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Parlamentul Republicii Moldova

Prin prezenta, transmitem în anexă copia scrisorii Directorului *Biroului pentru Instituții Democratice și Drepturile Omului (ODIHR)*, Maria Telalian, adresată Președintelui Comisiei juridice, numiri și imunități a Parlamentului RM, Veronica Roșca, însoțită de avizul elaborat de către ODIHR pe marginea *Proiectului Codului cu privire la organizarea și funcționarea Parlamentului Republicii Moldova* pe marginea capitolelor VI, VII, VIII, IX, XI și XII *(raporturile Parlamentului cu alte ramuri ale puterii de stat)*.

Avizul a fost întocmit în baza sesizării din 05 iulie 2024, parvenite din partea Președintelui Comisiei juridice, numiri și imunități a Parlamentului Republicii Moldova.

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SECRETARIATUL PARLAMENTULUI REPUBLICII MOLDOVA
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OPINION ON THE DRAFT CODE ON THE ORGANIZATION AND FUNCTIONNING OF THE PARLIAMENT OF MOLDOVA (REGARDING THE RELATIONS OF THE PARLIAMENT WITH OTHER BRANCHES OF POWER (CHAPTERS VI, VII, VIII, IX, XI AND XII))

REPUBLIC OF MOLDOVA

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Based on an unofficial English translation of the Draft Code commissioned by the OSCE Office for Democratic Institutions and Human Rights (ODIHR).

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EXECUTIVE SUMMARY AND KEY RECOMMENDATIONS

The principle of separation of powers, which ensures the division of governmental authority among the executive, legislative, and judicial branches, is a cornerstone of democratic governance and the rule of law. While most human rights treaties do not explicitly provide for separation and balance of powers, they establish principles and standards that necessitate this division to safeguard human rights effectively.

The Draft Code on the Organization and Functioning of the Parliament (Draft Code) generally provides a sound constitutional and procedural framework for shaping the separation and balance of powers. Embedding such provisions in an organic law is commendable, provided they safeguard the division of authority among the branches of government and establish clear procedures for parliamentary interaction with the executive and the judiciary. At the same time, certain areas of the Draft Code require careful revision to address potential gaps or ambiguities and align with international good practices.

Specifically, provisions on the impeachment of the President should be further refined to clearly distinguish between offenses related to the President's constitutional duties, which may warrant suspension or resignation, and those related to personal behaviour, which constitute grounds for impeachment. Moreover, by not relinquishing their parliamentary duties when assuming the role of interim President during temporary interim periods, the role of a Speaker may threaten the separation of powers. The Draft Code should also better define Parliament's role in the appointment and dismissal of public officials, ensuring compatibility with the Constitution and other relevant organic laws, and mandate a qualified majority for electing Constitutional Court judges along with effective deadlock-breaking mechanism.

To mitigate the risk of misuse of the procedure whereby the government may commit its confidence to a parliamentary vote on a draft law, the Draft Code should include additional safeguards and limitations to the use of this procedure to preserve the fundamental legislative functions of the Parliament. Additionally, provisions on legislative delegation should be revised to ensure enabling laws clearly define the delegated matters, duly justify the necessity of the delegation, and allow the Parliament to set effective oversight mechanisms for government ordinances.

Lastly, gender and diversity considerations should be taken into account throughout public officials' selection and nomination process to ultimately reflect the constitutional principle of gender equality between women and men.

More specifically, ODIHR makes the following recommendations to further align the Draft Code with OSCE human dimension commitments and other international standards:

A. Regarding Parliament's Relations with the President:

1. To ensure a thorough assessment of incapacity of the President, the timeline for confirmation by the Constitutional Court could be extended, particularly when determining whether the incapacity is permanent; [para 19]
2. To prevent conflicts of interest, the Speaker should consider relinquishing their parliamentary duties when temporarily assuming the presidential mandate in case of temporary interim periods, as provided in case of definitive interim periods; [para 22]
3. To enhance clarity and efficiency, the Draft Code should establish clear deadlines for each stage of the President's impeachment process; [para 31]

4. To provide legal clarity, a clear distinction should be made between offences related to the President's constitutional duties, which may warrant suspension or resignation, and those linked to personal behaviour, which may serve as grounds for impeachment, while ensuring that only sufficiently serious criminal offences may warrant impeachment of the President; [para 38]

B. Regarding Government Formation:

1. To better align no-confidence motions with the risk of dissolution to prevent overuse and reserve them for exceptional cases; [para 45]
2. Regarding the procedure by which the government may assume responsibility before the parliament for a draft law, to include safeguards and limitations to prevent its misuse:

- prohibiting the use of the procedure on certain subject matters;
- removing from Article 169 (2) the possibility to use the procedure with respect to organic laws;
- explicitly excluding the possibility to adopt constitutional amendments through this procedure;
- reconsidering the possibility to adopt several laws simultaneously;
- limiting the frequency of activation, including through extraordinary sessions;
- explicitly requiring that the procedure may only be activated after a thorough discussion in the Parliament; [para 47]

C. Regarding Legislative Delegation Procedure:

1. To require enabling laws to explicitly specify the legislative matter(s) being delegated, demonstrate how the delegation and contemplated ordinance(s) would contribute to the implementation of specific components of the government's policy programme, justify the necessity of the delegation, and allow the Parliament to define in the enabling law guiding principles and additional oversight mechanisms to inform and scrutinize the content of government's ordinance enacted under the delegation; [para 53]
2. To authorize the use of the legislative delegation procedure in specific emergency situations – that fall short of meeting the grounds for declaring a state of emergency – and during parliamentary sessions; [para 55]
3. To explicitly exclude constitutional laws from the legislative delegation procedure; [para 58]
4. To prohibit sub-delegation, unless explicitly authorized by the legislature in the enabling law; [para 60]
5. To prescribe a maximum duration for the legislative delegation, and specify that the enabling law automatically lapses upon the dismissal of the government, dissolution of the Parliament or expiration of its tenure; [para 64]
6. To introduce a prohibition on retroactive ordinances in line with the principle of legal certainty under the rule of law; [para 70]
7. To provide that ordinances automatically lapse if not examined by parliament or, at a minimum, require that a ratification bill for all ordinances be submitted to the Parliament within the deadline specified in the enabling law, while explicitly specifying that the Parliament has the authority to amend ordinances and repeal parts thereof during the ratification process; [paras 73 and 74]

D. Regarding Appointment and Dismissal Procedures:

1. To address potential disputes, particularly regarding dismissals, the text should clearly specify which public officials may be dismissed, emphasizing the irremovability of members of independent state organs; [para 77]
2. To strengthen legitimacy, decisions on appointing and dismissing public officials should require a qualified majority of all MPs, not just those present, while ensuring that effective deadlock-breaking mechanisms are in place; [para 79]
3. To increase women's representation in public office, the Draft Code should include provisions ensuring gender parity in appointments while upholding merit; [para 80]
4. To ensure broader consensus and reduce politicization, a qualified majority should also be required for electing Constitutional Court judges, along with effective deadlock-breaking mechanism; [para 86]
5. To address gaps in the parliamentary selection process, a specific bill could define details such as the selection committee's composition – which should reflect gender parity while also seeking to involve civil society representatives or representatives of the legal profession, candidate guarantees, and the application process. It should also enshrine transparency in nominating Constitutional Court judges; [para 88]
6. To ensure that the rules regarding the composition and selection/appointment to the Constitutional Court should be designed to prevent discrimination in the selection process, ensure the accessibility of the process and gender balance and a pluralistic composition in the Constitutional Court.; [para 89]

E. To ensure clarity and enforceability, the Constitutional Court should explicitly define the wording "address" in its rulings — distinguishing between recommendations and binding directives — while the Draft Code could enhance clarity by listing relevant treaties, such as those on personal status and fundamental rights, or referring to the Law on International Treaties of Moldova; [paras 93 and 95], and

F. To revise Article 194 of the Draft Code pursuant to which local administrations cannot take actions that threaten the territorial integrity, national security, or legality of the state more clearly so that the threat is defined as imminent, aligning with sovereignty and non-interference principles, ensuring only actions that directly endanger territorial integrity or national security qualify as threats, not all local administrative decisions [para 101].

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

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

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ANNEX: Draft Code on the Organization and Functioning of the Parliament of Moldova *(as of April 2024)*

I. INTRODUCTION

1. Throughout 2024, representatives of the OSCE Office for Democratic Institutions and Human Rights (ODIHR) and the Head of the Committee on Legal Affairs, Appointments and Immunities of the Parliament of the Republic of Moldova have been discussing ways to support parliamentary reform, more enhanced democratic governance and inclusive political participation in the Republic of Moldova. During a country visit of ODIHR representatives to Moldova in September 2024, the Head of the above-mentioned Committee reiterated its interest in requesting ODIHR to review the *Draft Code on the Organization and Functioning of the Parliament of Moldova* (hereinafter the "Draft Code").
2. On 26 September 2024, ODIHR confirmed its readiness to assess the compliance of the Draft Code with international human rights standards and OSCE human dimension commitments. Given the broad scope of the Draft Code, ODIHR also informed that several legal opinions on different components of the Draft Code will be prepared.[1] These legal analyses should be read together, along with the two ODIHR Opinions on the Draft Law on the Status, Conduct and Ethics of the Members of Parliament of the Republic of Moldova published in 2024.[2]
3. This Opinion was prepared in response to the above-mentioned request. ODIHR conducted this assessment within its general mandate to assist the OSCE participating States in the implementation of their OSCE human dimension commitments.[3]

II. SCOPE OF THE OPINION

4. The scope of this Opinion covers only the Draft Code submitted for review, especially the Chapters VI, VII, VIII, IX, XI and XII, and relevant provisions of the Constitution of Moldova regulating the relations and balance of powers between the legislature and other branches of government.[4] Thus limited, the Opinion does not constitute a full and comprehensive review of the entire legal and institutional framework regulating the

1 These legal reviews are focusing on the legislative procedure (Chapter III), the constitutional revision procedure (Chapter IV), procedure for declaring a state of emergency, siege or war (Chapter V), inter-institutional relations with other powers (Chapters VI to IX and XI-XII of the Draft Code), parliamentary oversight (Title III of the Draft Code), parliament's representative role and co-operation with civil society (Chapter X), and/or a combination of these and other issues as deemed appropriate. All legal reviews pertaining to the Draft Code and other legislation of the Republic of Moldova are available here: Moldova | LEGISLATIONLINE.

2 See ODIHR, *Opinion on Certain Provisions of the Draft Law on the Status, Conduct and Ethics of the Members of Parliament of the Republic of Moldova* (26 March 2024), in English and in Romanian; and *Opinion on the Draft Law on the Status, Conduct and Ethics of the Members of Parliament of the Republic of Moldova* (11 December 2024), in English and in Romanian.

3 See in particular *OSCE Decision No. 7/08 Further Strengthening the Rule of Law in the OSCE Area* (2008), point 4, where the Ministerial Council "*[e]ncourages participating States, with the assistance, where appropriate, of relevant OSCE executive structures in accordance with their mandates and within existing resources, to continue and to enhance their efforts to share information and best practices and to strengthen the rule of law [on the issue of] […] accountability of state institutions and officials, respect for the rule of law in public administration, […]*". See also *Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE*, 29 June 1990, Section III, para. 26; *Declaration on Strengthening Good Governance and Combating Corruption, Money-Laundering and the Financing of Terrorism*, 19th OSCE Ministerial Council, Dublin, 6-7 December 2012; see also OSCE, *Decision No. 5/14 on the prevention of corruption*, 21st OSCE Ministerial Council, Basel, 4-5 December 2014; *Decision No.4/16 on Strengthening Good Governance and Promoting Connectivity*, Hamburg 2016; and *Decision 6/20 on Preventing and Combating Corruption through Digitalization and Increased Transparency*, Tirana 2020, which calls upon participating States to prevent and combat corruption by, inter alia, *"[e]nhancing good governance, including the principles of transparency and accountability, and promoting integrity and oversight"*.

4 See the *Constitution of the Republic of Moldova* (1994, as last amended 2024).

relations and balance of powers between the legislature and other branches of government in Moldova.

5. The Opinion raises key issues and provides indications of areas of concern. In the interests of conciseness, the Opinion focuses more on those provisions that require improvements rather than on the positive aspects of the Draft Code. The ensuing legal analysis is based on international and regional human rights and rule of law standards, norms and recommendations as well as relevant OSCE human dimension commitments. The Opinion also highlights, as appropriate, good practices from other OSCE participating States and beyond in this field. When referring to comparative good practices, ODIHR does not advocate for any specific model; any country example should be assessed with caution since it cannot necessarily be replicated in another country and should always be considered in light of the broader national institutional and legal framework, as well as the country's legal system, social context and political culture.

6. Moreover, in accordance with the *Convention on the Elimination of All Forms of Discrimination against Women* (hereinafter "CEDAW") and the *2004 OSCE Action Plan for the Promotion of Gender Equality* and commitments to mainstream gender into OSCE activities, programmes and projects, the Opinion integrates, as appropriate, a gender and diversity perspective.[5]

7. The Opinion is based on an unofficial English translation of the Draft Code, which is attached to this document as an annex. Errors from translation may result. Should the Opinion be translated into another language, the English version shall prevail in case of discrepancies.

8. In view of the above, ODIHR would like to stress that this review does not prevent ODIHR from formulating additional written or oral recommendations or comments on respective subject matters in the future.

III. LEGAL ANALYSIS AND RECOMMENDATIONS

1. Relevant International Human Rights Standards, OSCE Human Dimension Commitments, and Key Considerations

9. In a democratic society, the power of the State is traditionally exercised through separate branches of government that operate largely independently while also serving as checks on one another to maintain a balance of power. These branches include the legislative branch, represented by a parliament; the executive branch, led by a government and, at times, a president; and a judiciary, which ensures the rule of law and legal accountability. In addition, a number of independent regulatory or accountability institutions or bodies, including national human rights institutions (NHRIs) that do not fall under these branches also exist, sometimes referred to as the

5 See the *UN Convention on the Elimination of All Forms of Discrimination against Women*, adopted by General Assembly resolution 34/180 on 18 December 1979; and the *OSCE Action Plan for the Promotion of Gender Equality*, adopted by Decision No. 14/04, MC.DEC/14/04 (2004), para. 32.

"fourth branch".[6] The principles of "separation of powers" and "balance of powers" demand that the three functions of the democratic state should not be concentrated in one branch, but should be distributed amongst different institutions. This principle is a cornerstone of democratic governance and the rule of law. In a functioning democracy, the existence of an effective system of checks and balances and respect for the rule of law are essential to ensure the appropriate balance between the three pillars of state power. In this respect and as underlined in the *ODIHR Preliminary Opinion on the Draft Code on the Organization and Functioning of the Parliament of Moldova (regarding Parliamentary Oversight, Title III),*[7] parliamentary oversight is an essential component of the system of checks and balances which characterizes democratic regimes based on the rule of law.[8] In addition, respect for human rights and fundamental freedoms are an essential part of democracy and the rule of law.

10. While most international and regional human rights treaties do not explicitly provide for separation and balance of powers, they establish certain principles and standards that necessitate this division to safeguard human rights effectively.

11. The Universal Declaration of Human Rights (UDHR) establishes the foundation for legal and institutional safeguards against governmental overreach.[9] Article 21 emphasizes the importance of a government that derives its authority from the will of the people, implying the necessity of checks and balances to prevent tyranny. The International Covenant on Civil and Political Rights (ICCPR) further elaborates on this principle.[10] Article 14 guarantees the right to a fair trial by an independent and impartial tribunal, which necessitates independence from executive and legislative influence.

12. The UN documents have consistently stressed that effective separation of powers is a prerequisite for the protection of human rights. The UN Human Rights Committee in its General Comment No. 25 noted that the right to participate in public affairs, voting rights and the right of equal access to public service as reflected in Article 25 of the ICCPR requires that *"[c]itizens also take part in the conduct of public affairs by exerting influence through public debate*".[11] In addition, the 2004 UN General Assembly Resolution 59/201 recognizes essential elements of democracy, including the necessity of institutional checks and balances, separation and balance of powers and respect for the rule of law.[12] Similarly, the 2003 UN Commission on Human Rights Resolution 2003/36 affirms the interdependence between democracy and human rights, underscoring the role of the separation of powers in ensuring democratic stability.[13]

13. Democracy is likewise one of the universal core values and principles of the Council of Europe.[14] The European Convention on Human Rights (ECHR) also incorporates

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6 See e.g., International IDEA, E. Bulmer, *Independent Regulatory and Oversight (Fourth-Branch) Institutions Constitution-Building Primer No. 19* (2019).

7 For an overview of relevant standards and commitments pertaining specifically to parliamentary oversight, see ODIHR Preliminary Opinion on the Draft Code on the Organization and Functioning of the Parliament of Moldova (regarding Parliamentary Oversight, Title III), Section III.1, at: <Moldova | LEGISLATIONLINE>.

8 See e.g., OSCE Parliamentary Assembly, *St. Petersburg Declaration – Resolution on Correcting the Democratic Deficit of the OSCE* (1999), page 5, paras. 2-3, which stress "*the crucial role Parliaments and Parliamentarians play as guardians of democracy, the rule of law and the respect of human rights at both the national and international levels*" and underline that "*democratic oversight and accountability are essential elements of transparency, credibility and efficiency*".

9 See the *Universal Declaration of Human Rights (UDHR)*.

10 See the *UN International Covenant on Civil and Political Rights* (hereinafter "ICCPR"), adopted by the UN General Assembly by resolution 2200A (XXI) of 16 December 1966. Moldova acceded to the Covenant on 26 January 1993.

11 UN Human Rights Committee, *General Comment No. 25*, 1996, para. 8.

12 See *Resolution 59/201*: Enhancing the role of regional, subregional and other organizations and arrangements in promoting and consolidating democracy, adopted by the General Assembly on 20 December 2004.

13 See *Commission on Human Rights Resolution 2003/36: Interdependence between democracy and human rights*, 23 April 2003.

14 European Commission for Democracy through Law (Venice Commission) of the Council of Europe: *Parameters on the Relationship Between the Parliamentary Majority and the Opposition in a Democracy: A Checklist*, 24 June 2019, para. 10. See also ECtHR: *Hyde*

provisions that uphold the separation of powers as a fundamental democratic requirement. The Preamble of the ECHR states that the members of the Council of Europe reaffirm *"their profound belief in those Fundamental Freedoms which are the foundation of justice and peace in the world and are best maintained on the one hand by an effective political democracy".* Several limitation clauses in the ECHR presume the existence of a democratic regime, requiring that restrictions on fundamental rights are "necessary in a democratic society".[15] Article 6 of the ECHR ensures the right to an independent and impartial judiciary, shielding the courts from executive and legislative interference. In addition, the Council of Europe Group of States against Corruption (GRECO) has emphasized the importance of upholding the principle of separation of powers and respecting judicial independence in the context of criminal investigations and proceedings relating to corruption in parallel to the work of parliamentary inquiry commission.[16] The Venice Commission's Compilation of Opinions and Reports on the Separation of Powers may also serve as a useful source of references.[17]

14. In addition, at the European Union (EU) level, the EU Council's Regulation (EC) No. 976/1999 underscores the necessity of democratic governance and the separation of powers as conditions for cooperation and assistance.[18] The European Commission's 2020 Rule of Law Report also emphasized that "*[e]ffective justice systems and robust institutional checks and balances are at the heart of the respect for the rule of law in our democracies"* but that the rule of law also *"requires an enabling ecosystem based on respect for judicial independence, effective anti-corruption policies, free and pluralistic media, a transparent and high-quality public administration, and a free and active civil society*".[19]

15. OSCE participating States have committed to build and strengthen democracy as the only system of government, and have recognized it as an inherent element of the rule of law.[20] Furthermore, the importance of pluralism with regard to political organizations[21] along with institutional and individual integrity of parliament and parliamentarians and public accountability have been recognized by OSCE participating States as core aspects of political life.[22] Already the OSCE Copenhagen Document 1990 emphasizes

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Park v. Moldova (No. 1), judgment of 31 March 2009, para. 27, where the Court reiterates that democracy "*is the only political model contemplated in the Convention and the only one compatible with it*."

15 See Articles 8-11 ECHR; Article 2 of the Forth Protocol 4 to the ECHR)

16 In the context of a parliament's investigation of an ongoing first instance corruption trial against a sitting politician, GRECO has acknowledged that "*the setting up of a parliamentary enquiry commission can function as a form of parliamentary control over issues of public importance*", though further emphasizing that when directed towards the judiciary in ongoing individual cases, it "*may potentially interfere with the separation of powers and respect for judicial independence*" with "*the risk of a chilling effect on judicial independence in the pending proceedings, as well as in future similar proceedings, and the potential impact on criminal investigations and proceedings relating to corruption against influential or politically connected persons*"; see GRECO, *Ad Hoc Report on Slovenia (Rule 34)*, adopted by GRECO at its 84th Plenary Meeting (Strasbourg, 2- 6 December 2019) Greco-AdHocRep (2019)3, para. 16.

17 See Venice Commission, *Compilation of Venice Commission's Opinions and Reports Concerning Separation of Powers*, CDL-PI(2020)012.

18 See *Council Regulation (EC) No 976/1999* of 29 April 1999, Article 3.2.b, laying down the requirements for the implementation of Community operations, other than those of development cooperation, which, within the framework of Community cooperation policy, contribute to the general objective of developing and consolidating democracy and the rule of law and to that of respecting human rights and fundamental freedoms in third countries.

19 European Union, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *2020 Rule of Law Report - The rule of law situation in the European Union*, Brussels, 30 September 2020, COM(2020) 580 final, page 4.

20 See CSCE/OSCE, *Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE* (1990 OSCE Copenhagen Document), 5 June-29 July 1990, para. 3

21 See CSCE/OSCE, *Document of the Moscow Meeting of the Conference on the Human Dimension of the CSCE* (1991 OSCE Moscow Document), 3 October 1991, para. 5.

22 See OSCE, *Charter of Paris for a New Europe*, Paris, 19 - 21 November 1990, which states that *"[d]emocracy, with its representative and pluralistic character, entails accountability to the electorate, the obligation of public authorities to comply with the law and justice administered impartially".* See also *1999 OSCE Istanbul Document*, 19 November 1999, where OSCE

that "*the rule of law does not mean merely a formal legality which assures regularity and consistency in the achievement and enforcement of democratic order, but justice based on the recognition and full acceptance of the supreme value of the human personality and guaranteed by institutions providing a framework for its fullest expression*" (para. 2). OSCE participating States have agreed that it is a "*duty of the government and public authorities to comply with the constitution and to act in a manner consistent with law*" and that "*the activity of the government and the administration as well as that of the judiciary will be exercised in accordance with the system established by law*".[23] Numerous OSCE commitments also stress the role of openness and transparency in public affairs and the importance of effective and inclusive participation in public and political life.[24]

16. Lastly, various regional organizations also reinforce these principles and underline the fundamental role of the balance of powers as a safeguard against authoritarian rule and cornerstone of democracy.[25]

2. PARLIAMENT'S RELATION WITH THE PRESIDENT (ARTICLES 142-163 OF THE DRAFT CODE)

17. The provisions of the Draft Code concerning the relationship between Parliament and the President have a significant impact on the functioning of the separation of powers, a fundamental principle that extends beyond law-making and parliamentary oversight, to the overall operation of Parliament.[26] According to the Constitution, the President, as *"the guarantor of national sovereignty, independence, and the unity and territorial integrity of the State"* (Article 77(2)), holds substantial authority in the exercise of executive power. Articles 142-143 of the Draft Code outline the process for determining the President's election date and the inauguration timeline, referencing

participating States committed to strengthen their efforts to *"promote good government practices and public integrity"* in a concerted effort to fight corruption.

23 See *1990 OSCE Copenhagen Document*, paras. 5.3-5.5.

24 See CSCE/OSCE, *Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE* (1990 OSCE Copenhagen Document), 5 June-29 July 1990, para. 5.8; and CSCE/OSCE, *Document of the Moscow Meeting of the Conference on the Human Dimension of the CSCE* (1991 OSCE Moscow Document), 3 October 1991, para. 18.1. See also OSCE, *Action Plan for the Promotion of Gender Equality*, adopted by Decision No. 14/04, MC.DEC/14/04 (2004), para. 44(d); *2003 OSCE Action Plan on Improving the Situation of Roma and Sinti within the OSCE Area*, para. 88; OSCE Ministerial Council, *Decision No. 4/13 on the enhancing OSCE efforts to implement the Action Plan on Improving the Situation of Roma and Sinti Within the OSCE Area, With a Particular Focus on Roma and Sinti Women, Youth and Children* (2013), para 4.2; *Report of the CSCE Meeting of Experts on National Minorities* (Geneva, 1991); OSCE/CSCE *1991 Moscow Document*, para. 41. See also OSCE High Commissioner on National Minorities (HCNM), *Ljubljana Guidelines on Integration of Diverse Societies*, 7 November 2012, where it is noted that *"[d]iversity is a feature of all contemporary societies and of the groups that comprise them*" and which recommend that the legislative and policy framework should allow for the recognition that individual identities may be multiple, multi-layered, contextual and dynamic.

25 See e.g., Community of Democracies, *Seoul Plan of Action Democracy: Investing for Peace and Prosperity*, November 12, 2002, preamble, which recognizes democratic institutions as essential for peace and prosperity, reaffirming the role of checks and balances in governance; African Union (AU), *Declaration on unconstitutional changes of government in Africa*, 2022, which stresses the need to prevent excessive executive power; OAU/AU, *Declaration on the Principles Governing Democratic Elections in Africa*, (II.4.c), which highlights the role of judicial independence; Economic Community of West African States (ECOWAS), *Supplementary Protocol of ECOWAS on Democracy and Good Governance*, (A/SP1/12/01), Article 1.a, which affirms the separation of powers as a safeguard against authoritarian rule; Organization of American States (OAS), *Inter-American Democratic Charter*, 11 September 2001, Article 3, which states that democracy requires an independent judiciary and a balance between branches of government; Andean Community, *Andean Charter for the Promotion and Protection of Human Rights (July 2002)*, Article 14, which emphasizes the importance of institutional checks and balances; Organisation internationale de la Francophonie (OIF), *Bamako Declaration*, 3 November 2000, 2.2, and *Ulaanbaatar Plan of Action Democracy, Good Governance and Civil Society*, 12 September 2003, 3.6.b, respectively, which highlight the role of parliaments in democratic governance and oversight.

26 See e.g., Venice Commission *Compilation of Venice Commission opinions and reports concerning separation of powers*, CDL-PI(2020)012, 8 October 2020, pp. 10-12. See also OSCE/ODIHR, *Guidelines on Democratic Lawmaking for Better Laws (2024)*, para. 11.

relevant organic laws. These provisions are mainly technical and do not warrant significant attention.

2.1. Termination of the Mandate of the President

18. The President may leave office through resignation (Article 144), death (Article 145), or permanent incapacity (Article 146). In the case of resignation, the President submits a request to the Parliament, which acknowledges it, declares the position vacant, sets the date for new elections, and seeks the Constitutional Court's assessment of the interim presidency. In the event of death, the Parliament acknowledges it and follows the same procedure. If the President is permanently unable to fulfil their duties for more than 60 days, Parliament seeks for the Constitutional Court's confirmation, after which it declares the office vacant, establishes an interim presidency, and schedules new election.

19. Article 146 of the Draft Code addresses the termination of the President's mandate in the event of permanent impossibility to carry out duties. However, when a resignation results from a permanent inability to perform presidential duties for more than 60 days, ambiguity may arise as to whether this should be considered a voluntary act under Article 144 or should involve a determination made by the Parliament through a prior request for the Constitutional Court to confirm the President's incapacity. Moreover, the sixty days-timespan seems rather brief to determine permanent incapacity, as a two-month inability to govern could result from temporary health conditions that do not necessarily indicate a lasting or permanent inability to fulfil presidential duties. **While safeguards exist with the requirement to seek confirmation by the Constitutional Court, this timeline could be extended to allow for a more thorough assessment of incapacity, especially when determining whether it is permanent.**

20. In addition, in the event of resignation, the Draft Code outlines the procedural steps the Parliament must follow, but does not require the Parliament to express its opinion on a presidential resignation as stated in Article 90(2) of the Constitution. The Draft Code only allows the Parliament to take note of the resignation, without expressing an opinion. **It is recommended to amend Article 144 of the Draft Code to indicate this requirement in line with the Constitution.**

21. According to Article 91 of the Constitution, if the President's office becomes vacant, this role is assumed by the Speaker of the Parliament or by the Prime Minister, in this order. In this regard, the Draft Code differentiates between "definitive interim" and "temporary interim" periods (Articles 147-148, respectively). While the latter relates to the temporary impossibility of the President to exercise their powers and the occurrence of events or legal facts that could lead to the termination of their mandate, the former is a definitive state of affairs in which the mandate of the President is terminated, also confirmed by the Constitutional Court. More specifically, Article 148 (2) defines "a temporary interim" period as a situation when the Speaker of the Parliament or the Prime Minister temporarily assumes the duties of the President without being relieved of their original responsibilities, until the President resumes office or the Constitutional Court confirms the interim status of the presidency. From the perspective of the separation of powers, the manner in which a temporary interim presidency is established is of critical importance. Without appropriate safeguards and counterbalances, the President could be suspended from exercising their powers even against their will.

22. During a definitive interim period in cases specified in Article 91 of the Constitution, Articles 34 (1) and 147 (3) of the Draft Code provide that the Speaker of the Parliament acting as interim President shall be relieved of the office of Speaker of the Parliament, and its role is carried out by one of the Vice-Speaker (Article 34 (2)). The Draft Code imposes specific limitations on the interim President regarding the exercise of presidential powers during the temporary interim period (Article 148 (7)), ensuring that the temporary office-holder cannot exceed their interim role.[27] However, as the Speaker retains their role while assuming presidential duties during the temporary interim period, certain competencies may still grant them broad discretion, which should in principle be subject to parliamentary oversight. This ultimately creates a risk of conflict of interest should the Speaker retains full prerogatives.[28] **It is therefore recommended to provide in Article 148 of the Draft Code that during the time they are serving as interim President during the temporary interim period, the Speaker shall relinquish their parliamentary duties, as done in case of definitive interim.**

23. Moreover, according to the Draft Code, when the President is absent due to regular, planned circumstances, they personally establish the temporary interim by decree (Article 148 (3) (1)). However, in situations that could lead to the termination of the mandate, such as death, resignation, suspension from office, or incapacity, or in situations where the President is unable to act (i.e., illness), the conditions of the interim are determined by the Speaker of Parliament, who may also assume the role of interim President. This concentration of power in the hands of the Speaker is counterbalanced by the requirement that the Parliament must seek confirmation from the Constitutional Court (Article 148 (2)). However, Article 148 (4) states that *"[t]he establishment of the temporary interim by temporarily replacing the President of the Republic of Moldova does not require the confirmation of the Constitutional Court,"* which seems to contradict the conditions for interim presidency outlined in Article 148 (2). Moreover, as noted above, since the Speaker of Parliament retains their original responsibilities while assuming the temporary interim presidency, this raises concerns about the separation of powers. **To ensure consistency and uphold institutional safeguards, it is recommended to resolve the discrepancy between Articles 148 (2) and 148 (4).**

2.2. Suspension of the Mandate of the President

24. Article 149 (1) of the Draft Code deals with the suspension of the President from office in case of acts committed in the exercise of the office, which amount to violations of the provisions of the Constitution, as per Article 89 of the Constitution. The Draft Code introduces a key procedural clarification to the existing constitutional provisions by requiring, in addition to the initiation by one-third of members of Parliament (MPs), the submission of Constitutional Court's opinion (Article 149 (3)). This requirement aligns with the Constitutional Court's role in determining the circumstances that justify the President's removal as per Article 135(1)(f) of the Constitution, thereby serving as an important procedural safeguard.

25. These safeguards also include the requirement that the initiative for suspension, along with the Constitutional Court's opinion and other relevant documents, be submitted to the Speaker of Parliament (Article 150 (1)); the obligation of the Speaker to promptly

27 During the temporary interim, the interim President of the Republic of Moldova may not dissolve the Parliament, appoint or dismiss ministers, appoint or dismiss the Prosecutor General or judges, or appoint or recall ambassadors.

28 See, for example, CoE, Recommendation *CM/Rec(2000)10* on codes of conduct for public officials, Article 13.

communicate the proposal to the standing committee, notify the President, and inform MPs (Article 150 (2)); and the Speaker's duty to convene a special parliamentary session to deliberate on the matter (Article 150 (3)). Additionally, the standing committee must verify the legality of the allegations within 10 days, examine evidence, hear the initiators and the President's response, and submit a report to the Parliament (Article 151). Parliamentary debates must begin with the initiators' presentation, allow the President to respond, ensure unrestricted discussion, and include questioning rounds, committee findings, and statements from parliamentary factions before the final vote (Article 152). Finally, a two-thirds majority of elected MPs is required to adopt the decision to suspend the President (Article 153).

26. The effectiveness of this qualified majority as a safeguard in the parliamentary decision-making process depends on whether it genuinely reflects a broad consensus among different political forces rather than merely the unilateral support of the governing majority.[29] In addition, in some countries decisions made by such bodies should receive cross-party support (i.e., support from a certain number of members representing the opposition); if a consensus-based decision is impossible, the representatives of the opposition on the committee should be able to table a minority report.[30] In the case of Moldova, there is an even more effective counterbalance of the possible political motivations behind the suspension from office of the President: after suspension, a national referendum has to be organized on the removal of the President (Article 89 (3) of the Constitution and Article 153 (3)-(5) of the Draft Code). According to the Constitution, "removal" is one of the legal grounds for ending the President's mandate (Article 91). The Draft Code similarly establishes that a referendum held after the President's suspension by Parliament results in removal (Article 153 (5)). Therefore, the provision stating that, following a referendum approving dismissal, the President shall be considered to have resigned (Article 153(6)) appears unnecessary. For legal clarity and consistency, it is advisable to avoid conflating different legal grounds for ending the President's mandate, such as removal and resignation. [31] **The Draft Code should be revised to eliminate this discrepancy.**

27. In addition, despite Article 81 (1) of the Constitution containing a strict incompatibility provision for the President with regard to the holding of any other remunerated position, the Draft Code does not provide procedural rules for addressing such a situation.[32] In the absence of these rules, an incompatibility may be treated as an alleged infringement of the President's duties (Constitution, Article 89 (1); Draft Code, Article 149 (1)). As a result, suspension from office and a national referendum on the President's removal could become the sole procedures to follow if an incompatibility situation arises. Generally, the simplest way to handle incompatibility is by setting a deadline for the voluntary resolution of the situation. If the incompatibility is not resolved voluntarily within the prescribed period, a declaratory decision by the Parliament could end the official's mandate, provided that the proper procedural safeguards are followed. **To clarify the relationship between the legal procedures in the Draft Code and the constitutional grounds for ending the President's mandate,**

29 See e.g., Venice Commission, *Parameters on the relationship between parliamentary majority and the opposition in a democracy: a checklist,* CDL-AD(2019)015, 24 June 2019, para. 114.

30 *Ibid.* para. 89.

31 For the explanation of consistency as part of the requirement of legal certainty, see e.g., OSCE/ODIHR, *Guidelines on Democratic Lawmaking for Better Laws (2024),* Principle 15 (Clarity and Intelligibility), para. 34; and CoE Venice Commission, *Rule of law checklist,* 11-12 March 2016, para. 60.

32 For a detailed overview of incompatibility provisions, see e.g., CoE Venice Commission, *Report on democracy, limitation of mandates and incompatibility of political functions,* CDL-AD (2012)027, 17 December 2012.

it is recommended to include explicit provisions in the Draft Code outlining the procedure to follow when incompatibility occurs. This should include effective procedural safeguards regarding the initiation of the case, its examination, the President's opportunity to resolve the incompatibility, and the decision-making process that could ultimately end President's mandate.

28. Lastly, Article 152 (1) of the Draft Code refers to a "group of members of Parliament" initiating a "procedure of impeachment". **It is not clear whether this suspension procedure is distinct from a process related to a criminal offense committed by the President and the subsequent charges that may be brought against them potentially resulting in an impeachment procedure governed by Articles 154-163 of the Draft Code. This needs to be clarified.**

2.3. Impeachment

29. Article 89 of the Constitution notes that the President may be suspended for committing serious offenses that infringe upon constitutional provisions, but the Draft Code introduces a broader approach by framing impeachment as a parliamentary procedure for authorizing the President's criminal responsibility. The procedure outlined in the Draft Code follows a structured three-step process: (1) lifting the President's immunity;[33] (2) suspending the President from office; and (3) approving the Prosecutor General's request for impeachment. If the Supreme Court finds the President criminally liable, their mandate ends, as per Article 81 (3) of the Constitution.

30. A simple majority vote in Parliament waives immunity (Article 158 (2)), and when immunity is waived, a two-thirds majority vote can suspend the President from office for the duration of criminal investigation (Article 158 (4)). Impeaching the President also requires at least a two-thirds vote of all elected MPs (Article 162 (2)), as well as the confirmation by the Supreme Court (Article 163 (3)). Generally, starting an impeachment procedure and obtaining the impeachment would require higher majorities than initiating and obtaining the vote of no confidence. However, those majorities should not be too high to make impeachment virtually impossible.[34] The procedure envisaged by the Draft Code is reasonable as it sets higher requirements for starting the procedure that can end the mandate of the President. Based on the above, the Draft Code contains significant procedural safeguards and a balanced regulation that takes into account the immunity of the President but also opens the possibility of examining their criminal responsibility.

31. However, certain provisions would still require further elaboration. First, although the standing committee has 10 days to review the case (Article 151 (1) in case of lifting immunity and Article 160 (1) in case of impeachment), the Draft Code does not set a deadline for the Speaker to convene the hearings. Establishing a clear timeline would be crucial not only for enhancing transparency but also for ensuring procedural efficiency and for keeping all involved parties duly informed in advance about the hearing. **It is recommended that the Draft Code include a clear deadline for the Speaker to convene the hearing.**

33 More specifically, the impeachment process begins with the waiver of the President's immunity, initiated by the Prosecutor General's request by filing a request for waiver of the immunity of the President for the purpose of criminal investigation (Article 155 (2)), which includes evidence of a potential crime (Article 154 (1) (2)). The Speaker refers the request to a standing committee, which is then discussed in a special session (Article 155(4)).

34 See Venice Commission *Parameters on the relationship between parliamentary majority and the opposition in a democracy: a checklist*, para. 130.

32. Second**,** timely consideration of a request to lift a President's immunity is crucial. If the request is delayed, it provides the concerned President with the opportunity to potentially tamper with evidence. Prolonged and legally uncertain immunity removal processes can also lead to negative consequences, such as information leaks, insider trading (where individuals exchange information for favours), or witness intimidation.[35] **Therefore, it is recommended to set specific timelines for lifting presidential immunity while ensuring clear timeframes for each step,** thereby allowing immunities to be lifted without undue delay.

33. In addition, Article 155 (4) stipulates that *"[t]he Prosecutor General's notification of the waiver of immunity shall be communicated without delay to the President of the Republic of Moldova."* **This provision is welcome in principle, however it would be recommended to establish a concrete timeline to prevent any delays in the process.**

34. Third, Article 156 (1) states that *"within 10 days, the Standing Committee shall examine the Prosecutor General's request [on merits of the case] for the waiver of the immunity of the President of the Republic of Moldova."* Article 156 (2) introduces the possibility of extending the procedure by requiring the Committee on Legal Affairs, Appointments, and Immunities to draft a report after examining the Prosecutor General's request, which is then submitted to the Standing Bureau. Since no specific timeline is set for the preparation and submission of the report, this could result in undue delays. **To ensure efficiency, it is recommended that the Standing Committee examine the request within 10 days and that the findings and conclusions be promptly included in the report, which should be submitted directly to the plenary of Parliament without unnecessary delays**.

35. Fourth, when carrying its functions, the Standing Committee should also comply with the *sub judice* rule that is, refraining from commenting or taking actions or pursuing lines of inquiry that could prejudge or influence the outcome of the ongoing case or investigations or trials that are about to be initiated;[36] it should not address the President's criminal liability, which may otherwise breach their right to be presumed innocent as protected by key international instruments.[37] **The Draft Code should make it explicit that there should not be any examination of the merits of the case in question nor analysis of potential guilt or otherwise of the President by the standing committee or other parliamentary bodies that are involved.**

36. Lastly, the Draft Code does not specify whether the hearings are public. The criteria for establishing and lifting immunity should be regulated in a clear and precise manner, and the procedures should be as transparent and open as possible, so as to ensure that

35 See OECD, *Combatting High-level Corruption in Eastern Europe*, 2024, p. 100. See also *ODIHR Opinion* on the Draft Law on the Status, Conduct and Ethics of the Members of Parliament of the Republic of Moldova, paras. 79-85.

36 i.e., a rule limiting comment and disclosure relating to judicial proceedings, in order not to prejudge or influence the outcome of a particular case or matter, which is under trial or being considered by a judge or court. See also e.g., OSCE/ODIHR, *Note on Parliamentary Inquiries into Judicial Activities* (2020).

37 According to Article 14 (2) of the ICCPR, "*Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law*"; according to Article 6(2) of the ECHR, "*Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law*". With respect to parliamentary committee of investigation in particular, see also e.g., ECtHR, *Rywin v. Poland*, nos. 6091/06, 4047/07 and 4070/07, 18 February 2016), para. 225, where the Court underlined that "*where a judicial procedure is opened concerning the same facts as those being examined by a parliamentary committee of investigation [PCI] the latter must maintain the requisite distance between its own investigations and the parallel procedure*" and in particular "*it must refrain from making any statements as to the merits of decisions taken by the courts or as to how the judicial proceedings are being conducted*", and paras. 114 and 118 and 226, which further underlined that PCI should not "*address [one]'s criminal liability and ma[ke] finding that breach[es] [one's] right to be presumed innocent*". See also Venice Commission, *Amicus Curiae brief in the case of Rywin v. Poland before the ECtHR (on Parliamentary Committees of Inquiry)* (2014), CDL-AD(2014)013, para. 31.

they are not misused for political purposes.[38] Given the public interest in these cases, it may be assumed that there are no restrictions on public attendance or broadcasting. **This could be explicitly clarified in the Draft Code to ensure openness and transparency.**

37. In addition, some other provisions warrant clarification. First, the types of crimes subject to impeachment remain unclear, which means that it may potentially encompass all types of crimes envisaged in the Criminal Code of Moldova, from light, less serious, serious, particularly serious to exceptionally serious.[39] In principle, the alleged acts should reach the requisite criteria of sufficient seriousness in the circumstances to warrant an impeachment of the President.[40] **The term "crime" should be more precisely defined to clarify which offenses may trigger the procedure, ensuring they are sufficiently serious to warrant impeachment of the President**.

38. Secondly, there is a need to distinguish between criminal acts committed by the President outside the scope of their duties and those that are related to constitutional violations during their tenure.[41] The Draft Code seems to treat these situations separately, yet no clear distinction is made in Article 154, which only details the procedure for lifting immunity, suspending the President, and approving the Prosecutor General's request for impeachment without addressing the specific grounds for initiating such actions. It is essential to explicitly differentiate between personal misconduct and violations tied to the President's constitutional duties, in particular, when the request concerns a criminal conduct/offence which is manifestly unrelated to the performance of official functions but relates to acts committed in relation to other personal or professional functions. **It is recommended that a clear distinction be made between offences committed within the framework of the President's constitutional powers, which relate to their political and constitutional role and may warrant suspension or resignation, and those offences tied to the President's personal behaviour, which are the basis for impeachment.**

RECOMMENDATION A.

1. To ensure a thorough assessment of incapacity of the President, the timeline for confirmation by the Constitutional Court could be extended, particularly when determining whether the incapacity is permanent.
2. To prevent conflicts of interest, the Speaker should consider relinquishing their parliamentary duties when assuming the presidential mandate in case of temporary interim periods, as provided in case of definitive interim periods.
3. To enhance clarity and efficiency, the Draft Code should establish clear deadlines for each state of the President's impeachment process.
4. To provide legal clarity, a clear distinction should be made between offences related to the President's constitutional duties, which may

38 See e.g., as a comparison with respect to the lifting of parliamentary immunities, Venice Commission, *Report on the Scope and Lifting of Parliamentary Immunities* (2014), para. 157, 171 and 191.
39 See Article 16 of the Criminal Code of the Republic of Moldova.
40 See e.g., Venice Commission, *Albania - Opinion on the powers of the President to set the dates of elections* (2019), para. 101.
41 *See* Venice Commission, *Report on the Scope and Lifting of Parliamentary Immunities* (2014), para. 92.

warrant suspension or resignation, and those linked to personal behaviour, which may serve as grounds for impeachment, while ensuring that only sufficiently serious criminal offences may warrant impeachment of the President.

3. PARLIAMENT'S RELATIONS WITH THE GOVERNMENT (ARTICLES 164-186)

3.1. Government Formation

39. No international standard defines the ideal relationship between the legislature and the executive in a democracy. As the UN Human Rights Commission's Resolution 'Promotion of the Right to Democracy' affirms, it is *"the right of citizens to choose their governmental system through constitutional or other democratic means"*.[42] However, *"when a state has opted for the parliamentary model, it is imperative that the elected body, Parliament, should have sufficient competencies to exercise legislative power and to hold government accountable."*[43]

40. As outlined in greater details in the ODIHR Opinion on the Draft Code on the Organization and Functioning of the Parliament of Moldova, parliamentary oversight is one of the fundamental functions of parliaments, along their legislative and representative roles, and it constitutes an essential component of the system of checks and balances that characterizes democratic regimes based on the rule of law and holds the executive accountable.[44] Parliamentary oversight plays a vital role in preventing and detecting potential abuses of power, arbitrary actions, or unlawful and unconstitutional conduct by the government and public agencies; it serves as a mechanism for holding the executive to account, enhancing the quality and legitimacy of public policies, programmes, and practices, and ensuring their effective implementation.[45] Parliamentary control is also necessary to help improve the transparency of the government's actions and enhance public trust towards the executive.[46] At the same time, oversight power entails both a capacity (legal mandate) and sufficient resources (financial, human) to carry out the necessary tasks. Lastly, the basic relations of the Parliament with the Government are of key importance from the point of view of the functioning of the governmental system and should be regulated in the Constitution.[47]

41. The Draft Code outlines the procedures for the Prime Minister's designation, specifying the parliamentary majority's responsibility to propose a candidate, formalizing agreements between political groups (Article 164 (2)-(3)), and defining the conditions under which the President can designate the Prime Minister. It also sets limitations: if there are no functioning "governing bodies" in Parliament or if Parliament cannot convene, the President cannot make the designation (Article 164, paras. (6)-(7)).

42 See the UN *Resolution on Promotion of the right to democracy*, Doc E/CN.4/Res/1999/57.
43 See the *Venice Commission Opinion* on the balance of powers in the Constitution and the Legislation of the Principality of Monaco.
44 See *ODIHR Preliminary Opinion* on the Draft Code on the Organization and Functioning of the Parliament of Moldova (regarding Parliamentary Oversight, Title III), para.10.
45 Inter-Parliamentary Union (IPU), Tools for Parliamentary Oversight (2007), pp. 9-10, where "parliamentary oversight" is defined as "*the review, monitoring and supervision of government and public agencies, including the implementation of policy and legislation.*"
46 See Inter-Parliamentary Union (IPU), Tools for Parliamentary Oversight (2007), pp. 9-10.
47 See e.g., CoE Venice Commission, *Compilation of Venice Commission opinions and reports concerning separation of powers* , pages 9-10.

42. The provisions of the Draft Code reflect a "rationalized parliamentary system," where pressure is applied to Parliament if a vote of confidence is not achieved. However, it is important to recognize that such a situation, if not exceptional, depends on Parliament's ability to overcome internal divisions or else it may lead to deadlocks, making it difficult to form a majority, even after new elections. While the mechanisms and procedures appear well-designed, there is no guarantee that a lack of confidence can be effectively overcome. **The Draft Code does not address scenarios where the government cannot be accepted, particularly in cases of fragile or minority coalitions.** While the Draft Code outlines clear procedures for consultations and nominations, it does not fully address the risk of prolonged stalemates if no stable majority emerges. In such cases, additional safeguards, such as a constructive vote of no confidence or clearer caretaker government provisions, could help ensure continuity and reduce the risk of prolonged deadlock.

43. In addition, while requiring functioning governing bodies to organize debates and secure a vote of confidence is reasonable, the term "governing bodies" is not clearly defined, potentially causing legal uncertainty. While the Parliament requires an elected Speaker, Vice-speaker, and functioning Standing Bureau to operate, the situation differs when certain committees or factions temporarily lack leadership. **To avoid ambiguity, it is recommended that the Draft Code explicitly identifies the positions and bodies that must be filled for the President to nominate a Prime Minister.**

3.2. Commitment of the Government's Responsibility in Relation to the Adoption of a Draft Law

44. Article 106^1 (1) of the Constitution provides that the government may commit its confidence to a parliamentary vote on a programme, a statement of general policy or a draft law. When this procedure is triggered, the discussion on the draft law stops in the legislature (Article 169 (4) of the Draft Code), and the text is deemed adopted unless the Parliament passes a motion of no-confidence against the government within three days from the date of the presentation of the draft law (Article 106^1 (2) and 106^1 (3) of the Constitution). The Draft Code envisages this procedure for draft organic or ordinary laws (Article 169 (2)) and the possibility to commit its confidence with respect to several draft laws simultaneously. In essence, it enables the government to pass one or several statute(s), including of higher rank, without a vote in parliament. This powerful tool in the hands of the government is balanced by the possibility for the Parliament to table and adopt a motion of no confidence within three days, in which case the bill(s) is/are not adopted and the government is dismissed. This procedure forces MPs into a challenging position: accepting the adoption of a bill they might oppose *without a vote* or even without any obligation to deliberate, or instigating government instability, and possibly an institutional crisis.

45. As underlined in a recent Venice Commission Opinion, while the motion of confidence is regulated in the constitutions of the majority of states with a parliamentary system, this form of motion of confidence exists in three Council of Europe member States (France, Romania and the Republic of Moldova). It arises when the government commits its responsibility in relation to a specific bill, and the bill is adopted without a vote and even without deliberation unless the motion of confidence is adopted.[48] In

48 See, CoE Venice Commission, *France - Final Opinion on Article 49.3 of the Constitution*, CDL-AD(2025)025-e, adopted by the Venice Commission at its 143rd Plenary Session (online, 13-14 June 2025), paras. 26-30.

general, to ensure the balance of powers between the executive and the legislature, the adoption of a motion of no confidence against the government should be balanced with the possibility to dissolve the parliament and call snap elections to resolve the ensuing conflict between the executive and the legislature. Under this arrangement, the threat of dissolution can have a chilling effect on MPs, discouraging them from passing a motion of no confidence following the triggering of the procedure. By contrast, in Moldova, the risk of dissolution following the vote of a motion of no confidence is much more limited because the President can dissolve the parliament only under specific, limited circumstances.[49] This makes it more tempting for MPs to overuse a vote of no confidence as a tool and pass a vote of no confidence regularly when it should be reserved for extraordinary circumstances. **Consideration could be given to aligning the motion of no confidence procedure with a clearer possibility of parliamentary dissolution, thereby discouraging its overuse and preserving it as a tool for extraordinary circumstances.**

46. Since the procedure envisages the adoptions of bills without a vote or even deliberation, and it represents a rather significant interference by the executive in the powers and role of the legislature, it is important to envisage safeguards to limit the over-use or risks of abuse by the government.[50] Notably, neither the Constitution nor the Draft Code imposes substantive and procedural restrictions on the use of the contemplated procedure. Given the significant impact of this mechanism, several limitations could be considered, including restrictions on the subject matters of the bill, the type of acts (for instance excluding higher-ranking texts such as organic laws and constitutional amendments), or on the number of texts on which this procedure can be triggered.[51] In its Opinion on the similar mechanism that exists in France, the Venice Commission recommends a number of limitations that it considers necessary to preserve the legislative function of parliament, including the requirement to hold a thorough parliamentary discussion, excluding the possibility to activate the procedure for organic laws, limiting the frequency of activation, including through extraordinary sessions, and excluding the possibility to combine it with other tools of so-called rationalised parliamentarism.[52]

47. In light of the foregoing, **the legal drafters should include additional safeguards and limitations to prevent the misuse of this procedure, including prohibiting the use of the procedure on certain subject matters, removing from Article 169 (2) the possibility to use the procedure with respect to organic laws (and explicitly excluding the possibility to adopt constitutional amendments through this procedure), while reconsidering the possibility to adopt several laws simultaneously and limiting the frequency of activation, including through extraordinary sessions. The Draft Code should also explicitly require that the procedure may only be activated after a thorough discussion in the Parliament.**

49 According to Article 85 of the Constitution of Moldova, the Parliament may be dissolved by the President in the event of impossibility to form the Government or in case of blocking up the procedure of adopting the laws for a period of 3 months, following consultations with parliamentary fractions (para. 1), or if it has not accepted the vote of confidence for setting up of the new Government within 45 days following the first request and only upon declining at least two requests of investiture (para. 2).

50 See, CoE Venice Commission, *France - Final Opinion on Article 49.3 of the Constitution*, CDL-AD(2025)025-e, adopted by the Venice Commission at its 143rd Plenary Session (online, 13-14 June 2025), para. 48.

51 See, CoE Venice Commission, *France - Final Opinion on Article 49.3 of the Constitution*, CDL-AD(2025)025-e, adopted by the Venice Commission at its 143rd Plenary Session (online, 13-14 June 2025). For instance, in France, since 2008, this procedure can only be used on finance bill, social security finance bill, and one other bill per parliamentary session, effectively limiting number of bills ths procedure can be triggered; see Article 49 (3) of the *Constitution of France*.

52 See, CoE Venice Commission, *France - Final Opinion on Article 49.3 of the Constitution*, CDL-AD(2025)025-e, adopted by the Venice Commission at its 143rd Plenary Session (online, 13-14 June 2025), para. 56.

The possibility to combine it with other tools of so-called rationalised parliamentarism should also be excluded.

48. It is noted that in some other countries, the logic is reversed and the bill can only be considered adopted if the legislature approves a motion of confidence.[53] A combined approach reflecting additional safeguards and limitations regarding the use of the procedure and requiring a vote of confidence for the adoption of the bill, could help mitigate the government's overreach into the legislature's lawmaking authority while maintaining government stability. Although acknowledging that constitutional amendments may not be envisaged at the moment, in the long run, such changes in the Constitution would be advisable.

RECOMMENDATION B.

1. To better align no-confidence motions with the risk of dissolution to prevent overuse and reserve them for exceptional cases;

2. To include safeguards and limitations to prevent the misuse of the procedure whereby the government may commit its confidence to a parliamentary vote on a draft law, including by:

- prohibiting the use of the procedure on certain subject matters;
- removing from Article 169 (2) the possibility to use the procedure with respect to organic laws;
- explicitly excluding the possibility to adopt constitutional amendments through this procedure;
- reconsidering the possibility to adopt several laws simultaneously;
- limiting the frequency of activation, including through extraordinary sessions;
- explicitly requiring that the procedure may only be activated after a thorough discussion in the Parliament.

3.3. Legislative Delegation to the Government

49. Article 106^2 of the Constitution provides that the legislature can temporarily delegate to the Government the power to regulate, via ordinances, specific policy matters that fall under the legislative powers of Parliament. Articles 178 to 181 of the Draft Code further elaborate and operationalize this procedure.

50. Legislative delegation procedures serve several purposes.[54] Firstly, they allow the legislature to prioritize its work and resources on substantial policy matters that require thorough debate, leaving relatively minor or administrative matters to be addressed by the executive through delegation. Secondly, the use of delegated legislation may be relevant for regulating policy matters that are highly technical or complex and require specialized expertise that legislators may not necessarily have. By delegating authority

53 See e.g., the Constitution of the Czech Republic (Article 44.3) and the Constitution of Niger (Article 107).

54 See in the OSCE region, for examples, *Constitution of Andorra*, Article 59; *Constitution of Croatia*, Article 88; *Constitution of France*, Article 38; *Constitution of Germany*, Article 80; Constitution of Greece, Article 43; *Constitution of Italy*, Articles 76 and 77; *Constitution of Romania*, Article 115; *Constitution of Spain*, Section. 82.

to specialised executive agencies with relevant expertise, the legislature can ensure that technical policy areas receive specialist inputs. Delegated legislation can also be used to regulate policy matters which may need to be changed and updated more frequently, such as to implement or transpose changing international or regional norms into national law. In addition, delegated legislation can be beneficial to respond quickly to certain health emergencies. It enables the executive to take timely decisions and adapt the law, without going through the lengthy ordinary law-making procedure in parliament, nor resorting to a formal state of exception, which typically concentrates more powers within the central executive. Importantly, legislative delegation can also serve as a mechanism to ensure some continuity during periods of political gridlock, allowing the executive to make necessary legislative changes even when the legislature is divided and unable to pass statutes.

51. Originally meant as an exceptional tool to support parliament's law-making authority, legislative delegation can undermine parliament's role if unregulated or not accompanied by appropriate safeguards and limitations, thereby allowing the executive to excessively control policy matters within the legislative domain. To prevent such abuses, the constitutional and statutory provisions regulating the legislative delegation procedure should be carefully crafted.[55] These provisions should establish adequate safeguards to uphold the primacy of parliament in crafting and adopting legislation, and preserve the balance of powers between the legislative and executive branches.

52. In particular, safeguards should be provided to ensure that any legislative delegation to the Government is: authorized by the legislature and provided by law; temporary; limited in scope; justified with a demonstrated necessity for the delegation; subject to legislative oversight, allowing parliament to monitor and review both the exercise of delegated powers and the content of ordinance; open to judicial review, to ensure that delegated authority is exercised within constitutional and legal boundaries; and transparent, requiring the government to publish ordinances and provide explanations on how delegated powers are used. In this regard, Article 106^2 of the Constitution and Articles 178 to 181 of the Draft Code establish several important safeguards, which broadly align with comparative practices in the OSCE region. At the same time, **certain provisions contain gaps and could be further clarified or improved. Additionally, more stringent constraints could also be considered to further prevent the risk of abuse of the delegated legislation procedure.**

3.3.1. Grounds for Delegation

53. Delegated legislation can be used only in order to implement the Government's programme of activity (Article. 106^2.1 of the Constitution and Article 178 (2) of the Draft Code). Similar requirements exist in a few other countries.[56] They ensure that delegated legislation can only be used for measures that would contribute to the implementation of the priorities contained in the Government's policy programme, which has itself been discussed and approved by the legislature as part of the vote of investiture (Article 98 of the Constitution and Article 166 of the Draft Code). **To ensure this safeguard is effective, the Government should be required to justify**

55 See Principle 1, Compliance with Democratic Principles, ODIHR *Guidelines on Democratic Lawmaking for Better Laws*.
56 See, for example, *Constitution of France*, Article 38 (and from outside the OSCE region, e.g., *Constitution of Benin*, Article 102; *1991 Constitution of Burkina Faso*, Article 107; *Constitution of Chad*, Article 137; *Constitution of Mauritania*, Article 60; *Constitution of Togo*, Article 86).

and demonstrate how the delegation and contemplated ordinances would contribute to the implementation of specific components of its policy programme.

54. **Although the Government's programme may be relatively broad and include objectives such as maintaining public order, it may be relevant to also authorize the use of delegated legislation in case of certain emergencies.** This would allow the government to request parliament's authorization to issue ordinances to respond to certain crisis that may require quick adaptation of the law, without resorting to a state of exception (such as a state of emergency) that typically concentrates more powers in the central executive. This could also facilitate timely legislative responses to crisis that fall short of meeting the grounds for declaring a state of emergency.[57]

3.3.2. Temporal Restrictions

55. Article 178 (1) of the Draft Code appears to limit the possibility to use the delegated legislation procedure to the period between sessions of parliament. This temporal constraint means that ordinances can only be issued by the government when the legislature is in recess, and arguably that the legislature regains its law-making authority when sitting. While this arrangement protects the law-making authority of the parliament, it may lead to difficulties in certain circumstances. In case an emergency requiring a prompt adaptation to the law arises when the Parliament is sitting, the government would either have to use the accelerated law-making procedure in parliament, or if the grounds are met, to resort to a state of exception. The latter may not enable a sufficiently quick response to mitigate the crisis, while the former would lead to a temporary concentration of powers in the executive. **To address this gap, it could be envisaged to allow the use of the delegated legislative procedure even during parliamentary sessions.**

56. If such arrangement were to be considered, the Draft Code should also clarify whether the legislature can consider and/or pass legislation on a matter delegated to the government while the delegation is still ongoing.

3.3.3. Material Restrictions

57. The use of ordinances is prohibited for regulating policy matters falling under the domain of organic laws (Article 106^2 (1) of the Constitution and Article 178 (2) of the Draft Code).[58] Organic laws' main purpose is to specify, supplement and operationalize specific provisions of the Constitution, particularly those related to the structure and functioning of state institutions, key government processes, and the guarantees for fundamental rights. In Moldova, policy issues regulated by organic statutes include core components of a constitutional democracy, such as, for examples, the electoral system; the regulation of political parties; the organisation and functioning of the Parliament, the Superior Council of the Magistracy and courts; the regulation of states of

57 Some comparative examples include – although from outside the OSCE region, e.g., Argentina (Article 76) where the Constitution permits the use of delegated legislation in case of 'public emergency', and Colombia (Article 150.10) where it is allowed in case of 'public necessity'

58 Organic laws have a special status under the Constitution. They subordinate to the Constitution but have a higher legal status compared to ordinary statute. This specific status is reflected in the conditions for their enactment, which are more stringent than for ordinary laws, since they require an absolute majority vote of all members of parliament after at least two readings to be adopted (Article 74.1 of the Constitution); organic laws cannot be subject to legislative delegation to the government (Article 106.b.1 of the Constitution), and they cannot be adopted, amended or abrogated during the period in which the mandate of the outgoing parliament is extended until the newly elected legislature starts its tenure (Article 63.3 of the Constitution).

exceptions; and the responsibilities and structure of decentralised entities.[59] The prohibition to regulate these matters via ordinance constitutes a robust safeguard for the primacy of the Parliament in lawmaking. It ensures that matters critical for the functioning of a constitutional democracy cannot be regulated by the Government through ordinance, and instead remain within the primacy of the legislature.[60] Similar restrictions are also found in other OSCE participating States.[61]

58. However, while the Constitution and the Draft Code prescribe a specific procedure for constitutional revision (Articles 141-143 of the Constitution and Articles 125-136 of the Draft Code),[62] they do not explicitly exclude constitutional laws from the scope of the delegated legislative procedure. To ensure that constitutional revisions follow the proper procedure**, it is recommended to explicitly exclude constitutional laws from the delegated legislation procedure.**

3.3.4. Sub-delegation

59. Article 106[2] of the Constitution and Articles 178-181 of the Draft Code regulate the delegation of legislative powers to the Government. The Constitution and the Draft Code are silent on the issue of sub-delegation by the Government. They neither authorize nor prohibit the Government from sub-delegating its delegated law-making power to another executive body, a regulatory or oversight institution, or a decentralised institution.

60. A few jurisdictions explicitly prohibit sub-delegation.[63] This prohibition ensures that the authority that enacts the ordinance is accountable to the legislature. Sub-delegation may blur the line of accountability, making it more difficult for the public to identify who has taken decisions and is accountable for them. On the other hand, sub-delegation may be relevant for regulating policy matters that are highly technical or complex and require specialized expertise. In these cases, sub-delegation to a specialized agency can result in better-informed policy decisions. **Therefore, it is recommended that the Draft Code provides for a general prohibition of sub-delegation, while envisaging an exception authorizing sub-delegation when explicitly authorized by the legislature in the enabling law.**

3.3.5. Content and Adoption of the Enabling Law

59 Article 72.c of the Constitution lists 15 subject matters that must be regulated by organic statutes. Article 72.c of the Constitution also extends organic laws to certain societal policy areas, such as the education system, labour laws, criminal legislation, the regulation of religious cults and the procedure for establishing economic zones. Furthermore, the Constitution includes 19 other mentions of the necessity of adopting organic laws to establish or further regulate specific institutions, fundamental rights and policy matters; see *Constitution of the Republic of Moldova* (as amended 2023), Articles 3.2, 12.4, 13.4, 17.1, 36.3, 41.3, 61.2, 63.1, 70.2, 78.6, 80.3, 97, 99.2, 108.2, 110.2, 110.3, 115.4, 123.2, and 133.5.

60 The Constitution further empowers the legislature to extend the domain of organic laws. Article 172.3.r of the Constitution allows parliament to regulate through organic statutes subject matters not explicitly designated as part of the organic legislative domain. Should the legislature wish to exclude a specific policy matter from the ordinance procedure without amending the Constitution, it can achieve this by regulating the matter through organic statute. This provision grants the legislature a flexible mechanism to restrict the scope of delegated legislation (in addition to the requirement to define the scope of delegation in an enabling law).

61 See, for example, *Constitution of Croatia*, Article 88; *Constitution of France*, Article 38 and Constitutional Council, *Decision 99-421DC*, 16 December 1999, para. 15 in which the Constitutional Council ruled that legislative matters falling under the domain or organic laws cannot be delegated to the Government; *Constitution of Greece*, Article 72.1; *Constitution of Romania*, Article 115.1; *Constitution of Spain*, Article 81.1.Outside of the OSCE region, see for examples, *Constitution of Chile*, Article 64; *Constitution of Colombia*, Article 150.10, *Constitution of Senegal*, Articles 77 and 78.

62 See OSCE/ODIHR, *Opinion on the Provisions of the Draft Code on the Organization and Functioning of the Parliament of Moldova Related to the Constitutional Revision Procedure* (Chapter IV), 19 May 2025.

63 See for examples, *Constitution of Andorra*, Article 59; *Constitution of Spain*, Article 82.3.

61. Article 106^2 of the Constitution and Article 178 (2) of the Draft Code require that any delegation of legislative authority should be made through an enabling law adopted by the Parliament, upon request from the Government. The enabling law should define the scope and duration of the delegation (Article 106^2 (2) of the Constitution and Articles 178 (3) and 179(1) of the Draft Code). This requirement is commendable and broadly aligns with good comparative practices, as it ensures that the Parliament retains ultimate control over the delegated legislation procedure. It guarantees that the delegation occurs only with legislative consent, that the Parliament determines the scope and duration of the delegation, and that such delegation is provided by law. Moreover, through the enabling law, the Parliament establishes judicially-enforceable terms and conditions on the availability and use of delegated powers. Importantly, it also allows the Parliament to modify or end the legislative delegation at any time, by amending or repealing the enabling legislation. However, as seen in comparative experiences, these safeguards are not always sufficient. Enabling laws sometimes grant excessively broad law-making powers to the executive for extended periods. In this context, **additional constraints could be considered in the Draft Code to further mitigate the risk of abuse.**

62. Regarding the scope of the legislative delegation, the Constitution and the Draft Code provide that the enabling law must define the scope of the delegation. To help prevent overly broad delegations, additional requirements could be introduced. Specifically, the **draft enabling law submitted by the government should explicitly specify the legislative matter(s) delegated, demonstrate how the contemplated ordinance(s) would contribute to the implementation of a specific component of government's policy programme, and justify the necessity of the delegation**. Additionally, the Draft Code could foresee **the possibility for the Parliament to include guiding principles in the enabling law to inform the content of government's ordinance enacted under the delegation, which the government would be required to follow**. These guiding principles would enable Parliament to have a degree of influence over the content of government ordinances.

63. Secondly, while the enabling law must define the duration of the delegation, neither the Constitution nor the Draft Code sets a maximum limit. Although relatively common in comparative practice, such arrangement raises concerns, as it may allow the legislature to delegate some of its law-making authority to the government for an extended period. To mitigate this risk, a few jurisdictions impose a maximum duration, typically ranging from six months to one year.[64] This approach ensures that delegations remain temporary while still granting the legislature flexibility in determining their appropriate length within the prescribed limit. This does not entirely prevent prolonged delegation of certain policy matters as the government can submit a new enabling law after the existing one expires. However, such a requirement compels the government to justify the need for a new delegation and provides the legislature with an opportunity to examine, debate and vote on the new request. **Therefore, to prevent overlong legislative delegation and reinforce its temporary nature, it is recommended that the Draft Code prescribe a maximum duration for the delegation.**

64. Furthermore, the Draft Code does not specify whether the enabling law applies solely to the incumbent government and legislature or whether it also binds subsequent governments and the next legislature. It is not clear whether the delegation continues or lapses when a new government is formed following the removal of the current

64 For example, the maximum duration of legislative delegation is six months in Croatia (*Constitution of Croatia*, Article 88); Colombia (*Constitution of Colombia*, Article 150.10), and one year in Chile (*Constitution of Chile*, Article 64).

government, or when a new legislature takes office after the dissolution of the current legislature or the expiration of its tenure. If the authority for delegated legislation originates from Parliament, its continuation should not depend solely on changes in government. Rather, it is for Parliament to decide whether such powers should lapse, instead of this occurring automatically upon a government's resignation. However, given that delegated legislation can only be used for measures that would contribute to the implementation of the priorities contained in the government's policy programme, it would be logical for the enabling law to automatically lapse upon the dismissal of the government, dissolution of the parliament or expiration of its tenure.[65] **Therefore, it is recommended to specify in the Draft Code that the enabling law automatically lapses upon the dismissal of the government, dissolution of the Parliament or expiration of its tenure.**

65. Article 178 (2) of the Draft Code provides that enabling laws would have the status of organic statutes, and, as such, would require an absolute majority vote of all MPs with at least two readings (Article 74 (1) of the Constitution). While such arrangement is rare in comparative practice,[66] it is to be welcomed. It ensures time for parliamentary examination and debate on the necessity and scope of the legislative delegation. The requirement of an absolute majority vote, combined with the proportional representation electoral system for electing the unicameral parliament, also fosters cross-party agreement, which is welcome. By contrast, the vast majority of constitutional systems with delegated legislation procedures require only a simple majority vote in parliament to adopt enabling laws. In such systems, when the executive has the support of (and control over) a majority in parliament, the executive may more easily resort to the delegated legislation procedure, which can significantly encroach the parliament's role. This risk may somewhat be reduced in bicameral systems, where the two chambers of parliament may have different partisan compositions, and both must approve the enabling law. However, in unicameral system such as Moldova, the requirement of absolute majority vote appears commendable. A few constitutions with unicameral legislature go further by requiring a qualified majority vote to ensure broader cross-party agreement and limit the potential for abuse by an executive with a compliant parliamentary majority.[67] **If there is a desire to secure greater cross-party agreement and higher political consensus when delegating legislative authority to the government, legal drafters could consider defining a specific higher threshold for the adoption of enabling laws.**

66. Finally, the Constitution and the Draft Code foresee judicial and legislative oversight mechanisms for the use of delegated legislative procedure. The Constitution provides for facultative judicial review of enabling laws and government ordinances (Article 135 (1.a) of the Constitution). The Constitution and the Draft Code also stipulate that, if the enabling law so requests, the Government must submit ordinances to Parliament for *ex post* approval (Article 106^2 (4) of the Constitution and Article 179 (2) of the Draft Code). **To further strengthen legislative scrutiny of the Government's use of delegated powers, legal drafters could consider supplementing the Draft Code with a provision allowing the Parliament to introduce additional control mechanisms in**

65 Several jurisdictions explicitly specify that enabling laws automatically lapse upon dissolution of parliament: in Mauritania, for example, enabling laws automatically lapse upon dissolution of the lower house of parliament. Similarly, in Morocco, enabling laws automatically lapse if either or both of the two chambers of the bicameral parliament are dissolved.

66 Colombia similarly requires an absolute majority vote of members of parliament to adopt enabling laws. However, unlike Moldova, Colombia has a bicameral legislature, and each of the two chambers must approve enabling laws by an absolute majority vote.

67 For instance, in Venezuela, enabling laws require a three-fifths majority vote of all members of the National Assembly, and in Benin, they require a two-thirds majority vote of all members of the National Assembly.

the enabling law. These could include, for instance, a requirement for the Government to submit a progress report to the Parliament on the use of delegated legislative powers, a duty to share draft ordinance with the relevant parliamentary committee for input before publication, a duty to conduct *ex ante* impact assessment and/or provide rationale, or any other control mechanisms deemed relevant by the legislature.[68]

3.3.6. Enactment and Legal Status of Ordinance

67. Once delegation is granted through the enabling law, the Government may enact ordinances to regulate legislative matters delegated to it (Article 106^2 (1) of the Constitution and Article 178 (2) of the Draft Code).

68. Article 102 (4) of the Constitution provides that government ordinances must be signed by the Prime Minister and countersigned by the ministers responsible for their implementation. Ordinances enter into force on the date of publication in the Official Gazette of the Republic of Moldova (Article 102 (4) of the Constitution and Article 181 (1) of the Draft Code). Ordinances do not need to be signed nor promulgated by the President of the Republic.

69. The requirement that ordinances be signed by the Prime Minister and the ministers responsible for their implementation is commendable. Since ministers are individually accountable to, and can be dismissed upon order from the Prime Minister (Article 98 (6) of the Constitution), ultimate decision-making regarding the content of ordinances is likely to rest with the Prime Minister in cases of disagreement within the government. However, the countersignature requirement fosters dialogue and exchange of views within the government on the content of contemplated ordinances. **To further strengthen collegiality and collective decision-making, legal drafters could consider introducing in the Draft Code a requirement that ordinances be adopted in the council of ministers**.[69]

3.3.7. Considerations Regarding the Content of Ordinance

70. The Constitution and the Draft Code do not define ordinance content. Best practice requires ordinances to cite their enabling law explicitly. This helps ensure that ordinances are provided by law and have a legitimate legal basis. It may also help prevent ultra vires ordinances, and facilitates judicial review by the Constitutional Court. **Therefore, it is recommended that the Draft Code require government ordinances to reference the enabling law on which they are based. Legal drafters could also consider supplementing the Draft Code with a prohibition of retroactive ordinances in line with the principle of legal certainty under the rule of law**.[70] Retroactive application of ordinances not only creates legal uncertainty but also undermines the parliament's legislative authority by retroactively modifying rules previously defined by parliament through legislation.

3.3.7. Scrutiny and Approval of Government Ordinances by Parliament

71. From a comparative perspective, the parliament's primacy in the legislative delegation procedure is typically upheld through two key mechanisms. First, the parliament

68 See, for examples, Article 82.6 of the *Constitution of Spain* which provides that '*The acts of delegation may provide for additional control devices in each case, without prejudice to the jurisdiction of the Courts*.'

69 See, for examples, *Constitution of Benin*, Article 102; *1991 Constitution of Burkina Faso*, Article 107; *Constitution of the Central African Republic*, Article 76; *Constitution of the Republic of the Congo*, Article 158; *Constitution of France*, Article 38; *Constitution of Mauritania*, Article 60; *Constitution of Togo*, Article 86; *Constitution of Niger*, Article 106.

70 See, for example, *Constitution of Croatia* Article 88, and, *Constitution of Spain*, Article 83.b.

predetermines the scope and duration of the legislative delegation through the enabling law (see section 4.5 above). Second, the parliament retains ultimate authority over the content of delegated legislations, by reviewing, and approving or rejecting, government ordinances after their enactment.

72. Article 106^2 (4) of the Constitution and Article 179 (2) of the Draft Code provide that the Parliament may require, in the enabling law, the government to submit a draft law for the approval of ordinances by a specified deadline for its subsequent approval by the legislature. Failure to submit the draft law on approval of ordinances by the deadline specified in the enabling law results in the termination of the effects of the ordinances (Article 106^2 (4) of the Constitution and Article 179 (3) of the Draft Code). If the Parliament rejects the draft law on approval of ordinances, the ordinances are repealed (Article 179 (5) of the Draft Code). If the Parliament approves or does not consider the draft law on approval of ordinances within the specified deadline, the ordinances remain in effect and may later on be amended or repealed only by law (Articles 106^2 (4) and 106^2 (5) of the Constitution and Articles 179 (4) and 181 (2) of the Draft Code). The decision to approve or reject a draft law on approval of ordinances is made through simple majority vote (Article 179.6 of the Draft Code). If the enabling law does not require the submission of a draft law for ordinance approval, government ordinances remain in force beyond the delegation period. Once the period set for issuing ordinances expires, ordinances may be amended or repealed only by law (Article 181 of the Draft Code). In essence, this arrangement means that the legislative scrutiny of government ordinances is not automatic. The government must submit its ordinances to the legislature for consideration and approval or rejection only when the Parliament explicitly requires so in the enabling law. **This arrangement is rare in comparative practice,[71] and raises concerns as it may limit legislative scrutiny of government ordinances.**

73. To ensure legislative scrutiny of delegated legislation, jurisdictions have devised different approaches. In some countries, the government is required to submit ratification bill to the legislature for all ordinances. If the government fails to submit the ratification bill by the deadline specified in the enabling law, or if parliament rejects the ratification bill, the ordinances lapse. If parliament does not consider the ratification bill, the ordinances remain in effect but keep a regulatory status. If parliament approves the ratification bill within the specified deadline, the ordinances remain in effect, acquire legislative status, and may later on be amended or repealed only by statute. This arrangement ensures that ordinances are submitted to the legislature, but does not guarantee parliamentary scrutiny as there is no obligation to include the ratification bill in the parliamentary agenda, meaning it may never be examined.

74. In some other countries, ordinances are subject to sunset clauses, meaning they automatically lapse after a specified period of time unless ratified by the legislature. Under this arrangement, the logic is reversed; delegated legislation remains temporary unless explicitly approved by the legislature.[72] Such arrangement ensures that delegated legislation enacted by the government remain in force beyond the delegation period only with parliamentary approval. An alternative approach could be to render ordinances null and void if the ratification bill has not been considered by parliament -

71 Similar arrangement exists in Romania; see *Constitution of Romania*, Article 115.3.

72 In Croatia, for example, delegated legislation automatically lapses one year after the delegation was granted unless parliament decides otherwise; see *Constitution of Croatia*, Article 88; in the Central African Republic, ordinances automatically lapse if they are not ratified by parliament within the deadline specified in the enabling law; *Constitution of the Central African Republic*, Article 42.

as opposed to simply submitted by the government to parliament - within the specified timeline. This would prevent the submission of a ratification bill from being a mere formality with no follow-up, and would incentivize parliament to scrutinize government ordinances. Under this arrangement, there would be three possible scenarios: adoption of the ratification bill, which confers legislative status to the ordinance; rejection of the ratification bill, which retains the ordinance's regulatory status; and non-submission or non-examination of the ratification bill, both of which render the ordinance null and void. **Therefore, with a view to enhance legislative scrutiny of government ordinances, it is recommended to include in the Draft Code that ordinances automatically lapse if not examined by the Parliament, or at a minimum, that a ratification bill for all ordinances must be submitted to the Parliament within the deadline specified in the enabling law.**

75. Finally, to ensure that the Parliament retains ultimate authority over the content of delegated legislation, it should have the authority to amend ordinances when voting on a ratification bill. As ratification bills follow the ordinary lawmaking procedure, the legislature can introduce amendments to the ratification bill, and thus amend the ordinances. **For clarity, legal drafters could explicitly state in the Draft Code that the Parliament may amend or partially repeal ordinances during ratification.**

RECOMMENDATION C.

Regarding the legislative delegation procedure:

1. To require enabling laws to explicitly specify the legislative matter(s) being delegated, demonstrate how the delegation and contemplated ordinance(s) would contribute to the implementation of specific components of the government's policy programme, justify the necessity of the delegation, and allow the Parliament to define in the enabling law guiding principles and additional oversight mechanisms to inform and scrutinize the content of government's ordinance enacted under the delegation;
2. To authorize the use of the legislative delegation procedure in specific emergency situations – that fall short of meeting the grounds for declaring a state of emergency – and during parliamentary sessions;
3. To explicitly exclude constitutional laws from the legislative delegation procedure;
4. To prohibit sub-delegation, unless explicitly authorized by the legislature in the enabling law;
5. To prescribe a maximum duration for the legislative delegation, and specify that the enabling law automatically lapses upon the dismissal of the government, dissolution of the Parliament or expiration of its tenure.
6. To introduce a prohibition on retroactive ordinances in line with the principle of legal certainty under the rule of law;
7. To provide that ordinances automatically lapse if not examined by parliament or, at a minimum, require that a ratification bill for all ordinances be submitted to the Parliament within the deadline specified

in the enabling law, while explicitly specifying that the Parliament has the authority to amend ordinances and repeal parts thereof during the ratification process.

4. Appointment and Dismissal From Public Office (Articles 202-208 and 187)

4.1. General Rules and Procedures

76. The Draft Code contains detailed general provisions on the appointment to and dismissal of public officials. Article 202 defines Parliament's authority to appoint and dismiss persons from public office. Article 203 establishes the principles and procedure for selecting candidates for public office through open competition. Article 204 details the steps of the open competition process, including application process. Article 205 outlines how candidates are proposed for appointment/nomination and the procedure for dismissals. Article 206 specifies that a parliamentary committee reviews appointment proposals for compliance with the law and submits a report to Parliament. Article 207 describes how the Parliament considers appointments and dismissals, including discussions, reports, and voting procedures. Article 208 states that appointees must take an oath before the Parliament, with the process being verified by a committee. Article 209 sets deadlines for filling vacancies in public office.

77. According to the principles of separation of powers and the rule of law, parliaments may make such decisions only for those public officials whom it has authorized to exercise their powers and only in cases expressly provided by law. The Draft Code does not explicitly specify which public officials these provisions apply to. Additionally, the special legal status of certain officials, such as members of independent bodies who may have guarantees like irremovability, must be taken into account (see Section 4.2).[73] **To prevent future disputes, particularly concerning dismissals, it is recommended to amend the text to specify which public officials may be subject to dismissal, with special emphasis on irremovability of members of independent state organs.**

78. Positively, the selection of candidates for appointment is based on open competition, merit, professionalism and integrity, transparency, and equal, non-discriminatory treatment (Article 203 (1)). The Draft Code provides detailed provisions regarding candidate interviews, the involvement of sectoral committees and parliamentary factions in the deliberation process, and the final decision-making by Parliament. Given the constitutional principle of openness in parliamentary sessions (Article 65 (1)) and the emphasis on transparency in the Draft Code, procedures related to the appointment and dismissals of public officials are also public.[74] However, the Constitution allows Parliament to hold closed-door sessions under certain circumstances (Article 65 (2)). **To ensure transparency and prevent excessive use of closed sessions, it is advisable to include explicit provisions in the Draft Code restricting their use to exceptional cases in appointment and dismissal procedures. Closed sessions may be justified,**

73 See Venice Commission *Compilation of Venice Commission opinions and reports concerning judges*, 18 July 2023.

74 See OSCE/ODIHR *Democratic Guidelines on Democratic Lawmaking for Better Laws* para. 24., however, in light of democratic accountability, it is also important in the case of other parliamentary procedures. See also Venice Commission: *Parameters on the relationship between the parliamentary majority and the opposition in a democracy: a checklist*, para. 65.

particularly during committee deliberations, where classified information might be reviewed, and members may be more susceptible to external pressure.

79. Article 207 (5) of the Draft Code provides that *"Parliament shall appoint to or dismiss persons from public office by a decision adopted by a majority of the Members of Parliament present, unless the Constitution of the Republic of Moldova provides for another majority."* The procedure of selection, nomination and appointment should be, to the maximum extent possible, based on a cross-party consensus. At a minimum, mechanisms should be in place which would reduce the dominance of the parliamentary majority within such collective bodies or limit the relevance of the affiliation of the office-holders with the governing party or a coalition. In that case, the requirement of a qualified majority may be even detrimental to the opposition in the long run, if it is not supplemented with an efficient anti-deadlock mechanism: without such a mechanism the replacement of an official at the end of their term may be problematic, and the qualified majority rule will therefore help to cement the influence of the current governing majority.[75] **In this respect, the decision on appointment and dismissal of the aforementioned officials should be taken by a special, qualified majority of all MPs, not only those of present, while ensuring effective deadlock-breaking mechanisms are in place.**

80. Lastly, the Draft Code does not ensure that selection and appointment processes are guided by the principles of gender balance and diversity.[76] The OSCE Athens Ministerial Council Decision on Women's Participation in Political and Public Life calls on participating States to *"consider providing for specific measures to achieve the goal of gender balance in all legislative, judicial and executive bodies."*[77] **In order to increase women's representation, it is recommended to supplement the Draft Code with provisions ensuring that gender considerations are taken into account throughout the selection and appointment process. This could consist of introducing a mechanism that ensures that the relative representation of women and men is taken into consideration during appointments, though not at the expense of the basic criterion of merit.**

4.2. Selection of Constitutional Court Judges

81. The independence of the judiciary is a fundamental principle and an essential element of any democratic state based on the rule of law.[78] The principle is also crucial to upholding other international human rights standards.[79] This independence means that

75 See the *Parameters on the relationship between the parliamentary majority and the opposition in a democracy: a checklist*, para. 142.

76 According to Council of Europe's Recommendation Rec (2003)3, the Member States should provide for gender-balanced representation in all appointments made by a minister or government to public committees and in posts or functions whose holders are nominated by government and other public authorities; See also the Appendix to the *Recommendation Rec (2003)3 of the Committee of Ministers to CoE Member States on the balanced participation of women and men in political and public decision-making*, adopted on 30 April 2002. Furthermore, *General Assembly Resolution 66/130General Assembly Resolution 66/130*, adopted on 19 March 2012, encourages States "to appoint women to posts within all levels of their Governments, including, where applicable, bodies responsible for designing constitutional, electoral, political or institutional reforms", para. 8.

77 See the *OSCE Ministerial Council, Decision No. 7/09*, Women's Participation in Political and Public Life, para. 20.

78 See UN Human Rights Council, Resolution on the Independence and Impartiality of the Judiciary, Jurors and Assessors, and the Independence of Lawyers, *A/HRC/29/L.11*, which stresses "the importance of ensuring accountability, transparency and integrity in the judiciary as an essential element of judicial independence and a concept inherent to the rule of law, when it is implemented in line with the Basic Principles on the Independence of the Judiciary and other relevant human rights norms, principles and standards". As stated in the *1990 OSCE Copenhagen Document*, "the rule of law does not mean merely a formal legality which assures regularity and consistency in the achievement and enforcement of democratic order, but justice based on the recognition and full acceptance of the supreme value of the human personality and guaranteed by institutions providing a framework for its fullest expression" (para. 2).

79 See *OSCE Ministerial Council Decision No. 12/05* on Upholding Human Rights and the Rule of Law in Criminal Justice Systems, 6 December 2005. See also European Court of Human Rights (ECtHR), *Campbell and Fell v. the United Kingdom* (Application no.

both the judiciary as an institution and also individual judges must be able to exercise their professional responsibilities without being influenced by the executive or legislative branches or other external sources. While every State is entitled to reform its judicial system in which its courts and judges operate, reform of the judiciary should respect longstanding international standards on the independence of the judiciary, the separation of powers and the rule of law, and other relevant obligations.

82. The requirement of independence refers, in particular, to the procedure for the appointment of judges, and guarantees relating to their security of tenure until a mandatory retirement age or the expiry of their term, where such exist, the conditions governing promotion, transfer, suspension of their functions, and the actual independence of the judiciary from political interference by the executive branch and legislature. As the UN Human Rights Committee has noted, "*States should take specific measures guaranteeing the independence of the judiciary, protecting judges from any form of political influence in their decision-making through the constitution or adoption of laws establishing clear procedures and objective criteria for the appointment, remuneration, tenure, promotion, suspension and dismissal of the members of the judiciary and disciplinary sanctions taken against them."*[80] In its Opinion, the Consultative Council of European Judges (CCJE) has also stated that *"European practice is generally to make full-time appointments until the legal retirement age"*[81]

83. This chapter analyses the role of the Parliament in appointing two Constitutional Court judges; however, it does not delve into the fundamental principles governing judicial appointment. Rather than providing a detailed examination of the broader framework of judicial selection, the focus remains on Parliament's specific involvement in this process within the margins of Article 187 and general rules under Articles 203-205.

84. According to Article 187 of the Draft Code, the Parliament appoints two judges to the Constitutional Court in line with Article 136 of the Constitution, and the selection process follows the rules outlined in the Draft Code (Articles 203-205).[82] According to these provisions, the selection of Constitutional Court judges is conducted through a transparent competition open to all eligible candidates, with the active involvement of the relevant sectoral committee in interviewing applicants. The selection process must comply with Article 138 of the Constitution, requiring candidates to possess outstanding judicial knowledge, high professional competence, and at least 15 years of experience in the legal field, legal education, or scientific activity.

85. There is a variety of mechanisms for judicial appointments across the OSCE region.[83] It is generally emphasized that undue political influence over the appointment process should be avoided, and that candidates are selected based on their merits and never on political considerations.[84] Selection of certain number of judges by the parliament is an

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7819/77, 7878/77, judgment of 28 June 1984), para. 78. See also *Olujić v. Croatia* (Application no. 22330/05, judgment of 5 May 2009), para. 38; and *Oleksandr Volkov v. Ukraine* (Application no. 21722/11, judgment of 25 May 2013), para. 103.

80 See *General Comment 32, United Nations Human Rights Committee*, 9 to 27 July 2007 (CCPR/C/GC/32). See also *Recommendation CM/Rec(2010)12 of the Committee of Ministers to member states on judges: independence, efficiency and responsibilities*, para. 49, (Adopted by the Committee of Ministers on 17 November 2010 at the 1098th meeting of the Ministers' Deputies)

81 See *Opinion no. 1(2001) of the CCJE for the attention of the Committee of Ministers of the Council of Europe on Standards concerning the independence of the judiciary and the irremovability of judges.* para. 49.

82 According to the Constitution, two members are appointed by the Parliament, two by the Government and two by the Superior Council of Magistrates (Article 136 (2)).

83 Across OSCE, judicial appointments to constitutional courts vary widely, including mixed appointment systems involving multiple branches of government (France, Italy, Russia, Turkey, Romania, Portugal, Czech Republic, Bulgaria), bipartisan legislative approval (Germany, Austria, Netherlands), and presidential nominations with parliamentary confirmation (Georgia, Ukraine, Serbia).

84 See *2010 CoE Recommendation CM/Rec(2010)12)*, para.46. *CCJE Opinion No. 10*, para.8. See also *2007 Venice Commission's Report on Judicial Appointments*, paras 25-32.

acceptable model, as *"appointment of the constitutional judges by different state institutions has the advantage of shielding the appointment of a part of the members from political actors"*.[85] However, the election of two constitutional judges with the ordinary majority "of the Members of Parliament present" raises questions. In the European constitutional tradition, the election of constitutional judges by parliament is often subject to a qualified majority requirement.[86] This ensures that the selection reflects broad political consensus rather than being dominated by a single majority. Such a safeguard is particularly crucial when the President and the Parliament share the same political affiliation, as it prevents them from appointing judges simultaneously without cross-party support.[87]

86. As also previously noted by ODIHR, *"[w]hen the appointment of judges to the highest level is the subject of a vote by Parliament, as this is often the case in OSCE participating States, the risk that political considerations prevail over the objective merits of a candidate cannot be excluded. […] In any case, judicial councils or other independent bodies should have the decisive role when appointing judges, and not the political bodies, which, if they are involved at all, should be able to object only on procedural grounds."*[88] While recognizing Parliament's responsibility in appointing judges, the Draft Code fails to ensure safeguards against political bias in the selection process. At a minimum, consideration should be given to reviewing the required majority for electing members of the Constitutional Court. In its recent opinion the Venice Commission also noted that *"the appointment of Constitutional Court judges is a sovereign prerogative of the nominating bodies and reflects the trust vested in the candidates. Therefore, this process cannot be equated with the bureaucratic, purely merit-based selection process applicable to public servants."*[89] **It is recommended that a rule be established requiring a qualified majority for the election of Constitutional Court judges, along with effective deadlock-breaking mechanism. This would help ensure broader consensus and reduce the risk of politicization in the process. By introducing such a requirement, the selection of these judges would be more likely to reflect a balanced and impartial approach, safeguarding the independence of the Constitutional Court while maintaining the integrity of the parliamentary role in the process.**

87. At the same time, it may in some cases be difficult to reach a qualified majority, which may occasionally lead to deadlock, resulting in the inability for the Constitutional Court to sit and issue decisions due to lack of quorum. To avoid this situation, several countries in the OSCE region have devised default solutions and/or anti-deadlock

85 See *Venice Commission Opinion on the draft amendments to three constitutional provisions relating to the Constitutional Court, the Supreme State Prosecutor and the Judicial Council of Montenegro*, para. 21.

86 For example, in Poland, Judges of the Constitutional Tribunal are elected by a three-fifths majority in the Sejm; in Spain, appointments require a three-fifths majority in the respective chambers of Parliament. In Germany, both chambers (Bundestag and Bundesrat) select judges with a two-thirds majority; in Georgia Parliament confirms the candidates by a three-fifths majority vote. In its Opinion on amendments to the Act of 25 June 2015 on the Constitutional Tribunal of Poland, Venice Commission, *CDL-AD(2016)001*, the Venice Commission recommended that "the Constitution be amended in the long run to introduce a qualified majority for the election of the Constitutional Tribunal judges by the Sejm, combined with an effective anti-deadlock mechanism" also proposing as an alternative, "a system by which a third of the judges of the Constitutional Tribunal are each appointed / elected by three State powers – the President of Poland, Parliament and the Judiciary" (paras. 140-141). See also e.g., Opinion on Questions Relating to the Appointment of Judges of the Constitutional Court of Slovak Republic, Venice Commission, *CDL-AD (2017)001*, paras. 57-58, where it is noted that "an election of constitutional judges by qualified majority allows depoliticisation of the process of the judges' election, because it requires that the opposition also has a significant position in the selection process" although this "can lead to a stalemate between majority and opposition but this can be overcome through specific anti-deadlock mechanisms".

87 See the *Venice Commission Final Opinion on the revised Draft Constitutional Amendments on the Judiciary in Albania*, para. 37.

88 See *ODIHR Opinion on the Laws on Courts, on Judicial Administration and on the Legal Status of Judges of Mongolia*, 3 March 2020, paras. 125 -128.

89 See *Venice Commission Opinion on Draft Law on the Constitutional Court of Moldova*, 17 March 2025 paras.64 and 65.

mechanisms, in addition to ensuring that the incumbent may remain in office until a successor is appointed.[90] One deadlock breaking mechanism used in some countries involves lowering the required majority after several unsuccessful votes.[91] However, providing for different, decreasing majorities in subsequent rounds of voting has the drawback that it may not be an effective incentive for the majority to reach a compromise in the first round of vote knowing that in subsequent rounds, the voting threshold will simply decrease; in principle, an anti-deadlock mechanism should be unattractive both to the majority and the minority to encourage compromise on both sides.[92] It is therefore crucial that the lowered threshold still requires a qualified majority vote and a minimum quorum to ensure that elected judges have the support of a broad political spectrum. Another potential deadlock-breaking mechanism could consist in the nomination of new candidates by a neutral body, such as the judicial council or the national human rights institution. **Should a qualified majority be contemplated, it should be accompanied by a tailor-made, effective deadlock breaking mechanism, which does not jeopardize the independence and impartiality of the Constitutional Court.**

88. In addition, the Draft Code lacks sufficient clarity on the selection process for Constitutional Court judges, relying instead on general rules applicable to public office. **Although some elements outline a general framework for parliamentary selection, several key details remain undecided, such as the composition of the selection committee – which should reflect gender parity while also seeking to involve civil society representatives or representatives of the legal profession, the guarantees required from candidates, and whether applications should be spontaneous or by invitation.**

89. **This gap could be addressed through a specific bill adopted by Parliament, introducing additional rules or exemptions for the selection process.** It is also essential that **the rules regarding the composition and selection/appointment to the Constitutional Court should be designed to prevent discrimination in the selection process, ensure the accessibility of the process and gender balance and a pluralistic composition in the Constitutional Court**.[93] By reflecting the composition of society, a pluralistic composition can enhance a constitutional court's legitimacy for striking down legislation adopted by a parliament as the representative of the people[94] and more generally foster greater public trust in the impartiality of the court.[95] **There should also be provisions enshrining the principle of openness, transparency and accessibility in the nomination, selection and appointment process for judges of the Constitutional Court.**

90 See *Compilation of Venice Commission Opinions and Reports Relating to Qualified Majorities and Anti-Deadlock Mechanisms In Relation to the Election by Parliament of Constitutional Court Judges, Prosecutors General, Members of Supreme Judicial and Prosecutorial Councils and the Ombudsman*, Venice Commission, 27 June 2018, pp. 4-8;

91 *Ibid.* In Italy, for example, for those judges of the constitutional court who are to be elected by parliament, the two-thirds majority requirement is reduced to three fifths after three unsuccessful ballots; see *Legge Constituzionale 22 Novembre 1967*, Republic of Italy, Article 3.

92 See e.g., Venice Commission, *Opinion on the draft amendments to three constitutional provisions relating to the Constitutional Court, the Supreme State Prosecutor and the Judicial Council of Montenegro*, *CDL-AD(2013)028*, paras. 5-8.

93 See Venice Commission, *Opinion on Proposed Voting Rules for the Constitutional Court of Bosnia and Herzegovina*, 8 November 2005, para. 13; and *Opinion on Amendments to the Act of 25 June 2015 on the Constitutional Tribunal of Poland*, 11 March 2016, para. 119.

94 See e.g., OSCE/ODIHR, *ODIHR Opinion on Two Bills of the Republic of Poland on the Constitutional Tribunal (as of 24 July 2024)*, para. 62; see also e.g., Venice Commission, *Opinion on Proposed Voting Rules for the Constitutional Court of Bosnia and Herzegovina*, CDL-AD(2005)039, 14 November 2005, para. 3.

95 See e.g., Venice Commission, *Opinion on the Law on the High Constitutional Court of the Palestinian National Authority*, CDL-AD(2009)014, 20 March 2009, para. 48.

90. It is also worth noting that the Constitution does not prohibit the reappointment of Constitutional Court judges after their six-year term, which jeopardizes the principle of independence and impartiality. This raises the question of whether sitting judges must undergo the same selection process if they seek reappointment. The possibility of reappointment could compromise judicial impartiality, as judges may be influenced by the prospect of securing another term.

RECOMMENDATION D.

1. To address potential disputes, particularly regarding dismissals, the text should clearly specify which public officials may be dismissed, emphasizing the irremovability of members of independent state organs.
2. To strengthen legitimacy, decisions on appointing and dismissing public officials should require a qualified majority of all MPs, not just those present, while ensuring that effective deadlock-breaking mechanisms are in place.
3. To increase women's representation in public office, the Draft Code should include provisions ensuring gender parity in appointments while upholding merit.
4. To ensure broader consensus and reduce politicization, a qualified majority should also be required for electing Constitutional Court judges, along with effective deadlock-breaking mechanism.
5. To address gaps in the parliamentary selection process, a specific bill could define details such as the selection committee's composition – which should reflect gender parity while also seeking to involve civil society representatives or representatives of the legal profession, candidate guarantees, and the application process. It should also enshrine transparency in nominating Constitutional Court judges.
6. To ensure that the rules regarding the composition and selection/appointment to the Constitutional Court should be designed to prevent discrimination in the selection process, ensure the accessibility of the process and gender balance and a pluralistic composition in the Constitutional Court.

5. Relations With the Constitutional Court (Articles 190-193)

91. Overall, Articles 192-194 of the Draft Code primarily serve as a reaffirmation of the separation of powers and the supremacy of the rule of law. However, in terms of concrete obligations, it remains largely general, lacking specific procedural or substantive requirements, and instead functions as a reiteration and extension of existing constitutional principles.

92. For example, Article 192 outlines the requirement for the Constitutional Court to submit an annual report on its activities and emphasizes parliament's obligation to address unresolved constitutional issues. However, this provision appears somewhat redundant, as Article 190 already requires the Parliament to take action on unconstitutionalities.

Similarly, Article 193 reinforces the principle of separation of powers while emphasizing the necessary collaboration between parliament and the judiciary. While both branches operate independently, the Parliament has a constitutional duty to uphold judicial independence and impartiality through its legislative role and actions concerning the judiciary. Furthermore, Article 194 requires the Parliament to cooperate with judicial institutions, including courts and the prosecution, while refraining from interfering in their functional activities, serving as a concrete reaffirmation of the separation of powers. At the same time, the Parliament is entitled to receive information on the judiciary's administrative functioning through an annual report and may request additional reports or data on justice-related matters. **To enhance clarity and effectiveness, provisions like these should be accompanied by more specific procedural and substantive requirements to ensure their enforceability and practical impact, with due respect to judicial independence.**

93. In addition, Article 190 of the Draft Code obligates the Parliament to prioritize laws addressing legal gaps identified by the Constitutional Court, ensuring unconstitutional provisions are corrected. However, the term "address" is vague: it could refer to non-binding recommendations or binding directives requiring legislative action. **To ensure clarity and enforceability, the Draft Code should clearly distinguish between "address" and "recommendation."**

94. Article 191 of the Draft Code addresses the constitutional review of treaties and international agreements signed by Moldova before their ratification process is completed. This provision grants MPs and political parties represented in parliament the right to refer a signed treaty or international agreement to the Constitutional Court prior to its ratification. The referral must be made from the moment the treaty is registered in parliament until the authorization for ratification is granted. Notably, the treaty cannot be ratified before the Court has issued its decision, and any identified unconstitutionality must be resolved before the ratification process can proceed, either by making reservations to the treaty or by amending the Constitution if necessary.

95. While the mechanism follows a classical dualist approach similar to countries with a system of incorporating international law, some aspects would need further clarification.[96] First, it appears that the term "international treaties" is limited to those agreements explicitly classified as such, potentially excluding other international agreements that could also affect constitutionality. Article 11 of the Law on International Treaties of the Republic of Moldova lists the treaties that are applicable.[97] **For clarity, such treaties could either be explicitly listed in the Code, for example, treaties on the status of persons, fundamental human rights and freedoms whose denunciation requires a parliamentary decision or a reference should be made to the Law on International Treaties of the Republic of Moldova.**

96. Second, if the treaty is found unconstitutional, Article 191 (4) of the Draft Code presents only two options: making reservations to the treaty (if permitted) or amending the Constitution to align the treaty with constitutional requirements. However, the rejection of the treaty as a potential solution is not addressed. Lastly, the President of

96 Such practice reflects procedures in other OSCE participating States where constitutional courts review international treaties before ratification to ensure compliance with national constitutions. For example, in Bulgaria, the Constitutional Court has the authority to conduct a priori reviews of treaties. Similarly, in France, the Constitutional Council can be requested to review an international treaty before ratification to determine its compatibility with the Constitution. In Georgia, the Constitutional Court has the authority to review international treaties upon request to ensure their compliance with constitutional norms. In Ukraine, the Constitutional Court can provide an opinion on whether an international treaty aligns with the Constitution before it is ratified by Parliament.

97 See Law No. 595-XIV of 24.09.1999 on International Treaties of the Republic of Moldova, N 24-26/137 of 02.03.2000.

the Republic of Moldova plays a role in the ratification of treaties by submitting them to the Parliament, but this specific function is not explicitly mentioned in Article 86 (1), which may create inconsistencies with the Constitution and the Law on International Treaties of the Republic of Moldova. **These issues could be better clarified.**

RECOMMENDATION E.

1. To ensure clarity and enforceability, the Constitutional Court should explicitly define the wording "address" in its rulings, distinguishing between recommendations and binding directives.
2. For clarity, the Draft Code could either list relevant treaties, such as those on personal status and fundamental rights, or refer to the Law on International Treaties of Moldova.

6. PARLIAMENT'S RELATION WITH THE LOCAL PUBLIC ADMINISTRATION (ARTICLES 194-196)

97. According to Article 109 (1) of the Constitution**,** local public administration is organized on the basis of principles of local autonomy, decentralization of public services, eligibility of the local public administration authorities and consultation of citizens on local problems of special interest. These principles are reflected in the Draft Code, supplemented by the requirement of transparency and institutional cooperation.

98. According to Article 194, the Parliament's relationship with local public administration (including the Autonomous Territorial Unit of Gagauzia and the left bank of the Dniester River) is based on principles of autonomy, legality, transparency, accountability, and cooperation. A specific role is assigned to the standing committee on the merits of the case, tasked with addressing cooperation and challenges between national and local levels. Parliament is granted the right to request information and decisions made by local public administrations, highlighting the hierarchical relationship between the two levels of government. Due to the fact that the subject of supervision provided by the Draft Code is the functioning of these public bodies in accordance with legal requirements, these provisions are in line with the principle of autonomy, even in the case of territories having special legal status. [98]

99. However, while oversight mechanisms are essential, they must be exercised in a manner that is fair, objective, and non-discriminatory, ensuring they do not serve as tools for intimidation. Provided that the standing committee's requests are specific and accompanied by appropriate legal safeguards, such oversight is proportionate and not unduly burdensome. At the same time, allowing any branch of the state to hold unchecked and absolute power would contradict the fundamental principles of the rule of law as a constitutional foundation. A 30-day deadline is set for the authority to provide the required information, with no provision for an extension, unless there is a compelling reason to do so. However, there are no regulations **specifying the consequence if a local government fails to comply with this requirement**, which may result in inconsistent or arbitrary implementation. **To ensure legal clarity and**

98 According to the *European Charter of Local Self-Government*, The administrative supervision of the activities of the local authorities shall aim only at ensuring compliance with the law. (Article 8. para. 2)

uniform enforcement, such consequences or sanctions should be incorporated into Article 194 (6) of the Draft Code.

100. Article 194 establishes that local administrations must operate within the legal framework set by the Constitution and cannot take actions that threaten the territorial integrity, national security, or legality of the state. This aligns with international law, particularly the UN Charter, which prohibits any threat or use of force against the territorial integrity or political independence of any state (Article 2(4)). Local actions that seek to undermine national sovereignty, such as unconstitutional declarations of independence, secessionist movements, or attempts to alter national borders, are considered a threat to both national security and territorial integrity. However, this is generally interpreted to apply to situations where there is an imminent threat to the state's sovereignty or territorial integrity. In practice, for an action to be deemed a threat, it often must involve clear and present danger or an explicit attempt to undermine national security.

101. In addition, even though lawmakers may have a legitimate interest in ensuring national security and territorial integrity, the scope of this Code should be appropriately limited to protect political debate. When the restriction is based on the protection of national security or of public order, the UN Human Rights Committee warns that it is not compatible "to suppress or withhold from the public information of legitimate public interest that does not harm national security or to prosecute journalists, researchers, environmental activists, human rights defenders, or others, for having disseminated such information."[99] **It is recommended to review Article 194 to specify that the threat must be imminent, as defined by the principles of sovereignty and non-interference under international law. This revision would support the understanding that not all actions by local administrations automatically pose a threat; rather, it is those actions that directly challenge the state's territorial integrity or national security that would be considered threats.**

102. It is particularly important because, according to Article 196, if local public administration authorities deliberately violate the provisions of the Constitution or legislation, or if their actions jeopardize territorial integrity, national security, or the rule of law, their activity may be suspended by Parliament. This is partly safeguarded by the fact that, the Code requires that the circumstances justifying the suspension be examined by administrative courts (Article 196 (2)), which is welcomed.

103. Article 195 of the Draft Code outlines provisions for institutional dialogue between the Parliament and local public authorities, emphasizing consultation and participation. As a general rule, sectoral committees are required to inform and consult with local public authorities on matters directly affecting them, aligning with the principles of participation[100] and subsidiarity.[101] Additionally, when it comes to draft normative acts that concern the status of the Autonomous Territorial Unit of Gagauzia or the powers of its authorities, Article 195.5 mandates that these acts must receive approval from the People's Assembly of Gagauzia, in accordance with the specific provisions of the Constitution (Article 111). This ensures that the unique status and autonomy of Gagauzia are respected, reinforcing the constitutional framework that governs its relationship with the central government, in line with the Constitution.

99 See Human Rights Committee *Concluding observations on the Russian Federation (CCPR/CO/79/RUS).*
100 See OSCE/ODIHR *Democratic Guidelines on Democratic Lawmaking for Better Laws*, para. 25.
101 See *European Charter of Local Self-Government*, Article 4.3.

RECOMMENDATION F.

To revise Article 194 of the Draft Code pursuant to which local administrations cannot take actions that threaten the territorial integrity, national security, or legality of the state more clearly so that the threat is defined as imminent, aligning with sovereignty and non-interference principles, ensuring only actions that directly endanger territorial integrity or national security qualify as threats, not all local administrative decisions.

7. BUDGETARY AUTONOMY (ARTICLES 210-211)

104. The Constitution grants to the Parliament the authority to approve the state budget—including that of its Secretariat and independent bodies, and oversee its implementation (Article 66 (h)). Article 210 of the Draft Code affirms this by recognizing Parliament's budgetary autonomy, with its financial resources allocated through the Secretariat's budget, which Parliament approves. Since the Parliament ultimately approves the state budget, ensuring its autonomy depends more on independent budgetary procedures and effective financial management than on the approval process itself. To uphold this autonomy, the Draft Code entrusts the Parliament's Secretariat with overseeing budgetary processes and managing financial resources independently. Article 211 of the Draft Code further reinforces the financial independence of independent public authorities by granting them the right to draft their own budgets, submit them to the Government, and follow parliamentary procedures in case of disputes, aligning with the Constitution. These provisions effectively reinforce Parliament's budgetary autonomy and strengthen the financial independence of public authorities, aligning with constitutional principles and promoting more transparent and accountable financial management.

8. THE LEGISLATIVE PROCESS

105. OSCE participating States have committed to ensuring that legislation will be "*adopted at the end of a public procedure, and [that] regulations will be published, that being the condition for their applicability*" (1990 Copenhagen Document, para. 5.8).[102] Moreover, key commitments specify that *"[l]egislation will be formulated and adopted as the result of an open process reflecting the will of the people, either directly or through their elected representatives*" (1991 Moscow Document, para. 18.1).[103] The ODIHR Guidelines on Democratic Lawmaking for Better Laws (2024) underline that "*all interested parties and stakeholders should have the opportunity to access the lawmaking process, be informed about it and be able meaningfully to participate and contribute*".[104] The Venice Commission's Rule of Law Checklist also emphasizes that the public should have a meaningful opportunity to provide input and may be a useful source of good practice.[105]

102 See *1990 OSCE Copenhagen Document*.
103 See *1991 OSCE Moscow Document*.
104 See *Guidelines on Democratic Lawmaking for Better Laws*, OSCE/ODIHR, 16 January 2024, Principle 7.
105 See *Rule of Law Checklist*, Venice Commission, CDL-AD(2016)007, Part II.A.5.

106. As such, public consultations constitute a means of open and democratic governance as they lead to higher transparency and accountability of public institutions, and help ensure that potential controversies are identified before a law is adopted. Consultations on draft legislation and policies, in order to be effective, need to be inclusive and to provide relevant stakeholders with sufficient time to prepare and submit recommendations on draft legislation.[106] To guarantee effective participation, consultation mechanisms should allow for input throughout the process, meaning not only when the draft is being prepared but also when it is discussed before Parliament, be it during public hearings or during the meetings of the parliamentary committees.

107. **ODIHR therefore recommends that the Draft Code be subject to transparent, inclusive, and extensive consultations throughout the adoption process.**

[END OF TEXT]

106 According to recommendations issued by international and regional bodies and good practices within the OSCE area, public consultations generally last from a minimum of 15 days to two or three months, although this should be extended as necessary, taking into account, inter alia, the nature, complexity and size of the proposed draft act and supporting data/information. See ODIHR, *Opinion on the Draft Law of Ukraine "On Public Consultations"* (1 September 2016), paras. 40-41.