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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

OSCE OFFICE FOR DEMOCRATIC INSTITUTIONS AND HUMAN RIGHTS
(OSCE/ODIHR)

HUNGARY

DRAFT JOINT OPINION

ON THE 2020 AMENDMENTS TO ELECTORAL LEGISLATION

on the basis of comments by

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Draft restricted

I. Introduction

1. By letter of 3 February 2021, Mr Michael Aastrup Jensen, Chairperson of the Monitoring Committee of the Parliamentary Assembly of the Council of Europe, requested an opinion of the Venice Commission on the legislative and constitutional package adopted by the Hungarian parliament in December 2020. This package includes Act CLXVII of 2020 on the Amendment of Certain Acts relating to Elections (hereinafter: the Act, [CDL-REF\(2021\)069](#)); see also the legislation in force before these amendments, [CDL-REF\(2021\)062](#), [CDL-REF\(2021\)063](#), [CDL-REF\(2020\)064](#), [CDL-REF\(2020\)065](#) and [CDL-REF\(2020\)070](#). According to established practice, the opinion was prepared jointly by the Venice Commission and ODIHR.
2. Mr Castellà Andreu, Mr Darmanovic, and Mr Dimitrov acted as rapporteurs for this opinion. Ms Marla Morry was appointed as expert for the ODIHR.
3. Due to the COVID-19 crisis and the time constraint, the rapporteurs were not able to travel to Budapest. Instead, assisted by Mr Garrone and Ms Silvestri from the Secretariat, as well as by Ms Kseniya Dashutsina from the ODIHR's secretariat, they held a series of video meetings on 16 September 2021 with the Ministry of Justice, the National Election Office, political groups in the National Assembly, as well as representatives of the civil society working in the field of elections.
4. This opinion was prepared in reliance on the English translation of the law. The translation may not accurately reflect the original version on all points.
5. *This opinion was drafted on the basis of comments by the rapporteurs and the results of virtual meetings. It was adopted by the Council for Democratic Elections at its... meeting (Venice and online, ...) and by the Venice Commission at its ... Plenary Session (Venice and online, ...).*

II. Background and scope of the joint opinion

6. The electoral legal framework of Hungary is quite complex and includes in particular Act XXXVI of 2013 on Electoral Procedure,¹ Act CCIII of 2011 on the Elections of Members of Parliament,² Act LXXXVII of 2013 on the Transparency of Campaign Costs related to the Election of the Members of the Parliament,³ Act L of 2010 on the Election of Municipal Representatives and Mayors,⁴ as well as Act CCXXXVIII of 2013 - Initiating Referendums, the European Citizens' Initiative and Referendum Procedure.⁵
7. On 10 November 2020, because of the ongoing COVID-19 pandemic, Hungary was in lockdown, ordered on the basis of the Second Authorisation Act adopted that same day. In the night of 10 November 2020, the Ninth Amendment to the Fundamental Law, together with an Omnibus Act (Act CLXV of 2020 amending 22 legislative Acts in the field of justice, hereafter "the Omnibus Act") and amendments to the election legislation (Act CLXVII of 2020) were submitted to Parliament by the government.

¹ [CDL-REF\(2020\)062](#)

² [CDL-REF\(2020\)070](#).

³ [CDL-REF\(2020\)064](#)

⁴ [CDL-REF\(2020\)065](#)

⁵ [CDL-REF\(2020\)063](#)

8. The Venice Commission and ODIHR have already analysed the Hungarian electoral legislation in an opinion of 2012.⁶ The key recommendations of this opinion were:

- 1) to provide for any fundamental change of electoral legislation, such as those to the electoral system, the determination of electoral boundaries and the method of allocating seats, on the basis of a broad and inclusive discussion, including various political points of view;
- 2) not to write concrete constituency delimitation in a cardinal law;
- 3) to more clearly define the method of allocation of seats to constituencies;
- 4) to make the choice between registering to vote for normal seats or the minority seats possible in reasonably short timeframe before election or, preferably, to give to the voters from national minorities the possibility of choice on election day between nationality lists and party lists.

9. The present opinion does not constitute a full and comprehensive review of the entire legal and institutional framework governing elections in Hungary, but will focus on the conformity of the Act with international standards, norms and practices, as for example set out in the United Nations' International Covenant on Civil and Political Rights (ICCPR), the European Convention on Human Rights (ECHR) and its additional protocols, the Council of Europe Code of Good Practice in Electoral Matters, drafted by the Venice Commission⁷ as well as relevant OSCE human dimension commitments. Where appropriate, it will also refer to other reference documents and sources, including the Hungarian Constitution (the Fundamental Law), as well as to relevant recommendations made in previous legal opinions published by the Venice Commission and/or ODIHR.

III. Executive summary

10. The Venice Commission and ODIHR note with concern that the Act was adopted during a state of emergency, apparently without public consultation. The Venice Commission and ODIHR consider that this swift procedure is not in line with the Rule of Law Checklist, nor is it compatible with the Commission's Report on Respect for democracy, human rights and the rule of law during states of emergency and the Report on the Role of the opposition in a democratic Parliament.

11. The Venice Commission and ODIHR stress that this speed and the lack of meaningful public consultations are particularly worrisome when they concern electoral legislation, which should not be seen as a political instrument: when defining the rules of the game which have to ensure a level playing field and respect for electoral rights, broad political consensus as well as extensive consultations with all relevant stakeholders are crucial.

12. The Venice Commission and ODIHR remind that a too wide use of cardinal laws, which once again took place when adopting the Act, is problematic with regard to both the Constitution and ordinary laws. Provision for qualified majorities is designed to require the search for a broad agreement between the majority and the opposition. This legitimate aim would be frustrated if the ruling coalition, on the ground that it possesses the qualified majority, refrained from even searching for such broad political agreement. Furthermore, requiring a qualified majority to amend technical or operational provisions in electoral laws poses an unnecessary hurdle for making changes needed for effective election administration.

13. The Venice Commission and ODIHR make the key recommendation to amend Section 3 and Section 68 of the Act, by significantly reducing the number of single-member constituencies

⁶ Venice Commission, [CDL-AD\(2012\)012](#), Joint Opinion on the Act on the Elections of Members of Parliament of Hungary.

⁷ Venice Commission, [CDL-AD\(2002\)023rev2-cor](#), Code of Good Practice in Electoral Matters: Guidelines and Explanatory Report.

and the number of counties in which each party needs to nominate candidates simultaneously in order to be able to run a national list of candidates.

14. Furthermore, the Venice Commission and ODIHR recommend:

- A. That members of lower-level commissions be selected through open and transparent recruitment, based on clear criteria, and not to leave their appointment any more in the hands of representative bodies.
- B. To review the mechanism for organising polling stations for absentee voters.
- C. To reconsider the requirement that after an election, any candidate who did not win a mandate be removed from the candidate list and withdraw their nomination in writing.
- D. To clarify and, if necessary, to review the extension of deadlines for dealing with electoral disputes, in order to ensure their timely settlement.
- E. To extend the right to appeal against the determination of the compensatory list result.
- F. To make the choice between registering to vote for normal seats or the minority seats possible in reasonably short timeframe before election or, preferably, to give to the voters from national minorities the possibility of choice on election day between nationality lists and party lists
- G. To review the power to issue fines for late return or loss of signature support sheets.
- H. That the timing for destruction of sensitive electoral material be explicitly tied to the finalisation of any legal disputes, to ensure that relevant evidence in ongoing disputes is not destroyed.
- I. To consider revising the constitutional and legislative provisions on the exclusion of the right to vote and to be elected in case of limited mental capacity.
- J. To reconsider the use of cardinal status for technical or operational provisions in electoral laws.
- K. To consider minimal redrawing of constituencies, aimed at respecting the principle of equal voting power as defined in national legislation and international standards, even less than one year before the elections.

15. Other recommendations may be found in the text of the opinion.

16. The Act introduces a number of positive technical changes which are welcome and will not be addressed in detail.

17. The Venice Commission and ODIHR remain at the disposal of the Hungarian authorities and the Parliamentary Assembly for further assistance.

IV. Analysis and recommendations

A. The procedure of adoption of Act CLXVII of 2020

18. The Venice Commission notes that Act CLXVII of 2020 was submitted to Parliament by the government as part of a major package introducing several legislative amendments, during a state of emergency declared earlier on that same day. The whole package was adopted by Parliament a few weeks later, apparently without public consultation, and came into force after one week only, with a few exceptions concerning constitutional amendments. While the bulk of the amendments are technical or operational in nature, based on an initial set of proposals prepared by the National Election Office in response to lessons learned from recent elections, some are much more substantial, and will be addressed as a priority below.

19. According to the Venice Commission's consolidated doctrine, any successful changes to electoral legislation should be built on at least the following three essential elements: 1) a clear and comprehensive legislation that meets international obligations and standards and addresses

prior recommendations; 2) the adoption of legislation by broad consensus after extensive public consultations with all relevant stakeholders; and 3) the political commitment to fully implement such legislation in good faith. An open and transparent process of consultation and preparation of such amendments increases confidence and trust in the adopted legislation and in the state institutions in general.

20. The swift procedure that has been followed, apparently without any consultation, is not in line with the Venice Commission's recommendations in the Rule of Law Checklist,⁸ nor is it compatible with the Commission's Report on Respect for democracy, human rights and the rule of law during states of emergency⁹ and the Report on the Role of the opposition in a democratic Parliament.¹⁰ Furthermore, it appears not to be in line with the Hungarian law, as for bills or constitutional amendments prepared by Ministers, public consultation is mandatory.¹¹ No reason has been offered as to why such a fast-track process was necessary. Nor were there reasons, based on the content of the Act or the situation at hand, why it should have been adopted during a state of emergency, when there was a real risk that no meaningful democratic discussion of government bills could take place, particularly when there were severe restrictions on the fundamental rights to freedom of assembly.¹²

21. The Venice Commission and ODIHR reiterate the importance, in a democratic society, of ensuring an inclusive public debate and a meaningful participation of the opposition in the parliamentary discussions.¹³ This is particularly true for electoral legislation: when defining the rules of the game which have to ensure a level playing field and respect for electoral rights. A broad consensus and extensive consultations with all relevant stakeholders are crucial to ensure acceptance of the election legislation, which encourages public trust and confidence in the electoral process, as previously recommended in the 2012 opinion¹⁴ It is regrettable that this advice was not followed for the 2020 revision.

B. The electoral system: Restrictions on the candidatures for the national constituency

22. Since coming back to a multiparty system in 1990, Hungary has used mixed electoral systems, with around half of the members of Parliament elected by a majoritarian system in one-member constituencies and the other half on proportional lists, with a compensatory mechanism. According to the present law (following substantial amendments in 2011), 106 Members of Parliament shall be elected in single-member constituencies and 93 from national lists.¹⁵ The proportional system is applied with a threshold of 5 % for single parties, 10% for joint lists of two parties and 15 % for joint lists of more than two parties. Partial compensation takes place, which should ensure a more proportional result.¹⁶

23. Section 3 of the Act, amending Section 8.1 of Act CCIII of 2011 on the Elections of Members of Parliament provides that for a national list to be registered, a party needs to nominate candidates simultaneously in a dramatically increased number of single-member constituencies.

⁸ Venice Commission, Rule of Law Checklist, [CDL-AD\(2016\)007](#), point 5.

⁹ Venice Commission, Report on Respect for democracy, human rights and the rule of law during states of emergency: Reflections, [CDL-AD\(2020\)014](#), para. 84.

¹⁰ Venice Commission, Report on the Role of the opposition in a democratic Parliament, [CDL-AD\(2010\)025](#), paras 106 - 115.

¹¹ Act CXXXI of 2010 on Social Participation in the Preparation of Laws, Articles 1 and 8(1)-(2).

¹² On 11 November 2020, the government introduced a blanket ban on demonstrations (Government Decree 484/2020. (XI. 10.), Articles 4(1) and 5(1)-(2)).

¹³ See also PACE Resolution 1601(2008), Procedural guidelines on the rights and responsibilities of the opposition in a democratic parliament.

¹⁴ Venice Commission, [CDL-AD\(2012\)012](#), Joint Opinion on the Act on the Elections of Members of Parliament of Hungary, paras 11, 13, 31.

¹⁵ Section 3 of Act CCIII of 2011 on the Elections of Members of Parliament.

¹⁶ Sections 14-16 of Law CIII of 2011.

The Act increases such number from 27 to 71 (out of 106), within 14 (out of 19) counties (in addition to Budapest), instead of 9 counties (in addition to Budapest). Commensurately, an amendment (Section 68) to Section 3(1) of Act LXXXVII of 2013 on the Transparency of Campaign Finance Costs related to the Elections of the Members of the Parliament provides that campaign financing from the central budget is only provided to parties which nominate candidates in at least 71 constituencies. This represents a major change that can significantly influence the electoral and political landscape, and this is by far the most important and most far-reaching change in the amendments adopted in December 2020.

24. It has also to be underlined that the amendment was introduced by an Independent MP allegedly affiliated with the ruling part during the last days of the parliamentary debates. The original draft required a party to run in fifty constituencies to propose a national list.

25. The goals of this rule are legitimate: it favours big parties and reinforces national-wide political parties or coalitions with a presence in an important part of the national territory. The avoidance of party fragmentation is not unacceptable *per se*, and democratic standards do not exclude stimuli for the consolidation of the political party system. A two-party system is not a rare situation in democracies. However, if the political landscape is more plural, electoral legislation should not intend to artificially squeeze the number of competitors in the elections to *de facto* two, to “us” and “them”. This might aggravate the level of political polarisation in the political arena and ultimately in the society.

26. The Hungarian government argues that this modification is designed to target what it calls “fake parties”, which run only to obtain public funding. This is also a legitimate goal. However, in the present political environment, opposition parties and NGOs consider that this reform is aimed at favouring the present majority and not the best way to reach this goal.

27. In the Hungarian context, the amendment looks favourable to the incumbents. The introduction, in 2011, of a first-past-the-post system, instead of a two-round one, had already favoured the majority party vis-à-vis an opposition consisting of several parties, which lost most chances in majoritarian constituencies when they did not present a common candidate. With the new system, if they do not submit a joint national list, opposition parties will have to run separately in more than two thirds of majoritarian constituencies and it is likely that they will obtain very few majoritarian seats. That is why all opposition parties make it clear that they strongly oppose this amendment, which was only supported by the political majority.

28. This has to be seen against the background of a legal framework which is unfavourable to common lists of several parties. Indeed, coalitions are penalised by the 10 or 15% threshold already mentioned, one of the highest worldwide.¹⁷

29. Another major concern deals with public campaign financing, since joint party lists are treated like individual parties. This financing is dependent on the number of candidates nominated in constituencies and not on the results. This was the case before the adoption of the Act and it still is.¹⁸ Amending this rule would be an efficient way to fight “fake parties”, which the authorities claim as the rationale of Section 3 of the Act. In addition, strengthening the legal framework to ensure campaign finance transparency offers an alternative solution for addressing the problem of misappropriation of public campaign funds. Measures to combat the fraudulent collection of voter signatures in support of candidates, a common practice in Hungary, will also serve to minimize the risk of so-called fake parties participating in elections

30. Moreover, this amendment creates a supplementary financial burden on small parties which are not part of a coalition by imposing on them the organisation of a campaign in a much larger

¹⁷ Section 14.2 of Act CCIII of 2011.

¹⁸ Sections 3 and 5 of Act LXXXVII of 2013.

number of individual constituencies and limits the chances of parties present in a limited number of constituencies, contrary to international standards. on freedom of association and the principle of political pluralism.¹⁹

31. Finally, pushing parties to unite in a coalition comprising parties with divergent programmes could produce confusion or even rejection among their electorate, as remarked by opposition parties.

32. In sum, in the present political situation, including the respective strength of political parties, the procedure followed, as well as the content of the amendment, lead to the conclusion that the main effect of this reform would be to favour the incumbents.

33. The Venice Commission and ODIHR therefore recommend amending Section 3 and Section 68 of the Act, by significantly reducing the number of single-member constituencies in which each party needs to nominate candidates simultaneously in order to be able to run a national list of candidates.

C. Other issues

1. Positive technical changes

34. The Act introduces a number of positive technical changes which are welcome, most of them proposed by the National Election Office. They include:

- Section 6 of the Act, introducing a new Section 13/B in the Act on Electoral Procedure which establishes the applicability of the general provisions of this Act in the event of a repeat election, subject to certain stipulated deviations. As a positive measure, this new provision fills a previous gap in the legislation with regard to the application of general and special rules in the event of holding of a repeat election;
- Section 13 of the Act, amending Section 30 of the Act on Electoral Procedure to introduce an alternative method for political parties and candidates to provide notification to the election authorities regarding their delegated members to the polling station commissions;
- Section 26 of the Act, introducing a new Section 121/A into the Act on Electoral Procedure, requiring the election office to refuse the delivery of a candidate's sheets of supporting voters on the day of the request by means of a resolution, thus facilitating a timely and effective challenge to the decision to refuse the submission;
- Section 27 of the Act, amending Section 122(6) of the Act on Electoral Procedure, which requires the sheets of supporting voters to contain the name and signature of the person collecting the voters' signatures, by including the collector's personal identification number, an additional safeguard to protect the integrity of the process particularly in light of problematic signature collection in past elections;
- Section 28 of the Act, adding to Section 133 of the Act on Electoral Procedure a new provision that requires election commissions to register a party's candidate list that meets the legal requirements, even if one or more candidates on the list are excluded on legal grounds;
- Section 30 of the Act, introducing a new Section 143/B in the Act on Electoral Procedure which provides that general legislation on the use of public areas does not apply to campaign activities, including contact with voters, distribution of leaflets, and collection of signatures, provided the set-up in the public area does not exceed four square metres;
- Sections 39 and 56 of the Act, respectively amending Sections 245(2) and 311(2a) of the Act on Electoral Procedure, providing that observers cannot be members of an

¹⁹ Cf. Venice Commission and ODIHR, [CDL-AD\(2020\)032](#), Joint Guidelines on Political Party Regulation, paras 102-103.

- electoral commission or office. This ensures that the roles of election administrators and election observers are kept distinct;
- Section 55 of the Act, amending Section 310 of the Act on Electoral Procedure to provide that any by-elections for a dissolved national minority self-government are to be funded in advance by the central budget if the minority government does not have the necessary funds to cover the costs. This new responsibility of the national authorities serves as an assurance that the minority communities will not be without a self-government due to lack of available funding for an unscheduled election;
 - Sections 44-46 and 66(g) of the Act, amending Sections 268, 278(5), and 279(1) of the Act on Electoral Procedure better secure the voting rights of citizens abroad and enhance their opportunity to effectively cast a ballot. This includes improved procedures and mechanisms for postal voters abroad to change their address, cast votes, and return voted ballots.
 - Section 16 of the Act introduces a new Section 40/A of the Act on Electoral Procedure, according to which the National Election Commission (NEC) may hold its meetings by electronic means, as decided by its president. This provides flexibility particularly in the face of an emergency situation, such as the COVID-19 pandemic.
 - An amendment to Section 42 (Section 17 of the Act), prohibiting the Rules of Procedure of the NEC to be amended after the call for national parliamentary elections or European Parliament elections, and until the day of the inaugural meeting of the national parliament or until the final election results are established for the members of the European Parliament, thus preventing political manipulation.
 - An amendment to Section 242 of the Act on Electoral Procedure (Section 38 of the Act) introduces a new provision that if the National Election Commission fails to discharge its obligation to determine the result of the election within two days of a court order pursuant to a complaint, the court is to determine the election result within two days based on the record, with the court's determination subject to review by the Constitutional Court.
 - A deadline for determination of the election result for European Parliament elections has been introduced in Section 343 of the Act on Electoral Procedure (Section 63 of the Act) – not later than the nineteenth day after voting. The inclusion of a deadline filled a legal gap.

35. The Venice Commission and ODIHR will not comment on purely technical amendments, e.g. those aimed at clarifying the terminology.

36. The following paragraphs will focus on the aspects of the law which should or could be reconsidered.

2. The use of cardinal laws

a. In general

37. The final provisions in Act CLXVII of 2020 on the Amendment of Certain Acts relating to Elections deem many of the aforementioned amendments to be cardinal pursuant to various articles of the Fundamental Law. Such cardinal provisions will be subject to special legislation needing two-thirds parliamentary majority to be amended in the future. Some of the amendments deemed cardinal are relatively technical in nature, such as the deadline for voters to submit requests for absentee voting.²⁰ While stability of the law is crucial to the credibility of the electoral process, it is those rules covering the election system itself, the composition of electoral commissions and the drawing of constituency boundaries that should be particularly safeguarded from political manipulation. Qualified majority is one mechanism to provide for stability and

²⁰ Other examples of amendments declared cardinal are the number of voters on a voter list that triggers the discretion of the local election office to divide up a polling station and the deadline for postal votes to arrive in country in order to be deemed valid.

broader consensus. However, other types of electoral provisions should normally have the rank of statute law that can be amended by simple majority. Indeed, rules on implementation, in particular those on technical questions and matters of details, can be in the form of regulations which provides the election administration with the necessary flexibility to respond to obvious needs.²¹ The Venice Commission and ODIHR remind that a too wide use of cardinal laws, which once again took place when adopting the Act, is problematic with regard to both the Constitution and ordinary laws²² and recommend to reconsider their use for electoral law provisions of an administrative nature.

38. Further, the Venice Commission stresses that provision for qualified majorities is designed to require the search for a broad agreement between the majority and the opposition. This legitimate aim would be frustrated if the ruling coalition, on the ground that it possesses the qualified majority, refrained from even searching for such broad political agreement.

b. The delimitation of constituencies

39. As the constituencies are listed in the Annex of a cardinal law, a majority of two thirds is required for each change. The Venice Commission and ODIHR had recommended in their 2012 opinion²³ not to provide for such a rigid regulation, which makes the necessary adaptation of the delimitation of constituencies to demographic evolution, for ensuring equal voting powers, dependent on a political decision. This concern proved justified, since the necessary albeit limited redrawing imposed by national law due to a deviation from the average number of inhabitants among constituencies of over 20 percent was not adopted more than one year before elections (as is required by the law).²⁴

40. The failure to change the delimitation of some constituencies is therefore contrary to national law, as stated by some Venice Commission and ODIHR's interlocutors during the online meetings, as well as with international standards²⁵.

41. The Venice Commission and ODIHR therefore once again recommend to refrain from defining the constituencies in a cardinal law, and instead to establish an independent committee to revise constituency boundaries as and when necessary under national law and international standards.²⁶

42. Further, minimal amendments to the delimitation of some constituencies could be envisaged even in the year before elections. The Venice Commission and ODIHR remind that exceptions to the principle of stability of electoral law in the year before elections are acceptable when they put an end to a situation contrary to the standards of the European electoral heritage, or they implement recommendations by international organisations.²⁷

²¹ See Venice Commission, Code of Good Practice in Electoral Matters, [CDL-AD\(2002\)023rev2-cor](#), paras. 63-67.

²² See for example Venice Commission Opinion on the constitutional amendments adopted by the Hungarian Parliament in December 2020, [CDL-AD\(2021\)029](#), para. 59, quoting the Opinion on the new Constitution of Hungary, [CDL-AD\(2011\)016](#), para. 12.

²³ Venice Commission, [CDL-AD\(2012\)012](#), Joint Opinion on the Act on the Elections of Members of Parliament of Hungary, paras 11, 31.

²⁴ Section 4.6 of Act CIII of 2012 provides: "If the deviation referred to in Subsection (4) exceeds 20%, Parliament shall amend Annex 2. Annex 2 may not be amended during the period between the first day of the year preceding the general election of Members of Parliament and the day on which the general election of Members of Parliament is held, with the exception of any election held due to the voluntary or mandatory dissolution of Parliament". In the present situation, this concerns two constituencies, and the National Election Office had included the necessary boundary delimitation changes in its package of proposed amendments.

²⁵ Venice Commission, Code of Good Practice in Electoral Matters, [CDL-AD\(2002\)023rev2-cor](#), I.2.2.

²⁶ Venice Commission, Code of Good Practice in Electoral Matters, [CDL-AD\(2002\)023rev2-cor](#), I.2.2.vii.

²⁷ Venice Commission, Interpretative declaration on the stability of the electoral law, [CDL-AD\(2005\)043](#), II.2.

3. *The right to vote*

43. Section 5 of the Act amends Section 13/A of Act XXXVI of 2013 on Electoral Procedure as regards exclusion from suffrage rights. The new version does not provide any more for such exclusion in case of “pathological addiction”. This has to be welcomed. However, the provision continues to exclude from suffrage rights those persons with reduced capacity due to mental disorder as determined and ordered by court decision in the course of conservatorship proceedings, if their “capacity to exercise suffrage... a) is greatly reduced permanently or recurrently, or b) is permanently and completely lost”. This restriction is based on Article XXIII(6) of the Constitution (the Fundamental Law), according to which “[t]hose disenfranchised by a court... for limited mental capacity shall not have the right to vote and to stand as a candidate in elections”. These restrictions seem to be in line with the case-law of the European Court of Human Rights, based on Article 3 Protocol 1 to the European Convention on Human Rights.²⁸ However, deprivation of the right to vote on the basis of any kind of mental disability is considered as contrary to Articles 12 and 29 of the [UN Convention on the Rights of Persons with Disabilities](#) (CRPD), according to which “State Parties shall recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life” and ensure their “right and opportunity [...] to vote and be elected”.²⁹ Therefore, the Venice Commission and ODIHR recommend again to consider revising the constitutional and legislative provisions on the exclusion of the right to vote and to be elected in case of limited mental capacity.³⁰

44. The deadline for requests for changing polling districts (absentee voting) established by Section 250(2) has been changed from four days to nine days before the voting (Section 41 of the Act). According to the National Election Office, the amendment aims to facilitate timely and effective handling of such requests, in light of the typically large number of absentee voters, while the Ministry of Justice noted its aim was to reduce the number of absentee voters. Civil society actors claim the amendment is a political measure aimed to suppress the vote of certain groups of absentee voters, i.e. university students. Any procedural changes that impact the exercise of voting rights, such as shortened deadlines to apply for alternative voting arrangements should be considered carefully to ensure they are administratively needed. Other administrative measures to ensure timely processing of absentee voters could be considered in lieu of limiting existing alternative voting measures.

4. *Voter and candidate registration*

45. The amendments revise provisions in the Act on Electoral Procedure related to the central and polling district voter registers. Continuous updating of the central voter register established in Section 96(1) using specified databases, now includes the database on central travel documents (Section 22 of the Act). A new requirement to record in the central register the voter’s refugee, immigrant or settled status raises questions about its purpose and the protection of private data.³¹ As a positive measure, amendments to Sections 97 and 102 (Sections 23-24 of

²⁸ See in particular *Alajos Kiss v. Hungary* - [38832/06](#), Judgment 20.5.2010.

²⁹ See Paragraph 48 of General Comment No. 1 to Article 12 of the CRPD, which states that “a person’s decision-making ability cannot be a justification for any exclusion of persons with disabilities from exercising [...] the right to vote [and] the right to stand for election”. Paragraph 9.4 of the 2013 CRPD’s Committee’s Communication No. 4/2011 (Hungary) stated: “an exclusion of the right to vote on the basis of a perceived or actual psychosocial or intellectual disability, including a restriction pursuant to an individualized assessment, constitutes discrimination on the basis of disability.” See also Recommendation [CM/Rec\(2011\)14](#) of the Committee of Ministers to member states on the participation of persons with disabilities in political and public life, Appendix, 1 and 3.

³⁰ Hungary, Parliamentary Elections, 8 April 2018, ODIHR Limited Observation Mission Final Report, recommendation 14.

³¹ The data content of the central voter register, described in Annex 2 to the Act on Electoral Procedure, now additionally includes the type and number of the document proving Hungarian citizenship in case the voter does not have a Hungarian address and personal identification number, as well as the voter’s refugee, immigrant or settled status. In addition, the requirement to indicate in the register of polling districts and constituencies (Annex1) which national minorities have thirty or more members in the settlement was changed to twenty-five or more.

the Act) introduce a requirement that resolutions on removal from the central or polling district registers must be communicated by handing over the resolution or sending it by mail or other means of delivery to those affected on the working day following adoption of the resolution. However, removal from the central voter register of entries of persons who have died does not require a separate resolution to be issued. It appears that removal of such entries does not require communication with those affected, which may challenge due process to be notified of losing one's voting right, particularly important in cases where mistaken removal takes place. As a positive measure, the introduction of Section 105/A (Section 25 of the Act) provides an opportunity for voters registered for mobile voting to request removal from the mobile voter register. The amendment does not, however, explicitly provide that such voters be automatically reintroduced into the regular voter register. This should be made explicit.

46. Section 29 of the Act introduces in Section 137(3) a requirement that after an election, any candidate who did not win a mandate be removed from the candidate list and withdraw their nomination in writing. This measure precludes the possibility to deem other list candidates elected in cases where an elected party list candidate resigns or dies. The Venice Commission and ODIHR recommend reconsidering this amendment.

5. Electoral administration

47. Amendments to the Act on Electoral Procedure introduce various changes to the legal provisions relating to the election commissions and offices.³² The ODIHR previously noted concerns with the procedure in Sections 21 and 23 for selection of some of the members of territorial and local election commissions – that is, election by, respectively, the capital city or county general assembly following nomination by the head of the territorial election office or election by the representative body of the settlement's municipality following nomination by the head of the local election office.³³ Section 24 of the Act on Electoral Procedure, as amended by Section 12 of the Act, regulates the election of polling station commission members by the representative body of the settlement's municipality. All these provisions leave the appointment to lower levels of the electoral administration in the hands of a political body. Other systems of appointment would ensure more neutrality, for example, a random one or leaving the nomination to independent electoral authorities. In light of stakeholders' concerns with the impartiality of heads of these election offices who are politically-appointed municipal clerks, the Venice Commission and ODIHR recommend that members of lower-level commissions be selected through open and transparent recruitment, based on clear criteria, in line with previous recommendations.³⁴

48. Section 24 of the Act on Electoral Procedure as amended by Section 12 of the Act provides for election of "the required number [of members]" to polling station commissions, rather than the previous wording of "three members and the necessary alternate members". The head of the local election office allocates three elected members to each polling commission and a new requirement provides that if the number of partisan-delegated members is less than two, additional elected members are to be allocated to have five in total. In addition, the discretion of the head of the local election office to supplement members of a polling commission due to high numbers of registered absentee and/or mobile ballot voters has been revised. While previously the discretion was to add members if the number of mobile ballot voters "makes it necessary", the amendments require additions if the number of mobile ballot voters exceeds forty. At the same time, the discretion to allocate the "necessary" number of members to polling stations designated for absentee voters if the voter list exceeds 1,500 has replaced the previous

³² Sections 8-20 of the Act, amending Sections 15(1), 19(3), new 19(6), 21, 23-24, new 30(4), 33(3), 38(1), new 40/A, 42, 45, new 45/A, and 72 of the Act on Electoral Procedure.

³³ Under Section 24, some members of polling station commissions are also nominated by the head of the local election office and elected by the representative body of the settlement's municipality.

³⁴ Hungary, Parliamentary Elections, 8 April 2018, ODIHR Limited Observation Mission Final Report, recommendation 12.

requirement to allocate explicit numbers of additional members.³⁵ Even if these provisions aim to ensure smooth election day operations, the broad discretion in some of the provisions may result in inconsistent and ineffective application by the local election offices. The Venice Commission and ODIHR recommend reconsidering this provision.

49. Section 33 of the Act on Electoral Procedure, as revised by Section 14 of the Act, provides for the termination of the mandates of members of election commissions. However, the amendments repeal but do not replace the reference to the time of termination of the mandate of the appointed (partisan-delegated) members on the lowest-level (polling) commissions, thereby leaving a gap.³⁶ The Venice Commission and ODIHR recommend addressing this issue.

50. Section 38(1) of the Act on Electoral Procedure, as revised by Section 15 of the Act, regulates the timeline for the holding of inaugural meetings by the election commissions, which was not the case previously. The first meeting of the polling station commissions must be held “within eight days before the vote, after their members are appointed”, implying all members. The requirement to hold the inaugural meeting of the polling station commissions after all elected and delegated members are in place, as opposed to only the elected members as was previously the case, is a positive development that places all members on an equal footing. However, the timeline of “within eight days before the vote” allows the holding of the first meeting up to the day before election day challenging effective preparation for election day operations.³⁷ The Venice Commission and ODIHR recommend considering this issue.

51. Amendments to Section 45 of the Act on Electoral Procedure (Section 18 of the Act) elaborate on the decision-making process of election commissions. They provide that the content of the proposal for a decision is to be determined and presented by the president of the election commission or a member appointed by them; the president oversees the technical input involved in preparing the proposals for decisions. If the proposal for a decision is rejected by a commission, in order to prepare a new proposal, the president may adjourn the meeting or request postponement of the decision to a new date within the time limit for making a decision, the postponement to be decided by the commission. These provisions provide further clarity and transparency in the decision-making of the commissions. However, the Venice Commission and ODIHR recommend, in line with previous recommendations, providing commission members with the opportunity to contribute to the formulation of draft decisions or to submit alternative drafts for deliberation, to contribute to the inclusivity of the process.³⁸

52. As introduced in a new Section 45/A of the Act on Electoral Procedure (Section 19 of the Act), conflict-of-interest rules for members of election commissions are a positive development but have a limited scope. Elected members of commissions may not participate in making second-instance decisions in cases involving a standing candidate to which the member is related. In order to enhance public trust in the election administration, the Venice Commission and ODIHR recommend that conflict-of-interest provisions extend to all commission members, whether elected or appointed, that the types of conflict-of-interest relationships be broadly defined, and that members who have a conflict-of-interest with a standing candidate step down from their post. At a minimum, commission members should be required by law to recuse from participating in any decision in which they have a direct conflict-of-interest, whether it is a first or second instance decision.

³⁵ The law previously provided that at least four additional members had to be assigned if the number of voters on the list exceeded 1,500 and at least two more members assigned for every additional 1,000 voters above 1,500.

³⁶ The previous version of the provision stated that the mandates of the appointed members of the polling station commissions terminate at the time the election result becomes final.

³⁷ In addition, the amendments do not establish clear and appropriate timelines for the other types of lower-level election commissions (e.g., local election commissions, territorial election commissions, etc.) to hold their inaugural meetings.

³⁸ Hungary, Parliamentary Elections, 8 April 2018, ODIHR Limited Observation Mission Final Report, recommendation 24.

53. Section 78 of the Act on Electoral Procedure concerns the designation of a polling district (station) in each settlement for voters with the status of domicile in the settlement. An amendment to this Section (Section 21 of the Act) clarifies that such designated polling stations are also to be used by voters who have changed polling district (absentee voters). The amendment further provides that in cities with district rights and in districts of the capital, a polling station separate from the one designated for voters with the status of domicile in the settlement can be designated for absentee voters. This provision appears aimed at addressing overcrowding at specially designated polling stations by allowing separate designations for domiciled and absentee voters. According to the amendments, the number of absentee voters assigned to a designated polling station is not subject to the legal minimum number of voters.

54. New Sections 257/A and 257/B in the Act on Electoral Procedure, as amended by Section 43 of the Act, grant the head of the local election office with the discretion to divide the voter list of a polling district designated for absentee voting into several sections if the list has above 1,500 voters and mandates such division if the list is above 2,000.³⁹ A previous ODIHR recommendation proposed that consideration be given to have more than one polling station in each electoral district to be designated for absentee voters, in order to address problems of long queues and delays at such polling stations.⁴⁰ Though the amendments do not allow for designation of additional polling stations for absentee voters in line with the recommendation, they provide a mechanism to facilitate smoother election day operations. However, while the new mechanism may be utilised as such, the ODIHR previously recommended that the maximum limit of 1,500 voters for regular polling stations, as established in Section 77(1), should also apply to polling stations designated for absentee voting.⁴¹ Providing heads of election offices with discretionary power in cases of lists between 1,500 – 2,000 does not adequately address this issue, as the limit does not strictly apply.

55. Moreover, any such division of a designated polling station for absentee voters does not appear to foresee distinct polling commissions overseeing the divided sections. The sections are to be physically located within the same station or building (the latter as sub-polling districts), and overseen by the same polling commission, except that ballot-counting subcommittees are to operate in sub-polling districts. The new Section 257/B regulates the composition of the ballot-counting subcommittees but is unclear on whether the members are to be appointed from among existing or spare polling station commission members, potentially challenging election day operations.⁴² Ballot counting subcommittees are imbued with the status of polling station commissions to carry out the tasks of a polling station commission, further complicating this new mechanism. The head of the local election office may add members to the commission, if necessary, to conduct the counting.⁴³ Generally, this new legal framework aimed at facilitating smooth operations in designated polling stations is overly complicated and might not be the most effective means to achieve this objective. The Venice Commission and ODIHR therefore recommend reviewing the new mechanism and related provisions.

³⁹ As per Section 78 of the Act on Electoral Procedure, one polling station per electoral district is designated by the head of the local election office for those voters registered to vote as absentee voters. As noted earlier, Section 24 refers to polling stations designated for absentee voters potentially exceeding 1,500 voters.

⁴⁰ Hungary, Parliamentary Elections, 11 April 2010, ODIHR Election Assessment Mission Report.

⁴¹ Hungary, Parliamentary Elections, 8 April 2018, ODIHR Limited Observation Mission Final Report, recommendation 26.

⁴² Section 257/B states that the head of the local election office shall appoint three elected members to the ballot-counting subcommittees from among the elected members of the polling station commissions.

⁴³ In addition, amendments to Section 245 (Section 39 of the Act) provide that if a division takes place, candidates and nominating organisations may delegate one additional member to the polling station commission, or two more per sub-polling district. Sub-Sections (5)-(7) under Section 28 which are repealed had established the number of additional members to be appointed by candidates and nominating organisations if the head of the local election office supplemented a polling station commission with additional elected members.

6. Election dispute resolution

56. Sections 35 and 36 of the Act revise Sections 214 and 228 of the Act on Electoral Procedure, which had established deadlines of three or five days from receipt of the matter for election commissions to adjudicate objections and appeals - in line with international standards.⁴⁴ The amendments introduce an additional deadline of fifteen days for consideration of complaints to commissions that “do not relate to an election which has already been called but the result of the election has not yet become final”. The precise meaning and application of this amendment is unclear in terms of whether the deadline relates to pre- or post-election complaints, while the Ministry of Justice noted that it can apply to both.⁴⁵ The appropriateness of an election dispute-related deadline depends on which stage of the electoral process it is applicable and a fifteen-day adjudication deadline is not considered international good practice particularly for pre-election disputes. The Venice Commission and ODIHR recommend clarifying and, if necessary, revising these provisions in order to ensure the timely settlement of disputes, in conformity with international good practice.

57. A new Section 307/R of the Act on Electoral Procedure (Section 52 of the Act) establishes an explicit right to appeal against the determination of the compensatory list result but only on grounds of breach of the rules for aggregating the results of individual constituencies and determining the election result. The limited breadth of this provision appears to challenge the right to effective legal remedy in election disputes. The Venice Commission and ODIHR recommend extending the grounds for such appeal.

7. National minority self-government

58. Section 56 amending Section 311(2a) of the Act on Electoral Procedure introduces a ban on specified public officials and candidates being appointed as observers in national minority self-government elections, which does not apply to observers for the other types of elections.⁴⁶ The reasoning for such discrepancy and stricter application to national minority elections is unclear and may warrant reconsideration.

59. Section 57 of the Act amends Section 317 of the Act on Electoral Procedure, requiring the sheets for collecting voter signatures in support of a candidate to indicate the nationality of the candidate. This requirement does not appear really necessary and its conformity with international standards on public disclosure of national minority status could therefore be questioned.⁴⁷

60. In their 2012 opinion, the Venice Commission and ODIHR had recommended to make the choice between registering to vote for normal seats or the minority seats possible in reasonably short timeframe before election or, preferably, to give to the voters from national minorities the possibility of choice on election day between nationality lists and party lists.⁴⁸ They reiterate this recommendation.

⁴⁴ Venice Commission, Code of Good Practice in Electoral Matters, [CDL-AD\(2002\)023rev2-cor](#), II.3.3.g.

⁴⁵ The Ministry of Justice explained that the new deadline applies to an appeal against any decision or election result that is “in force”, whether before or after an election day, referring to these appeals as “not urgent” due to the “final” nature of the contested decision.

⁴⁶ The amendment prohibits, among others, elected representatives, deputy mayors, municipal clerks, and candidates to be observers of national minority self-government elections. Section 18 of the Act on Electoral Procedure bans the same list of officials from serving on election commissions in any type of election but does not ban them from being observers.

⁴⁷ Cf. Article 3 of the Framework Convention for the Protection of National Minorities (ETS 157); Code of Good Practice in Electoral Matters, [CDL-AD\(2002\)023rev2-cor](#), I.2.4 and par. 23.

⁴⁸ Venice Commission, [CDL-AD\(2012\)012](#), Joint Opinion on the Act on the Elections of Members of Parliament of Hungary, paras 11, 49.

8. Referendums

61. The amendments revise several Sections in Act CCXXXVIII of 2013 on Initiating Referendums, the European Citizens' Initiative and Referendum Procedure. An amendment to Section 11(1) extends the deadline from 30 to 60 days for the National Election Commission to decide whether to certify or not an initiative referendum question. The National Election Office expressed that the extension was necessary from an administrative standpoint, as in some cases 30 days was insufficient time. While this does not go against international good practice *per se*, civil society actors raised concerns that the extended deadline might undermine the timeliness of a referendum initiative.

62. Sections 18(2), 19(3), 19A(2), 19B(4) and 19C(4) of Act CCXXXVIII of 2013 require the initiator of a national referendum to return the support signature sheets to the National Election Office by the deadlines previously established. The amendments to each of these sections (Sections 69-73 of the Act) extend that handover requirement to blank signature sheets (in addition to completed and incomplete signature sheets). The amendments also decrease the fine for failure to return a sheet, to be imposed by the NEC, with a cap established for the total amount of the fine.⁴⁹ In line with a previous ODIHR recommendation relating to candidate signature support sheets in elections,⁵⁰ the Venice Commission and ODIHR recommend reviewing the power to issue fines for late return or loss of support sheets, given that the return of such sheets does not necessarily protect the data contained in them.

9. Other provisions

63. Section 4 of the Act amends Section 79(2) of Act XXXVI of 2012 on the National Assembly, which provides that election contestants enjoy immunity until the election results are finalised, subject to a decision by the National Election Commission (NEC) to suspend such immunity. An amendment to this provision clarifies that the motion to suspend immunity is to be submitted to the President of the NEC. The amendment implies that it is the National Assembly, and not the relevant law enforcement bodies, which are to request the NEC to suspend the immunity. However, the provision does not establish the procedure through which the law enforcement authorities are to submit a request to the National Assembly to initiate such a motion. This should be considered.

64. Section 7 of the Act introduces a new Section 13/C in the Act on Electoral Procedure which mandates the destruction of sensitive election materials on the ninetieth working day after the voting. It provides a list of documents to destroy including, among others, all voter registers and related requests and decisions, registered personal details of observers, lists of voters supporting candidate nominations, and ballot papers. This provision consolidates several other repealed provisions that appeared throughout the act on the destruction of specific types of election materials and aims to comprehensively cover destruction of all sensitive materials. The new provision refers to destruction on the ninetieth day after the voting (as did the repealed provisions). However, the Venice Commission and ODIHR recommend that the timing for destruction be explicitly tied to the finalisation of any legal disputes, to ensure that relevant evidence in ongoing disputes is not destroyed. They also recommend that, as a matter of security, the law specify how the materials are to be destroyed.

⁴⁹ The fine was decreased from 1,000 to 800 forints for each sheet not returned, with a cap of five times the monthly amount of mandatory minimum wage in the case of a voter initiator, or ten times in the case of an organisation. A new Section 23A regulates the imposition and payment of the fine. For instance, the new provision provides that the NEC shall impose the fine within 30 days of the expiry of the time limit specified in the aforementioned provisions and allows persons liable for the fine to make equal monthly instalments for up to two years if the fine exceeds 5,000 forints. The new provision provides for the fine to lapse at the latest five years after its imposition at which time it is deemed legally irrecoverable.

⁵⁰ Hungary, Parliamentary Elections, 6 April 2014, OSCE/ODIHR Limited Election Observation Mission Final Report, recommendation 18.