Warsaw, 10 December 2024
Opinion-Nr.: GEN-MDA/503/2024 [NS]

OPINION ON THE DRAFT LAW "ON THE STATUS, CONDUCT AND ETHICS OF THE MEMBERS OF PARLIAMENT" OF MOLDOVA

MOLDOVA

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Based on an unofficial English translation of the Draft Law provided by the Parliament of the Republic of Moldova.

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EXECUTIVE SUMMARY AND KEY RECOMMENDATIONS

The present Opinion on the Draft Law on the Status, Conduct and Ethics of the Members of Parliament of the Republic of Moldova (Draft Law) follows the publication of an earlier Opinion in March 2024 that was specifically focusing on the conduct and ethics of parliamentarians. The present opinion analyses the other provisions of the Draft Law that have not been subject to the March 2024 review, in particular, those addressing the status and mandate of Members of Parliament (MPs), parliamentary immunity, their rights and obligations and incompatibilities.

MPs generally enjoy a special status with certain advantages and responsibilities designed to safeguard the free exercise of their mandate and protect them against pressures that may undermine their independence.

The Draft Law provides a comprehensive framework of guarantees necessary for elected representatives to exercise their mandates freely and independently. At the same time, the Draft Law would benefit from some revisions and additions. First, the provisions pertaining to the termination or removal of the mandate should be further elaborated to avoid misuse or politicization of the process. The system of parliamentary immunities should be fine-tuned to ensure a proper balance between safeguarding the effective democratic functions of parliament or the rights of any member MP or group of MPs and not fostering a culture of impunity. In particular, the Draft Law should be supplemented to provide for clear and objective criteria for lifting parliamentary immunity, while ensuring that the procedure is open, transparent and impartial. Finally, the Draft Law should seek to better address gender equality and diversity aspects in the status and working conditions of MPs.

More specifically, and in addition to what is stated above, ODIHR makes the following recommendations to further strengthen the provisions of the Draft Law in accordance with international standards and good practices:

A. Regarding MPs' mandate:

1. to clarify the ineligibility ground of "incapacity for work" leading to the termination of mandate by, inter alia, defining the authority which should establish such "incapacity" and the relevant procedural arrangements for removing a mandate on such ground, while ensuring that these provisions do not lead to the undue exclusion of persons with disabilities from political participation; [para. 31]

2. to reconsider the involvement of the standing committee in the procedure for removing a parliamentary mandate in case of "definitive impossibility to exercise the position of the MP for more than four consecutive months" and contemplate instead involving an independent concilium of medical professionals and provide adequate safeguards to ensure the confidentiality of any personal health data regarding the concerned MPs; [para. 32]
3. to define in the Draft Law the core and obligatory parliamentary activities that all MPs must participate in or cross-reference the relevant legislation regulating this issue; [para. 33]

4. to consider introducing a qualified majority vote in plenary to decide on the removal of an MP's mandate, while respecting due process guarantees and ensuring the right of defence for the concerned MP; [para. 34]

B. Regarding incompatibilities:

1. to specify in the Draft Law the positions "of public responsibility or public office", as well as "paid positions" which are incompatible with the exercise of an MP's mandate while re-assessing whether the scope of the incompatibilities is necessary and adequate in the context of Moldova and whether broader exemptions for paid activities could be considered, such as for sports, artistic activities or medical practice; [paras 38-39]

2. to allow anyone who becomes aware of the incompatibility of certain MPs to report this to the competent body; [para. 41]

3. to consider adding a prior (3-7 days) warning before an automatic termination of the MP's mandate if the respective MP has not acted to resolve the situation of "incompatibility", to make sure that the mandate is not removed due to some minor technical reason or human error; [para. 45]

C. Regarding parliamentary immunity in general:

1. to align Article 15 of the Draft Law with Article 70 (3) of the Constitution of Moldova by including a reference to the case when an MP is caught in flagrante delicto where inviolability shall not apply; [para. 50]

2. to reconsider the terminology used in the Draft Law with respect to parliamentary immunity to ensure a clearer distinction between the two forms of parliamentary immunity (non-liability and inviolability), which are of a different nature and which are usually regulated and applied in a quite different manner; [para. 51]

3. to clarify that the non-liability provided in Article 16 of the Draft Law continues to apply after the termination of the mandate of an MP, while the parliamentary inviolability provided in Article 15 ends with the expiry of the mandate; [para. 52]

D. To specify in Article 15 (3) which "actions of prosecution" may be carried out by the prosecution service and are not covered by the parliamentary immunity/inviolability, while also considering excluding the searches out of its material scope; [para. 59]

E. Regarding non-liability:

1. to specify in Article 16 (2) of the Draft Law what falls within the category of "other actions, which fall under the status of the MP", while also introducing a definition of "parliamentary duties", in order to define the exact scope of non-liability; [para. 61]

2. to clarify whether the non-liability applies irrespective of whether a particular expression was made by an MP inside or outside of parliament, including appearances in the media or in public meetings and debates; [para. 61]

3. to supplement Article 16 (3) of the Draft Law with other exceptions from non-liability for types or content of expression which States must prohibit or render punishable according to international law, including the "dissemination of ideas based on racial superiority", "advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence", sexual harassment and violence against women; [para. 66]

F. To provide clear and objective criteria and an open and transparent procedure for lifting parliamentary immunity/inviolability; [para. 76]

G. Regarding lifting non-liability:

1. To consider shortening the deadlines currently envisaged in the Draft Law, while ensuring that adequate and precise deadlines for each step of the procedure for lifting parliamentary immunity to ensure that parliamentary immunities may be lifted without undue delay, within a matter of a few days; [paras 82-85]

2. To envisage in the Draft Law a possibility for the responsible committee to seek assistance from politically neutral and competent outside experts that are of undoubted integrity and independence; [para. 88]

3. To envisage in the Draft Law an obligation for the MPs who receive the case related documents to maintain confidentiality and not disclose any information pertaining to the MP concerned and information of the case, subject to adequate sanctions in case of breach; [para. 90]

4. To specify in the Draft Law the reasons which would justify the MP's absence from the committee's sitting and plenary session where the issue of his/her immunity lifting are to be discussed. [para. 93]

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 commitments and provides concrete recommendations for improvement.

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Annex: Draft Law on the Status, Conduct and Ethics of the Members of Parliament of the Republic of Moldova (as of December 2023)

I. INTRODUCTION

1. On 7 February 2023, the Deputy Speaker of the Parliament of the Republic of Moldova sent to the OSCE Office for Democratic Institutions and Human Rights (hereinafter "ODIHR") a request for an assistance in the effort to reform the Parliament and strengthen the integrity of parliamentarians as well as public accountability, including by analyzing the relevant legislative proposals when they become available, to assess their compliance with international human rights standards and OSCE human dimension commitments.
2. On 13 February 2023, ODIHR responded to this request, confirming the Office's readiness to review the legislative proposal governing the conduct and ethics of "MP of the Republic of Moldova once the finalized text is shared with ODIHR. On 7 December 2023, the draft Law of the Republic of Moldova on the Status, Conduct and Ethics of the Members of Parliament (hereinafter "Draft Law") was submitted to ODIHR. Given the initial request to focus in particular on the conduct and ethics of parliamentarians, as an initial step, ODIHR prepared the *Opinion on Certain Provisions of the Draft Law* (hereinafter "the March Opinion"),[1] which primarily dealt with these aspects. This initial Opinion was sent to the requestor on 26 March 2024 and presented to the Parliament of Moldova on 28 March 2024. During the presentation of the Opinion, the Head of the Committee on Legal Affairs, Appointments and Immunities of the Parliament of Moldova expressed interest in further legal analysis of the entire Draft Law.
3. The present Opinion was prepared in response to the above follow-up request. It offers an assessment of the full text of the Draft Law, reviewing, in particular, the provisions relating to the status and mandate of MPs, parliamentary immunity, their rights and obligations and incompatibilities which were not covered in the March Opinion. The absence of comments on certain provisions of the Draft Law should not be interpreted as an endorsement of these provisions.
4. ODIHR conducted this assessment within its mandate to assist the OSCE participating States (hereinafter "pSs") in the implementation of their OSCE human dimension commitments.

II. SCOPE OF THE OPINION

5. The scope of this Opinion covers only the Draft Law submitted for review, in particular, its provisions relating to the status and mandate of MPs, parliamentary immunity, their rights and obligations and incompatibilities which were not covered in the March Opinion. Thus limited, the Opinion does not constitute a full and comprehensive review of the entire legal and institutional framework regulating the status and immunities of MPs, parliamentary rules and standards, as well as ethics and public integrity in the Republic of Moldova. For the comprehensive assessment of the Draft Law the present Opinion should be read in conjunction with the March Opinion.
6. The Opinion raises key issues and provides indications of areas of concern. In the interest of conciseness, it focuses more on those provisions that require amendments or

1 *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), available in English and in Romanian.

improvements than on the positive aspects of the Draft Law. 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 pSs in this field. When referring to national legislation, ODIHR does not advocate for any specific country model but rather focuses on providing clear information about applicable international standards while illustrating how they are implemented in practice in certain national laws. Any country example should be approached with caution since it cannot necessarily be replicated in another country and has always to be considered in light of the broader national institutional and legal framework, as well as country context and political culture.

7. Moreover, in accordance with the Convention on the Elimination of All Forms of Discrimination against Women[2] (CEDAW) and the 2004 OSCE Action Plan for the Promotion of Gender Equality[3] and commitments to mainstream gender into OSCE activities, programmes and projects, the Opinion integrates, as appropriate, a gender and diversity perspective.

8. This Opinion is based on an unofficial English translation of the Draft Law provided by the Parliament of the Republic of Moldova, which is annexed to this document. Errors from translation may result. Should the Opinion be translated in another language, the English version shall prevail.

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

III. LEGAL ANALYSIS AND RECOMMENDATIONS

1. Relevant International Human Rights Standards and OSCE Human Dimension Commitments

10. An overview of relevant international and regional standards and recommendations regarding the integrity and accountability of public officials and parliamentary integrity and ethics in general is provided in the March Opinion. This Sub-Section focuses on the standards and OSCE commitments relevant to the analysis of other aspects of the Draft Law, specifically the status and mandate of MPs, their rights and obligations, parliamentary immunities and incompatibilities.

11. OSCE pSs have committed to build, consolidate and strengthen democracy as the only system of government, and have recognized it as an inherent element of the rule of law.[4] Democracy is likewise one of the universal core values and principles of the United Nations, and the Council of Europe.[5] Respect for human rights and fundamental freedoms

2 See the *UN Convention on the Elimination of All Forms of Discrimination against Women* (CEDAW), adopted by General Assembly resolution 34/180 on 18 December 1979. The Republic of Moldova acceded to the Convention on 1 July 1994.

3 See the *OSCE Action Plan for the Promotion of Gender Equality,* adopted by Decision No. 14/04, MC.DEC/14/04 (2004), para. 32.

4 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

5 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 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*."

is an essential part of democracy and the rule of law. Furthermore, the importance of pluralism with regard to political organizations,[6] along with institutional and individual integrity of parliament and parliamentarians and public accountability have been recognized by OSCE pSs as core aspects of democratic governance and political life.[7] MPs generally enjoy a special status with certain advantages and responsibilities designed to safeguard the free exercise of their mandate and protect them against pressures that may undermine their independence.

12. International and regional human rights instruments do not regulate the status MPs, their rights and obligations and parliamentary immunity as such. A fortiori, MPs are entitled to all the rights applicable to any individual. At the same time, due to their specific functions and roles in a democratic society, they may also benefit from specific enhanced protection as well as certain limitations and/or obligations, compared to other citizens. In particular, in light of their mandate, elected representatives enjoy an elevated level of protection of their freedom of expression guaranteed under Article 19 of the ICCPR and Article 10 of the ECHR, given the fundamental importance of parliament as a unique forum for debate in a democratic society.[8] The system of "parliamentary immunities"[9] aims to ensure the protection of the democratic functions of parliament and provide guarantees necessary for elected representatives to exercise their mandates effectively without fear of interference from the executive or judiciary (see also Sub-Section 4 *infra*).

13. However, the protection offered by parliamentary immunity may in some specific cases come into conflict with rights protected by the International Covenant on Civil and Political Rights (ICCPR)[10] and the European Convention on Human Rights and Fundamental Freedoms (ECHR).[11] For example, any form of parliamentary immunity might interfere with the principle of equality before the law (Article 26 of the ICCPR; and Article 20 of the EU Charter of Fundamental Rights), since the parliamentarians are granted special legal protection that other individuals do not have, and the right of access to a court (Article 14 of the ICCPR, Article 6 (1) of the ECHR), which constitute essential elements of the rule of law. By their very existence the rules on parliamentary immunity may also contribute to undermining public confidence in parliament and in the democratic system as such.[12]

14. At the same time, the European Court of Human Rights (ECtHR) has expressly recognized that a system of parliamentary immunity cannot by itself, in principle, be regarded as imposing a disproportionate restriction on the right of access to a court as

6 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.

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

8 See e.g., ECtHR, *Karácsony and Others v. Hungary* [GC], nos. 42461/13 and 44357/13, 17 May 2016, para. 138.

9 The terminology used in OSCE participating States to regulate "parliamentary immunity" varies greatly; for the purpose of this Opinion, it is important to distinguish two forms of "parliamentary immunity", first "non-liability" (i.e., immunity against any judicial proceedings for votes, opinions and remarks related to the exercise of parliamentary office) and "inviolability" (i.e., special form of legal protection whereby certain legal/procedural measures, such as arrest, detention or prosecution, may not be taken against parliamentarians for statements or acts *unrelated* to the exercise of their parliamentary mandates without the consent of the parliament, potentially subject to some exceptions). See also ECtHR, *Karácsony and Others v. Hungary* [GC], nos. 42461/13 and 44357/13, 17 May 2016, para. 138.

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

11 See *Council of Europe's Convention for the Protection of Human Rights and Fundamental Freedoms* (ECHR), which entered into force on 3 September 1953. The Republic of Moldova became a State Party to the ECHR on 12 September 1997.

12 See Venice Commission, Report on the Scope and Lifting of Parliamentary Immunities, adopted by the Venice Commission at its 98th plenary session (Venice, 21-22 March 2014), para. 148.

embodied in Article 6 (1) of the ECHR.[13] However, the ECtHR will assess whether the said immunity pursues a legitimate aim connected with the protection of the democratic functions of parliament,[14] as opposed to the interests of individual parliamentarians,[15] and whether it is proportionate to that aim, considering that the broader an immunity, the more compelling its justification must be in order to be compatible with the ECHR.[16] Such immunity can be justified to the extent that it is suitable and necessary in order to ensure that the elected representatives of the people are effectively able to fulfil their democratic functions, without fear of harassment or undue interference from the executive, the courts and political opponents.[17] At the same time, a fair balance must exist between the general interest of the community and the need to safeguard the fundamental rights of individuals.[18]

15. As for relevant "soft law", *Resolution (97) from the Committee of Ministers of the Council of Europe (hereinafter "CoE") "On the Twenty Guiding Principles for the Fight against Corruption"*[19] addresses the problem of corruption in general. The Guiding Principle 6 states the need "*to limit immunity from investigation, prosecution or adjudication of corruption offences to the degree necessary in a democratic society*". The CoE Group of States against Corruption (hereinafter "GRECO") has evaluated its member States against this Guiding Principle in the context of several evaluation rounds.[20] Furthermore, the *OSCE Parliamentary Assembly Resolution on Limiting Immunity for Parliamentarians in Order to Strengthen Good Governance, Public Integrity and the Rule of Law in the OSCE Region (2006)* should be mentioned as one of the key instruments to ensure a functioning parliamentary integrity system.[21]

16. In addition, several documents of a non-binding nature underline the need to review parliamentary immunity rules to ensure that they do not hinder the addressing of harassment and violence against women in politics, and that they do not protect MPs who perpetrate such violence.[22]

17. It should be also noted that the 1990 OSCE Copenhagen Document requires OSCE pSs to "*ensure that candidates who obtain the necessary number of votes required by law are duly installed in office and are permitted to remain in office until their term expires or is otherwise brought to an end in a manner that is regulated by law in conformity with democratic parliamentary and constitutional procedures*."[23] Furthermore, the OSCE/ODIHR-Venice Commission Guidelines on Political Party Regulation[24] state that

13 See ECtHR, *A. v. United Kingdom*, no. 35373/97, 17 December 2002, para. 83.
14 Such as protecting free speech in Parliament and maintaining the separation of powers between the legislature and the judiciary (ECtHR, *A. v. United Kingdom*, no. 35373/97, 17 December 2002, para. 77).
15 *Ibid.* *A. v. United Kingdom*, para. 85. See also ECtHR, *Cordova v. Italy*, no. 40877/98, 30 January 2003, paras. 62-64, where the ECtHR underlined that parliamentary non-liability should not extend to the private behaviour and remarks of the member concerned that are "*not connected with the exercise of parliamentary functions in their strict sense*".
16 See ECtHR, *A. v. United Kingdom*, no. 35373/97, 17 December 2002, para. 78.
17 See the Venice Commission, Report on the Scope and Lifting of Parliamentary Immunities, adopted by the Venice Commission at its 98th plenary session (Venice, 21-22 March 2014), paras. 35-36.
18 See also ECtHR, *Cordova v. Italy*, no. 40877/98, 30 January 2003, para. 64.
19 See CoE, *Resolution (97) from the Committee of Ministers of the Council of Europe (hereinafter "CoE") "On the Twenty Guiding Principles for the Fight against Corruption"*.
20 For instance, for Moldova, see the latest Third Interim Compliance Report adopted by GRECO at its 98th Plenary Meeting (Strasbourg, 18-22 November 2024). .
21 See OSCE Parliamentary Assembly, *Resolution on Limiting Immunity for Parliamentarians in Order to Strengthen Good Governance, Public Integrity and the Rule of Law in the OSCE Region* (2006).
22 See e.g., Parliamentary Assembly of the Council of Europe (PACE), *Resolution 2274 (2019) on Promoting parliaments free of sexism and sexual harassment*, 9 April 2019. See also UN Special Rapporteur on violence against women, its causes and consequences on violence against women in politics, *2018 Report*, A/73/301, 2018, p. 19; and ODIHR, *Addressing Violence Against Women in Politics in the OSCE Region Toolkit - Tool 2: Addressing Violence against Women in Parliaments* (2022), p. 27.
23 *1990 OSCE Copenhagen Document*, para. 7.9.
24 ODIHR-Venice Commission, *Guidelines on Political Party Regulation*, 2nd Edition, 2020, paras. 131-132, citing also the case of ECtHR, *Paunović and Milivojević v. Serbia*, no. 41683/06, 24 May 2016, para. 63.

there should be no imperative mandate imposed on deputies because, "*according to a generally accepted democratic principle, the parliamentary mandate belongs to an individual MP, because he/she receives it from voters via universal suffrage and not from a political party*"[25]. Furthermore, the Venice Commission's Report on the recall of mayors and local elected representatives[26] stresses that the same principles of prohibiting an imperative mandate should apply to all representatives, at regional and local level as well as at national level.

2. BACKGROUND AND GENERAL COMMENTS

18. As mentioned in the March Opinion, the Draft Law contains provisions related to the status, privileges and mandate of MPs in general, their rights and obligations, parliamentary immunity, as well as rules regarding their conduct and ethics. If the Draft Law is adopted, upon entry into force, it will abrogate the Law No. 39 of 7 April 1994 on the Status of Members of Parliament, which currently regulates the start and end of the mandate, incompatibilities, parliamentary immunity and MPs' rights and obligations resulting from the mandate.[27] At the same time, Article 71 of the Draft Law specifies that when adopted, it will be "*applied in corroboration with the provisions of the Rules of Procedure of the Parliament adopted by Law no. 797/1996*" but have precedence in case of contradiction.

19. A number of issues addressed in the Draft Law duplicate or largely overlap with the provisions of the parliamentary Rules of Procedure (hereinafter "RoP").[28] This is the case, for instance, with Chapter III of the Draft Law on Parliamentary Immunity which covers issues that are addressed under Chapter 5 of the RoP. Furthermore, at the meeting with the Parliament of Moldova, where the March Opinion was presented, ODIHR representatives were informed that the Parliament was also working on a draft Code on the Organization and Functioning of the Parliament which provisions can also potentially overlap with the provisions of the Draft Law and those contained in the RoP of the Parliament. Therefore, as already indicated in the March Opinion, **the legal drafters should to the extent possible avoid duplication and overlaps between the Draft Law and the RoP and/or other legislation on the organization/functioning of the Parliament** and consider introducing relevant amendments to the RoP and/or cross-referencing relevant provisions**.**

20. Finally, as mentioned in the March Opinion, the Draft Law could be further enhanced by more systematically including gender, diversity and inclusion perspectives, ensuring that the respective provisions effectively address discrimination on all grounds, harassment and violence against women and marginalized communities (see also comments in paras. 51 and 57-58 of the March Opinion).

25 *Ibid.* para. 131.
26 See <https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2019)011rev-e>, para. 18.
27 See *Law No. 39 of 7 April 1994 on the Status of Members of Parliament*, as last amended in March 2023.
28 See *Law of the Republic of Moldova No. 797 of 02 April 1996 for the adoption of Parliament's Rules of Procedure* (as last amended by LP52 of 16 March 2023).

3. MANDATE OF THE MEMBERS OF PARLIAMENT

3.1. Beginning of the Parliamentary Mandate

21. Article 3 (5) of the Draft Law mentions that "*the mandate of the MP shall be irrevocable, and the party, the socio-political organization or the electoral bloc on the list of which the MP was elected, shall lose the right to revoke them*". This provision is generally commendable as it recognizes the principle of free political mandate.[29] At the same time, it is not clear when the nominating entity "loses" the right to revoke an MP. This could lead to a situation where an elected MP's mandate could potentially be revoked within the period between the election and validation of the mandate. **The Draft Law should specify that the nominating entity does not have the right to revoke MPs' mandate from the date of an MP's election.**

22. Pursuant to Article 69(1) of the Constitution, MPs start exercising their mandate under the condition of prior validation. Pursuant to Article 62 of the Constitution, "*[u]pon the proposal submitted by the Central Electoral Commission, the Constitutional Court rules either on the validation of the mandate of the Member of Parliament, or on invalidation whenever electoral legislation has been infringed*." Article 4 (1) of the Draft Law states that "*the mandate of the MP shall start from the date of election provided it is validated*", which reflects the constitutional provisions, although a clearer mention of the procedure and timeline for validating the mandate by the Constitutional Court could be added. There are a variety of possible mechanisms of validation of parliamentary mandates when such requirement exists, validation by a constitutional court being one of them.[30] The issue of validation of the mandate of an MP is intrinsically linked to the issue of the validation of the election results. In this respect, ODIHR recommended in the past to clearly prescribe the deadlines and procedures for post-election complaints while considering empowering the Central Election Commission to enact the final election results, with a possibility of judicial review.[31]

23. Article 4 (4) of the Draft Law provides that "*the written oath shall be pronounced solemnly, signed by each MP*" (Article 4 (4)) and *"[t]he refusal to take the oath leads to the invalidation of the mandate, a fact taken note of by the plenum of the Parliament*" (Article 4 (5)). It is further stated in Article 4 (6), with respect to MPs whose mandates start in the course of the Parliament's term, that "*the oath is taken after the validation of the mandate*". Thus, this suggests that taking the oath as such does not validate a mandate.

24. Since the time of the validation of the mandate and oath-taking are different, there are uncertainties as to when certain obligations or requirements would start to be applicable to an MP. For example, Article 10 (2) of the Draft Law states that "*the incompatibility shall start from the moment of the mandate validation and taking the oath"*. This should be clarified.

29 As mentioned by ODIHR on many occasions, the revocation and recall of elected representatives is at odds with the principle of representation; recall is closely connected with the system of the imperative mandate which is a relic of systems where the actor who administered the mandate was not the electors but the party. Once an MP is elected, the nominating organization should have no authority over the revocation of the mandate. See ODIHR-Venice Commission, *Joint Opinion on the Draft Constitution of the Kyrgyz Republic* (19 March 2021), para. 69; and ODIHR, *Opinion on the Rules of Procedure of the Jogorku Kenesh of the Kyrgyz Republic*, 24 May 2023, paras. 31 and 38.

30 See e.g., Inter-Parliamentary Union (IPU), The Parliamentary Mandate – A Global Comparative Study, <mandate_e.pdf (ipu.org)>.

31 See ODIHR, *Republic of Moldova Early Parliamentary Elections, 11 July 2021 - ODIHR Election Observation Mission Final Report*, p. 26.

3.2. Termination of the Mandate

25. Article 6 of the Draft Law provides the grounds for the termination of an MP's mandate, including expiration of the term; resignation from MP's position, mandate removal, incompatibility and death.

26. Article 6 (3) further states that "*the termination of the MP mandate shall be established by the Parliament through the decision voted by the majority of present MPs declaring the vacancy of the mandate*". In addition, Article 6 (4) states that in case of termination of the MP mandate, the documents shall be sent to the Central Electoral Commission for the initiation of the validation of the mandate of the "alternate candidate". At the same time, contrary to what is provided in the law in force,[32] the Draft Law does not specify that **the alternate candidate should be the candidate who is next on the list, and in case of refusal by the next candidate, the order of the list should continue to be followed. It is recommended for this to be clarified.**

27. Article 9 (1) of the Draft Law further enumerates grounds and reasons for "removal of the mandate of the Member of Parliament" (*ridicarea mandatului de deputat*) or compulsory termination of the mandate based on the following grounds: " (a) *Ineligibility [in circumstances further elaborated in Article 9 (2)*[33]*]*, (b) *Definitive impossibility to exercise the position of the MP for more than four consecutive months*; (c) *Groundless absence from any parliamentary activity for more than four months*."

28. It is of utmost importance that the grounds and procedure for the removal of MPs mandate are clearly laid out and enumerated to avoid uncertainty and potential politicization of such important matters. While Article 9 (2) (g) of the Draft Law lists a refusal to take the oath as one of the instances for ineligibility being a ground for removing an MP's mandate, Article 4 (5) of the Draft Law suggest that the refusal to take the oath leads to the "invalidation of the mandate". This is not consistent and may lead to ambiguities, and needs to be clarified.

29. Article 9 (3) envisages that in cases of ineligibility provided for under items (a)-(d),[34] the mandate of the MP shall cease by law. Article 9 (4) further specifies that in the other cases (provided for under para. (2) items (d)-(f) of the same Article),[35] the Parliament shall decide, at the request of the National Integrity Authority (hereinafter "NIA"), on the removal of the MP's mandate.

30. First, it is noted that both Article 9 (3) and Article 9 (4) of the Draft Law refer to Article (2) (d) on conflicts of interest meaning that it is unclear in such case whether the mandate shall cease by operation of law or whether decision by parliament upon a request from NIA is needed. This should be clarified Second, **further clarification should be provided on how the request from NIA should be lodged with the Parliament, what**

32 Article 2 (10) of the *Law No. 39 of 7 April 1994 on the Status of Members of Parliament* provides that "*the vacant mandate shall be assigned to the next alternate on the list of the party, the socio-political organization or the electoral bloc for which the deputy whose mandate was declared vacant has been a candidate*".

33 According to Article 9 (2) of the Draft Law, "*The MP becomes ineligible in the following cases: (a) recognition of the incapacity for work; (b) in case of conviction for intent crimes and/or sentencing to prison (deprivation of liberty) by final and irrevocable court decision, regardless of whether the act was committed before or after the validation of the mandate; (c) loss of citizenship of the Republic of Moldova; (d) establishing, through the final act of ascertainment, of the direct or through a third person conclusion of a legal act, making or participating in the decision-making without solving the actual conflict of interests in accordance with the provisions of the legislation on the settlement of the conflict of interests; (e) failure to submit the declaration of wealth and personal interests or refusal to submit it pursuant to Law no.132/2016 on the declaration of wealth and personal interests; (f) disposition by the court, through an irrevocable decision, of the confiscation of unjustified assets; (g) refusal to take the oath*."

34 i.e., (a) incapacity for work; (b) conviction for intent crimes and/or sentencing to prison by final and irrevocable court decision; (c) loss of citizenship of the Republic of Moldova; (d) conflict of interests (see footnote 41).

35 Article 9 (2) (e) to (g) cover to the failure to submit the declaration of wealth and personal interests, court decision to confiscate unjustified assets and refusal to take the oath.

justifications need to be provided, as well as the procedural aspects of the relevant decision of the Parliament, i.e., how the Parliament scrutinizes and approves the NIA request, in which majority the relevant decision should be adopted, etc.

31. The reasons for removing the mandate of an MP as per Article 9 of the Draft Law include the MP's ineligibility in case of "*recognition of the incapacity for work*". As indicated in the March Opinion, terms such as "incapacity" used in legislation could potentially be used to exclude or disqualify persons with disabilities,[36] contrary to Articles 12 and 29 of the 2006 UN Convention on Rights of Persons with Disabilities, which state that persons with disabilities "*enjoy legal capacity on an equal basis with others in all aspects of life*" and protect the right to political participation, respectively.[37] To avoid ambiguities and misinterpretation of this provision, **it is recommended to clarify the above ground for ineligibility leading to the removal of the parliamentary mandate in order not to lead to the exclusion of persons with disabilities from participation in political life**. In particular, it would be advisable **to clarify which authority should establish the existence of such ground and the relevant procedural arrangements for removing a mandate on such ground**.

32. Moreover, the procedure for termination of the mandate for reason of "*definitive impossibility to exercise the position of MP for more than four consecutive months*" (Article 9 (1)) should be reconsidered. First of all, such a ground for removal of the mandate could be problematic as an MP has been elected by the people and his/her mandate is irrevocable[38] (see also para. 21 *supra*). In case of impossibility to exercise the mandate for health reasons, a voluntary resignation of the concerned MP would be a more logical option rather than a compulsory termination of his/her mandate by the Parliament. Second, in terms of procedure, Article 9 (5) provides that "*the final impossibility to exercise the position of the MP for more than four consecutive months shall be ascertained by the lead standing Committee, upon the notification by the President of the Parliament, on the basis of health certificates. The Committee shall draw up a report and propose to the Parliament the removal of the MP's mandate"*. In general, given the extremely sensitive nature of health-related personal information, the processing of such personal data should be accompanied by stringent safeguards appropriate to the risks at stake.[39] This is especially important in cases where the concerned MPs, especially those from the political minority, may be vulnerable to undue pressure or harassment from the

36 See e.g., ODIHR, *Guidelines on Promoting the Political Participation of Persons with Disabilities* (2019), pp. 36 and 82, underlining in particular that "*Election laws that include language referring to "capacity", "inability", "illness", "incapacity" or "competency" should all be reviewed to ensure that persons with disabilities are not at risk of exclusion or disqualification from political and public life*".

37 UN Committee on the Rights of Persons with Disabilities, General Comment 1 on Article 12 of Convention on the Rights of Persons with Disabilities (2014), para. 49, which stipulates that "*States parties have an obligation to protect and promote the right of persons with disabilities to access the support of their choice in voting by secret ballot, and to participate in all elections and referendums without discrimination. The Committee further recommends that States parties guarantee the right of persons with disabilities to stand for election, to hold office effectively and to perform all public functions at all levels of government, with reasonable accommodation and support, where desired, in the exercise of their legal capacity*."

38 In France, for example, there is no such provision except in the case of mental disease (guardianship) which has to be acknowledged by the Constitutional Council upon request of the bureau of the National Assembly or the Senate.

39 See Council of Europe, *Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data* (CETS No. 108), 28 January 1981, which entered into force in Moldova on 1 June 2008, and which provides that *"[p]ersonal data revealing racial origin, political opinions or religious or other beliefs, as well as personal data concerning health or sexual life, may not be processed automatically unless domestic law provides appropriate safeguards*". The Republic of Moldova has also signed on 9 February 2023, although not yet ratified, the *Protocol amending the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data* (CETS No. 223), which aims at further enhancing personal data protection mechanisms; the Explanatory Report to the Protocol further provides examples of the types of additional safeguards that could be considered alone or in combination regarding the handling of such sensitive data, including the data subject's explicit consent, a law covering the intended purpose and means of the processing or indicating the exceptional cases where processing such data would be permitted, a professional secrecy obligation, measures following a risk analysis, a particular and qualified organisational or technical security measure. See also e.g., Committee of the Convention for the protection of individuals with regard to the automatic processing of personal data (Convention 108), *Guidelines on the Protection of Individuals with regard to the Processing of Personal Data by and for Political Campaigns* (2021), para. 4.2.4.

executive or other MPs in the form of unfounded allegations and findings regarding their ability to perform parliamentary. Hence, the involvement of a standing Committee, which composition would generally not avoid politicization, to review health certificates and draw up a report may not fulfil such requirements. It would instead be advisable **to involve an independent concilium of medical professionals the (gender-balanced and diverse) composition of which should be approved by the parliament with a qualified majority vote**. In any case, confidentiality of such personal health data should be ensured and mechanisms in place to prevent undue disclosure.

33. With respect to the ground for lifting the mandate in case of "groundless absence from any parliamentary activity for more than four months", it is not clear from the Draft Law which core and obligatory parliamentary activities all MPs must participate in. If this refers to the sittings of the Parliament and of its working bodies as mentioned in Article 31 of the Draft Law on "justified absences", this should be specified. If the above provision remains as broad as the Article suggests ("absence from any parliamentary activity"), this might cause unnecessary ambiguities and misuses, such as, for example, removal of the MP's mandate in case of non-participation in parliamentary receptions and social gatherings, which could be also interpreted as "parliamentary activity". **Unless this is regulated in another legislative act of Moldova, which should be cross-referenced in the Draft Law, further clarifications should be provided in this respect.** As per usual practice, and as suggested in Article 31 of the Draft Law (and relevant provisions of the Rules of Procedure),[40] mandatory participation is required in the parliamentary plenary sitting, as well as in the work of the parliamentary committees, with appropriate disciplinary sanctions for unjustified absences in place (see Article 68 of the Draft Law providing for the possible loss of salary rights, benefits and compensations). The committee chair should have the right to report to the relevant parliamentary governing bodies cases of unjustified absences, requesting that the MP is replaced.

34. As a general recommendation, in case of mandate removal, **consideration could be given to require a qualified majority vote in plenary in order to ensure that the decision to remove the mandate is supported by a broad majority across the political spectrum, and not the parliamentary majority only, while respecting due process guarantees and ensuring the right of defence, to avoid "politicization" of the process.**

RECOMMENDATION A.

1. To clarify the ineligibility ground of "*incapacity for work*" leading to the termination of mandate by, *inter alia*, defining the authority which should establish such "incapacity" and the relevant procedural arrangements for removing a mandate on such ground, while ensuring that these provisions do not lead to the undue exclusion of persons with disabilities from political participation.
2. To reconsider the involvement of the standing committee in the procedure for removing a parliamentary mandate in case of "*definitive impossibility to exercise the position of the MP for more than four consecutive months*" and contemplate instead involving an independent concilium of medical

40 Article 129 of the Rules of Procedure.

professionals and provide adequate safeguards to ensure the confidentiality of any personal health data regarding the concerned MPs.

3. To define in the Draft Law the core and obligatory parliamentary activities that all MPs must participate in or cross-reference the relevant legislation regulating this issue.
4. To consider introducing a qualified majority vote in plenary to decide on the removal of an MP's mandate, while respecting due process guarantees and ensuring the right of defence for the concerned MP.

3.3. Incompatibilities

35. Article 70 of the Constitution provides that "*The office of the Member of Parliament is incompatible with the holding of any other remunerated position, except for didactic and scientific activities*". Rules on "incompatibilities" generally aim to prohibit MPs from engaging in certain public and/or private occupations during their term of office to ensure that they are not influenced by narrow interests in their role as representatives of the people.

36. Article 10 of the Draft Law addresses "incompatibilities", specifying that the aim is to "*ensure independence in the activity of the MP, avoid the concentration by an MP of excess prerogatives, as well as protect their professional and moral integrity*" (Article 10 (4)).

37. Article 10 (3) provides that the list of positions which "*the mandate of the MP shall be incompatible with"*, including positions of the President of the Republic, local or district councillors, MP in the People's Assembly in the Autonomous Territorial Unit (TAU) of Gagauzia, ambassador, assistant in the Cabinet of persons holding positions of public responsibility; any position granted by a foreign state or international organization, etc. At the same time, the said Article also mentions "*any position of public responsibility or public office*", which appears to be overbroad and potentially ambiguous. Unless such positions of public responsibility are clearly defined in other legislation,[41] using such vague terminology might cause ambiguities and potentially arbitrary enforcement, especially since such position of "public responsibility" can cause the loss of the parliamentary mandate.

38. Same considerations relate to "*exercising of any other paid position, except for the teaching and scientific activity, carried out outside the program established by this law*" (Article 10 (3) (e) of the Draft Law). The absence of a clear definition of "paid position" may be subject to diverging interpretation. It is noted that practices differ widely throughout the OSCE region regarding the rules on incompatibilities for MPs,[42] with some countries prohibiting MPs from owning or running businesses while serving in parliament while other require the declaration of any such earnings. This also depends on the country context. In any case, it is important to set up systems that ensure that rules about incompatible outside activities for MPs are clear enough so they can be effectively enforced and are not circumvented.[43] While recognizing the need for limitations on paid

41 In France, for example, incompatibilities include judge, executive of local government, president of an independent administrative authority, executive of public companies, or subsidized private companies, advocate (except if the MP was advocate more than 12 months before the beginning of his/her mandate).
42 See e.g., ODIHR, *Parliamentary Integrity: A Resource for Reformers* (2022), pp. 55-57.
43 *Ibid.* p. 56.

outside activity to ensure parliamentarians are accountable to and act in the interest of only their electorate, , the list of incompatible positions should also be limited to what is deemed necessary in the country context. This also should ensure that such incompatibility rules do not constitute a deterrent for qualified individuals to serve in the parliament. In any case, the scope of the incompatibilities should be precisely defined. The legal drafters should re-assess whether the scope of the incompatibilities is adequate in light of the above considerations, and whether some further exemptions for paid activities should be considered beyond those for "teaching and scientific activities", such as for sports, artistic activities, or medical practice, as well as other fields where regular practice, even during parliamentary mandate, is necessary for being able to successfully continue in these professions after the mandate ends.

39. **It is thus recommended to specify in the Draft Law the positions "of public responsibility or public office", as well as "paid positions" which are incompatible with the exercise of an MP's mandate while re-assessing whether the scope of the incompatibilities is necessary and adequate in the context of Moldova and whether broader exemptions for paid activities could be considered.**

40. Article 11 addresses the issue of "declaration of incompatibilities" by obliging MPs to "*declare in writing to the Commission on Parliamentary Ethics and Conduct about any activity that they will continue to carry out in the future*". Furthermore, any incompatibility that may occur "*during the exercise of the mandate shall be brought to the attention of the Commission on Parliamentary Ethics and Conduct, in writing, immediately, but not later than 3 days from the occurrence thereof*" (Article 11 (3)).

41. First of all, as mentioned in the March Opinion, **besides the duty of each MP to report on potential incompatibilities, it is recommended to allow anyone who becomes aware of the incompatibility of certain MPs to be able to report this to the competent body,**[44] **providing that there are safeguards against manifestly slanderous, retaliatory, ill-founded or unsubstantiated claims.**

42. Furthermore, consideration could be given to allow this data to be filed electronically in a pre-approved form to facilitate the reporting process and avoid misinterpretation. Such structured filing would also streamline the work of the Commission on Parliamentary Ethics and Conduct which is mandated by the Draft Law to monitor "incompatibilities" (Article 11 (4)).

43. As already indicated in the March Opinion, tasking the newly established parliamentary ethics body to deal with incompatibility issues raises the question about its capacity and would appear to exceed the purpose for which such a body should be formed (see Sub-Section 7.1 on the Status, Structure and Functions of the Commission on Parliamentary Ethics and Conduct of the March Opinion). Based on the existing structure of standing committees of the Parliament of the Republic of Moldova, and notwithstanding that certain parliamentary committees might be formed or annulled with the adoption of this Draft Law, **the Committee on Legal Affairs, Appointments and Immunities would seem the most appropriate body to control and react to potential incompatibilities, considering the existing tasks and powers of this Committee**.

44. According to Article 12 (1) of the Draft Law, an MP shall *"within 30 days from the date of the mandate validation and the date of taking the oath, or, as appropriate, from the date of occurrence of the case of incompatibility, choose between the MP mandate and*

44 See e.g., *A comparative analysis of financial disclosure obligations on members of parliaments - Strengthening integrity, independence and accountability in the European Parliament* (May 2023), pp. 49 and 51 referring to the example in Hungary and in the Netherlands.

the position generating the incompatibility, and resign from one of the positions or shall, as appropriate, be suspended from the positions incompatible with the MP mandate".

45. As per Article 12 (4) of the Draft Law, if the term for removing the state of incompatibility has expired and the incompatibility persists, and the MP has not submitted an application for resignation from the position of MP, the mandate shall be terminated by law on the date of expiry of the 30 days term established for the removal of the incompatibility. This Article further requires the Commission on Parliamentary Ethics and Conduct to inform the President of the Parliament about the termination by law of the MP mandate. It would be advisable, however, **to consider adding a prior (3-7 days) warning with the possibility to rectify the situation before an automatic termination of the MP's mandate if the respective MP has not acted to resolve the situation of "incompatibility", to make sure that the mandate is not removed due to minor technical reason or human error**.

RECOMMENDATION B.

1. To specify in the Draft Law the positions "of public responsibility or public office", as well as "paid positions" which are incompatible with the exercise of an MP's mandate while re-assessing whether the scope of the incompatibilities is necessary and adequate in the context of Moldova and whether broader exemptions for paid activities could be considered, such as for sports, artistic activities or medical practice.
2. To allow anyone who becomes aware of the incompatibility of certain MPs to report this to the competent body.
3. To consider adding a prior (3-7 days) warning before an automatic termination of the MP's mandate if the respective MP has not acted to resolve the situation of "incompatibility", to make sure that the mandate is not removed due to some minor technical reason or human error.

4. PARLIAMENTARY IMMUNITY

4.1. General Comments

46. As noted above, MPs' immunity aims to protect the democratic functions of parliament and provide guarantees necessary for elected representatives to exercise their mandates freely and independently without fear of interference from the executive or judiciary. At the same time, situations where individuals may strategically seek parliamentary office purely to gain immunity from prosecution and protect their personal interests should be avoided. Hence, establishing the right balance between protecting MPs from political persecution or harassment - whereby false charges may be brought against them as a means of intimidation, and not fostering a culture of impunity where MPs are put above the law, is one of the core challenges of all parliaments.

47. Broadly defined, parliamentary immunity is a legal instrument, which temporarily or permanently inhibits legal action, measures of investigation, and/or measures of law

enforcement in criminal, administrative and/or civil matters against MPs.[45] It is important to distinguish between the two main forms of parliamentary immunity, which are usually referred to as "non-liability" (i.e., immunity against any judicial proceedings for votes, opinions and remarks *related* to the exercise of parliamentary office) and "inviolability" (i.e., special form of legal protection whereby certain legal/procedural measures, such as arrest, detention and/or prosecution, may not be taken against parliamentarians for statements or acts *unrelated* to the exercise of their parliamentary mandates without the consent of the parliament with possible exceptions). "Non-liability" means that MPs cannot be held accountable, except by parliament itself through the relevant disciplinary procedures and by the people at elections, for anything they say in the exercise of their parliamentary mandate and for any vote they cast in parliament. At the same time, parliamentary inviolability normally protects parliamentarians against civil, administrative and/or criminal proceedings for statements or acts *unrelated* to the exercise of their parliamentary mandates. It implies, generally speaking, that they may only be arrested and/or prosecuted with the assent of the parliament, although there may be some exceptions, for instance in case of *flagrante delicto* (i.e., in the process of committing a crime) and/or with respect to certain specific offences.

48. Article 71 of the Constitution of the Republic of Moldova provides that "*Members of Parliament may not be prosecuted or held legally liable for their votes or opinions expressed in the exercise of their mandate*", thereby reflecting the principle of non-liability. Article 70 (3) of the Constitution states that MPs may not be detained, arrested, searched, except in cases of flagrant misdemeanour, or sued at law, without the prior consent of the Parliament and upon hearing of the MP in question. The material scope of the immunity/inviolability is broad, and potentially cover any types of offences, irrespective of their serious nature.

49. The Draft Law seems to regulate both categories of parliamentary immunity. Article 14 (1) of the Draft Law states that "*parliamentary immunity guarantees the independence and freedom in the exercise of the MP mandate*". Article 14 (5) further defines that parliamentary immunity is directly and inextricably linked to the MP's mandate. At the same time, Article 14 (2) indicates that "*In accordance with the constitutional provisions, the purpose of parliamentary immunity is to protect the MP against prosecution for acts unrelated to the parliamentary position and guarantee their freedom of expression*".

50. Article 15 of the Draft Law partly mirrors Article 70 (3) of the Constitution, stating that the MP cannot be detained, arrested, searched or sent to court for the commission of crimes without the consent of the Parliament, after their hearing. Importantly, however, Article 15 of the Draft Law does not refer to the cases where MPs have been caught in *flagrante delicto*, which the Constitution clearly considers as an exception.[46] Recognizing *flagrante delicto* as an exemption from parliamentary inviolability is common and justifiable since the validity of the prosecution can hardly be questioned, given that the facts constituting the offence and the identity of the perpetrator are clearly established. **It is thus recommended, to align Article 15 of the Draft Law with the wording of the Constitution and refer to *flagrante delicto* as an exemption from parliamentary inviolability**. Acknowledging, however, that it may serve as a loophole for arresting a parliamentarian protected by immunity, **it would be advisable to**

45 See European Parliament, Parliamentary Immunity in a European Context, In-depth analysis of the JURI Committee, 2015, page 6.

46 It should be noted, however, that as indicated in the GRECO evaluation report for Moldova "Corruption prevention in respect of members of Parliament, judges and prosecutors" adopted on 1 July 2016, in case of flagrant offence, MPs may be subjected to house arrest for maximum 24 hours, upon prior consent of the Prosecutor General, who has to inform immediately the Speaker of the Parliament. If the Parliament considers that the MP's arrest is unfounded, it immediately orders the annulment of this measure (Articles 9-11 of the Law on the Status of MP).

establish clear criteria for what constitutes "in *flagrante delicto"* to avoid any broad interpretation and application of this concept by the prosecutors and courts.[47]

51. Furthermore, the Draft Law does not clearly distinguish between the two categories of parliamentary immunity. Notably, both Article 14 and Article 15 refer to "parliamentary immunity", while it is clear from the content of Article 15 that it covers "inviolability", meaning special legal protection for parliamentarians accused of breaking the law, against arrest, detention and search, without the consent of the Parliament. At the same time, "non-liability" appears to be covered by Article 16 of the Draft Law ("Independence of opinions") guaranteeing an immunity against any judicial proceedings for votes, opinions and remarks related to the exercise of parliamentary mandate. For the sake of legal certainty, **it is recommended to reconsider the terminology used in the Draft Law with respect to parliamentary immunity to ensure a clearer distinction between the two forms of parliamentary immunity, which are of a different nature and which are usually regulated and applied in a quite different manner**.

52. According to Article 14 (6) of the Draft Law, "*the MP enjoys parliamentary immunity from the moment of election, under the condition of the mandate validation and until the date of termination of the MP capacity*". Parliamentary immunity is intrinsically linked to the exercise of the mandate. While inviolability ends with the expiry of a member's term of office or the dissolution of parliament, parliamentary non-liability should remain in force for words spoken and votes cast during the exercise of the mandate even after its termination, so that no later legal action against parliamentarians can be brought once s/he has left office. In this sense non-liability is perpetual, in contrast to rules on inviolability, which normally just mean a suspension of certain legal/procedural measures until after the expiry of the mandate. It is recommended **to clarify that the non-liability provided in Article 16 of the Draft Law continues to apply after the termination of the mandate of an MP, while the parliamentary inviolability provided in Article 15 ends with the expiry of the mandate**.

RECOMMENDATION C.

1. To align Article 15 of the Draft Law with Article 70 (3) of the Constitution of Moldova by including a reference to the case when an MP is caught in *flagrante delicto* where inviolability shall not apply.
2. To reconsider the terminology used in the Draft Law with respect to parliamentary immunity to ensure a clearer distinction between the two forms of parliamentary immunity (non-liability and inviolability), which are of a different nature and which are usually regulated and applied in a quite different manner.
3. To clarify that the non-liability provided in Article 16 of the Draft Law continues to apply after the termination of the mandate of an MP, while the

47 As the experience of the IPU Committee on the Human Rights of Parliamentarians has shown, flagrante delicto is sometimes easily invoked even failing any ingredients of a flagrante delicto offence. Examples concern the arrest of members of parliament for several days and even months after the alleged facts under the pretext of a "flagrant crime", the arrest of parliamentarians who had participated in a peaceful demonstration, but were held responsible under the flagrante delicto procedure for acts of violence which occurred after they had left the premises, and the arrest of a parliamentarian for allegedly having signed uncovered cheques several months before his arrest. The Committee has consequently recalled that a broad interpretation of flagrante delicto may amount to voiding immunity itself of any real meaning. See UNDP Initiative on Parliaments, Crisis Prevention and Recovery, Parliamentary Immunity Background Paper prepared in association with the Inter-Parliamentary Union, page. 16.

parliamentary inviolability provided in Article 15 ends with the expiry of the mandate.

4.2. Inviolability

53. Rules on inviolability for MPs are found in a number of countries, but there is no common model. A great variety of rules on inviolability exist in terms of what kind of legal offences are covered and what legal/procedural measures the MPs are protected against. At the same time, they should be subject to critical review and reassessment because they can be problematic on several fronts, including because they go against the principle of equality before the law, they may be open to misuse by those who have broken the law, they may alter public confidence in parliament as an institution, and the procedure for lifting immunity may be politicized.[48] When such rules on inviolability exist, they should not go beyond what is strictly justified for legitimate purposes and should be construed, interpreted and applied in a restrictive manner.[49]

54. 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 they are not misused for political purposes.[50] While rules on inviolability may protect against arrest, detention and prosecution, they should not protect against preliminary investigations, as long as these are conducted in a way that does not unduly harass the MP concerned.[51]

55. As indicated by GRECO, Article 70 (3) of the Constitution still prevents a full investigation against an MP from taking place, using searches or special investigative techniques, without his/her immunity being lifted,[52] though noting an emerging parliamentary practice of lifting parliamentary immunities. At the same time, without constitutional amendments, preliminary investigations will remain impeded given the impossibility to carry out searches if the parliamentary immunity is not lifted.

56. According to Article 14 (9), parliamentary immunity "*shall be applied to the domicile, workplace/office, personal and official vehicles, documents, correspondence, luggage and communications equipment belonging to the MP*". This would imply that parliamentarians are protected against arrest, searches, detention and bringing to justice

48 See Venice Commission, *Report on the Scope and Lifting of Parliamentary Immunities* (2014), paras. 146-150..
49 *Ibid.* Venice Commission, *Report on the Scope and Lifting of Parliamentary Immunities* (2014), paras. 157-158.
50 *Ibid.*. See also (2006).
51 *Ibid.* Venice Commission, *Report on the Scope and Lifting of Parliamentary Immunities* (2014), para. 159.
52 See also GRECO evaluation report for Moldova "Corruption prevention in respect of members of Parliament, judges and prosecutors" adopted on 1 July 2016. In this report GRECO also referred to the decision of the Constitutional Court of Moldova No. 2 of 20 January 2015 which ruled that the wording of Article 70(3) of the Constitution clearly allows criminal investigative authorities to start and perform investigations against MPs without the need to ask the Parliament to lift their immunity, as immunity can only occur in three cases, namely apprehension, arrest and search. This finding was also confirmed in the Third Interim Compliance report adopted by GRECO at its 98th Plenary Meeting. In particular, with respect to Moldova, GRECO recommended that determined measures be taken in order to ensure that the procedures for lifting parliamentary immunity do not hamper or prevent criminal investigations in respect of members of Parliament suspected of having committed corruption related offences. The authorities of Moldova reported that between April 2023 and April 2024 nine requests for lifting the parliamentary immunity of three parliamentarians MPs had been submitted and granted. Eight requests concerned the commission of alleged offences of corruption. GRECO noted that the parliamentary practice of lifting immunity of members of Parliament has consolidated further. All requests for lifting parliamentary immunity have been accepted. Thus, GRECO considered that, in view of an established practice by parliament to accept requests for lifting parliamentary immunity, this recommendation has been dealt with in a satisfactory manner. That notwithstanding, GRECO still calls on the authorities to consider amending Article 70 (3) of the Constitution to abolish the immunity enjoyed by parliamentarians. While some initiatives to amend Article 70 (3) of the Constitution were introduced, with the aim to make it possible to lift immunity without prior approval of Parliament, in order to detain, arrest, search or prosecute a parliamentarian, if s/he had committed passive or active corruption, abuse of powers, influence peddling, illicit enrichment and money laundering offences, such amendments were not adopted.

not only in their homes or while attending parliament, but also on their way to and from parliament.

57. Article 15 (3) of the Draft Law further specifies that "*the parliamentary immunity shall not apply to the actions of prosecution not involving detainment, arrest, searches or bringing to justice*" with "bringing to justice" referring to the stage when a case is sent to court.

58. As mentioned above (see paras 54-55 *supra*), it also very important that the parliamentary immunity does not apply to investigations which may be crucial to gathering evidence and establishing the facts of the case and need to be conducted while the case is still fresh, and not years later, after the expiry of the period of immunity. While the Constitution of Moldova and Article 15 of the Draft Law do not mention "investigations" within the material scope of inviolability, they at the same time preclude the authorities from conducting house or office searches, and/or seizing or searching personal belongings and ICT equipment, which might render impossible any gathering evidence for later prosecution at the end of the parliamentary mandate.[53] With respect to Moldova, the OECD noted specifically that "*the investigation and collection of evidence in cases of corruption committed by MPs may be further hindered by the requirement to notify the MP, which can result in the destruction of direct evidence […] mak[ing] further investigative actions such as searches and seizures of documents, mobile phones, and other computer equipment pointless in relation to the MP*."[54] It recommended legislative amendments to address such pitfalls.[55] Moreover, and although this may require an amendment to the Criminal Code, it would also be important to provide that the statute of limitation be suspended during the period in office of the MP.

59. Finally, **it would be advisable for Article 15 (3) to specify which "actions of prosecution" (for instance, requests of information from e.g., financial institutions, businesses or foreign entities) may be carried out to ensure a clear delineation between those that are covered by the parliamentary immunity/inviolability and those that are not, while also considering excluding the searches out of its material scope**.

> **RECOMMENDATION D.**
>
> To specify in Article 15 (3) which "actions of prosecution" may be carried out by the prosecution service and are not covered by the parliamentary immunity/inviolability, while also considering excluding the searches out of its material scope.

53 Countries where parliamentarians are immune also from investigation, including preliminary inquiries and house and office searches, include Albania, Austria, Belarus, Georgia, Russia, Italy and Ukraine. See the Venice Commission Report on the Scope and Lifting of Parliamentary Immunities, adopted by the Venice Commission at its 98th plenary session (Venice, 21-22 March 2014), para 109.

54 See e.g., OECD, *Baseline Report of the Fifth Round of Monitoring of Anti-Corruption Reforms in Moldova: The Istanbul Anti-Corruption Action Plan*, 2024, p. 138.

55 See e.g., OECD, *Baseline Report of the Fifth Round of Monitoring of Anti-Corruption Reforms in Moldova: The Istanbul Anti-Corruption Action Plan*, 2024, p. 138; and OECD, Combatting High-level Corruption in Eastern Europe, 2024, p. 100.

4.3. Non-liability

60. Article 16 (1) of the Draft Law provides that the MPs cannot be prosecuted or held legally responsible for the votes or the opinions expressed in the exercise of the mandate. Article 16 (2) further defines the scope of non-liability by stating that independence of MPs' opinions shall only refer to the activity of an MP carried out "*in the exclusive exercise of the mandate*", such as declarations made in the Parliament and within the working bodies, public speeches and remarks, questions, interpellations and motions, submission of draft normative acts or formulation of amendments and proposals, opinion expressed in the voting process and laid down in the Parliament's documents and "*other actions, which fall under the status of the MP*".

61. The scope of non-liability and the acts/statements covered are not exhaustively enumerated, since Article 16 (2) also refers to "*other actions, which fall under the status of the MP*". **It is recommended to specify what falls within this category, while introducing a definition of "parliamentary duties".** This will allow to more precisely define the material scope of non-liability. Furthermore, the drafters could **more clearly specify whether it is sufficient that the expression takes place within the context of parliamentary activities, irrespective of whether inside or outside of parliament, including appearances in the media or in public meetings and debates.**[56]

62. It should be noted that the relationship between immunity and the right to freedom of expression is indirect. Parliamentary immunity/non-liability itself does not usually have the potential to infringe this right, but it is useful to determine the exact extent of freedom of expression in order to establish the limits of parliamentary immunity/non-liability. For example, Article 16 (3) of the Draft Law enumerates exceptions from non-liability, i.e., in case of "*Public calls to rebellion, violence, separatism, which, according to the legislation, involve criminal liability, [that] do not fall under the scope of the legal guarantee of the freedom of expression of MPs for their opinions"*. Regarding public calls to "separatism", in the March Opinion, ODIHR referred to its *Comments on the Criminalization of "Separatism" and Related Criminal Offences* (2023), in which it warned against considering "separatism" to fall within the scope of criminal law due to the inherently vague nature of the term, broad range of conduct that may be captured by it and the potential impact on human rights and fundamental freedoms.[57] It is important to recall that, irrespective of the scope of non-liability, **the expression of opinions or political views regarding the need for autonomy or even secession of part of the territory is protected by the right to freedom of expression unless the means (or actions) advocating secession or autonomy or directed against territorial integrity are violent, undemocratic or illegal from the international law point of view.**

63. As underlined in the March Opinion (see para. 38), given the fundamental importance of the freedom of parliamentary debate in a democratic society, OSCE pSs have very limited latitude in restricting the content of parliamentary speech. The ECtHR has consistently emphasized the importance of freedom of expression for MPs noting that speech in Parliament enjoys an elevated level of protection.[58] Any limitation to the right to freedom of expression must be "prescribed by law", pursue one or more legitimate aims listed in

56 In France, for example, MP interviews to media or MP opinion in the framework of the writing of a report upon request from the Government are not considered as acts of parliamentary functions for the purpose of parliamentary immunity.

57 See ODIHR, *Comments on the Criminalization of "Separatism" and Related Criminal Offences* (2023), Executive Summary and para. 50.

58 See e.g., ECtHR, *Karácsony and Others v. Hungary* [GC], nos. 42461/13 and 44357/13, 17 May 2016, paras. 138 and 142.

international instruments (Article 19 of the ICCPR and Article 10 of the ECHR), be "necessary in a democratic society" and non-discriminatory.

64. The substantive scope of protection of parliamentary non-liability is considered for the most part to be covered by Article 10 of the ECHR, given that the protection offered by Article 10 of the ECHR. has gradually developed to now offer a very wide protection for freedom of speech, and in particular for any opinions voiced as part of public political debate.[59] At the same time, the ECtHR has also expressly stressed that "*the fight against all forms of intolerance is an integral part of the protection of human rights, it is of crucial importance that politicians, in their public speeches, avoid disseminating statements that could fuel intolerance", when such speeches "give rise to 'a present risk' and an 'imminent' danger for society […] or is likely to*".[60] It should be underlined that international human rights law recognizes a limited number of types or content of expression which States must prohibit or render punishable (by law),[61] providing that the legal provisions are strictly interpreted in accordance with international freedom of expression standards, especially when dealing with "incitement" to acts of violence.[62] Such prohibitions should apply to MPs and should not fall within the scope of protection afforded by the parliamentary immunity/non-liability. This is in addition to provisions to ensure the orderly conduct of parliamentary proceedings and discipline as envisaged in Article 50 of the Draft Law (see Sub-Section 4.2.3 of the March Opinion).[63]

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59 It should be noted, however, that the ECtHR does not have a common approach with regard to the extent of freedom of expression enjoyed by parliamentarians under the ECHR and its general conclusions still remain diverse: on the one hand, limitations on freedom of expression in political discourse require "the closest scrutiny" (see ECtHR, *Castells v. Spain*, no. 11798/85, 23 April 1992). On the other hand, being a parliamentarian alone does not confer upon an individual a greater freedom of expression (see *Keller v. Hungary*, no. 33352/02, 4 April 2006) and may even lead to a greater duty of care.

60 See ECtHR, *Erbakan v. Turkey*, no. 59405/00, 6 July 2006, paras. 64 and 68.

61 These include: "*direct and public incitement to commit genocide*", which should be punishable as per Article III (c) of the Convention on the Prevention and Punishment of the Crime of Genocide to which the Republic of Moldova acceded on 26 January 1993; the "*propaganda for war*" and the "*advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence*", which should be prohibited as per Article 20 (1) and (2) of the ICCPR; "*all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as […] incitement to [acts of violence] against any race or group of persons of another colour or ethnic origin*", which should be an offence punishable by law according to Article 4 (a) of the ICERD; "*public provocation to commit acts of terrorism*", when committed unlawfully and intentionally which should be criminalized (see UN Security Council *Resolution 1624 (2005)*). International recommendations also call upon States to enact laws and measures, as appropriate, "*to clearly prohibit and criminalize online violence against women, in particular the non-consensual distribution of intimate images, online harassment and stalking*", including *"[t]he threat to disseminate non-consensual images or content*", which must be made illegal; see UN Special Rapporteur on violence against women, its causes and consequences, *Report on online violence against women and girls from a human rights perspective* (18 June 2018), A/HRC/38/47, paras. 100-101. *General Policy Recommendation No. 7* of the European Commission against Racism and Intolerance (ECRI) recommends to make it a criminal offence to publicly incite to violence, hatred or discrimination, or to threaten an individual or group of persons, for reasons of race, colour, language, religion, nationality or national or ethnic origin where those acts are deliberate. See also Council of Europe Committee of Ministers, *Recommendation CM/Rec(2022)16 on combating hate speech*, adopted by the Committee of Ministers on 20 May 2022, para. 11. On 18 October 2022, the Sixth Committee (Legal) in the U.N. General Assembly, approved a resolution on "Crimes against humanity" without a vote to open a space for a substantive exchange of views on all aspects of the draft articles on the Prevention and Punishment of Crimes against Humanity, which Article 3 explicitly prohibits justifications of crimes against humanity.

62 Regarding the prohibition of incitement to discrimination, hostility or violence (Article 20 of the ICCPR and Article 4 of the ICERD), it is also subject to the strict conditions of Article 19 of the ICCPR, see UN Human Rights Committee (CCPR), *General Comment no. 34 on Article 19: Freedoms of opinion and expression*, 12 September 2011, para. 11 and CERD, *General recommendation No. 35* (2013), paras. 19-20. Such forms of expression would only be prohibited and punishable by law when: (1) the expression is intended to incite imminent violence; and (2) it is likely to incite such violence; and (3) there is a direct and immediate connection between the expression and the likelihood or occurrence of such violence; taking into account a number of factors to determine whether the expression is serious enough to warrant restrictive legal measures including the context, speaker (including the individual's or organization's standing), intent, content or form, extent of the speech, and likelihood of harm occurring (including imminence); see CERD, *General recommendation No. 35* (2013), paras. 13-16; see also the *Rabat Plan of Action on the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence*, in the Report of the United Nations High Commissioner for Human Rights on the prohibition of incitement to national, racial or religious hatred, United Nations General Assembly, 11 January 2013, Appendix, para. 29; and International Mandate-holders on Freedom of Expression, *Joint Declaration on Freedom of Expression and Countering Violent Extremism* (2016), para. 2(d). See also ODIHR, *Hate Crime Prosecution at the Intersection of Hate Crime and Criminalized 'Hate Speech'* (2024), p. 20.

63 See ECtHR, *Féret v. Belgium*, no. 15615/07, 16 July 2009, where the Court stated that incitement to the exclusion of foreigners constitutes a "*fundamental attack on the rights of persons*", so it justifies "particular precautions", including against politicians. Consequently, the Court held that the limitation of the applicant's freedom of expression by the Belgian court had not violated the Convention.

65. Moreover, as specifically recommended at the international level, to ensure a safe working environment, a parliament free of sexism and sexual harassment, it is fundamental to review immunity rules which afford immunity from prosecution to members of parliament for sexual harassment and violence against women.[64]

66. In light of the foregoing, **Article 16 (3) of the Draft Law should be supplemented to include other exceptions from non-liability, including for "dissemination of ideas based on racial superiority", "advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence", sexual harassment and violence against women.**[65]

RECOMMENDATION E.

1. To specify in Article 16 (2) of the Draft Law what falls within the category of "other actions, which fall under the status of the MP", while also introducing a definition of "parliamentary duties", in order to define the exact scope of non-liability.
2. To clarify whether the non-liability applies irrespective of whether a particular expression was made by an MP inside or outside of parliament, including appearances in the media or in public meetings and debates.
3. To supplement Article 16 (3) of the Draft Law with other exceptions from non-liability for types or content of expression which States must prohibit or render punishable according to international law, including the "dissemination of ideas based on racial superiority", "advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence", sexual harassment and violence against women.

4.4. Lifting Parliamentary Immunity

4.4.1. Criteria for Lifting Immunity

67. As mentioned above, the material scope of parliamentary immunity/inviolability is very broad and Article 70 (3) of the Constitution does not distinguish between the nature and seriousness of the offences that are alleged to be committed. Similarly, Article 15 of the Draft Law states that the MP cannot be detained, arrested, searched or sent to court for the commission of crimes without the consent of the Parliament, without distinguishing between the nature and seriousness of the alleged offences.

68. In this respect, it is noted that GRECO specifically recommended that "*determined measures be taken in order to ensure that the procedures for lifting parliamentary immunity do not hamper or prevent criminal investigations in respect of members of*

64 See Parliamentary Assembly of the Council of Europe (PACE), *Parliaments free of sexism and sexual harassment*, p. 5.
65 See e.g., PACE, *Resolution 2274 "Promoting parliaments free of sexism and sexual harassment"*, 2019, Article 8.2. See also See ODIHR Study: *Parliamentary Integrity: A Resource for Reformers (2022)*, pp. 26-27.

Parliament suspected of having committed corruption related offences" and considered this recommendation to only be partly implemented.[66] While constitutional amendments were initiated in order to allow the possible lifting of the immunity without prior approval of Parliament, in order to detain, arrest, search or prosecute a parliamentarian, if s/he had committed passive or active corruption, abuse of powers, influence peddling, illicit enrichment and money laundering offences, such amendments were not adopted.[67] Without constitutional amendments, it would not seem possible to reduce the material scope of the parliamentary immunity/inviolability and exclude certain offences from protection, for instance particularly serious crimes, corruption-related offences or where the alleged crime is minor, as done in some countries.[68]

69. While Article 70 (3) of the Constitution provides for the possibility to detain, arrest, search or sue at law an MP with prior content of the Parliament, the Draft Law does not elaborate much the criteria and procedure for lifting parliamentary immunities.

70. Article 15 (2) of the Draft Law states that "*the consent of the Parliament represents decisions of political, not legal, nature*". Indeed, in many countries, voting to remove the immunity of an MP is in principle seen and treated primarily as a political decision, on which parliament has wide discretionary powers, and which may not be overruled by any other institution.[69] A parliament is a political institution composed of representatives of political parties, and parliamentary procedures for lifting immunity may always be subject to political considerations, which might not necessarily always be consistent with an objective and impartial approach. To limit the potential for misuse for partisan interests, some countries have developed detailed rules covering the criteria and procedure for lifting immunity.[70] In this respect, several reports have noted specific challenges in Moldova, including the lack of clear and objective criteria for lifting immunities and recommended legislative amendments to address such pitfalls.[71]

71. A number of criteria could be considered, which may be of a more general or a more specific nature. As for general criteria, these can for example be that immunity should as a main rule be lifted if this is necessary in order not to manifestly obstruct the course of justice.[72] The most common specific criteria for lifting the parliamentary immunity often relate to the seriousness and character of the alleged crime/offence, for instance corruption-related offences, whether there is a case of in *flagrante delicto* or not, and whether the alleged crime is in any way connected to parliamentary functions.[73] Some countries also explicitly exclude minor offences from the scope of parliamentary inviolability.[74]

66 See CoE Group of States against Corruption (GRECO), *Third Interim Compliance Report for the Republic of Moldova*, adopted by GRECO at its 98th Plenary Meeting (Strasbourg, 18-22 November 2024)paras. 31-35.
67 *Ibid.*
68 See e.g., International IDEA, *Legislatures: Organization, Administration and Privileges, Constitution-Building Primer 24* (2024), p. 55.
69 Venice Commission, *Report on the Scope and Lifting of Parliamentary Immunities* (2014), para. 135.
70 See e.g., International IDEA, *Legislatures: Organization, Administration and Privileges, Constitution-Building Primer 24* (2024), p. 56.
71 See e.g., OECD, *Baseline Report of the Fifth Round of Monitoring of Anti-Corruption Reforms in Moldova: The Istanbul Anti-Corruption Action Plan*, 2024, p. 138; and OECD, Combatting High-level Corruption in Eastern Europe, 2024, p. 100.
72 In France, for example, the Constitutional Court held in 1962 that a request for the lifting of immunity must be "serious, fair and sincere" and that the decision on lifting shall be based on no consideration other than the underlying facts presented in the request.
73 See e.g., Venice Commission, *Report on the Scope and Lifting of Parliamentary Immunities* (2014), para. 136; and International IDEA, *Legislatures: Organization, Administration and Privileges, Constitution-Building Primer 24* (2024), p. 55.
74 In France, for example, offences resulting in administrative fines are not covered. In Luxembourg immunity does not prevent action being taken against a parliamentarian for petty offences for which the law does not prescribe detention and which do not constitute dishonourable offences. In other countries, such as Hungary and Portugal, petty offences are also covered by immunity even if they do not come under criminal procedure, in Romania only if they are of a criminal nature. In Germany, Kyrgyzstan, Latvia, Russia, Czech Republic, and Slovakia, immunity also extends to "any other restriction" or "administrative action" without any further clarification.

72. According to Article 17 (1) of the Draft Law, the General Prosecutor may request the Parliament to lift the immunity of an MP "if the MP has committed a felony or misdemeanour", i.e., grave crimes. Therefore, while differentiation envisaged by the Draft Law regarding the seriousness of the crime is commendable, **consideration could also be given to introducing a possibility to lift immunity in case of minor or administrative offences – although this would likely require a constitutional amendment.**

73. There are a number of other criteria for assessing whether parliamentary inviolability should be maintained, which may also be considered, such as: whether the allegations are clearly and obviously unfounded; when the alleged offence is an unforeseen consequence of a political action; when the allegations are clearly brought for partisan-political motives (*fumus persecutionis*) in order to harass or intimidate a member of parliament or interfere with his or her mandate; when legal proceedings would seriously endanger the democratic functions of parliament or the basic rights of any member or group of members.[75]

74. Furthermore, consideration should be given to the aforementioned GRECO recommendation (see para. 68 *supra*) to determine measures in order to ensure that the procedures for lifting parliamentary immunity do not hamper or prevent criminal investigations in respect of MPs suspected of having committed corruption-related offences. **One of the possible ways to fulfil this recommendation could be to establish certain criteria for either granting or refusing the requests for lifting the immunity, especially when such request is based on sincere, serious and fair ground and using searches or special investigative techniques will allow not to obstruct justice**.

75. It should be noted that the Draft Law does not make a distinction as to the scope of inviolability between criminal offences related to the exercise of parliamentary functions and "private" offences, that have no bearing on parliamentary functions. At the same time, this distinction could constitute an important criterion to consider when assessing whether to lift immunity,[76] in particular, **when the request concerns a criminal conduct/offence which is manifestly unrelated to the performance of parliamentary functions but relates to acts committed in relation to other personal or professional functions**.

76. In light of the above, unless provided in another piece of legislation or other documents that would be consistently followed as part of respective parliamentary practices, **the Draft Law should be supplemented to provide for clear and objective criteria for lifting parliamentary immunity**. In addition, when determining whether the immunity should be lifted, **there should not be any examination of the merits of the case in question nor analysis of potential guilt or otherwise of the MP concerned**, or of whether or not the allegations made justify prosecution.[77] **The Draft Law could make this clear.**

See the Venice Commission Report on the Scope and Lifting of Parliamentary Immunities, adopted by the Venice Commission at its 98th plenary session (Venice, 21-22 March 2014), para 118.

75 See Venice Commission, *Report on the Scope and Lifting of Parliamentary Immunities* (2014), paras. 188-189.

76 For example, the ECtHR is reluctant to accept a limitation of the right of access to court in cases where the object of legal proceedings against the parliamentarian concerned is not, or is insufficiently, connected with his parliamentary functions. In the case Tsalkitzis v. Greece, a construction developer wished to bring corruption charges against the mayor of Kifissia. In November 2001, he had filed a complaint of blackmail and abuse of office against the mayor. However, the latter had in the meantime been elected to parliament in the general elections of 2000 and was now protected by inviolability. The ECtHR first observed that the alleged criminal act had taken place almost three years prior to the former mayor's election to parliament. Moreover, the Court noted that a connection between the alleged crime of blackmail and corruption with the former mayor's parliamentary functions could not be assumed, since it fell well outside the sphere of normal parliamentary business and since it was of a particular immoral nature.

77 See Venice Commission, *Report on the Scope and Lifting of Parliamentary Immunities* (2014), para. 194.

77. In any given case, the relevant considerations should be weighed against each other. If the request is based on sincere and serious grounds, and if there is no reason to suspect *fumus persecutionis*, then there should be a strong presumption in favour of lifting inviolability. The basic test should be that inviolability should only be maintained in cases where this is justified with reference to specific considerations and proportionate and necessary in order to safeguard the effective democratic functions of parliament or the rights of any MP or group of MPs.[78]

78. Finally, **it is advisable to grant the right to request lifting of inviolability not only to the Prosecutor General, but also to the MP concerned**, **and to also consider whether those who are directly and individually affected by the alleged offence should have such a right too, while also envisaging appropriate safeguards against potential misuse in this respect. It would also be advisable to further elaborate in the law the procedure for lifting parliamentary immunities/inviolability to ensure openness and transparency, while at the same time safeguarding privacy.** The guiding principles elaborated by the Venice Commission could serve as a useful reference in this respect.[79]

RECOMMENDATION F.

To provide clear and objective criteria and an open and transparent procedure for lifting parliamentary immunity/inviolability.

4.4.2. Time-frame and Procedure for Lifting Immunity

Time-frame

79. Timely consideration of the request to lift an MP immunity is of utmost importance. If the request to lift the immunity from the Prosecutor General is considered over a lengthy period of time, this gives ample opportunities for the MPs concerned to tamper with possible incriminating evidence before any searches/seizures are undertaken or they may even leave the country before any arrest/detention may take place. Lengthy and legally uncertain processes for removal of the immunity might lead to other negative consequences such as information leakages, insider information trading (i.e., an MP with access to information passes it to the incriminated MP requesting favours in return), intimidation of witnesses, etc. Therefore, it is generally recommended to include specific timelines to expedite the process of lifting parliamentary immunities.[80] If this time limit is exceeded without an explicit decision, this may in some systems be considered as a suspension of proceedings and therefore akin to a refusal to lift immunity.

80. As per Article 17 (3) of the Draft Law "*the President of the Parliament shall inform the MPs about the request [from Prosecutor General to lift the immunity] in the plenary session of the Parliament [...] following the date of the submission thereof*." First, the legal drafters should **consider whether the whole plenary (all MPs) should be informed about the request, or whether the request could be directly forwarded to the responsible committee, especially since MPs will have to vote on the proposal of the standing committee anyway**. A direct submission of the request by the President of

78 See Venice Commission, *Report on the Scope and Lifting of Parliamentary Immunities* (2014), para. 190.
79 *Ibid.* para. 194.
80 OECD, Combatting High-level Corruption in Eastern Europe, 2024, p. 100.

the Parliament to the responsible committee would shorten the duration of the procedure as there will not be a need to wait for the next plenary session. This would also limit the circle of people receiving this sensitive information since in practice, it is easier to monitor the observance of confidentiality pledges by the members of one committee than by the whole parliament.

81. According to Article 17 (4) of the Draft Law, if the above request of the Prosecutor General reaches the Parliament in the period between the sessions, it shall be brought to the attention of MPs during the first plenary meeting of the following session. Therefore, it might take several weeks or even months until the request from the Prosecutor General is reviewed, which might seriously hamper the execution of justice.

82. Moreover, Article 18 (1) provides that "*the lead standing Committee shall examine the request of the Prosecutor General not later than 15 days after it has been brought to the attention of MPs"*. Article 18 (6) opens another possibility to extend the duration of the procedure for lifting the immunity by stating that "*after the examination of the request of the Prosecutor General, the Committee on Legal Affairs, Appointments and Immunities shall draft a report to be submitted to the Standing Bureau*". Since no timeline for preparation and submission of the report is envisaged, this could potentially lead to undue delays in the examination of the case. At the same time, **it is crucial that the proposal of the committee is considered and decided by the plenary at the earliest opportunity and without any delay.**

83. Finally, as per Article 19 (1) of the Draft Law "*the report of the lead standing Committee shall be subject to examination and approval by the Parliament in no more than seven days following its submission to the Standing Bureau"*. Article 19 (7) also states that "*the decision of the Parliament shall be forwarded to the Prosecutor General within three days from the date of adoption"*.

84. It is understood that currently, the process for lifting parliamentary immunities in Moldova is rather swift, for instance in 2022, taking in total from 1 to up to 7 days from the first request of the investigative body to the Prosecutor General to the day when the Parliament lifted the immunity of its members, which is considered swift and does not represent undue delays, by comparison of a duration of four months for lifting immunities of judges, considered to be unduly delayed.[81]

85. Therefore, **consideration could be given to consider shortening the deadlines currently envisaged in the Draft Law, while ensuring that adequate and precise deadlines are provided for each step to ensure that parliamentary immunities may be lifted without undue delay, within a matter of a few days.**

Role of the responsible committee

86. In addition, the Draft Law defines the role of the committee to "*examine the request of the Prosecutor General [and] determine the existence or non-existence of some fundamental reasons for the request acceptance or rejection"* (Article 18 (1)). At the same time, as underlined above, the standing committee should not be going into the merits of the criminal charges or this may otherwise come into conflict with the principle of presumption of innocence, as protected by key international instruments[82] and national law of Moldova. Therefore, as underlined above in para. 76 *supra*, **the examination of**

81 OECD, *Baseline Report of the Fifth Round of Monitoring of Anti-Corruption Reforms in Moldova: The Istanbul Anti-Corruption Action Plan*, 2024, p. 138.

82 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*".

the request should rely on clear and objective criteria excluding any examination of the merits of the case in question nor analysis of potential guilt or otherwise of the MP concerned and this should be clarified.

87. Article 14 (3) of the Draft Law provides that parliamentary immunity cannot be waived, which is understood to mean that it cannot be waived by an MP herself/himself. However, it is generally recommended to provide for the possibility for the MP concerned to waive inviolability and to insist on having the case considered by the ordinary public prosecutor and to have their rights or criminal charges against them determined in court.[83]

88. **It is also recommended to envisage in the Draft Law a possibility for the responsible committee to seek assistance from politically neutral and competent outside experts that are of undoubted integrity and independence.**[84] Such experts should preferably be chosen on a general basis, at the start of each parliamentary period and should be brought in to assist in the assessment (though not with voting rights). Such experts may for example be chosen from academia, retired judges or other people of undoubted integrity and independence.

89. Moreover, to ensure protecting the parliamentary opposition, usually in a minority, against undue pressure from the ruling majority, **it is advisable that the request to lift immunity is assessed by the committee, reflecting the political composition of parliament.**

90. In addition, assessing such lifting by the parliamentary committee may give political opponents in Parliament the chance to investigate and look into private information of the member concerned. Article 18 (3) of the Draft Law provides that "*the Prosecutor General, accompanied, if necessary, by the case prosecutor, shall be requested to submit to the lead standing Committee the case- related documents, on the basis of which the request for the lifting of immunity was submitted*". **This should be coupled, however, with an obligation for the MPs who receive the said documents to maintain confidentiality and not disclose any information pertaining to the MP concerned and information of the case, subject to adequate sanctions in case of breach.**

Procedure

91. The procedure for lifting parliamentary immunity should be open, transparent, clear and impartial.[85] It should be clearly regulated and need to comply with general principles of procedural law, including rights of both parties to be heard. As mentioned above (see para. 86 *supra*), the procedures should always respect the principle of the presumption of innocence, as protected by the ICCPR and ECHR.

92. They should be comprehensive, clear and predictable, as well as transparent and known to the public. Since the decision to lift an MP's immunity has legal consequences that might lead to investigation, prosecution and eventual conviction, to limit the risk of politicization of the process, it is crucial that the MP in question should have their immunity removed based on clear and objective criteria.

93. It is noted that the Draft Law tries to ensure all necessary procedural guarantees for the MPs concerned in its Articles 18-19. Among other, Article 18 (4) requires the presence of the MP with respect to whom the lifting of parliamentary immunity is requested, as

83 As indicated in the Venice Commission Report on the Scope and Lifting of Parliamentary Immunities, adopted by the Venice Commission at its 98th plenary session (Venice, 21-22 March 2014), para. 164, even if this is not a legal requirement under Article 6 of the ECHR, as pointed out by the Court in *Kart v. Turkey*, no. 8917/05, 3 December 2098, it is still preferable from a best model perspective to give the person concerned the possibility to have the allegations examined by the judicial system.

84 See Venice Commission, *Report on the Scope and Lifting of Parliamentary Immunities* (2014), para. 166.

85 See Venice Commission, *Report on the Scope and Lifting of Parliamentary Immunities* (2014), paras. 187, 191-194.

well as of the Prosecutor General, at the meeting of the lead standing Committee. This Article also states that the groundless absence of either of them shall not prevent the examination of the request. Furthermore, Article 19 (2) of the Draft Law allows for the suspension of the request's examination in case of "the reasoned absence of the MP" from the plenary session of the Parliament where the Committee's report should be examined, stating at the same time that "*the groundless absence of the MP shall not prevent the request's examination*". However, the Draft Law does not define those reasons that could potentially justify the absence from the plenary session. While Article 31 (2) enumerates the reasons justifying the absence of MP from parliamentary sessions in general (see paras. 47-48 of the March Opinion), some of those reasons (such as official trips abroad, "personal interest leave" or non-participation in sign of protest against an item on the Agenda of the day) can hardly be invoked in case of examination of the immunity's lifting, since they can be easily misused by an MP concerned. Therefore, **it would be advisable to specify in the Draft Law the reasons which would justify the MP's absence from the committee's sitting and plenary session, along with a type of justification to be submitted, while providing for a simple monitoring mechanism for this.**

94. Finally, Article 20 (1) provides that "*the Prosecutor General informs on a monthly basis the lead standing Committee on the progress of the investigation"*. Although it is important that there is some form of oversight following the lifting of the parliamentary immunity, this obligation for the prosecution to inform may not benefit the fairness and impartiality of the investigation process. This may also result in unnecessary information leakages which could prevent the collection of evidence and other negative side effects, especially if the committee meetings are open to the public and no confidentiality pledges are required from the members.

RECOMMENDATION G.

1. To consider shortening the deadlines currently envisaged in the Draft Law, while ensuring that adequate and precise deadlines for each step of the procedure for lifting parliamentary immunity to ensure that parliamentary immunities may be lifted without undue delay, within a matter of a few days.

2. To envisage in the Draft Law a possibility for the responsible committee to seek assistance from politically neutral and competent outside experts that are of undoubted integrity and independence.

3. To envisage in the Draft Law an obligation for the MPs who receive the case related documents to maintain confidentiality and not disclose any information pertaining to the MP concerned and information of the case, subject to adequate sanctions in case of breach.

4. To specify in the Draft Law the reasons which would justify the MP's absence from the committee's sitting and plenary session where the issue of his/her immunity lifting are to be discussed.

5. 5. OTHER ISSUES

5.1. MPs' Rights and Guarantees

95. Article 22 of the Draft Law defines the rights of MPs that they are entitled to exercise in connection with their mandate. Some of those rights, however, would require further clarification. For example, unless a matter of inaccuracy of translation of the Draft Law, the right "to rule on procedural issues" (Article 22 (g)) would require explanation/reformulation to give a better understanding of what it entails. The same applies with respect to the right to "notify the Constitutional Court": while it may refer to the right of an MP to apply to the Constitutional Court as envisaged in the Law on the Constitutional Court, along with a number of other subjects, a clearer formulation would be advisable in this respect. Another example is the right "*to visit any public entity as established by the Standing Bureau*", that does not specify under which conditions such visit should be possible (Article 22 (o)). Finally, the right to "*address any public entity, officials in matters related to the exercise of the mandate and participate in their examination*" would also benefit from defining the particular modalities of exercise of this right, i.e. the number of votes necessary to support the relevant parliamentary request, as well as the legal consequences for a failure to respond to the MP's request, unless this is define by the RoP or other legislation of Moldova.

96. As to MPs' guarantees, which are defined by Article 60 of the Draft Law, consideration could be given to more clearly define the amount, modalities and conditions of MPs' salaries and "*other monetary rights"*, including *"monthly increment for holding a scientific title, single and annual bonuses*" (Article 62 of the Draft Law).

97. As indicated in the March Opinion, a low level of MPs' salaries may increase the risk that MPs will regard their other entitlements – allowances and expenses − as opportunities to extract additional income, while also rendering it more difficult to attract qualified people[86] and thus, more attention should be paid to this matter in the Draft Law.

5.2. Gender Equality and Diversity Aspects in the Status and Working Conditions of MPs

98. Finally, the Draft Law is overall silent in terms of addressing gender equality and diversity aspects in the status and working conditions of MPs. The challenge of balancing working in Parliament with family life is a fundamental issue in advancing the gender-sensitivity of the Parliament.[87] It affects MPs who are parents, and whose working hours are connected to sittings of the Parliament. In that respect, *CoE Recommendation (2003)3 on Balanced Participation of Women and Men in Political and Public Decision-making* in its Appendix states that parliaments should take measures to ensure that their time tables and working methods enable elected representatives of different genders to

86 See ODIHR Document: *Parliamentary Integrity: A Resource for Reformers* (2022), p. 66.
87 See e.g., ODIHR, *Compendium of Good Practices for Advancing Women's Political Participation in the OSCE Region* (2016), pages 86-91 and 97-98; and IPU, *Gender-sensitive Parliaments - A Global Review of Good Practices* (2011), Chapter 9.

reconcile their work and family life.[88] Similarly, the organization of work should allow men and women parliamentarians to spend sufficient time with their families and should allow both parents to take maternity or paternity leave under the same conditions, unless there is a reasonable and objective justification.[89] Article 67 of the Draft Law addresses the issue of MPs' leave but does not mention family-related or parental leave. Nothing is said with respect to working hours. **Family-friendly and flexible working hours, and family-related entitlements (shared parental leave or obligatory parental leave for fathers) should be addressed in the Draft Law**. A good international practice, in that respect, is the one introduced by the newly adopted *Directive (EU) 2019/1158 of the European Parliament and of the Council of 20 June 2019* on work-life balance for parents and carers, which provides that "*each worker has an individual right to parental leave of four months*", irrespective of their gender.[90] **The conditions for "unpaid leave for personal interests" (Article 67) should also be defined to avoid arbitrary or discriminatory application in practice**.

[END OF TEXT]

88 CoE, Recommendation (2003)3 on Balanced Participation of Women and Men in Political and Public Decision-making, para. 8 and the Explanatory Memorandum.

89 See, in this context, ECtHR, *Konstantin Markin v. Russia* [GC], no. 30078/06, 22 March 2012, and *Hulea v. Romania*, no. 33411/05, 2 October 2012, both of which found violations of the Convention because of the authorities' failure to provide both parents with the right to parental leave. See also e.g., IPU, *Gender-sensitive Parliaments - A Global Review of Good Practices* (2011), pages 92-94.

90 See *Directive (EU) 2019/1158 of the European Parliament and of the Council of 20 June 2019 on work-life balance for parents and carers*, Article 5.