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**EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW**  
**(VENICE COMMISSION)**  
**OSCE OFFICE FOR DEMOCRATIC INSTITUTIONS AND HUMAN RIGHTS**  
**(OSCE/ODIHR)**

**REPUBLIC OF MOLDOVA**  
**JOINT OPINION**

**ON THE DRAFT LAWS ON AMENDING**  
**AND COMPLETING CERTAIN LEGISLATIVE ACTS**

**(ELECTORAL SYSTEM FOR THE ELECTION OF THE PARLIAMENT)**

**Adopted by the Council for Democratic Elections**  
**at its 59th meeting (Venice, 15 June 2017)**

**and**

**by the Venice Commission**  
**at its 111<sup>th</sup> Plenary Session**  
**(Venice, 16-17 June 2017)**

**on the basis of comments by**

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**Mr Eirik HOLMØYVIK (Substitute member, Norway)**  
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Partnership for Good Governance



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## **I. Introduction**

1. On 15 March 2017, Mr Andrian Candu, Speaker of the Parliament of the Republic of Moldova, requested the opinion of the Venice Commission on a draft revision of the electoral legislation replacing the proportional system for the election of Parliament by a plurality system in single-member constituencies, submitted by the Democratic Party (draft law No. 60) (CDL-REF(2017)021). On 27 April, the Speaker also asked for an opinion on a second draft (draft law No. 123) introducing a mixed electoral system, submitted by the Socialist Party (CDL-REF(2017)022).

2. On 5 May, the Parliament of the Republic of Moldova held the first reading on both drafts and adopted in first reading a “merged” version of the two proposals, based on draft law No. 123, envisaging the adoption of a mixed system. This version (CDL-REF(2017)028) is similar to draft law No. 123 except for two small amendments.<sup>1</sup> It will be addressed below as “the draft”.

3. According to established practice, the opinion has been prepared jointly by the Venice Commission and the OSCE Office for Democratic Institutions and Human Rights (hereinafter “OSCE/ODIHR”). Messrs Richard Barrett, Eirik Holmøyvik and Oliver Kask were appointed as rapporteurs for the Venice Commission, and Ms Tatyana Hilscher-Bogussevich as the expert for the OSCE/ODIHR.

4. A delegation of the Venice Commission and OSCE/ODIHR composed of Messrs Holmøyvik (member, Norway), Kask (member, Estonia), Markert (Director, Secretary of the Venice Commission), and Garrone (Head of the Division of Elections and Political Parties), as well as Mr Oleksii Lychkovakh (Election Advisor, OSCE/ODIHR) and Ms Tatyana Hilscher-Bogussevich (OSCE/ODIHR expert) visited Chişinău on 9-11 May, to meet with the Speaker of the Parliament and the parliamentary factions and groups, the President of the Republic, the Minister of Justice, and the Central Electoral Commission (CEC) as well as non-parliamentary groups and civil society. This Joint Opinion takes into account the information obtained during the above-mentioned visit.

5. During the visit, the delegation was provided with the text of the merged version of the two draft proposals. On 12 May, the Speaker of the Parliament requested the Venice Commission and the OSCE/ODIHR to extend the scope of the review to the merged draft law and to focus on it as the latest legislative proposal.

6. The present Joint Opinion was adopted by the Council for Democratic Elections at its 59<sup>th</sup> meeting (Venice, 15 June 2017) and by the Venice Commission at its 111<sup>th</sup> Plenary Session (Venice, 16-17 June 2017).

## **II. Scope of the Joint Opinion**

7. The scope of this Joint Opinion covers only the draft amendments submitted for review. Thus, the Joint Opinion does not constitute a full and comprehensive review of all available legislation on elections in the Republic of Moldova.

8. The Joint Opinion raises key issues and provides indications of areas of concern with regard to the merged version, which is nearly identical to draft law No. 123. Since draft law No. 60 is not any more on the agenda in Parliament, it will not be commented upon as such, except on the issue of recall, which has been repeatedly addressed in recent discussions on electoral reform in the Republic of Moldova. In the interest of conciseness, the Joint Opinion

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<sup>1</sup> The inversion of numbers 50 and 51 in Article 73 and the deletion of Article 87(7).

focuses more on areas that require amendments or improvements than on the positive aspects of the draft amendments. The ensuing recommendations are based on the relevant international obligations and standards, including Article 3 of the First Protocol to the European Convention on Human Rights, the Venice Commission Code of Good Practice in Electoral Matters (2002) (CDL-AD(2002)023rev2, hereinafter “the Code of Good Practice”), the 1990 OSCE Copenhagen Document, and the International Covenant on Civil and Political Rights (ICCPR), as well as other Council of Europe and OSCE commitments and the experience gained with similar provisions in other countries in the region. It refers to previous joint opinions on legislation of the Republic of Moldova on elections and political parties, in particular, an opinion adopted in 2014 on a former proposal for the introduction of a mixed system for the election of Parliament.<sup>2</sup> It takes into account OSCE/ODIHR and Parliamentary Assembly of the Council of Europe (PACE) reports on elections observed in the Republic of Moldova.<sup>3</sup>

9. This Joint Opinion is based on an unofficial English translation of the draft amendments provided by the authorities of the Republic of Moldova. Errors from translation may result.

### **III. Executive Summary**

10. Successful electoral reform is built on at least the following three elements: 1) clear and comprehensive legislation that meets international standards and addresses prior recommendations; 2) adoption of legislation by broad consensus after extensive public consultations with all relevant stakeholders; 3) political commitment to fully implement the electoral legislation in good faith.

11. The Venice Commission and the OSCE/ODIHR remind that any large-scale amendment of electoral legislation needs a thorough public debate and consultation not only among political parties represented in the Parliament, but also among other relevant actors outside the Parliament and civil society, leading to a broad consensus. Electoral reforms, especially of a fundamental nature, such as those entailing a change of electoral system, should be guided by the interests of voters and avoid any perception of favouring any political actor.

12. If any amendments are made to fundamental elements of electoral law, including the electoral system proper, they should take place well in advance of the next elections and at any rate at the latest one year beforehand. Should early elections be called after the introduction of changes to an electoral system, this system should be applied only at least one year after the adoption of the amendments.<sup>4</sup>

13. The “merged” draft was supported by a strong majority vote in first reading in parliament on 5 May. Nevertheless, several parliamentary political parties did not support the draft, and many parties have stated that the proposed reform does not serve the interests of the country. There is also no consensus within society as to which electoral system is preferred. Consensus should not be achieved only to change the electoral system, but on the choice of the system itself. The debate has been concentrated on aspects and advantages of the

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<sup>2</sup> Joint Opinion on the draft law amending the electoral legislation of the Republic of Moldova CDL-AD(2014)003); see also, for example, Joint Opinion on the draft law on changes to the Electoral Code (CDL-AD(2016)021); Joint Opinion on draft legislation of the Republic of Moldova pertaining to financing political parties and election campaigns (CDL-AD(2013)002); Joint Opinion on the draft working text amending the Electoral Code of Moldova (CDL-AD(2010)014); Joint Opinion on the Electoral Code of Moldova (CDL-AD(2008)022); Joint Opinion on the Electoral Code of Moldova as of March 27, 2007 (CDL-AD(2007)040).

<sup>3</sup> See [OSCE/ODIHR reports on elections in Moldova](#).

<sup>4</sup> CDL-AD(2002)023rev2, II.2.B; Interpretative declaration on the stability of electoral law (CDL-AD(2005)043), II.4.

proposed amendments only. A thorough public debate, however, should discuss all positive and negative effects of the amendments, as well as other possible options to reform. It cannot therefore be said that the reform was adopted by broad consensus after extensive public consultations with all relevant stakeholders. Moreover, the procedure for the adoption of the draft in first reading, while in line with frequent parliamentary practice in the Republic of Moldova, was very swift without opportunity for meaningful and inclusive parliamentary debate which is required for such a fundamental change. The Venice Commission and the OSCE/ODIHR therefore recommend, if electoral reform is to be conducted, that it receives genuine consensus after a thorough debate in Parliament and in society on its precise content, especially given the existing polarisation around the issue.

14. While the choice of an electoral system is a sovereign decision of a State, the amendments proposed in the draft aimed at shifting from a proportional to a mixed system, raise significant concerns:

- In the present Moldovan context, the proposed reform could potentially have a negative effect at the constituency level, where independent majoritarian candidates may develop links with or be influenced by businesspeople or other actors who follow their own separate interests;
- The responsibility vested with the CEC to establish single-mandate constituencies for the majoritarian component is based on vague criteria that pose a risk of political influence on this aspect of the work of the CEC;
- Detailed and comprehensive criteria for the establishment of constituencies for the Transnistrian region of the Republic of Moldova and for citizens abroad are not stipulated;
- The thresholds for parliamentary representation in the proportional component remain high;
- Proposed changes are unlikely to enhance the representation of women in the Parliament, and no additional special measures are introduced to compensate for this.

15. In light of these concerns and in view of the lack of consensus on this polarising issue, such a fundamental change, while a sovereign prerogative of the country, is not advisable at this time.

16. Additional concerns regarding provisions in the draft include the following:

- The draft does not address earlier recommendations and concerns pertaining to the regulation and oversight of political party and campaign finance.
- The proposed transfer of responsibility for control over campaign finance as well as of a number of aspects of the electoral process from the CEC to District Electoral Councils, as well as the involvement of district courts, would pose further challenges to effective control and supervision. This includes lack of appropriate resources.
- Under the proposed changes, electoral and judicial districts would not correspond with single-member constituencies.
- Moreover, while not included in the merged draft law, it ought to be underscored that provisions for the recall of elected candidates, as provided for by draft law No. 60, contradict provisions of the Constitution and are not in conformity with international standards.

17. The OSCE/ODIHR and the Venice Commission remain at the disposal of the authorities of the Republic of Moldova for any further assistance that they may require.

#### IV. Analysis and Recommendations

##### A. General comments and background of the reform

18. In March 2014, the Venice Commission and the OSCE/ODIHR adopted a Joint Opinion on a further proposal to introduce the mixed electoral system, which raised a number of concerns. As underlined in this Joint Opinion,<sup>5</sup> amending the electoral system is not a novelty in the Republic of Moldova. Since 2014, due to the reintroduction of the direct election of the President of the Republic, the Electoral Code was amended *inter alia* to (re-)introduce provisions for presidential elections.<sup>6</sup>

19. In April 2013, reform of electoral legislation was hastily added to the agenda of the Parliament in the midst of a political crisis. The purpose of the draft amendments was to alter the electoral system from a single nationwide constituency through proportional representation from party lists to a mixed member proportional system (a proposal similar to draft law No. 123 and the merged version).<sup>7</sup> The bill was adopted on 19 April 2013. These amendments to the electoral system were repealed shortly thereafter on 3 May 2013, and the Electoral Code reverted back to the proportional electoral system. However, in addition to repealing the amendments, the parliament raised the thresholds for parliamentary representation.

20. The 2014 Joint Opinion addressed a further proposal to introduce a mixed electoral system, which raised a number of issues. Apart from the timeframe of the reform (less than one year before scheduled parliamentary elections), it underlined the absence of public debate (at the time when the draft was submitted for opinion). It included the following remarks:

- “The proposed mixed electoral system, in which 51 Members of Parliament (MPs) out of the 101 shall be elected by a proportional closed-list system in one single nationwide constituency and 50 MPs shall be elected in as many single-member constituencies, is a fundamental reform. In the present Moldovan context, the proposed reform could potentially have a negative effect at the local level, where independent majoritarian candidates may develop links with or be influenced by local businesspeople or other actors who follow their own separate interests.
- Achieving better accountability of the political institutions towards the citizens is a key goal in the Republic of Moldova, which requires adopting pending legislation, rather than launching a new comprehensive electoral reform. To that end, it is strongly recommended to revise legislation regarding political parties and electoral campaign finance, as advised in the Joint Opinion of the Venice Commission and OSCE/ODIHR on draft legislation of the Republic of Moldova pertaining to financing political parties and election campaigns (CDL-AD(2013)002).
- Although the creation of electoral districts could improve representation of minorities, it presents important challenges. A clearer methodology for the delimitation of constituencies, further assessment and provision for periodical review are highly recommended.

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<sup>5</sup> CDL-AD(2014)003, par. 16.

<sup>6</sup> Cf. Joint Opinion on the draft law on changes to the Electoral Code (CDL-AD(2016)021) and CDL-REF(2016)032.

<sup>7</sup> See CDL-AD(2014)003.

- The problem of the representation of Transnistria and of Moldovan citizens living abroad has not been addressed in a convincing and implementable solution in the present draft.”<sup>8</sup>

21. The points raised in the 2014 Joint Opinion remain valid. Concerning political parties and electoral campaign finance, the OSCE/ODIHR pointed out in its Final Report on the 2016 presidential election that although a legislative revision in 2015 “addressed some previous recommendations by the OSCE/ODIHR, the Venice Commission and the Council of Europe’s Group of States against Corruption (GRECO), the legal framework contains a number of gaps and leaves some previous recommendations unaddressed.”<sup>9</sup> The legislation does not allow adequate time for effective oversight of financial reports, fails to provide proportionate sanctions for campaign finance violations during signature collection and the campaign [...] and does not address third-party campaigning.”<sup>10</sup> The Report concluded that “overall, the regulatory system and its implementation continue to be insufficient to ensure transparency, integrity and accountability of campaign finances, and did not enjoy public confidence.”

22. Revising political party and campaign finance legislation with a view to bringing it in closer conformity with international standards and good practice should be considered a priority.<sup>11</sup> During the expert visit, many interlocutors regarded the need to address insufficient regulation and oversight in this area as urgent and more fitting with the stated objective of enhancing the integrity of political actors and elected officials than a reform of the electoral system.

23. The findings of the 2014 Joint Opinion as well as the doubts expressed by the Venice Commission and the OSCE/ODIHR towards the relevance of the introduction of a mixed electoral system and its effects also remain valid. They would apply *a fortiori* to the introduction of a first-past-the-post system in single-member constituencies. This is elaborated in more detail in this opinion.

24. According to the Electoral Code currently in force in the Republic of Moldova, the 101 seats of the unicameral assembly are elected in one nationwide constituency through a proportional representation system from closed party-lists. MPs serve four-year terms. The minimum representation thresholds for parties to enter Parliament are as follows: 6% for a political party; 9% for an electoral block of two political parties and/or socio-political organisations; 11% for an electoral block of 3 or more political parties and/or socio-political organisations; 2% for an independent candidate. Concerning the formula for mandate allocation, a reform in the Electoral Code of 2010 replaced the D’Hondt formula with a new method, which allocates the “remainder seats” on an equal basis to all parties that pass the threshold to enter Parliament rather than on a proportional basis, resulting in a possible distribution of a greater number of seats to small parties.<sup>12</sup>

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<sup>8</sup> CDL-AD(2014)003, par. 12.

<sup>9</sup> Issues addressed include more comprehensive campaign finance reporting requirements and stipulating criteria for spending limits.

<sup>10</sup> OSCE/ODIHR Election Observation Mission Final Report on the Presidential Election 30 October and 13 November 2016, Republic of Moldova, p. 16. [Republic of Moldova, Presidential Election 30 October and 13 November 2016, OSCE/ODIHR Election Observation Mission Report](#), p. 16.

<sup>11</sup> See Article 7.3 of the [2004 United Nations Convention against Corruption](#) and paragraph 194 of the [OSCE/ODIHR and Venice Commission Guidelines on Political Party Regulation \(CDL-AD\(2010\)024\)](#).

<sup>12</sup> According to Article 87 of the Electoral Code, mandates are first allocated to successful independent candidates. The votes cast in favour of these candidates are subtracted from the total number of valid votes. The remaining number of valid votes is then divided by the number of mandates remaining to obtain the electoral quotient. The number of votes cast for each party passing the threshold is then divided by the electoral quotient to obtain the number of mandates allocated to that party. If the resulting fraction is greater than 0.5, the party receives an additional mandate. Any remaining mandates are then allocated to the parties that crossed the threshold, starting with the party that received the largest number of mandates after the first distribution. One additional seat is given to each party until all mandates have been allocated.

## B. The choice of the electoral system

25. The Venice Commission and the OSCE/ODIHR have consistently expressed the view that the choice of an electoral system is a sovereign decision of a state through its political system.<sup>13</sup> There are different electoral systems, and multiple options on how they are presented are found across the OSCE region and member states of the Venice Commission.<sup>14</sup> States have wide discretion in designing electoral systems, provided that international conventions and standards, guaranteeing, in particular, universal, equal, free and secret suffrage, are respected. Different electoral systems have different advantages and shortcomings.

26. However, a state's electoral system cannot be viewed in isolation. It must be seen in the context of the constitutional, legal and political traditions of the state, the party system, and territorial structure. Therefore, when assessing an electoral system, or proposed changes, the Venice Commission and the OSCE/ODIHR place it within a specific context. The perception that the chosen system works well in one state does not necessarily mean that it can be successfully replicated in another. The manner in which power is spread across the three branches of government and the role of political parties makes such replication deceptive as the change of environment will give rise to unexpected consequences. There may be checks and balances, including unwritten ones, which allow a system to function well in one state, but those checks and balances may be impossible to transfer. Furthermore, the economic realities of party or campaign funding can distort an otherwise competitive electoral environment. Finally, the failure to respect the distinction between state and party can undermine an electoral system which may appear well designed in theory compared to the reality.<sup>15</sup>

27. However, this does not mean that historical or foreign experience is irrelevant. The experience of states with a similar history and political culture and located in the same region may be pertinent. For example, the specific national context in Moldova in 2014, led the Venice Commission and the OSCE/ODIHR to be critical towards the proposed introduction of a mixed electoral system, which raised concerns about the excessive involvement of businesspeople in the electoral process.<sup>16</sup> Similar objections in other countries have been expressed in other joint opinions by the Venice Commission and OSCE/ODIHR.<sup>17</sup>

28. Any fundamental change of the electoral system should take into account the effects of such change. The debate on an electoral system should be broad and allow relevant stakeholders to bring forward positive and negative effects of this reform.

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<sup>13</sup> The UN General Assembly Resolution A/RES/46/137 noted that "recognizing that there is no single political system or electoral method that is equally suited to all nations and their people and that the efforts of the international community to enhance the effectiveness of the principle of periodic and genuine elections should not call into question each State's sovereign right, in accordance with the will of its people, freely to choose and develop its political, social, economic and cultural systems, whether or not they conform to the preferences of other States". The OSCE Ministerial Council noted in the 2002 Porto Ministerial Declaration, Decision No. 7/02, that "democratic elections can be conducted under a variety of electoral systems."

<sup>14</sup> See for example CDL-AD(2004)003, Report on Electoral Systems - Overview of available solutions and selection criteria.

<sup>15</sup> See Paragraph 5.4 of the [1990 OSCE Copenhagen Document](#).

<sup>16</sup> CDL-AD(2014)003.

<sup>17</sup> For example, the specific national context in Ukraine led the Venice Commission and OSCE/ODIHR to be critical towards the reintroduction of a mixed electoral system in 2011, which brought back problems such as excessive involvement of powerful businesspeople in the electoral process. See the Joint Opinion on the draft law on election of people's deputies of Ukraine (CDL-AD(2011)037).



### C. The proposed mixed electoral system

29. The draft proposes a mixed parallel electoral system. It envisages that 50 MPs shall be elected by a proportional closed-list system in one single nationwide constituency and 51 MPs shall be elected in as many single-member constituencies, under a plurality system, where the winning candidate receives the highest number of votes of the valid votes cast.<sup>18</sup> The voter would have two ballots, one for the proportional component and one for the plurality component of the election (Article 4(2)). Unlike in the mixed system proposed in 2013, an absolute majority of the votes in a single-member constituency is not required and a second round is not envisaged: a classical first-past-the-post system would rather be introduced for the plurality part of the election. Candidates may run simultaneously in the national and a single-member constituency, with the latter taking priority if a candidate is elected in both constituencies. The thresholds for mandate distribution under the proportional component for political parties are the same as in the current Electoral Code. One exception is that the previous threshold for independent candidates has been removed.

30. The explanatory statement to the draft law No. 123 refers to the fact that mixed electoral systems exist in different countries, such as Germany, Hungary, Lithuania and Japan. While it is certainly true that experiences from other states can provide valuable insights when considering a reform of the electoral system, comparative law arguments should be used with caution. State institutions and legislative arrangements function within a specific legal, political and cultural context. The presumption that institutional and legislative arrangements can be easily transplanted between legal systems and produce comparable results has often proven false.<sup>19</sup> Moreover, there is a variety of mixed systems that may have different effects on the way citizen interests are represented and more generally on democratic development. The system considered here provides for a parallel application of the first-past-the-post and of the proportional systems, while, for example, the German electoral system (often called “personalised proportional representation”) provides for compensatory seats and therefore for the final result to be more proportional.

31. According to the explanatory statement, the aim of the change of electoral system is to combine the advantages of both the majority and the proportional systems. According to the stated rationale of this reform, the amendments are intended to:

- Bring a remedy to the concerns on the perceived distance between elected representatives and their constituents;
- Help identify and develop new political leaders that will diversify political leadership and improve the national decision-making process;
- Provide fair representation of all citizens in Parliament, including those from the Transnistrian region and those from abroad.

32. While majority or plurality systems in single-member constituencies may improve and further strengthen the link between citizens and their representatives, this is not always the case. In the 2014 Joint Opinion, the OSCE/ODIHR and the Venice Commission warned that such systems in specific political contexts may instead weaken or distort the link between the citizens and their representatives, and thus fail to achieve the declared objective of the draft.<sup>20</sup> This would be the case if there is a strong influence of (local) businesspeople or other non-electoral stakeholders on their communities within a single-member constituency. Experiences from the 2012 parliamentary elections in Ukraine demonstrate that “the new mixed electoral system has changed the dynamic of these elections in comparison with the 2007 parliamentary

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<sup>18</sup> Draft law No. 123 envisages 50 MPs be elected in single-mandate constituencies and 51 elected in the nationwide constituency under proportional representation system.

<sup>19</sup> See: Alan Watson, *Legal transplants: An approach to comparative law*, Scottish Academic Press: Edinburgh 1974.

<sup>20</sup> See CDL-AD(2014)003, par. 28.

elections, as party-nominated and independent candidates are competing strongly at the local level. A number of independent candidates are linked to wealthy businesspeople, some of whom are also supporting political parties financially.”<sup>21</sup>

33. Concerning the introduction of a mixed electoral system and the specific political context in the Republic of Moldova, the 2014 Joint Opinion, based upon consultations with political parties, non-governmental organizations and experts, expressed concern over similar consequences. The OSCE/ODIHR and the Venice Commission concluded that adopting a mixed electoral system in the Republic of Moldova raised “serious concerns and could have important shortcomings”.<sup>22</sup> There appears to be little ground to reconsider this assessment only three years later. During the visit to Chişinău, many stakeholders again voiced concerns that in the current political context in Moldova, any electoral system with a major majoritarian component would allow for undue influence by local businesspeople, or other actors who follow their own separate interests. Thus, in the current political context, the introduction of a mixed electoral system still raises serious concerns.

34. The OSCE/ODIHR and the Venice Commission acknowledge that bringing the elected representatives closer to their constituents is a legitimate aim for the reform of an electoral system. Majoritarian systems in single-member constituencies may indeed have such effects. Keeping in mind that the choice of electoral system is the sovereign decision of the people of the Republic of Moldova, the OSCE/ODIHR and the Venice Commission would nonetheless mention that the aims stated in the explanatory report to the draft law are achievable also through other options, for example, a proportional system with constituency or preference voting. Such measures can help bring voters closer to their representatives in the current proportional system, without risking the above-mentioned serious concerns that a mixed system raises in the current Moldovan political context, which far outweigh possible positive effects. The introduction of a proportional system with constituencies in the Republic of Moldova was suggested as a possible option by the Venice Commission as early as in 2003.<sup>23</sup> Enabling voters to vote not only for party lists, but also for individual candidates (preference vote) could also be an option to enhance the link between the electorate and elected MPs.

35. The thresholds for political parties to enter the Parliament, as stipulated in Article 86 (2) of the current Electoral Code and replicated in Article 89 (2) of the draft, remain high. The Venice Commission and the OSCE/ODIHR have consistently recommended lowering the thresholds in the Republic of Moldova.<sup>24</sup> In particular, this issue should be reconsidered if a mixed system favouring larger parties is introduced. Five party lists obtained seats in the last elections and a lower threshold would not necessarily lead to an overly fragmented Parliament unable to function.

#### **D. Public debate and consultations**

36. The choice of an electoral system is an important decision for any democracy and should not only be adopted as a political compromise by political groups, but also through broad consensus achieved through a process of public consultation. It should result from an open, inclusive and transparent process that involves a wide array of election stakeholders, including

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<sup>21</sup> See OSCE/ODIHR Election Observation Mission Final Report, Ukraine, Parliamentary Elections 28 October 2012, p. 4.

<sup>22</sup> CDL-AD(2014)003, par. 48.

<sup>23</sup> CDL-AD(2003)001, Opinion on the Election Law of the Republic of Moldova, par. 17ff.

<sup>24</sup> CDL-AD(2014)003, par. 45; CDL-AD(2008)022, par. 15; cf. CDL-AD(2007)040, par. 16. For a comparative approach, see Report on thresholds and other features of electoral systems which bar parties from access to Parliament (II) (CDL-AD(2010)007), par. 20ff.

both parliamentary and non-parliamentary parties, as well as civil society representatives.<sup>25</sup> Building consensus on the choice of an electoral system contributes to the acceptance, legitimacy and stability of the governing system.

37. During the expert visit, the Venice Commission and OSCE/ODIHR delegation was informed that a wide public information campaign was carried out that focused predominantly on the declared benefits of the majoritarian electoral system under draft law No. 60, in particular the proposed possibility of recalling elected MPs (see subsection IV.J on Recall). Several public discussions involving representatives of parliamentary and non-parliamentary parties, civil society and academia, were held within the Parliament. These were also mostly focused on the proposed shift to the majoritarian system. During the visit, the initiators of the reform cited numerous opinion polls, collected support signatures, and endorsements from different organisations, as indications of broad public support in favour of a change of the electoral system.

38. The fact that the proposed draft passed first reading on May 5 with 74 out of 76 votes in the 101-member Parliament appears as a sign of broad support in the parliament. However, during the visit to Chişinău, the delegation found little evidence of broad consensus on the change from a proportional system to a mixed system. While representatives of the Democratic Party and of the European People's Party – a faction created during the present legislature - supported the reform, representatives of the Socialist Party informed the Venice Commission and OSCE/ODIHR delegation that they considered the change as a an alternative compared to a fully majoritarian system. Subsequently, the President of the Socialist Party, sent the Venice Commission a letter saying that the Party supported the draft. All other parliamentary and non-parliamentary parties that met with the delegation voiced strong concerns over a change to a mixed electoral system, and questioned the need for this change, although some of these parties advocated such a change at an earlier stage. Numerous parties and stakeholders raised concerns that the pluralism of political views in the Parliament would suffer as a result of this reform and that it would lead to undue influence of money in political activities. Whichever way to consider these concerns, they clearly challenge the formal consensus behind the proposed change to the electoral system.

39. Given the importance of a change to the electoral system, it is important that reform takes place following an inclusive and thorough process of public consultation. In the Republic of Moldova, a change to either a mixed system or a uninominal system has been discussed for several years, but the current draft law appears to have been hastily introduced to the Parliament. The first reading of the draft law on May 5 did not previously appear on the Parliament's agenda, but was added to the agenda by the Speaker on the same day. During the visit to Chişinău, all parties apart from the supporters of both draft laws expressed regrets as to the haste and procedure with which such an essential draft law was introduced to the Parliament. A number of parliamentary and non-parliamentary parties as well as representatives of established civil society organisations voiced concern with regard to the proposed reform.

40. Without prejudice to the merits of the arguments presented, the verification of which falls outside the purview of the present joint opinion, the existing polarisation around the issue, including the points mentioned above, is not indicative of meaningful consultation and broad consensus among key stakeholders.

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<sup>25</sup> Paragraph 5.8 of the [1990 OSCE Copenhagen Document](#) provides that legislation should be “adopted at the end of a public procedure”. Paragraph 8 of the [1996 United Nations Committee on Human Rights General Comment 25](#) to Article 25 of the ICCPR [International Covenant on Civil and Political Rights \(ICCPR\)](#) states that “citizens also take part in the conduct of public affairs by exerting influence through public debate and dialogue with their representatives or through their capacity to organize themselves. This participation is supported by ensuring freedom of expression, assembly and association”.

## E. The delimitation of constituencies

41. The delimitation of constituencies is an important means of promoting equal voting power for all electoral systems. As single seat systems lead to one political group representing each constituency, the mechanisms for designing and reviewing boundaries are often more important than with multi-seat constituencies. Boundary delimitation and review should follow criteria to achieve a balanced and transparent distribution of seats. This is crucial if a fully majoritarian system is applied, as in draft law No. 60, but also in mixed systems where single-member constituencies tend to be larger, potentially enhancing the disproportion in the results of the majoritarian part of the system.

42. According to the Code of Good Practice in Electoral Matters, *“Equal voting power [...] entails a clear and balanced distribution of seats among constituencies on the basis of one of the following allocation criteria: population, number of resident nationals (including minors), number of registered voters, and possibly the number of people actually voting. An appropriate combination of these criteria may be envisaged. [...] The geographical criterion and administrative, or possibly even historical, boundaries may be taken into consideration.”*<sup>26</sup>

43. In their previous opinion,<sup>27</sup> the Venice Commission and the OSCE/ODIHR considered that tasking the CEC with the drafting of constituencies involved a number of risks and recalled a number of important principles:

*33. ... Article 74 provides that the delimitation of boundaries is the responsibility of the Central Electoral Commission. This creates a double risk: a risk of politicisation for the Central Electoral Commission, as well as the risk of overloading it. Indeed, in order to ensure the fairness of the electoral process, decisions of the Central Election Commission may be challenged by any of the electoral stakeholders. This would include any single decision concerned with the delimitation of constituencies and could lead to an exponential increase in the number of complaints, as well as requiring more resources for the Central Electoral Commission. With regard to the periodicity of review, the OSCE/ODIHR states that “Redistricting should be conducted periodically to ensure that equality among voters is not diminished due to population movement.” “When necessary, redrawing of election districts shall occur according to a predictable timetable and through a method prescribed by law and should reflect reliable census or voter registration figures. Redistricting should also be performed well in advance of elections, be based on transparent proposals, and allow public information and participation.” According to the Code of Good Practice, “in order to avoid passive electoral geometry, seats should be redistributed at least every ten years, preferably outside election periods, as this will limit the risks of political manipulation.” Population variance among constituencies should also be taken into consideration.*

44. This comment remains valid for the present draft. Even though more precision has been brought by the considered legislative proposals on the delimitation of constituencies, the following comment remains valid:

*34. To avoid criticism on gerrymandering and to guarantee the necessary confidence in the Central Electoral Commission, the draft should provide for a transparent districting process, performed well in advance of the next parliamentary elections and be based on clear, publicly announced rules, taking into account the existing administrative divisions,*

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<sup>26</sup> CDL-AD(2002)023rev2, I.2.2.

<sup>27</sup> CDL-AD(2014)003.

*and historical, geographical and demographic factors. In particular, the delimitation of single-mandate district boundaries in areas with high levels of minority settlements needs to ensure respect for the rights of national minorities, and electoral boundaries should not be altered for the purpose of diluting or excluding minority representation. Moreover, as established in the Code of Good Practice, “the maximum admissible departure from the distribution criterion adopted depends on the individual situation, although it should seldom exceed 10% and never 15%, except in really exceptional circumstances”.*

45. The draft provides for a maximum deviation of 15%; however, this is too high as a general norm, and could challenge the principle of equal voting power.

46. The 2014 Joint Opinion’s recommendation of providing for periodical review has been followed.<sup>28</sup> Article 74(7) of the draft stipulates that the borders of single-member constituencies may be revised at the latest 180 days before the ordinary elections. Constituency borders are fundamental elements of electoral law, and redrawing them may have significant political consequences. To promote stability in the fundamental elements of electoral law, the Code of Good Practice recommends that such parts of an electoral law should not be open to amendment less than one year before an election.<sup>29</sup> Given the importance of constituency boundaries, the proposed deadline of at least 180 days may not be sufficient to ensure impartial and comprehensive delimitation procedures before an election. The Venice Commission and the OSCE/ODIHR therefore recommend undertaking the delimitation of constituencies at least one year in advance of an election.

47. If the responsibility for establishing constituencies remains with the CEC, as envisaged by the draft, it is recommended that the law provides more detailed criteria and that the above outlined concerns are addressed through corresponding provisions and adjustments. Alternatively, in line with the Code of Good Practice, consideration could also be given to setting up a special independent body enjoying public trust to establish and to review constituency boundaries. As per international good practice, the constituency delimitation process could include a geographer, a sociologist and a balanced representation of parties and representatives of national minorities.<sup>30</sup> Irrespective of the final composition of the body, it is recommended that it be clearly mandated to ensure broad and inclusive consultations with all the relevant stakeholders. It should be also pointed out that an administrative territorial reform is ongoing in the Republic of Moldova. The outcomes of merging and re-organising territorial units should also be carefully considered during the constituency delimitation process.

## **F. Representation of national minorities, Gagauzia**

48. National minority representation is a recurrent topic in OSCE/ODIHR and Venice Commission joint opinions on the electoral system of the Republic of Moldova.<sup>31</sup> These joint opinions have stressed the importance of taking into account sizable national minorities living on the territory of the Republic of Moldova. The 2014 Joint Opinion pointed out:

*36. The choice of the electoral system – proportional representation, majoritarian or a mixed system – is not what dictates or determines minority inclusion or exclusion. However, the choice of system is not irrelevant to the participation of members of minorities in the electoral process. It is often considered that ‘the more an electoral system is proportional, the greater the chances minorities have to be represented in the elected bodies and majoritarian systems are often seen as not appropriate.’<sup>32</sup>*

<sup>28</sup> See CDL-AD(2014)003, par. 33.

<sup>29</sup> See Code of Good Practice II 2. b.

<sup>30</sup> CDL-AD(2002)023rev2, I.2.2.vi.

<sup>31</sup> See CDL-AD(2014)003, par. 35; CDL-AD(2010)014, par. 12 and CDL-AD(2007)040, par. 12.

<sup>32</sup> J. Velaers, *Electoral Law and representation of minorities*, CDL-UD(2012)006, par. 9.

*This is, however, only relative. Much depends on both the legal and the practical situation in a given state, nevertheless, the delimitation of electoral constituencies should facilitate equitable representation of the entire population and can be a tool to ensure the representation of national minorities.*<sup>33</sup>

49. The delimitation of boundaries can thus be of critical importance to the performance of the system in representing national minorities, limiting or enhancing their representation as a result. Among other measures, it is advisable that constituencies established in areas with concentrated minority population do not merge with other territorial units or parts of the country in order not to dilute the representation of minorities.

50. In the 2013 draft proposal to introduce a mixed electoral system, three constituencies were to be created in the Autonomous Territorial Unit of Gagauzia. While the 2014 Joint Opinion expressed some reservations as to the criteria for determining these three constituencies, the introduction of constituencies specific to Gagauzia was welcomed.<sup>34</sup> The current draft proposal, however, does not prescribe any single-member constituencies specific to Gagauzia. As a consequence, the representation of the Gagauzian minority is dependent on the general rules of representation in the nationwide constituency or representation in uninominal constituencies according to the general criteria in Article 74 and subject to CEC decision. The effective representation of the Gagauz minority would therefore depend on the precise delimitation of constituencies; it is advisable to create contiguous constituencies that do not join parts of the Gagauz Autonomous Region with other parts of the territory.

51. Moreover, the representation that a sizable concentrated national minority may achieve in a single-member constituency may prove to be less than the representation that would be achieved under a proportional system, as majoritarian candidates may receive more votes than are necessary to win seats. This may also result in the compartmentalisation of national minorities or the emergence of tensions between communities.<sup>35</sup> The Venice Commission and the OSCE/ODIHR therefore recommend ensuring that no revision of the electoral legislation goes without proper consideration of national minorities' representation.

## **G. Transnistria**

52. The Moldovan territory on the left bank of the Nistru river (Transnistria), which is outside government control, poses particular challenges to the electoral legislation. In the 2013 draft proposal to introduce a mixed electoral system, three constituencies were to be created in Transnistria regardless of the population. The 2014 Joint Opinion recommended in this regard that clear criteria for the creation of constituencies be enumerated and that implementation issues be duly taken into account, including with regard to the conduct of the campaign and the use of foreign funds.

53. This recommendation remains applicable. The draft envisages the establishment of single-member constituencies for Transnistria; however, it does not provide sufficient criteria and detail on the process. Article 74(2) appears to provide that the size of these constituencies should be calculated on the basis of the number of registered voters for the last parliamentary elections in Transnistria as well as in the rest of the territory. Since participation in elections is historically lower in Transnistria than in the rest of the territory, this may not be the best criterion. The draft stipulates that the exact criteria for establishing constituencies are to be

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<sup>33</sup> CDL-AD(2014)003, par. 36.

<sup>34</sup> See CDL-AD(2014)003, par. 35.

<sup>35</sup> [OSCE/ODIHR Handbook on Observing and Promoting the Participation of National Minorities in Electoral Processes](#), p. 38.

established by a CEC regulation. It further provides in Articles 29<sup>2</sup> and 87(5) that polling stations for voters residing in Transnistria will be established on the territory of the Republic of Moldova under the constitutional jurisdiction of central authorities. Based on Article 75(3), an electoral council for Transnistrian constituencies shall be established in Chişinău. It is recommended that the Electoral Code include more specific and detailed provisions on the voting arrangements for residents of Transnistria, concerning *inter alia* the establishment of polling stations, collection of support signatures,<sup>36</sup> and the conduct of the campaign. The decision on the number of constituencies allocated to Transnistria has political elements and could be directly regulated by the law.

## H. Representation of women

54. The number of women MPs in the Moldovan Parliament remains very low. The proposed draft does not include measures aimed at enhancing the representation of women and is likely to affect it negatively. As previously noted, “somewhat larger numbers of women tend to be elected under proportional systems than under “first-past-the-post” majority or plurality systems, or under mixed systems.”<sup>37</sup> In particular, majoritarian systems in single-member constituencies have a low level of female representation.

55. The draft maintains the provision of the current Electoral Code, which requires that each gender be represented with a minimum of 40% of candidates on candidate lists.<sup>38</sup> It also stipulates that modifications to candidate lists shall be carried out by observing the provisions of the Law on Ensuring Equal Chances for Women and Men.<sup>39</sup> However, given that these measures will apply only to half of the seats in the Parliament (those elected from the proportional contest), the provisions would not serve to improve the low representation of women, on the contrary. It is recommended that this issue be given further consideration, including additional temporary special measures to encourage political parties to present a gender-balanced representation of candidates across constituencies, or imposing that a representative number of women be placed in winnable positions in candidate lists in the proportional component.<sup>40</sup>

## I. Out-of-country voters

56. Due to a large number of citizens living abroad, out-of-country voting is a key issue in the Republic of Moldova.<sup>41</sup>

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<sup>36</sup> Article 80(6) of the draft provides that signatures in support of candidates standing in constituencies established for Transnistria may come from any constituencies.

<sup>37</sup> See the [OSCE/ODIHR Handbook on Monitoring Women's Participation in Elections](#), p. 20.

<sup>38</sup> Article 41(2<sup>1</sup>).

<sup>39</sup> Article 7(2)b of the Law on Ensuring Equal Chances of Men and Women stipulates that parties must contribute to ensuring equal rights and opportunities between women and men by ensuring the representation of women and men in candidate lists without discrimination on the criterion of sex.

<sup>40</sup> Article 4.1 of the CEDAW states that the adoption “of temporary special measures aimed at accelerating de facto equality between men and women shall not be considered discrimination”. See also paragraph 3 of the OSCE Ministerial Council Decision 7/09, which calls on participating States to “encourage all political actors to promote equal participation of women and men in political parties, with a view to achieving better gender balanced representation in elected public offices at all levels of decision-making”.

<sup>41</sup> PACE Election Observation Report on the 2014 parliamentary elections, par. 22, puts the number of Moldovan citizens residing abroad between 700,000 and 900,000 while there was a total of 3.2 million registered voters; among them, about 160,000 were registered abroad in 2016 (PACE Election Observation Report on the 2016 presidential elections, par. 17). The issue was also raised in a number of OSCE/ODIHR previous reports on elections in [OSCE/ODIHR previous reports on http://www.osce.org/odihr/elections\\_in\\_Moldova/moldova](#). See also the summary report on voters residing *de facto* abroad, CDL-AD(2015)040, which refers to the situation in four countries, including the Republic of Moldova.

57. Article 74(5) appears to address some of the criticism in the 2014 Joint Opinion with regard to the 2013 draft, which envisaged that citizens residing abroad would elect three MPs in a single “uninominal” constituency abroad. It leaves the CEC to “determine the number, demographic and geographical coverage” of the uninominal constituencies abroad. This seems to suggest that the delimitation of constituencies abroad will be based on the number of registered voters (see Article 74(2)). This is problematic since many Moldovans living abroad are registered based on their in-country address and would be counted in constituencies in Moldova. It is also unclear how the delimitation of out-of country constituencies could be based on the “territorial-demographic principle in one or several neighbouring localities”. To guarantee equal voting power for voters abroad, it is recommended that the law be more detailed and specific on the criteria for determining the single-member constituencies abroad.

58. For single-member constituencies on Moldovan territory, voting rights are based upon a person’s domicile, see Article 87(4). Article 87(6) of the draft provides that any Moldovan citizen not registered in advance may vote in any polling station set up abroad. The right to vote abroad is subject to conditions provided in the Regulation on voting for Moldovan citizens living abroad, which the Venice Commission and the OSCE/ODIHR were not in a position to assess.

59. While there is no obligation for states to organise out-of-country voting,<sup>42</sup> if such voting is provided, citizens abroad should not be subject to arbitrary or unreasonable restrictions to the right to vote.<sup>43</sup> The number and distribution of polling stations should therefore not have a discriminatory effect. The lack of transparency over the criteria for determining the number and location of polling stations abroad has previously been a cause of concern for the OSCE/ODIHR and the Venice Commission.<sup>44</sup> The draft amends Article 29<sup>1</sup> of the Electoral Code, requiring the CEC to “take into account the number of citizens living outside the Republic of Moldova, based on information provided by the competent authorities of the host state where these stations shall be established”. This requirement is a welcome step in the right direction. It is, however, recommended that the Electoral Code provide clear and fixed criteria for the CEC on how to determine the number of polling stations abroad, including the use of demographical statistics. In addition, during the expert visit, some interlocutors expressed concerns that the data would be provided by the host states, rather than relevant Moldovan institutions.

## **J. Recall (draft law No. 60)**

60. Even if draft law No. 60 is not any more on the agenda and further drafts do not provide for recall, the issue has been repeatedly addressed in recent discussions on electoral reform in the Republic of Moldova and therefore deserves to be addressed. Article 94<sup>1</sup> of draft law No. 60 proposes to enable voters to recall MPs through a local referendum in their constituency. To call such a referendum, Article 182(4) requires the signatures of at least 1/3 of the eligible voters in the relevant uninominal constituency or administrative-territorial unit and a subsequent verification by a court as per Article 186 (3). Successful revocation of a mandate requires the votes of at least half of the voters from the corresponding constituency, but not less than the number of voters who voted when electing the said MP (Article 198(1)). Grounds for revocation of the mandate are given in Article 177(3): “Revocation of a Member of Parliament may be initiated if s/he does not observe the interests of the community in the constituency, does not

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<sup>42</sup> See ECtHR *Sitaropoulos and Giakomopoulos v. Greece* [G.C.], 15 March 2012, application no. 42202/07, par. 75. See also CDL-AD(2002)023rev2 *Code of Good Practice*, I.1.1. c.v.

<sup>43</sup> See from the case law of the ECtHR on arbitrariness in relation to Article 3 Protocol 1 of the ECHR: *Hilbe v. Lichtenstein* (dec.), 7 September 1999, application no. 31981/96; *Doyle v. United Kingdom* (dec.), 6 February 2007, application no. 30157/06 and *Sitaropoulos and Giakomopoulos v. Greece* [G.C.], 15 March 2012, application no. 42202/07 par. 69.

<sup>44</sup> See CDL-AD(2016)021, par. 18 and CDL-AD(2014)003, par. 41-43. See also OSCE/ODIHR Election Observation Mission and PACE Reports on the [2014 parliamentary elections](#) and on the [2016 presidential election](#).



exercise properly the duties of a Member of Parliament stipulated by law, violates moral and ethical norms, that is factually and properly confirmed". The proposed draft Law No. 60 would have effectively established a system of general recall of representatives, which in a certain political context, may well function as an imperative mandate. It has to be considered as a political and not a legal procedure. Involving courts in such a procedure would put them at risk to be politicised.

61. An imperative mandate is prohibited by Article 68(2) of the Moldovan Constitution. The Constitutional Court has also made clear that parliamentary mandates are irrevocable and are exercised in the interest of the whole nation.<sup>45</sup> Furthermore, a recall procedure is not in conformity with international standards and has been a matter of concern to the OSCE/ODIHR and the Council of Europe.<sup>46</sup> It is therefore welcomed that no such provisions are included in the draft, indicating that this initiative will not be pursued further.

62. The explanatory memo to the draft proposal points to Article 69 (2) of the Constitution as a basis for allowing the recall of mandates. According to this provision, the mandate of an MP ceases "... on withdrawal of the mandate...". The explanatory memo furthermore points to a judgement by the Constitutional Court on the interpretation of Article 69.

63. However, though it is for the Constitutional Court to pronounce on the constitutionality of the proposed draft law, the interpretation given to Article 69 does not seem to be in conformity with the case-law of the Constitutional Court.

64. In its judgement on Complaint No 8(b) 2012, at para. 34 et seq, the Constitutional Court stated that the parliamentary mandate in Moldova is, as a matter of Moldovan constitutional law and theory, a representative one on behalf of the whole nation.

*34. In the Court's view, the parliamentary mandate expresses the relationship of the lawmaker with the whole nation, in the service of which it is found, not only with the electorate that voted for him/her, though they benefit from the parliamentarian's presence by virtue of his/her obligation to keep in touch with the voters. Thus, the phrase "being in the service of the people" from Article 68 (1) of the Constitution means that, at the time of the election and until the end of the mandate, each Member becomes the representative of the people in its entirety and has as mission to serve the common interest, that of the people, and not just the parties to which one belongs to. In exercising his/her mandate, the parliamentarian shall be subject to only the Constitution, the laws and shall adopt attitudes which, according to his/her conscience, serve the public welfare.*

65. Further at para. 43 and 44:

*43. Thus, since they are not representatives of a faction of the population, parliamentarians may not be the defenders of particular interests, they are absolutely free in the exercise of their mandate and do not have the obligation to fulfil the commitments that they could undertake before the election or any eventual instructions of the voters expressed during the mandate. The elected do not have the legal obligation to support the Party or the decisions of their group in the Parliament. Furthermore, if the legislator,*

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<sup>45</sup> See the Judgment on interpretation of Article 68 paragraphs (1), (2) and Article 69 paragraph (2) of the Constitution, Complaint no. 8b/2012, 19 June 2012, par. 53, 57, 67 and 68.

<sup>46</sup> Paragraph 7.9 of the [1990 OSCE Copenhagen Document](#) requires that elected officials "are permitted to remain in office until their term expires or is otherwise brought to an end in a manner that is regulated by law in conformity with democratic parliamentary and constitutional procedures". See also PACE Resolution 1303 (2002), Functioning of democratic institutions in Moldova, par. 8, and the Report on the Imperative Mandate and Similar Practices (CDL-AD(2009)027), par. 39.

*by his conduct, causes damage, the party or the group can exclude him/her, however, this exclusion does not entail the loss of parliamentary mandate. This, obviously, does not prevent the lawmaker, once elected, to honor his/her commitments and to comply with the voting discipline of the parliamentary group to which he/she is part of.*

*44. Consequently, the Court holds that, in the logic of free representation, the parliamentarian's mandate is irrevocable: voters may not make it to stop prematurely and dismissals practice in blank is prohibited. Voters may not, therefore, express dissatisfaction with the way in which a candidate has fulfilled the mission than by refusing to grant their votes when he/she seeks re-election.*

66. The judgement of the Constitutional Court deals specifically with Article 69 in cases where MPs neglect or are unable to perform their duties as such. The grounds for revocation of a mandate given in Article 177(3) of the proposed draft go beyond the scope of situations of neglect and non-performance of parliamentary obligations. This provision explicitly allows for the revocation of mandate for not observing the interests of the community in the constituency, which implies a general power of recall of the representative for the citizens in the constituency. This understanding is further evidenced by the fact that unlike the grounds for the cessation of mandate in Article 69 of the Constitution and in the said judgement of the Constitutional Court, the recall of a mandate, according to Article 177 (3) of the proposed draft, is not decided by the Parliament, but the citizens in the representative's constituency through a referendum.

67. Attempts to remove the irrevocability of MPs in the Republic of Moldova have previously been an issue of concern for the OSCE/ODIHR and the Council of Europe.<sup>47</sup> Imperative mandate and recall of representatives are unknown in modern European democracies: as underlined by the Venice Commission, "the basic constitutional principle which prohibits imperative mandate or any other form of politically depriving representatives of their mandates must prevail as a cornerstone of European democratic constitutionalism".<sup>48</sup>

## **K. Campaigning**

68. The draft foresees amendments in Article 64<sup>1</sup> of the Electoral Code, according to which national and public broadcasters will no longer be required to provide free airtime and to organise debates for candidates in majoritarian elections. It leaves majoritarian candidates without any means to access to such airtime or debates. Parliamentary elections are of wide national interest and have important consequences on state governance. Free and equal or equitable access to media by all contestants is a cornerstone of democratic elections. Debates in regional media do not sufficiently allow all viewpoints of political parties (whose representatives might be the candidates in small constituencies) to be discussed in the same way as in the case of debates in national media and free access to advertising. It is recommended to review the envisaged amendments to Article 64<sup>1</sup>.<sup>49</sup>

## **L. Other issues**

### Modification of candidates' lists

69. The draft provides for the possibility to replace candidates both in the nationwide and in single-mandate constituencies up to seven days before elections (Articles 82-83). Although the

<sup>47</sup> See PACE Resolution 1303 (2002), Functioning of democratic institutions in Moldova, par. 8.

<sup>48</sup> See Report on the Imperative Mandate and Similar Practices (CDL-AD(2009)027), par. 39.

<sup>49</sup> The OSCE/ODIHR has previously recommended that the obligations placed on nationwide private broadcasters, as stemming from a broad formulation of Article 64<sup>1</sup>(4), could be revisited with a view to guaranteeing these broadcasters' editorial independence. See the [OSCE/ODIHR Final Report on 2014 parliamentary elections](#), p. 15. The observation in the present joint opinion is therefore to be read as particularly applicable to obligations of national public broadcasters.

principle of free mandate does not in principle forbid political parties to modify the list of candidates, such late modifications limit the rights of candidates to be elected - the person does not have the possibility to be registered in another list of candidates or as an independent candidate - and raise questions as to internal party democracy. The possibility of a late replacement facilitates centralised control over the candidates, including those in single-member constituencies, who may in practice be dependent on the party leadership. In addition, late changes to party lists have the potential to confuse voters or leave them uninformed about who is on the lists, potentially impacting their choice.<sup>50</sup> It is recommended to adjust the deadline for the withdrawal of candidates to avoid replacements late in the process.

### Nomination of candidates

70. The draft proposes to add a letter e<sup>1</sup> to Article 44(1) according to which the list of documents that must be submitted in respect of a candidate should include the “integrity record of the candidate issued under the law”. The concept of “integrity” contemplated by this provision and the source of the record are unclear and may be a method of excluding candidates on arbitrary criteria. As such this provision needs to be clarified with more precise definition of this concept.

71. The draft requires the establishment of initiative groups for supporting candidates for the majoritarian election (Article 81) and contains detailed regulations on the process of their establishment. These requirements on regulating and limiting the number of members of initiative groups and the collection of packages of various packages of documents are excessive since the candidate has to collect enough public support before being registered anyway. Extensive regulation in this area appears to be unjustified.

72. According to Article 76 of the draft, candidates for the parliamentary elections are not required to have permanent residence in Moldova, unlike under the current Electoral Code. This change leads to a wider application of the principle of universal suffrage, keeping in mind the high level of internal and external migration in the Republic of Moldova.

### Repeat voting

73. According to Article 95<sup>3</sup> of the draft, repeat voting is conducted in case the Constitutional Court declares the elections invalid. In some cases the invalidity of elections may be caused not only by violations on election day, but beforehand, such as following the misuse of administrative resources, inequalities in campaigning in public media, violations in the registration of candidates. Repeat voting is organised shortly after the invalid elections and with the same candidates. Thus, it may not be sufficient to address identified shortcomings. It is recommended that the law should address this issue.

### Respective roles of the CEC, District Electoral Councils, and of courts

74. The draft envisages the transfer of a number of responsibilities related to majoritarian contests from the CEC to District Electoral Councils (DECs), including with regard to registration of candidates, allocation of mandates, and control over campaign expenditure declarations. Electoral districts would still correspond “usually” to second-level territorial-administrative units of the Republic of Moldova – and therefore not to constituencies (Article 27(1)). The discrepancy between electoral districts and constituencies could be highly problematic, if several DECs were to take decisions on candidates in the same constituency. Moreover, it is advisable for key decisions to be taken by the CEC, as it is usually better equipped with qualified staff and can assure uniform practice and implementation. This is

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<sup>50</sup> See the [OSCE/ODIHR Final Report on the 2010 early parliamentary elections](#), p. 10.

especially important for the control of candidate expenditure during campaign periods, as the principle of equality has to be ensured nationwide and specialised knowledge and resources are required to provide effective oversight.

75. Similar problems would apply to the judicial procedure in dealing with complaints and appeals as well as termination of MPs' mandates. The draft foresees regional first instance courts to be competent instead of the Chişinău Court of Appeals, and these courts' jurisdiction applies to territories which are not intended to correspond to electoral constituencies.

#### Polling stations

76. According to the current Electoral Code (Article 187), polling stations are set up for a maximum of 3,000 voters. This number is already high to allow for a smooth voting process and to avoid queues. The draft increases the number of voters per polling station to 5,000, leading to even larger risks of challenges for the election management, as well as to the prolongation of counting procedures. It is recommended to lower the number of maximum voters per polling station, not to increase it.

#### Additions to the voters list on Election Day

77. Article 53(2) states that supplementary voter lists will include, in particular, citizens residing on the territory of the precinct not included in the voter lists, as well as voters who come to the polling station with an absentee vote certificate. As stated in the Code of Good Practice,<sup>51</sup> the registration of voters should not take place at the polling station on election day. Such a restriction is important to avoid possible multiple voting and is an incentive for voters to check their data in the voter register before election day. As noted in a previous Joint Opinion, "the situations in which voters are added to the supplementary voters' lists should be narrowed in order to avoid potential doubts regarding the integrity of voters' lists and possibilities for multiple voting."<sup>52</sup>

#### Validation of mandates of alternate candidates

78. Article II of the draft provides that the vacant mandates are allocated to alternate candidates by the Constitutional Court based on a proposal by the CEC. The proposed procedure is very long, leaving up to 10 days to the CEC and 30 days to the Constitutional Court for decision-making. Appeals procedures on the allocation of seats have to be dealt with in a timely manner, due to the importance of the right composition of Parliament in a democratic system. A similar approach should apply to the filling of vacant mandates. It is recommended to reconsider the provision and to provide for a deadline of 3 to 5 days.<sup>53</sup>

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<sup>51</sup> CDL-AD(2002)023rev2, I.1.2.iv; for the Republic of Moldova, see CDL-AD(2010)014, par. 32.

<sup>52</sup> CDL-AD(2010)014, par. 32.

<sup>53</sup> Cf. CDL-AD(2002)023rev2, II.3.3.g.