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## **OPINION ON THE DRAFT LAW INTRODUCING A “PEOPLE’S ADVOCATE FOR ENTREPRENEURS’ RIGHTS”**

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### **MOLDOVA**

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Based on an unofficial English translation of the Draft Law provided by the People’s Advocate of the Republic of Moldova.

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## EXECUTIVE SUMMARY

The Draft Law aims to establish a People's Advocate for Entrepreneurs' Rights that would form part of the current legal structure of the People's Advocate of Moldova, which is a constitutional human rights body and a National Human Rights Institutions (NHRI) accredited with A-Status that is considered to be compliant with the Paris Principles.

While recognizing that there are many types of national human rights institutions (hereinafter "NHRIs"), with diverse structures, mandates and competencies, this Draft Law, if implemented, may significantly change the structure and nature of the People's Advocate, introducing a wholly new and unrelated mandate pertaining to the defence of so-called "entrepreneurs' rights and legitimate interests".

Broadening the scope of the human rights mandate of an NHRI is not problematic *per se*, if such additional functions are accompanied by the allocation of adequate financial, technical and human resources and if this does not lead to an overburdening of the NHRI and a potential dilution of its human rights work. The attempt to add an Entrepreneurs' Advocate to Law no. 52/2014 on the People's Advocate (hereinafter "the enabling law"), will however create another distinct People's Advocate within the existing framework of the NHRI, with competences that lie outside of the institution's current human rights mandate. Such a step could lead to a potential duplication or overlap of duties and activities, possibly creating a conflict of competences or interests and leading to difficulties in protecting the human rights of individuals vis-a-vis business entities.

Moreover, intended reform may likely further increase the current ambiguities regarding the respective roles and responsibilities of the two existing People's Advocates and the practical challenges that this poses to the NHRI. The Draft Law and accompanying documentation also do not appear to sufficiently address the need for additional financial resources for the institution, which risks amplifying the ongoing problem of under-funding already faced by the NHRI of Moldova. This is all the more concerning, as this reform was initiated without engaging in prior consultations with the People's Advocate.

Already today, nothing should prevent entrepreneurs from submitting a complaint to the office of the People's Advocate like all other individuals, should they wish to complain about alleged violations of their basic rights in the context of their business activities, including breaches of their property rights, fair trial rights, the right to respect for private life, rights to freedoms of speech or association, or discrimination, among others.

In this context, it is welcome that the Draft Law proposes to extend to legal persons the right to submit a complaint to the People's Advocate. It would, however, be preferable to introduce this amendment to the enabling law, rather than to the Law on the Approval of the Regulation on the Organization and Functioning of the People's Advocate.

Based on the above considerations, it is recommended that the Draft Law be reconsidered in its entirety, and that consultations take place between the People's Advocate, the relevant government office responsible for developing the proposed amendments, civil society, and the international community. Unless a number of highly problematic proposed amendments to the People's Advocate's mandate are

revised, the Draft Law may potentially call into question the People's Advocate's A-status accreditation.

Further, based on the above considerations, it would be preferable to refrain from introducing a People's Advocate for entrepreneurs' rights within the existing institutional structure. This should not, however, prevent the State from establishing a separate body, outside of the current office of the People's Advocate.

If, however the reform is nevertheless pursued as contemplated, the respective roles and responsibilities of the three People's Advocates should be clarified and relevant legislation should provide for a mechanism to resolve potential conflicts of competences or interests between these bodies, while ensuring the adequate allocation of human, technical and financial resources necessary to carry out the respective functions, and adequately defining the authority of the Advocates. Any additional reform efforts should be based on an in-depth human rights impact assessment, among others, and should be consulted extensively with the People's Advocate and other relevant stakeholders (including civil society) at an early stage, and throughout the lawmaking process.

***As part of its mandate to assist OSCE participating States in implementing OSCE commitments, ODIHR reviews, upon request, draft and existing legislation to assess their compliance with international human rights standards and OSCE commitments and provides concrete recommendations for improvement.***

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## I. INTRODUCTION

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1. On 23 November 2020, the People’s Advocate of the Republic of Moldova sent to the OSCE Office for Democratic Institutions and Human Rights (OSCE/ODIHR) a request for an opinion on the Draft Law for Amending Some Normative Acts Introducing a “People’s Advocate for Entrepreneurs’ Rights” (hereinafter “the Draft Law”). On 27 November 2020, OSCE/ODIHR responded to this request, confirming the Office’s readiness to prepare a legal opinion on the compliance of the Draft Law with OSCE commitments and international human rights standards.
2. In 2015 and 2017, the Venice Commission published two Opinions on the Law no. 52 on the People’s Advocate (Ombudsman) of the Republic of Moldova<sup>1</sup> and on the Proposed New Article 37 of the Law on the People’s Advocate Finance Provisions,<sup>2</sup> respectively, to which the Opinion will make references as appropriate.
3. This Opinion was prepared in response to the above request. OSCE/ODIHR conducted this assessment within its mandate to assist OSCE participating States in the implementation of key OSCE commitments in the human dimension.

## II. SCOPE OF THE OPINION

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4. The scope of this Opinion covers only the Draft Law, submitted for review. Thus limited, the Opinion does not constitute a full and comprehensive review of the entire legal and institutional framework on the People’s Advocate and the promotion and protection of human rights and fundamental freedoms in Moldova.
5. The Opinion raises key issues and provides indications of areas of concern. In the interest of conciseness, it focuses more on areas that require amendments or improvements than on the positive aspects of the Draft Law. The ensuing recommendations are based on international human rights standards and obligations, OSCE human dimension commitments, and good national practices. Where appropriate, they also refer to the relevant recommendations made in previous legal opinions published by OSCE/ODIHR and/or the Venice Commission.
6. This Opinion is based on an unofficial English translation of the Draft Law provided by the People’s Advocate of the Republic of Moldova. Errors from translation may result.
7. In view of the above, OSCE/ODIHR would like to note that this Opinion may not cover all aspects of the Draft Law, and that the Opinion thus does not prevent OSCE/ODIHR from formulating additional written or oral recommendations or comments on the respective legal acts or related legislation in Moldova in future.

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<sup>1</sup> Venice Commission, [Opinion on the Law on the People’s Advocate \(Ombudsman\) of the Republic of Moldova](#), CDL-AD(2015)017, adopted by the Venice Commission at its 103rd Plenary Meeting (Venice, 19-20 June 2015).

<sup>2</sup> Venice Commission, [Opinion on Proposed New Article 37 of the Law on the People’s Advocate of Moldova](#), CDL-AD(2017)032, adopted by the Commission at its 113th Plenary Session (Venice, 8-9 December 2017).

### III. LEGAL ANALYSIS AND RECOMMENDATIONS

#### 1. INTERNATIONAL STANDARDS AND OSCE COMMITMENTS RELATING TO NATIONAL HUMAN RIGHTS INSTITUTIONS

8. National Human Rights Institutions (NHRIs) are independent domestic bodies with a constitutional and/or legislative mandate to protect and promote human rights. NHRIs hold a crucial position among the range of institutions that form the infrastructure of a democratic system based on the rule of law and human rights.<sup>3</sup> They are “a key component of effective national human rights protection systems and indispensable actors for the sustainable promotion and protection of human rights at the country level”.<sup>4</sup> Thus, NHRIs link the responsibilities of the State stemming from international human rights obligations to the rights of individuals in the country. Although part of the state apparatus, the independence of NHRIs from the executive, legislative and judicial branches ensures that they are able to fulfil their mandate to protect individuals from human rights violations, particularly when such violations are committed by public authorities or bodies.<sup>5</sup>
9. There are many different types of NHRIs, with various structures, sizes, mandates and competencies. Internationally recognized rules on the mandates and competencies of NHRIs can first and foremost be found in the United Nations Principles relating to the Status of National Institutions for the Promotion and Protection of Human Rights, the so-called “Paris Principles”.<sup>6</sup> Adopted by the UN General Assembly, these principles set out minimum standards on the establishment and functioning of NHRIs, in terms of pluralism, transparency, guarantees of functional and institutional independence and effectiveness. The implementation of the Paris Principles and evaluation of NHRIs against these principles is undertaken by the Global Alliance of National Human Rights Institution’s (hereinafter “GANHRI”) Sub-Committee on Accreditation (hereinafter “SCA”).<sup>7</sup> The SCA publishes reports on the accreditation of NHRIs, reviews their status and provides them with periodic status accreditation every five years.<sup>8</sup> The ensuing recommendations are also based on the General Observations of the GANHRI, developed by its SCA (hereinafter “SCA General Observations”), which serve as interpretive tools of the Paris Principles.<sup>9</sup>

<sup>3</sup> See ODIHR, *Opinion on the Draft Federal Law on the Support to the National Human Rights Institution of Switzerland* (31 October 2017), par13.

<sup>4</sup> See UN High Commissioner for Human Rights, *Report to the UN General Assembly (2007)*, A/62/36, par 15.

<sup>5</sup> See ODIHR, *Final Opinion on the Draft Act Amending the Act on the Commissioner for Human Rights of Poland* (16 February 2016), available in [English](#) and in [Polish](#), par 11.

<sup>6</sup> The *UN Principles relating to the Status of National Institutions for the Promotion and Protection of Human Rights* (hereinafter “the Paris Principles”) were defined at the first International Workshop on National Institutions for the Promotion and Protection of Human Rights in Paris (7-9 October 1991), and adopted by UN General Assembly Resolution 48/134 of 20 December 1993.

<sup>7</sup> The Global Alliance of National Human Rights Institutions (GANHRI), formerly known as the International Coordinating Committee for National Human Rights Institutions (hereinafter “ICC”), was established in 1993 and is the international association of national human rights institutions (NHRIs) from all parts of the globe. The GANHRI promotes and strengthens NHRIs in accordance with the Paris Principles, and provides leadership in the promotion and protection of human rights. See <https://ganhri.org/>.

<sup>8</sup> See GANHRI, *Statute of GANHRI* (version adopted on 5 March 2019), Article 15, and GANHRI SCA Accreditation Reports 2001-2019, available at <https://nhri.ohchr.org/EN/AboutUs/GANHRIAccreditation/Pages/SCA-Reports.aspx>. Accreditation is the official recognition that an NHRI meets the requirements of or continues to comply with the Paris Principles. The SCA awards A, B or C Status. Status A means that an NHRI is fully in compliance with the Paris Principles and a voting member in the work and meetings on NHRIs internationally; Status B means that the NHRI does not yet fully comply with the Paris Principles or has not yet submitted sufficient documentation in this respect. Status B NHRIs have observer status in the work and meetings of NHRIs; Status C Institutions do not comply with the Paris Principles though this status is no longer applied. The People’s Advocate of the Republic of Moldova has Status A; see GANHRI, *Chart of the Status of National Institutions Accredited* - Accreditation Status as of 27 November 2019.

<sup>9</sup> See the latest revised *General Observations* of the Sub-Committee on Accreditation, as adopted by the GANHRI Bureau (hereinafter “SCA General Observations”) at its meeting held in Geneva on 21 February 2018.



10. The importance that the United Nations ascribes to NHRIs in the promotion and protection of human rights is also documented by various resolutions of the UN General Assembly and of the UN Human Rights Council.<sup>10</sup>
11. In addition, when an NHRI also performs the function of a National Preventive Mechanism (hereinafter “NPM”) under the Optional Protocol to the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (hereinafter “the OPCAT”),<sup>11</sup> the enabling NHRI legislation shall comply with the relevant provisions of the OPCAT. In particular, Article 18 of the OPCAT states that State Parties “*shall guarantee the functional independence of the national preventive mechanisms as well as the independence of their personnel*” and “*shall give due consideration to the [Paris] Principles*” when establishing national preventive mechanisms.
12. At the Council of Europe level, Recommendation CM/Rec(2019)6 of the Committee of Ministers to member States on the development of the Ombudsman institution,<sup>12</sup> several Recommendations and Resolutions of the Parliamentary Assembly of the Council of Europe,<sup>13</sup> and the European Commission against Racism and Intolerance’s (ECRI) General Policy Recommendation No. 2 on Equality bodies to combat racism and intolerance at national level (2017),<sup>14</sup> among others, set out the characteristics which are essential for NHRIs, more specifically for any ombuds institution, to operate effectively while guaranteeing their independence. The Venice Commission also published the Principles on the Protection and Promotion of the Ombudsman Institution (The Venice Principles),<sup>15</sup> which were endorsed by the Committee of Ministers of the Council of Europe on 2 May 2019, by the Parliamentary Assembly of the Council of Europe on 2 October 2019, by the Congress of Local and Regional Authorities on 30 October 2019 and by the UN General Assembly on 16 December 2020,<sup>16</sup> which establishes these principles as the new global standard for the ombudsmen institutions.
13. OSCE participating States have committed to facilitating “the establishment and strengthening of independent national institutions in the area of human rights and the rule of law” in the Copenhagen Document of 1990.<sup>17</sup> OSCE/ODIHR has been specifically

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<sup>10</sup> See e.g., UN General Assembly, *Resolution no. 74/156 on National Human Rights Institutions*, [A/RES/74/156](#), adopted on 18 December 2019; *Resolution no. 72/186 on the Role of the Ombudsman, Mediator and Other National Human Rights Institutions in the Promotion and Protection of Human Rights*, [A/RES/72/186](#), adopted on 19 December 2017; *Resolution no. 70/163 on National Institutions for the Promotion and Protection of Human Rights*, [A/RES/70/163](#), adopted on 17 December 2015; *Resolutions nos. 63/169 and 65/207 on the Role of the Ombudsman, Mediator and Other National Human Rights Institutions in the Promotion and Protection of Human Rights*, [A/RES/63/169](#) and [A/RES/65/207](#), adopted on 18 December 2008 and on 21 December 2010 respectively; *Resolutions nos. 63/172 and 64/161 on National Institutions for the Promotion and Protection of Human Rights*, [A/RES/63/172](#) and [A/RES/64/161](#), adopted on 18 December 2008 and 18 December 2009 respectively; and *Resolution no. 48/134 on National Institutions for the Promotion and Protection of Human Rights*, [A/RES/48/134](#), adopted on 4 March 1994. See also UN Human Rights Council, *Resolution no. 39/17 on National Human Rights Institutions*, [A/HRC/RES/39/17](#), adopted on 28 September 2018; *Resolution no. 34/17 on Regional Arrangements for the Promotion and Protection of Human Rights*, [A/HRC/RES/34/17](#), adopted on 11 April 2017; and *Resolution no. 27/18 on National Institutions for the Promotion and Protection of Human Rights of the UN Human Rights Council*, [A/HRC/RES/27/18](#), adopted on 7 October 2014.

<sup>11</sup> *UN Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment* (OPCAT), adopted by UN General Assembly resolution A/RES/57/199 of 18 December 2002. The Republic of Moldova ratified the OPCAT on 24 July 2006.

<sup>12</sup> Council of Europe, [Recommendation CM/Rec\(2019\)6 of the Committee of Ministers to member States on the development of the Ombudsman institution](#), adopted on 16 October 2019.

<sup>13</sup> See e.g., Parliamentary Assembly of the Council of Europe (PACE), *Recommendations 757 (1975)* (29 January 1975) and *1615 (2003) on the Institution of Ombudsman* (8 September 2003); and *Resolutions 1959 (2013) on the Strengthening the Institution of Ombudsman in Europe*, 4 October 2013; and [2301 \(2019\) on Ombudsman Institutions in Europe – The need for a set of common standards, adopted on 2 October 2019](#).

<sup>14</sup> European Commission against Racism and Intolerance (ECRI), *General Policy Recommendation No. 2 on Equality bodies to combat racism and intolerance at national level*, adopted on 13 June 1997 and revised on 7 December 2017.

<sup>15</sup> European Commission for Democracy through Law (Venice Commission), [Principles on the Protection and Promotion of The Ombudsman Institution](#) (The Venice Principles), CDL-AD(2019)005 .

<sup>16</sup> UN General Assembly, [Resolution 75/186 on the role of Ombudsman and mediator institutions in the promotion and protection of human rights, good governance and the rule of law](#), A/RES/75/186, 16 December 2020.

<sup>17</sup> See OSCE Copenhagen Document (1990), par 27, available at <<http://www.osce.org/odihr/elections/14304?download=true>>.

tasked to “continue and increase efforts to promote and assist in building democratic institutions at the request of States, inter alia by helping to strengthen [...] Ombud[s] institutions”,<sup>18</sup> which should be impartial and independent.<sup>19</sup>

14. The ensuing recommendations will also make reference, as appropriate, to other documents of a non-binding nature, which provide further and more detailed guidance, such as previous Opinions of the OSCE/ODIHR and the Venice Commission on the laws on NHRIs and ombudspersons,<sup>20</sup> the Venice Commission Compilation of Opinions Concerning the Ombudsman Institution,<sup>21</sup> and the UNDP-OHCHR’s Toolkit for Collaboration with National Human Rights Institutions (2010).<sup>22</sup>

## 2. NATIONAL LEGAL FRAMEWORK

15. Chapter III<sup>1</sup> of the Constitution of the Republic of Moldova, which was introduced by Law no. 70 of 13 April 2017, regulates the status and role of the People’s Advocate. Pursuant to Article 59<sup>1</sup> (1) of the Constitution, the People’s Advocate “ensures the promotion and protection of human rights and fundamental freedoms”. As previously noted by the Venice Commission, this is welcome since “a constitutionally defined mandate and status are essential, especially in a young democracy, for the consolidation and strengthening of this institution and its efficiency” and constitutes “a sign of the importance and respect granted to the institution and its functioning”.<sup>23</sup>
16. The enabling law and mandate of the People’s Advocate (Ombudsman) of the Republic of Moldova are set out in Law no. 52/2014 on the People’s Advocate, as amended (hereinafter referred to as the “enabling law”). The People’s Advocate is Moldova’s NHRI and was most recently accredited with A-Status in May 2018<sup>24</sup> by GANHRI SCA and should be due for regular periodic re-accreditation in 2023.<sup>25</sup> Pursuant to Article 5 (1) of the enabling law, there are currently two autonomous People’s Advocates appointed by the Parliament, one of whom should be specialized in children’s rights and freedoms. The Law approving the Regulation for Organization and Operation of the Ombudsman’s Office (2015)<sup>26</sup> further regulates the functioning of the office of the People’s Advocate.
17. Moreover, Article 30 of the enabling law, besides establishing the People’s Advocate Office, has created a Council for the Prevention of Torture to serve as the NPM under the OPCAT. At the same time, the UN Committee against Torture noted that the legal framework is ambiguous as to whether this Council is an advisory body to the People’s

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<sup>18</sup> See OSCE, *Bucharest Plan of Action for Combating Terrorism* (2001), Annex to OSCE Ministerial Council Decision on Combating Terrorism, MC(9).DEC/1, 4 December 2001, par 10.

<sup>19</sup> See e.g., *OSCE Action Plan for the Promotion of Gender Equality* (2004), Annex to OSCE Ministerial Council Decision No. 14/04, MC.DEC/14/04, 7 December 2004, par 42 (second indent).

<sup>20</sup> Available at <https://www.legislationline.org/odihr-documents/page/legal-reviews/topic/82/National%20Human%20Rights%20Institutions/show> for ODIHR and at <https://www.venice.coe.int/webforms/documents/?topic=24&year=all> for the Venice Commission.

<sup>21</sup> See Venice Commission, *Compilation of Venice Commission Opinions Concerning the Ombudsman Institution*, CDL-PI(2016)001, 5 February 2016.

<sup>22</sup> UNDP-OHCHR, *Toolkit for Collaboration with National Human Rights Institutions* (December 2010).

<sup>23</sup> Venice Commission, *Opinion on Proposed New Article 37 of the Law on the People’s Advocate of Moldova*, CDL-AD(2017)032, adopted by the Commission at its 113th Plenary Session (Venice, 8-9 December 2017), par 28.

<sup>24</sup> See GANHRI SCA, *Report*, May 2018, pages 25-28; and GANHRI, *Chart of the Status of National Institutions Accredited* - Accreditation Status as of 27 November 2019. In its May 2018 review, the SCA expressed concerns about the compliance of the People’s Advocate with the Paris Principles in the following areas: (1) the transparency and levels of participation in the selection and appointment process; (2) the lack of provision in the enabling law for pluralism and diversity; (3) the insufficiency of funding, the NHRI’s ability to assign funds to its priorities, and the level of funds for the additional mandate; (4) the need to allocate additional resources for interaction with the international human rights system; and (5) the need to improve monitoring of the implementation of human rights by the state.

<sup>25</sup> See *GANHRI Statute* [version adopted at the General Assembly on 5 March 2019], Article 15.

<sup>26</sup> See the *Law approving the Regulation for Organization and Operation of the Ombudsman’s Office No. 164* dated 31 July 2015, Official Gazette No. 267-273/504 of 2 October 2015.



Advocate, who should then be considered as the actual NPM, or whether it is an independent collegial body that is the national mechanism for the prevention of torture, in conformity with the OPCAT.<sup>27</sup>

18. It is worth emphasizing that the SCA and a number of international human rights monitoring mechanisms have in the past expressed concern regarding the insufficient human and financial resources allocated to the office of the People’s Advocate to effectively fulfil its mandate.<sup>28</sup>

### 3. PROCEDURE FOR AMENDING THE NHRI ENABLING LAW

19. The introduction of a new entity to defend and promote so-called “entrepreneurs’ rights” in Moldova has been discussed for some months. Initially, the proposed reform envisioned the establishment of a completely distinct body governed by separate legislation, and a separate Draft Law on the Entrepreneurs’ Advocate 472/MEI/2020<sup>29</sup> was thus developed. The Informative Note to the Draft Law explains that this option was rejected by the Ministry of Justice and the Ministry of Finance, which considered a new separate law dedicated to this field to be inappropriate<sup>30</sup> and instead proposed to introduce the core provisions of this Draft Law on the Entrepreneurs’ Advocate into the People’s Advocate’s enabling law. According to the Informative Note, the decision to include such new functions within the mandate of the current People’s Advocate’s office and in the enabling law appears to have been taken in June 2020.<sup>31</sup>
20. Based on the public consultation process described in the impact analysis prepared in connection to the Draft Law, it appears that, regrettably and for reasons that are unclear, no consultations were held with the People’s Advocate prior to this decision. Rather, public consultations appear to have been focused almost exclusively on the business community, public authorities, and key actors in the economic sphere, such as the economic councils of the President and the Prime Minister, as well as the Ministry of Finance. Placing the Draft Law, the Informative Note, and the related impact assessment on the websites of the Ministry of Economy and Infrastructure and of the State Chancellery – as was done according to the Informative Note<sup>32</sup> – is not the same as engaging in meaningful, effective and inclusive consultation process. The SCA has emphasized that where NHRI laws are amended, an open, transparent and meaningful consultative process should be undertaken, including with the NHRI itself.<sup>33</sup> Similarly, concerning NPMs, the UN Sub-Committee on the Prevention of Torture requires that the

<sup>27</sup> See UN Committee against Torture (UNCAT), *Concluding observations on the third periodic report of Republic of Moldova*, CAT/C/MDA/CO/3, 21 December 2017, par 15 (a).

<sup>28</sup> See GANHRI SCA, *Report*, May 2018, pages 25-26. See also for example, CEDAW, *Concluding observations on the sixth periodic report of the Republic of Moldova*, CEDAW/C/MDA/CO/6, adopted in February 2020, pars 16-17; Committee on Economic, Social and Cultural Rights, *Concluding observations on the third periodic report of the Republic of Moldova*, E/C.12/MDA/CO/3, 19 October 2017, pars 8-9; UNCAT, *Concluding observations on the third periodic report of Republic of Moldova*, CAT/C/MDA/CO/3, 21 December 2017, pars 15-16; UN Human Rights Committee, *Concluding observations on the third periodic report of the Republic of Moldova*, CCPR/C/MDA/CO/3, 18 November 2016, pars 8-9; and Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *Report on the visit to Moldova*, CAT/OP/MDA/1, 10 March 2014, par 17.

<sup>29</sup> This draft is available in the original language at: [https://cancelaria.gov.md/sites/default/files/document/attachments/proiectul\\_472\\_1.pdf](https://cancelaria.gov.md/sites/default/files/document/attachments/proiectul_472_1.pdf).

<sup>30</sup> See the Informative Note, Part I.

<sup>31</sup> See the Informative Note, Part I, which states: “Following the approval of the draft law on the Entrepreneurs’ Advocate (Ombudsman) (unique number 472 / MEI / 2020), according to the approach of the State Chancellery no. 18-23-5409 of 25.06.2020, the Ministry of Justice and the Ministry of Finance exposed the inopportunity of a new separate law dedicated to this field, and the examination of the solution to complete Law no. 52/2014 on the People’s Advocate (Ombudsman) with specific regulations for the entrepreneurs’ advocate, according to the example on the normative regulations regarding the People’s Advocate for Children’s Rights.”

<sup>32</sup> See Informative Note, Part VII.

<sup>33</sup> For example, concerning the development of the NHRI in Norway, the SCA recommended that “[a]n inclusive and consultative process to ensure broad support for a new NHRI should be initiated by the Government without delay”, emphasizing that “[t]he process should include the [existing institution], civil society groups and other stakeholders”; see GANHRI SCA, *2011 Report*, Norway, October 2011, pages 15-16.

NPM be consulted on changes to laws relevant to its mandate.<sup>34</sup> It is thus essential that the NHRI be meaningfully consulted in relation to draft legislation that affects or concerns it, at all stages of the law-making process, from the preparation of the initial draft by the government, to parliamentary debates and up until the adoption, as well as future evaluation of the legislation.<sup>35</sup>

21. More generally, OSCE participating States have committed to ensure that legislation will be “*adopted at the end of a public procedure, and [that] regulations will be published, that being the condition for their applicability*” (1990 OSCE Copenhagen Document, par 5.8).<sup>36</sup> It is also worth recalling that OSCE commitments require legislation to be adopted “*as the result of an open process reflecting the will of the people, either directly or through their elected representatives*” (Moscow Document of 1991, par 18.1). The Venice Commission’s Rule of Law Checklist also emphasizes that the public should have a meaningful opportunity to provide input.<sup>37</sup> Particularly legislation that may have an impact on human rights and fundamental freedoms, as is the case here, should undergo extensive consultation processes throughout the drafting and adoption process, to ensure that the NHRI, human rights organizations and the general public, including marginalized groups, are fully informed and able to submit their views prior to the adoption of the Act.<sup>38</sup>
22. For consultations on draft legislation to be effective, they should be organized in a way that provides sufficient time to stakeholders to prepare and submit recommendations on draft legislation, while the State should set up an adequate and timely feedback mechanism whereby public authorities should acknowledge and respond to contributions, providing for clear justifications for including or not including certain comments/proposals.<sup>39</sup> Public discussions and an open and inclusive debate will increase all stakeholders’ understanding of the various factors involved and enhance confidence and trust in the adopted legislation, and in the institutions in general.<sup>40</sup>
23. Given the potential impact of the Draft Law on the exercise and protection of human rights and fundamental freedoms, it is also essential that the development of legislation in this field be preceded by an in-depth regulatory impact assessment, including on human rights compliance and NHRI’s compliance with the Paris Principle, completed with a proper problem analysis using evidence-based techniques to identify the most efficient and effective regulatory option.<sup>41</sup> While an impact analysis was prepared to demonstrate the need for and possible impacts of the Draft Law, this was limited to an assessment of the impact of the proposed legal amendments to businesses and the

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<sup>34</sup> UN Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, [Guidelines on National Preventive Mechanisms](#), 9 December 2010, UN Doc CAT/OP/12/5, par 28.

<sup>35</sup> See also the [Belgrade Principles on the Relationship between National Human Rights Institutions and Parliaments](#) (2012), which the OHCHR recommends to use as guidelines to strengthen co-operation between NHRIs and parliaments for the promotion and protection of human rights at the national level, especially par 4, which states that “*Parliaments, during the consideration and adoption of possible amendments to the founding law of a NHRI, should scrutinize such proposed amendments with a view to ensuring the independence and effective functioning of such institution, and carry out consultation with the members of NHRIs and with other stakeholders such as civil society organizations*”; and pars 27-28 which provide that “*NHRIs should be consulted by Parliaments on the content and applicability of a proposed new law with respect to ensuring human rights norms and principles are reflected therein*” and “*Parliaments should involve NHRIs in the legislative processes, including by inviting them to give evidence and advice about the human rights compatibility of proposed laws and policies*”.

<sup>36</sup> Available at <<http://www.osce.org/fi/odihr/elections/14304>><http://www.osce.org/fi/odihr/elections/14304>>.

<sup>37</sup> See Venice Commission, [Rule of Law Checklist](#), CDL-AD(2016)007, Part II.A.5.

<sup>38</sup> See e.g., ODIHR, [Opinion on the Draft Federal Law on the Support to the National Human Rights Institution of Switzerland, Warsaw](#), 31 October 2017, par 95.

<sup>39</sup> See e.g., [Recommendations on Enhancing the Participation of Associations in Public Decision-Making Processes](#) (from the participants to the Civil Society Forum organized by ODIHR on the margins of the 2015 Supplementary Human Dimension Meeting on Freedoms of Peaceful Assembly and Association), Vienna 15-16 April 2015.

<sup>40</sup> See e.g., ODIHR, [Opinion on the Draft Federal Law on the Support to the National Human Rights Institution of Switzerland, Warsaw](#), 31 October 2017, par 95.

<sup>41</sup> See e.g., ODIHR, [Preliminary Assessment of the Legislative Process in the Republic of Uzbekistan](#) (11 December 2019), Recommendations L and M; and Venice Commission, [Rule of Law Checklist](#), CDL-AD(2016)007, Part II.A.5.

economic sector, but does not appear to have focused on the impact that the Draft Law would have on the Office of the People’s Advocate and human rights in general.

24. Such impact assessment is particularly relevant, given that significant amendments to an NHRI’s enabling law may also result in a Special Review by the SCA.<sup>42</sup> As discussed below, the changes in the proposed amendments are significant as they substantially impact the mandate of the NHRI of Moldova and its ability to fulfil its mandate to the fullest extent, especially if the additional financial resources that are allocated to the institution are insufficient. Also, a unilateral change in the enabling law of an NHRI, without consulting the institution and taking its views into account, is likely to cause significant concern to the SCA.
25. In light of the above, OSCE/ODIHR calls upon the public authorities to ensure that the Draft Law and any legislative initiatives pertaining to the NHRI, and more generally to the protection of human rights and fundamental freedoms, is subject to open, inclusive, extensive and effective consultations, including with the NHRI, human rights organizations and the general public, including marginalized groups, offering equal opportunities for women and men to participate. According to the principles stated above, such consultations should take place in a timely manner, and at all stages of the law-making process, including when the planned reform and subsequently the draft legislation are discussed by the Government as well as before the Parliament.

#### 4. THE PURPOSE AND SCOPE OF THE DRAFT LAW

26. At the outset, it is important to note that the establishment of a dedicated entity to protect entrepreneurs’ rights and to defend and represent businesses’ and entrepreneurs’ interests in their relations with state or sub-state entities is an unproblematic, and even welcome step. The active development of institutions that protect the interests of entrepreneurs began in the 1990s with the establishment of ombudsperson<sup>43</sup> institutions that have mandates involving the protection of businesses, such as in the United States, Canada, Poland, and the United Kingdom.<sup>44</sup> Certain international bodies, such as the European Bank for Reconstruction and Development (EBRD) and the Organisation for Economic Co-operation and Development (OECD), have been promoting such mechanisms<sup>45</sup> with a view to developing entrepreneurship, promoting business integrity and addressing the issues faced by entrepreneurs in relation to state administration and regulation. More recently, a number of countries from Eastern Europe and Central Asia have established such bodies and entrepreneurs’ or business ombudspersons or commissioners exist as separate bodies, for instance in Ukraine,<sup>46</sup> Georgia,<sup>47</sup> Uzbekistan,<sup>48</sup> Kazakhstan,<sup>49</sup> the

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<sup>42</sup> See SCA, [Practice Note 2](#) (6 March 2017), which states that “[i]n accordance with Article 16.2 of the GANHRI Statute, the SCA may initiate a Special Review where it appears that the circumstances of any A-status NHRI may have changed in a way that affects compliance with the Paris Principles”, thereby referring to situations such as where the enabling law of the NHRI has been amended significantly or where there has been a significant political change that impacts adversely on the ability of the NHRI to fulfill its mandate.

<sup>43</sup> For the purposes of this Opinion, and while acknowledging that the Scandinavian term “Ombudsman” is considered to be gender-neutral in origin, the term “ombudsperson” is generally preferred, in line with increasing international practice to ensure the use of gender-sensitive language (see e.g., <[https://www.unescwa.org/sites/www.unescwa.org/files/page\\_attachments/1400199\\_0.pdf](https://www.unescwa.org/sites/www.unescwa.org/files/page_attachments/1400199_0.pdf)>).

<sup>44</sup> See e.g., Organisation for Economic Co-operation and Development (OECD), [Anti-corruption Reforms in Eastern Europe and Central Asia, Progress and Challenges, 2016-2019](#) (2020), page 178. See also European Union-Council of Europe, [Technical Paper: Comparative analysis of “International and Russian experience in terms of powers, competencies and practices of Business Ombudsman Institution”](#) (2013), pages 6-7, which provides an overview of international practices of business ombudsman or similar institutions.

<sup>45</sup> See <<https://www.ebrd.com/what-we-do/sectors-and-topics/business-ombudsman-initiatives.html>>. See also *ibid.* page 193, Recommendation E (2020 OECD Report on Anti-Corruption Reforms in Eastern Europe and Central Asia).

<sup>46</sup> See Ukraine’s Business Ombudsman, <<https://boi.org.ua/>>.

<sup>47</sup> See Business Ombudsman of Georgia, <<https://businessombudsman.ge/en/legislation>>.

<sup>48</sup> See the Commissioner for Protection of Rights and Legitimate Interests of Entrepreneurs under the President of the Republic of Uzbekistan, <<https://biznesvakil.uz/en/news/2>> (enabling law available here (in Russian) <<https://lex.uz/docs/4242838>>).

<sup>49</sup> See the Ombudsman for the Protection of the Rights of Entrepreneurs of Kazakhstan, <<https://ombudsmanbiz.kz/eng/>> (enabling law available here in Russian: <[https://online.zakon.kz/document/?doc\\_id=31416500](https://online.zakon.kz/document/?doc_id=31416500)>).

Kyrgyz Republic<sup>50</sup> and the Russian Federation.<sup>51</sup> As noted by the OECD, the act of creating such bodies generally tends to respond to a strong demand from the private sector for the protection of businesses’ rights and interests from various abuses by public administrations in countries where the justice system may not always be able to provide such protection.<sup>52</sup> It is worth underlining, however, that such bodies have been established solely for the purpose of addressing businesses’ and entrepreneurs’ interests and needs. The present Opinion, on the other hand, focuses on the proposal to add such functions to the mandate of the Moldovan People’s Advocate, and the manner in which the proposed amendments were developed.

27. The Draft Law under review seeks to amend the enabling law and other relevant legislation with a view to establishing a People’s Advocate for Entrepreneurs’ Rights that would form part of the People’s Advocate’s current structure. The proposed amendments thereby aim to increase the number of people’s advocates to three<sup>53</sup> and to expand the mandate and functions of the People’s Advocate’s office to include so-called “entrepreneurs’ rights”.
28. According to the Informative Note to the Draft Law,<sup>54</sup> the stated purpose of the Draft Law is to assist economic agents in counteracting abuses committed by public authorities and institutions in particular, and eliminate shortcomings in the relevant normative framework, especially unnecessary and ineffective procedures. The Impact Analysis on the Draft Law emphasizes that such shortcomings not only diminish the competitiveness and productivity of economic operators, but ultimately also harm the interests of consumers.<sup>55</sup> While not underestimating the impact of such shortcomings on persons running businesses, such issues appear completely unrelated, to say the least, to a constitutional mandate to promote and protect fundamental human rights, children’s rights and to prevent torture, as currently exercised by the People’s Advocate in Moldova. The Informative Note does not mention the Paris Principles, the key international standard in relation to NHRIs, nor does it mention the existing status of the People’s Advocate as an NHRI. Both of these omissions are very concerning, as they fail to acknowledge the key role of this institution for the promotion and protection of human rights. Finally, it is also unclear whether an impact analysis has been undertaken on the effects of adding such a new mandate to the People’s Advocate’s Office (see par 23 *supra*).
29. In light of the above, it is noted that the proposed amendments represent a fundamental change to the nature of the People’s Advocate as a human rights body, by introducing to the office a completely new and unrelated mandate. As further analysed below, this amendment may call into question the Government’s commitment to its NHRI, thereby threatening to undermine the proper and effective functioning of the office of the People’s Advocate, its independence, and ultimately, the promotion and protection of human rights and fundamental freedoms in Moldova.

## 5. EXPANSION OF THE NHRI’S MANDATE

30. As noted above, Article 59<sup>1</sup> of the Constitution provides that the People’s Advocate ensures the promotion and protection of human rights and fundamental freedoms. The

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<sup>50</sup> See the Business Ombudsman of the Kyrgyz Republic, <<http://boi.kg/en/>> (establishing resolution (in Russian) available here: <<http://cbd.minjust.gov.kg/act/view/ru-ru/12866/10?cl=ky-kg&mode=tekst>>).

<sup>51</sup> See the Presidential Commissioner for Entrepreneurs’ Rights of the Russian Federation <[ombudsmanbiz.ru](http://ombudsmanbiz.ru)>.

<sup>52</sup> *Op. cit.* footnote 44, page 178 (2020 OECD Report on Anti-Corruption Reforms in Eastern Europe and Central Asia).

<sup>53</sup> Article 5 (1) of the Law no. 52/2014 on the People’s Advocate, as amended, currently provides that “[t]he Parliament appoints two People’s Advocates, autonomous among them, where one is specialized in the issues of the child rights and freedoms protection”.

<sup>54</sup> Available at <<https://cancelaria.gov.md/sites/default/files/document/attachments/proiect-877.pdf>>.

<sup>55</sup> See Impact Analysis on the Draft Law, 1(a).



enabling law further states that the People’s Advocate “ensures the observance of human rights and freedoms by public authorities, organizations and undertakings, regardless of the type of ownership and legal form of organization, by non-profit organizations and by people with positions of responsibility at all levels” (Article 1 (1)) and “contributes to the defense of human rights and freedoms” (Article 1 (2)). The extensive human rights reports of the People’s Advocate further demonstrate that this is a body dedicated to the promotion and protection of human rights.<sup>56</sup>

31. The proposed new Article 17<sup>1</sup> (2) of the enabling law provides that the People's Advocate for Entrepreneurs’ Rights “defends the rights and legitimate interests of entrepreneurs by: preventing their violation, monitoring and reporting on compliance at the national level, promoting the rights and legitimate interests of entrepreneurs and their defense mechanisms, applying regulated procedures by the present law, improving the legislation and international collaboration in this field”. Hence, the proposed amendments will expand the mandate of the NHRI to cover an area – so-called “entrepreneurs’ rights” – that is only tangentially related to human rights. Additionally, the term “entrepreneurs’ rights” is not adequately defined in the Draft Law, nor are these rights enumerated in any way.
32. According to sections A.1 and A.2 of the Paris Principles, an NHRI should possess “as broad a mandate as possible”, which is to be “set forth in a constitutional or legislative text”, and should include both, “the promot[ion] and protect[ion] of human rights”. However, the Paris Principles do not refer to the rights of legal persons, but exclusively to “human rights”. SCA General Observation 2.1. further states that “[a]n NHRI’s mandate should be interpreted in a broad, liberal and purposive manner to promote a progressive definition of human rights which includes all rights set out in international, regional and domestic instruments, including economic, social and cultural rights”. Accordingly, the definition of “human rights” should be expansive,<sup>57</sup> and should cover, but not be limited to the UN human rights conventions ratified by a state. Therefore, broadening the scope of the human rights mandate of an NHRI is not necessarily problematic *per se*, if such additional functions are accompanied by the allocation of adequate financial, technical and human resources, which does not, however, appear to be the case, as shown below in Sub-Section 9 *infra*. It may also lead to an overburdening of the NHRI and a potential dilution of its human rights work.
33. Based on an overview of NHRI laws of OSCE participating States, it would appear to be rather uncommon to expressly refer to “entrepreneurs’ rights” as a separate category of rights as part of or next to the human rights mandate of an NHRI, thereby combining these two different mandates in the NHRI enabling legislation. For instance, in Armenia, the Human Rights Defender appears to cover such matters *in practice* and has a specialized department in charge of receiving complaints from the business sector,<sup>58</sup> as does the Office of the Commissioner for Human Rights of Poland, which has the specialized Administrative and Business Law Division to deal with such cases. Apart from institutions which are also “general” ombudspersons and thereby cover a wider range of powers in relation to good public administration (e.g., in Lithuania<sup>59</sup>), there is nothing in other NHRI enabling laws that would be comparable to what is being proposed here for Moldova. The Draft Law therefore appears to pose a unique circumstance, where

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<sup>56</sup> See <<http://ombudsman.md/en/rapoarte/anuale/>>.

<sup>57</sup> See e.g., GANHRI, [SCA Report](#), Scotland, March 2015.

<sup>58</sup> See OECD, [Anti-corruption Reforms in Eastern Europe and Central Asia, Progress and Challenges, 2016-2019](#) (2020), page 179. See also Human Rights Defender of Armenia, 2019 Report, chapter 10 (pages 419-477) and <[https://www.ombuds.am/en\\_us/site/BusinessRight](https://www.ombuds.am/en_us/site/BusinessRight)>.

<sup>59</sup> See Republic of Lithuania Law on the Seimas Ombudsmen, 3 December 1998 No. VIII-950, Article 5. The Seimas Ombudsman “... protects human rights and freedoms, investigates the complainants’ complaints about abuse of office by or bureaucracy of officials and seeks to upgrade public administration”.

a mandate wholly unrelated to the promotion and protection of human rights and fundamental freedoms would be expressly added to an NHRI’s human rights mandate in an NHRI enabling law. This does not mean that an NHRI will not or cannot deal with potential human rights violations committed against legal persons, in so far as the rights and fundamental freedoms covered by international human rights standards may be applicable to legal persons (see pars 38-41 *infra*).

34. As emphasized by the SCA in its General Observations, changes to the mandate and functions of an NHRI should be carefully scrutinized to ensure that “*its guarantees of independence and powers do not risk being undermined in the future*”.<sup>60</sup> The Venice Principles also underline that “*States shall refrain from taking any action aiming at or resulting in [...] any hurdles to [the] effective functioning [of the Ombuds Institution], and shall effectively protect it from any such threats*”.<sup>61</sup> In this context, it is therefore absolutely essential to closely review the potential impact of the proposed amendments on the independence of the People’s Advocate as an NHRI and its functioning and ability to carry out its primary mandate to promote and protect human rights and fundamental freedoms.
35. The proposed amendments to Article 5 (1) of the enabling law will see the addition of a new People’s Advocate “*specialized in the issues of protection of entrepreneurs’ rights*”, with the three People’s Advocates being “*autonomous among them*”. It is however unclear how these three officeholders would relate to each other. This concept of autonomy of individual officeholders within one institution has previously been criticized by the Venice Commission in its 2015 Opinion on the Law on the People’s Advocate (Ombudsman) of the Republic of Moldova due to its lack of clarity on the internal arrangements between the two People’s Advocates, including how autonomous or independent they are from one another.<sup>62</sup> Such concerns were echoed by the UN Committee on the Rights of the Child in its latest concluding observations on Moldova, where it recommended that the respective roles and responsibilities of the People’s Advocate’s Office and the Office of the Ombudsman for Children’s Rights be clearly defined to allow both to effectively discharge their mandates.<sup>63</sup> The addition of another distinct People’s Advocate, working on an area outside of the institution’s current human rights mandate, is likely to further increase the ambiguities regarding the respective roles and responsibilities of the three People’s Advocates and the practical challenges faced by the NHRI. This is compounded by the fact that the Draft Law does not contain a clear definition of what “*entrepreneurs’ rights*” entail, and if and to what extent they may be equated with human rights. Such ambiguities and lack of clear definitions could lead to a potential duplication or overlap of duties and activities, or possible conflicts of interest between the different People’s Advocates, which could prove difficult to resolve (see also par 46 *infra*).

36. The proposed amendment to point 14 of Annex 1 to the regulations on the Office of the People’s Advocate state that along with the People’s Advocate for Children’s Rights, the People’s Advocate for Entrepreneurs’ Rights “*will submit to the People’s Advocate proposals related to the planning of the Office’s activity, to the elaboration of the draft budget and to the reporting*”.<sup>64</sup> This provision suggests that the other two mandate-holders are somehow subordinate to the People’s Advocate. In practice, this may pose concerns in terms of these bodies’ independence and also means that the

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<sup>60</sup> *Op. cit.* footnote 9, Justification to General Observation 1.1. (2018 SCA General Observations).

<sup>61</sup> *Op. cit.* footnote 15, par 24 (2019 Venice Principles).

<sup>62</sup> Venice Commission, [Opinion on the Law on the People’s Advocate \(Ombudsman\) of the Republic of Moldova](#), CDL-AD(2015)017, pars 43-44.

<sup>63</sup> See Committee on the Rights of the Child (CRC), [Concluding observations on the combined fourth and fifth periodic report of the Republic of Moldova](#), CRC/C/MDA/CO/4-5, 20 October 2017, par 11.

<sup>64</sup> Proposed amendment to the Law approving the Regulation for Organization and Operation of the Ombudsman’s Office No. 164 dated 31.07.2015 (Official Gazette No.267-273/504 of 2 October 2015).



People’s Advocate will need to engage directly in the work of the People's Advocate for Entrepreneurs' Rights, taking time away from his/her own human rights work. The same concerns arise with regard to the Secretary-General of the institution, who might be similarly engaged, given his/her role in conducting the organizational and administrative activities of the Office (Article 35 of the enabling law).

37. The proposed amendments also add so-called “entrepreneurs’ rights and legitimate interests” (see proposed new Article 17<sup>1</sup> of the enabling law) to the mandate of the People’s Advocate. Pursuant to the Draft Law, the wording “entrepreneurs’ rights” is to be added after references to “human rights” and/or “children’s rights” to various provisions of the enabling law. According to the thus revised Article 12 of the enabling law, the People’s Advocate will then also be obliged to defend “*entrepreneurs*” in accordance with the Constitution and “*international laws and treaties*” relevant to entrepreneurial activity.<sup>65</sup>
38. It is acknowledged that at the Council of Europe level, legal persons or corporations have been considered as potential right-holders, to the extent that the rights and fundamental freedoms covered by the *European Convention on Human Rights and Fundamental Freedoms*<sup>66</sup> (ECHR) may be applicable to legal persons. Although only Article 1 of the First Protocol of the ECHR<sup>67</sup> on the right to property expressly recognizes legal persons as recipients of fundamental rights, several of the other human rights in the ECHR are considered to be also granted to legal persons, as shown in the case-law of the European Court of Human Rights (ECtHR).<sup>68</sup> Of note, Article 34 of the ECHR has been interpreted by the ECtHR as including private legal entities within the category of persons entitled to complain on their own behalf to the ECtHR, providing that they qualify as “victims”.<sup>69</sup>
39. In this respect, nothing currently prevents entrepreneurs as natural persons from submitting a complaint to the office of the People’s Advocate like all other individuals, regarding potential violations of their basic rights in the context of their business activities, to, e.g., protect their property rights, their rights of access to court to seek legal remedies, rights to freedom of speech and freedom of association, or to protect themselves against discrimination, etc. It is worth remembering in this context that the right to respect for private life also covers certain aspects of an individual’s professional activity, including as an entrepreneur.<sup>70</sup> Article 18 (1) of the enabling law specifies that the People’s Advocate only examines complaints from “natural persons”, which *prima facie* excludes legal persons, including businesses and non-governmental organizations, from submitting complaints to the People’s Advocate. However, the Draft Law proposes to amend the Law no. 164/2015 for the approval of the Regulation on the organization and functioning of the People's Advocate Office, by replacing the existing term "natural person" with the terms "natural person/legal person". This is a welcome step, that would also be in line with a recommendation made by the Venice Commission in its 2015

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<sup>65</sup> Proposed amended Article 12 (1) (a) of the enabling law on the obligations of the People's Advocate would provide that the People's Advocate is obliged “*to defend human rights and freedoms as well as of the entrepreneurs in accordance with the Constitution of the Republic of Moldova, with international laws and treaties in the field of human rights and freedoms as well as from the field of entrepreneurial activity to which the Republic of Moldova is a party, to exercise its duties in accordance with the law*” [amendments underlined].

<sup>66</sup> Council of Europe (Coe), *Convention for the Protection of Human Rights and Fundamental Freedoms* (ECHR), entered into force on 3 September 1953. The Republic of Moldova ratified the ECHR on 12 September 1997.

<sup>67</sup> See <<https://www.coe.int/en/web/conventions/full-list/-/conventions/rms/090000168006377c>>.

<sup>68</sup> See European Journal of Comparative Law, P.H.P.H.M.C. van Kempen, *Human Rights and Criminal Justice Applied to Legal Persons. Protection and Liability of Private and Public Juristic Entities under the ICCPR, ECHR, ACHR and AChHPR* (2010), page 3.

<sup>69</sup> See e.g., ECtHR, *NBTK & Swig Group Inc. v. Russia* (Application no. 307/02, decision of 23 March 2006).

<sup>70</sup> See e.g., ECtHR, *Bărbulescu v. Romania* [GC] (Application no. 61496/08, judgment of 5 September 2017), par 71; *Jankauskas v. Lithuania* (no. 2) (Application no. 50446/09, judgment of 27 June 2017), pars 56-57; and *Fernández Martínez v. Spain* [GC] (Application no. 56030/07, judgment of 12 June 2014), pars 109-110.

Opinion<sup>71</sup> and with Resolution 1959 (2013) of the Parliamentary Assembly of the Council of Europe on Strengthening the Institution of Ombudsman in Europe.<sup>72</sup> At the same time, it would be preferable if this quite substantive change to the mandate of the People’s Advocate would be introduced to the enabling law, rather than a law approving a regulation on organization and functioning of the NRHI.

40. Moreover, this still does not mean that legal persons enjoy exactly the same level of protection and hold the same rights as individuals, as some rights and fundamental freedoms are inherent to human beings only. Similarly, so-called “entrepreneurs’ rights” cannot be simply equated to “human rights” and are thus of a different nature.
41. Indeed, there is a significant difference between the concept of “rights” in general, and “human rights” specifically. “Rights” refer to legal entitlements granted by law and is an evolving and broad concept. For entrepreneurs, as indicated in the Informative Note, so-called “entrepreneurs’ rights” cover issues such as the existence of a qualitative normative framework, the predictability of regulations, and the quality and efficiency of public services. “Human rights” are inherent to the condition of being human, and are universal, inalienable, indivisible and interdependent. They refer to those rights derived from the international (and national, as codified in the Moldovan Constitution) body of laws that deal with the basic rights and freedoms of a human person. The fact that “human rights” and so-called “entrepreneurs’ rights” have been conflated in the proposed amendments leads to a number of potential problems.
42. The repeated proposals to add “and the rights of entrepreneurs” after “human rights and freedoms” to relevant provisions of the enabling law creates vagueness and confusion as to whether the Draft Law views the rights of entrepreneurs as equivalent to or as separate from human rights and fundamental freedoms of all persons. It appears rather problematic to elevate so-called “entrepreneurs’ rights” to a unique set of rights that operate at the same level as human rights, in the absence of international standards that would support such a step. The establishment of a People’s Advocate for Entrepreneurs’ Rights may also convey the idea of an implicit hierarchy, placing the rights of entrepreneurs above those of other groups, which do not have such dedicated mandate-holder. Further, the reference to so-called (undefined) entrepreneurs’ “legitimate interests”, to be defended by the People’s Advocate for Entrepreneurs’ Rights, is very unclear. Overall, this may weaken the general human rights mandate of the People’s Advocate, and dilute the weight and value given to human rights,<sup>73</sup> as well as create uncertainty as to the NHRI’s mandate and potentially cause confusion among the public. Furthermore, given the NHRI’s expected role in handling complaints related to human rights violations by business entities,<sup>74</sup> this mandate to also protect business interests of legal entities may possibly create conflicts of interests within the institution of the NHRI and render it more difficult to protect the human rights of individuals *vis-a-vis* business entities (see also par 46 *infra*).
43. Moreover, when assessing compliance with the Paris Principles, the SCA requires that NHRI enabling laws have “*sufficient detail to ensure the NHRI has a clear mandate and independence*”, including “*the NHRIs role, functions, powers, funding and lines of accountability, as well as the appointment mechanism for, and terms of office of, its*

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<sup>71</sup> *Op. cit.* footnote 1, par 67 (2015 Venice Commission’s Opinion on the Law on the People’s Advocate of Moldova).

<sup>72</sup> *Op. cit.* footnote 13, par 4.1.6. (PACE Resolutions 1959 (2013)).

<sup>73</sup> See e.g., *op. cit.* footnote 22, page 25 (2010 UNDP-OHCHR Toolkit on NHRIs).

<sup>74</sup> See e.g., ICC (former GANHRI), [Edinburgh Declaration on the Role of NHRIs in addressing Business and Human Rights](#) (10 October 2010), par C.II. See also *op. cit.* footnote 9, General Observation 1.2. (2018 SCA General Observations); and ODIHR, [Opinion on the Draft Federal Law on the Support to the National Human Rights Institution of Switzerland](#) (31 October 2017), Recommendation B.

members”.<sup>75</sup> The SCA also requires that there exist a clear definition of human rights in the NHRI’s enabling law<sup>76</sup> and considers whether “*the mandate has been appropriately defined to encompass the promotion and protection of all relevant rights contained in the international instrument*”.<sup>77</sup> The present definition of the People’s Advocate’s mandate in the enabling law is clear in this respect. The concept of “entrepreneurs’ rights” mentioned in the Draft Law, on the other hand, is a vague one. In particular, it is unclear how this concept is to be interpreted within the NHRI’s current mandate of international human rights norms. The expansion of the current definition in the enabling law to include aspects that are not well defined nor understood is potentially problematic. The proposed amendments also appear inconsistent with the constitutional provisions on the People’s Advocate, which strictly refer to “*human rights*”.

44. Further, adding yet another potentially broad function to the People’s Advocate’s mandate risks further amplifying the problematic issue of under-funding of the NHRI of Moldova noted above (see par 18 *supra*). If not accompanied by additional human, technical and financial resources, such a step also risks overburdening the institution<sup>78</sup> (see Sub-Section 9 *infra*).
45. In light of the foregoing, given the broad and vague definitions of so-called “entrepreneurs’ rights” and the above-mentioned implications of broadening the mandate of the People’s Advocate to include such rights, it would appear that the proposed amendments will reduce the NHRI’s compliance with the Paris Principles’ requirement for a clear human rights mandate.
46. Finally, while outside of this legal analysis, the competing interests that the future People’s Advocate’s Office will face need to be considered. In a situation where the People’s Advocate is obliged to take action to assure respect for human rights and freedoms also by private entities, including business companies, as required by Article 1(1) of the enabling law, having a new People’s Advocate for entrepreneurs in the proposed form and within the same institution would inevitably entail the prospect of potential serious conflicts of competences and interests. It is not possible to exclude situations where the People’s Advocate is asked to deal with a complaint lodged by a natural person running a business for the protection of his/her rights from actions of certain business entities, while at the same time, these very same business entities reach out to the People’s Advocate for Entrepreneurs’ Rights; such situations could potentially be harmful to the functioning of the NHRI. More generally, as emphasized above, this may dilute the core human rights mandate of the institution, also because businesses generally have powerful lobbies and resources behind them, that may enable them to advocate for increased time and attention from the institution, to the detriment of the needs of victims of human rights violations. This additional practical aspect should be considered in the context of the proposed amendments.

## 6. EXPANSION OF THE NHRI’S POWERS AND FUNCTIONS

47. In addition to the above-mentioned expansion of the mandate of the NHRI, its functions and responsibilities are set to increase also in other areas, including with regard to making legislative recommendations in the field of “entrepreneurial activities”, monitoring, and representation before public authorities and courts in cases related to the “rights of entrepreneurs” (see e.g., proposed amended Article 11 (d) to (f) on the rights of the

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<sup>75</sup> *Op. cit.* footnote 9, General Observation 1.1. (2018 SCA General Observations).

<sup>76</sup> See e.g., SCA Report, Palestine, March 2009, page 7.

<sup>77</sup> *Op. cit.* footnote 9, General Observation 2.8. (2018 SCA General Observations).

<sup>78</sup> See e.g., *op. cit.* footnote 22, page 25 (2010 UNDP-OHCHR Toolkit on NHRIs).

People’s Advocate). The legislative and promotional functions of the People’s Advocate will also be expanded to include activities aiming at the improvement of the legislation in the field of “entrepreneurs’ rights” and the promotion of their rights (see amended Articles 27 and 28).

48. NHRI are expected to work for the promotion and protection of human rights and such additional functions will significantly change the nature of the institution and as mentioned above, potentially dilute its human rights mandate. Further, looking at the current structure of the People’s Advocate’s Office, the addition of this mandate is likely to have a significant impact across the work of the entire institution, which the provision of potential eleven additional staff members (see Article XIII of the Draft Law amending Article 1 (b) of the [Law no. 164/2015 for the Approval of the Regulation on the Organization and Functioning of the People's Advocate's Office](#)) may be unlikely to compensate, all the more if no clear legislative provision ensures adequate financial and technical resources that would allow the NHRI to carry out its full mandate effectively.

## 7. ELIGIBILITY REQUIREMENTS FOR THE PEOPLE’S ADVOCATE

49. Article 59<sup>1</sup> of the Constitution provides that the People’s Advocate shall “*enjoy an excellent reputation, ha[ve] high professional and well-known activity on defense and promotion of human rights*”. Such eligibility requirements are further elaborated in Article 6 of the enabling law, which in particular requires that a candidate shall have “*a length of service of at least 10 years and a well-known activity in the field of defense and promotion of human rights*” (point (d)). The Draft Law now proposes to amend this provision, to include the alternative of at least 10 years and a well-known activity “*in the field of entrepreneurial activity*”. Though this may not have been the primary intent of the legal drafters, this change reads as if a person could take on *any* of the roles within the People’s Advocate’s office with this sole professional entrepreneurial experience and allegedly without any human rights experience. This would not be compliant with the eligibility requirement of being a human rights specialist set out in Article 59<sup>1</sup> of the Constitution. It is recommended to rethink the wording of the Draft Law in this respect, and change it to ensure that the requirements for the already existing People’s Advocates are kept as they are.

## 8. APPOINTMENT AND DISMISSAL PROCESS

50. According to Article 8 of the enabling law, the current People’s Advocates are appointed by the majority of all elected Members of Parliament. Article 6 of the enabling law lists the eligibility requirements for becoming a People’s Advocate, while its Article 7 lays down the modalities of the selection of candidates for the position of People’s Advocate. Generally, the enabling law could be further enhanced by supplementing the selection criteria to ensure the integrity and quality of the People’s Advocate in line with international recommendations, while ensuring that such criteria are developed in consultation with all relevant stakeholders, including civil society, and that they are not unduly narrow.<sup>79</sup>
51. The Draft Law proposes to enlarge the composition of the special parliamentary commission responsible for selecting People’s Advocates, currently comprising members of the Commission on Human Rights and Interethnic Relations and of the

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<sup>79</sup> See *op. cit.* footnote 9, Justification to General Observations 1.7. and 1.8. (2018 SCA General Observations). See also *op. cit.* footnote 15, Principle 8 (2019 Venice Principles).



Commission on Legal Affairs, Appointments and Immunities, to also include members of the Committee on Economy, Budget and Finance. This latter committee is not one that is focused on human rights and the inclusion of its members as part of the selection panel for *all three* mandate-holders (including People’s Advocate and People’s Advocate for Children’s Rights) is potentially problematic in that it may weaken the human rights expertise and focus of the selection panel.

52. In its 2018 review of the People’s Advocate, the SCA expressed concern about the existing provisions for appointment and noted that the People’s Advocate (OPA) “*is advocating for amendments to its enabling law to include a provision stating that the OPA shall be appointed by the Parliament with an absolute majority vote based on a transparent and participatory selection process*”.<sup>80</sup> The UN Committee Against Torture has also previously recommended to formalize “*a clear, transparent and participatory selection and appointment process*” in accordance with Paris Principles,<sup>81</sup> as also stated in SCA General Observation 1.8. As emphasized in the Justification to General Observations 1.8., the Paris Principles require a selection process “*characterized by openness and transparency*”, and under the control of “*an independent and credible body and involv[ing] open and fair consultation with NGOs and civil society*”.<sup>82</sup> Also, the provisions for the selection and appointment process must be enshrined in law even where the actual practice meets the Paris Principles requirements,<sup>83</sup> preferably in the respective enabling legislation.<sup>84</sup> The Venice Commission has also emphasized that “*[t]he way according to which an Ombudsman is appointed is of the utmost importance as far as the independence of the institution is concerned*”.<sup>85</sup> The Parliamentary Assembly of the Council of Europe, in its Recommendation 1615(2003), requires “*exclusive and transparent procedures for appointment and dismissal [of an ombudsman] by Parliament by a qualified majority of votes sufficiently large as to imply support from parties outside government, according to strict criteria which unquestionably establish the ombudsman as a suitably qualified and experienced individual of high moral standing and political independence*”.<sup>86</sup>
53. The current process of selecting candidates, as set out in Article 7 of the enabling law, pledges to follow key principles of open competition, transparency, and equal opportunity (Article 7 (3)). The competent selection commission publishes information on the selection process and candidates’ eligibility online, and the CVs of candidates are also placed online, as are the results of the selection process (Article 7 (2), (4), and (7)). At the same time, the process itself would benefit from greater transparency, and openness to the involvement of groups from outside Parliament in the selection process. Rather than enhancing the transparency and participatory nature of the selection process, the changes introduced by the Draft Law appear to weaken them, particularly when taken in conjunction with the above-mentioned changes to the eligibility requirements for the People’s Advocate. Generally, it would be advisable for the People’s Advocate to be elected by a qualified majority of members of Parliament, to ensure transparency and

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<sup>80</sup> See GANHRI, [SCA Report, May](#) 2018, page 26.

<sup>81</sup> See UNCAT, [Concluding observations on the third periodic report of Republic of Moldova](#), CAT/C/MDA/CO/3, 21 December 2017, par 16 (c).

<sup>82</sup> *Op. cit.* footnote 9, Justification to General Observation 1.8. (2018 SCA General Observations).

<sup>83</sup> See e.g., GANHRI, [SCA Report](#), New Zealand, May 2016, pp. 42-43; and [SCA Report](#), Zimbabwe, May 2016 p. 22. See also, [SCA Report](#), Canada, May 2011 p. 12.

<sup>84</sup> See e.g., GANHRI, [SCA Report](#), Mauritania, November 2009 p. 4; [SCA Report](#), Belgium, March/April 2010 p. 11; [SCA Report](#), Switzerland, March/April 2010, p. 12; [SCA Report](#), Congo, October 2010, p. 4.

<sup>85</sup> Venice Commission, [Opinion on the Draft Law on the Public Attorney of ‘The former Yugoslav Republic of Macedonia’](#), CDL-AD(2003)007, B.II Article 5.1.

<sup>86</sup> CoE Parliamentary Assembly, [Resolution 1615 \(2003\) on the Institution of Ombudsman](#), par 7.3.

broad consensus among different political trends,<sup>87</sup> though this would also require amending Article 59<sup>1</sup> (3) of the Constitution.

54. Further, in relation to dismissal, under proposed revised Article 14(3) of the enabling law, the Committee on Economy, Budget and Finance would have a fundamental role in the preparation of a report of the Special Parliamentary Committee that determines the proposal for dismissal (of any of the People’s Advocates) by the Parliament. The appropriateness of this level of influence in the dismissal of a human rights body is questionable. In its 2015 review of the enabling law, the Venice Commission had already expressed other concerns about the modalities of the dismissal process, which remain relevant.<sup>88</sup> These concerns risk being augmented even further by the contemplated amendments.

## 9. FUNDING

55. The proposed amendments include the provision for additional human resources for the expanded mandate, by raising the limit of the number of staff that the Office can employ from 65 to 76 (see Article XIII of the Draft Law amending Article 1 (b) of the [Law no. 164/2015 for the approval of the Regulation on the organization and functioning of the People’s Advocate Office](#)).
56. While the Informative Note mentions salaries for these new staff members, it does not mention any additional increase in the budget of the NHRI, which would clearly be required in order to meet the requirements of the proposed amendments. As mentioned in par 18 *supra*, the NHRI has to date suffered from a lack of human and financial resources. Moreover, Article 37 of the enabling law on the Financing of the Office was also amended in 2017. The Venice Commission, which reviewed the proposed amendment at the time, noted that the proposed Article 37, now adopted, would limit the ability of the People’s Advocate to freely submit his/her own budget proposal, and thus “*significantly weaken the financial independence of the institution*”.<sup>89</sup>
57. Where an NHRI is tasked with additional functions, the SCA has emphasized that there must be a corresponding increase in the budget to enable it to assume the responsibilities of discharging these additional functions.<sup>90</sup> Similarly, the Venice Principles underline that “[t]he law shall provide that the budgetary allocation of funds to the Ombudsman institution must be adequate to the need to ensure full, independent and effective discharge of its responsibilities and functions”.<sup>91</sup> ECRI has made a similar recommendation regarding non-discrimination bodies, by noting that expanded mandates must be accompanied by “*appropriate additional funding*”.<sup>92</sup> The additional funding should not be a ‘one off’ when new powers are allocated, but a permanent increase in the budget.<sup>93</sup> It is of considerable concern if the People’s Advocate office is expected to take on this new mandate within its existing funds, with further resources only allocated for additional staff members. This would undoubtedly impact the ability of the People’s

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<sup>87</sup> *ibid.*, par 7.3. See also *op. cit.* footnote 15, Principle 6 (2019 Venice Principles).

<sup>88</sup> Venice Commission, [Opinion on the Law on the People’s Advocate \(Ombudsman\) of the Republic of Moldova](#), CDL-AD(2015)017, pars 59-63.

<sup>89</sup> Venice Commission, [Opinion on Proposed New Article 37 of the Law on the People’s Advocate of Moldova](#), CDL-AD(2017)032, pars 34 and 37.

<sup>90</sup> See *op. cit.* footnote 9, General Observation 1.10. (2018 SCA General Observations). See also e.g., [SCA Report](#), Costa Rica, November 2016, pages 18-19.

<sup>91</sup> *Op. cit.* footnote 15, par 21 (2019 Venice Principles).

<sup>92</sup> See e.g., regarding equality bodies, ECRI, [General Policy Recommendation No. 2: Equality Bodies to Combat Racism and Intolerance at National Level](#), adopted on 7 December 2017, CRI(2018)06, par 28.

<sup>93</sup> See e.g., [SCA Report](#), Maldives, March/April 2010.



Advocate to exercise its core functions of protecting and promoting human rights and fundamental freedoms.

58. Further, the People’s Advocate as an NHRI is required to have financial autonomy. Financial autonomy is critical to any NHRI’s independence. In particular, an NHRI should have “*absolute management and control*”<sup>94</sup> over the budget allocated to it. Government interference in the financial affairs of NHRIs are of particular concern to the SCA. Article XIII of the Draft Law provides that the People’s Advocate for Entrepreneurs’ Rights will submit to the People’s Advocate proposals related to the elaboration of the draft budget. This further underlines the concerns raised above (see pars. 35-36) regarding independence and autonomy of the different People’s Advocates,

*[END OF TEXT]*

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<sup>94</sup> *Op. cit.* footnote 9, General Observation 1.10. (2018 SCA General Observations).