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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

AND

JAJ

(OSCE/ODIHR)

JOINT OPINION

**ON THE DRAFT LAW
AMENDING THE ELECTORAL LEGISLATION**

OF THE REPUBLIC OF MOLDOVA

**Adopted by the Council for Democratic Elections
at its 47th meeting
(Venice, 20 March 2014)
and by the Venice Commission
at its 98th Plenary Session
(Venice, 21-22 March 2014)**

on the basis of comments by

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I. Introduction

1. In November 2013, the Speaker of the Parliament of Moldova, Mr Igor Corman, requested the Venice Commission to comment on a text sent to him by a faction from the Democratic Party of Moldova (DPM), concerning a draft proposal to reform the electoral legislation of Moldova (CDL-REF(2014)001). In line with standard practice, the Venice Commission and the OSCE/ODIHR have undertaken a joint opinion of the draft legislation.

2. In the request submitted to the Venice Commission, it was stated that the draft intended to replace the existing proportional electoral system with a mixed parallel electoral system, under which members of parliament would be elected through single-mandate constituencies and party lists in a nationwide proportional constituency. The draft has yet to be registered in the parliament. Parliamentary elections are scheduled to take place in Moldova by the end of 2014, or, at the latest, in February 2015.

3. This joint opinion should be read in conjunction with prior joint opinions of the Venice Commission and the OSCE/ODIHR on the Election Code of Moldova, as well as numerous election observation reports from previous OSCE/ODIHR and Parliamentary Assembly of the Council of Europe (PACE) election observation missions (EOMs) to Moldova, which provide good background for understanding the development of the electoral legislation in Moldova.¹ It should also be read in conjunction with the Joint Opinion on Draft Legislation pertaining to political parties and election campaigns, adopted in March 2013 (CDL-AD(2013)002).

4. This opinion should also be read in conjunction with the following documents:

- European Convention on Human Rights, Article 3 of the First Protocol;²
- Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE (29 June 1990);³
- International and regional documents, which are binding on Moldova;
- Venice Commission and OSCE/ODIHR, Joint Opinion on the *draft working text amending the Election Code of Moldova*, CDL-AD(2010)022;
- Venice Commission and OSCE/ODIHR, Joint Opinion on the *election code of Moldova as of 10 April 2008*, CDL-AD(2008)040;
- Venice Commission and OSCE/ODIHR, Joint Opinion on the *election code of Moldova*, CDL-AD(2007)040;
- Venice Commission documents:
 - i. Code of Good Practice in Electoral Matters;⁴
 - ii. Code of Good Practice in the field of Political Parties;⁵
 - iii. Guidelines on an internationally recognised status of election observers;⁶
- The Constitution of Moldova;

¹ All OSCE/ODIHR and Venice Commission joint opinions on the Moldovan legal framework can be found at: <http://www.osce.org/odihr/elections/moldova> and <http://www.venice.coe.int/webforms/documents/?country=48&year=all>. All OSCE/ODIHR election observation mission reports can be found at: <http://www.osce.org/odihr/elections/moldova>. All PACE reports can be found at: <http://assembly.coe.int/defaultE.asp>.

² Convention for the Protection of Human Rights and Fundamental Freedoms (CETS No.: 005), available at: www.conventions.coe.int/Treaty/en/Treaties/Html/005.htm.

³ Available at: www.osce.org/odihr/elections/14304.

⁴ Venice Commission of the Council of Europe, Code of Good Practice in Electoral Matters, adopted by the Venice Commission at its 52nd session (Venice, 18-19 October 2002, CDL-AD(2002)023rev), available at: [www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2002\)023rev-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2002)023rev-e).

⁵ Venice Commission of the Council of Europe, Code of Good Practice in the field of Political Parties, adopted by the Venice Commission at its 78th session (Venice, 13-14 March 2009, CDL-AD(2009)021), available at: [www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2009\)021-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2009)021-e).

⁶ Venice Commission of the Council of Europe, Guidelines on an internationally recognised status of election observers, adopted by the Venice Commission at its 81st plenary session (Venice, 11-12 December 2009, CDL-AD(2009)059), available at: [www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2009\)059-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2009)059-e).

- The Electoral Code as of 17 January 2012 (CDL-REF(2012)039).

5. On 20-22 January 2014, a delegation made up of Venice Commission and OSCE/ODIHR experts participated in a working visit to Chisinau. This opinion is prepared on the basis of the comments by Ms Paloma Biglino, Mr Srdjan Darmanović, Mr Manuel Gonzalez Oropeza and Ms Gaëlle Deriaz, as well as Mr Alberto Guevara Castro (expert, Mexico). The delegation met with civil society, the Speaker of the Parliament, the parliamentary caucuses of political parties in the ruling coalition as well as the Communist Party in the opposition, the Ministry of Justice, the Central Electoral Commission, the Constitutional Court and the international organisations working in the electoral field in Moldova.

6. This opinion is provided in response to the above-mentioned request for review and with the goal of assisting the authorities in Moldova, political parties, and civil society in their efforts to develop a sound legal framework for the conduct of democratic elections.

7. *This opinion was adopted by the Council for Democratic Elections at its 48th meeting (Venice, 20 March 2014) and by the Venice Commission at its 98th Plenary Session (Venice, 21-22 March 2014).*

II. Scope of the review

8. The scope of the Opinion covers only the draft proposal submitted by the Speaker of the Parliament of Moldova. Thus limited, the Opinion does not constitute a full and comprehensive review of all available legislation on elections in the Republic of Moldova.

9. The Opinion raises key issues and indicates areas of concern. The ensuing recommendations are based on the relevant international standards, including Council of Europe and OSCE commitments, as well as on the Venice Commission Code of Good Practice in Electoral Matters (2002) (hereinafter “the Code of Good Practice”).

10. This Opinion is based on the English translation of the draft proposal. This Opinion cannot guarantee the accuracy of the translation reviewed, including the numbering of articles, clauses, and sub-clauses. Any legal review based on translated laws may be affected by issues of interpretation resulting from translation.

III. Executive summary

11. The Venice Commission and the OSCE/ODIHR have issued many opinions on the various changes to the Election Code of Moldova. The Election Code currently in force provides a good basis for the conduct of democratic elections in the country, although it could be improved, in particular concerning the seat allocation methodology and the thresholds established in the last reform.⁷ Nevertheless, the key challenge for the conduct of genuinely democratic elections remains the exercise of political will by all stakeholders, to uphold the letter and the spirit of the law, and to implement it fully and effectively.

12. While the choice of an electoral system is a sovereign decision of a State, the proposed amendments in the draft submitted for consideration, which specify changing from a proportional to a mixed system within a year of parliamentary elections, raise serious concerns:

⁷ See, among others, Joint Opinions on the electoral legislation of Moldova CDL-AD(2007)040 and CDL-AD(2008)022. See also OSCE/ODIHR *Election Observation Mission Final Report*, early parliamentary elections, 28 November 2010, Moldova.

- The Code of Good Practice stipulates that basic elements of the electoral system should not be changed within a year of an election, and that when changing fundamental aspects of an election law, “care must be taken to avoid not only manipulation [of the election system] to the advantage of the party in power, but even the mere semblance of manipulation.”⁸ Enough time for discussion and the construction of consensus around this major change in the electoral system should be allocated, and the main rules for an election should not be changed in an election year. A reform such as the one proposed by the draft should be introduced at an earlier stage, not only a few months before the next general elections.
- Public discussion will enrich the comparative perspective and the analysis of other experiences on mixed electoral systems, as well as the understanding of the various factors that may explain advantages and shortcomings of such an electoral option. The draft reform has not yet been discussed with all electoral stakeholders in Moldova. It is strongly recommended that the choice of the electoral system of Moldova is the result of an open and inclusive debate. This will also enhance the transparency of the process of developing electoral legislation as well as ensure public participation and confidence in the adopted electoral legislation.
- The proposed mixed electoral system, in which 51 Members of Parliament (MPs) out of the 101 shall be elected by a proportional closed-list system in one single nationwide constituency and 50 MPs shall be elected in as many single-member constituencies is a fundamental reform. In the present Moldovan context, the proposed reform could potentially have a negative effect at the local level, where independent majoritarian candidates may develop links with or be influenced by local businesspeople or other actors who follow their own separate interests.
- Achieving better accountability of the political institutions towards the citizens is a key goal in Moldova, which requires adopting pending legislation, rather than launching a new comprehensive electoral reform. To that end, it is strongly recommended to approve pending legislation regarding political parties and electoral campaign finance, as advised in the Joint Opinion of the Venice Commission and OSCE/ODIHR on Draft legislation of the Republic of Moldova pertaining to financing political and election campaign (CDL-AD(2013)002).
- Although the creation of electoral districts could improve representation of minorities, it presents important challenges. A clearer methodology for the delimitation of constituencies, further assessment and provision for periodical review are highly recommended.
- The problem of the representation of Transnistria and of Moldovan citizens living abroad has not been addressed in a convincing and implementable solution in the present draft.

13. The proposed reform is not yet presented in an official draft, as it has not been registered with the parliament. Recent Moldovan history has shown that changes have been carried out in the Election Code within a very short period of time. The Venice Commission and the OSCE/ODIHR therefore welcome the effort of the Moldovan authorities to seek their opinion before launching any reform, but public discussion and consensus with all electoral stakeholders remain essential.

14. The proposed reform lowers minimum representation thresholds, reverting back to the provisions prior to the amendments to the Election Code in May 2013. This is a welcome

⁸ Para. 2, 63-65 of the Code of Good Practice.

provision, which could be implemented if there is the necessary consensus and time to carry out such a reform.

15. Should this proposal be registered with the parliament and become an official draft, the Venice Commission and the OSCE/ODIHR remain ready to assist authorities of Moldova in support of their efforts to improve election-related legislation and bring it more closely in line with OSCE and Council of Europe commitments and international standards.

IV. Analysis and recommendations

A. Preliminary comments and background of the reform

16. Amending the electoral system is not a novelty in Moldova. The country has previously used both majoritarian and proportional electoral systems. In the first parliamentary elections of 1990, deputies of the National Assembly were elected by a purely majoritarian system through single-member constituencies. This system became fully proportional in the parliamentary elections of 1994, with the entire country being considered one nationwide constituency. The proportional system has remained in place since 1994, but specific provisions have been adjusted through the introduction of different thresholds for parties, independent candidates and electoral coalitions, as well as with a change in the seat allocation method. In this respect, an amendment to the Election Code was made in June 2010, which changed the method for allocating seats in party-list proportional representation from the D'Hondt formula to a new method (see more details below, on the description of the electoral system). The introduction of this new mandate allocation formula occurred some four months before the early parliamentary elections, which took place on 28 November 2010. These amendments raised concerns as they seemed to work to the advantage of the incumbent parties. While the Venice Commission and the OSCE/ODIHR issued an opinion on draft amendments in June 2010,⁹ the changes to the seat allocation formula took place after the opinion was adopted.

17. In 2013, a further reform of the electoral legislation was hastily added to the agenda of the parliament in the midst of a political crisis, which resulted in the collapse of the government. The purpose of the draft amendments introduced in April 2013 was to alter the electoral system from a single nationwide constituency through proportional representation from party lists to a mixed member proportional system. Of the Moldovan Parliament's 101 MPs, 51 MPs were to be elected through a proportional system from party lists and 50 MPs through single-mandate constituencies. No discussions or consultations with the opposition party, the parties within the coalition and the rest of the electoral stakeholders, including any specialised body or institution from civil society, took place at that stage. The bill was adopted on 19 April 2013, in its second reading with 63 votes. Different stakeholders as well as the international community voiced their concerns about these changes. Subsequently, an *ad hoc* parliamentary committee determined that the law would violate constitutional provisions guaranteeing voting rights and that its adoption did not comply with parliamentary rules of procedure. These amendments to the electoral system were repealed shortly thereafter on 3 May 2013 and the Election Code reverted back to the proportional electoral system. However, in addition to repealing the amendments, the parliament raised the thresholds for representation (see below).

18. Electoral reform, which may include amending the electoral system, could contribute to the democratic process. As stated in Venice Commission and OSCE/ODIHR joint opinions, "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

⁹ Joint Opinion on the Draft Working Text Amending the Election Code of Moldova, Opinion No. 576/2010, CDL-AD (2010) 014.

all political forces".¹⁰ When the draft proposal was submitted for analysis, there had been no open debate with other political parties in the ruling coalition or in the opposition, and the document had not been shared with civil society.

19. Taking into account the recent history of the electoral reform in Moldova, the submission of a request for an opinion at such an early stage of a potential reform process is to be welcomed. However, any electoral reform process should be subject to open debate and to expert opinions. Broad consensus is only possible when the public is well informed and all electoral stakeholders can express their opinion on the electoral changes under consideration. There has not yet been any consultation with political parties and civil society concerning this reform, and, if it were to move forward, public debate should be guaranteed. Inclusiveness and transparency are key aspects related to electoral reform and should be specifically ensured when modifying the electoral system.

B. On the timeframe of the reform

20. As noted, the draft proposal has not been yet officially registered in parliament. Beyond the short time frame of adopting the legislation, the new provisions would need to be implemented by the electoral administration. The Central Election Commission would require sufficient time and resources to conduct a range of activities both at the central and lower levels, including staff training, voter education, expanded oversight of campaign finance, and boundary delimitation (see below). Citizen observer groups and other civil society organizations engaged in the electoral process would also require time to review and understand the changes and adjust their programs accordingly. Furthermore, political parties will need enough time to adjust their internal candidate selection process to the new system. The mandate of the current Moldovan parliament expires on 28 November 2014. Elections should be held within three months from this date, therefore, by the end of February 2015, at the latest.

21. According to the Code of Good Practice and its explanatory report, the stability of the law is crucial to credibility of the electoral process, which is itself vital to consolidating democracy. This also applies to the electoral system, due to its decisive role in the election results. Thus care must be taken to avoid not only manipulation to the advantage of the party in power but to avoid even the mere semblance of manipulation. Even when no manipulation is intended, changes will appear to be dictated by immediate party political interests. Additionally, rules that change frequently and that are complicated may confuse voters. The Code of Good Practice notes that the fundamental elements of electoral law, including the electoral system should not be open to amendment *less than one year before an election*.¹¹

22. The proposed reform that focuses on changing the electoral system, if adopted, will have to be implemented and put into force in less than one year before the next parliamentary elections. This not only raises serious concerns in terms of feasibility, but also in terms of building confidence of voters and other stakeholders, including political parties (in particular from the opposition) and civil society. Such a fundamental reform should not be perceived as manipulation of the electoral legislation in an electoral year. Thus, a sufficient and clear timeframe for implementation of such a significant change is essential.

C. On the proposed mixed electoral system

23. According to the Election Code currently in force in Moldova, the 101 seats of the unicameral assembly are elected in one nationwide constituency through a proportional

¹⁰ See, among many others: Joint Opinion on the Draft Amendments to the Laws on Election of People's Deputies and on the Central Election Commission and on the Draft Law on Repeat Elections of Ukraine, CDL-AD(2013)016, para 16, and Joint Opinion on the Draft Law on Election of the People's Deputies of Ukraine, CDL-AD(2011)037, para 22.

¹¹ CDL-AD(2002)023rev, explanatory report, paras. 2.b, 64, 65.

representation system from closed party-lists. MPs serve four-year terms. The minimum representation thresholds for parties to enter parliament are as follows: 6% for a political party; 9% for an electoral block of two political parties and/or socio-political organizations; 11% for an electoral block of 3 or more political parties and/or socio-political organizations; 2% for an independent candidate. Concerning the formula for mandate allocation, a reform in the Election Code of 2010 replaced the D'Hondt formula with a new method which allocates "remainder seats" on an equal basis to all parties that pass the threshold to enter parliament rather than on a proportional basis, resulting in a possible distribution of a greater number of seats to small parties.¹²

24. The draft proposes a mixed parallel electoral system, in which 51 MPs shall be elected by a proportional closed-list system in one single nationwide constituency; and 50 MPs shall be elected in as many single-member constituencies, under a plurality system requiring the winning candidate to receive more than half of the valid votes or a second round of voting is required. The thresholds for mandate distribution under the proportional component for political parties also change: 4% for a party; 7% for blocks of 2 parties; and 9% for blocks of 3 or more. A 2% threshold is also required for independent candidates. The proposed thresholds are the same as those in place prior to the amendments to the Election Code in May 2013.

25. The decision on an electoral system is a political one that must be undertaken by political forces on a political basis, although broad consensus achieved through a process of public consultation is highly recommendable. Each electoral system has both advantages and disadvantages. These depend on various factors, such as party system, tradition, and territorial structure. According to the explanatory statement of the draft proposal, the aim of the electoral change would be to combine the advantages of both the majority and the proportional systems. According to the stated rationale of this reform, the amendments are intended to bring:

- A remedy to the concerns on the perceived distance between elected representatives and their constituents;
- More direct representation for Moldovan citizens residing abroad;
- Direct representation of the population residing in the Transnistrian region;
- A shared experience with other countries in the region; Romania and Ukraine have recently introduced a change towards a similar mixed electoral system.

26. There are several aspects of the proposal that require a more detailed analysis.

1. On the risks of moving to a mixed electoral system in Moldova

27. The explanatory statement of the submitted draft proposal refers to the fact that mixed electoral systems exist in different countries, such as Ukraine, Romania or Germany. However, the practical consequences of similar electoral systems can vary, since party systems, institutional structures or social environment are always different. In other countries, the choice of a mixed system may be the result of a consensual sovereign decision, and the way in which it is implemented in other cases is key to building trust in the democratic process and to adjust and solve possible concerns accordingly. Germany is a recurrent example in comparative law of a mixed system, which has been able to build trust, but it is unlikely to be comparable with

¹² According to Article 87 of the Election Code, mandates are first allocated to successful independent candidates. The votes cast in favour of these candidates are subtracted from the total number of valid votes. The remaining number of valid votes is then divided by the number of mandates remaining to obtain the electoral quotient. The number of votes cast for each party passing the threshold is then divided by the electoral quotient to obtain the number of mandates allocated to that party. If the resulting fraction is greater than 0.5, the party receives an additional mandate. Any remaining mandates are then allocated to the parties that crossed the threshold, starting with the party that received the largest number of mandates after the first distribution. One additional seat is given to each party until all mandates have been allocated. The timing and lack of public consultation on the amendment were criticised in the OSCE/ODIHR *Election Observation Mission Final Report*, early parliamentary elections, 28 November 2010, Moldova, pp. 5 and 6. It was also criticised in the PACE Election observation report, early parliamentary elections, 28 November 2010, Moldova, paras. 17-19.

the Republic of Moldova. This is the case not only because of the specifics of the Federal State, the size or the different institutional structure, but also because it is a system of proportional representation, which also includes provisions for compensation through additional seat distribution to maintain the overall proportionality of the parliament with that of votes received by the political parties.

28. Majority or plurality systems in single-member constituencies can improve and further strengthen the link between citizens and their representatives; however, this is not always the case. If there is an influence of local businesspeople or other non-electoral stakeholders on their communities, this could potentially serve to negatively develop the links with or have an influence on independent majoritarian candidates more than between the local MPs and the citizens. This was, for example, the case of Ukraine. According to the first Interim Report No. 1 of the OSCE/ODIHR EOM on the 2012 parliamentary elections in Ukraine,¹³ “the new mixed electoral system has changed the dynamic of these elections in comparison with the 2007 parliamentary elections, as party-nominated and independent candidates are competing strongly at the local level. A number of independent candidates are linked to wealthy businesspeople, some of whom are also supporting political parties financially.”

29. Some of the political parties, NGOs and experts consulted during the working visit expressed their concern about similar consequences occurring in Moldova if the proposal for electoral system reform were to be approved. In this context, alternative solutions could be considered to enhance the fairness and transparency of elections and increase accountability. These include the supervision of the voter registry, auditing electoral and campaign financing, and the adoption of measures to further improve internal accountability and democracy within political parties. These types of measures could work within a proportional or a mixed electoral system, and specific recommendations have already been presented in the Venice Commission and OSCE/ODIHR Joint Opinion adopted in March 2013 (CDL-AD(2013)002). Therefore, any electoral system chosen, in particular one that contains single-member constituencies implies the need for clear campaign finance regulation and oversight that guarantee a level playing field for all electoral contestants. Moldova already uses both proportional and majoritarian components to elect representatives in local elections. However, as the last OSCE/ODIHR EOM report to the 2011 local elections in Moldova stated, “Campaign finance oversight mechanisms are insufficiently developed, lacking precision and enforcement. None of the relevant bodies actively undertook measures to address breaches of campaign financing regulations.”¹⁴

2. On the delimitation of constituencies

30. The current Election Code stipulates one nationwide constituency, with a proportional distribution of seats. As stated in a previous joint opinion:

“Very few countries are electing the Parliament in one constituency only. In Europe the Netherlands represent a prominent exception. In most other countries there is a degree of geographical representation secured by elections held in a number of constituencies. If a country is rather uniform in terms of population or other relevant criteria, elections in one constituency may work well. It will then be up to the parties to secure the geographical representation when compiling their lists of candidates. However, when minorities are concentrated in certain areas, constituencies can be the most effective instruments for securing reasonable minority representation in the Parliament.”¹⁵

¹⁴ OSCE/ODIHR Limited Election Observation Mission, Republic of Moldova, Local Elections, 5 and 19 June 2011 Final Report, p. 12.

¹⁵ CDL-AD(2003)001, para. 17.

31. The draft submitted also establishes single-member constituencies. However, the proposal raises concerns on two different sets of questions: the *size* of the constituencies and the *manner* in which they are determined.

32. Concerning the *size* of the constituencies, the draft foresees the allocation of constituencies without including or explaining the criteria applied. According to the Code of Good Practice, "Equal voting power [...] entails a clear and balanced distribution of seats among constituencies on the basis of one of the following allocation criteria: population, number of resident nationals (including minors), number of registered voters, and possibly the number of people actually voting. An appropriate combination of these criteria may be envisaged. [...] The geographical criterion and administrative, or possibly even historical, boundaries may be taken into consideration."¹⁶

33. The draft does not provide clear criteria for *constituency delimitation nor for periodicity of review*. Article 74 provides that the delimitation of boundaries is the responsibility of the Central Electoral Commission. This creates a double risk: a risk of politicisation for the Central Electoral Commission, as well as the risk of overloading it. Indeed, in order to ensure the fairness of the electoral process, decisions of the Central Election Commission may be challenged by any of the electoral stakeholders. This would include any single decision concerned with the delimitation of constituencies and could lead to an exponential increase in the number of complaints, as well as requiring more resources for the Central Electoral Commission. With regard to the periodicity of review, the OSCE/ODIHR states that "Redistricting should be conducted periodically to ensure that equality among voters is not diminished due to population movement."¹⁷ "When necessary, redrawing of election districts shall occur according to a predictable timetable and through a method prescribed by law and should reflect reliable census or voter registration figures. Redistricting should also be performed well in advance of elections, be based on transparent proposals, and allow public information and participation."¹⁸ According to the Code of Good Practice, "in order to avoid passive electoral geometry, seats should be redistributed at least every ten years, preferably outside election periods, as this will limit the risks of political manipulation."¹⁹ Population variance among constituencies should also be taken into consideration.

34. To avoid criticism on gerrymandering and to guarantee the necessary confidence in the Central Electoral Commission, the draft should provide for a transparent districting process, performed well in advance of the next parliamentary elections and be based on clear, publicly announced rules, taking into account the existing administrative divisions, and historical, geographical and demographic factors. In particular, the delimitation of single-mandate district boundaries in areas with high levels of minority settlements needs to ensure respect for the rights of national minorities, and electoral boundaries should not be altered for the purpose of diluting or excluding minority representation. Moreover, as established in the Code of Good Practice, "the maximum admissible departure from the distribution criterion adopted depends on the individual situation, although it should seldom exceed 10% and never 15%, except in really exceptional circumstances"²⁰ (see below the comments on the constituencies of Transnistria and Gagauzia).

¹⁶ CDL-AD(2002)23rev, section 2.2(ii) and (iii). See also paragraph 7.3 of the 1990 OSCE Copenhagen Document, which requires the equality of the vote, and point 3.2 of the Existing Commitments for Democratic Elections in OSCE Participating States, ODIHR, Warsaw, October 2003.: "The delineation of constituencies in which elections are conducted must preserve the equality of voting rights by providing approximately the same ratio of voters to elected representatives for each district. Existing administrative divisions or other relevant factors (including of a historical, demographic, or geographical nature) may be reflected in election districts, provided the design of the districts is consistent with the equality of voting and fair representation for different groups in society."

¹⁷ *Existing Commitments for Democratic Elections in OSCE Participating States.*, p. 55.

¹⁸ *Ibidem*, point 3.3, p. 14.

¹⁹ VC code p. 17, section 2.2 para 16:

²⁰ Point 2.2. para. 15.

3. The constituency of Gagauzia

35. Already in the 2007 and 2010 joint opinions, the Venice Commission and the OSCE/ODIHR stressed the importance of taking into account sizable national minorities living on the territory of the Republic of Moldova when deciding on an electoral system. It was then recommended that “the electoral system for the Parliament should create possibilities for adequate participation in public life of national minorities and mainstream interests at regional level.”²¹

36. The choice of the electoral system – proportional representation, majoritarian or a mixed system – is not what dictates or determines minority inclusion or exclusion. However, the choice of system is not irrelevant to the participation of members of minorities in the electoral process. It is often considered that “the more an electoral system is proportional, the greater the chances minorities have to be represented in the elected bodies and majoritarian systems are often seen as not appropriate.”²² This is, however, only relative. Much depends on both the legal and the practical situation in a given state, nevertheless, the delimitation of electoral constituencies should facilitate equitable representation of the entire population and can be a tool to ensure the representation of national minorities.

37. Article 74.2 of the submitted proposal establishes that three constituencies should be created in the Autonomous Territory Unit of Gagauzia. The aim of this provision seems to follow recommendations made by the Venice Commission and the OSCE/ODIHR in previous opinions on the representation of minorities. According to the proposal, citizens of Gagauzia would be represented not only by the MPs elected in the national constituency, but also by MPs elected in their majoritarian constituencies. However, the methodology to implement such provisions is unclear. The choice of allocating three majoritarian constituencies in the region could be challenged as arbitrary, taking into account the population data, showing deviations between different constituencies of more than the recommended 10% (15% in special circumstances), and therefore, presenting an unequal distribution of mandates.²³

38. Therefore, while the introduction of constituencies could be welcome in the electoral system of Moldova in terms of representation of minorities, the criteria to implement such provisions should be further considered and established clearly in the legislation, as a result of a broad consensus.

4. The constituencies of Transnistria

39. According to Article 74.2 of the submitted proposal, three majoritarian constituencies should be created in the localities on the left bank of Nistru and Dubasari district. As previously stated, population data should be taken into account in establishing the number of constituencies created. The feasibility of organising elections in Transnistria raises a number of concerns. This territory is currently outside of the control of the central authorities, thereby making election-activities such as the electoral campaign, and voting and counting by precinct commissions difficult to implement. In previous parliamentary elections, voting could not take place on the territory under the control of the Transnistrian *de facto* authorities, and polling stations were established in government-controlled territory at which persons residing in Transnistria could vote.

40. The proposed reform does not contain any precise indication about how to overcome possible implementation problems. Any change in the Election Code in this respect should

²¹ Joint Opinion on the *Election Code of Moldova*, CDL-AD(2007)040, para. 12; Joint Opinion on the *draft working text amending the Election Code of Moldova*, CDL-AD(2010)014, para. 12.

²² J. Velaers, *Electoral Law and representation of minorities*, CDL-UD(2012)006, para. 9.

²³ Code of Good Practice, point 2.2., para. 15.

enumerate clear criteria for the creation of constituencies in the Transnistria region, as well as take into account feasibility issues.

5. The constituency abroad

41. Out-of-country voting is a central issue in Moldova, due to the large number of citizens living abroad.²⁴ Voters abroad are already eligible to vote in parliamentary elections. The 2010 OSCE/ODIHR EOM report on the parliamentary elections noted that, while there was an attempt to include Moldovans abroad in voting, the allocation of polling stations abroad did not correspond to the distribution of citizens of voting age residing abroad. Article 74.2 of the draft proposal establishes one single-member constituency abroad. While the practice of facilitating out-of-country voting varies among countries, there is a noted lack of consensus in the Moldovan context on the fairness and basis of establishing only one constituency. As previously stated, equality in voting power should be respected and the number of effective voters residing abroad taken into consideration to establish the constituencies abroad.

42. According to Article 90.4, "in the uninominal [majoritarian] constituency established abroad will be considered elected those three candidates who have accumulated the highest number of votes". Three representatives will therefore be allocated, according to this draft proposal, to the citizens residing and voting abroad. There is an inconsistency in the terms used, as the constituency abroad is considered to be majoritarian, and therefore, it should be a single-member constituency. Moreover, the proposal does not take into account important matters such as the low number of representatives elected by such a large number of citizens, the difficulties for campaigning in such a large constituency, or the peculiarities of financing candidates abroad.

43. It would be highly recommendable that the draft proposal is more detailed and specific on such important provisions.

D. On the representation thresholds

44. Article 86 of the present Election Code, modified in May 2013, raised the minimum representation thresholds for parties to enter parliament as follows:

- 6% for a political party;
- 9% for an electoral block of two political parties and/or socio-political organizations;
- 11% for an electoral block of 3 or more political parties and/or socio-political organisations;
- 2% for an independent candidate.

45. The threshold for participating in seat allocation in the parliament has been repeatedly amended. The OSCE/ODHIR and the Venice Commission have constantly recommended to lower the thresholds and "avoid(ing) reversing the reduction."²⁵ The draft submitted for assessment reverts back to the threshold levels that existed before the last elections, by requiring, in its Article 88.2, 4% for political parties, 7% for blocks of 2 parties and 9% for a block of 3 or more parties. Independent candidates would have the same minimum threshold of 2%. As stated in previous opinions on the electoral law of Moldova, this is a positive step, which could increase pluralism and reduce number of wasted votes.

²⁴ According to various sources, these citizens account for up to 500,000 of a total of 2.6 million voters registered on voter lists, although there are differing estimates on these numbers. See *Observation of the early parliamentary elections in Moldova (28 November 2010) Report*, Parliamentary Assembly, Council of Europe, 24 January 2011.

²⁵ See CDL-AD(2007)040, para. 16; CDL-AD(2008)022, para. 14.

E. On the impact of the proposed reform on women's representation

46. The submitted draft does not take into consideration provisions of ensuring women's representation under the proposed electoral system. The number of women MPs in the Moldovan Parliament is very low. In the parliamentary elections of 2010, only 19 women were elected out of the 101 mandates.²⁶ Until now, Moldova has not followed the recommendations of the Parliamentary Assembly of the Council of Europe to increase women's representation in politics.²⁷ The new electoral proposal does not improve gender equality, and could further limit women's representation in parliament. As the European Parliament stated more than fifteen years ago, the countries with majority or plurality electoral systems in one-member constituencies have the lowest level of female political representation. In single-member constituencies, political forces often prefer male candidates because, in such a way, they expect better electoral results than when selecting women.²⁸

V. Conclusion

47. The draft proposal submitted for consideration introduces a fundamental reform, changing the proportional electoral system into a mixed system, in which 51 Members of Parliament (MPs) out of the 101 shall be elected by a proportional closed-list system in one single nationwide constituency and 50 MPs shall be elected in as many single-member constituencies. The proposed reform is not yet presented in an official draft, as it has not been registered with the parliament of Moldova.

48. The choice of an electoral system is a sovereign decision of a State, but in the present Moldovan context, the proposed reform raises serious concerns and could have important shortcomings. Moreover, a clearer methodology for the delimitation of constituencies and further provisions on the representation of Transnistria and of Moldovan citizens living abroad should be included.

49. The Venice Commission and OSCE/ODIHR, although welcoming the effort of the Moldovan authorities to seek their opinion before launching any reform, urge caution in introducing such fundamental changes to the electoral system in the limited time ahead of the next parliamentary elections. Additionally, prior to proceeding with such fundamental changes, it is essential to have inclusive public discussions and to seek consensus with electoral stakeholders on the electoral system and related provisions.

50. The Venice Commission and the OSCE/ODIHR stand ready to assist the authorities of Moldova in their efforts to improve the legal framework for democratic elections and bring it more closely in line with OSCE commitments, Council of Europe and other international standards for democratic elections.

²⁶ Morozova, Galina, Underrepresentation of women in the parliament of the Republic of Moldova. A gender perspective on democratic development in the country. Lund University, Faculty of Social Sciences, Department of Political Sciences, 2011, <http://lup.lub.lu.se/luur/download?func=downloadFile&recordId=2155527&fileId=2155528>

²⁷ PACE, resolution 1706(2010), available at:

<http://www.assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta10/ERES1706.htm>; see also Recommendation 1899(2010), available at:

<http://assembly.coe.int/Mainf.asp?link=/Documents/AdoptedText/ta10/EREC1899.htm>. See also the OSCE/ODIHR election observation mission final report in both 2011 local elections and 2010 parliamentary elections, which also recommended to promote women's participation.

²⁸ Differential impact of electoral systems on female political representation, Directorate-General for Research, Working document, Women's rights Series, W-10, Electoral Systems, http://www.europarl.europa.eu/workingpapers/femm/w10/2_en.htm