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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

OSCE OFFICE FOR DEMOCRATIC INSTITUTIONS AND HUMAN RIGHTS
(ODIHR)

GERMANY

JOINT OPINION

ON THE AMENDMENTS TO THE FEDERAL ELECTION ACT

Approved by the Council for Democratic Elections
at its 77th meeting (Venice, 8 June 2023)
and adopted by the Venice Commission
at its 135th Plenary Session (Venice, 9-10 June 2023)
on the basis of comments by

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I. Introduction

1. By letter of 3 March 2023, Mr Tiny Kox, President of the Parliamentary Assembly of the Council of Europe, requested an Opinion regarding the draft law on the amendment of the German Federal Election Act and its compliance with Council of Europe standards. A revised version of the amendments (CDL-REF(2023)020) was adopted by the *Bundestag* on 17 March 2023. This is the text which will be examined in the present Opinion. As this Opinion relates to the electoral field, it was prepared jointly by the Venice Commission and ODIHR.

2. Mr Oliver Kask, Mr Tomáš Langášek, Mr Cesare Pinelli and Mr Pere Vilanova Trias acted as rapporteurs for this Opinion. Ms Tamara Otiashvili was appointed as expert for ODIHR.

3. On 23 May 2023, a joint delegation composed of Mr Kask, Mr Langášek, Mr Pinelli, Ms Otiashvili as well as Mr Pierre Garrone for the Venice Commission Secretariat, travelled to Berlin and had meetings with the political groups of the *Bundestag* and Representatives from the Federal Ministry of the Interior and Community. They also received written replies to questions put to the *Bundeswahlleiterin* (federal returning officer). This Joint Opinion takes into account the information obtained during the above-mentioned meetings as well as through the written comments of the *Bundeswahlleiterin*. The Venice Commission and ODIHR are grateful to the German authorities for the excellent organisation of the visit.

4. This Opinion was prepared in reliance on the English translation of the electoral legislation. The translation may not accurately reflect the original version on all points.

5. This Opinion was approved by the Council for Democratic Elections at its 77th meeting, and, following an exchange of views with Mr Till Steffen, member of the Bundestag, it was adopted by the Venice Commission at its 135th Plenary Session (Venice, 9-10 June 2023).

II. Background and scope of the Joint Opinion

6. In the present Opinion, the Venice Commission and ODIHR do not examine the overall legal framework related to elections in Germany. The Opinion only deals with the amendments of the German Federal Election Act (Sections 1 – 6, 48), which reform the electoral system for the elections to the Low Chamber of the German parliament (*Bundestag*). These amendments are primarily intended at ensuring a fixed number of seats at the Bundestag by changes to the system of “personalised proportional representation” combining two votes (on proportional lists and in one-member constituencies) leading to possible non-representation of some constituencies. They also suppress the possibility for parties having obtained at least three seats in one-member constituencies but less than 5 % of the total votes to take part in the allocation of list seats.

7. The Venice Commission’s role is not to replace national constitutional courts. The interpretation of the German Federal Constitution is in the competence of the *Bundesverfassungsgericht*, to which, moreover, some political parties intend to apply for a review. Based on the request, the Venice Commission and ODIHR can only discuss the best practices and international standards or explain the electoral systems used in the Venice Commission’s member states and OSCE participating states.

A. The situation before the amendments

8. Under the previous electoral system, candidates competed in 299 single-seat electoral districts under a first-past-the-post system, and in 16 multi-seat *Länder* constituencies with closed party lists. Those parties which either surpassed the five per cent threshold of second votes at the national level or won seats in at least three single-member constituencies were

eligible to participate in the proportional allocation of parliamentary seats. Seats were allocated according to the number of seats won in the single-member constituencies and to the proportion of the seats at Länder level. The number of seats won directly by a party in the single-member constituencies of a Land was then subtracted from the total number of seats allocated to that party's list, with any remaining seats being allocated in the order of list.

9. So-called “overhang (surplus) mandates” were allocated if a party won more direct mandates through first votes (majoritarian) in a federal state than it would be entitled to according to the second vote (proportional) results in the respective federal state. In addition, on the basis of the case-law of the Constitutional Court, additional compensatory mandates had to be allocated to ensure proportional results (see below).

10. In the last decades, with the increasing fragmentation of the electorate and the decreasing strength of the larger parties, direct seats were frequently won with an ever smaller proportion of the votes in the constituency. Direct seats now account for only 40% of the seats (instead of 50% in principle). As it appears from the explanatory report to the Bill, this increase is constant and the size of the Bundestag has accordingly been increased by almost one quarter (631 members in 2013, 709 in 2017, 736 in 2021, namely 123% of the size of 598 members provided in the law if there are no overhang mandates). In 2021, the number of overhang mandates was 34, which in turn resulted in 104 compensatory mandates. The continuous increase of overhang mandates implies that the allocation of seats at this stage does not correspond to the distribution of the second votes and therefore to the relative effective strength of the parties.

11. The German Federal Constitutional Court ruled against overhang mandates not being compensated, arguing that *“the principles of equal elections and of equal opportunities of the parties are violated because additional mandates are allocated pursuant to [provisions which] permit overhang mandates with no compensation to a degree which eliminates the fundamental nature of Bundestag elections as proportional representation elections.”*¹ On the basis of this judgment, the increase of overhang mandates had to be compensated by adding extra seats to the other parties in order to give a true reflection of the distribution of second votes. The overhang mandates and a mandatory allocation of extra seats are thus the decisive factors responsible for an increase of the size of the Bundestag.

12. This development is costly and creates several problems for the operational capacity and efficiency of the Parliament. The functional obstacles relate not only to the obvious issues of space and staffing but also to the work of the parliamentary committees in which all members have the constitutional right to participate. The explanatory report further points out the acceptance problems among the public, who rightly expect their Parliament to resolve the great issues affecting the future of German democracy.

B. The amendments

13. The main objective of the reform consists in abolishing the rules on the overhang – and compensatory - mandates without renouncing to the combination of proportional and personal representation, which lies at the core of the electoral system since the foundation of the Federal Republic. The reform thus puts an end to the continuous increase in the number of seats in the *Bundestag*.

¹ The Federal Constitutional Court, Judgment of 25 July 2012, No. GER-2012-2-019, 2012. In: Venice Commission, Bulletin, 2012 (<https://www.venice.coe.int/files/Bulletin/B2012-2-e.pdf>), 87-9. In 2008, the Constitutional Court did not void provisions related to overhang mandates, but it found them to challenge the principle of the equality of the vote and limited their number to fifteen. See [Press Release No. 68/2008 of 03 July 2008](#). In its established case-law, the German Federal Constitutional Court has emphasised that the legislature is free, in principle, to choose an electoral system and that this freedom includes the option to introduce a system of pure proportional representation (BVerfGE 131, 316, 334-5 [2012]).

14. With the amendments to the Federal Electoral Law, the total number of seats at the Bundestag is fixed at 630. Overhang mandates are accordingly abolished, and so are, by way of consequence, compensatory mandates.

15. The amendments instead maintain two votes for each voter (first vote – constituency and second vote – party list vote). However, the vote for a party list becomes the fundamental element of the election result, as it determines the number of seats accruing to a party. The vote relevant to personal representation, called “first vote” moves to the second place and contributes to the assignment of seats to the candidates according to their distribution among the parties.

16. According to the new Section 4 of the Federal Election Act, the proportion of the total number of votes cast for each party will first be established nationally, and the number of seats accruing to each party will be determined (primary distribution) before these seats are then distributed among the *Land* lists (secondary distribution). The number of seats given to a party’s *Land* list will then define the maximum number of that party’s successful constituency candidates who are eligible to obtain a seat on the basis of the constituency vote. The newly introduced Section 5 regulates how the distribution of seats is calculated. Within a party, the candidates who won the most votes in their respective constituency are ranked according to their constituency vote share. According to Section 6, these votes are then allocated to the party, and the number of mandates which these entitle the party to is determined by its “second vote” result. These seats are then distributed among the *Land* lists. If a party is entitled in a *Land* to more seats than the number of candidates who received the most “second votes”, these additional seats will be filled from the party list. If fewer seats are available, the candidates with the lowest “first vote” share lose out and the constituency mandate is not allocated. In the event of equal numbers of voters and equal share of first vote, the winning candidate is determined by drawing lots by the Federal Returning Officer (Section 6 (3)). Electoral success in a constituency will therefore not only depend on obtaining a relative majority, but also on coverage by the main vote. If there are more constituency winners than the seats to which the party is entitled to on the basis of the second vote, the constituency seat will not be allocated. This makes the proportional aspect of the vote still more dominant than before.

17. As already said, the other main change to the electoral system to be assessed is the suppression of the possibility for parties having obtained at least three seats in one-member constituencies but less than 5 % of the total votes to take part in the allocation of list seats. They can just keep their (1, 2 or 3) constituency seats.

III. Analysis and recommendations

A. Procedural aspects

1. Adoption procedure

18. The Venice Commission and ODIHR have consistently expressed the view that any successful changes to electoral legislation should be built on at least the following three essential elements:

- 1) 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, with adequate procedural and judicial safeguards and means by which to timely evaluate any alleged failure to do so.

19. The choice of an electoral system is the sovereign right of each state; however, it should be decided and agreed upon through broad and open discussions in the Parliament with the participation of all political forces.

20. The problem of the growing size of the Bundestag and the need for reform have been debated over the years among experts² and in the media.³ There have also been several attempts to reform the Federal Election Act prior to the present amendment, which resulted in a vivid debate.⁴

21. Amendments to the Federal Election Act were initiated by the Social Democratic Party (SPD) parliamentary group together with Alliance 90/The Greens and the Free Democratic Party (FDP). The discussion on the envisaged reform of the electoral legislation commenced in 2022, following the establishment of an Electoral Rights Commission.⁵ The first reading of these amendments in an ordinary legislative procedure took place in the plenary of the *Bundestag* on 27 January 2023, and a public hearing was held by the Committee on Internal Affairs and Community on 6 February 2023. The amendments were put to a vote on 17 March and passed with 400 votes in favour, 261 against and 23 abstentions. A number of interlocutors met by the delegation argued that these amendments were adopted before the commission finalised its work and published its final report.

22. A number of parties raised concerns about the amendments themselves and the process under which they were initiated. The Christian Democratic Union and its federal faction partner, the Christian Social Union of Bavaria (CDU/CSU) parliamentary group asked that the deliberations be postponed, arguing that the members of the Committee on Internal Affairs and Community had not received the Committee communication about the planned deliberations until midday on the day before the meeting. In the CDU/CSU parliamentary group's view, a rushed process was inappropriate given the importance of the amendments. The Left Party parliamentary group was also on the position that the motion for the amendments was submitted at short notice, and there was insufficient time to assess their constitutionality and formulate a parliamentary response. Lastly, the Alternative for Germany (AfD) parliamentary group contended that the amendments should be reconsidered, because the motion for an amendment included an entirely new proposal, which was not discussed by the commission.

23. The SPD parliamentary group responded that the formal objections voiced against these amendments were baseless, "and that the process should not be dragged out any further, including out of respect for a potential review of the reform by the Federal Constitutional Court before the next Bundestag elections."⁶ The Alliance 90/The Greens parliamentary group supported the amendments by noting that various electoral reform models had been discussed

² For example, KREILINGER, Valentin, *Downsizing the German Bundestag (Working Paper Series)*, Luiss School of Government, 2020 (<https://sog.luiss.it/sites/sog.luiss.it/files/WP60%20-%20Kreilinger%20rev.pdf>); WEINMANN, Philipp, GROTZ, Florian, *Reconciling parliamentary size with personalised proportional representation? Frontiers of electoral reform for the German Bundestag*. *German Politics* 31.4 (2022): 558-578; KARPEN, Ulrich, *Between proportional and majority voting – the German electoral system in need of reform*, *Amicus Curiae*, issue 103 (2015): 6-9 (<https://journals.sas.ac.uk/amicus/article/view/2479/2437>).

³ DELCKER, Janosch, *Bloated Bundestag runs out of space*, *Politico*, 2016 (<https://www.politico.eu/article/germany-parliament-lower-house-bloated-bundestag-reform-runs-out-of-space/>); MILES HERSZENHORN, Miles, *Germany's government agrees to limit size of Bundestag*, *Politico*, 2020 (<https://www.politico.eu/article/germanys-grand-coalition-agrees-to-limit-size-of-bundestag/>).

⁴ For example see JOHN, Stefanie, *Analysis of the German Federal Elections 2021*. Heinrich-Böll-Stiftung, 2021 (https://us.boell.org/sites/default/files/2021-10/BTW21_Analyse_21_final_en.pdf); GROTZ, Florian, PUKELSHEIM, Friedrich, *Fehlleistung Wahlrechtsreform*, *Frankfurter Allgemeine Zeitung*, 6. 9. 2020 (<https://www.faz.net/aktuell/politik/bundestagswahlrecht-fehlleistung-wahlrechtsreform-16940863.html>)..

⁵ The Electoral Rights Commission was appointed by the Bundestag on March 16, 2022.

⁶ See [the Explanatory note](#) (in German).

at length at many meetings of the Electoral Law Commission and that the criticism put forth testified to “an unwillingness to reduce the size of Parliament, and [was] merely intended to drag the process out”.⁷ The delegation learnt during the visit that these amendments will be appealed with the Federal Constitutional Court once they are signed and promulgated.

24. At the outset, it should be welcomed that consultations commenced well ahead of the next elections and the proposed amendments were deliberated upon through public debate. However, the Venice Commission and ODIHR take note of the lack of cross-party support and remind that the choice of an electoral system is an important decision for any democracy and should preferably be adopted through broad consensus achieved through a process of public consultation as a political compromise by political groups. The reform process should result from an open, inclusive and transparent process that involves a wide array of election stakeholders, including both parliamentary and non-parliamentary parties, as well as civil society representatives.⁸

25. As some of the political parties represented currently in the parliament have criticised the reform and claimed it to be unconstitutional, the reform cannot be defined as based on a broad consensus. However, international standards cannot be understood as preventing any reform of the electoral system which may be opposed by some political parties. On the other hand, building a broad consensus on the choice and fundamental aspects of an electoral system contributes to the acceptance, legitimacy and stability of the governing system. Amendments to the substantial elements of the electoral legislation could only be considered appropriate if the aim of the reform is in accordance with public interest and other proposed solutions were disregarded only after thorough public discussions and explanations. The change of the system is disputable only if it undermines the confidence of the voters, political parties and civil society in the electoral process. In the present case, extensive political consultations and public debate on the reform were held, however, some fundamental changes – which may exclude some political parties currently represented in the *Bundestag* from the parliament –, while debated, were tabled late in the process.

2. Stability of electoral law

26. The Venice Commission's Code of good practice in electoral matters⁹ recommends that the fundamental elements of electoral law, in particular 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. The Venice Commission has pointed out the risk of manipulating the vote through changes of the electoral law, against which it has insisted on respect for the stability principle. More precisely: *“Stability of the law is crucial to credibility of the electoral process, which is itself vital to consolidating democracy... One way of avoiding manipulation is to define in the Constitution or in a text higher in status than ordinary law the elements that are most exposed (the electoral system itself, the membership of electoral commissions, constituencies or rules on drawing constituency boundaries). Another, more flexible, solution would be to stipulate in the Constitution that, if the electoral law is amended, the old system will apply to the next election – at least if it takes place within the coming year – and the new one will*

⁷ *Ibid.*

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

⁹ Venice Commission, [CDL-AD\(2002\)023](#), Code of Good Practice in Electoral Matters, II.2.b. See also [CDL-AD\(2005\)043](#), Interpretative Declaration on the Stability of the Electoral Law. See also (mutatis mutandis) ECtHR, *Georgian Labour Party v. Georgia*, Application No. 9103/04, Judgment, 8 July 2008, para. 88.

*take effect after that.*¹⁰ The amendments address one of the fundamental elements of electoral law, the electoral system proper and deals with the role of the electoral constituencies. While limited in nature, it is difficult to assess the reach of the changes in the allocation of seats they could bring. At any rate, as the next elections in Germany will take place in 2025 in principle, stability of electoral law is not put into question. There is sufficient time for the political parties and other stakeholders to prepare for elections based on the amended electoral system. Since the level of support for political parties may change over this period, the amendments cannot be considered as aimed at cementing the level of representation of the parties in the present majority coalition or to fight against political pluralism. Moreover, it is commendable that some proposed provisions of the amendments, specifically those determining the order of the State (*Land*) lists of parties by the number of second votes that each obtained in the last elections (Section 30(3)), do not come into force until 2026, after the next planned Bundestag elections.¹¹

B. Substantive aspects: electoral system and constituencies' representation

1. Size of the Parliament and number of seats

27. There are no international standards that recommend any particular ratio of parliamentary seats to the size of population. –The amendment is however aimed to a better application of parliamentary procedures, allowing for all Members of Parliament to have more time to present in the sessions of the parliament - apart from reducing difficulties in planning the expenditures from the federal budget, the logistics and sufficient rooms and supporting personnel, which are not the essential elements of the debate. A large number of Members of Parliament makes the co-operation between them more time-consuming and thus renders more difficulty to find time for the interaction with other state institutions or voters. The Venice Commission and ODIHR are not in a position to assess whether the reduction of seats would improve the functioning of Parliament, an issue belonging to the appreciation of the national authorities. It should however be underlined that it is very rare that there is no limit to the number of seats in a Parliament. Simplifying the electoral system by setting a fix number of seats has also the potential to contribute to a better understanding of the electoral process by the public, which may contribute to the legitimacy of the electoral outcome in a broad sense. The amendments further help avoiding inequalities between the Länder which could result in their different number of overhang – and compensatory - mandates. In conclusion, the reduction of the number of seats (or rather the impossibility to increase their number according to election results) is in practice rather limited and does not go against any standard (the number of seats is fixed at 630), and the introduction of a fixed number of seats is welcome.

2. Electoral system

28. The Venice Commission and ODIHR will now examine to what extent the amendments to the German electoral system in the narrow sense are in conformity with international standards. These include, *inter alia*, Article 3 of the Additional Protocol to the European Convention on Human Rights and the case-law of the European Court of Human Rights (ECtHR), the Code of Good Practice in Electoral Matters as well as the 1990 OSCE Copenhagen document.

¹⁰ Venice Commission, [CDL-AD\(2002\)023rev2-cor](#), Code of Good Practice in Electoral Matters, paras 63, 66.

¹¹ Article 1, point 2, and Art. 2(2) of the Twenty-fifth Act, of 14 November 2020, amended the Federal Elections Act. The Twenty-fifth Act was adopted less than three years ago and the purpose of its Art. 1, point 2, was to reduce the number of constituencies to 280. This provision has been abrogated by the assessed amendment before coming into force [according to Art. 2(2) of the Twenty-fifth Act, it should have entered into force on 1 January 2024]. This abrogation does not go against the principle of stability of electoral law. There is no indication of arbitrariness or abusive conduct, even if the issue of the suitability for legislation definitively adopted to be abrogated before its entry into force could be addressed.

29. The European Court of Human Rights (ECtHR) has ruled, on the basis of Article 3 of the First Additional Protocol to the European Convention on Human Rights,¹² that the choice of the electoral system by which the free expression of the Opinion of the people in the choice of the legislature is ensured – whether it be based on proportional representation, the “first-past-the-post” system or some other arrangement – is a matter in which states (High Contracting Parties) enjoy a wide margin of appreciation (*Matthews v. the United Kingdom*, *Mathieu-Mohin and Clerfayt v. Belgium*, *Yumak and Sadak v. Türkiye* [GC]).¹³ As long as all electors have by their vote the possibility of affecting the composition of the legislature, the choice of the electoral system falls in the state’s margin of appreciation.¹⁴ In this regard, the Court’s task is to determine whether the effect of electoral legislation is to exclude some persons or groups of persons from participation in the political life of the country, whether the discrepancies created by a particular electoral system can be considered arbitrary or abusive or whether the system tends to favour political parties or candidates by giving them an electoral advantage at the expense of others.¹⁵ Any conditions imposed by electoral legislation must not thwart the free expression of the opinion of the people in the choice of the legislature – in other words, they must reflect, or not run counter to, the concern to maintain the integrity and effectiveness of an electoral procedure aimed at identifying the will of the people through universal suffrage.¹⁶

30. The Venice Commission and ODIHR do not recommend any specific electoral system. Different electoral systems and multiple options on how they are presented are found across the member states of the Venice Commission and the OSCE region. They have different advantages and shortcomings; however, the choice of an electoral system is a sovereign decision of a state through its political system, provided that international obligations, guaranteeing, in particular, universal, equal, free and secret suffrage, are respected. The Code of Good Practice in Electoral Matters states that, “within the respect of the above-mentioned principles [that is the rest of the Code], any electoral system may be chosen”.¹⁷ The principles of universal, equal, free and secret suffrage, as developed in the Code, thus apply to electoral systems. The most relevant in the field is the principle of equal suffrage, which entails *inter alia* equal voting rights and equal voting power.¹⁸

31. The perception that the chosen system works well in one state does not necessarily mean that it can be successfully replicated in another. Rather, a chosen electoral system must be seen in the context of the constitutional, legal and political traditions of the state, the party system, and territorial structure. Similarly, there are no international standards recommending a specific method or degree of proportionality regarding the distribution of seats. It is

¹² Article 3 Protocol No. 1: “The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the Opinion of the people in the choice of the legislature.”

¹³ ECtHR, *Matthews v. the United Kingdom*, Application No. 24833/94, Judgment (Grand Chamber), 18 February 1999, para.. 64; ECtHR, *Mathieu-Mohin and Clerfayt v. Belgium*, Application No. 9267/81, Judgment, 2 March 1987, para.. 54; ECtHR, *Yumak and Sadak v. Türkiye*, Application No. 10226/03, Judgment (Grand Chamber), 8 July 2008, paras 110-111.

¹⁴ See similarly ECtHR, *Riza and Others v. Bulgaria*, Applications nos. 48555/10 and 48377/10, Judgment, 13 January 2016, para. 14; *Bompard v. France*, Application No. 44081/02, Decision, 4 April 2006.

¹⁵ ECtHR, *Bakirdzi and E.C. v. Hungary*, Application nos. 49636/14, 65678/14, Judgment, 10 November 2022, para.. 45.

¹⁶ ECtHR, *Lykourazos v. Greece*, no. 33554/03, Judgment, 15 June 2006, para.. 52.

¹⁷ Venice Commission, [CDL-AD\(2002\)023rev2-cor](#), Code of Good Practice in Electoral Matters, II.4. [The UN General Assembly Resolution A/RES/46/137](#) noted that “recognizing that there is no single political system or electoral method that is equally suited to all nations and their people and that the efforts of the international community to enhance the effectiveness of the principle of periodic and genuine elections should not call into question each State’s sovereign right, in accordance with the will of its people, freely to choose and develop its political, social, economic and cultural systems, whether or not they conform to the preferences of other States”. [The OSCE Ministerial Council noted in the 2002 Porto Ministerial Declaration, Decision No. 7/02](#), that “democratic elections can be conducted under a variety of electoral systems.”

¹⁸ Venice Commission, [CDL-AD\(2002\)023rev2-cor](#), Code of Good Practice in Electoral Matters, I.2.

recognised that states enjoy a broad margin of appreciation as long as the revision of such a fundamental element of electoral legislation takes place in an open consultative process, and the methods of allocation of the seats ensure the equality and the inclusiveness of the voting process. Lawmakers could consider the Venice Commission report on electoral systems with a view to identifying an optimum relationship between genuine representation and stability of government, while respecting the principle of equal suffrage.¹⁹

- a. Possible non-representation of some constituencies and the role of the second vote

32. The principle of equal voting rights requires each voter to have the same number of votes.²⁰ This requirement is obviously met by the present amendment as each voter has two votes, namely the first vote (vote in a given constituency) and the second vote (party list vote). The fact that second votes in some constituencies will not contribute to the allocation of seats does not go against this principle, it is just an example of “wasted votes” which, as recognised by the European Court of Human Rights, are unavoidable in any electoral system.²¹

33. According to the principle of equal voting power, “seats must be evenly distributed between the constituencies”. This implies a limitation to the over- or under-representation of the voters of a constituency.²²

34. Under the reformed system, some constituencies – those where the party candidates coming first have the lowest percentage of votes compared to other candidates – may not have any mandates allocated: the candidate receiving the most votes in the constituency (first votes) will only receive a constituency mandate if a seat is available according to the result of the second votes of the respective party (Section 6(1)). The absence of any representation of a constituency may appear as the grossest violation of the principle of equal voting power. However, this statement should be qualified: it is the absence of representation of this constituency’s *voters* which would go against international principles, as do inequalities of representation. Parliament represents voters and not territories, equality has to be ensured between the voters in the constituencies and not between constituencies as such.

35. While the present German electoral system before the amendments was already mainly a proportional system – as to its results at least -, with a plurality element, the system as revised has to be understood as analogous to a proportional system with preference vote. In a first stage, the second vote decides on the allocation of seats to parties, while, in a second stage, the seats of these parties are allocated as a priority to the candidates who obtained the best percentages in the constituencies - and then in the order of the lists. In other terms, the new system concentrates on the proportionality of the representation at national level as the distribution of seats among political parties derives first and only from national results (second votes). The voters of all constituencies take part in the proportional allocation of seats to the parties.

36. The principle of equal voting power does not mean that a mandate has to be allocated to each constituency. In the new system, the absence of mandates for some of the constituencies is just a side effect of the proportional distribution of mandates at federal level between the political parties (candidates’ lists) and the purpose to distribute the seats among candidates’ lists proportionally, hence decreasing the foreseeability. However, giving more importance to the

¹⁹ Venice Commission, [CDL-AD\(2004\)003](#), Report on Electoral Systems: Overview of Available Solutions and Selection Criteria, particularly Section 4.

²⁰ Venice Commission, [CDL-AD\(2002\)023rev2-cor](#), Code of Good Practice in Electoral Matters, I.2.1.

²¹ ECtHR, *Riza and Others v. Bulgaria*, Applications nos. 48555/10 and 48377/10, Judgment, 13 January 2016, para. 137; ECtHR, *Mathieu-Mohin and Clerfayt v. Belgium*, Application No. 9267/81, Judgment, 2 March 1987, para. 53.

²² Venice Commission, [CDL-AD\(2002\)023rev2-cor](#), Code of Good Practice in Electoral Matters, I.2.2. See also Report on Constituency Delineation and Seat Allocation, [CDL-AD\(2017\)034](#), in particular ch. IV.

second vote in elections is a political choice of the Parliament. The first vote in each constituency has the same degree of importance, as well, as it determines the ranking of candidates for the allocation of mandates within the party list.

37. The impact of the vote on the determination of who will be the MPs of each party may appear as rather limited. However, under the new system of personalised proportional representation, voters still have the decisive power to rank the candidates within the political party candidates' list – although the voters may not choose between the candidates in the party list –, as the candidates with the highest percentage of first votes get the mandates distributed to the party based on second votes. This gives more choice to the voter than closed list systems still in force in many democracies,²³ which are in conformity with international standards.

38. In conclusion, the amendment does not go against the principle of equal suffrage, even if it lowers the chance of some candidates to be successfully elected.

b. Allocation of seats to constituencies

39. The amendments modify Section 3 by decreasing the possible maximum deviation in the number of voters in the constituencies. Section 3(1) now reads that “a constituency should not deviate from the average population of the constituencies by more than 10 per cent in either direction; where the deviation is greater than 15 per cent, the boundaries shall be redrawn.” For legal clarity, Section 3(2) was amended to regulate that the number of constituencies in the individual *Land* shall correspond to the population portion.

40. The reduction of the maximum deviation is welcome as it is in line with international good practice, which provides that deviations in population numbers in constituencies, generally, should not exceed 10 per cent “and should certainly not exceed 15 per cent except in special circumstances.”²⁴ This is also in line with a previous ODIHR recommendation on variance in constituency size, which recommended “narrowing the deviation limits.”²⁵

41. Moreover, the Venice Commission and ODIHR would like to recall that the process of constituency delimitation should be undertaken by an inclusive political consensus.²⁶ In addition, although it is not possible at this stage to assess potential impact, the delimitation of single-mandate constituencies in areas with high concentrations of minority communities should ensure respect for the rights of national minorities. Furthermore, it is advisable that constituencies established in areas with concentrated minority population do not merge with other territorial units or parts of the country in order not to dilute the representation of minorities.

c. Abolition of the exception to the 5% threshold (*Grundmandatsklausel*)

42. Up to the latest amendments, the German Federal Election Act stipulated an exemption to the 5% threshold for parties having obtained (at least) 3 direct mandates in constituencies (*Grundmandatsklausel*) – as well as for parties representing national minorities (Danes, Frisians, Sorbs and Roma).

²³ Cf. Report on Proportional Electoral Systems: the Allocation of Seats inside the Lists (open/closed lists), [CDL-AD\(2015\)001](#), II.B.

²⁴ See [The Code of Good Practice in Electoral Matters](#), II.2.b. According to previous legislation, the constituency boundaries were drawn so that they did not diverge more than 15% and by no means more than 25% from the average population in the constituencies.

²⁵ See [ODIHR Final Report](#) on Elections to the Federal Parliament (Bundestag), 27 September 2009.

²⁶ [The Code of Good Practice in Electoral Matters](#) underlines that the “fundamental elements of electoral law, in particular 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,” II. 2. b. See also the [Interpretative Declaration on the Stability of the Electoral Law](#), adopted by the Council for Democratic Elections at its 15th meeting (Venice, 15 December 2005) and the Venice Commission at its 65th plenary session (Venice, 16-17 December 2005; CDL-AD(2005)043).

43. The present amendment has eliminated the former exemption (the *Grundmandatsklausel*) as it was considered constitutionally problematic in a system based on coverage by main votes. The explanatory report provides that *“the fact is that the primary purpose of the election in constituencies will be to enable parties to obtain the seats they merit on the basis of their performance in the second vote and not, as hitherto, to elect individuals. Making an exception for parties which obtain fewer than 5 % of the second votes cast but capture the largest number of first votes in three constituencies, with the result that the party in question enters Parliament on the strength of its second votes, is difficult to justify constitutionally in a system based on coverage by second votes.”*

44. As already said, the Venice Commission and ODIHR do not express preference for any electoral system as long as they do not go against international standards. There is no international standard on electoral thresholds. However, the assessment of the electoral threshold is subject to a proportionality test and this test needs to take into account other features of the electoral system. In general, lowering the electoral threshold offers the potential benefit of increasing political pluralism and aligning the mandates closer to the voters' will by minimising “wasted” votes.²⁷ It is worth noting that in 2011, the Second Senate of the Federal Constitutional Court ruled that the five per cent barrier clause in force for the 2009 elections to the European Parliament (7th electoral term) violated the principles of equal suffrage and of equal opportunities of the political parties. The same was ruled for local elections.²⁸ The change under consideration appears in the field of discretion of the national authorities especially given the decisions of the Constitutional Court on the matter. The Venice Commission and ODIHR acknowledge that keeping the *Grundmandatsklausel* would go against the main idea of the primary role of the “second vote”, so its abolition appears as consistent with the priority given to votes cast for the proportional part of the election.

45. Abolishing the basic mandate favours larger and well-established political parties, and makes it more difficult for smaller, regional or newer parties to achieve parliamentary representation proportional to their level of support. For example, the new electoral system does clearly have a negative impact on some regional parties not having an organisation in many Länder but still being widely popular in some of them, as they may not gain the required percentage of votes nationwide. For example, some parties may be well established in certain constituencies but not have the outreach to the entire country, subsequently impacting their overall nationwide performance. Moreover, according to Section 18(2), only parties for which a *Land* list has been approved in the relevant federal state may nominate constituency candidates. While such a change gives priority to the principle of the coverage/distribution of votes (based on proportional votes), this limits a party's internal decisions and prevents it from nominating candidates in the constituencies only.

46. The question to be addressed here is whether the suppression of the possibility for parties with strong, but only local support to benefit from the exemption contravenes international electoral standards. The *Bundestag* is designed as a Chamber representing the German nation as a whole. In other words, European election standards do not demand any specific election rules for locally strong political parties (the only analogous requirement involves national minorities that are still favoured in the German electoral legislation). Thus, the German legislator enjoys a wide margin of appreciation in this field, too, and it cannot be concluded that their discretion has been exercised in a disproportionate manner.

²⁷ In its Resolution 1705 (2010), the Parliamentary Assembly of the Council of Europe called upon member states to “consider decreasing legal thresholds that are higher than 3 per cent”. This is however not a universally recognised standard.

²⁸ [See Press Release No. 70/2011 of 09 November 2011](#). See also [ruling](#) for local elections.

47. It should however be noted that the possible influence of the change on the results is not merely theoretical. If we look at the results of the last parliamentary elections, *die Linke*, with 4,9% of the vote, could take part in the proportional distribution of seats only thanks to its 3 direct mandates, and thus obtained a total of 39 seats. The CSU, with 5,2%, would take the risk to be eliminated if direct mandates did not allow entering Parliament. The revision of the legislation well in advance of the next parliamentary elections, however, reduces the risk of political manipulation.

48. The question can however be raised whether the 5% threshold as such, without any exception save for national minorities, goes against international standards. There exist various forms of electoral thresholds which aim to avoid excessive fragmentation of the political landscape. There may, on the contrary, be measures giving preference to a more varied composition of legislative bodies or granting a certain protection to smaller political formations. The ECtHR has recognised that these measures differ from country to country and has refused to assess any particular threshold without taking into account the electoral system of which it forms a part (*Yumak and Sadak v. Turkey*).²⁹ In principle, it affords the State Parties a broad margin of appreciation on how to regulate such threshold requirements.³⁰ However, a threshold of 10% is considered to be excessive by the ECtHR, at least in the absence of correctives (*Yumak and Sadak v. Turkey*).³¹ The election threshold of the Turkish electoral system has appeared repeatedly before the Venice Commission. Although Türkiye consequently decreased the threshold to 7%, it was still deemed high by the Venice Commission.³²

49. While election thresholds of 10% and 7% are or may be deemed excessively high, a threshold of 5% is nothing unusual in the European context where a number of States which are using the proportional system in elections set this cut-off clause (e.g. the Czech Republic, Estonia, Germany, Poland or Romania).³³ Although the combination maintaining the 5% threshold and elimination of the *Grundmandatsklausel* could hinder the election chances of smaller and/or local parties in Germany, it cannot be said, that in itself it violates the principle of equal suffrage. It pursues the legitimate aim to prevent the fragmentation of the electorate and to set up a functional legislative body and an effective government with a sufficient parliamentary majority.

50. In a federal state, regional interests may be protected by a bicameral parliament. The German *Bundesrat* is the main institution to protect some regional interests. The *Länder* participate in the administration of the Federation through the *Bundesrat*³⁴ - but it is necessary to stress out that the *Bundesrat* is not elected directly, its members are delegated by *Länder*. A general 5% threshold without exceptions for smaller parties having a high level of support just in some constituencies does not lead to non-representation of such local and regional interests. These interests may be represented and protected also by procedural means in the legislative procedure like the inclusion and hearing of regional institutions or civil society organisations.

²⁹ ECtHR, *Yumak and Sadak v. Turkey*, Application No. 10226/03, Judgment (Grand Chamber), 8 July 2008, paras 131-2.

³⁰ ECtHR, Guido Strack against Germany and Peter Richter against Germany, Applications nos. 28811/12 and 50303/12, Decision, 1 September 2016, para. 33.

³¹ ECtHR, *Yumak and Sadak v. Turkey*, Application No. 10226/03, Judgment (Grand Chamber), 8 July 2008, para. 147.

³² Venice Commission, [CDL-AD\(2022\)016](#), Turkey – Joint Opinion on the Amendments to the Electoral Legislation by Law No. 7393 of 31 March 2022, paras 27ff..

³³ Venice Commission, [CDL-AD\(2022\)016](#), Turkey – Joint Opinion on the Amendments to the Electoral Legislation by Law No. 7393 of 31 March (20 June 2022), para. 33. See already Venice Commission, [CDL-AD\(2008\)037](#), Comparative Report on Thresholds and Other Features of Electoral Systems Which Bar Parties From Access to Parliament; [CDL-AD\(2010\)007](#) Report on Thresholds And Other Features of Electoral Systems Which Bar Parties From Access to Parliament (II).

³⁴ *Grundgesetz*, Art. 50.

51. Nevertheless, while there is no international standard for electoral thresholds, lowering the threshold offers the potential benefit of increasing political pluralism and aligning the mandates close to the voters' will. This is particularly relevant due to the suppression of the *Grundmandatsklausel*.³⁵ Lowering the threshold may also eliminate the negative consequences of the amendment for regionally strong political parties and thus contribute to achieving a broader political consensus that was lacking when the amendment was adopted.

d. Independent candidates

52. There are no restrictions for independent candidates to run for elections, in line with paragraph 7.5 of the Copenhagen Document.³⁶ Section 6(2) does not require coverage by second votes for independent candidates to win a seat, whereas Section 6(1) requires such coverage for constituency candidates who have been nominated by a party and who obtain the largest number of second votes in their constituency. Section 27(4) was amended to provide that "[o]nly persons who have not been nominated as candidates under Section 20(3) may be nominated as candidates on a Land list." This means that independent candidates are prohibited from simultaneously standing for election on a party's *Land* list, limiting their right to stand for election. The Explanatory Note justifies this restriction by noting that "the advantages resulting from independent candidature cannot be combined with the benefits of party nomination, and this ensures that no one will secure an over privileged position." While this provision prevents potential abuse of this option, it does not increase the possibility for an independent candidate to be elected. Specifically, by abolishing the "weight" of the constituency (first) vote and shifting to strict proportional representation, the chances of independent candidate to be elected would be lowered. Positively, amended Section 48(2) stipulates that, if an independent candidate withdraws from parliament, his or her seat remains vacant. However, it is not entirely clear if this seat is reserved for independent candidates, or any other party can compete in a by-election. Further measures to ensure equal and more effective participation of independent candidates could be envisaged.

53. An interesting and problematic aspect is the standing of individual candidates. The absence of requirement to be covered by second votes may, at least in theory, place independent constituency candidates at an advantage over constituency candidates who are nominated by a party, because the former automatically obtain a seat if they receive the largest number of first votes in their constituency. This unequal treatment is a justifiable corollary of the system, because an independent candidate cannot be covered by the second votes cast for a party list.

e. Gender Considerations

54. The legislation does not provide for gender quotas for candidate nominations or party lists and the proposed amendments do not include measures aimed at enhancing the representation of women. Both ODIHR and the Council of Europe recognise that legislative measures are

³⁵ International good practice, as a principle, advises the states to keep the threshold levels low. See paragraph 22.3 of the CoE Parliamentary Assembly Resolution 1705 (2010), which calls on CoE member States "consider decreasing legal thresholds that are higher than 3 per cent". See also in recent opinions, Venice Commission and ODIHR Joint Urgent Opinion on Amendments to the Electoral Code and Related Legislation in Armenia, CDL-AD(2021)025, para 45-48; Venice Commission and ODIHR Joint Opinion on Amendments to the Electoral Legislation and Related "Harmonisation Laws" in Turkey, CDL-AD(2018)031, paras 30-36; Venice Commission and ODIHR Joint Opinion on the Draft Electoral Code of Moldova, CDL-AD(2022)025, para 123.

³⁶ Paragraph 7.5 of the [1990 OSCE Copenhagen Document](#) calls the participating States to "respect the right of citizens to seek political or public office, individually or as representatives of political parties or organizations, without discrimination." In addition, in accordance with the rulings of the Federal Constitutional Court (BVerfGE 41, 399, 416 et seq. [1976]), independent candidates should stand for election in constituencies.

effective mechanisms for promoting women's participation in political and public life.³⁷ Further, Article 4 of the Convention on the Elimination of all Forms of Discrimination Against Women emphasizes that "adoption by States Parties of temporary special measures aimed at accelerating *de facto* equality between men and women shall not be considered discrimination".³⁸

55. Although shifting to more proportional representation may impact the election of women, this can only be made effective where women are ranked high on party lists. The Venice Commission and ODIHR noted that the issue of representation of women in candidatures has been debated in the Electoral Rights Commission and recognise that the amendment is not a comprehensive reform of the electoral system. They recommend that further discussion be devoted to this issue.

56. The other amendments are largely technical, aligning the terminology affected by the main changes.

IV. Conclusion

57. On 3 March 2023, Mr Tiny Kox, President of the Parliamentary Assembly of the Council of Europe, requested an Opinion regarding the draft law on the amendment of the German Federal Election Act and its compliance with Council of Europe standards. The Venice Commission and ODIHR assessed the Law as adopted by the Bundestag on 17 March 2023.

58. The Venice Commission and ODIHR are grateful to the German authorities for their co-operation in the preparation of this Opinion.

59. The amendments of the German Federal Election Act include two main changes to the electoral system: the first implies the primacy of the vote for proportional lists, involving the suppression of the overhang mandates as well as the possibility for some constituencies not to be represented; the second one abolishes the exception to the 5% threshold for parties having obtained three direct mandates.

60. The Venice Commission and ODIHR reiterate that any electoral system may be chosen as long as it does not go against electoral international standards. They consider that the amendments under consideration are largely in conformity with these standards, both in substance and regarding the way and timing of their adoption procedure. However, the Venice Commission and ODIHR take note of the lack of cross-party support. Building broad consensus on the choice and fundamental aspects of an electoral system contributes to the acceptance, legitimacy and the stability of the governing system. Consideration could be given to improving the representation of women in candidatures.

61. The Venice Commission and ODIHR remain at the disposal of the German authorities and the Parliamentary Assembly for further assistance in this matter.

³⁷ See [OSCE Ministerial Council, Decision No. 7/09 in Women's Participation in Political and Public Life](#), para. 2; Council of Europe, [Parliamentary Report on Increasing women's representation in politics through the electoral system](#).

³⁸ Additionally, the Venice Commission has stated that parity must be an objective, rather than a strict obligation, in which the aim is to guarantee a minimum level of 40% of elected representatives of each gender, additionally, the Commission has considered that "once women constitute a particular proportion of a parliament, politics and policies will be transformed. Accordingly, the number of women in parliament really does matter". See Venice Commission, [CDL-AD\(2005\)002](#), Report on Parliamentary Assembly Recommendation 1676 (2004) on Women's Participation in Elections. para. 15; [CDL-AD\(2009\)029](#). Report on the Impact of Electoral Systems on Women's Representation in Politics, para. 12.