that provide for unequal rights and opportunities for certain subjects. For example, by far not all NGOs have the right to observe elections – this can only be done by those meeting the requirements established by the Code. In the out-of-country election district, voters do not vote for individual candidates in the electoral lists or for regional lists of candidates, as no candidates are nominated in that district. By contrast, voters in Ukraine vote both for regional electoral lists and for individual candidates in those lists. In the territory of certain states (the Russian Federation), out-of-country election precincts were closed, which made it harder for voters to exercise their electoral rights compared to voters in other states and in the territory of Ukraine, as well as compared to the elections in which these precincts functioned. No limit on the number of voters is established for any out-of-country election precinct, while for the election precincts in the territory of Ukraine (with certain exceptions) the number of voters is limited to 2,500. The different number of voters at election precincts and the absence of restrictions on the maximum number of voters at out-of-country election precincts directly affect the ability to exercise electoral rights – indeed, at an out-of-country election precinct with as many as 14,000 voters (Embassy of Ukraine in Israel) or even 51,000 voters (Embassy of Ukraine in Moldova) it is much more difficult to exercise the right to vote (in particular due to the queues, the limited number of PEC members, the limited

time allotted for voting) than at a regular or special election precinct with 1,500 – 2,500 voters or at an out-of-country election precinct at the Embassy of Ukraine in Northern Macedonia (80 voters). Nor do out-of-country voters enjoy the same opportunities to obtain information about the electoral subjects and other election-related issues compared to voters in Ukraine, inasmuch as election campaigning outside Ukraine is prohibited, while out-of-country voters' access to print and audiovisual media can be significantly complicated or even totally impossible (for example as regards the broadcasting of Ukrainian TV/radio programs). One can also claim inequality in the scope of rights and opportunities in the context of the Electoral Code provisions specifying different lists of documents for receiving ballot papers on the day of voting depending on the election precinct type, enshrining the PECs' broad discretionary powers when forming an excerpt from the voter list (for example the PEC's right to conduct selective checks of the grounds for voting at voters' place of stay), establishing additional rights for voters with disabilities that are not granted to other categories of voters, providing for automatic inclusion of the PEC members in the voter lists at the election precinct (other categories of voters are not granted such a right).

Can it be argued in all these cases that the relevant provisions of the Electoral Code violate the principle of equal suffrage, introduce/provide for inequality or discrimination in the sense of Article 24 of the Constitution, Article 26 of the International Covenant on Civil and Political Rights and Article 14 of the ECHR? The content of the concept of equal suffrage is revealed in General Comment 25 of the UN Committee on Human Rights on Article 25 of the International Covenant on Civil and Political Rights and in the Venice Commission's Code of Good Practice in Electoral Matters. In a generalized form, the principle provides for: (1) equality of electoral rights – each voter must have the same number of votes as any other voter; (2) equal weight of the votes required to obtain a deputy mandate in the constituency (constituencies); (3) equality of opportunities for the electoral subjects in the exercise of electoral rights, which includes their impartial treatment by the state, ensuring the possibility of appealing violations and the proper restoration of electoral rights, establishing an equal playing ground for parties and candidates, etc.; and (4) taking positive measures to prevent discrimination of vulnerable/underrepresented social groups in politics, including women and ethnic minorities.

Thus, the establishment of certain specific features of the exercise of the active electoral right by voters in the OED, including alternative ways of exercising that right, does not in itself contradict the principle of equal franchise – certainly, provided that the equality/equal weight of the votes of such voters is preserved.

As regards discrimination, the European Court of Human Rights formulated a position according to which states can define the status of different groups in different ways to eliminate “actual inequality.” This position was formulated in particular in the ECtHR's judgment in *Andrie v. the Czech Republic* (establishing a lower retirement age for women who had children to support and not taking similar measures towards men who had children to support does not violate Article 14 of the ECHR, as it is aimed at eliminating the inequality of women who received lower salaries and pensions compared with men). From the ECtHR's viewpoint, the establishment of certain benefits does not violate Article 14 of the ECHR if the different approaches to regulating the status of certain groups are based on “objective and reasonable” criteria (judgments in *Lindsay v. the United Kingdom*; *Molla Sali v. Greece*; *Fabris v. France*; *D.H. et al. v. the Czech Republic*; *Hoogendijk v. the Netherlands*). To determine the presence or absence of signs of discrimination in the sense of Article 14 of the ECHR, the ECtHR uses the following test: 1) Have the rights of certain categories of persons been determined in different ways in analogous or similar situations?; 2) if so, was such a difference or its absence objectively justified, i.e.: a) did it pursue a legitimate goal; b) were the means used to achieve the goal reasonably proportionate to that goal? In the ECtHR's judgments, a legitimate goal means for example ensuring national security (*Konstantin Markin v. Russia*), ensuring legal certainty (*Fabris v. France*), restoring peace (*Sejdić and Finci v. Bosnia and Herzegovina*), or protecting women (*Khamtokhu and Aksenchik v. Russia*). Proportionality means achieving a balance between the need to protect the interests of the community and the respect for the rights of an individual. At the same time, when establishing such a balance and, accordingly, the different approaches to determining the status of individual groups, states have a certain level of discretion (as in *Molla Sali v. Greece*; *Stummer v. Austria*; *Burden v. the United Kingdom*; *Carson et al. v. the United Kingdom*).

If voters in the OED are provided with additional opportunities to participate in the voting, such action will pursue a legitimate goal – i.e. it will be aimed at ensuring the principle of universal suffrage, the proper exercise of the right to vote, which often cannot be properly exercised by such voters as they exercise it directly at the election precinct on the day of voting – due to a large number of voters in the voter list or the remoteness of such election precinct from the voter’s place of residence. If the means for achieving this goal are the only ones to eliminate actual inequality compared to voters registered in the territory of Ukraine, then such means are proportionate to the goal. Thus, in general the expansion of opportunities for exercising the right to vote in the OED does not violate the requirements of Article 24 of the Constitution or Article 14 of the ECHR.

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