



## **PRELIMINARY STATEMENT**

# **Democratic commitment demonstrated by the people of Kenya, despite parties' forceful criticism of key institutions**

**Nairobi, 10 August 2017**

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### **Summary**

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- A problematic electoral reform process resulted in very little time for the preparation of the elections, especially given the requirements presented by new technologies. The newly-appointed Independent Electoral and Boundaries Commission (IEBC) showed resilience, however it struggled with its communication and the finalisation of polling procedures. It was also under extreme pressure with an exceptionally high number of legal challenges. The campaign was characterised by persistent allegations of bias by both camps towards key state institutions. Ultimately, the lack of trust in the election process could not be compensated for by new technology.
- Voters showed exceptional commitment and determination to cast their ballots. From before the opening of polling stations, there were extensive queues. EU election observation mission (EOM) observers saw security officers appropriately deployed. Candidates' agents were also very present and assessed to be able to operate freely. Voting and counting was assessed as very well conducted and transparent. There were some problems with secrecy, inking and voters whose biometric identification didn't work not being sufficiently recorded. Voting was consistently well assessed by EU EOM observers in Jubilee and NASA strongholds, as well as in swing constituencies, with no signs of centralised or localised manipulation. The EU EOM final assessment of the elections will also consider the conduct of the tallying and petitions processes. To date the IEBC has demonstrated its commitment to transparency in the results process, including by putting results forms on line.
- Following a protracted and sometimes violent standoff between the ruling party and opposition in summer 2016, agreement was reached on a new leadership of the IEBC. This followed opposition allegations of corruption against the former commissioners and resulted in a positive agreement involving both camps in the selection of the new leadership. Electoral legal reform was undertaken very late in the process and the most recent amendments were passed without the agreement of the opposition. The contracted timeframe put extremely high operational pressure on the new IEBC leadership and its implementation of new technology.
- The legal framework generally complies with international standards for elections, with a progressive Constitution adopted in 2010. Kenya has ratified the major international instruments covering electoral rights, although the African Charter on Democracy, Elections and Governance has only been signed, not ratified. The increased role of technology in the electoral process needs to be matched with legal safeguards, particularly in regards to data-protection.
- There has been uncertainty throughout the electoral process due to the very high number of court cases, including in regards to key parts of the process. The judiciary received over 845 pre-election cases and, positively, resolved disputes within three weeks. Increased litigation close to the election appears to be a result of the high levels of competition, the lack of trust, the IEBC not always directly addressing

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stakeholder concerns, and the late changes in the law. Enforcement of the Electoral Code of Conduct by the IEBC did not have clear rules of procedure or evident consistency in adjudication. While the IEBC challenged some legal decisions, it did not seek legal clarification on unclear provisions in the law and legal rulings, which did not help provide certainty.

- The IEBC showed resilience and commitment, with operational preparations for the election remaining on track throughout challenging and frequently changing circumstances. However the IEBC lacked stakeholder confidence, despite the appointment of new commissioners, and was subject to criticism and challenge, in particular from the National Super Alliance (NASA). There was a lack of routine consultation with stakeholders, and stronger communication was needed. Final procedures for the high technology aspects of the election were developed late, not elaborated on or strongly communicated, and not sufficiently tested in advance of the election (in terms of capacity or security). Finally the IEBC clarified that electronic scans of results forms would be the basis for determining results.
- There are 19,611,423 voters on the register, an increase of 36.6% from 2013. A KPMG audit of the register found the biometric data to be of good quality but also noted serious database security issues that needed addressing. In order not to risk disenfranchising people unduly, the IEBC could not remove the vast majority of the estimated one million deceased voters from the register given the incomplete registration of deaths (by the civil registration department). Other irregularities, such as duplicates and inaccurate records, remain to be addressed.
- Persistent criticism of the integrity and neutrality of state institutions, including the IEBC and the judiciary, by the main party leaders has negatively affected confidence in the election and the rule of law. Strong tensions dominated a highly competitive electoral environment, with an absence of constructive dialogue between the two main political camps. A number of violent incidents occurred between followers of gubernatorial candidates and included some five killings. While national incumbency benefitted Jubilee, the advantages of incumbency at county level were evidently to the benefit of both political camps. Positively, EU EOM observers reported that candidates could generally campaign freely, including in each others' strongholds.
- The lack of applicable campaign finance legislation undermines equality of opportunity and transparency in the election campaign. The current legal framework contains no regulation at all of individual candidates, only minimal political party finance regulation, and apparently limited oversight of party finance. There are concrete observations of funds raised being used *inter alia* for inducement payments, including the distribution of food and money at campaign events, as witnessed by EU EOM long-term observers (LTOs). The handing out of cash or other goods at rallies was common practice by candidates, a practice forbidden by law.
- The state as well as private national media allocated equitable shares of coverage to the key contestants. However bias in favour of one or the other leading political camp was noted in the vernacular radio stations. Extensive paid media campaigns promoting successes of incumbents raised concerns about incumbent advantage. Journalists in several counties were threatened in connection with their reporting on political or election-related matters and stated that they commonly exercise self-censorship.
- A high number of well-produced false news items distributed on social media, reportedly in part by political camps, attempted to delegitimise genuine stories about political rivals. The lack of data protection regulations and applicable campaign finance legislation leaves use of data mining unregulated and difficult to assess. Social media provided important platforms for the exchange of information about the elections, but also appeared to reinforce inflammatory messages during the campaign

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- As women make up only 9.4% of all candidates, the two-thirds gender principle is highly unlikely to be met, given the lack of enabling mechanisms. This raises questions about the constitutionality of the next parliament. Numerous cases were reported of women candidates being harassed, attacked or discriminated against by other contestants and their supporters, or by their own party leadership. Persons with disability comprise only 0.74% of registered voters and 0.2% of candidates for elective positions.
  - At this preliminary stage, the EOM has identified a few key recommendations, which will be further developed and supplemented in the EU EOM final report. These include: establishing a framework for legislative reform well in advance of future elections, a thorough review of technology, and developing a parliamentary mechanism to provide for the two-thirds gender principle.
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*The European Union Election Observation Mission (EU EOM) has been present in Kenya following an invitation from the IEBC. The mission is led by Chief Observer, Marietje Schaake, Member of the European Parliament (MEP) from the Netherlands. A small advance team observed the party primaries and voter registration in April - June 2017. The EU EOM was then established from 13 June with a core team of 10 analysts and 30 long-term observers deployed across the country. For security reasons EU EOM observers were not deployed to the northeast and could not always go to all parts of all counties visited. On election day, the mission was composed of over 130 observers from 28 EU Member States, Canada, Norway and Switzerland. A delegation of the European Parliament, headed by David McAllister MEP, also joined the mission and fully endorses this Statement. On election day, observers visited 631 polling stations in 227 constituencies in 35 counties. As security conditions limited the locations visited, the observation sample is not fully representative.*

*This preliminary statement is delivered prior to the completion of the election process. The final assessment of the elections will depend on the conduct of the remaining stages of the election process, in particular, the tallying of results, acceptance of results and the handling of election petitions. The EU EOM assesses the whole electoral process against international obligations and commitments for democratic elections as well as the laws of Kenya. The EU EOM is independent in its findings and conclusions and adheres to the Declaration of Principles for International Election Observation signed at the United Nations in October 2005. The EU EOM will publish a final report, containing recommendations, within approximately two months of the conclusion of the electoral process.*

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## Preliminary Findings

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### Background

The 8 August 2017 elections were the sixth consecutive elections since the country's return to a multiparty system in 1991 and the second under the progressive 2010 Constitution. Kenya has a history of disputed presidential election results, pronounced ethno-regional divisions and varying levels of election violence, in particular in 2007/8. Devolution with its four new elective posts (governor, senator, county women representative and member of county assembly) has substantially altered the electoral dynamics by creating new local arenas of political competition. In total 1,882 seats and positions were contested across 290 constituencies in 47 counties.

Kenyans have traditionally voted strongly along ethnic lines. With no ethnic community being in a majority position, ethno-regional alliances have been formally and informally forged for coalition governments.<sup>1</sup> The 2017 presidential elections were contested by the same two broad alliances as in 2013. President Kenyatta's Jubilee Party evolved from an alliance into a party in September 2016. Raila Odinga's opposition Coalition for Reforms and Democracy (CORD) also expanded into the National Super Alliance (NASA) after Musalia Mudavadi and his Amani National Congress (ANC) joined at the end of 2016.

### **Electoral Reform Process**

Following a protracted and sometimes violent standoff between the ruling party and opposition in summer 2016, agreement was reached on a new leadership of the Independent Electoral and Boundaries Commission (IEBC). This followed opposition allegations of corruption against the former commissioners, and resulted in a positive agreement involving both camps in the selection of the new leadership. Electoral reform was undertaken very late in the process, with the most recent amendments to the Elections Act passed without the agreement of the opposition. This made implementation very challenging and further politicised the electoral process.

There have been two amendments to the Elections Act 2011, in October 2016 and January 2017, both less than one year before the constitutionally-fixed election date. These amendments have covered fundamental aspects of the electoral process, including the recruitment of IEBC commissioners and the integrated use of technology. The legal changes were the result of negotiations that followed extensive demonstrations by the opposition in May 2016 and the response of the police, who were criticized for excessive use of force. The January 2017 amendments, providing *inter alia* for complementary mechanisms in case of technology failure, were passed without opposition participation.

The current IEBC commissioners' term began on 18 January 2017, less than seven months before the elections. This is not consistent with international good practice or the recommendations of the Kriegler report,<sup>2</sup> and put high levels of operational pressure on the new IEBC commissioners and their implementation of a new integrated technology, which is particularly difficult in a highly politicised environment.

### **Legal Framework**

The legal framework generally complies with international and regional standards for elections. Kenya has ratified the major international instruments covering electoral rights, although the African Charter on Democracy, Elections and Governance (ACDEG) has only been signed not ratified.

The constitution is progressive, including in providing for public participation and inclusion. It establishes universal suffrage for every adult citizen, and for the first time prisoners and a limited part of the diaspora were given the right to vote in the presidential race. Candidates, in addition to being registered to vote, must meet moral and ethical requirements, elaborated in the Leadership and Integrity Act. The subjective nature of these requirements is not consistent with authoritative interpretation of the International Covenant on Civil and

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<sup>1</sup> Kenya officially has 43 ethnic communities with the biggest 5 comprising 66% of the population. These are the Kikuyu (17%), Luhya (14%), Kalenjin (13%), Luo (12%) and Kamba (10%). Whereas in 2007/2008 the two communities most strongly involved in the post-election violence, the Kikuyu and the Kalenjin, were on opposing sides, they have been in alliance since 2013.

<sup>2</sup> The Kriegler report on the 2007 elections recommended no changes to the leadership of the electoral management body within 15 months of an election. The Venice Commission Code of Good Practice refers to the fundamental elements of electoral law, in particular the electoral system proper, membership of electoral commissions and the drawing of constituency boundaries, not being open to amendment less than one year before an election.

Political Rights (ICCPR), which refers to any restriction on candidacy being objectionable.<sup>3</sup> Similarly for the educational requirements for presidential and governor candidates.<sup>4</sup>

The Elections Act includes a comprehensive Electoral Code of Conduct, which is binding on all parties, party members and candidates. It commits contenders to *inter alia* preventing and condemning violence and intimidation, and to promoting ethnic tolerance. The code also binds contenders to “*without prejudice to the right to present a petition to an election court, accept the final outcome of the election and the Commission’s declaration and certification of the results thereof*” (in line with ACDEG article 17). The increased role of technology in the electoral process needs to be matched with legal safeguards, particularly in regards to data-protection.

The general elections involve six different races. At the national level, the President is elected by a qualified majority to serve a five-year term (renewable once). To win the first round, a candidate must obtain a majority (50% plus 1 vote), plus at least 25% of the valid votes in more than half the 47 counties (24). Of the 349 members of the National Assembly, 290 are directly elected in constituencies using first-past-the-post (FPTP), and 47 are reserved for women elected at the county level. An additional 12 seats are reserved for nominated members of special interest groups, including persons with disabilities (PWD), youth and workers.<sup>5</sup> Similarly for the Senate.<sup>6</sup>

### **Electoral Dispute Resolution**

The electoral process has been characterised by a high number of legal cases with adjudications having a profound impact on the course of the election. Some reasons given for the increased quantity of litigation close to the election are: deeply-rooted grievances, lack of trust in institutions, high levels of competition, the IEBC not always addressing stakeholder concerns directly and in good time, and late changes to the IEBC leadership and the legal framework. This has resulted in an environment of procedural uncertainty.

The judiciary has received over 845 pre-election cases, a significant increase from the few lodged in 2013. Civil electoral cases have been prioritized at all levels and, positively, disputes have been resolved within three weeks.<sup>7</sup> A judicial taskforce, the Judiciary Committee on Elections, has increased court preparedness, including through training of staff and magistrates, resource allocation, and shortening time-frames for determining criminal cases.

The cases examined by the EU EOM generally appear to have followed sound legal reasoning based on earlier precedents. However some decisions raise serious implementation questions, in particular in regards to undertaking public participation and late changes in the results process (see below). Furthermore the establishment of polling station and constituency results as final, with no complaint process possible, defers all opportunity for remedy to judicial election petition mechanisms. In the long run, this could be reconsidered

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<sup>3</sup> ICCPR, Human Rights Committee, General Comment 25, paragraph 15.

<sup>4</sup> ICCPR, Human Rights Committee, General Comment 25, paragraph 15.

<sup>5</sup> The allocation of seats for the nominated members is proportional to the number of seats won by the party in the National Assembly, Senate and county assemblies.

<sup>6</sup> Likewise, of the 67 members of the Senate, 47 are directly elected at the county level (FPTP), 16 are reserved for nominated women, 2 for youth and 2 for PWDs (male and female). At the county level, 47 governors and 1,450 members of county assemblies (one per ward) are directly elected using FPTP, and there are also six nominated members. A least two each represent PWDs, youth and marginalised groups. Each county must nominate members of the under-represented gender to ensure compliance with the two-thirds gender principle of representation.

<sup>7</sup> Pre-election cases have no set timelines for resolution by the superior courts. Except for disputes before the Political Parties Disputes Tribunal (PPDT), which come under section 41(1) of the Political Parties Act, which provides for disputes to be resolved expeditiously, within a maximum of three months.

for stronger compliance with an authoritative interpretation of the ICCPR.<sup>8</sup> The finality of lower-level results, with no possibility of correction, was established in a High Court decision and upheld by the 23 June Court of Appeal (which referred to previous legal judgments).<sup>9</sup>

Following a series of controversial procurement actions and rulings, on 7 July 2017, the High Court nullified the IEBC decision to contract Al Ghurair to print the presidential ballot papers and ordered the IEBC to restart the tendering process, citing lack of public participation (contrary to the Constitution). On 10 July 2017, the IEBC appealed to the Court of Appeal and the court found that public participation was not required in direct procurement and that the tight electoral timeline needed to be considered. The court ruled in favour of the IEBC and ballot printing resumed, some 18 days before the election. Both court decisions prompted strong political reactions.

The lack of deadlines for pre-election petitions and decisions has resulted in extremely late rulings that are problematic to implement. For example some disqualified candidates were later reinstated, but only after ballot printing and preparation of the Kenya Integrated Electoral Management System (KIEMS) devices.<sup>10</sup> Disputes during the pre-election period can be resolved by the IEBC, the Political Parties Disputes Tribunal (PPDT) and courts of law. While there have been improvements in distinct jurisdictions, in practice this is not yet fully understood by parties.<sup>11</sup> In regards to party nomination lists, 236 petitions were filed at the PPDT,<sup>12</sup> with the PPDT ordering the reconstitution of at least 19 party lists for non-compliance with constitutional provisions on the inclusion of PWDs, youth and ethnic minorities.<sup>13</sup>

The Electoral Code of Conduct (ECC) and the Political Party Code of Conduct contain a comprehensive list of provisions that applies to candidates, party leaders and supporters. However enforcement of ECC rulings is legally overly-centralised in the IEBC Commissioners, who form the IEBC Electoral Code of Conduct Enforcement Committee (ECCEC). The ECCEC did not generally use powers of initiative and in total determined 71 cases (with 8 decisions appealed to the High Court). The ECCEC lacked clear rules of procedure, and rulings and penalties were not evidently consistent. Penalties applied included disqualification and large fines up to KSH 3 million (approximately €24,000) to be paid within 24 hours. The IEBC has not published or provided the decisions of the ECCEC (or the Dispute Resolution Committee). On 3 August the High Court overturned an ECCEC decision, criticising it for a lack of reasoning and a very punitive order.

Most cases referred to plagiarism of political party symbols, colours and the use of pictures of presidential contenders by independent candidates. In addition there were 11 cases relating to violence, primarily involving governor candidates. The relatively low number of cases may also be partly attributable to some fines issued to complainants (as well as accused persons). The IEBC decision to suspend campaigning by all contenders in Siaya county for one week did not appear to be consistent with legal provisions.

To date there have been five criminal convictions involving electoral offences. Very recent new legislative provisions have been added to the Election Offences Act (EOA),<sup>14</sup> which mandates the Office of the Director

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<sup>8</sup> ICCPR Human Rights Committee, General Comment 31, paragraph 15 refers to States “ensur[ing] that individuals have accessible and effective remedies... Administrative mechanisms are particularly required to give effect to the general obligation to investigate allegations of violations promptly, thoroughly and effectively through independent and impartial bodies.”

<sup>9</sup> Supreme Court ruling 2014 (Petition No.10 of 2013), Hassan Ali Joho vs Suleiman Said Shahbal & IEBC..

<sup>10</sup> Up to 4 August, 17 candidates were reinstated, some as late as 4 days before the election, and 10 were deleted.

<sup>11</sup> EU EOM has observed ten cases where parties filed their cases in the wrong forum leading to dismissal for want of jurisdiction while others filed more than one case in different courts leading to the dismissal of their cases.

<sup>12</sup> Up until 2 August, 210 decisions were reached before the election, of which 8 were appealed to the High Court.

<sup>13</sup> The IEBC also heard 23 cases on party list nominations.

<sup>14</sup> The EOA supplements other overlapping provisions in the Penal Code, National Cohesion and Integration Act, and the Public Order Act. The EOA came into force on 4 October 2016.

of Public Prosecutions (ODPP) to initiate charges within 12 months of an election. ODPP actions are reportedly limited by a lack of sufficient resources due to its annual budget being finalized in advance of its new Electoral Offences Act (EOA) responsibilities. Some civil society stakeholders have also questioned its ability to challenge more senior leaders. In total the ODPP reported 95 election-related criminal cases (34 of which fall under the EOA), mostly relating to the party primaries. In a letter dated 12 July 2017, the Commission on Administrative Justice (Office of the Ombudsman), informed the DPP about alleged EOA breaches, specifically in relation to misuse of public resources and positions. It named 12 high-ranking officials, including two sitting Jubilee and three sitting NASA governors.<sup>15</sup> Charges have yet to be brought in any of these cases.

### **Election Administration**

The administration of a complex process within a compressed timeframe put extremely high levels of operational pressure on the new IEBC Commissioners. This was further intensified by the mandatory requirement for almost exclusive use of integrated technology for key aspects of the electoral process.<sup>16</sup> Furthermore the pressure on the IEBC, and the sense of personal risk, was amplified following the violent murder of Chris Msando, an IEBC ICT manager, on 31 July.

Positively, the IEBC showed resilience and a strong commitment to the process and kept electoral preparations on track. The recruitment and training of over 360,000 temporary staff was overall well conducted, as was the transportation and securing of sensitive and non-sensitive polling material. The Commission made efforts to address concerns related to the use of KIEMS, including improving network coverage, prolonging battery life and providing additional secure digital (SD) memory cards.

However there was a delay in development of final procedures for the high technology aspects of the election. Biometric voter identification and electronic results transmission, as well as some procedures, lacked detail. The needed procedures were for the most part only provided after training had started and manuals had been printed.<sup>17</sup> They were finally shared with the public on 28 and 29 July via guidelines and a key speech. Additional information was also shared on social media close to the elections. The lack of extensive detailed information and clarity to stakeholders did not help promote confidence or understanding of the process.

While the IEBC challenged some legal decisions, it did not seek legal clarification on unclear provisions in the law and legal rulings, for example on the status of official results. This made its work potentially subject to more legal challenge and reduced certainty in the process.

The IEBC has lacked stakeholders' confidence and has been subject to public criticism, in particular from NASA. Greater transparency, inclusiveness and communication were repeatedly requested by the opposition and various civil society organisations. Despite its efforts, including in mainstream and social media, the IEBC's communication lacked structure, consistency and depth at times. Positively, the IEBC engaged with contestants, including through two meetings with presidential candidates/representatives, the holding of the National Elections Conference (NEC), and stakeholder events at the results centre (Bomas). However, sufficient mechanisms for routine stakeholder consultation has been lacking.

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<sup>15</sup> The Jubilee governors are in Meru and Kericho, and the NASA governors are in Mombasa, West Pokot and Kitui.

<sup>16</sup> While technology in elections has the potential to increase efficiency and transparency and also to reduce risk of human error, complete reliance on it can raise excessive expectations, be hard to implement, and reduce national ownership. Good practice for the introduction of new technology includes decisions based on stakeholder consultation, participatory assessments and feasibility studies, and not relying on technology to address structural issues.

<sup>17</sup> As late as 5 August, some three days before the election, the IEBC revoked an earlier position of 3 August, and stated that unstamped ballots are invalid. This followed a regulatory change that removed this requirement in April 2017.

At local level, EU EOM LTOs reported much higher public confidence in the work of local IEBC staff, particularly following the rotation of permanent staff in May. This was across counties regarded as pro-NASA, pro-Jubilee, or swing counties. The 337 county and constituency returning officers (ROs) seemed to be generally regarded as impartial, well-prepared and regularly engaging stakeholders.

However the enduring mistrust of the national IEBC, and accusations of partiality and manipulation, resulted in NASA and civil society supporting an earlier 2014 Supreme Court decision on election results being final at polling stations and constituencies (in order to avoid the possibility of higher-level “*interference*”). Following the 2014 ruling, the IEBC did not seek legal clarification or appear to adjust its operational plans accordingly. Only after the 23 June 2017 Court of Appeal ruling did the IEBC alter its results management framework. The 23 June ruling also introduced new features, including the electronic transmission of results from constituencies. This presented serious operational challenges late in the electoral preparations, although it did remove previously expressed concerns and bring NASA and civil society groups on board.<sup>18</sup>

The finality of lower-level results removes the possibility for results verification (through provisional results being checked and then finalised). The IEBC now bears full responsibility with no correction mechanism, and temporary polling staff have unchecked authority.<sup>19</sup> Implementation of the ruling also required the development of some new results management procedures, which were not tested in any election prior to 8 August.<sup>20</sup> Some uncertainty continued through the process over the critical matter of which results format should prevail: scanned, paper or keyed-in results.

### Voter Registration

The law prescribes that to be registered as a voter, a citizen must provide a national identity card or a Kenyan passport as evidence of having attained 18 years of age. Therefore, citizens who have turned 18 just before election day, are *de facto* excluded if they are not of age at the time of registration or have not yet obtained an ID card. EU EOM LTO teams reported that stakeholders noted some minority groups facing delays in obtaining ID cards.<sup>21</sup> Citizens adjudged bankrupt are also excluded, which is an excessive restriction on the right to vote.<sup>22</sup> The late amendment also stipulates that citizens are eligible to vote when they have their biometric data captured in the polling station’s register.

The voter register, as certified on 27 June 2017, comprises of 19,611,423 voters, an increase of 36.6% from the 14,352,545 registrants in 2013.<sup>23</sup> Using 2017 population projections, based on the 2009 population and housing census, registered voters represent approximately 82% of all adult citizens. However, the real percentage is lower, as a proportion of the registrants have since died but have not been removed from the register. A total of 51% of registered voters are under the age of 35.

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<sup>18</sup> At previous elections, particularly in 2007 and to a lesser degree in 2013, the tallying process was marred by significant lack of transparency. Opposition leaders and supporters and parts of civil society refer to presidential election results having been manipulated at the national tallying centre.

<sup>19</sup> The Krieglger Commission recommended “*that ample time be allowed for verifying provisional results, so that they are declared final/official only once there is no risk that errors may still be found or non-frivolous objections raised.*”

<sup>20</sup> The ruling further requires electronic transmission of constituency tallied results to the national level, which in the past was only undertaken manually.

<sup>21</sup> Minority groups such as Muslims and Hindus in Embu, Nyeri and Machacos counties reportedly needed to follow a longer procedure with more rigorous screening and approval by a vetting committee before proceeding to the national registration bureau, thus potentially delaying their ID issuance.

<sup>22</sup> Elections (Amended) Act 2011 Section 9. The ICCPR Human Rights Committee have noted in General Comment 25 “*The grounds for such deprivation [of article 25 rights] should be objective and reasonable.*” (paragraph 14).

<sup>23</sup> Continuous voter registration was suspended by the IEBC on 7 March to be resumed on 6 September 2017. Positively, after 20 July the Commission published the entire register of voters by polling station on its website.

A legally-mandated independent audit of the voter register was conducted by KPMG in April-June 2017, and its report was eventually published on 11 July. The audit found the biometric data in the register to be of very good quality. But it also identified a number of security and data-integrity concerns, including weak database security settings and a lack of operational continuity planning. Inaccuracies found in the register, mainly due to clerical errors, amounted to 14.7% of the total records. These were reportedly mostly corrected, also following the register's inspection period. Other irregularities were reportedly not addressed by the IEBC given the short time available before the elections.<sup>24</sup>

KPMG estimated that about one million voters have died since the establishment of the voter register at the end of 2012. Due to difficulties in matching records and the incompleteness of the civil registration database, the IEBC eventually only removed some 88,000 deceased voters, as removal of more records would have risked error, disenfranchisement, and controversy. The Commission emphasized that the biometric voter identification technology to be used in polling stations should provide a safeguard against people voting in the name of deceased registrants.

### Registration of Candidates

Following either primaries or party appointment, all aspirants needed to pass an IEBC nomination process conducted by ROs at different levels. To oversee integrity and ethical requirements a working group was established under the Office of the Attorney General, comprising of the IEBC, the Ethics and Anti-Corruption Commission (EACC), and the Registrar of Political Parties. In total 106 aspirants with pending integrity issues were identified. However the IEBC maintained that everyone is innocent until proven guilty, and all possible appeals mechanisms have been exhausted, and upheld most of their candidacies. Various groups voiced concerns about the consequent limited number of rejections, requesting the IEBC to instead take firm action against corruption.<sup>25</sup> A total of 14,523 candidates eventually competed for all elective seats, out of 15,082 aspiring candidates. On average there were nearly eight candidates per race (three of whom were independent).

### The Campaign

All six races have been highly competitive, with most attention falling on the well-resourced presidential and gubernatorial campaigns. Strong tensions dominated, with Kenyatta and Odinga never sharing a stage, as they had in 2013. They did not take up chances to calm the tense campaign atmosphere through direct engagement, for example at the NEC, the early July peace gathering, or the presidential TV debate. The proliferation of independent candidates, most of them having lost in party primaries, resulted in more complex local dynamics. Despite the overall tensions EU EOM LTOs reported that candidates could generally campaign freely, including in each others' strongholds, with the freedoms of association, assembly and movement respected.<sup>26</sup> Positively, LTOs reported overall appropriate security force presence at rallies.

The campaign was characterised by accusations between the two dominant camps and state institutions. Kenyatta and Ruto accused NASA of deliberately trying to postpone the elections through repeated petitions to the courts. They also made strongly-worded criticism of the judiciary for potentially jeopardizing the election date. Odinga and other NASA leaders alleged collusion between the Jubilee government and the IEBC, the National Police Service and the Kenya Defence Forces, to selectively suppress turnout and manipulate the elections. The Chief Justice gave two press conferences, one on 10 July and another on 2 August when he denounced both political camps for "*attacks on the judiciary*" (with six of the seven cases he

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<sup>24</sup> Irregularities relate primarily to records with shared or missing ID numbers, records with ID numbers not found in the National Registration Bureau database, and with passport numbers not found in the Immigration database. Overall these amount to 2.32% of total records.

<sup>25</sup> The Kenya National Commission on Human Rights sought an advisory opinion from the Supreme Court on the standards and guidelines applicable to leadership and integrity. The opinion is still awaited.

<sup>26</sup> Apart from a short period in mid-July when Kenyatta and Odinga were heckled in their opponents' strongholds.

mentioned referring to Jubilee leaders). The persistent criticism of the integrity and neutrality of state institutions has negatively affected confidence in the election.

Violent incidents occurred between followers of gubernatorial candidates in Uasin Gishu, Bungoma, Mandera, Marsabit, Siaya and Garissa counties among others. These included some five killings in three separate incidents. There were also some incidents of violent language. In this regards, the EU EOM has seen video footage of one of NASA's main campaign managers chanting with crowds "*we have defeated tear gas, now we want bombs*".<sup>27</sup> The EU EOM also learned of weapons being moved in to informal settlements in Nairobi by both camps.

While national incumbency benefitted Jubilee, the advantages of incumbency at county level were evidently to the benefit of both political camps.<sup>28</sup> During the 141 rallies observed by EU EOM LTOs, there were 27 instances of misuse of state resources noted in 16 counties. These included 18 instances with Jubilee, mostly relating to the presidential election campaign, and 4 with ODM/NASA. This primarily involved the use of official county and national government vehicles to and from campaign events (including one military helicopter in Makueni county).<sup>29</sup> Controversially, cabinet secretaries are exempt from the campaign ban for civil servants and were consequently seen regularly at rallies of the President. Another reported example of incumbent advantage was in the presidential issuance of land titles in Tharaka Nithi on 27 June.<sup>30</sup> Some four days before the election, NASA alleged one of their results offices was raided by state security services. The same night two consultants working with NASA on their campaign were deported, with visa irregularities given as reasons.

Some actions by state authorities helped to ease the escalation, including the IEBC fining and issuing warnings to some candidates, and the arrest of two MPs, both from the opposition, for hate speech.<sup>31</sup> Several government commissions monitored the election campaigns according to their constitutional mandates with regard to hate speech, corruption, gender equality, and adherence to human rights standards. Civil society interlocutors criticised particularly the National Cohesion and Integration Commission (NCIC) for failing to sufficiently initiate sanctions for hate speech.

There was an atmosphere of uncertainty and fear with some citizens temporarily moving back to their rural homes areas, mostly in the western parts of the country, thereby possibly relinquishing their right to vote. This is likely to have disproportionately affected women as men moved their families away. EU EOM observers noted leaflets against local ethnic minorities in Eldoret, Naivasha, Nairobi and Mombasa. EU EOM observer teams received credible reports about the buying of ID cards, apparently to disenfranchise opponents' voters.<sup>32</sup> The focus by different state institutions on possible hotspots, while arguably being part of prudent planning, was also criticised for increasing fear of imminent violence.

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<sup>27</sup> In a presidential rally in Dandora, Nairobi on 14 July Senator Muthama said in Swahili: "*We have defeated stones, we have defeated tear gas, now we want bombs*" ("*Tumeshinda mawe. Tunataka bomb, Tumeshida tear gas, Tunataka bomb*") with the crowd repeating his sentences. Designated Prime Cabinet Secretary Musalia Mudavadi is shown in the car ahead of Muthama's.

<sup>28</sup> During the campaign Jubilee and Jubilee associated parties had 25 number of Governors and NASA had 22 number.

<sup>29</sup> These included 18 instances with Jubilee and 4 with ODM/NASA.

<sup>30</sup> According to the Land Policy Act and a Supreme Court advisory opinion in December 2015, the Cabinet secretary after consultation and cooperation with the National Lands Commission issues title deeds and not the president.

<sup>31</sup> Junet Mohammed/ODM (Suna East, Migori country, Nyanza) on 21 July, and Mathew Lempurkel/ODM, (Laikipia North, Rift Valley) on 22 July.

<sup>32</sup> EU EOM observers received reports about buying of ID cards in Nairobi, Kajiado, Muranga, Nakuru, Makueni, Uasin Gishu, Meru, and Kitui counties. This was in most cases related to county-level contests.

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## Political Finance

Kenya's lack of applicable campaign finance legislation undermines equality of opportunity and transparency in the election process. The Election Campaign Financing Act of 2013 has yet to be made operational as the parliament has not approved the necessary regulations, and it has been suspended by parliamentary amendment.<sup>33</sup> Thus the current legal framework provides no regulation at all for individual candidates and only provides for limited political party finance regulation. This may be seen as weakening the fulfilment of ICCPR obligations for a genuine election,<sup>34</sup> as well as the Convention against Corruption transparency measures.<sup>35</sup>

There is no limit on parties' spending or on political advertising. The Political Parties Act (PPA) limits individual donations, prohibiting individuals and organizations from contributing an amount exceeding 5% of the total expenditure of the recipient party from the previous year. However, this can be circumvented by donations to individual candidates.

Only three parties qualified for public funding in the current financial year: Jubilee Party, ODM (NASA), and Wiper Democratic Movement – Kenya (NASA). The fund, at KSH 370,504,799 (approximately €3.4 million), is dramatically lower than the law prescribes and has been criticized by ODM and others for not substantially helping level the playing field.<sup>36</sup>

Provisions for transparency in party finance appear to be limited and the Office of the Registrar of Political Parties (ORPP) appears aware that parties routinely underreport their incomes. The ORPP has not developed any monitoring tools to capture parties' spending during the campaign period, thus it is not clear how it will assess parties' financial reports. To date the office has only provided the EU EOM with the 2016 financial reports of two parties, both of them NASA (ODM and Wiper Democratic Movement – Kenya).

Public funding is reportedly only a small fraction of the funds that the Jubilee Party and NASA have raised for the elections. Most candidates interviewed by EU EOM LTOs refer to funding the bulk of their campaigns through personal savings and private donations, which fall outside the jurisdiction of the ORPP. There is a common perception, as well as concrete observations, that funds are also used for inducement payments. LTOs in Nairobi, Kajiado and Uasin Gishu counties observed the distribution of food during the campaign period. They also reported the distribution of money (referred to as a "*transportation refund*") in six separate campaign events in Embu, Mombasa, Nairobi, Nyeri and Kakamega counties. According to information available the Jubilee party has undertaken higher levels of spending.

## Media

Kenya has a vibrant media landscape, including over 200 TV and radio stations. However, the sector is dominated by powerful media houses with links to the country's political elite. Journalists across the country spoke of exercising self-censorship to varying degrees when reporting political issues. Threats or violence against journalists, cited as long-term concerns, were also evident during the pre-election period.<sup>37</sup> A lack of

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<sup>33</sup> Article 88(4)(i) of the Constitution requires that IEBC regulate the amount of money being spent in any election. However IEBC regulations require parliamentary approval.

<sup>34</sup> ICCPR, Human Rights Committee, General Comment 25, paragraph 19.

<sup>35</sup> Convention against Corruption, article 7(3). Also the African Union Convention on Preventing and Combating Corruption, article 10.

<sup>36</sup> ORPP indicated to the EU EOM that the Fund is approximately 10% of the amount prescribed by PPA section 24(1)(a), which is 0.03% of the national government revenue or about KSH 3 billion (approximately €27 million).

<sup>37</sup> The EU EOM has received credible reports from journalists in Isiolo, Kajiado, Kirinyaga, Kitui and Siaya, about threats or incidents related to their reporting on political or election-related matters. The EU EOM learned about similar incidents in Bungoma, Kakamega, Nairobi and Siaya that allegedly occurred prior to the EU EOM's arrival.

credible and timely investigation were also reported. EU EOM interlocutors also referred to critical reporting being weakened by fears of the government withholding advertising and consequent revenue loss.

Overall, the media provided extensive coverage of the elections, with the focus on the two main parties/coalitions and their presidential contenders. The campaign of less prominent contestants, as well as their access to the media, was limited. This was partially due to a lack of financial means.<sup>38</sup> While televised debates among gubernatorial and some other candidates have taken place in some counties, a highly anticipated presidential debate did not offer voters an opportunity to compare the leading candidates as the President, the lead candidate for Jubilee, did not participate.

Jubilee had notably more adverts on electronic media than NASA at the start of the campaign, with an evening out in the last two weeks of the campaign. Many media adverts promoting the President's and government's successes raised questions about the misuse of public funds to the advantage of the incumbent.<sup>39</sup>

The EU EOM media monitoring<sup>40</sup> found that the state KBC TV and radio have provided equitable news coverage of the two major parties/coalitions through the campaign period.<sup>41</sup> The KBC provided free airtime to contestants. However, the criteria for time allocation was not transparent and the free slots were not provided in a systematic way.

During the campaign, the national broadcast media at times leaned towards one or other of the major camps, but the overall coverage was relatively equitable. Vernacular radio stations showed a clear preference to one or other major camp, mainly in terms of time allocated. Such an approach was most notable on Kameme, which clearly promoted Jubilee in terms of time and tone of coverage, while presenting NASA negatively. Kass also leaned towards Jubilee, while Mulembe, Musyi, and Ramogi leaned towards NASA.

Social media provided important platforms for the exchange of information about the elections. A high number of well-produced false news materials was distributed on social media, reportedly in part by political campaigns to delegitimise political rivals. Some EU EOM interlocutors and media reports argued that the leading campaigns have used data miners to target social media information/campaigning. They also raised concerns about the lack of data protection laws, leaving individuals at risk of exposure, possibly advantaging the ruling party due to its access to citizen information through state institutions. The lack of campaign finance regulations further obscured such campaign activities.

Guidelines on the use social media by NCIC and the Communication Authority of Kenya were circulated in mid and late June, and then later improved and released on 13 July. They include requirements for "*honesty and accuracy*" in publications, and for providers to remove "*undesirable political content*". Concern was raised that these could be selectively applied. Inflammatory messages originating at political rallies appeared to be reinforced by supporters through social media. However, the public perception of hate speech, broadly defined in the constitution and National Cohesion and Integration Act, appears to include negative campaigning and it is open to varied interpretation.

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<sup>38</sup> However KTN gave all presidential candidates a one hour slot to present their positions, and also newspapers covered all eight contestants.

<sup>39</sup> Election Offences Act, section 14 (2) stipulates that no government "*shall publish any advertisements of achievements of the respective government either in the print media, electronic media...*"

<sup>40</sup> Since 24 June the EU EOM has been analysing election coverage in a representative sample of 15 media outlets, consisting of 4 TV channels (KBC, Citizen, NTV and KTN), 7 radio stations (KBC Radio Swahili service, Radio Jambo, Kameme, Kass, Mulembe, Musyi and Ramogi) and 3 daily newspapers (Nation, Standard and Star) and a weekly East African. Broadcasts monitored were in Kiswahili, English, Kalenjin, Kamba, Kikuyu, Luhya, and Luo.

<sup>41</sup> KBC TV news programmes devoted 34% of its coverage of political actors and election protagonists to Jubilee, and 34% of its coverage to NASA. Independent candidates and other parties received 11% KBC radio presented a similar pattern of news coverage.

## Civil Society and Citizen Observation

Kenya has a competent and diverse civil society sector. However the government has failed to implement the Public Benefits Organisations Act 2013, and is criticised for over-control and restriction of the activities of civil society organisations (CSOs). The election process has been scrutinised by a wide variety of organisations with respective specific expertise since the mass voter registration exercise in 2016, with CSOs looking at *inter alia* the legal framework, IEBC readiness and policing. Other election-related initiatives include Kura Yangu Sauti Yangu co-organising the NEC with the IEBC, and various peace and mediation initiatives. The Elections Observation Group (ELOG), a permanent CSO network, monitored voter registration, party primaries, violence and hate speech, providing information and analysis to the public.<sup>42</sup> It also deployed approximately 7,700 observers on election day, including for a nationwide parallel vote tabulation.

## Participation of Women and Disadvantaged Groups

Despite constitutional provisions prescribing the two-thirds gender principle of representation in elective and appointive positions, there has been a failure to establish enabling mechanisms, leaving women under-represented in legislative assemblies and in the electoral process. Thus, Kenya's commitments under the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, and the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), remain unfulfilled.

Women make up only 9.4% of all candidates competing for elective positions,<sup>43</sup> a slight increase compared to the 2013 elections.<sup>44</sup> None of the 2017 presidential candidates were women and only 4.3% of gubernatorial candidates were female. It is highly unlikely that women will comprise one third of the new legislature, and thus there is a high risk of legal challenge regarding the constitutionality of the 12<sup>th</sup> parliament.<sup>45</sup>

While there are various policies in place to facilitate women's candidacy, these have not substantially increased the number of elected women.<sup>46</sup> The 2016 revision of the PPA calls for 15% of the Political Parties Fund to be allocated to qualified parties based on the number of candidates from special interest groups elected in the preceding elections. Women's advocacy groups and the media have reported numerous cases of women aspirants and candidates being harassed, attacked or discriminated against by other contestants and their supporters, or their own party leadership. Women are under-registered, comprising 47% of registered voters (a greater gender differential than in 2013), in contrast to 2017 adult population projections of 51% women.

Kenya ratified the Convention on the Rights of Persons with Disabilities (CRPD) in 2008 and the constitution reserves special seats for persons with disability (PWDs) in the National Assembly, the Senate and county assemblies. However, the constitution also establishes sound mental capacity as a condition for registering as a voter and standing as a candidate, which is not consistent with the CRPD.<sup>47</sup>

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<sup>42</sup> Since March 2017, ELOG has deployed 290 LTOs countrywide, 21 media monitors focusing on hate speech, and 93 monitors for special interest groups.

<sup>43</sup> According to IEBC data, out of 14,523 candidates running for elective positions, 1,358 are women.

<sup>44</sup> This is attributed to the increase in independent candidates. Women comprised 19.4% and 26.5% of legislators in the National Assembly and Senate, and there were no female governors and no directly-elected women senators.

<sup>45</sup> The two third gender principle of representation will certainly not be complied with despite the 47 elected seats reserved for county women representatives to the National Assembly and the 16 nominated seats reserved for women in the Senate.

<sup>46</sup> For example party primaries fees must be graduated or waived for members of special interest groups. In addition, candidate nomination fees payable to IEBC were reduced by 50% for members of special interest groups.

<sup>47</sup> The CRPD Committee's interpretation of CRPD articles 12 and 29 state that mental incapacity should not serve as a basis for the deprivation of the right to vote and to be elected, under any circumstances.

The reserved seats notwithstanding, PWDs are very under-represented as candidates for elective positions, with only approximately 30 PWDs out of a total of 14,523, which is 0.2%. While there are an estimated six million PWDs in Kenya according to the World Health Organization (WHO) and local Disabled Persons Organisations (DPOs), only 144,530 are registered to vote according to IEBC statistics (0.74% of all registrants). A series of recent legislative and regulatory measures improve provisions for accessibility, albeit in a limited way.<sup>48</sup> Although the IEBC has developed specimen tactile ballot guides for the 2017 elections, it did not make them available on election day. Positively, media coverage of campaign and other election events included sign language.<sup>49</sup>

### **Polling and Counting**

On election day, voters showed exceptional commitment and determination to vote, waiting in long queues throughout the day. Voting was conducted in a calm atmosphere, with just a few disturbances observed in the vicinities of some polling stations. Election staff observed worked diligently and effectively, and the IEBC took resolute actions of replacement of a few staff.

EU EOM observers saw security officers appropriately deployed (one or two were present in 85% of polling stations observed). Party agents were also very present and assessed to be able to operate freely. The EU EOM, as well as candidate agents and citizen observers, were able to observe the voting process without restriction in almost all polling stations visited. EOM observers did not see Jubilee agents in 6% of visited stations in NASA strongholds, while they did not see NASA agents in 27% of visited stations in Jubilee strongholds.

Polling was consistently well assessed by EU EOM observers in Jubilee and NASA strongholds, as well as in swing constituencies, with no signs of centralised or localised manipulation. There were positive assessments of voting in 94% of 631 polling stations observed (in 227 constituencies in 35 counties across the country). Voting procedures were generally well implemented. However in approximately one third of polling stations, the layout did not sufficiently protect secrecy of the vote. In over a quarter of stations visited, voters' fingers were not checked for traces of ink. In nearly half of stations, one or more voters were not recognised by their biometric data (fingerprints) and their alphanumeric data was then checked in the KIEMS. In 43% of such cases, the proper complementary mechanisms were not carried out, meaning that there was not a proper record (on the KIEMS or on paper).<sup>50</sup>

Overall closing and counting was well conducted in the 44 stations observed, with good levels of transparency, in the presence of candidate representatives and observers without interference. However there were inconsistent closing arrangements,<sup>51</sup> and in some polling stations observed, polling staff did not undertake mathematical consistency tests and there was some difficulties completing results forms. Copies of results forms were generally provided to party representatives in

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<sup>48</sup> The Elections Act prescribes that the IEBC “*put in place appropriate infrastructure including special voting booths...*” while the Persons with Disabilities Act stipulates that PWDs shall “*be provided with the necessary devices and assistive devices and services.*”

<sup>49</sup> Section 39 of The Persons with Disabilities Act stipulates that all television stations shall provide a sign language inset or subtitles in all newscasts and educational programmes.

<sup>50</sup> In several instances, there was a lack of sufficient 32A forms or validation in the system by presiding officers. Furthermore, presiding officers often referred to not being aware of having a backup printed voter register, as they had been instructed to exclusively use the KIEMS for voter identification.

<sup>51</sup> With not all voters in line at the time of closing being allowed to vote, and some voters arriving after the closing time being given a ballot.

most cases and posted outside the polling stations. In almost all cases presidential results were properly entered and electronically transmitted, in full view of agents and observers. In a few cases KIEMS were not operational for transmission of results, and/or staff had difficulty entering data or scanning due to weak network or technical issues.

To date the IEBC has demonstrated its commitment to transparency in the results process, including by putting results forms on line. On 9 August NASA complained through several press conferences about alleged ICT manipulations of the keyed-in results. As with all complaints received by an EU EOM, the mission can look into the matter, but more importantly will look at how the responsible authorities manage the issue.

### **Key Recommendations**

The EU EOM will continue in country to observe the remaining stages of the election process, including results tallying and announcement, response to results and the petitions processes. The mission will also formulate recommendations for improving future electoral processes in Kenya, which will be released in a final report within approximately two months of the conclusion of the electoral process. The EU is committed to supporting the implementation of recommendations for improved future elections in line with national legislation and international commitments related to political participation.<sup>52</sup> At this preliminary stage the EOM has identified the following key recommendations, which will be further developed and supplemented in the EU EOM final report.

1. In order to get an agreed and clear legal framework well in advance of the next elections, a process of legislative reform be undertaken promptly, including consultation with all stakeholders and to be based on cross-party consensus.
2. A thorough review of technology used be undertaken, with consideration of alternative means of providing for electoral integrity. Any further use of technology be planned more in advance to allow for public consultation, field and security testing as well as training.
3. The new parliament must address the mechanism to provide for the two-thirds gender principle among elected representatives.

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This Preliminary Statement is available on the mission website (Website: [www.eueom.eu/kenya2017](http://www.eueom.eu/kenya2017)) and social media links: Facebook: [www.facebook.com/eueomkenya2017](https://www.facebook.com/eueomkenya2017), Twitter: [@eueomkenya2017](https://twitter.com/eueomkenya2017), Instagram: <https://www.instagram.com/eueomkenya/?hl=en>).

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<sup>52</sup> For further information see *Beyond Election Day, Best Practices for Follow-Up to EU Election Observation Missions*, 2017. Available at: [https://eeas.europa.eu/sites/eeas/files/eom\\_brochure\\_2017.pdf](https://eeas.europa.eu/sites/eeas/files/eom_brochure_2017.pdf)