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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

DRAFT COMPILATION

OF VENICE COMMISSION OPINIONS AND REPORTS

**CONCERNING THRESHOLDS
WHICH BAR PARTIES
FROM ACCESS TO PARLIAMENT¹**

¹ This document will be updated regularly. This version contains all opinions and reports adopted up to and including the Venice Commission's 104th Plenary Session (22-24 October 2015).

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Table of Contents

I.	Introduction	3
II.	General Remarks.....	4
III.	The Choice of an Electoral System.....	4
IV.	The Different Types of Threshold	5
	<i>A. The Legal Threshold</i>	6
	1. The level of the legal threshold.....	6
	i. The calculation of the legal threshold.....	8
	ii. Undesirable effects	9
	2. The legal thresholds: specific features.....	10
	i. Thresholds in majority/plurality systems.....	10
	ii. The territorial scope of the threshold	11
	iii. Thresholds and electoral blocs/Graduation of the threshold	12
	iv. Alternative thresholds.....	13
	v. Cumulative thresholds	13
	vi. Threshold and preference vote	14
	3. The comparison between legal thresholds in Europe.....	14
	<i>B. The Natural Threshold</i>	17
	1. The concept	17
	2. Natural threshold and size of constituencies	20
	3. The problem of national transposition.....	22
	4. Effect of the threshold on the parties and voters behaviour	23
V.	Thresholds and Minority Representation	24
VI.	Reference Documents	29

I. Introduction

The present document is a compilation of extracts taken from opinions and reports/studies adopted by the Venice Commission on issues concerning thresholds. The aim of this compilation is to give an overview of the doctrine of the Venice Commission in this field.

This compilation is intended to serve as a source of references for drafters of constitutions and of legislation relating to elections, researchers as well as the Venice Commission's members, who are requested to prepare comments and opinions on such texts. However, it should not prevent members from introducing new points of view or diverge from earlier ones, if there is good reason for doing so. The present document merely provides a frame of reference.

This compilation is structured in a thematic manner in order to facilitate access to the topics dealt with by the Venice Commission over the years.

The compilation is not a static document and will continue to be regularly updated with extracts of newly adopted opinions or reports/studies by the Venice Commission.

Each opinion referred to in the present document relates to a specific country and any recommendation made has to be seen in the specific constitutional context of that country. This is not to say that such recommendation cannot be of relevance for other systems as well.

Both the brief extracts from opinions and reports/studies presented here must be seen in the context of the original text adopted by the Venice Commission from which it has been taken. Each citation therefore has a reference that sets out its exact position in the opinion or report/study (paragraph number, page number for older opinions), which allows the reader to find it in the corresponding opinion or report/study.

The Venice Commission's position on a given topic may change or develop over time as new opinions are prepared and new experiences acquired. Therefore, in order to have a full understanding of the Venice Commission's position, it would be important to read the entire Compilation under a particular theme. Please kindly inform the Venice Commission's Secretariat if you think that a quote is missing, superfluous or filed under an incorrect heading (venice@coe.int).

II. General Remarks

“The minimum threshold is known in many European electoral regimes and its purpose is systematically to avoid an excessive fragmentation of parliaments.”

CDL-AD(2009)028, Joint Opinion on the Draft Law No. 3366 about Elections to the Parliament of Ukraine – paragraph 21.

(...)“the effect of most electoral systems, which is to strengthen the two main parties so that one can govern and the other form the opposition, is by no means reprehensible, even if it does reduce the representation of smaller parties. Nevertheless, the reduction should not be excessive, though this is largely a subjective matter and raises the issue of what constitutes a reasonable balance.”

“At what point does a threshold become excessive? Proportional representation purists would say right from the start, as it permits a gap to emerge between representatives and those they represent. Nevertheless, most electoral legislation establishes thresholds to avoid fragmentation.”

CDL-AD(2010)007, Report on thresholds and other features of electoral systems which bar parties from access to Parliament (II) paragraph 65, 66.

(...) “No electoral system can be perfectly proportional in practice: according to the principle of representation a larger body (whole electorate) is always translated into a much smaller one (members of parliament). There will thus always be a certain minimum amount of votes needed to qualify a party for representation (distribution of seats) in the parliament. The threshold of exclusion is about that percentage of votes. On the one hand, it is generally true that MS are more restrictive to minor/new parties in this respect. This is, however, not so when a minor party’s support is concentrated within a specific region that corresponds to one or more of the electoral districts. On the other hand, even though PS and combined systems (CS) are considered generally to be more favourable to minor/new parties when it comes to the threshold of exclusion, there are still significant degrees of exclusion possible in those systems as well.”

CDL-AD(2008)037, Comparative Report on thresholds and other features of electoral systems which bar parties from access to Parliament, paragraph 13.

III. The Choice of an Electoral System

“At all events, there is no point in seeking a uniform electoral system for all the countries of the Council of Europe. The answer may be to set limits (...) and leave it to each country to decide what arrangements are best suited to its particular circumstances, having regard to its history and party system, and best able to strike a satisfactory balance between the two potentially conflicting requirements of representativeness and governability.”

CDL-AD(2010)007, Report on thresholds and other features of electoral systems which bar parties from access to Parliament (II) paragraph 72.

“The natural starting point of any analysis of electoral systems’ effect on inclusion/exclusion of parties from access to parliament is the “Duverger’s law”. It states that majority/plurality system “tends to party dualism” while “proportional representation tend to multipartyism”. The law is not without exceptions and can be understood only as a probabilistic generalization. Sometimes significant disparities exist within one and the same system-family. Nonetheless, the choice of a

type of electoral system (majority/plurality, combined, proportional) is an important general threshold; it is itself a mechanism with an important general impact on minor party exclusion/inclusion and, consequently, party fragmentation. Party systems will be more competitive and fragmented in proportional systems (PS), whereas majority/plurality systems (MS) will usually restrict opportunities for minor parties. Thus, a study of electoral systems worldwide found that “the mean number of parliamentary parties (based on the simplest definition of parties holding at least one seat) was 5.22 in the countries using majority/plurality systems, 8.85 in combined (or mixed) systems, and 9.25 in societies with proportional representational electoral systems.” Similarly, “the mean number of relevant parties [] (holding over 3% of parliamentary seats) was 3.33 in all majority/plurality systems, 4.52 for combined systems, and 4.74 for all proportional systems”.

CDL-AD(2008)037, Comparative Report on thresholds and other features of electoral systems which bar parties from access to Parliament, paragraph 5.

As stated in Venice Commission and OSCE/ODIHR joint opinions:

“the choice of an electoral system is the sovereign right of each state; however it should be decided and agreed upon through broad and open discussions in the parliament with the participation of all political forces”.

See, among many others:

CDL-AD(2013)016, Joint Opinion on the Draft Amendments to the Laws on Election of People’s Deputies and on the Central Election Commission and on the Draft Law on Repeat Elections of Ukraine, paragraph 16.

CDL-AD(2011)037, Joint Opinion on the Draft Law on Election of the People’s Deputies of Ukraine, paragraph 22.

IV. The Different Types of Threshold

(...)“By the term “threshold” we usually understand the threshold in the formal sense: the legally prescribed minimum number of votes needed for a party to take part in distribution of parliamentary seats.”(...)

“There are two types of thresholds of exclusion. In some electoral systems the threshold is set artificially, by law. This is known as the *legal* (or artificial, or formal) threshold. Parties that do not obtain the legally prescribed minimum number of votes do not get any seat. This is an obvious limitation to minor parties, one that often also proves fatal to the survival of such parties.”(...)

(...)“The second one is the so-called *natural* (or hidden, or effective, or informal) threshold. This one is present in any electoral system, regardless of whether or not the system also has any legal threshold. Even when there is no legal threshold at all, small parties can thus still face considerable natural thresholds for access to parliament. The natural threshold is the percentage of votes needed to get one seat at a district level, and is mainly dependent on the mean district magnitude (the average number of legislators returned per district, spanning from one in the UK to 150 in the Netherlands.)”(...)

CDL AD(2008)037, Comparative Report on thresholds and other features of electoral systems which bar parties from access to Parliament - paragraphs 3, 14, 15.

A. The Legal Threshold

1. The level of the legal threshold

The approach adopted varies widely from country to country. In the Council of Europe member states the threshold varies from 10% of the votes cast to 0 – that is no legal threshold – as the following, non-exhaustive, list shows:

Threshold as % of votes cast:

10%	Turkey
7%	Russia (since 2007, previously 5%)
5%	Germany, Belgium (by constituency), Estonia, Georgia, Hungary, Moldova, Poland, Czech Republic, Slovakia
4%	Austria, Bulgaria, Italy, Norway, Slovenia, Sweden
3%	Spain (by constituency), Greece, Romania, Ukraine (4% until 2004)
2%	Denmark
0.67%	Netherlands (the only legal threshold is the national threshold of 1/150 of the votes cast).

Several countries, in particular Sweden, Finland, Ireland and Iceland, have no legal threshold but as their constituencies are small, as in Ireland, or limited in size, the natural thresholds considered below have the same effect.

Practice varies widely, although in general thresholds are around 4 to 5%. It needs to be recognised that this can pose problems.

CDL-AD(2010)007, Report on thresholds and other features of electoral systems which bar parties from access to Parliament (II) – paragraph 20 – 23.

(...)“States with legal threshold differ according to the chosen percentage. For the member states of the Venice Commission this range is between the lowest 0.67% (in the Netherlands) to the highest 10% (in Turkey).”(...)

CDL AD(2008)037, Comparative Report on thresholds and other features of electoral systems which bar parties from access to Parliament - paragraph 14.

“The new 6% threshold is rather high (even though there are countries with even higher thresholds). Such a high threshold may lead to a high number of wasted votes. It is therefore recommended to keep the threshold lower than this.”

CDL-AD(2008)022, Joint Opinion on the Election Code of Moldova – paragraph 15.

“In comparison to other electoral systems a “3%-clause” is rather low, but perfectly acceptable in order to ensure a wide participation of different political forces in Parliament.”

CDL-AD(2009)019, Opinion on the Draft Law amending the Law on election of People's Deputies of Ukraine – paragraph 23.

“Considering the experience of different countries, thresholds from 3 to 5% are in principle appropriate.”

CDL-AD(2006)002rev, Opinion on the Law on Elections of People's Deputies of Ukraine – paragraph 86.

“The Venice Commission has on several occasions indicated that it considers thresholds above 5% as being problematic. The recent reform in the electoral legislation has lowered the threshold to 5%, which is to be applied in 2016. The Venice Commission regrets that this was not applied to the 2011 elections.”

CDL-AD(2012)003, Opinion on the law on political parties of the Russian Federation – paragraph 30.

“Although five percent (5 per cent) is not contrary to any international or European standard, it is not clear why the legal threshold has been raised. This change could adversely affect smaller political parties and lists submitted by groups of citizens.”

CDL-AD(2009)039, Joint Opinion on Draft Laws on Electoral Legislation of Serbia – paragraph 65.

“In the proportional part of the parliamentary electoral system, the threshold of 7% of the votes has been regarded as too high by the Venice Commission. By international comparison, it might be appropriate to lower the threshold to 4%-5%.”

CDL-AD(2004)005, Opinion on the Unified Election Code of Georgia as amended on 14 August 2003 – paragraph 50.

“The legal threshold for the allocation of mandates in the nationwide proportional component of the elections is five per cent. As stated in the 2011 Joint Opinion, this threshold, combined with the ban on the formation of electoral blocs and the choice of a mixed system, “does not facilitate the access of different political forces to parliament.” In Resolution 1705 (2010) of the Parliamentary Assembly of the Council of Europe, the Council of Europe called upon member states to “consider decreasing legal thresholds that are higher than 3 per cent”. The Venice Commission and the OSCE/ODIHR recommend that consideration be given to decreasing the five percent threshold stipulated in the parliamentary electoral law.”

CDL-AD(2013)016, Joint Opinion on the Draft Amendments to the Laws on election of people's deputies and on the Central Election Commission and on the Draft Law on repeat elections of Ukraine – paragraph 16.

“The high level of the legal threshold (7%) (Article 105.7) has not been lowered despite being sharply criticised by international organisations. It goes without saying that setting a threshold of exclusion is always a political decision; therefore, legal thresholds in proportional electoral systems vary quite a lot, from 0.67% to 10% of the national vote. Within this empirical spectrum, however, Georgia has one of the highest legal hurdles worldwide. Generally, it can be stated that the “mechanical” concentration effect of such a high threshold will hardly remain within the acceptable limits of “proportional representation”.(..) In sum, the 7%-threshold is definitely too high not only in normative terms, but also with

regard to the actual political context. Therefore, it would be highly recommendable to lower it to 4%-5%.”

CDL-AD(2002)009, Opinion on the Unified Election Code of Georgia – paragraph 81.

(...)”since only 25 seats are allocated by (proportional) voting in the multi-seat constituency it appears that a 6% quota is unnecessarily high. The purpose of the quota can only be to ensure that Parliament is able to form coherent governing majorities. This purpose is already enhanced by the fact that three quarters of all seats are allocated through elections in single-seat constituencies, a rule which favours bigger parties. Under the current system it is necessary to receive at least 4% of the votes in order to obtain one seat in Parliament. If the law aimed to prevent single member representations of parties in Parliament it would therefore have to set an 8% threshold. Such a threshold would clearly be too high. It is therefore suggested to lower the threshold to 5%.”(...)

CDL-INF(2000)017, Law on Parliamentary Elections of the Republic of Azerbaijan: Comments adopted by the Venice Commission, chapter 7.

“Is a higher threshold acceptable? In its judgment of 8 July 2008 in the case of *Yumak and Sadak v Turkey* the European Court of Human Rights accepted the 10% threshold in Turkish legislation on the grounds that it had the legitimate aim of avoiding excessive parliamentary fragmentation, thus encouraging the emergence of a majority government. However its acceptance was also based partly on the existence of several correctives and safeguards, notably the independent candidatures that permitted the election of a few Kurdish members of parliament.”

(...)The German Constitutional Court is quite punctilious on this subject, but has never questioned the 5% threshold for representation. It has even offered it protection, for example in a decision of 30 May 1962 on access to the media during election campaigns, where it stated that if new parties whose sole aim was to make themselves known were to have the same access to broadcasting facilities as the large parties, this would create a sense of uncertainty in the electorate and a tendency for voting to fragment, which was definitely to be avoided. Admittedly, this is an old decision but the reasoning is still valid.”

“In 2007 in its Resolution 1547 the Council of Europe's Parliamentary Assembly opted for a 3% limit, though with the important reservation that this recommendation applied to "wellestablished democracies". This threshold seems a little low, even if we recognise the important distinction between established democracies and less established ones where the party system is still being created. In the former, a 3 to 5% threshold is probably acceptable, subject to the existence of safeguards, particularly for national minorities, and so long as the implicit threshold is not still higher. In the new democracies, in contrast, higher thresholds might be envisaged to encourage the establishment of simple and effective party systems, with the same precautions and certainly without exceeding 10%, which is already fairly high.”

CDL-AD(2010)007, Report on thresholds and other features of electoral systems which bar parties from access to Parliament (II) paragraph 67,66, 68.

i. The calculation of the legal threshold

“Article 66(2) of the draft national elections law limits distribution of parliamentary mandates to political parties that receive more than 5 per cent of the vote nationwide and at least 0.5 per cent of the vote in each of the seven oblasts and Bishkek and Osh cities. Both thresholds are calculated against the number of voters who participated in elections. This is a positive

development compared with previous practice when the threshold was calculated against the number of registered voters. Further, as noted in previous OSCE/ODIHR reports, the double threshold requirement compromises the objectives of a proportional representation system. The Venice Commission and OSCE/ODIHR recommend that the second threshold requirement of 0.5 per cent of the vote in each of the seven oblasts and Bishkek and Osh cities be reconsidered and that thresholds for the allocation of parliamentary seats be calculated based on the number of valid votes cast, rather than against the number of voters who participated in elections, in line with international practice.”

CDL-AD(2011)025, Joint opinion on the draft law on presidential and parliamentary elections, the draft law on elections to local governments and the draft law on the formation of election commissions of the Kyrgyz Republic – paragraph 18.

“The threshold is calculated against the number of voters who participated in elections. The Venice Commission and OSCE/ODIHR recommend that the threshold for the allocation of the parliamentary seats is calculated based on the number of valid votes cast in line with international practice.”

CDL-AD(2011)037, Joint Opinion on the Draft Law on Election of People's Deputies of Ukraine – paragraph 118.

“Finally, the calculation basis of the threshold requirements should be modified as well. Like in presidential elections, the distribution of both the majoritarian and the proportional seats of the parliamentary electoral system is still based on the votes cast. As already explained above, the calculation procedure should be adapted to internationally common standards, i.e. the valid votes ought to be the calculation basis.”

CDL-AD(2004)005, Opinion on the Unified Election Code of Georgia as amended on 14 August 2003 – paragraph 83.

ii. Undesirable effects

“We will consider first a number of particularly significant undesirable effects, and then certain ways of dealing with them. Finally, we will look at the difficult issue of the relevance of such systems.

We will consider two particular examples of such effects, though there are others.

- Turkey: for the 2002 elections, the party in power decided to introduce a 10% threshold of votes cast, probably to prevent the Kurdish party from gaining representation. What it failed to anticipate was that it would itself fail to reach this figure and that the so-called "proportional" system would give the following curious results:

	% of votes	Seats	% of seats
AKP	34.2	361	66.9
CHP	19.5	179	33.1
Not represented	46.3	0	0

100.0 540 100.0

More than half the electorate was deprived of representation and those parties that were elected had a percentage of seats twice that of their percentage of votes, so that a proportional system became a majority one.

- Russia: in 1995, there was a 5% threshold for the half of the Duma that was elected on a proportional basis. The results were as follows:

	% of votes	Seats	% of seats
CP	22.3	99	44.0
Liberal Democrats	11.2	50	22.2
Our Home – Russia	10.1	45	20.0
Yabloko	6.9	31	13.8
Not represented	49.5	0	0
<hr/>			
	100.0	225	100.0

Each party represented had twice the percentage of seats as its percentage of votes. What was distinctive about this election was that the proportional part led to plurality type results, with heavy over-representation of the main parties, whereas the plurality part led to proportional types results, namely fragmentation and the election of local candidates.”

CDL-AD(2010)007, Report on thresholds and other features of electoral systems which bar parties from access to Parliament (II) – 24 – 27.

(...)”It will exclude a considerable number of parties/valid votes from Parliament in favour of the strongest political forces; consequently, it tends to produce a rather majoritarian effect. This is basically confirmed by the 1999 parliamentary elections, where all in all 283,279 valid votes (14.1%) were ‘lost’ (see Table 1). Given the recent fragmentation of the Georgian party system following the break-up of the predominant CUP, the “exclusion effect” of the threshold will surely be reinforced during the next elections; it might even come to a result similar to the Russian Duma elections of 1995, when almost 50% of the valid votes were ‘filtered’ by a 5%- threshold and, due to this effect, the bigger parties could double (!) their seats (in relation to a pure proportional distribution of votes). And if the 1999 Russian Duma election had had a 7 percent threshold it would again have been very disproportional. A maximum of 5 percent is the most that can be justified. Moreover, it could be envisaged to increase the threshold by steps, e.g. 4 percent at the next election and 5 percent at the election after that (without changing the law, which would determine from the day of its adoption the date for the increase of the threshold).”(...)

CDL-AD(2002)009, Opinion on the Unified Election Code of Georgia – paragraph 81.

2. The legal thresholds: specific features

i. Thresholds in majority/plurality systems

“The situation is fairly simple in the case of single member majority/plurality systems, more complex for proportional systems with national and/or local thresholds.”

“There is no problem with single round plurality systems as in Britain. The person who receives the most votes is elected with no minimum condition. In practice, people are rarely elected with fewer than 35% of the votes cast. Since the abstention rate may be as much as 40% (38.5% in the United Kingdom in 2005), this constitutes barely more than 20% of the registered voters in that constituency, which is not very representative but still more votes than any other candidate has received, thus justifying that person's election (...)

The main example of a two-round single member majority system is France, which has made the conditions for access to the second round increasingly strict. Since 1976 this has been dependent on obtaining the support of at least 12.5% of the registered voters, which with an abstention rate of 40% means more than 20% of the votes cast. In fact, in the most recent parliamentary elections, in 2007, there were only three constituencies with more than two candidates in the second round, out of a total of 577, including ones that were won on the first round. Admittedly, this has the disadvantage of eliminating parties that are not part of major coalitions but it does also avoid manoeuvring by dissident candidates. In fact it raises the question of what we expect from the electoral process. (...)

CDL-AD(2010)007, Report on thresholds and other features of electoral systems which bar parties from access to Parliament (II) paragraphs 16, 17-18.

ii. The territorial scope of the threshold

If the justification for a minimum threshold is to avoid excessive fragmentation and secure a reasonably well-structured parliament, thus making it easier to form a government, a national threshold is the logical approach and this is the one that is most frequently adopted. A major disadvantage is that it impedes the representation of regional parties and ones representing the interests of national minorities. Certain countries, such as Spain, where this is a particularly important issue have therefore opted for a constituency threshold. It is probably inappropriate to make any general recommendation. At most it might be argued that national thresholds are acceptable in countries where there is no real national minority problem, or where there are specific measures to deal with it, but that they must be used with care, and even replaced by local thresholds where this is necessary.”

CDL-AD(2010)007, Report on thresholds and other features of electoral systems which bar parties from access to Parliament (II) paragraph 19.

“Another example of the different functioning of the thresholds, due to specificities of each system in which they appear, is this: “a national legal threshold (as in Germany) applied across the whole country limits minor parties such as the Party of Democratic Socialism (PDS), who are strongest in the east but who fell below the 5% level nationally in the 2002 Bundestag election, whereas a district-level legal threshold (e.g. the one used in Spain) will not affect small parties such as the Basque Nationalists, who are returned in their regional strongholds”.

CDL AD(2008)037, Comparative Report on thresholds and other features of electoral systems which bar parties from access to Parliament - paragraph 14.

(...) “A legal threshold of two percent (2%) is established by Article 94.3: “The entitlement to the participation in the distribution of the deputy mandates shall be acquired by the parliamentary candidates entered in the election list of the parties in the territorial election districts and in the national election district, provided that no less than two per cent of the votes of all the voters, who took part in the voting within the national election district, have been cast for the parliamentary candidates from this party within the national election

district.” The minimum threshold is known in many European electoral regimes and their purpose is systematically to avoid an excessive fragmentation of parliaments. Combined with preferential voting, it may create the possibility for a candidate to reach the electoral quota within a territorial election district, thereby winning a mandate in the candidate’s own right, but not be allocated a mandate if the candidate’s political party did not reach the two percent (2%) threshold nationally. This limitation is, however, not contradictory with European standards.”

CDL-AD(2009)028, Joint Opinion on the Draft Law No. 3366 about Elections to the Parliament of Ukraine – paragraph 21.

iii. Thresholds and electoral blocs/Graduation of the threshold

(...) “A differentiated threshold” should be introduced, i.e. a separate one for parties (e.g. 4%) and higher ones for electoral alliances (e.g. 6% for twoparty alliances, 8% for coalitions of three and more parties). “Invented” in the transition processes of Central and Eastern Europe in the early 1990s, differentiated thresholds had all in all positive effects on the consolidation of competitive party systems since they provided not only an incentive to build electoral coalitions, but also stimulated fusion processes among mini-parties (with similar programmes) and thus contributed to increasing intra-fractional cohesion within Parliament.”

CDL-AD(2002)009, Opinion on the Unified Election Code of Georgia – paragraph 82.

“A number of articles have been changed to remove the possibilities for parties to form a pre-election alliance or a bloc. Such alliances tended to be formed for electoral purposes only and the parties making up the bloc would submit a common list of candidates for the parliament or local council elections. Such possibilities are often given in cases where there are many small parties contesting in constituencies of a small magnitude (few seats) or where the threshold for the first candidate is high. In Moldova, the whole country is one constituency for the parliamentary elections and the whole district, municipality or village is the constituency for local council elections. In addition, the threshold for winning seats used to be higher for blocs than for parties. The need for forming alliances has therefore been less than in countries with smaller constituencies.

Yet, combined with the increase of the threshold for parliamentary representation, the removal of the possibility for political parties and socio-political organisations to run in electoral blocs could further increase the amount of lost votes in parliamentary elections.

It is therefore recommended to lower the threshold for participating in allocation of seats to its previous level at 4%.”

CDL-AD(2008)022, Joint Opinion on the Election Code of Moldova – paragraph 16 – 18.

“The parliamentary electoral law does not allow political parties to form electoral blocs to present candidates in the elections. Unless there is a legitimate reason for banning the formation of electoral blocs, and due to the threshold of five percent for mandate allocation, consideration should be given to allowing political parties to form electoral blocs to present candidates in the elections, as previously recommended by the Venice Commission and the OSCE/ODIHR.”

CDL-AD(2013)016, Joint Opinion on the Draft Amendments to the Laws on election of people's deputies and on the Central Election Commission and on the Draft Law on repeat elections of Ukraine – paragraph 59.

iv. Alternative thresholds

“Several countries offer a lifeline to parties that fail to reach the national threshold. They may be allowed to take part in the allocation of seats if they have won in a minimum number of constituencies. One seat is sufficient in Denmark or Austria, and 3 in Germany. In the last-named this is facilitated by the division of seats, half of which are elected by single member plurality system and half from lists presented in each Land.

In practice, these provisions do not normally operate, though it may happen. For example, in the 1994 German elections, the PDS only obtained 4.4% of the votes but won three seats directly in the eastern Länder and therefore took part in the national apportionment, giving it 30 seats. In 2002 however it obtained 4% of the vote but only two seats directly, and therefore did not receive any more. This is a real threshold effect, since the third seat in 1994 in fact represented 28.

Such formulae or local minima, as in Denmark or Sweden, may help to deal with the problem of national minorities.”

(...)“If a significant part of the political spectrum were to be denied parliamentary representation this would be grounds for criticism, but at least in the established democracies this is not the case since those seeking election adapt to the rules in force and both parties and voters take account of them in their behaviour.

As a result, there are relatively few wasted votes, meaning ones that secure no representation. This emerges from an examination of the highest thresholds referred to above: for example, in Germany they number between 3 and 6%; in Austria between 0.7 and 2% and in Sweden between 2 and 5.7%. However, the situation may be different where the party system is not well established, in which case there may be significant variations. The fact that the electoral system may tend to simplify the party system is not in itself a fault.

However, national thresholds are sometime of only limited value, since another form of threshold may play a greater role.”

CDL-AD(2010)007, Report on thresholds and other features of electoral systems which bar parties from access to Parliament (II) – paragraph 28 – 30, 31 – 33.

v. Cumulative thresholds

“Article 66(2) of the draft national elections law limits distribution of parliamentary mandates to political parties that receive more than 5 per cent of the vote nationwide and at least 0.5 per cent of the vote in each of the seven oblasts and Bishkek and Osh cities. Both thresholds are calculated against the number of voters who participated in elections. This is a positive development compared with previous practice when the threshold was calculated against the number of registered voters. Further, as noted in previous OSCE/ODIHR reports, the double threshold requirement compromises the objectives of a proportional representation system. The Venice Commission and OSCE/ODIHR recommend that the second threshold requirement of 0.5 per cent of the vote in each of the seven oblasts and Bishkek and Osh cities be reconsidered.”(...)

CDL-AD(2011)025, Joint opinion on the draft law on presidential and parliamentary elections, the draft law on elections to local governments and the draft law on the formation of election commissions of the Kyrgyz Republic – paragraph 18.

(...)“As the proportional representation system is now based on nine geographically established constituencies, the rationale for a nationwide threshold of 5 per cent is questionable. Moreover, the double threshold reduces considerably the chances of minorities to be represented in the parliament as it is quite difficult to suppose that they will be able to achieve not only the nationwide threshold of 5 per cent but also the second threshold of 0.5 per cent in every constituency. *The Venice Commission and the OSCE/ODIHR recommend that the 5 per cent nationwide threshold be removed from the law if mandates are to be distributed based on a regional proportional representation system using election results in nine separate geographical constituencies.*”

CDL-AD(2014)019, Joint Opinion the Venice Commission and OSCE Office for Democratic Institutions and Human Rights (OSCE/ODIHR) on the draft Election Law of the Kyrgyz Republic – paragraph 18.

vi. Threshold and preference vote

(...) A candidate may benefit from the preference vote if the number of received votes is at least seven per cent of the votes cast for the candidate list. The seven per cent threshold is mentioned in the Annex and is not reflected in the law itself. The seven per cent should be included in relevant articles of the draft Code. The threshold for political parties and coalitions for participating in the allocation of seats at the national level remains four per cent.

CDL-AD(2014)001, Joint Opinion on the draft Election Code of Bulgaria - paragraph 16.

3. The comparison between legal thresholds in Europe

“Based on an analysis of electoral legislation and other sources a list of different legal thresholds across several of the European states was prepared. The list (table) appears at the end of this subsection. However, it also follows from the analysis that any sound conclusions as to the comparative merits of these numbers would have to take into account a complex set of different contexts associated with the numbers. Most obviously, we would have to take into account the thresholds’ *different levels of application* as appear across different states. Thus, some laws prescribe that a certain amount of votes needs to be obtained at the constituency/district level (e.g. Spain). Others require nation-wide legal thresholds (e.g. Germany), and still other thresholds are meant to apply at both these levels (e.g. Sweden). It is impossible, without further and detailed measurements/calculations of the type used in political science, to assess which of these systems, other things being equal, is at the end more/less favourable to parties’ access, and what the actual degree of that inclusiveness/exclusiveness is. Moreover, there are differences between the countries as to the *stage of the threshold’s application*: whether the legal threshold is applied to the first, second, or any subsequent rounds of seat allocations. Furthermore, there is the problem of the “*graduation of the threshold*”: the thresholds differ also in the sense that some numbers apply to parties and others to party coalitions; for example 5 % per parties, 8% per two-party coalitions, 10 % for larger party-coalitions. All these circumstances further complicate a potential comparative assessment of our question (the relative openness/closure of a given system to parties’ access). The same is true of the fact that some states (e.g. Germany) prescribe alternative legal thresholds determined by *seats, not percentage*. These usually (as in the case of Germany, where winning 3 direct (plurality) seats also suffices to take part in the distribution at the national level) appear in addition to the thresholds determined by percentage. On top of this, there are *other details of each system* that make the comparative assessment of the threshold effects even more difficult. For instance, in Germany the 5% national threshold plays an important role while the threshold of 3% in Greece has little effect: there, minor parties fail to get elected due to a

different cause – the use of fifty-six districts for party lists. Similarly, the 3% legal threshold in multimember districts in Spain may be nearly insignificant. It's has been reported that it is already the magnitude of the districts in Spain that “does not permit the representation of parties with a share of votes lower than 5 percent”. Another example of the different functioning of the thresholds, due to specificities of each system in which they appear, is this: “a national legal threshold (as in Germany) applied across the whole country limits minor parties such as the Party of Democratic Socialism (PDS), who are strongest in the east but who fell below the 5% level nationally in the 2002 Bundestag election, whereas a district-level legal threshold (e.g. the one used in Spain) will not affect small parties such as the Basque Nationalists, who are returned in their regional strongholds.””

Legal Threshold in Majority/Plurality Systems

Country	Legal Threshold
Belarus	None
France	Either 12.5% support of registered electorate in a district, or to finish in top two (in first round) to qualify for second round
UK	None

Legal Threshold in Combined Systems

Country	Legal Threshold
Albania	2,5% for parties and 4 % for coalitions (before the constitutional revision)
Germany	Either 5% nationwide or 3 district seats
Hungary	5% of votes in proportional representation tier needed to qualify for any seats from proportional representation tier or national tier
Italy	4%
Lithuania	5%
Russia	5% (when the combined system was applied)
Ukraine	4% (when the combined system was applied)

Legal Threshold in Proportional Systems

Country	Legal Threshold
Austria	1 seat in a lowest-tier district, or 4% nationwide, needed to

	qualify for middle or national tier seats
Belgium	5% of votes needed within a constituency to qualify for seats there
Bosnia and Herzegovina	None
Bulgaria	4%
Croatia	5%
Czech Republic	5%
Denmark	Parties do not qualify for share of higher tier seats unless they win a lower tier seat, win the equivalent of the Hare quota in two of the three regions, or win 2% of national vote
Estonia	5%
Finland	None
Greece	3%
Iceland	None
Ireland	None
Latvia	5%
Luxembourg	None
Moldova	6%
Netherlands	0.67%
Norway	4%
Poland	5%
Portugal	None
Romania	5 %
Russia	7 %
Slovakia	5%
Slovenia	4%
Spain	3% of votes needed within a district to qualify for a seat there
Sweden	Either 4% national or 12% district
Switzerland	None

“the former Yugoslav Republic of Macedonia”	None
Turkey	10%
Ukraine	3 %

CDL AD(2008)037, Comparative Report on thresholds and other features of electoral systems which bar parties from access to Parliament - paragraph 14.

B. The Natural Threshold

1. The concept

(...) “This one is present in any electoral system, regardless of whether or not the system also has any legal threshold. Even when there is no legal threshold at all, small parties can thus still face considerable natural thresholds for access to parliament. The natural threshold is the percentage of votes needed to get one seat at a district level, and is mainly dependent on the mean district magnitude (the average number of legislators returned per district, spanning from one in the UK to 150 in the Netherlands). The other factors that affect the natural threshold are the seat allocation formula, the number of contestant political parties and the size of an assembly. Generally speaking, a system with small district magnitudes thus requires a relatively high percentage of votes per district to return a legislator. Conversely, the more seats there are to fill in the districts, the lower its natural threshold.

While the concept of national threshold is clearly different from the legal, or formal, threshold, it is obvious that depriving minor/new parties of accurate or any representation “can be done just as well by low district magnitude as by imposing a formal threshold”. As to the measurement of a country’s natural district threshold (average number), there is no formula that would work in all circumstances. Nonetheless, there is consensus that the following formulas [$t=75\%/(m+1)$, or $m = (75\%/t) - 1$], where “t” is the threshold” and “m” is the magnitude (number of seats per district), result in sufficiently accurate estimations of the natural threshold. To take an example, when seats are to be allocated through fourteen-seat districts, the natural threshold is $75\%/(14+1)$, that is, 5%. This means that it is as difficult for a party to get into parliament in such circumstances as if there were a formal district threshold of 5%. Moreover, if there were a legal threshold of 5%, or lower, prescribed at the district level, such a legal threshold would be quite irrelevant: a party with fewer votes than 5% could not get a seat regardless of whether or not there was the legal threshold. The following are some examples of natural thresholds (average numbers) as calculated for some of the countries.”

Natural Threshold in Majority/Plurality Systems

Country	Natural Threshold
Belarus	50%
France	50%
UK	35%

Natural Threshold in Combined Systems

Country	Natural Threshold
Hungary	11.3%

Natural Threshold in Proportional Systems

Country	Natural Threshold
Belgium	9.2%
Finland	5%
Iceland	10.8%
Ireland	15%
Luxembourg	4.8%
Portugal	6.7%
Spain	9.7%
Switzerland	9%

“An important caveat needs to be mentioned here. While the natural threshold may be an important general indicator of the threshold at the district level it could not, of course, be equated with nation-wide natural threshold, or compared with the legal nation-wide threshold.

For instance, while the average natural threshold (district level) for Spain is 9.7% (see above) a party can actually get into the Spanish Cortes by winning just one seat in any district. In the Madrid district (with 34 seats and thus only 2.1% natural threshold in 2000 elections) a party would thus, in the absence of the district legal threshold of 3% in Spain, need only 2.1% of the national vote. Applying the additional legal district threshold of 3% this still meant only 0.38% of the national vote.”

“Similarly, with 165 elected legislators an average district magnitude in Ireland is 4.0 (2002 elections). The average natural threshold at the district level is thus 15% ($75\%/5$). Again, it is quite clear that this cannot possibly be the same as the nation-wide natural threshold; it would have to mean that a party with 14.9% support would not get into the Parliament. In fact, while within an individual three-seat district a party would get a seat only at approximately 18.7% of votes ($75\%/(m+1)$), this is only about 0.3% of the votes on the national level.”

“Indeed, the natural district threshold cannot be automatically projected to the national level and directly compared with, say, the nationwide legal threshold. Some have tried to devise a formula and calculate the nationwide natural thresholds (see the tables at the end of this subsection). However, such calculations cannot be fully precise; any such calculation would remain approximation because, among others, the real force with which the thresholds curtail access depends heavily upon particular distribution of party support, the number of districts, and the number of legislators returned within each district. These characteristics

may vary significantly, and some average reflection on the national level (or to some extent even the average district level) might not fully capture the exclusionary force already at work within some specific districts. Moreover, even if sufficiently approximate, the nationwide natural threshold is a concept that does not have all the properties of the legal threshold while it has some unique properties of its own. Furthermore, “whereas natural thresholds tend to widen the proportionality gap between the share of votes and seats, favouring especially the biggest party, legal thresholds foster a more proportional distribution of seats among those parties that passed the threshold”. Hence, the two thresholds, when translated to the national level, could not be directly compared as if they were one and the same thing.”

“The following three variables are relevant for calculating the approximation to the nationwide natural threshold: M (average district magnitude), S (total assembly size), and E (number of electoral districts). The formula is this: $T = 75\% / ((M + 1) * \sqrt{E})$ or, which is the same, $T = 75\% / (((S/E) + 1) * \sqrt{E})$, or $75\% / (((S + E)/E) * \sqrt{E})$. To illustrate with our examples of Spain and Ireland: in Spain, where S=350, and E=52, the nation-wide natural threshold (T) is 1.35%, while in Ireland, where S=165 and E=42, T amounts to 1.85%. The following are some additional calculations of the nationwide natural threshold.”

Nation-wide Natural Threshold in Majority/Plurality Systems

Country	Nation-wide Natural Threshold
France	1.56%
UK	1.48%

Nation-wide Natural Threshold in Combined Systems

Country	Nation-wide Natural Threshold
Germany	0.13%
Hungary	1.77%
Russia (when the combined system was applied)	1.67%

Nation-wide Natural Threshold in Proportional Systems

Country	Nation-wide Natural Threshold
Austria	0.41%
Belgium	1.93%
Denmark	0.43%
Finland	1.32%
Ireland	2.34%
Italy	1.48%
Netherlands	0.5%
Spain	1.35%

CDL AD(2008)037, Comparative Report on thresholds and other features of electoral systems which bar parties from access to Parliament, paragraph 15-20.

“The term natural is not really the right one since in practice it is the relevant electoral law that determines the apportionment of seats between constituencies. The size of constituencies is critical, even though compensatory arrangements are possible.”

“This was highlighted more than 40 years ago by Douglas Rae in *The Political Consequences of Electoral Laws* (Yale University Press, 1967) but it continues to be generally ignored despite the fact that it is far more important than the eternal issue of how precisely to define proportionality. We will not consider the latter here since every system is based on the highest average principle (except possibly for the last seats, but the effect is marginal) and it has little to do with the question of thresholds.”

CDL-AD(2010)007, Report on thresholds and other features of electoral systems which bar parties from access to Parliament (II) – paragraph 34, 35.

2. Natural threshold and size of constituencies

“The simplest way to avoid an implicit threshold is to have a single national constituency, as in the Netherlands, with 150 seats, and Israel, with 120. In the former, for example, parties can win a seat if they secure 1/150, or 0.67%, of the useful votes. This results in almost perfect representativeness, but at the price, inevitably, of a proliferation of parties, with generally ten or more represented.

A variant, which leads to the same result, is to calculate the allocation of seats at national level but then apportion them between the electoral divisions, in this case the Länder in Germany and in Austria, thus avoiding the effects of an implicit threshold in these divisions while maintaining representatives' geographical affiliations.

In Germany, this geographical affiliation is reinforced by the dual vote system, with half the seats attributed to single member constituencies and the other half to lists, from which seats are then allocated on a compensatory basis to achieve national proportional representation. The system has great attraction but is not exempt from criticism. The most traditional one concerns the *Überhangsmandate*, or the additional seats that parties obtain and retain if they win more seats directly than they would be entitled to on a proportional basis (16 in the 2009 elections). The Constitutional Court has also identified a curious perverse effect of second votes, whereby in certain cases parties can obtain more seats by receiving fewer second votes. As a result, the Court has declared this aspect of the electoral law unconstitutional and called for a redrafting, which will probably be completed by 2013 (judgment of 3 July 2008).

CDL-AD(2010)007, Report on Thresholds and other features of electoral systems which bar parties from access to Parliament (II) – paragraph 54 – 56.

(...)“If a constituency includes four seats, a proportion of the votes in the order of 25% is necessary to win one of them. On the other hand, if there are 100 seats, subject to any national minimum 1% of the vote is sufficient to win one seat. Constituency size is therefore critical. The situation can be summarised by the following formula which calculates a representativeness limit: L is the number of votes necessary to be certain of winning a seat.

$$L = \frac{\text{total number of votes}}{\text{number of seats} + 1} + \varepsilon \text{ (the smallest possible value)}$$

Take the example of a four-member constituency: $L = \frac{100\%}{4+1} + \varepsilon$

1. In other words, if a party has 20.1% it is sure to win a seat, whereas one with $\frac{100\%}{4+1} - \varepsilon$ is not. If four parties have 20.1% the fifth may remain unrepresented with 19.6%, though it is immediately obvious that this is a possibility, not a certainty. For example, if the votes are apportioned 20.1 – 20.1 – 20.1 – 19.6 – 10.1 – 10, the party with 19.6% will be represented. An absolute formula requires the number of competing parties to be taken into account, which greatly reduces the validity of the one proposed by M. Gallagher and P. Mitchell, where the threshold is $L = 75\% (N+1)$, N being the number of seats to be filled. (...)

A general formula must take account of the number of parties taking part. The rapporteur has produced the following tentative formula, though this has not been fully thought through and must be treated with caution.

$$L = \frac{uv}{N + up - 1} - \varepsilon \quad \text{where:}$$

- uv is the number of useful votes (ones that can be counted after taking account of the legal threshold)

- N is the number of seats in the constituency

- up is the number of useful parties (those allowed to take part because they have received useful votes)

Taking the previous example of four seats and five parties standing, the formula gives

$$L = \frac{100\%}{4 + 5 - 1} - \varepsilon, = 12.5 - \varepsilon$$

In such a case there is no distribution of votes that will enable a party with fewer than 12.5% of the votes to win a seat. However, the rapporteur is still not fully convinced and would welcome a demonstration to the contrary. Besides, while this formula may help to explain the results of an election, it is of little value to lawmakers because it presupposes advanced knowledge of the number of parties taking part.

Moreover even if the formula is convincing at constituency level (and it is still just a hypothesis), it is not obviously transposable to the national scene.”

CDL-AD(2010)007, Report on thresholds and other features of electoral systems which bar parties from access to Parliament (II) – paragraph 36 – 41.

“Spain has 52 constituencies which vary greatly in size. Figures for 2008 give three main groups:

- 5 may be considered large: Madrid 35, Barcelona 31, Valencia 16, Seville 12, Alicante 12, or 106 seats,

- 20 may be considered medium, between 6 and 10 seats, for a total of 145,

- 27 are small, between 1 and 5 seats, for a total of 99.

Clearly then, under the preceding formulae a party with a uniformly distributed national result of 5% of the votes cast is only likely to win in constituencies with more than 15 seats. The best example is provided by the 2004 elections where the IU, with 5% of the votes, won five seats. As the theory would suggest, two each were in the major constituencies of Madrid and Barcelona, one was in Valencia and there were none elsewhere.

However another factor is the spatial distribution. If a party's votes are concentrated in a few constituencies, the national result is meaningless. Thus, the Catalan parties only stand in Catalonia. In the same elections, the CIU won 10 seats with 3.2% of the national vote (but much more in Catalonia) and the ERC 8 seats with 2.5% of the national vote (*idem*).

Clearly then, calculating on a national scale only gives very approximate results. Nevertheless, based purely on a nationally calculated threshold, as above, the following conclusions can be drawn:

- the parties below the threshold will probably be under-represented, that is they will win a lower percentage of seats than of votes,
- the parties above it will certainly be over-represented.

This example makes the rapporteur sceptical about the Gallagher/Mitchell formula. They consider the threshold in Spain to be 1.35%, which does not correspond to reality and is in any case below the legal threshold (3% per constituency), whereas in 50 constituencies out of 52 (Madrid with 35 seats and Barcelona with 31 being the exceptions) the implicit threshold reinforces considerably the explicit one.

All that can be said with certainty is that this implicit threshold serves a relative purpose, namely that it does not prevent representation, as the legal one does, but it makes it more difficult for smaller parties. As noted above, it can be considered to be an indication of the level beyond which parties will be under- or over-represented.

Nevertheless, the effect is sufficiently significant to warrant certain attenuating measures.”

CDL-AD(2010)007, Report on thresholds and other features of electoral systems which bar parties from access to Parliament (II) – paragraph 46 – 52.

3. The problem of national transposition

“If all the constituencies were the same size the main difficulty would be to establish whether the number of parties taking part was always the same. Since only so-called "useful" parties are considered this would be possible. Unfortunately, this is far from being the case. Only Iceland has 6 equal 9 seat constituencies while Irish constituencies are fairly uniform with 3, 4 or 5 seats. However constituencies in Belgium range from 24 to 4 seats, in Denmark from 16 to 2, in Finland from 33 to 6, in Luxembourg from 23 to 9 and so on.

To resolve this difficulty, Douglas Rae proposes an average that is simply the total number of seats divided by the total number of constituencies. For example, in Spain 350 seats and 52 constituencies gives an average of 6.73.

The application of the previous formulae would give:

$$L = \frac{100}{N + 1} - \varepsilon = \frac{100}{6.73 + 1} - 0.1 = 12.8$$

$$L = 75\% (N+1) = 75\% (7.73) = 5.8$$

$$L = \frac{100}{N + up - 1} = \frac{100}{6.73 + 4 - 1} = \frac{100}{9.73} = 10.3$$

The last example is based on four parties, assuming that each constituency is fought by the three main parties (PSOE, PP, IU) plus a nationalist or regional one. However this is an approximation. The results vary considerably. All that can be concluded is that a party that exceeds these figures has a very good chance of being elected whereas below this level the situation is much less certain. A more detailed examination of the Spanish situation, which is quite topical, highlights the difficulty.”

L is the number of votes necessary to be certain of winning a seat

N is the number of seats to be filled

up is the number of useful parties

CDL-AD(2010)007, Report on thresholds and other features of electoral systems which bar parties from access to Parliament (II) – paragraph 42 – 45.

4. Effect of the threshold on the parties and voters behaviour

“While avoiding the illusion that those concerned are perfectly informed, it is reasonable to assume that their actions will take account of the constraints imposed by implicit thresholds. Thus regional parties will only present candidates in their region, or even in favourable constituencies within that region where they will concentrate their manpower and financial resources. Similarly, small ideological parties will focus on what in theory is favourable ground for them. If the system allows, this can lead to alliances between parties, whereby, for example, one will not stand in a particular constituency in exchange for another party including one of its candidates on its list, there or elsewhere. To ensure that explicit or implicit thresholds are not too easily thwarted some electoral laws specify higher thresholds for alliances than for individual parties, but this is rare.

Besides, reasonably well informed voters may themselves decide not to vote for parties they otherwise support that have no chance of success, so that their votes will carry weight in the final choice. An example is the significant number of split votes in German elections, where according to estimates as many as 15% of electors vote for small parties in the proportional part of elections but major ones in the plurality part. In practice, this is not significant in this system because the compensatory arrangements mean that seats won directly are deducted from the proportional allocation, so seats are not really lost and the final result is the same, though subject to the aforementioned Überhangsmandate. The main function of such split votes is in fact to ensure that small parties cross the 5% barrier, and this can be critical.

Be that as it may, the notion of "useful votes", as a common explanation of the British two party system, is also to be found in proportional systems and may be used to mitigate, in part, any threshold effect. Hence, as noted above, the relatively small number of so-called "wasted votes".

CDL-AD(2010)007, Report on thresholds and other features of electoral systems which bar parties from access to Parliament (II) – paragraph 58 – 60.

“In the end, what is important is that the relevant electoral rules are clear and easy to understand by both parties and voters so that they can adjust their behaviour to take them into account. For example, they should not think that any party with 5% of the vote is sure to be represented because that is the national threshold, if at the same time an implicit constituency threshold actually prevents or seriously reduces the chances of such representation. This is not so easy to grasp.”

CDL-AD(2010)007, Report on thresholds and other features of electoral systems which bar parties from access to Parliament (II) paragraph 71, 70.

V. Thresholds and Minority Representation

a) Parties representing national minorities must be permitted. Yet the participation of national minorities in political parties is not and shall not be restricted to the so-called ethnic based parties.

b) Special rules guaranteeing national minorities reserved seats or providing for exceptions to the normal seat allocation criteria for parties representing national minorities (for instance, exemption from a quorum requirement) do not in principle run counter to equal suffrage.

c) Neither candidates nor voters must find themselves obliged to reveal their membership of a national minority.

d) Electoral thresholds should not affect the chances of national minorities to be represented.

e.) Electoral districts (their number, the size and form, the magnitude) may be designed with the purpose to enhance the minorities' participation in the decision-making processes.”

CDL-AD(2005)009, Report on Electoral Rules and Affirmative Action for National Minorities' Participation in decision-making process in European countries - paragraph 68.

“Other systems, while not necessarily guaranteeing the presence of members of national minorities in elected bodies, facilitate the representation of minority organisations. In Poland and Germany, for instance, threshold rules do not apply to such organisations.”

CDL-INF(2000)004, Electoral law and national minorities page 4.

“Most of the states studied use a proportional or predominantly proportional system. This is obviously not to say that the systems are proportional all to the same extent. Without going into a detailed study of the countless variants of electoral systems, it is useful to recall the following: although proportional systems give a more proportional result than majority systems, a proportional system - or, to be more exact, a proportional method of translating votes into mandates - does not in itself guarantee that the composition of the elected body is a true reflection of that of the electorate. The proportionality of the outcome may be limited by several factors:

a. The most visible is the threshold, which excludes from the distribution of seats parties which have not obtained a certain percentage of votes. The significance of the threshold obviously depends on the percentage of votes to which it corresponds. Furthermore, a threshold which applies at national level will exclude more parties than one at constituency level. *Turkey* is an example of a particularly harsh threshold, as it is set at 10% nationwide, while *Poland* has a threshold of 7%. In *Germany*, too, the threshold is set at national level, but is only 5% (or three direct mandates), which allows five parties (or coalitions) to be

present in the *Bundestag*, whereas only two would enter the parliament if there were a threshold of 10%. In *Denmark*, the threshold has hardly any impact, as it is merely 2%. In *Armenia*, the threshold is in principle 5%; however, if one political party manages to get more than 5%, the first two parties which follow (in number of votes) also obtain seats in proportion to their result. It should be pointed out that in *Poland*, as in *Germany*, the threshold rules do not apply to minority lists. Thus, the German minority in Silesia is represented in the parliament.”

CDL-INF(2000)004, Electoral law and national minorities page 5.

“Recently (in *Yumak and Sadak v. Turkey*), the Court stated that it would be desirable for the 10 % threshold applied to Turkish elections be lowered and/or for corrective counterbalances to be introduced to ensure optimal representation of the various political tendencies, but the Turkish authorities are in the position to conveniently assess the choice of an appropriate system. Therefore the states can pay due attention to the general exigencies of the national electoral policies in conformity with historical and political factors. Article 3 of the Protocol goes no further than prescribing "free" elections held at "reasonable intervals" "by secret ballot" and "under conditions which will ensure the free expression of the opinion of the people" in the choice of the legislature. It follows that Protocol 3 "does not create any obligation to introduce a specific system" of elections, but it applies in particular to the modalities of the elections.”

CDL-AD(2008)013, Report on Dual Voting for Persons belonging to National Minorities – paragraph 23.

“Electoral thresholds should not affect the chances of national minorities to be represented.”

CDL-AD(2008)013, Report on Dual Voting for Persons belonging to National Minorities – paragraph 37.

“Different arrangements of the electoral system may facilitate minority representation:

(...)

- lower threshold (or exemption from the threshold) may enhance the integration of national minorities in governance (...)

These arrangements should, where appropriate, be made at the national level as well as at the regional and local levels.”

CDL-AD(2008)013, Report on Dual Voting for Persons belonging to National Minorities – paragraph 42 – 43.

“As stated by the HCNM (paragraph 7 of the document), there are a variety of mechanisms to implement the right to effective participation in public affairs. Participation of national minorities in public life, and more precisely their representation in elected bodies, can be ensured in certain cases by applying the general rules of electoral law with a view (or the effect) of ensuring proper minority representation; in other cases, States apply specific rules providing for representation of minorities or facilitating it.

For instance, the choice of the proportional electoral system may ensure an effective participation, even when no exception is introduced to the general electoral system. But obviously when a threshold is introduced, the provision for a lower threshold for the national minorities parties implies special exceptions to the general rules. On the other side, single member electoral districts in areas where territorially concentrated minorities are present,

may imply an exception to the general rules on allocation of seats only if the number of electors assigned to the minority electoral districts are not complying with the criteria of the general distribution of voters in the electoral districts provided for by the general rules of electoral law. Reserved seats are a more obvious way of favouring minority representation.”

CDL-AD(2008)013, Report on Dual Voting for Persons belonging to National Minorities – paragraph 44 – 45.

“Only small-sized minorities need to be represented through dual voting. Larger minorities may actually be represented by adjusting the electoral system, for example through specific constituencies, a more proportional electoral system or exemption from the threshold for minority lists.”

CDL-AD(2008)013, Report on Dual Voting for Persons belonging to National Minorities – paragraph 64.

“In the previous version of the draft law, a specific preferential treatment was reserved to “a minority national community participating in the total population to 2%”; in the current version of the draft law, this quantitative criterion has been substituted for “the minority national community of Croats”. It is true that, according to the last census (2003), only the Croats had reached a percentage lower than 2 per cent (i.e. 1 per cent), so that they appear to be the only beneficiary of the specific preferential treatment. However, Venice Commission and OSCE/ODIHR are of the opinion that it would be preferable to maintain an objective, quantitative criterion in order not to stigmatise one specific group and, more importantly, not to create a possible basis for discrimination in the Constitution, should, in future censuses, the Croats reach a higher percentage or other minority groups reach lower percentages. Should the quantitative criterion be preferred, a reference to the census should also be added, as previously recommended.”

CDL-AD(2011)011, Joint opinion on the draft law on amendments to the law on election of councillors and members of Parliament of Montenegro – paragraph 11

“Regarding the authentic representation of minorities, the use of a general model for all minority nations or other minority national communities without reserved seats is introduced by the draft law, with a lower quorum requirement which partially takes into account the actual population of minorities. This model is original and balanced, is in conformity with the Constitution and applicable international standards, and therefore deserves a positive assessment.”

CDL-AD(2011)011, Joint opinion on the draft law on amendments to the law on election of councillors and members of Parliament of Montenegro – paragraph 55.

“According to Article 9(2) of the new Elections Act, nationality lists may be drawn up by nationality self-government, supported by at least one per cent of the voters registered with a maximum of 1,500 signatures from the nationality. The five per cent threshold is waived for such nationality lists but they are entitled to one seat only if they secure at least one fourth of the electoral Hare’s quota. The national minorities that fail to win a mandate will still be entitled to a non-voting parliamentary spokesperson, who is the unsuccessful candidate ranked first on the nationality list.”

CDL-AD(2012)012, Joint Opinion on the Act on the Elections of Members of Parliament of Hungary – paragraph 47.

“The electoral system is laid down in Articles 9 and 11-24 of the Law. A system of proportional representation – which generally favours smaller groups and is therefore more advantageous to minorities – is provided for, with blocked lists in a single constituency at the level of each local and regional self-government unit. The number of seats in each unit is stipulated by the unit’s statute. A 5 % threshold is applied for all elections. The d’Hondt method was used for the calculation of seat distribution.”(...)

“The Commission questions whether such a threshold – whether the 5 % legal threshold or a higher *de facto* one – would be in accordance with Article 15 of the Constitution and with the text and purpose of Article 21 of the draft Constitutional Law on the Rights of National Minorities in the Republic of Croatia, which aim at ensuring to national minorities on a proportional basis the right to political representation at state and local levels and participation in public affairs. (In that same draft Constitutional Law, in relation to the Croatian Parliament, it is provided under Article 20 that minorities forming less than 4% of the population shall together have at least 6 seats in the Parliament.)”

CDL-AD(2002)003, Consolidated Opinion on the Law on the Election of Members of the Representative Bodies of Local and Regional Self-Government Units of Croatia – paragraph 15,17.

“The Venice Commission and the OSCE/ODIHR recall that countries have to develop a wide diversity of mechanisms in accordance with their historical and legal traditions, and the political system.”

(...)“The threshold is the object of discussion among the political leaders(...)While this matter is not for the Venice Commission and OSCE/ODIHR to decide, it is important that the threshold be realistically reachable by the small minority groups.”(...)

“Regarding the authentic representation of minorities, the use of a uniform model for all minority nations or other minority national communities without reserved seats is introduced by the Draft Law. The Code of Good Practice in Electoral Matters illustrates that special rules guaranteeing national minorities reserved seats or providing for exceptions to the normal seat allocation criteria for parties representing national minorities (for instance, exemption from a quorum requirement) do not in principle run counter to equal suffrage. However, guaranteeing reserved seats is not an indispensable way of affirmative action.”

CDL-AD(2010)023, Joint Opinion on the Draft Law on Amendments and Supplements to the Law on the Election of Councillors and Members of Parliament of Montenegro – paragraph 19,28,51.

“However, the law does not include a substantive definition of “list of national minority”, i.e. a definition serving to determine which political parties, coalitions, and groups of citizens under the five percent (5 per cent) threshold are entitled to participate in the distribution of mandates. The provisions of Article 21.2-21.4 approach the matter in a formal way, implying as they do that such determination will have to be made by “the body competent for keeping registers of political parties”, as this body “corroborates by a certificate” “the position of a political party of a national minority”, presumably on the basis of materials having been filed by those concerned for purposes of entry upon the register. Unless the matter is clearly dealt with in other legislation in a democratic way, it would be beneficial if the law provided guidance for assessing what the “position” of the political party means. The OSCE/ODIHR and the Venice Commission recommend that the Draft Law be amended to include such a definition.”

CDL-AD(2009)039, Joint Opinion on Draft Laws on Electoral Legislation of Serbia – paragraph 58.

“The 5 % threshold is quite high and tends to favour larger groupings, to the detriment of small political parties. It should be noted also that the lower the number of seats in a unit – a matter not regulated by law but left for the statutes of each unit, as described above –, the lower the probability that the (proportional) representation of minorities will be achieved. For instance, in elections to small local councils with only seven to ten seats, minor parties will need to obtain between eight and twelve percent of valid votes in order to have a representative elected. The *de facto* threshold may therefore in fact be higher than that laid down by law. Again, this acts to the detriment of small (often minority) political parties.”

CDL-AD(2002)003, Consolidated Opinion on the Law on the Election of Members of the Representative Bodies of Local and Regional Self-Government Units of Croatia – paragraph 16.

“Paragraph 3 of Article 94 also states that for the lists of candidates representing minorities with a share of the overall population up to 2 per cent, these lists participate in the allocation of seats if they receive at least 0.4 per cent of the valid votes. In practice, this amounts to a reserved seat that appears to be introduced to address the expectations of the Croat minority. However, it is nevertheless necessary to have obtained 0.4% of votes. This paragraph should be amended to clearly state that the population figures should be based on the last census. The threshold is the object of discussion among the political leaders; the Croats have notably proposed a lower one (0.2%). While this matter is not for the Venice Commission and OSCE/ODIHR to decide, it is important that the threshold be realistically reachable by the small minority groups. This provision is a welcome development in line with the Constitution of Montenegro, Article 8, which allows for special measures to be taken to ensure equality and eliminate discrimination.”

Paragraph 4 of Article 94 lacks sufficient detail on how the mandates will be distributed to the “collective lists of candidates”. The law establishes three separate allocations: (1) allocations under the 0.4% threshold; (2) allocations under the 0.7% threshold; and (3) allocations under the 3% threshold. Obviously, mandate allocations under one of the allocations will affect how many mandates remain to be allocated under the two remaining allocations. The law should state each step for allocation under each separate allocation. It is recommended that the law state each and every step of the allocation process for all mandates, anticipating mathematical anomalies and unexpected voting results.”

CDL-AD(2010)023, Joint Opinion on the Draft Law on Amendments and Supplements to the Law on the Election of Councillors and Members of Parliament of Montenegro – paragraph 28, 29.

VI. Reference Documents

CDL-INF(2000)004 Electoral law and national minorities

CDL-INF(2000)017 Law on Parliamentary Elections of the Republic of Azerbaijan: Comments adopted by the Venice Commission

CDL-AD(2002)003 Consolidated Opinion on the Law on the Election of Members of the Representative Bodies of Local and Regional Self-Government Units of Croatia

CDL-AD(2002)009 Opinion on the Unified Election Code of Georgia

CDL-AD(2003)001 Opinion on the Election Law of the Republic of Moldova

CDL-AD(2004)005 Opinion on the Unified Election Code of Georgia as amended on 14 August 2003

CDL-AD(2005)009 Report on Electoral Rules and Affirmative Action for National Minorities' Participation in decision-making process in European countries

CDL-AD(2006)002rev-e Opinion on the Law on Elections of People's Deputies of Ukraine

CDL-AD(2008)013 Report on Dual Voting for Persons belonging to National Minorities

CDL-AD(2008)022 Joint Opinion on the Election Code of Moldova

CDL-AD(2008)037 Comparative Report on thresholds and other features of electoral systems which bar parties from access to Parliament

CDL-AD(2009)019 Opinion on the Draft Law amending the Law on election of People's Deputies of Ukraine

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CDL-AD(2010)023 Joint Opinion on the Draft Law on Amendments and Supplements to the Law on the Election of Councillors and Members of Parliament of Montenegro

CDL-AD(2011)011 Joint opinion on the draft law on amendments to the law on election of councillors and members of Parliament of Montenegro

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CDL-AD(2011)037 Joint Opinion on the Draft Law on Election of the People's Deputies of Ukraine

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CDL-AD(2014)001 Joint Opinion on the draft Election Code of Bulgaria

CDL-AD(2014)003 Joint Opinion on the draft Law amending the electoral legislation of Moldova

CDL-AD(2014)019 Joint Opinion the Venice Commission and OSCE Office for Democratic Institutions and Human Rights (OSCE/ODIHR) on the draft Election Law of the Kyrgyz Republic