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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

OSCE OFFICE FOR DEMOCRATIC INSTITUTIONS AND HUMAN RIGHTS
(ODIHR)

GEORGIA

JOINT URGENT OPINION

ON DRAFT AMENDMENTS TO THE ELECTION CODE

Issued pursuant to Article 14a
of the Venice Commission's Rules of Procedure on 30 April 2021

Endorsed by the Venice Commission
at its 127th Plenary Session
(Venice and online, 2-3 July 2021)

on the basis of comments by

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I. Introduction

1. By letter of 9 March 2021, Mr Archil Talakvadze, Chairperson of the Parliament of Georgia, requested an opinion by the OSCE Office for Democratic Institutions and Human Rights (hereinafter "ODIHR") on draft amendments to the Election Code of Georgia (CDL-REF(2021)031). According to the established practice, the opinion has been prepared jointly by ODIHR and the European Commission for Democracy through Law of the Council of Europe (hereinafter "Venice Commission").

2. Mr Nicos Alivizatos, Mr Michael Frendo and Ms Katharina Pabel acted as rapporteurs for the Venice Commission. Ms Marla Morry was appointed as legal expert for the ODIHR.

3. On 12-13 April 2021, a joint delegation composed of Mr Alivizatos, Mr Frendo and Ms Pabel on behalf of the Venice Commission, and of Ms Morry on behalf of the ODIHR, as well as Mr Michael Janssen and Ms Martina Silvestri from the Secretariat of the Venice Commission and Ms Kseniya Dashutsina from the ODIHR, participated in a series of videoconference meetings with members of the Central Election Commission, representatives of various political parties of Georgia, representatives of non-governmental organisations (NGOs) and the international community represented in Tbilisi. This Joint Opinion takes into account the information obtained during these meetings. The ODIHR and the Venice Commission are grateful to the Parliament of Georgia and the Council of Europe Office in Georgia for the excellent organisation of the videoconferences.

4. This urgent joint opinion was issued pursuant to the Venice Commission's Protocol on the preparation of urgent opinions (CDL-AD(2018)019) on 30 April 2021. It was endorsed by the Venice Commission at its 127th Plenary Session (Venice and online, 2-3 July 2021).

II. Scope of the Joint Opinion

5. The scope of this Joint Opinion covers only the legislative revisions officially submitted for review ("the draft amendments"). Thus limited, the Joint Opinion does not constitute a full and comprehensive review of the entire legal and institutional framework governing elections in Georgia.

6. The ensuing recommendations are based on international standards, norms and practices, as for example set out in the United Nations' International Covenant on Civil and Political Rights (ICCPR), the European Convention on Human Rights (ECHR) and its additional protocols, as well as relevant OSCE human dimension commitments, and the Venice Commission's Code of Good Practice in Electoral Matters.[1] Where appropriate, they also refer to other reference documents and sources as well as relevant recommendations made in previous legal opinions published by the ODIHR and/or the Venice Commission.

7. This Joint Opinion is based on an unofficial English translation of the draft amendments and the relevant Georgian law. Errors from translation may result.

8. In view of the above, the ODIHR and the Venice Commission would like to make mention that this Joint Opinion does not prevent the ODIHR and the Venice Commission from formulating additional written or oral recommendations or comments on the respective legal act or related legislation pertaining to the legal and institutional framework regulating electoral legislation in Georgia in the future.

[1] Venice Commission, Code of Good Practice in Electoral Matters, CDL-AD(2002)023rev2-cor.

III. Executive Summary

9. As a preliminary remark, it should be noted that any successful changes to electoral and political party legislation should be built on at least the following three elements: 1) a clear and comprehensive legislation that meets international obligations and standards and addresses prior recommendations; 2) the adoption of legislation by broad consensus after extensive public consultations with all relevant stakeholders; and 3) the political commitment to fully implement such legislation in good faith. In particular, the ODIHR and the Venice Commission stress that an open and transparent process of consultation and preparation of such amendments increases confidence and trust in the adopted legislation and in the state institutions in general.

10. Furthermore, the Venice Commission and ODIHR underline the importance of the stability of electoral law, which is a precondition to public trust in electoral processes and implies that electoral legislation, and especially its fundamental elements, should be amended well before the next elections. The practice in Georgia of frequently amending the electoral legislation risks undermining the integrity of the electoral process and ongoing efforts to consolidate democracy.

11. This Joint Opinion notes the positive changes in the draft amendments to the Election Code, including those related to measures tackling misuse of administrative resources, strengthening the process for determination of the election results, and enhancement of the electoral dispute resolution process. However, concerns are raised with some of the proposed amendments, for example those concerning the composition of election commissions. Moreover, while some outstanding recommendations for specific changes to the legal framework previously put forward by ODIHR and the Venice Commission are addressed in this legislative initiative, many fundamental issues remain however unaddressed. A more comprehensive and systemic reform is still needed.

12. The current legislative amendment initiative is not based on a comprehensive review of the legislation but is rather targeted at overcoming a political stalemate and addressing political concerns that arose during the last parliamentary elections of 31 October 2020.

13. ODIHR and the Venice Commission make the following key recommendations for further improvement of the draft amendments to the Election Code:

A. To consider introducing a qualified (e.g. two-thirds) parliamentary majority vote or a double majority requirement (requiring a majority among MPs both of the ruling parties and the opposition parties) for the election of the chairperson and non-partisan members of the Central Election Commission (CEC), with a final anti-deadlock mechanism. To require higher credentials for non-partisan CEC members and ensure a diverse membership in the selection commission that undertakes a transparent, merit-based nomination process.
B. To remove the specific restrictions of the right for a party to appoint a member to the CEC under draft Article 13(1)b) and c), i.e. the conditions that the party is entitled to state funding and that at least one of the party members actually “carries out activities of the member of the Parliament” thus excluding parties boycotting Parliament.
C. To further amend the draft provisions on the selection process of members of District Election Commissions (DECs) and Precinct Election Commissions (PECs), so as to ensure, inter alia, a transparent, genuinely merit-based process for the appointment of non-partisan members as well as the right for a party to appoint a member to an election commission – where applicable – without the conditions that the party is entitled to state funding and that at least one of the party members actually “carries out activities of the member of the Parliament”, in line with recommendation B.
D. To clearly set out in the law on what grounds the removal of party-nominated election commission members may be based.

Furthermore, ODIHR and the Venice Commission recommend:

E. prohibiting both the presence of partisan representatives and campaign activity in the areas around polling stations on election day;
F. adopting a comprehensive regulatory framework that specifies clear and objective criteria for granting and conducting recounts and annulments to ensure transparent, fair and uniform practice in the counting and tabulation of results and handling of post-election disputes;
G. facilitating the timely handling of election disputes in the courts by allowing electronic submission of complaints to the courts, submission until midnight on the deadline day, and the possibility for remote hearings;
H. further extending the timeframes for submission and adjudication of appeals and ensuring that technical formalities do not prevent due consideration of complaints;
I. addressing previous Venice Commission and ODIHR recommendations requiring single-mandate electoral districts to be of equal or similar voting population;
J. establishing a detailed and comprehensive regulatory framework for the use of new voting technologies. In light of the limited time remaining before the 2021 local elections, it may be that a pilot project for certain electronic technologies is the only viable option for the next elections.

14. These and additional recommendations, as highlighted in bold, are included throughout the text of this Joint Opinion.

15. The Venice Commission and ODIHR stand ready to assist the Georgian authorities to further review the Election Code, to bring it closer in line with international standards and good practice.

IV. Background

16. In October 2020, parliamentary elections were held in Georgia. The pre-electoral period had been marked by increased political tension triggered among others by disagreements over the existing parliamentary electoral system. In June 2020, constitutional amendments were adopted following a Memorandum of Understanding (MoU) signed on 8 March 2020 between the main opposition parties and the ruling party in which it was agreed to conduct the 2020 elections under a revised electoral system. The amendments introduced a larger proportional component to the parliamentary electoral system and temporarily lowered the threshold for political parties to be represented in Parliament, from five to one per cent. Subsequent amendments to the election legislation adopted in the months prior to the elections covered a broad range of issues.

17. Following the first round of elections, the incumbent ruling party and eight opposition parties reached the parliamentary threshold, as well as the statutory threshold for receiving state funding. However, all of the opposition parties rejected the election results, alleging widespread electoral fraud. The opposition parties boycotted the second round of elections held in single-mandate constituencies and have not taken part in the new Parliament, demanding that new parliamentary elections be held, among other requests.

18. Following a series of negotiations brokered by the international actors in January 2021, two opposition political parties reached an agreement with the ruling party and joined Parliament based on an MoU signed among them. The MoU remained open to the other opposition parties. It included issues related to the local election system, formation of the election administration and election disputes. The remaining six opposition parties, however, including the major opposition party, maintained their refusal to join the Parliament until their requests would be met. The new Parliament thus consisted of the ruling party, with 90 seats, and 2 opposition parties holding 6 seats out of 150 seats. The Venice Commission and ODIHR commented that “the decision of the opposition to boycott parliamentary sessions is

regrettable. While parliamentary boycotts are a legitimate means of expressing dissent in political discourse, lengthy and extensive boycotts may hinder any meaningful parliamentary dialogue and could have impact on the right to political participation of the people through its elected representatives."[2] On 19 April 2021, the two opposition parties who had entered into the MoU, four additional opposition parties and two independent MPs signed an amended agreement with the ruling party, committing to joining Parliament and pursuing several reforms, including the electoral reform. However, three parties, including the major opposition party, did not sign the document.

19. As a result of the MoU of January 2021, the Working Group on Electoral Reform resumed its work in Parliament in February 2021. Representatives of international and local organisations and the Central Election Commission (CEC) participated in the group meetings. However, due to the boycott of the opposition parties at that time, the group worked without their involvement, limiting the inclusiveness and legitimacy of the process. In addition, the consultation process occurred in a hasted manner. A series of proposed amendments to the electoral legal framework have been drafted under that process. The proposed amendments that are the subject of this Joint Opinion relate to the composition of the election administration, misuse of administrative resources, election day agitation, amendments to protocols of polling results and conducting recounts, complaints and appeals, the election system for local elections, as well as electronic voting and counting. Most of the amendments follow from the MoU, while some issues addressed in the draft emanate from proposals put forward by civil society organisations. It should be noted that the above-mentioned agreement of 19 April 2021 foresees the preparation of further amendments to the draft law within a short timeframe.

20. The Venice Commission and ODIHR wish to reiterate that the election system and legal framework for carrying out elections should be based on as wide a consensus as possible amongst all the parties participating in an election and that every effort should be made, particularly at this time in Georgia, to achieve this shared confidence in the process. However, the ownership of the process can only take place by dialogue amongst all the stakeholders driven by a genuine desire to safeguard and enhance Georgian democracy. Legal opinions can facilitate this process taking place on the ground but are no substitute for it. In addition, it should be considered that the timeframe in which the proposed amendments were discussed and drafted was unnecessarily compressed, failing to provide for an adequate public consultation process.

21. Prior to the drafting of the aforementioned amendments, a set of earlier amendments essentially proposed to circumscribe the right of boycotting parties to receive state funding. Those draft amendments were reviewed by the Venice Commission and the ODIHR which concluded that the proposed amendments are an excessive and disproportionate measure that restricts political pluralism and limits the rights of the opposition.[3] They advised against the adoption of the amendments; the draft is still pending in parliament. Some of the draft amendments that are being assessed under this Joint Opinion are directly related to the draft amendments related to state funding entitlement.

22. Finally, it should be noted that following the 2020 parliamentary elections, the ODIHR recommended that the electoral legislation be reviewed to bring it further in line with OSCE commitments, international standards and good practices, well in advance of the next election period and within an inclusive consultation process.[4] It noted that some previous ODIHR and

[2] Venice Commission-ODIHR, Joint Opinion on Amendments to the Election Code, the Law on Political Associations of Citizens and the Rules of Procedure of the Parliament of Georgia, CDL-AD(2021)008, par. 10.
[3] Venice Commission-ODIHR, Joint Opinion on Amendments to the Election Code, the Law on Political Associations of Citizens and the Rules of Procedure of the Parliament of Georgia, CDL-AD(2021)008, paragraphs 13-16.
[4] See ODIHR Election Observation Mission Final Report Georgia Parliamentary Elections, 31 October 2020.

Council of Europe recommendations remained unaddressed. However, the current legislative amendment initiative is not based on a comprehensive review of the legislation but is rather targeted at overcoming a political stalemate on the election system and addressing political concerns that arose during the last parliamentary elections, mainly related to the election administration and credibility of the election results.

V. Analysis and Recommendations

A. Stability of the law

23. The electoral law must enjoy a certain stability, protecting it against party political manipulation. "Stability of the law is crucial to credibility of the electoral process, which is itself vital to consolidating democracy. Rules which change frequently – and especially rules which are complicated – may confuse voters. Above all, voters may conclude, rightly or wrongly, that electoral law is simply a tool in the hands of the powerful, and that their own votes have little weight in deciding the results of elections."[5] The practice in Georgia of frequently amending the electoral legislation risks to undermine the integrity of the electoral process and the state's ongoing efforts to consolidate democracy.[6] It furthermore risks confusing voters, parties and candidates, and makes it difficult for the competent electoral authorities to apply the law, which may lead to mistakes in the electoral process and, as a consequence, distrust in the elected bodies.

24. Moreover, the timing of the currently proposed changes to the election legislation, less than one year before the next local elections (slated for the latter half of 2021) may be found not in line with international good practice[7] if the amendments relate to fundamental aspects of the elections, including changes to key elements of the local election system and composition of the electoral commissions. An exception to the principle of stability of electoral law is admissible if there is a broad consensus on the reform. It is not the first time that amendments to the Georgian election legislation have been initiated too close to an election period, and in past election observation missions, ODIHR and the Parliamentary Assembly of the Council of Europe have stated that this was inconsistent with the principle of stability of the law[8] and created confusion amongst voters.[9]

B. Composition of election administration

25. In the absence of a specific international standard for the formation of election administrations, each country should find the most appropriate model that complies with local traditions and good practices that have been developed, and based on a few guiding principles, most notably the independence and impartiality of the election administration, confidence of election stakeholders in the election management bodies, and transparency and accountability in the overall election process. As noted in the Code of Good Practice in Electoral Matters, "[w]here there is no longstanding tradition of administrative authorities' independence from those holding political power, independent, impartial electoral commissions must be set up at all levels, from the national level to the polling station level" to ensure that elections are properly conducted, or at least to remove serious suspicions of

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[5] See Venice Commission, Code of Good Practice in Electoral Matters, CDL-AD(2002)023rev2-cor, paragraph 63 of the Explanatory Report; see also paragraphs 58 and 64-67.
[6] The last major electoral reform package was adopted by parliament in mid-2020, less than one year ago.
[7] Guideline II. 2.b. of the Code of Good Practice in Electoral Matters states that "[t]he fundamental elements of the electoral system proper, membership of electoral commissions and the drawing of constituency boundaries, should not be open to amendment less than one year before an election, or should be written in the constitution or at a level higher than ordinary law".
[8] See e.g. the ODIHR parliamentary election observation report of 2020.
[9] See e.g. the PACE parliamentary election observation report of 2016.

irregularity.[10] The proposed amendments can be seen as an attempt to ensure this, but further improvements seem necessary as outlined below.

26. A wide range of models for the formation of election-administration bodies has emerged in OSCE participating States, including central election administration bodies that are based on multi-party representation. The membership of lower-level commissions generally replicates the principle followed in the establishment of the central commission. The main value of setting up the central election management body based on multi-party representation is to strengthen confidence and transparency in the process by allowing major political interests to take part in the administration of the election. The key assumption is that major political interests contesting the election should be able to identify professional publicly respected individuals, who, regardless of their political affiliation, will be able to implement the legal framework in a collegial and consensual manner, in accordance with both the spirit and letter of the law.

27. The proposed amendments to Articles 8, 10, 12-14, 19-20, 24-26, 30, 42, 196 and 203.3 of the Election Code of Georgia concern the composition of election commissions at the three levels – Central Election Commission (CEC), District Election Commissions (DECs) and Precinct Election Commissions (PECs). The draft amendments maintain the mixed composition of the CEC and DECs (non-partisan and partisan appointments of members) but introduce changes to the number of commission members and the appointment processes. The amendments fundamentally change the membership of PECs from a mixed composition to a fully non-partisan membership. In light of the significantly revised process proposed for the appointment of political party nominees as members to the election commissions, Article 2 of the draft amendments terminates the authority of the standing members appointed by parties to the commissions, which have to be replaced according to the revised Article 196. However, the mandates of non-partisan members of the CEC and DECs serving five-year terms are not terminated under the amendments.[11]

28. Under the proposed amendments, the number of CEC members would increase from the current 11 (excluding the CEC chairperson) to 17 members (including the CEC chairperson), with parliament to appoint 8 members upon nomination by the President of Georgia following a competitive selection process, an increase from 5, and political parties to appoint 9 members, an increase from 6.[12] With respect to the political party appointments, each eligible party would be entitled to appoint one CEC member each, a significant change from the current proportional appointment process (see below for further discussion on changes to the party appointment process).[13] This increase in political party seats on the CEC reflects the current political reality following the 2020 parliamentary elections.

[10] See Venice Commission, Code of Good Practice in Electoral Matters, CDL-AD(2002)023rev2-cor, Guideline II 3.1.b.

[11] In the context of the Board of the Public Broadcaster, a 2013 Constitutional Court judgment ruled unconstitutional, legislation that dismisses public officials prior to completion of a fixed term appointment on an independent body.

[12] Draft Article 10(1) of the Election Code.

[13] Draft Article 13 of the Election Code.

29. Under the present legislation and since 2017, parties with parliamentary factions have the right to appoint election commission members at all levels in proportion to the number of votes received in the last parliamentary elections.[14] The ODIHR observed in recent elections that this resulted in dominant representation of the ruling party in the election commissions which negatively impacted public perception of the impartiality and independence of the commissions, a cornerstone of any election administration. The move from multiple (proportional) to single appointments to the CEC by each eligible party addresses an ODIHR recommendation following the 2020 parliamentary elections that states: "The composition of the election administration could be reconsidered to increase its impartiality and independence. The appointment formula could be revised to ensure more balanced political representation and to prevent factual dominance of a single political party."[15]

30. The proposed amendments provide for the CEC chairperson to be nominated by the President and appointed by two-thirds of CEC members from the CEC members elected by the parliament.[16] The draft amendments essentially establish the status of the chairperson on the same footing as a member of the CEC. Notably, the proposed changes would repeal a requirement for the President to consult with civil society organisations on three nominees for CEC chairperson, instead giving the president unfettered discretion to nominate one CEC member to be chairperson.[17] In light of the perception of limited trust in the independence and impartiality of the CEC such a move away from public consultation in regard to the leadership of the central election body is not advisable. Indeed, bolstering the role of civil society in the nomination process for the CEC chairperson may be key to increasing public trust. Moreover, it should be noted that the presidential post itself does not enjoy full public confidence as a mechanism that is free from political influence in the nominations for posts of the CEC chairperson and non-partisan members, and that alternative nomination mechanisms may garner broader acceptance. However, completely excluding the President of the Republic from the process would require a constitutional amendment.[18]

31. The draft amendments maintain the process whereby if the CEC chairperson is not elected by two-thirds of CEC members within a given time frame, the President shall submit the same candidate to the Parliament which shall then elect the CEC chairperson.[19] The Venice Commission and ODIHR recognise that there has to be a method to overcome an impasse if the first method does not result in the election of a chairperson. That said, in the absence of a requirement that the election by parliament should take place at qualified majority, this effectively means that the chairperson will represent the ruling party. It must be stressed once more that consensus around the CEC chairperson is an important matter for Georgian democracy. Therefore, every attempt should be made to find as wide a consensus as possible on the CEC chairperson. It should be noted that this concern may also apply even in a non-boycott situation, if the nominee for CEC chairperson does not receive any support from the opposition but can, in any case, be appointed by majority vote. Moreover, the draft does not provide for the case that Parliament does not approve the candidate proposed by the President. **To guarantee broader consensus on CEC leadership, consideration should be given to introducing a qualified (e.g. two-thirds) parliamentary majority vote or a double majority requirement (requiring a majority among MPs both of the ruling**

[14] Before 2017 parliamentary parties were appointing one election commissioner each.
[15] The ODIHR election observation reports from the 2017 local elections and 2018 presidential election in Georgia also included recommendations to reconsider the formula for the composition of election commissions to ensure more balanced political representation.
[16] The current Article 10(2) of the Election Code has the chairperson nominated and appointed from candidates outside the CEC membership.
[17] Draft Article 10(3) of the Election Code.
[18] See Article 52(1)d) of the Constitution, according to which the President of Georgia shall "participate in the appointment of the Chairperson and members of the Central Election Commission of Georgia in cases defined by the organic law and in accordance with the established procedure".
[19] Article 10(5) of the Election Code.

parties and the opposition parties) for the election of the CEC chairperson, with a final anti-deadlock mechanism.

32. At the same time, the proposed amendments move from a presidential selection commission made up of half civil society representatives for recommending to parliament nominees for non-partisan CEC members, to a selection commission fully composed of civil society actors.[20] Short of a systemic change, this is a positive step toward assuring an impartial central election body and increasing public trust in the CEC, especially in light of past challenges to appoint CEC members that enjoyed full public confidence. However, care needs to be taken to ensure that only impartial and reputable organisations are included in the commission.

33. In this respect, the amendment introduces the requirement that the member organisations have at least three years of experience in election observation. In the Georgian context, three years' activity may be too short as such young organisations do not have the necessary track record to foster public confidence in the independence of their work. At the same time, the requirement that the organisations have election observation experience is arguably too restrictive as it excludes relevant stakeholders and experts such as reputable academics and members of long-standing civil society organisations that work on issues related to democracy and human rights but which may not necessarily formally observe elections. Moreover, the new provisions do not make it clear whether all such organisations should be represented. **It would be preferable that the criteria for members of the selection commission ensure a diverse membership; the inclusion of political party representatives (ensuring adequate representation of opposition parties) may be considered. Moreover, requiring higher credentials for non-partisan CEC members and strengthening the selection process itself would build public confidence in the CEC, by mandating interviews, increasing transparency, requiring substantiated decisions, and granting the right to appeal.[21]**

34. As with the potential appointment of the CEC chairperson by the parliament noted above, the parliament majority rule for the election of non-partisan CEC members could effectively result in all members being ruling party appointees. **Alternative mechanisms for the nomination and/or appointment of non-partisan CEC members should be explored to ensure broader-based consensus on those members, guarantee the independence and impartiality of the highest election body, and garner increased public confidence in the election administration. As noted earlier, the introduction of a qualified (e.g. two-thirds) majority parliamentary vote or a double majority requirement, with an anti-deadlock mechanism, should be considered.** This point holds even more importance if the proportion of non-partisan CEC members plus ruling party appointee versus opposition-appointed members remains the same as in the current and draft law, since the ruling party effectively holds power to appoint an absolute majority of all CEC members. In any case, on-the-ground consensus on the appointment of CEC members should be sought in an environment in which the election administration does not enjoy a high level of public confidence.

35. The proposed provisions on the composition of the highest election body are not fully in line with international good practice for election commissions with multi-party representation.[22] The Code of Good Practice in Electoral Matters provides that the central election commission should include representatives of parties already in parliament or having scored at least a given percentage of the vote. Such membership should be premised on equality, which can

[20] Draft Article 12(3) of the Election Code.
[21] Article 12(4) of the Election Code establishes particularly low criteria for CEC members, including at least 25 years old, a higher education, at least three years of work experience, and a certificate of an electoral administration officer.
[22] See Venice Commission, Code of Good Practice in Electoral Matters, CDL-AD(2002)023rev2-cor, Guideline II 3.1.d.

be construed strictly or on a proportional basis, the latter taking account of the parties' relative electoral strengths.[23] The proposed amendments do not establish equal rights (strict or proportional) to membership on the commission as they introduce a provision that parliamentary parties have the right to appoint a CEC member only if the party is entitled to state funding in accordance with the law and at least one of its members of parliament carry out parliamentary activities in accordance with paragraph 10 of Article 224 of the Regulation of the Parliament.[24]

36. The above-noted exclusions appear to be aimed at addressing the parliamentary boycott and seeking the functioning of the parliament, but depriving individual parties of the established right to participate in the election administration is not the proper or proportionate way to do so. While states are not obliged to provide parties with the right to manage the elections, if the choice of election management structure is one of multi-party representation, the right should be extended to all political parties based on either their representation in parliament or electoral strength in terms of votes received. While the legislation should address how and when changes in commission membership should occur when a political party dissolves, new parties emerge, or when the relative strength and representation of parties in elected institutions change, the application of the above-mentioned factors in determining which parties will form the election administration risk increasing political tension and undermining confidence in the election administration. This is especially so in situations of parliamentary boycott by (part of) the opposition which will result in many parties losing the right to appoint members to the CEC. It must be stressed again that political dialogue remains the most appropriate mechanism to overcome political stalemate.

37. At the same time, it is noted that in situations of boycott of parliamentary activities by most opposition parties, any legislation that could be seen as largely punitive in nature, and that targets opposition parties, should be avoided. As stated by the Venice Commission, there is a clear need for ensuring that majorities do not abuse their otherwise legitimate rights just because they won the elections.[25] Undue restrictions on otherwise eligible parliamentary opposition parties to participate in the election administration would go against this principle, send the wrong message and set a dangerous precedent in terms of party pluralism and equality of opportunity in the electoral process. There are other more proportionate and appropriate means to achieve the goal of this amendment, which could involve imposing direct consequences on individual members of parliament for their actions, rather than excluding a political party from participating in the electoral process on the same basis as other parties.

[23] See Venice Commission, Code of Good Practice in Electoral Matters, CDL-AD(2002)023rev2-cor, Guidelines I 2.3 and II 3.1.d and e.

[24] See draft Article 13(1) of the Election Code. Under a standing draft amendment to the Organic Law on Political Unions of Citizens, criticised by the earlier-noted Joint Opinion of the Venice Commission and ODIHR (CDL-AD(2021)008), political parties (and political parties of an electoral block) forfeit annual state funding if more than half of their members elected to parliament did not take up their seats, and they temporarily lose state funding if half their members of parliament did not attend without good reason more than half of the regular plenary sittings during the previous regular plenary session (see draft amendments to Articles 30 and 39 of the Law on Political Associations of Citizens). Paragraph 10 of Article 224 of the Regulation of Parliament provides that members of parliament are deemed not to exercise the powers of a member of parliament and shall not be paid a salary as prescribed by law if he/she does not participate in a parliamentary committee.

[25] Venice Commission, Parameters on the Relationship between the Parliamentary Majority and the Opposition in a Democracy: A Checklist, CDL-AD(2019)015, par. 20.

38. In addition, the proposed amendments provide that if the number of parties eligible to appoint a CEC member is more than 9, the priority shall be given to a party that receives more funding from the state budget and that in case of equal funding, the earlier registered party for the election is given priority[26] – whereas the existing provision states that priority be given to a party that has received more votes in the elections. The proposed provision is inconsistent with the Code of Good Practice in Electoral Matters which recommends, as noted earlier, that when a partisan-based central election commission is used, either each parliamentary party should have representation on the commission or each party having scored at least a given percentage of the vote should be eligible to appoint a member. Moreover, to take into account extraneous factors such as the amount of state funding entitlement and the timing of registration for elections undermines the purpose of political party participation in the election administration, that is, to build public confidence in the impartiality of the election administration and credibility of the electoral process. **In light of the preceding paragraphs, the Venice Commission and ODIHR recommend reconsidering the proposed changes to the eligibility of parties for the appointment of CEC members and revising draft article 13(1) to (3) of the Election Code to bring it more in line with the international principle of equality of opportunity in the electoral process. In particular, the specific restrictions of the right for a party to appoint a member to the CEC under draft Article 13(1)b) and c) – i.e. the conditions that the party is entitled to state funding and that at least one of the party members actually "carries out activities of the member of the Parliament"– should be removed.**

39. It should be noted that the draft provisions do not clearly regulate the situation where the number of parties eligible to appoint a CEC member is less than 9. It appears that the draft foresees that the total number of party-appointed CEC members may be less than 9 and addresses that situation by making a technical revision to each of the provisions referring to CEC's quorum and decision-making, that is, to require a percentage of the "members in the list" to be present and to support the decision, rather than a percentage of the "total number of members".[27] **While the use of the term "members in the list" appears to refer to those members appointed, the phrase could be more clearly written as "appointed members" throughout the draft amendments.**

40. Similar to the proposed changes in the CEC composition, under the draft amendments the number of DEC members would increase from 12 to 17 members (including the chairperson). The number of members appointed to the DECs by eligible political parties for the period of an election would increase to 9 from 6, while the remaining 8 members, an increase from 6, would be appointed by the CEC by majority vote of all members.[28] The eligibility of political parties to appoint members to the DECs and the move from proportional to single member appointments for each eligible party are the same as for the proposed party appointment process for CEC membership. As such, **the same commentary as noted above for the proposed changes to the CEC composition and appointment process apply to the draft amendments related to the DEC composition and appointment process.** In addition, it should be noted that in the past, DECs have not enjoyed full public confidence due, in part, to many non-partisan DEC members having been previously party-appointed to election commissions or as partisan observers, or affiliated to such persons. **Establishing criteria that preclude such types of appointments by the CEC and that define merit-based selection criteria would be a positive step toward assuring effective non-partisan appointments to the DECs. Consideration could also be given to enhancing the selection process, including holding interviews and substantiating decisions to demonstrate merit-based selection. To further bolster public confidence, consideration**

[26] Draft Articles 13(2) and 13(3) of the Election Code.
[27] See, for example, proposed changes to Articles 8(4) and 14(1)(f).
[28] Draft Articles 19-20 of the Election Code. Five of the eight CEC-appointed DEC members would be appointed for five-year terms and three appointed only for the period of an election.

could be given to qualified majority (e.g. two-thirds) rather than majority vote (with an anti-deadlock mechanism) or identifying alternative selection methods.

41. It should be noted that the significant increase in the number of CEC and DEC members, proposed to be 17 for each of these bodies, may in practice pose a challenge for the election administration, particularly in reaching decisions on a consensus basis, a preferable approach under international good practice.[29] While a mixed composition structure for election management bodies is acceptable from an international perspective, enlarging the commissions as an apparent solution to a political crisis is arguably not an effective approach and may actually undermine the public's trust in the election administration, particularly if it negatively impacts their professional work. In this respect, the ODIHR election observation report on the 2018 presidential election recommended that consideration be given to aligning the number of commission members at each level to the actual need. For PECs, this is addressed by the proposed amendments (see below) but for the CEC and DECs the number of members actually increased rather than decreased. Moreover, it should be noted that the proportion of non-partisan- versus party-appointed CEC/DEC members remains the same as under the current system, that is, just under 50 per cent are non-partisan appointees. In this regard, it is questionable why increasing the number of party appointees from six to nine and introducing the parity principle, which will provide a more pluralistic election administration, necessitated a proportionate increase in the number of non-partisan members, absent clear justification as to administrative need. This approach appears solely aimed at maintaining the same proportion of non-partisan/party appointees. In light of the low level of trust in the CEC/DECs due to widespread perceptions that their non-partisan members are ostensibly ruling party loyalists, maintaining the same proportion in their composition cannot serve to strengthen public confidence in the election administration.

42. The Code of Good Practice in Electoral Matters provides that the bodies appointing members of electoral commissions must not be free to dismiss them at will, with the Explanatory Report elaborating that this practice can cast doubt on their independence.[30] Recall for disciplinary reasons to protect the impartial and professional performance of the election administration is permissible provided the grounds for this are clearly and restrictively specified in the law. However, the proposed amendments leave in place provisions that give parties complete discretion to dismiss their commission members.[31] **The Venice Commission and ODIHR reiterate their long-standing recommendation calling for the legislation to set out on what grounds a removal is justified in order to protect the tenure of commission members.[32]**

43. As observed by the ODIHR in past Georgian elections, public confidence in the independence and impartiality of the election administration is lowest at the PEC level. The proposed amendments would fundamentally change the composition of PECs.[33] The current model of 12 members, half appointed by the DECs and half by eligible political parties, would be reduced to a minimum 7 members, with one additional member added for every 300 voters

[29] See Venice Commission, Code of Good Practice in Electoral Matters, CDL-AD(2002)023rev2-cor, Guideline II. 3.1 h and par. 80 of the Explanatory Report.

[30] Venice Commission, Code of Good Practice in Electoral Matters, CDL-AD(2002)023rev2-cor, Guideline II 3.1 f and para. 77 of the Explanatory Report. Article 22 of the Election Code provides that once appointed to an election commission, a member is legally bound to act independently, even if appointed by a political party.

[31] Party-appointed CEC members can be recalled by their party any time except during an election period, DEC members can be recalled by their nominating parties at any time up until election day, and PEC members can be recalled not less than 15 days prior to the election day.

[32] See Venice Commission-ODIHR Joint Opinion on the Draft Election Code of Georgia, CDL-AD(2011)043, paragraphs 42-43.

[33] In addition to changes in the PEC composition, the ban in Article 24 of the Election Code on persons who have been found by a court to have committed an administrative violation of the election legislation in the past eight years to be appointed as PEC members, would be reduced to the past four years..

registered, and all members appointed by the DECs based on a non-partisan basis and conditional majority vote.[34] This model appears to premise the number of members on the actual needs of the election administration, rather than on a pre-determined number aimed at including a cross-section of both non-partisan and partisan members. This composition would ensure more streamlined running of election day operations and alleviate the recurring problem of parties arbitrarily recalling and replacing many of their PEC members preceding election day, a practice which may undermine the independence and stability of these bodies. It would also address persistent allegations that party-appointed PEC members are not always fully engaged in the election day proceedings, acting more as observers.

44. However, fundamentally, a shift away from multi-party representation may do little to gain back stakeholder trust in the election administration, and would most likely further undermine public confidence, taking into account past challenges in the appointment of non-partisan PEC members. This is especially so if the established selection criteria and professional appointment processes for CEC, DEC and PEC members are not fundamentally strengthened to guarantee objective, transparent and genuinely merit-based selection of non-partisan members down to the lowest level.[35] **Until systemic reform of the election administration is undertaken, shifting to a fully non-partisan model may not be advisable.** In the interim, a mixed model PEC composition with the non-partisan appointments made by two-thirds of DEC members or the use of alternative appointment mechanisms could be considered as a way to increase public trust. **Whichever mechanism is adopted, a transparent, genuinely merit-based process for appointment of non-partisan PEC members is key to enhancing public confidence.**

45. Long-standing ODIHR recommendations to legislate procedures and clear selection criteria for appointment to lower-level commission members to ensure a transparent and non-partisan selection process remain unaddressed. If the PECs are transformed into fully non-partisan "professional" commissions, providing for greater transparency and objectivity in the competition process will be even more important. At the same time, strengthening political will for independent and impartial election administration and fostering a political culture that values a credible electoral process cannot be achieved through legislative initiative, whether the election administration is premised on multi-party or non-partisan membership. It is the implementation and enforcement of impartial election administration that will be key for future Georgian elections.

46. It should be noted that any decision to maintain a mixed model should consider that mere duplication of the proposed CEC/DEC mixed composition of 17 members would certainly not be practically appropriate at the PEC level. In this respect, administrative needs and ensuring the smooth-running of election day proceedings should be prioritised when establishing PEC composition. **If there is not a clear administrative reason to have more than the currently proposed minimum 7 PEC members, with one additional member added for every 300 voters registered, it is recommended to maintain these numbers in whichever model is used.**

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[34] See draft Article 24(2): "A respective DEC shall elect the PEC members by a majority vote of the DEC members in the list, provided that they are also supported by at least 3 respective DEC members elected by the CEC for 5-year term. […]" I.e., as under the existing law, the DEC would elect the PEC members by a majority vote of the total number of DEC members, including at least three non-partisan members serving five-terms. In the same Article, the phrase "unless he/she is a family member of the candidate" is probably a mistaken translation, instead of "if he/she is a family member of the candidate".

[35] Use of a database of certified election administrators for priority appointment to professional DEC and PEC positions is one tool to enhance the professionalism of the election administration, provided that training is offered on a regular basis and that the database is kept up-to-date and holds a sufficient number of candidates. The prohibition in Article 24(2) of the Election Code against appointment to a PEC of persons who were party-appointed to any election commission in the last general election could be expanded to include previous party representatives/observers. In addition, the time period "in the last general election" could be expanded to the last five or ten years.

47. In addition, in case of a mixed model of PEC composition, as with the proposed CEC/DEC composition, the principle for political party appointments based on strict equality is, in the current context, a more appropriate mechanism than the existing proportional party appointments. **In any case, as noted earlier with regard to the higher commissions, otherwise eligible political parties should not lose their right to appoint PEC members on grounds that they are not entitled to state funding or that their elected members of parliament do not participate in parliamentary activities.**

48. The ODIHR report from the 2020 parliamentary elections recommended that "[t]he timeframes for submission and review of applications for PEC membership could be extended to ensure meaningful competition" and that "[t]he selection procedures and criteria for the recruitment of PEC staff could be further elaborated to guarantee a more open and inclusive process." Under the proposed amendments, the timeframe for appointments of non-partisan PEC members during regular elections would change from "not earlier than the 50th day and not later than the 46th day before election day" to "not later than the 46th day before election day". The proposed change would grant DECs the opportunity to announce the competition earlier and give more time to review and consider the applications.[36] However, while this amendment provides DECs with the possibility to conduct a robust selection process, it does not in any way oblige them to do so, thereby leaving DEC' with complete discretion. In addition, a proposed provision requires the list of respective candidates for non-partisan PEC positions to be published on the CEC website prior to the election of the members. However, no concrete timeframe for posting is established, limiting the amendment's potential to increase transparency. **Due to the limited nature of these changes, the above-noted ODIHR recommendations concerning the timeframes for submission and review of applications for PEC membership as well as selection procedures and criteria for the recruitment of PEC staff are therefore reiterated.**

49. The proposed amendments introduce remuneration from the state election funds for a party representative at a PEC (essentially, the partisan observers) at the same level of compensation for PEC members.[37] This new remuneration for partisan observers is apparently to compensate for the proposed repeal of party-appointed PEC members who are remunerated under the current legislation. The need and appropriateness of remunerating partisan observers with public funds is questionable. Arguably, electoral subjects should either compensate their observers from their own funds or recruit volunteers. At the same time, it should be noted that accredited observers from civil society organisations are not entitled to remuneration from public funds, thereby improperly prioritising partisan observation over non-partisan monitoring of elections. Moreover, the appropriateness of the proposal to pay/forward the remuneration to the political party rather than to the individual party representative is questionable, making it appear that the payment is ostensibly a form of additional state funding for parties.

50. Furthermore, the proposed amendments do not address another deficiency, which in the eyes of the Venice Commission and ODIHR is very significant: each PEC usually houses in the same building several ballot boxes, which are placed in different rooms. To the extent that the number of PEC members does not suffice, there is no adequate supervision of all ballot boxes by representatives of all parties, as ought to be the case. In order to cope with that deficiency, that is in order to ensure that the election procedure in each ballot box is supervised by one representative at least of the ruling party and one from opposition parties, **it is suggested that either party observers are explicitly assigned with the duty and capacity**

[36] The current timeframe is interpreted and applied in practice as a four-day window for recruitment and selection, an unduly short period for the selection of thousands of professional PEC members.
[37] Draft Articles 42 and 203.3 of the Election Code. Party representatives (observers) at the PECs would be eligible for remuneration if they represent a party that wins a seat in parliament, receives state funding, or has at least one member of parliament who is on a parliamentary committee.

to supervise every ballot box within the existing PECs or that the number of PECs is substantially increased.

C. Prevention of misuse of administrative resources

51. Under international good practice, equality of opportunity in the election campaign must be guaranteed for election contestants.[38] Prohibition on misuse of administrative resources of all types in the election campaign is key to ensuring a level playing field. ODIHR election observation reports from past Georgian elections have consistently identified the use of administrative resources in election campaigns as a significant problem, particularly the active participation of public sector employees in campaigns during their working hours. This has included campaign gatherings of teachers, doctors and other public sector employees to meet with ruling party candidates and attend their campaigns, with signs of apparent pressure to do so. This problem stems, in part, from the lack of clarity and specificity in the legislation, substantive gaps in the regulations on misuse of administrative resources, and inadequate enforcement of the applicable law. The proposed amendments include some changes aimed at further combatting such misuse of administrative resources.

52. The list of those banned from conducting and participating in campaigning has been broadened by the draft amendments.[39] In particular, the prohibition on "public officers of state authorities and local self-government bodies" to campaign during normal business hours and/or when they are directly performing their duties has been changed to "public servants." Although defined by the Law on Public Service, the former phrase had varying interpretations among stakeholders as to which public officials legally fall under it.[40] The term "public servants" apparently covers a significantly broader segment of public sector employees, including those who work under labour or administrative contracts, representatives of the municipality mayors (except for the municipality of Tbilisi) and other persons employed in the municipality.[41] In addition, the prohibition on "public school teachers", among others, to campaign during working hours or when directly performing their duties has been clarified to be inclusive, by referring to "directors, educators, teachers, other persons employed in pre-school and educational institutions and general education institutions established by the state or municipality, and other personnel employed there."

53. A new prohibition, added to the same article, bans assemblies "for official reasons" of public servants, directors, educators, teachers, and other persons employed in educational institutions established by the state or municipality, and other specified groups of public sector employees.[42] While this provision appears to be aimed at preventing the past practice of public sector institutions ordering their employees to assemble for campaign meetings, the provision is not sufficiently clear, and gives rise to some concerns regarding the right to free assembly. Any limitations imposed on the public servants' right to freedom of assembly needs to adhere to the requirements outlined in Article 22 par 2 of the ICCPR and Article 11 par 2 of the ECHR. This means that such limitations will need to be based on law, follow a legitimate aim, and be

[38] See Venice Commission, Code of Good Practice in Electoral Matters, CDL-AD(2002)023rev2-cor, Guideline I. 2.3.
[39] Draft Article 45(4) of the Election Code.
[40] The former phrase is defined in Article 3(e) of the Law on Public Service as persons who are appointed to a public service position for an unlimited term by the state, autonomous republic, municipality, and Legal Entity of Public Law. See paragraph 62 of the 2011 Venice Commission - ODIHR, Joint Opinion of the on the draft Election Code of Georgia, CDL-AD(2011)043.
[41] The concept of "public servant" is defined in Article 3(d) of the Law on Public Service as including all public sectors employees except political and public-political officials.
[42] Draft Article 48(1)(d) of the Election Code prohibits the "assembly for official purposes of public servants, personnel of the legal entities under public law, non-commercial legal entities established by the state or municipalities, directors, educators, teachers, other persons employed in pre-school and educational institutions and general education institutions established by the state or municipality, and other personnel employed there."

necessary and proportionate to fulfil this aim. **Draft Article 48(1)(d) of the Election Code on the ban of assemblies by certain groups of public sector employees "for official reasons" should therefore be formulated with more precision. It should be made clear that this ban is dealing with the prohibition of misuse of administrative resources during the electoral campaign.**

54. The aforementioned proposed amendments are a significant initiative which should reduce the instances of misuse of administrative resources. However, the amendments do not address previous recommendations put forward by the ODIHR and Council of Europe's Group of States against Corruption (GRECO) to take significant measures to prevent the misuse of administrative resources, including repeal of a legal provision that allows unrestricted campaigning by high-level public officials, strengthening sanctions for misuse of administrative resources, and identifying a single authority to consider complaints, investigate and take actions in cases of abuse of administrative resources.[43] In addition, the occurrence of online social media campaigning by public servants during working hours, and use of official government webpages for campaign purposes, notable problems in recent elections in Georgia, are not addressed in the draft law. It should also be emphasised that stepping up enforcement of prohibitions on misuse of administrative resources must go hand in hand with strengthening the legislation on this matter. **A more comprehensive and systematic regulation on the prevention of the misuse of administrative resources is therefore recommended. Such regulation needs to ensure that any misconduct of public sector employees is interlinked with (disciplinary) sanctions and other rules specifically related to them.**

D. Regulation of election day "agitation"

55. The right to vote free from pressure and intimidation is a fundamental aspect of democratic elections. The proposed amendments strengthen the provision on campaign-related agitation around polling stations.[44] In particular, the ban on hindrance of movement of voters within 25 metres of a polling station on election day is increased to 100 metres and a new ban introduced against gathering people or tracking voters within 100 metres from the polling station. These provisions are a positive step to counter attempts at influence and control of voters around polling stations that apparently occurred in past Georgian elections. While the amendments propose to repeal a provision that explicitly excludes sanctioning of these types of election-day violations, the draft does not explicitly provide for any sanction or means of enforcement, thereby diminishing effective deterrence of such activities.

56. It should be noted that these types of piecemeal and narrow amendments to prevent campaign agitation and intimidation on election day do not address **long-standing Venice Commission and ODIHR recommendations to include a general prohibition against any type of campaign activity starting 24 hours prior to elections.**[45] The proposed amendment also does not address **ODIHR's recurrent recommendation from the past three election observation missions that, short of a general campaign silence period, both the presence of partisan representatives and campaign activity in the areas around polling stations should be prohibited on election day. These recommendations provide a broader solution to ensuring voters are able to cast their votes free from intimidation**

[43] See the 2018 GRECO Second Addendum to the Second Compliance Report of Georgia. See also ODIHR election observation reports on the 2016, 2018, and 2020 Georgian elections that include recommendations to strengthen the legal and institutional framework to effectively combat the misuse of administrative resources.
[44] Draft Article 45(12) of the Election Code.
[45] For instance, see the Venice Commission-ODIHR Joint Opinion on the Draft Election Code of Georgia, CDL-AD(2011)043, paragraph 66.

and undue influence, and are thus reiterated.[46] More effective law enforcement outside polling locations is also necessary to ensure enforcement of such prohibitions.

E. Amendments to protocols of polling results and conducting recounts

57. A fair and honest count of the votes is a cornerstone of democratic elections. This standard is set out in paragraph 7.4 of the OSCE 1990 Copenhagen Document which requires that votes "are counted and reported honestly with the official results made public." A number of the proposed amendments appear to be aimed at curbing the problems that occurred during the 2020 parliamentary elections with regard to counting and tabulation, and increasing public trust in the credibility of the election results.

58. The proposed amendments repeal the PEC power to draw up when needed but not later than the day following the polling day, a protocol amending the summary protocol of the polling results if there are statements/explanations of the members of a respective PEC and/or other legal and factual grounds.[47] A new provision further stipulates that after the PEC stamp is sealed in a separate package and the package signed by the PEC members, it is prohibited for the PEC to draw up an amendment protocol of the polling results.[48] Under the draft amendments, the DEC is provided with sole authority to make, by DEC ordinance, corrections of data in PEC summary protocols, based on opening the sealed packages received from the PEC, and recount the number of voter signatures and ballots.[49] These measures are understandable in light of the problems faced in the 2020 parliamentary elections that seriously undermined the credibility of the election results in the view of stakeholders, and may serve as safeguards against such problems in future elections.

59. The draft amendments introduce an obligation on DECs to open respective election materials and recount the votes, in cases when the number of votes received, number of voters and/or invalid papers are corrected by the PEC in the summary protocol.[50] It is also advisable to establish a mandatory recount in cases where the recorded number of invalid and valid ballots exceeds the number of voter signatures. Deadlines for the DECs and CEC to prepare their summary protocols of results based on the lower-level summary protocols are substantially extended under the proposed changes, apparently due to the new obligations to conduct recounts in some circumstances and the extended deadlines for adjudication of post-election complaints (see below). The DECs would have up to 14 days and the CEC up to 25 days to complete their summary protocols.[51] Also introduced is a random audit of polling station results to be conducted following election day.[52] Each DEC would be required to randomly select five polling stations in each electoral district not later than the sixth day after

[46] Further confidence-building measures would also be advisable in relation to the voting process itself. E.g., the request for party representatives to leave the room where the ballot box is placed by Commission members should be very restrictively regulated; the banning of cell phones from the actual voting booth is not uncommon and should be seriously considered to avoid voters taking pictures of their votes in response to outside pressure, or to curry favour with the party they would have voted for; stricter control of the actual ballot sheet could be achieved by electronic means, including bar coding, in an attempt to build more confidence that no 'carousel' practices are taking place.

[47] Draft Article 13(2)(d.1).

[48] Draft Article 70(4.1) of the Election Code.

[49] Draft Article 73(1.1) of the Election Code.

[50] Draft Article 21(d.1) of the Election Code. During the 2020 parliamentary elections, the ODIHR election observation mission noted that in those cases when DECs amended PEC summary protocols of results on their own initiative or based on complaints, they usually avoided initiating recounts of ballots and largely relied on explanatory notes and amendment protocols provided by the PECs.

[51] The deadline in Article 75(1) for DECs to tabulate the election results at district level based on the PEC summary protocols and decisions on violations of election legislation is extended from 11 to 14 days. The deadlines in Articles 76(1) and 125(1) for the CEC to prepare a summary protocol are extended from 19 to 25 days.

[52] Draft Article 21(d.1) of the Election Code; it should be noted that the proposed amendments include two provisions labelled as Article 21(d.1).

the election day and conduct recounts; the selection mechanism is not established. Moreover, the draft amendments do not establish which actions must be taken following the recounts, for instance, if significant discrepancies are uncovered in any or all of the recounts, which limits the effectiveness of the audit.

60. The above-noted provisions are significant positive measures that may effectively serve to enhance the accuracy, legitimacy, and credibility of the election results. **However, it is advisable to also explore alternative measures to ensure competent and honest counting and reporting of results at the precinct level, e.g., strengthening the appointment process for commission members to assure professional capacity and impartiality and providing supplementary training on completion of summary protocols of results. In addition, strict and consistent enforcement of sanctions for violations by election officials in relation to the counting and tabulation process could serve as an effective deterrent. Strengthening the capacity of commissions and courts to effectively handle post-election complaints would also contribute to the legitimacy and credibility of the election results.**

61. Regarding finalisation of election results, it should be noted that in a politically sensitive environment, unduly prolonging the final conclusion of the results could have serious repercussions. Political and public tensions may arise if the election contestants and electorate have to wait months to know the final outcome of the election. At its worst, and as seen in Georgia to some extent during the 2020 parliamentary elections, public protests can erupt and turn violent. In this respect, it is advisable to ensure that the final election results are determined once and for all within a maximum two months from the election day, taking into account all of the deadlines for determination of the summary protocols of results and resolution of complaints and appeals to the highest level. **When legislating these various deadlines, it is recommended to take this concern into account.**

62. Moreover, the regulatory gap on recounts and annulments of results undermines the transparency and effectiveness of the post-election dispute resolution process; this is especially problematic in a sensitive political environment where allegations of election fraud persist and have grown over the years. **Therefore, adoption of a comprehensive regulatory framework that specifies clear, objective criteria for granting and conducting recounts and annulments to ensure transparent, fair and uniform practice in the counting and tabulation of results and handling of post-election disputes as reiterated in ODIHR election observation reports over the years, is recommended.**

F. Complaints and appeals

63. The legal framework must provide effective procedures and remedies for the protection of electoral rights at all stages of the electoral process and stipulate that every voter, candidate and political party has the right to lodge a complaint with the competent authority when an infringement of electoral rights has occurred.[53] According to OSCE commitments and international standards and good practice, decisions made by independent and impartial authorities responsible for supervising the conduct of elections shall be subject to appeal with an independent and impartial judicial authority.[54] Procedures on admissibility of complaints and appeals should be designed to preserve the right of aggrieved parties to seek redress, not to unnecessarily exclude claimants or deny consideration. Time-limits and deadlines for

[53] See Venice Commission, Code of Good Practice in Electoral Matters, CDL-AD(2002)023rev2-cor, Guideline II.3.3 and paras. 92-102 of the Explanatory Report. Guideline II.3.3.f provides that "all candidates and all voters registered in the constituency concerned must be entitled to appeal. A reasonable quorum may be imposed for appeals by voters on the results of elections."

[54] Paragraph 5.10 of the 1990 OSCE Copenhagen Document states that everyone shall have an effective means of redress against administrative decisions, so as to guarantee respect for fundamental rights and ensure legal integrity. Article 2.3(a) of the ICCPR states that "any person whose rights or freedoms as herein recognised are violated shall have an effective remedy…"

submission and adjudication should strike a balance between respecting the right to challenge the decisions and (in)action of electoral bodies, providing resolution in a timely manner, and allowing adjudicators the time necessary to process, review, investigate, and make decisions. In setting deadlines, consideration should be given to the level of adjudicative body and nature of the complaints.

64. Some of the proposed amendments aim to strengthen the election dispute resolution process, apparently in response to the largely ineffective handling of post-election complaints by commissions and courts that led to political and public backlash following the 2020 parliamentary elections. The existing framework for complaints and appeals in the Election Code has been the subject of long-standing and reiterated ODIHR and Venice Commission recommendations to simplify the process; broaden legal standing to ensure that citizens whose electoral rights are violated are entitled to lodge a complaint to seek legal remedy; provide for the right to seek judicial review of all decisions and (in)actions of election bodies and their officials; revise legal deadlines for submission and adjudication of complaints to allow for sufficient time to effectively prepare and adjudicate cases and, at the same time, provide for duly expedited resolution; avoid overly strict rules on complaint admissibility with the aim to assure substantive consideration of all complaints; provide for online submission of complaints to election commissions.[55] Some of the above-noted recommendations are addressed, in whole or in part, by the proposed amendments. However, **the need for robust reform of the election dispute resolution process to ensure straight-forward access to timely, transparent, and effective resolution of disputes is not addressed. Such a more comprehensive reform is recommended, at least in the longer term.** In this connection, the rapporteurs noted during the videoconferences that several interlocutors stressed the importance of a well-functioning judiciary as a precondition for the effectiveness of the electoral dispute settlement and citizens' trust in it.

65. Draft Article 77(5.3) of the Election Code explicitly authorises complaints to be submitted to the DECs and CEC in hard copy or electronic form, according to a procedure to be determined by CEC ordinance. This is a positive step that will effectively facilitate the timely submission of complaints, particularly as many complaints were denied consideration during the 2020 parliamentary elections on grounds of late submission in light of the short submission deadline. **To facilitate the timely handling of election disputes in the courts, consideration could also be given to allowing electronic submission of complaints to the courts, submission until midnight on the deadline day, and the possibility for remote hearings where parties or witnesses in the claim are unable to reach the court on time.**

66. Voters in Georgia are not broadly granted legal standing to protect their electoral rights. A proposed amendment provides that any complaints submitted to a commission or court by an unauthorised claimant (i.e., one who does not have standing to submit that type of complaint) or any complaint that is not accompanied by the claimant's identification is to remain unconsidered.[56] In this connection, attention is drawn to the principles that legal standing in election-related cases should be granted as widely as possible and that the procedure must be simple and devoid of formalism, in particular to avoid decisions on inadmissibility, especially in politically sensitive cases.[57] It should be noted that during the 2020 parliamentary elections, the majority of post-election complaints were denied consideration,

[55] For example, see Venice Commission-ODIHR Joint Opinion on the Draft Election Code of Georgia, CDL-AD(2011)043, paragraph 110; ODIHR Election Observation Mission Final Report Georgia Parliamentary Elections, 31 October 2020, pages 24-26.
[56] Article 78(1.1) of the Election Code.
[57] See Venice Commission, Code of Good Practice in Electoral Matters, CDL-AD(2002)023rev2-cor, Guideline II. 3.3 b and Explanatory Report.

many on technical grounds other than late submission.[58] This undoubtedly contributed to public mistrust in the election dispute resolution process and a lack of confidence in the election results.

67. The Code of Good Practice in Electoral Matters recommends a timeframe of between 3-5 days for the submission and adjudication of election-related complaints and appeals as an appropriate balance between respecting the right to seek legal remedy and providing timely and effective resolution of election disputes.[59] In a positive step, the proposed amendments increase the unduly short adjudication time-limits for election commissions and courts of appeal: from two days to four days for DECs and from one day to two days for the CEC and appeal courts, essentially doubling these adjudication periods.[60] In addition, the unduly short deadlines for submission of complaints to the CEC and for lodging appeals against CEC decisions to the Tbilisi City Court were increased from one to two days. While increasing these deadlines and time periods are an improvement, **the above-noted extensions are not fully in line with international good practice as noted above – most falling short of the recommended minimum three-day submission and adjudication timeframe – and should therefore be further amended.**

68. In addition, unrevised deadlines of two days for submission of complaints to the DECs, two days to lodge an appeal to a first instance district/city court, and one day for submission to an appeal court also fall short of the above-noted international good practice. The provisions also maintain a two-day time-limit for the first instance court to adjudicate election cases which for some matters, depending on their complexity, would be insufficient time to conduct a thorough review and investigation. More than a two-day period for submission and adjudication of complaints and appeals would allow claimants to better prepare the cases and for the courts to provide more effective resolution.

69. The draft amendments provide the right to appeal to court the decision of the CEC chairperson (or other authorised CEC official) that refuses to draw up an administrative offence protocol on violation of the election legislation.[61] The provision would give the court authority to directly impose an administrative penalty against an offender or to dismiss the appeal. This provision addresses a long-standing and reiterated ODIHR recommendation that the denial of requests to draw up protocols for electoral violations be subject to judicial review. Likewise, the proposed amendment addresses a claim in a pending Constitutional Court case on the same matter.[62] However, the proposed two-day deadline for submission of the appeal and the ten-day timeframe for the court to adjudicate the matter are unduly short and lengthy, respectively, taking into consideration the earlier-noted international standards of three-five days for submission and adjudication of election-related complaints and appeals. **It is, therefore, recommended to adjust the appeal timeframes under Draft Article 93(8.1) of the Election Code in line with the international standards.**

G. Local election system

70. The choice of an electoral system is a sovereign decision of a state, provided the system conforms with principles contained in OSCE commitments, the Code of Good Practice in

[58] One of the common grounds to deny consideration was the claimant's failure to submit a power of attorney from the observer organisation they represented, even where the observer had his/her own accredited observer certificate.
[59] See Venice Commission, Code of Good Practice in Electoral Matters, CDL-AD(2002)023rev2-cor, Guideline II. 3.3 g and Explanatory Report. Paragraph 95 of the Explanatory Report notes that it is permissible to grant a little more time to higher courts for their rulings in election-related cases.
[60] Draft Article 77(2) and (4) of the Election Code.
[61] Draft Article 93(8.1) of the Election Code.
[62] In April 2020, a Constitutional Court case lodged by a civil society group challenged the lack of a right to judicial review of the CEC chairperson's decision not to draw up an administrative offence protocol. The case is still pending.

Electoral Matters and other international norms, including requirements for transparency, universality and equality of suffrage of voters and non-discrimination among candidates and political parties.[63] The draft amendments propose some changes to the existing local election system, but maintain its mixed proportional-majoritarian nature.[64] The amendments would fix the total number of seats on each local council and change the division between proportional and majoritarian seats, as well as lower the electoral thresholds for winning council seats in the proportional contests. These changes fall within the discretion of the state. However, local elections in Georgia have yet to provide for constituencies of an approximately equal population size and thus, to guarantee the equality of the vote within the framework of the electoral system. In this respect, a long-standing Venice Commission and ODIHR recommendation to review the local election system in order to ensure the equality of suffrage has not been addressed.[65]

71. The proposed amendments make changes to the local election system in Articles 18, 140, 148, 155, and 162. A new Article 18(3) provides that the number of local council members elected by the proportional and majoritarian system shall be defined by the present Law and the revised Articles 140 and 155(4) fix the number of seats for each of the 64 local councils (between 18-50) and divide the total number of seats between the proportional and majoritarian contests.[66] The division between proportional and majoritarian seats has been changed in favour of a significantly higher proportion of proportional seats in each municipality.[67] In addition, the revised Article 148 lowers the electoral threshold in proportional contests from 4 to 3 per cent for all localities (except Tbilisi), and the revised Article 162 lowers the threshold for Tbilisi municipality from 4 to 2.5 per cent. While there is no international standard for electoral thresholds, lowering the threshold offers the potential benefit of increasing political pluralism and aligning the mandates closer to the voters' will by minimising "wasted" votes. It should however be noted that, due to the natural threshold, the decrease of the threshold will be effective only in those municipalities with about, at least, 20 to 25 seats (the electoral quota being 4 % of the votes in a constituency with 25 proportional seats and 5 % in a constituency with 20 proportional seats).

72. The existing Article 14(1)(e) provides that the CEC establish by ordinance the electoral districts and/or specify their boundaries, as determined under this Law. Existing Article 18(2) provides that for local self-government elections, (majoritarian) electoral districts shall be set up, and their boundaries, titles and numbers determined by CEC ordinance. However, the law does not require that the (majoritarian) electoral districts for local elections be of equal or comparable size (except within the municipality of Tbilisi), thus failing to guarantee one of the main principles of electoral rights, equality of the vote.[68] Moreover, the legislation does not

[63] Paragraph 7.3 of the 1990 OSCE Copenhagen Document commits OSCE participating States to "guarantee universal and equal suffrage to adult citizens." The United Nations Human Rights Committee has adopted a General Comment (General Comment No. 25) interpreting the principles of democratic elections set forth in Article 25 of the International Covenant on Civil and Political Rights. See also Venice Commission, Code of Good Practice in Electoral Matters, CDL-AD(2002)023rev2-cor, Guideline I. 2.2.

[64] The proportional part is held within a single electoral district (the whole of the self-governing community or city) through closed party lists and the majoritarian part is held in multiple single-mandate constituencies within the locality.

[65] Venice Commission-ODIHR Joint Opinion on the Draft Election Code of Georgia, CDL-AD(2011)043, paragraph 22.

[66] Under the current legislation, the number of seats for the proportional contests is fixed, while the number of majoritarian seats is fixed for the five self-governing cities but partially variable for the remaining municipalities, dependent on the number of registered voters in the municipality.

[67] In Tbilisi and the other four municipalities, the proportion of seats that will be elected through the proportional party list system will be 80 per cent, and in the self-governing communities, will be two-thirds of the council members.

[68] As regards the municipality of Tbilisi, the existing Article 155(5) provides that the CEC shall by ordinance determine the local single-seat majoritarian electoral districts of Tbilisi and shall define their boundaries "considering the number of voters and existing boundaries of territorial units."

provide clear rules for delimitation of constituencies for local elections and does not specify any criteria for legally permissible deviations among electoral constituencies, and justification for any exceptional cases. The law also does not establish an independent committee in charge of drawing the boundaries of the electoral constituencies, as recommended by the Code of Good Practice in Electoral Matters.[69]

73. In the 2010 and 2017 local elections there were wide differences in voter populations in the majoritarian electoral districts within each municipality.[70] In 2010, across the country, the number of registered voters in a single-mandate constituency varied considerably within the same local government unit; at times, by more than 1,000 per cent. Even in Tbilisi, where a large population of voters should make it easier to establish comparable electoral districts, there were deviations of up to 30 per cent. In the 2017 local elections, only 20 per cent of the majoritarian constituencies was within 15 per cent of deviation from the average number of voters within each municipality, with the other 80 per cent of constituencies above 15 per cent. While some deviation in the number of voters in each electoral district may be unavoidable due to geographic or demographic factors, such large deviations undermine the principle of equality of the vote.[71]

74. In light of the above, a long-standing Venice Commission and ODIHR recommendation has been to amend the electoral legislation to require single-mandate electoral districts to be of equal or similar voting population and to specifically address how electoral districts are to be established in all types of elections, including the specific criteria that must be applied and respected.[72] The recommendation further states that those bodies responsible for creating electoral boundaries should be independent and impartial, the delimitation process should be transparent and involve broad public consultations, and the legislation foresee periodic boundary reviews that would take into account population changes.[73] **The proposed amendments do not address any aspect of this recommendation, leaving a key shortcoming of the local election system in place. This recommendation is therefore reiterated.**

H. Electronic voting and counting

75. According to new transitional provisions in the proposed amendments, for the next local elections, the CEC is authorised to use electronic means to carry out voter registration at polling stations, voting, counting of votes, and drawing up a summary protocol of the results.[74] While use of electronic means may ease the process and reduce risks of human error or

[69] Guideline I.2.2.vii of the Code of Good Practice in Electoral Matters states that "this committee should preferably include a geographer, a sociologist and a balanced representation of parties and, if necessary, representatives of national minorities".

[70] ODIHR Election Observation Mission Final Report Georgia Local Elections, 30 May 2010, page 6; ODIHR Election Observation Mission Final Report Georgia Local Elections, 21 October and 12 November 2017, page 5.

[71] In line with paragraph 7.3 of the 1990 OSCE Copenhagen Document, participating States undertake to guarantee universal and equal suffrage to adult citizens. Guideline I.2.2 of the Code of Good Practice in Electoral Matters provides that the seats should be evenly distributed among constituencies and recommends that the admissible departure from the norm "should not be more than 10%, and should certainly not exceed 15% except in special circumstances (protection of a concentrated minority, sparsely populated administrative entity)."

[72] See the Venice Commission-ODIHR Joint Opinion on the Draft Election Code of Georgia, CDL-AD(2011)043, paragraph 20.

[73] Guideline I.2.2.v. of the Code of Good Practice in Electoral Matters states: "In order to guarantee equal voting power, the distribution of seats must be reviewed at least every ten years, preferably outside election periods."

[74] Draft Articles 203.1 and 203.2 of the Election Code. The provisions specifically require the counting of ballot papers by electronic means in at least as many precincts as is necessary "to reveal the sociologically valid results of the constituency".

intentional violation, there are inherent complexities and risks with electronic voting and counting, and the electorate and political forces can be leery of electronic voting. As such, it is common practice for states to introduce new voting technologies on a pilot basis. In addition, the legal framework should properly regulate the use of any new voting technologies in the electoral process. However, the draft law does not provide any regulation on the use of electronic means to carry out the aforementioned processes and only provides that the rules and conditions for the use of electronic means are to be determined by CEC resolution. **It is recommended that the draft amendments establish a regulatory framework for the use of new voting technologies in the next local elections taking into account international good practice as noted below.**

76. Procedures and requirements for the use of information technology during electronic voting, counting and tabulation must be accurately reflected in the electoral legislation. Often, important parts can be found in other legislation, such as that relating to data protection. First, the regulation could either be done primarily in the electoral law itself or, alternatively, the legal framework could establish only general rules, leaving the detail to binding regulations issued by the electoral management body. While the latter is advantageous in terms of flexibility, it can give too much scope for election procedures to be adapted to the needs of the technology, instead of the other way around, and to circumvent important safeguards if time becomes scarce due to any delays in the implementation of the new voting technology system. Second, it is important that the electoral legislation explicitly state that the suffrage guarantees applicable to paper-based voting are also applicable to new voting technologies, even though the way of voting is different.

77. The Code of Good Practice in Electoral Matters provides that “electronic voting should be used only if it is safe and reliable; in particular, voters should be able to obtain a confirmation of their votes and to correct them, if necessary, respecting secret suffrage; the system must be transparent.”[75] With regard to the use of electronic rather than manual counting, the legal framework should provide safeguards, with provisions in place so that the accuracy and soundness of hardware and software used for counting ballots can be verified independently. Whether manual, mechanical or electronic voting is used, procedures for auditing and inspection must be in place to ensure accuracy and reliability. In this respect, it should be noted that the aforementioned proposed amendment regarding the random audit of polling results explicitly precludes recounts in polling places where electronic ballot counting machines are used.

[75] See Venice Commission, Code of Good Practice in Electoral Matters, CDL-AD(2002)023rev2-cor, Guideline I.3.2.iv. and paragraphs 42-44 of the Explanatory Report.

78. In addition to establishing minimum criteria for new voting technology use, specific areas that must also be addressed in the legislation include:

- The scope of access to new voting technologies that will be provided to observers, candidates and political parties;
- The procedural steps for audits and recounts where new voting technology is used;
- The primacy of the voter-verifiable paper record in determining the results in the event of legal challenges;
- Defining the contractual obligations of vendors, certification agencies and suppliers;
- Accountability provisions for public officials and election administration;
- Criminal sanctions in case of new voting technology abuse;
- Complaints and appeals in regards to new voting technology use;
- Data-protection regulations.

79. **The above areas should be addressed in detail in a text that is understandable to the general reader.** This is particularly important where the introduction of new voting technologies is likely to introduce legal challenges before and during elections. It should be emphasised that while the introduction of new voting technologies has its advantages, it risks undermining public trust in the electoral process and results, especially in politically sensitive environments. In light of the widespread allegations of electoral fraud during the 2020 parliamentary elections and the very high number of complaints and appeals lodged, most challenging the accuracy of the counting and summary protocols of results, **it is strongly advisable that the electoral legislation adequately cover the above-noted issues.** Certainly a shift from paper-based to electronic voting and counting should not be considered a panacea to the problems that occurred during the 2020 parliamentary elections.

80. **Of utmost importance is that any new use of electronic means must be sufficiently planned and prepared in advance, and that effective voter education and election administration training be undertaken.[76] Moreover, in light of the limited time remaining before the 2021 local elections, it may be that a pilot project for certain electronic technologies is the only viable option for the next elections.** In light of the above, careful consideration should be made in deciding on the nature and extent of the pilot project, taking into account that introducing electronic means in an urban context will be more feasible and suitable than in rural areas. In addition, a follow-up study of any pilot project is advisable, to be undertaken by the CEC, as a key tool toward effective planning and implementation of more broad-based future use of election-related technologies. In addition, any introduction of electronic voting should take into account the Council of Europe's standards in the field of e-voting.[77]

[76] In the 2017 local elections and 2018 presidential election, the CEC piloted the use of electronic machines at polling stations on a very limited basis, in eight polling stations.

[77] Recommendation CM/Rec(2017)5 of the Committee of Ministers to member States on standards for e-voting; Explanatory Memorandum to Recommendation CM/Rec(2017)5 of the Committee of Ministers to member States on standards for e-voting; Guidelines on the implementation of the provisions of Recommendation CM/Rec(2017)5 on standards for e-voting.

VI. Technical Remarks

81. While it is understood that the reviewed version of the draft law may not yet be final, attention should be drawn to certain technical shortcomings that should be corrected. As a matter of precise legislative drafting, provisions that remain unchanged should not be reproduced in the draft law. For instance, where only the paragraph number changes, this change should be specified: e.g., "paragraph 6 becomes paragraph 7" and where only part of a paragraph changes, it should only specify which words or sentences are replaced or repealed, making clear that the other words and sentences remain unchanged. In the current draft, these legislative drafting rules are often not followed. This reduces the transparency and coherency of the legislative changes as the reader cannot clearly determine which changes to the legislation are being made without undertaking a full comparative analysis of all affected provisions. **It is recommended to review the draft law to omit provisions and parts of provisions which are not being amended and make clearer which provisions or parts of provisions are being replaced or repealed. In addition, there a few technical errors in the draft law, though this could be attributed to errors in translation.[78] Prior to final adoption of the amendments, it is recommended that any technical errors be identified and corrected.**

[78] For instance, the revised Article 10(4) refers to "nomination of candidates" while the procedure has been changed from multiple nominees to a single nominee for CEC chairperson and Article 10(5) refers to "paragraph 5 of this Article" but apparently should be a reference to paragraph 4 of the Article.