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(VENICE COMMISSION)

REPUBLIC OF MOLDOVA

OPINION

**ON THE DRAFT LAW
AMENDING SOME NORMATIVE ACTS
RELATING TO THE PEOPLE'S ADVOCATE**

**Adopted by the Venice Commission
at its 126th Plenary Session
(online, 19-20 March 2021)**

on the basis of comments by

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Contents

I.	Introduction	3
II.	General remarks.....	3
A.	International standards	3
B.	Previous Venice Commission's opinions.....	4
C.	The national legal framework.....	5
III.	Analysis.....	6
A.	The introduction of the PAER in the legal national order.....	6
1.	The reasons underlying the introduction of the PAER.....	6
2.	The competencies of the PAER according to the draft law	6
a.	The protection of legitimate interests of entrepreneurs.....	7
b.	The competence over complaints of legal persons.....	7
3.	The election procedure of the PAER	9
4.	The term of office of the PAER	9
B.	The introduction of the PAER into the PA Office (hereinafter the PAO).....	9
1.	Internal operational consequences	10
a.	With regard to decision making process.....	10
b.	With regard to the internal structure	11
c.	With regard to the financial and administrative means	12
2.	External consequences	12
a.	The identity of the PAO.....	12
b.	Conflict of missions.....	12
C.	Additional remarks.....	13
1.	The consultation process.....	13
2.	Considering further amendments.....	14
3.	The importance of accompanying measures	14
IV.	Conclusion	14

I. Introduction

1. By letter dated 24 November 2020, the late Mr Mihail Cotorobai, People's Advocate (Ombudsman) of the Republic of Moldova, requested the opinion of the Venice Commission on the draft Law for amending some normative Acts relating to his institution (CDL-REF(2021)013), hereinafter "the draft Law".
2. Ms Lydie Err, Mr Johan Hirschfeldt, Mr Jørgen Steen Sørensen and Mr Igli Totozani acted as rapporteurs.
3. On 18-19 February 2021, the rapporteurs, along with Ms Caroline Martin from the secretariat, had online meetings with the Speaker of the Parliament, the Minister of Justice, representatives of the Ministry of Justice and of the Ministry of Economy, the People's Advocate for Children, members of the People's Advocate institution and representatives of the civil society and of an entrepreneur's union. The delegation would like to thank the Permanent Representation of the Republic of Moldova in Strasbourg for having organised the meetings with the authorities.
4. This draft Opinion is based on the English translation of the draft Law. The translation may not always accurately reflect the original version on all points, therefore certain issues raised may be due to problems of translation.
5. This opinion was drafted on the basis of comments by the rapporteurs and the results of virtual meetings. Following an exchange of views with Ms Maia Banarescu, People's Advocate for Children of the Republic of Moldova, it was adopted by the Venice Commission at its 126th Plenary Session (online, 19-20 March 2021).

II. General remarks

A. International standards

6. On 16 December 2020, the United Nations General Assembly adopted Resolution A/RES/75/186 on "The role of Ombudsman and mediator institutions in the promotion and protection of human rights, good governance and the rule of law".¹
7. At the level of the Council of Europe:
 - on 16 October 2019, at the 1357th meeting of the Ministers' Deputies, the Committee of Ministers adopted Recommendation CM/Rec(2019)6 of the Committee of Ministers to member States on the development of the Ombudsman institution to member States on the development of the Ombudsman institution;
 - on 2 October 2019, the Parliamentary Assembly, adopted Resolution 2301 (2019) on "Ombudsman institutions in Europe - the need for a set of common standards";
8. The Venice Commission adopted the Principles on the protection and promotion of the Ombudsman Institution (the "Venice Principles"), at its 118th Plenary Session (Venice, 15-16 March 2019). The Venice Principles were endorsed by the Committee of Ministers of the Council of Europe at the 1345th Meeting of the Ministers' Deputies, on 2 May 2019; by the Parliamentary Assembly of the Council of Europe, Resolution 2301(2019), on 2 October 2019 ; by the Congress

¹ See, United Nations, General Assembly, The Role of Ombudsman Institutions in the Promotion and Protection of Human Rights, Good Governance and the Rule of Law, Resolution adopted by the General Assembly on 16 December 2020 [based on the report of the Third Committee (A/75/478/Add.2, para. 89)

of Local and Regional Authorities of the Council of Europe, Resolution 451(2019) on 29-31 October 2019.

9. The People's Advocate of Moldova being also the National Human Rights Institution, the amendments will also be analysed in the light of the United Nations "Paris Principles" on National Human Rights Institutions.

10. In addition, the opinions that the Venice Commission has given in the past will also serve as a basis for the present analysis. The Venice Commission has indeed provided several opinions² on various legislative provisions aimed at regulating the Ombudsman's activity.

B. Previous Venice Commission's opinions

11. In 2015 the Venice Commission, at the request of the then newly elected People's Advocate (Ombudsman) of the Republic of Moldova, adopted an opinion on Law no. 52 of 03.04.2014 on the People's Advocate (hereinafter "PA").

12. The Venice Commission noted that, based on Law n°52 of 2014, the Republic of Moldova had switched from the previous system, with several Parliamentary Advocates, to the model of one single Ombudsman with general competence and, within the same office, a special - autonomous - Ombudsman for the protection of children's rights. The Commission considered that as such it was a legitimate choice, falling within the wide discretion of each country, provided that all necessary conditions and safeguards be provided to ensure the independent and effective functioning of the new Ombudsman institution, in accordance with relevant standards and good practices in the field.

13. The Commission had noted that the Peoples' Advocate for Children (hereinafter "PAC") was deemed to be autonomous from the PA, but noting the lack of institutional and financial independence of the former and recommended to clarify the internal arrangements within the PA Office³.

14. The Venice Commission recommended the adoption of specific constitutional guarantees for the election, status, mandate and competencies of the Ombudsman Institution³.

15. The Venice Commission also recommended that the competence of the institution in relation to the private sector and the courts should be reconsidered and clearly specified. In paragraph 29 of the Opinion, the Commission "considers it advisable to include private bodies in the jurisdiction of the PA only to the extent that these agencies are entrusted with a public service mission or, where applicable, co-financed by the state."⁴

16. The Venice Commission recommended that the exclusion of legal persons as complainants should be reconsidered.⁵

17. The Venice Commission also recommended an amendment of the Law so as to clearly state that the PA can only be dismissed by a 2/3 majority of the members of Parliament.⁶

18. The law was amended in 2015 and 2016 (see CDL-REF(2017)054). One of these amendments, the amendment in Article 17¹ (5), seems to be related to the recommendation mentioned above referring to the PAC position. The current PA Office seems to be organized in

² See, CDL-AD(2015)017; CDL-AD(2017)032,

³ See CDL-AD (2015)017, see § 80, also §§ 22-23

⁴ See CDL-AD (2015)017, see § 81, also §§ 27-31, and especially and e contrario § 30 on PAC

⁵ See CDL-AD (2015)017, see §§ 66-67

⁶ See CDL-AD (2015)017, see § 81 and §. 60

line with what was recommended by the Venice Commission with regard to the choice for a national Ombudsman with overall competence, and within the same office, an autonomous PAC.

19. However, all the other recommendations of the Venice Commission mentioned above remain valid and would still merit consideration by the authorities.⁷

C. The national legal framework

20. Article 59¹ of the Moldovan Constitution related to the People's Advocate was amended in 2017. This step had also been recommended by the Venice Commission in its opinion (CDL-AD (2015)017, § 80). The new article reads as follows:

“Article 59¹

Statute and role of the People's Advocate

(1) The People's Advocate ensures promotion and protection of human rights and fundamental freedoms.

(2) A person who enjoys an immaculate reputation, high level professional competence and notorious activity in the field of protection and promotion of human rights can be appointed in the position of People's Advocate.

(3) The People's Advocate is appointed in this position by the Parliament with the vote of the majority of the elected deputies under the transparent selection procedure provided by the law for a 7 years mandate which is non-renewable. During his/her mandate, the People's Advocate is independent and impartial. He/she cannot be subject to any imperative or representative mandate.

(4) The People's Advocate has no legal liability for his/her opinions expressed while executing his/her mandate.

(5) The People's Advocate cannot execute any other remunerated function, except the didactic, scientific or creative activity. The People's Advocate has no right to engage in political activity and he/she cannot be the member of any political party.

(6) Interference in the activity of People's Advocate, deliberate ignorance of his/her intimations and recommendations as well as impediment in any form of his/her activity brings legal liability in the manner the law provides.

(7) The People's Advocate may be dismissed from his/her position with the vote of 2/3 of the elected deputies under the procedure established by the law which provides his/her prior hearing.

(8) Organizational and functional way of the institution of the People's Advocate is determined by the organic law. “

21. The constitutional provision is applicable to both the institution of the PA as such and the specialised PA established within the PA. The PAC was already in place when the constitutional provision came into force. The tasks of the PAC to deal with children's rights clearly fall within the ambit to ensure “promotion and protection of human rights and fundamental freedoms” of Article 59¹ of the Constitution. The external independence or autonomy of the two PAs is provided for in Article 59¹ (6), while the internal independence or autonomy for each of them follows from the law no 52/ 2014 which governs the PA institution.

⁷ The Recommendation in § 13 however corresponds to the amendment of the Constitution mentioned in § 16.

III. Analysis

A. The introduction of the PAER in the legal national order

22. Article XII of the draft “Law for amending some normative acts” provides for the amendment of Law 52/2014 on the People’s Advocate, completing its Article 1 with paragraph 3.1 as follows: “The People’s Advocate for the Protection of Entrepreneurs’ Rights exercises his duties for ensuring the observance of the rights and legitimate interests of the entrepreneurs by the public authorities, by organizations and enterprises, regardless of the type of property and legal form of organization, by non-profit organizations and by people with positions of responsibility at all levels.” Hereafter the abbreviation PAER will be used.

1. The reasons underlying the introduction of the PAER

23. It seems that the authorities have been inspired by the examples of similar specific institutions in the United States, Canada, Poland, the United Kingdom, Russia and Ukraine.

24. According to the informative note that accompanies the legislator through these changes aimed at improving the current unfavourable business climate due to:

1. the search for predictability of the regulation of the entrepreneurial activity;
2. the deficiencies of the state control system of the entrepreneurial activity;
3. the level of quality and/or efficiency in the provision of public services imposed by virtue of the law, in particular, deficiencies in the process of issuing permissive documents, making mandatory registrations, expertise, etc.;
4. the quality of the judicial system and the effectiveness of the functioning of the criminal prosecution process.⁸

25. Additionally, during the meetings held with the authorities, the People’s Advocate Office and the civil society, it was emphasized that there is a need for a protection and promotion mechanism for the rights of entrepreneurs, especially for the small and medium ones (over 90% of businesses in Moldova, according to the information provided during the meetings, are entrepreneurs of this size), who are often victims of arbitrariness by the administration. The representatives of the state authorities acknowledged that such a request is also the result of a demand from international partners who are concerned about the security of foreign investment in the country.

26. However, it is uncertain which “entrepreneurs” will actually use the PAER as a complaint mechanism. While small self-employed and medium-sized enterprises should be in theory the largest and targeted beneficiaries, in practice it is not excluded that this mechanism will be rather used by medium and even large companies, which are more experienced in defending their rights before public authorities.

2. The competencies of the PAER according to the draft law

27. Article 17¹ of the current law is to be modified as following:

“Article 17¹” Duties of the People’s Advocate for Entrepreneurs’ Rights

(1) The People’s Advocate for Entrepreneurs’ Rights provides protection and assistance to entrepreneurs in order to ensure the observance of their rights and legitimate interests by

⁸ Republic of Moldova, *Informative Note to the draft law on the amendment of some normative acts (People’s Advocate for Rights)*

public authorities, by organizations and enterprises, regardless of the type of property and legal form of organization, by non-profit organizations and by people with positions of responsibility at all levels.

(2) The People's Advocate for Entrepreneurs' Rights defends the rights and legitimate interests of entrepreneurs by: preventing their violation, monitoring and reporting on compliance at the national level, promoting the rights and legitimate interests of entrepreneurs and their defence mechanisms, applying regulated procedures by the present law, improving the legislation and international collaboration in this field.

(3) The People's Advocate for Entrepreneurs' Rights cooperates with any person, non-profit organization, institution or public authority with activity in the field.

(4) The People's Advocate for Entrepreneurs' Rights decides on the requests regarding the violation of the rights of the entrepreneurs.

(5) For the purpose of defending the rights of entrepreneurs, the People's Advocate for Entrepreneurs' Rights may notify the Constitutional Court and may file actions in the courts.

(6) In his activity, the People's Advocate for Entrepreneurs' Rights is assisted by a specialized subdivision within the People's Advocate Office. "

28. According to the amendment, the proposed competence for the PAER is therefore broader than that of the PA or the PAC, under several aspects.

a. The protection of legitimate interests of entrepreneurs

29. First, the proposal includes the wording "rights and legitimate interests" of entrepreneurs, which is a competence outside the scope of human rights and freedoms for entrepreneurs as such. However, such a broader competence is not in principle incompatible with possible competences of the Ombudsman; Principle 1 of the Venice Principles states "Ombudsman Institutions have an important role to play in strengthening democracy, the rule of law, good administration and the protection and promotion of human rights and fundamental freedoms."

30. According to Article 59¹ (1) of the Constitution, the PA ensures the "promotion and protection of human rights and fundamental freedoms". This is the constitutional mandate of the office.

31. The question could be raised as to whether the notion "human rights and fundamental freedoms" can be interpreted as covering the rights of companies ("entrepreneurs"). Constitutional systems and international courts vary substantially in the extent to which they allow legal persons to assert claims of human rights and fundamental freedoms. In this case, as the notion of "human rights and fundamental freedoms" is obviously part of Moldova's internal constitutional concepts, its interpretation is ultimately a matter for the Constitutional Court.

32. The second issue is whether new Article 17¹ which intends to expand the mandate of the PA can be given within the constitutional frame. It does not seem entirely unreasonable to argue that the PA cannot be given mandates that do not have a clear and obvious link to its constitutional mandate.

33. While Article 59¹ (8) provides that the organic law shall determine the "manner in which the institution shall be organised and function", one may assume that this is rather a reference to Article 59¹ (1).

34. During the exchange of views with the authorities, a different interpretation of Article 59¹ (1) of the Constitution of the Republic of Moldova was observed. The representatives of the People's Advocate read this mandate as related only to natural persons, while the representatives of the Government and the Parliament read it as including legal persons as well.

b. The competence over complaints of legal persons

35. Secondly, the competence of the PAER is not limited to deal with complaints from physical persons but also from legal persons.

36. In the 2014 Law on the PA, the right to complain before the PA is regulated in Article 18.1 according to which "The People's Advocate reviews the complaints of individuals, no matter of citizenship, age, gender, political or religious beliefs, living permanently, being or having been temporarily on the territory of the country (hereinafter - petitioners), whose rights and freedoms were allegedly violated by the Republic of Moldova". The 2015 Opinion of the Venice Commission on the law of 2014 observed with concern that the wording of the law was "a fundamental impediment to exclude legal persons -including NGOs- from the protection of the PA".

37. This provision was taken into account by the Moldovan legislator who in the new amendments and precisely in the Law no. 164/2015 on the approval of the Regulation on the organization and functioning of the PA, in sub-point 11, replaced the existing words "natural person" with the text "natural person/legal person".

38. Principle 15 of the Venice Principles states "Any individual or legal person, including NGOs, shall have the right to free, unhindered and free access to the Ombudsman, and to file a complaint". This amendment is therefore in line with the Venice Principles in terms of access to the Ombudsman institution.

39. However, two concerns remain with regard to this amendment. Firstly, the legislator has chosen to regulate a fundamental principle such as the access to the Ombudsman not by amending the PA law, in Article 18.1, but by amending the Regulation on the organization and functioning of the institution. As the position of this law in relation to the organic PA law, according to the hierarchy of legal acts, seems to be subordinated, it is important to recall that access to the Ombudsman, as a component of the institution's safeguards, is an important standard, which should therefore be regulated in the PA law rather than in a regulation.

40. Secondly, a difficulty could arise from the relationship between two principles, that of access to the Ombudsman and that of his or her competencies. For instance, if, on the one hand, legal persons, in this case entrepreneurs, have the right to submit complaints to the Ombudsman for violation of their rights or legitimate interests, and if, on the other hand, the competence of the Ombudsman is also extended to all "organisations and enterprises, irrespective of the type of ownership and legal form of the organisation" (which is not in compliance with Principle 13 of the Venice Principles), this could result in the Ombudsman dealing with "conflicts" between private sector entities. In such a case, the Ombudsman would go beyond his usual jurisdiction of conflict resolution.

41. Finally, it should be recalled that the competences of the PA and the PAER (but not those of the PAC), include the supervision of the private sector. This broad competence for an Ombudsman is generally not in line with Recommendation CM/Rec(2019)6 of the Committee of Ministers to member States on the development of the Ombudsman institution nor with the Principle 13 of the Venice Principles according to which the "*mandate of the Ombudsman shall cover all general interest and public services provided to the public, whether delivered by the State, by the municipalities, by State bodies or by private entities.*". In its 2015 Opinion, the Venice Commission had already recommended that the competence of the institution in relation to the private sector and the courts shall be reconsidered and clearly specified.⁹

42. The Venice Commission reiterates its recommendation of reconsidering the competence of the institution in relation to the private sector and of clearly specifying it in line with Principle 13 of the Venice Principles.

⁹ See CDL-AD(2015)017, §81 and §§27-31

3. The election procedure of the PAER

43. With regard to the nomination criteria for being appointed as an Ombudsman, Principle 8 of the Venice Principles states that the criteria “shall be sufficiently broad as to encourage a wide range of suitable candidates. The essential criteria are high moral character, integrity and appropriate professional expertise and experience, including in the field of human rights and fundamental freedoms”.

44. The draft amendments do not provide any nomination criteria. Nomination criteria should be foreseen also for the PAER appointment. Hence, with regard to the nomination criteria of the PAER, the Venice Commission recommends providing for nomination criteria which shall follow Principle 8 of the Venice Principles.

45. With regard to the selecting procedure of the candidates for the PAER and the role of the special parliamentary commission (there seems to be an inaccuracy in the draft law in Article 7 par.1 "commission of legal affairs"), the previous recommendations of the Venice Commission's Opinion on the law of the PA,¹⁰ which recommended the transfer to the parliamentary session of the lists of all candidates who meet the objective criteria provided by law, are still valid.

46. Moreover, the Venice Commission recommends that the selection and election procedure shall be in accordance with the Venice Principles¹¹ and the Paris Principles.¹²

47. According to the draft law under consideration, the PAER is elected by the votes of the majority of members in Parliament. The Venice Principles, in Principle 6, provide for “preferably” a “qualified majority”.¹³ This standard in fact reflects the essential importance of the election of the Ombudsman for the independence of the institution and the public image of that independence. The Ombudsman must enjoy the widest possible public consensus, and its public trust and legitimacy depends heavily on his/her election. The implementation of this principle, however, would require a constitutional amendment.

4. The term of office of the PAER

48. The term of office is set at 7 years and is non-renewable. This provision is fully in line with Principle 10 of the Venice Principles which states: “The term of office of the Ombudsman shall be longer than the mandate of the appointing body. The term of office shall preferably be limited to a single term, with no option for re-election; at any rate, the Ombudsman's mandate shall be renewable only once. The single term shall preferably not be stipulated below seven years”.

B. The introduction of the PAER into the PA Office (hereinafter the PAO)

49. The draft amendments intend to insert the PAER within the PAO. The drafters have hence chosen that the protection of the rights of the entrepreneurs should be foreseen by a new mandate for a new PAER, within the structure of the current PA, with a similar organization and functioning as the PAC. This decision can be interpreted as strengthening the mixed system which until now has consisted of the PA and PAC by allocating new specific functions instead of

¹⁰ See, CDL-AD(2015)017, §. 30, p. 10

¹¹ See Principles 6,7,8 CDL-AD(2019)005, *Principles on the Protection and Promotion of the Ombudsman Institution*

¹² See Article 1 (a,b,c,d,e), United Nations, General Assembly, *Principles relating to the Status of National Institutions (The Paris Principles)*, Adopted by General Assembly resolution 48/134 of 20 December 1993.

¹³ See CDL-AD(2019)005, Principle 6 reads as follow: The Ombudsman shall be elected or appointed according to procedures strengthening to the highest possible extent the authority, impartiality, independence and legitimacy of the Institution. The Ombudsman shall preferably be elected by Parliament by an appropriate qualified majority.” CDL-AD(2019)005

setting up another institution. The idea of construing the PAER within the PAO is mainly carried by financial constraints.

50. First of all, it is important to recall that the Commission has always considered that States have a wide margin of appreciation in choosing the model of Ombudsman institution.

51. This observation finds a similar provision in the Venice Principles, precisely in the Principle 4 according to which "The choice of a single or plural Ombudsman model depends on the State organization, its particularities and needs. The Ombudsman Institution may be organized at different levels and with different competencies".

52. It is worth recalling that according to Principle 5 of the Venice Principles "States shall adopt models that fully comply with these Principles, strengthen the institution and enhance the level of protection and promotion of human rights and fundamental freedoms in the country." The choice to establish this new specialised Ombudsman within the PAO needs to be implemented in a manner that guarantees that the Ombudsman's office, even if it is composed of specialised ombudsmen, shall be in its entirety compact, coherent and independent from the outside and from other institutions. Precisely independence, as a norm and principle, is to be associated with the protection of this constitutionally based institution and its safeguarding against inappropriate external influences. The Venice Commission expresses several concerns in this respect.

1. Internal operational consequences

a. With regard to decision making process

53. According to Article 17¹ (6), of the draft law, the PAER is "assisted by a special subdivision within the people's advocate office". This subdivision "is subordinated to the PA and provides an organizational, legal, informative and technical support in the exercise of its functions". Furthermore, this idea seems to be reinforced also by the provision of Article 20 of the law on the regulation of the PA according to which this office "21) ensures the management of human resources and the implementation of personnel policies; 22) ensures the management of budgetary resources and financial accounting; 23) ensures the management of information resources; 24) exercises other functions intended to ensure the full and effective exercise of the powers of the People's Advocate."

54. In addition, it is the PA who approves the organisational structure, organisation chart and staff of the Office (point 11), the Subdivision Regulation (point 12), and carries out the overall management of the Office (point 23).

55. It results from these provisions that the PAER, like the PAC, has only functional autonomy but no other role of an administrative, institutional or financial nature, or even over the human resources of the subdivision he or she heads.

56. This division of roles seems to have been the expression of the will of the legislator, but it may, over time, be a cause of fragmentation of the institution and thus of its weakening, creating difficulties and contradictions, even blockages, between the constituent entities of the PA institution. The Venice Commission had already expressed concerns about the lack of clarity of the division of roles between the PA and the CPA in its 2015 opinion.

57. The Venice Commission considers therefore necessary to clarify the relations between the PAO, the PAC and the PAER.

58. The risk of internal conflicts between the PA, the PAC and the PAER when fulfilling their different and sometimes contradictory or overlapping tasks is obvious.

59. A mechanism to solve such problems should be foreseen and cannot be left to the wisdom of the three advocates. The mechanism should prevent the possibility for the PAC or the PAER to together outvote the PA. A better option would be that the general PA (also the Head of the institution as such) should have the last say and have the competencies to act on behalf of the institution in conflicting cases.

b. With regard to the internal structure

60. It is worth recalling here Recommendation (2019)6 of the Committee of Ministers of the Council of Europe as well as Principle 22 of the Venice Principles which recommends that “The Ombudsman Institution shall have sufficient staff and appropriate structural flexibility. The Institution may include one or more deputies, appointed by the Ombudsman. The Ombudsman shall be able to recruit his or her staff”¹⁴.

61. The above standard is essential for the independence of the institution. This independence is especially related to the right of the PA not only to have the necessary staff to carry out its mandate, but more than that to give him/her the right to recruit it independently in accordance with the law, to decide in complete independence on the internal structure of the institution in accordance with its priorities and the human rights situation in the country.

62. Following the same logic in order to maintain the independence and coherence of decision-making, the PA should be able to elect him/herself his/her Deputies, in charge with certain sections and covering certain areas, of course, in accordance with the criteria provided by the law. This is essential to maintain the independence of the institution and to avoid any interference from the outside, even from the Parliament, for example, through the election of Deputies.

63. The same applies to the selection of PAO staff. Indeed, the selection of PAO staff from other institutions outside the PA may create the possibility of inappropriate influence on independent PA decision making process and therefore pose the risk of blocking that decision making. This standard applies to all Ombudsman institutions.

64. By virtue of this standard, two alternative options can be foreseen for the PAO: either the PAC and the newly established PAER are two new PAs independent both from each other and from the PA, according to all standards of independence, or these two PAs shall be nominated by the PA him/herself as his/her Deputies as it is provided for in Principle 22 of the Venice Principles¹⁵.

65. While in the Venice Principles there is a subtle caution against having too many different Ombudsman institutions¹⁶, both solutions are in line with the spirit of the Venice and Paris principles. The second solution, which would serve the interests of a monocratic institution, could be considered, in this later respect, as strengthening the PAO as an independent and strong institution for the protection of human rights in the country¹⁷. It has however prejudicial external

¹⁴ CDL-AD(2019)005

¹⁵ Principle 22 reads : “The Ombudsman Institution shall have sufficient staff and appropriate structural flexibility. The Institution may include one or more deputies, appointed by the Ombudsman. The Ombudsman shall be able to recruit his or her staff.”

¹⁶ See Principle 4, which reads : “The choice of a single or plural Ombudsman model depends on the State organisation, its particularities and needs. The Ombudsman Institution may be organised at different levels and with different competences”.

¹⁷ As a reference, see also “«The amendment proposed to Article 9 provides for a division of labour between the deputy protectors. The deputies would have “special functions for the protection of persons deprived of liberty, protection of people belonging to minority nations and other minority national communities, protection of the rights of child, protection of gender equality, protection of disabled persons and protection from discrimination”. The specialisation of the deputies is welcomed because it allows the deputies to deal efficiently with the issues attributed to them whereas the general mandate of the Protector provides for coherence between these specialised areas.» CDL-AD(2009)043, §§9,14.; CDL-PI(2016)001, § 35.

consequences which will be analysed below (see below §§ 69-80).

c. With regard to the financial and administrative means

66. It is well known that when the mandates of existing institutions are widened, the risk of under-financing is often greater than when an entirely new institution is created, because it is assumed that there will be “synergies” to take advantage of. However, if this is not handled properly, it may well lead to financial dilution of the institution’s fundamental mandate. This was in fact one of the major concerns raised by the representatives of the PAO.

67. Hence, any change in the office of the institution, under any circumstances, must be accompanied by financial and administrative support at a level that will not only not compromise its work and day-to-day activities in carrying out the mandate(s), but will, on the contrary, take it to a higher level.

68. It is not for the Commission to assess whether the budget and staff increases provided for in the draft law are appropriate to the needs of the institution and to the financial needs and capacities of the country, nor in particular whether they would be effective in responding to potential applications, but this element shall be seriously considered.

2. External consequences

a. The identity of the PAO

69. The “identity”, or core mission, of an Ombudsman institution is established in various international instruments, including the Venice Principles (notably Principle 12).

70. This mandate may include protection of e.g. small local business companies against abuse of power from the side of public agencies. The Ombudsman is the “little man’s advocate”. Indeed, this is the term that has rightly been chosen to designate the institution of the Ombudsman in certain countries, such as Moldova, while in other countries the term advocate could lead to misinterpretation.

71. For most Ombudsman institutions – including the Moldovan PA – their real powers lie in the respect and authority they build based on their identity as genuine protectors of human rights and fundamental freedoms. It is therefore very probable that an Ombudsman institution having (also) a more general mandate of protecting entrepreneurs will find it very difficult to maintain its identity as a protector of human rights and fundamental freedoms.

72. Therefore, introducing a PAER within the PA institution could very likely lead to a distorted perception of the institution and its primary and core missions. The Venice Commission recommends that the authorities take this important point into account. Thus, if the choice of a separate institution were to prevail, it would be appropriate not to give it a name like “Advocate of Entrepreneurs” or “Ombudsman of Entrepreneurs”.

b. Conflict of missions

73. Under Article 18(3) of the Law on the PA, the PA reviews complaints on decisions etc. of the “public authorities, organizations and companies, no matter of the type of property and legal organization form ...”.

74. As described in §§ 35-42 above, the PAER is meant to have quite extensive jurisdiction over private companies, presumably including entrepreneurs, much broader than recommended in the Venice Principles.

75. Although it is perfectly understandable that the Moldovan context calls for such a broad mandate, this has important consequences for the institution's mandate when it comes to whom to protect. Generally speaking, there is little doubt that an Ombudsman institution will easily lose its credibility if, to a considerable extent, it is meant at the same time to control and to protect the same legal entities.

76. This does not mean that an Ombudsman institution cannot to a certain extent have a mandate to protect legal entities over which it has jurisdiction. But great care must be taken in this respect or it will very easily lead to the blurring of the Ombudsman mandate in the public eye. It is quite conceivable that, after the changes in question, entrepreneurs could well be both important 'customers' and important objects of investigation for the PAO. This could be very risky in terms of the public credibility of the institution.

77. Moreover, due to this overlapping of competences, conflicts between the three Ombudsman are bound to arise and need to be resolved. Since the PA and the PAC are already competent for cases concerning certain fundamental rights involving in one way or another physical persons also being entrepreneurs, the competence of the PAER may easily collide. One solution would be to ensure that the PA has the final say in case of conflict and that it is responsible for resolving any conflicts of jurisdiction.

78. It is definitely necessary to take into account the fact that this area of potential conflicts will be even widened if the PA and the PAC, in full compliance with the Venice Principles¹⁸ and in line with their previous recommendations¹⁹, are given the competence to deal with complaints also from legal persons.

79. To sum up, the introduction of the protection of the rights of entrepreneurs as such by a special PA and entrusted to a constitutional institution, in charge of dealing with cases concerning human rights and freedoms, will inevitably give rise to conflicts of competence between the three defenders within the same institution. A case concerning both aspects of human rights on the one hand and legitimate rights and interests on the other hand, with an entrepreneur or other plaintiff opposing another private company or organisation on the other hand, cannot be excluded.

80. Furthermore, it is worth considering that the fact that there are three defenders with different competences, which sometimes overlap with certain tasks provided for in the constitution and other tasks outside this constitutional framework, also risks compromising the legitimacy of the institution for the general public.

C. Additional remarks

1. The consultation process

81. According to the exchanges of views, it seems that the draft has been forwarded and presented to Parliament without any prior public consultation. Any change in the Laws governing the Ombudsman / NHRI is a very sensitive matter, no change should be made without first ensuring a public, transparent and accountable consultation process, in the first place with the PA-institution itself, with the civil society and any relevant stakeholders.

82. To guarantee effective participation, consultation mechanisms must allow for input at an early

¹⁸ Principle 15 reads : Any individual or legal person, including NGO's, shall have the right to free, unhindered and free of charge access to the Ombudsman, and to file a complaint."

¹⁹ See CDL-AD (2015)017, §§29, 27-31, 66-67

stage “and throughout the process”,²⁰ meaning not only when the draft is being prepared by relevant ministries but also when it is discussed before Parliament (e.g. through the organization of public hearings).

83. The Venice Commission recalls the need for genuine and wide-ranging public consultation.

2. Considering further amendments

84. The Commission invites the legislator to take the opportunity of a possible revision of the PA’s law not only to implement the recommendations formulated in previous opinions of the Venice Commission which are still valid (see §§ 11-18 above) but also to implement the Venice Principles more extensively. In this regard, Principle 17 of the Venice Principles sets out that “The Ombudsman shall have the legally enforceable right to demand that officials and authorities respond within a reasonable time set by the Ombudsman”.

85. While this principle may seem trivial, it is very important in practice and would be worth including it in draft amendments to the PA’s law.

3. The importance of accompanying measures

86. At the level of the Ombudsman institution it is clear that appropriate training measures must regularly supplement the legislative provisions. This is for instance amply mentioned in the Council of Europe's Recommendation CM/Rec(2019)6 of the Committee of Ministers to member States on the development of the Ombudsman Institution²¹.

87. At the level of the normative framework the introduction a code of good conduct or a code of ethics relating to relations between administrations and citizens are very positive accompanying measures that can also be taken by the authorities.

IV. Conclusion

88. As a preliminary remark, the Venice Commission recalls that States have a wide margin of appreciation in choosing the most appropriate model of Ombudsman institution for the promotion and protection of human rights.

89. Introducing into the national legal order a “People’s Advocate for Entrepreneurs Rights” as well as incorporating it in the already existing institution of the People's Advocate calls for several remarks.

90. First and foremost, if the introduction of a People's Advocate for Entrepreneur’s Rights should occur, the Commission reiterates the importance of defining very clearly the fields of competences of this new Advocate, and more precisely with regard to the private sector. This clarification is all the more important as it will make it possible to resolve any conflicts of competence that may arise. The Venice Commission reiterates its previous recommendation of reconsidering the competence of the institution in order “to include private bodies in the jurisdiction of the People's Advocate only to the extent that the agencies are entrusted with a public service mission or where applicable, co-financed by the State²²” and of clearly specifying it in line with Principle 13 of the Venice Principles.

²⁰ See Section II, Sub-Section G on the Right to participate in public affairs (2014 OSCE/ODIHR Guidelines on the Protection of Human Rights Defenders)

²¹ Recommendation CM/Rec(2019)6 of the Committee of Ministers to member States on the development of the Ombudsman Institution (adopted by the Committee of Ministers on 16 October 2019 at the 1357th meeting of the Ministers’ Deputies)

²² CDL-AD (2015) 17, §29

91. As regards the procedure of appointment and dismissal of the People's Advocate for Entrepreneurs' Rights, the Commission notes that in order to implement the Venice Commission's principle requiring a qualified majority for the election of the Ombudsman, a constitutional amendment would be required. Appointment criteria should also be provided for according to Principle 8 of the Venice Principles. With regard to the term of office envisaged by the draft amendments, the Commission congratulates the drafters for having provided for a duration in line with the Venice Principles.

92. Regarding the incorporation of the People's Advocate for the Entrepreneurs' Rights into the People's Advocate Office, the Commission recalls that it must not bring adverse effects to the institution of the People's Advocate and the Peoples' Advocate for Children with regard to the core mission of the institution and its identity. If the choice of this integration is maintained, it is essential to define an internal last resort decision maker (preferably the People's Advocate), clear internal structural mechanisms to ensure a proper functioning while keeping in mind the essential unity of the institution. In addition, sufficient and appropriate budgetary guarantees and increases to ensure the functioning of the institution and the efficient processing of cases are indispensable.

93. The Venice Commission recalls the need for genuine and wide-ranging public consultation and of accompanying measures that could enhance the protection of human rights.

94. Finally, the Commission invites the legislator to take the opportunity of a possible revision of the People's Advocate law not only to implement the outstanding recommendations formulated in previous opinions of the Venice Commission which are still valid, but also to fully implement all Venice Principles.

95. The Venice Commission remains available for any further assistance.