

OPINION

of Promo-LEX Association

on the draft law on piloting postal voting, no. 65 of 01.03.2024

The Context of the Initiative to Piloting Postal Voting

1. The November 2020 presidential election recorded the highest overseas voter turnout since 1994, with 263,177 voters participating in the second round on 15 November 2020,¹ constituting about 16% of the total voter turnout. Overseas voting was conducted in 139 polling stations across 36 countries. Despite this being the highest number of overseas polling stations ever established by the Central Election Commission (CEC), many experienced long queues and requested extensions during both voting rounds, particularly in the second round. Additionally, 11 polling stations exhausted their ballot supplies before Election Day concluded.² In the 2021 early parliamentary elections, 150 polling stations were established abroad, attracting 212,434 diaspora voters. Notably, in 14 polling stations across France, the UK, Germany, and Italy³, the voter turnout per station surpassed 3,000.
2. The growing number of citizens living abroad has made it increasingly challenging to guarantee their right to vote solely through traditional polling station methods. It is not feasible to continuously increase the number of polling stations. There is a pressing need for alternative voting mechanisms, which should be organized and executed in adherence to the principles of free and secret voting.
3. In the aftermath of the 2020 presidential elections, Promo-LEX's Final Report⁴ by the Observation Mission emphasized “the need to overhaul the legal framework to introduce supplementary and alternative voting options for citizens abroad. This includes considering possibilities such as extending the voting period (from one day to two, for instance); and adopting and deploying alternative voting methods (like postal voting, early voting, or internet voting)”.
4. With the adoption of the new Electoral Code in 2022, one of the solutions suggested above - two-day voting - has already been provided for in the legislation. At the same time, although internet voting has been proactively advocated and promoted by the CEC, this alternative voting method does not seem to enjoy political support at the moment, especially in the context of hybrid warfare and IT security risks.
5. A much better known and globally applied alternative (than internet voting) is postal voting, that stands as the **predominant mechanism for overseas voters following in-person polling station voting**. According to the overseas voting database of IDEA International, encompassing around 216 countries⁵, 73% of the surveyed nations facilitate some form of overseas voting. The primary method is in-person voting at polling stations—utilized by 109 countries, with postal voting coming in second—adopted by 53 countries. Postal voting is predominantly employed in elections conducted in a single round. Within the European Union, 13 countries utilize postal voting.

¹ <https://rezultate.cec.md/api/api/GetReport?electionId=10048&electionRoundId=20111&electionCircumscriptionId=4889>

² These are the following polling stations in the UK, Italy, Germany and France: 3 in London, Northampton, Bologna, Parma, Berlin, Frankfurt am Main, Montreuil, Paris and Villeneuve-Saint-Georges.

³ Câte 2 secții de votare în Franța, Marea Britanie și Germania, 8 secții de votare în Italia,

http://alegeri.md/w/Votarea_%C3%AE_n_str%C4%83in%C4%83tate_la_alegerile_parlamentare_2021#Rezultatele_alegerilor

⁴ Final Report. Election Observation Mission for the elections for President of the Republic of Moldova on 1 (15) November 2020, p. 101.

⁵ According to: [Voting from abroad](#) in European Parliament elections. BRIEFING European elections 2024, p. 2.

6. **In view of the above, Promo-LEX Association reiterates the need to provide voters abroad with alternative voting mechanisms, including by the adoption of postal voting.**
7. Concurrently, Promo-LEX Association insists that postal voting, like other alternative voting methods, should be introduced in compliance with all legal procedures and ensuring compliance with constitutional provisions and electoral standards. In this respect, Promo-LEX Association deems it crucial to deliberate and scrutinize the following contentious elements of the draft law:

Piloting Postal Voting Within the Framework of International Standards and Constitutional Provisions.

8. To guarantee that elections align with the core principles of the European electoral heritage, foundational to every democratic society, five essential rules must be upheld: **suffrage must be universal, equal, free, secret, and direct**. Additionally, elections should occur at regular intervals. Collectively, these principles embody the European electoral heritage.⁶
9. The Constitution of the Republic of Moldova regulates in Articles 38, 61, 78 the same principles of voting - universal, equal, direct, secret and freely expressed suffrage. Therefore, the considerations expressed below also hold validity within the framework of constitutional norms.
10. In the context of this draft law, which proposes piloting postal voting exclusively for voters in the USA and Canada, the legal implications of this pilot make it impossible to assert the universality and equality of the vote. Consequently, we posit that these principles could be upheld if postal voting were made accessible to all voters who opt to utilize this alternative voting method.
11. In this context, it's pertinent to recall that the International Covenant on Civil and Political Rights (ICCPR)⁷ in Article 25(b) mandates that every citizen should have the right and opportunity/possibility, without any distinctions as mentioned in Article 2 and without unreasonable restrictions, to elect and be elected in genuine periodic elections (...). This stipulates that the right to choose must be ensured not just legally (de jure) but also in practice (de facto). Consequently, states are obligated to implement affirmative actions to actualize the participation rights. Such measures could entail, for instance, ensuring voter registration is as inclusive as possible and the polling stations are conveniently located. Therefore, limiting the facilitation of the right to vote via postal voting only to voters in certain countries could be perceived as discriminatory or unreasonable.
12. At the same time, the Constitutional Court has highlighted that equality in voting does not necessitate exercising the vote under identical conditions domestically and internationally, given that citizens residing within the country and those abroad find themselves in differing legal circumstances (HCC 34/2016, § 110). This reasoning was articulated to clarify that voters living outside the country cannot avail of the same voting conditions as those within. In this context, the Promo-LEX Association believes that **the implementation of postal voting would adhere to both the aforementioned principles and constitutional norms, provided that this option is accessible to all overseas voters**.
13. Like any alternative voting method conducted outside of traditional polling stations, postal voting faces the potential risk of external influence or susceptibility to corruption. In such instances, guaranteeing **a secret and freely expressed vote** goes beyond the purview of regulatory measures and, thus, cannot be fully assured. From this standpoint, a comprehensive evaluation is essential to determine the viability of implementing postal voting in a manner that preserves the integrity and trustworthiness of the electoral process.
14. While the draft law provides certain safeguards for voters (including the option to vote at polling stations on election day—a measure that can aid in ensuring a secret and freely expressed vote), it is deemed essential to enhance the draft law with clauses that guarantee: a) straightforward reporting mechanisms to law enforcement and electoral authorities concerning potential infringements of

⁶ [Code](#) of Good Practice in Electoral Matters

⁷ [International Covenant](#) No. 31 of 16.12.1966 on Civil and Political Rights.

these principles, b) efficient handling of such reports, and c) imposition of stricter penalties for breaches of the aforementioned principles in instances of postal voting.

15. A significant concern arises from the potential breach of the ***principle of electoral legislation stability***, particularly if the draft law persists in incorporating additional lower electoral bodies that are not specified in the Electoral Code. It is important to remember, as per Article 11 of the Code, that "the electoral system and the process for forming constituencies or electoral bodies cannot be changed less than one year prior to the national elections". Furthermore, given the stated purpose of the law (to create the necessary regulatory framework for piloting postal voting and verifying the appropriateness of implementing this method on a permanent basis), and its limited application to a single election event, the passage of a provisional electoral law appears unwarranted and could set risky precedents.
16. The Code of Good Practice in Electoral Matters similarly emphasizes the need for electoral law to have a certain level of stability to safeguard against manipulations by political parties. The law's stability is a crucial aspect of the electoral process's credibility and plays a vital role in reinforcing democracy. Hence, frequent alterations to the rules or their complexity can perplex voters. This confusion might lead voters to suspect, whether accurately or not, that electoral law serves as an instrument for those in power, diminishing the perceived value and impact of their vote in determining election outcomes.
17. In addition to the uncertainties regarding the applicability of the principles discussed above, ***there exists a degree of uncertainty as to whether constitutional rules allow early voting***. Article 38(2) of the Constitution guarantees the voting rights of citizens who have attained the age of 18 by election day. Consequently, the application of this rule to postal voting raises questions for voters who turn 18 on or before election day but after the deadline for postal vote receipt has passed.

Gaps and Uncertainties in the Drafting Process

18. ***Promo-LEX Association disapproves of the way the process of developing the legal framework for the implementation/piloting of postal voting is taking place. In this regard, we consider it necessary to draw attention to the following shortcomings:***

- ***Delayed inclusion of postal voting on the public agenda.*** For a robust legislative framework, regulations must transcend immediate political needs. In alignment with the law's intent, introducing a new voting mechanism and establishing new electoral bodies are significant amendments that should be enacted well before the election period. We are convinced that the arguments used by the authors of the draft to justify it were well founded at the stage of drafting the 2022 Electoral Code (which was largely signed by the same authors).
- ***Insufficient transparency in the drafting process:*** While the public received some information from the CEC regarding the pilot of internet voting, postal voting has not been publicized. Furthermore, the authors have not shared any feasibility studies, specifications, action plans, or other pertinent documents necessary for piloting such a crucial and intricate mechanism;
- ***efforts to achieve national consensus on the implementation of postal voting.*** This deficiency is highlighted by the lack of public discussions or consultations with other political entities or civil society organizations prior to the draft law's registration. „Given the sensitivity of the political issue at hand, it is imperative to engage in extensive, transparent discussions devoid of haste and populist intentions. This should include public consultations involving civil society organizations, overseas voter communities, and all pertinent institutions to ensure a comprehensive approach to introducing this voting method.”⁸

19. ***Regarding the concept of "piloting" postal voting,*** without prior experience, concerns arise that it might "compromise the integrity of the electoral process"⁹. Nevertheless, we believe that, generally, such an approach can be seen as justifiable. However, conducting a pilot limited to a very small

⁸ [Study. Alternative voting methods.](#) Lessons learned for the Republic of Moldova from the experience of Romania and Poland, p.45.

⁹ [EFOR Analysis.](#) Postal Voting: Yes, But Not Anyhow. Policy Brief No. 37, May 2015.

number of states would seem appropriate only for partial elections. For national elections, it is recommended to fully develop the procedures and introduce alternative voting options for Moldovan citizens across all countries. Additionally, the criteria for selecting specific states for the postal voting pilot raise doubts about the rationale behind these choices.

20. At the same time, we note that ***the draft organic law subject to public consultation derogates from a number of provisions of the Electoral Code***. For example, it establishes a new type of electoral list, which is not provided for by the legal and regulatory framework, or the printing of ballot papers by voters in the context of the second round of elections. On the one hand, there is an "ad hoc" piloting law, which seems to be valid only for the presidential elections in autumn 2024. However, we believe that having different provisions that will govern the same election may cause confusion among election officials and other participants in the process about the clarity and predictability of the electoral process. We call on the authorities to explain and unambiguously regulate the legislative uncertainties and ambiguities that call into question the stability of electoral procedures.

Potentially Problematic Issues for the Future Implementation of the Law

21. ***Significant responsibilities are assigned to the Central Electoral Commission (CEC) within a limited timeframe, amidst concerns about the commission's capacity***. Thus, according to the organic law, the CEC will develop and approve regulations and instructions aimed at regulating the electoral procedures for the exercise of postal voting (on the functioning of the computer subsystems on pre-registration and voter registration, on detailed electoral procedures aimed at securing voting, keeping and ensuring the integrity of the ballot envelopes, etc.). Additionally, the CEC is responsible for developing and managing the Voter Registration Subsystem for postal voting.

Concerns about the CEC's capacity are further highlighted by the Promo-LEX Observation Mission's findings from the 2023 General Local Elections, which noted a shortage of human resources, particularly in the ICT sector, and delays in approving the regulatory framework. These issues raise questions about the feasibility of implementing the proposed quality procedures for postal voting effectively.

22. ***Regarding the creation of lower electoral bodies specifically for postal voting***, we suggest the authors reconsider the necessity of establishing separate lower-level electoral bodies for the pilot phase. While the justification for separate electoral bodies might hold if postal voting were to be implemented for all overseas voters, the pilot limited to just two countries likely does not warrant this. The existing structures for overseas voting outlined in the Electoral Code should suffice to address the requirements of the pilot.

23. ***The legislation does not specify how postal voters will be informed about the progression of their vote throughout the process***. We find important that the legal framework includes mechanisms to inform voters about the status of their vote at various stages involving electoral bodies. According to the rules in force, voters are notified only at the final stage when the polling station that has not received the return envelopes by the end of the deadline for receiving the outer envelopes notifies the voter of this by e-mail sent to the contact address indicated by the voter. The notification is equivalent to declaring the ballot paper sent by the polling station as spoiled.

24. ***The law must ensure consistent conditions for organizing postal voting across both election rounds***. While Article 21 of the draft law specifies that the Central Electoral Commission is responsible for printing the ballot papers for postal voting in a quantity that matches the voter count, it does not distinguish between rounds. Conversely, Article 34 mandates that for a second ballot or repeat voting, voters must print the ballot papers themselves, as sent electronically by the electoral authorities.

This requirement contradicts the Electoral Code and diverges from practices in countries that facilitate postal voting. Should the lawmakers choose to proceed with this approach, it is advisable to allow for both printing options to be available for both rounds of voting.

25. ***The legislation currently does not explicitly grant observers access to every electoral procedure associated with postal voting***. This issue extends beyond merely overseeing activities within polling stations, emphasizing the importance of observer access throughout the entire process. This includes

registration for postal voting, as well as the counting and centralization of results. Ensuring transparency is a responsibility that falls not only on the electoral administration but also on all entities involved in the process, such as the Ministry of Foreign Affairs and any postal service providers. This comprehensive access enables all interested stakeholders to monitor and, if necessary, challenge procedures that deviate from the established legal framework.

26. *The current legislation lacks specific penalties for potential fraud in postal voting.* It is crucial that the law includes sufficiently deterrent measures to address issues such as exerting pressure on voters to choose a particular candidate or abstain from voting, submitting false information during the registration process, among others.

Recommendations from Promo-LEX Association in the Context of the Public Consultation on the Draft Law for Postal Voting

1. Provide universal access to postal voting for all citizens residing overseas.
2. Conduct extensive public consultations on the draft law to ensure wide-ranging support from both political spheres and civil society for the initiation and implementation of postal voting.
3. Refine the draft law by addressing identified issues and incorporating the suggestions outlined previously, especially those related to the fundamental principles of European electoral heritage.
4. Proceed to a second reading and adoption of the draft law only after securing favorable assessments from the Venice Commission and the OSCE/ODIHR.