Federal Act on Political Rights

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ONLINE COMMENTARY
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COMMENTARY ON

Art. 2 PRA

A commentary by Goran Seferovic

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Art. 2 Ineligibility to vote

Persons lacking legal capacity who are ineligible to vote in accordance with Article 136 paragraph 1 of the Federal Constitution are persons who are subject to a general deputyship or are represented by a carer as they are permanently incapable of judgement.

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I. HISTORY OF ORIGINS

A. Federal competence and limitation of the grounds for exclusion

Under the FC 1848, Swiss citizens (men) who had reached the age of 20 were entitled to vote at their place of residence, provided they were not excluded from the right to vote under the legislation of the canton of residence. Doctrine usually divides the requirements for the right to vote into the ability to vote and the right to vote. The right to vote (also voting right in the narrower sense) typically depends on the place of residence in the community concerned. The ability to vote is further divided into objective requirements (at that time gender, today only age and Swiss citizenship) and the subjective requirement (no exclusion from the right to vote). The definition of active citizenship, as far as exclusion from the right to vote was concerned, thus lay with the cantons, even in federal matters. 1

The constitutional legislator adopted this regulation in the FC 1874, but in doing so created an explicit competence basis for the Confederation to establish uniform regulations on voting rights with art. 74 para. 2 FC 1874. Since the Confederation had already previously regulated all requirements with the exception of the exclusion of the right to vote, this basis could only refer to this competence. Such a basis of competence is in itself unnecessary with regard to the exclusion from political rights in federal matters, since this already results from the federal government's organisational autonomy. However, the Confederation claimed for itself to also regulate the exclusion from voting rights in cantonal and communal matters. 2

The Federal Assembly had already enacted the Federal Act on Federal Elections and Votes under the FC 1848 in 1872. However, this law was limited to repeating in art. 2 the constitutional provision of art. 63 FC 1848. In the 19th century, two bills with which the Confederation wanted to make use of this legislative competence failed in referendum votes. Although it is a matter of course for the Confederation to regulate the conditions and content of the right to vote in federal matters by virtue of its organisational autonomy, this competence was still controversial in the 19th century from a political point of view. As early as 1915, the Federal Supreme Court declared census voting 3

rights, which made voting rights dependent on the payment of a tax, to be incompatible with political equality. However, according to this practice, the cantons were allowed to continue to exclude those unable to pay from the right to vote, since the Federal Supreme Court doubted their expertise in public affairs. The cantons also excluded other categories of Swiss citizens from the right to vote. For example, criminal convictions or being poor led to exclusion from the right to vote. In some cantons, the ban on drinking in public houses, which was the main punishment, could lead to exclusion from the right to vote, and in the canton of Geneva, even membership of the Communist International.

4 When the Confederation took over further powers, it also partly regulated the related grounds for exclusion from the right to vote, which also applied to cantonal and communal matters under the FC 1874 (cf. n. 2 above). Thus, with the enactment of the SchKG in 1889, the Confederation still left it to the cantons to determine the consequences of bankruptcy and fruitless attachment. In 1920, however, the Federal Assembly enacted the Federal Act on the Public Law Consequences of Fruitless Attachment and Bankruptcy and restricted the cantons in excluding the right to vote due to bankruptcy or fruitless attachment. The debtor could only be excluded from the right to vote if the court determined that he or she was substantially at fault for the loss of assets. The federal legislature limited the exclusion from voting rights in this case to a maximum of four years. This limited possibility of exclusion from the right to vote was abolished in 1971. Then, within the framework of the criminal law competence it had assumed, the Confederation also regulated the cessation in civil honour as a secondary penalty to penal servitude and imprisonment, which also led to exclusion from the right to vote. The corresponding provision was also repealed in 1971.

5 Although the Confederation extended the right to vote to Swiss women in 1971 as part of a constitutional revision, it was not until the PRA came into force in 1978 that the federal legislature succeeded in completely regulating exclusion from the right to vote under federal law and in limiting it to cases of incapacitation due to mental illness or mental incapacity with Art. 2 PRA. The cantonal exclusion rules remained reserved in the Federal Constitution until 1991 and were only deleted with the introduction of the voting age of 18 and the corresponding revision of the Constitution. However, Art. 2 PRA had already rendered the constitutional provision obsolete before then.

B. Relationship to constitutional law and the CC

Although the PRA today regulates political rights at federal level, the law no longer defines the prerequisites and content of the right to vote since the legislature repealed art. 1 of the PRA in 2002. The norm was deemed obsolete after the total revision of the Federal Constitution, as the constitutional legislator standardised the prerequisites and content of the right to vote at the constitutional level in art. 136 para. 1 and 2 FC. Accordingly, the PRA regulates the composition of the electorate only with regard to exclusion from the right to vote. 6

However, since the constitutional legislator also regulated exclusion from the right to vote in art. 136 para. 1 FC, the legislator also temporarily repealed art. 2 PRA with the total revision of the Federal Constitution. The current provision was only reintroduced in 2013 in a new formulation in the course of the revision of adult protection law. Since the revision of the adult protection law, the Constitution grants political rights to all Swiss citizens who have reached the age of 18 and are not incapacitated due to mental illness or mental incapacity, although the civil law institute of incapacitation no longer exists. Instead of amending the Constitution, the legislature wanted to "reinterpret" the Constitution through art. 2 PRA and focus on comprehensive guardianship due to permanent incapacity to judge. 7

In terms of content, the comprehensive guardianship was undoubtedly intended to be the successor institute to incapacitation. The comprehensive guardianship is to be ordered if a person is particularly in need of assistance. Although it is to be welcomed that the pejorative concept of mental illness or mental weakness has been removed from adult protection law, it is nevertheless a makeshift approach and the constitution should be revised accordingly. 8

II. SIGNIFICANCE OF THE PROVISION

A. General

The PRA consistently uses the term "right to vote" as a generic term for all political rights to which voters are entitled. 9

According to art. 39 para. 1 FC, the Confederation has the legislative competence to regulate the exercise of political rights in federal matters. To this end, 10

the federal legislature has essentially enacted the PRA and the VPR. If a necessary regulation cannot be derived from federal law, cantonal law is to be applied in accordance with art. 83 PRA. In addition, the PRA often expressly refers to cantonal law (e.g. voting by third parties, art. 5 para. 6 PRA or early voting, art. 7 para. 3 PRA), which even today leads to slightly different procedural modalities for the exercise of voting rights in federal matters at the cantonal level. This is justified by the close interlocking of the procedural provisions for cantonal and federal electoral and voting rights. However, the cantonal implementing provisions require federal approval with constitutive effect.

11 Art. 2 PRA is based on the civil law legal institutions of comprehensive guardianship and precautionary mandate for the exclusion from the right to vote in federal matters (cf. in detail below III). Since the codification principle applies in civil law, there is no room for cantonal law – outside of genuine reservations – to regulate these institutes in this respect. Reservations in favour of the cantons exist in adult protection law primarily in the area of organisational and procedural law. This means that there can be no substantive deviations from cantonal law with regard to the institutes of adult protection law, but there can be deviations in procedural terms. However, Art. 2 PRA does not comment on the question of the procedure by which a person is excluded from the right to vote if the relevant requirements are met (cf. E below).

B. Legal comparison

12 According to art. 39 para. 1 FC, the cantons regulate the exercise of political rights at cantonal and communal level. This competence also includes regulating the exclusion from the right to vote in cantonal and communal matters. In doing so, however, the cantons must comply with the requirements of federal law and, in particular, with fundamental rights. In recent decades, the cantons have abolished all grounds for exclusion that deviate from federal law. The cantons sometimes explicitly refer to the political rights at federal level for the requirements of the right to vote.

13 According to the provision of art. 2 PRA, persons who are under comprehensive guardianship due to permanent incapacity or who are represented by a guardianship representative are also deemed to be incapacitated in political matters without further ado. This automatism is widely criticised by scholars

(cf. n. 36 below) and certain cantons deviate from this procedure with regard to cantonal voting rights. The cantons of Vaud and Neuchâtel, for example, have special procedures for exclusion from the right to vote. According to this procedure, the persons concerned are also automatically excluded from the right to vote, but there is a procedure in which the persons can regain the right to vote after an individual examination. The canton of Geneva has gone even further. Whereas under the new constitution of 2012 the voting rights of persons permanently incapacitated could only be withdrawn on the basis of an order by a judicial authority, the canton deleted this provision without replacement in 2020 with reference to art. 29 of the Convention on the Rights of Persons with Disabilities and immediately restored the rights of the persons affected by an exclusion. Other cantons are also considering such a measure.

14 It is to be hoped that the Confederation will also revise the procedure for exclusion from the right to vote in federal matters so that permanent incapacity to judge under civil law does not automatically imply incapacity to judge in political matters. Should a model along the lines of the Canton of Geneva be sought at federal level, this would of course require a revision of art. 136 FC. Even if the political rights of the cantons have converged considerably, the cantons thus prove that they can still act as an "experimental laboratory" for democracy.

III. COMMENTARY ON THE TEXT OF THE NORM

A. Reference to institutes of adult protection law

15 According to the legislature's intention, art. 2 CPD is intended to adapt the conditions for exclusion from the right to vote under art. 136 para. 1 FC at the legislative level – contrary to the wording of the Constitution – to the revised adult protection law (for criticism, see above n. 7 f.). Since then, art. 2 PRA has linked the exclusion from the right to vote to two new legal institutions under civil law introduced in 2013: the comprehensive guardianship and the advance directive.

B. Comprehensive guardianship

16 The comprehensive guardianship is one of the four types of guardianship provided for by the legislature in adult protection law. In accordance with its name, the comprehensive guardianship differs from the accompanying

guardianship, the representation guardianship and the participation guardianship in that it comprehensively removes the capacity to act of the person concerned by law. Nevertheless, a comprehensively assisted person can retain a certain capacity to act within the framework of the law of persons, insofar as he or she is capable of judgement in this regard.

17 The general requirements for ordering a guardianship are set out in art. 390 para. 1 CC, whereby the order may in any case only be made subsidiary to other assistance and must be proportionate (art. 389 CC). A reason for assistance is required (objective state of weakness) as well as a need for assistance, which consists in the need for special protection due to the inability to take care of one's own affairs or to have one's affairs taken care of by granting a power of attorney. A third requirement must result from these two prerequisites: A threat to the welfare of the person concerned. It follows from this that, even if the first two conditions are met, a guardianship is not to be ordered if, for example, the environment provides sufficient support, which also results from the subsidiarity requirement of Art. 389 Para. 1 No. 1 CC.

18 All three of these requirements must be set out in the reasons for the decision of the adult protection authority. The authority must hear the person concerned (art. 447 para. 1 CC) and, under certain conditions, consult an expert opinion. In the case of a comprehensive guardianship that is to be established on the basis of a mental disorder, an expert opinion must always be obtained according to the practice of the Federal Supreme Court. A guardianship is established at the request of the person concerned or a person close to him or her, as well as ex officio (art. 390 para. 3 CC).

19 In addition to these general requirements, which apply to all guardianships, the requirement that the person concerned must be "particularly in need of assistance" is added in the case of a comprehensive guardianship. This means that the need for protection of the person concerned is particularly high, which may be the case if the person is permanently incapacitated. Permanent incapacity is therefore not a prerequisite for comprehensive guardianship, but an example of a case in which comprehensive guardianship may be indicated. While persons under comprehensive guardianship are predominantly permanently incapacitated, permanent incapacity does not necessarily lead to comprehensive guardianship. In the practice of adult protection, even in cases of permanent incapacity, a mere representative guardianship is often sufficient, in which the guardian is assigned a large number of tasks. In view of the fact

that exclusion from the right to vote can only be ordered in the case of a comprehensive guardianship, this leads to unequal treatment which calls the regulation into question (see also n. 36 below).

The comprehensive guardianship is therefore not necessary in every case, even in cases in which the person concerned cannot in principle bring about any legal effects through his or her actions (cf. art. 389 para. 2 CC). The consequence of comprehensive guardianship is that the person loses his or her capacity to act in full by operation of law and, as the most intrusive measure, may therefore only be ordered if the objective cannot be achieved by other measures. 20

Thus, the adult protection authorities have discretion in selecting the type of assistance, even though the private law literature avoids this term. However, it is nothing other than a demand for the exercise of discretion when the doctrine demands that the authority does not force a case "into an existing corset", but rather aligns the measures to the individual case and also examines combined assistance. 21

Statistics show that comprehensive assistance orders are proportionally more frequent in Ticino and French-speaking Switzerland, which may be due to the fact that in these cantons judicial authorities often decide on the order. These problematic differences have contributed to the fact that the Confederation now wants to examine the problem of the automatic exclusion of comprehensively assisted persons from the right to vote more closely (cf. n. 37 below). 22

C. Advance directive

The second legal institution under adult protection law that can justify exclusion from the right to vote is the provisional mandate under art. 360 ff. CC. An advance directive is a unilateral legal transaction similar to a contract, which at the same time represents an adult protection measure initiated by the person concerned and can supersede other adult protection measures. 23

With an advance directive, a person who is capable of acting can instruct another natural person or legal entity to take over the care of persons or property in the event of the principal's incapacity to judge or to represent the principal in legal transactions (art. 360 para. 1 CC). The advance directive may cover these three tasks cumulatively or alternatively. If the advance directive relates 24

to all three areas and also includes them in full, it largely corresponds to the comprehensive guardianship.

25 With regard to the exclusion from the right to vote, art. 2 PRA requires that the person concerned be "represented" by a person authorised to make provisions. The dispatch does not comment on this formulation, but merely mentions that in the case of persons who are represented under an advance directive, the authorities have previously determined that the person concerned is incapable of judgement. If one follows the areas of responsibility that art. 360 para. 1 CC delineates, the wording of art. 2 PRA would require that the advance directive at least refer to representation in legal dealings. However, the separation of representation in legal transactions from the other areas of responsibility is contrary to civil law doctrine and practice, which have always considered the representation of the ward to be included in the concepts of care of persons and property. The guardianship commissioners thus also have the right of representation in all areas of responsibility assigned to them.

26 From the perspective of art. 2 PRA, however, this has the problematic consequence that potentially every effective advance directive can lead to exclusion from the right to vote, even if it does not extend to all three areas mentioned in art. 360 para. 1 CC. Certainly, even with an advance directive, the person must be permanently incapacitated, which in practice will probably also require a comprehensive advance directive. Nevertheless, the wording of art. 2 PRA would equate comprehensive guardianship and an advance directive, which does not cover all three areas of art. 360 para. 1 CC, as alternative prerequisites and thus place very different requirements on them. The legislature has not commented on this imbalance, which is why the provision must be interpreted, taking into account the principle of equality of rights, to the effect that only advance directives that relate to all three areas (care of persons and property and representation in legal transactions) can lead to exclusion from the right to vote. The equation of the two institutions in art. 2 PRA thus seems ill-conceived.

27 This is made clear by the fact that advance directives enable "tailor-made" private provision. An advance directive does not necessarily have to cover the entire care of persons or property and can thus in fact leave it to the adult protection authority to order supplementary state measures if such become necessary. Without the supplementary state measures, such an advance directive also does not achieve the same intensity of intervention as a comprehen-

sive guardianship. According to the explanations in the preceding paragraph, such an advance directive should not be sufficient to justify exclusion from the right to vote.

The advance directive can only become effective when the adult protection authority has determined that its preconditions have been met. One of the preconditions is the incapacity of the person concerned to judge in the defined legal area, which must in principle be determined by the adult protection authority. Although this incapacity must be of a certain minimum duration (a few hours are not sufficient), a permanent incapacity as mentioned in art. 398 para. 1 CC is not required. 28

D. Permanent incapacity

From the point of view of adult protection law, permanent incapacity to judge is a possible circumstance in which a person is considered to be in particular need of assistance within the meaning of art. 398 para. 1 CC and thus the prerequisite for comprehensive assistance may exist. Permanent incapacity to judge is therefore not a prerequisite for comprehensive guardianship (n. 16 above). Similarly, an advance directive can only become effective if the adult protection authority determines that the person concerned has become incapable of judgement. However, the incapacity to judge need not be permanent even for the validity of the advance directive (above n. 23). In order to be excluded from the right to vote under art. 2 PRA, however, a person must be permanently incapacitated, in contrast to the institutions of adult protection law. 29

A person is incapable of judgement if he or she lacks the capacity to act rationally (cf. art. 16 CC). On the one hand, capacity to judge presupposes a certain degree of intellectual insight, rational judgement and thus reasoning ability (capacity for insight). On the other hand, based on this insight, the person must be able to form a will and to act in accordance with this will (capacity to form and implement a will). The capacity to judge must always be assessed in relative terms, i.e. according to the specific point in time and the specific legal transaction. In the case of adults, capacity is generally presumed. On the other hand, art. 16 CC provides for certain conditions in which, on the contrary, incapacity to judge is presumed (such as infancy or mental disability). 30

31 While incapacity is to be assessed relatively and therefore does not have to be permanent, a person may only be excluded from the right to vote under art. 2 PRA if he or she is "permanently" incapacitated. Permanent incapacity is also mentioned in art. 398 para. 1 CC, but there only as a possible case in which a person may (but need not) be in particular need of assistance. According to some doctrine, incapacity is permanent if it cannot be expected that the person will regain capacity. Another part of the doctrine, however, does not want to understand permanent as "lifelong", since a person can regain the capacity to judge in the case of a treatable mental illness, for example. According to both doctrines, the probability that the incapacity to judge will last and thus a prognosis about the duration and course of the corresponding condition of a person seems to be relevant. This makes the concept of permanent incapacity problematic, as such prognoses are hardly possible.

E. Significance for exclusion from the right to vote under art. 2 PRA

32 As shown above, the grounds for exclusion from the right to vote have become increasingly narrow over time. Today, the only persons who can be excluded from the right to vote are those who are under comprehensive guardianship due to permanent incapacity or who are represented by a person authorised to make provisions. Article 2 of the PRA does not address the question of how persons under comprehensive guardianship or represented by a guardianship representative are excluded from the right to vote.

33 If a person is placed under comprehensive guardianship, the adult protection authority will in future notify the civil registry office and the communal authorities at the place of residence by law; the latter will keep the commune's electoral register. Under the new law, it is no longer relevant for the notification whether the comprehensive guardianship was established due to permanent incapacity, whereas previously only guardianships established due to permanent incapacity were notified. The communal authorities can therefore no longer determine beyond doubt from the report of the adult protection authority whether the person was placed under comprehensive guardianship because he or she is permanently incapable of judgement or whether there is another reason for this. However, permanent incapacity is still required for exclusion from the right to vote, as only this can justify exclusion from the right to vote according to the express wording of art. 2 PRA.

One of the reasons why the revision has not yet entered into force is that the Federal Council has to issue an ordinance under the new law on information on adult protection measures. It conducted a consultation on the preliminary draft of this ordinance in 2019, which led to controversial results. For this reason, the Federal Council is now proposing that the revised provisions on the notification of adult protection measures enter into force on 1 January 2024 without an accompanying ordinance and that the corresponding provisions in the CC be deleted even before they have entered into force. In terms of content, the Federal Council considers the ordinance to be unnecessary because the Conference for the Protection of Children and Adults (KOKES) has in the meantime issued recommendations on the provision of information on adult protection measures. 34

From the point of view of the authorities, it would be desirable for the adult protection authority to record the permanent incapacity in the disposition, but this would have an unnecessarily stigmatising effect from the point of view of the person concerned. In such a case, the authority would also have to reconsider the decision if the incapacity was no longer permanent but the comprehensive guardianship remained in place. For reasons of proportionality, the doctrine also calls for a narrow interpretation of the notification obligations. 35

Since the comprehensive guardianship is intended to be a last resort, persons who are permanently incapacitated can also be under other guardianships and in this case are not excluded from the right to vote. The fact that the legislature requires a connection between the measure of comprehensive guardianship and permanent incapacity leads to unequal treatment, which cannot be objectively justified, in view of the flexibilisation that the reform of adult protection law has made possible with regard to official measures. On the one hand, persons who are permanently incapacitated are not always under comprehensive guardianship, and on the other hand, persons who are comprehensively guardianed are not always permanently incapacitated. 36

The permanent incapacity must also relate to the exercise of the right to vote, which the municipal authorities would have to examine in the specific individual case, if the adult protection authority has not already done so. An automatism would certainly violate art. 29 of the Convention on the Rights of Persons with Disabilities; however, it is unclear whether this convention is directly applicable. The UN Committee on the Rights of Persons with Disabili- 37

ties, which is responsible for examining reports on the implementation of the CRPD, even considers any exclusion of persons from the right to vote on the basis of disability to be contrary to the Convention. In its current report, it called on Switzerland to abolish all regulations that deny disabled persons their political rights.

38 Article 2 of the PRA must be interpreted by the Confederation in conformity with the Constitution and international law, which would at least require that the competent authorities, within the meaning of article 29 of the CRPD, examine whether the permanent incapacity also relates to the exercise of political rights before excluding a person from the right to vote. The cantonal regulations that provide for a special procedure for excluding a person from the right to vote are therefore to be welcomed (cf. n. 13 f. above). In its report on disability policy, the Federal Council dealt with reforms to make it easier for persons with disabilities to participate in the political process, but the national government did not address the problem of the automatic exclusion of persons with comprehensive assistance. It was not until two parliamentary initiatives that the Federal Council decided to examine this issue in greater depth, also in view of the fact that comprehensive assistance is ordered with varying frequency in the different language regions.

39 The ECHR also requires a case-by-case examination of an exclusion from the right to choose, based on article 3 of the First Additional Protocol. However, Switzerland has not ratified this protocol, which is why the corresponding practice of the ECtHR is not binding on Switzerland.

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COMMENTARY ON

Art. 3 PRA

A commentary by Goran Seferovic

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Art. 3 Political domicile

[1] Votes shall be cast in the political domicile, i.e. the commune in which the person eligible to vote is resident and registered to vote. Persons of no-fixed residence shall vote in their commune of origin.

[2] Any person who deposits an identification document other than the certificate of origin (certificate of residence, provisional certificate, etc.) shall acquire political domicile only if they prove that they are not registered to vote in the place where their certificate of origin is deposited.

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I. HISTORY OF ORIGINS

A. Politically disputed municipal citizenship rights

The background to the political disputes about political domicile and thus the right to vote in a community is the differentiation of citizenship rights since the Reformation, because historically the right to vote was linked to citizenship rights. During this time, the communal citizenship right and the land rights developed, which corresponded to today's cantonal citizenship right. Since the two rights had different prerequisites and different reasons could lead to their loss, citizens did not necessarily have both rights at the same time. This differentiation was intensified from the 17th century onwards, when the municipalities began to seal themselves off against accepting foreigners. On the one hand, this was because citizenship was increasingly understood as akin to ownership and, on the other, because the home principle had become established in the care of the poor. In this way, people with different residence titles and rights lived in one community. Justice co-operatives exercised political rights, while Hintersassen or Landsassen were entitled to use the communal property, but had no political rights. Hintersassen had been resident in a municipality for a long time, but did not have citizenship of the municipality. Landassen had cantonal citizenship but no municipal citizenship, and in towns a distinction was often made between major and minor citizenship, the latter conferring only limited rights. 1

B. Gradual convergence of federal and cantonal voting rights

In keeping with its liberal orientation, the FC 1848 introduced fundamental freedom of establishment for Swiss citizens of Christian denomination. However, the FC 1848 did not yet oblige the cantons to also grant settled Swiss citizens political rights in their municipality of residence. The freedom of settlement for Swiss of the Jewish faith was not realised until a partial revision of the FC in 1866. On the same voting date, however, two constitutional revisions failed, which wanted to grant the settlers political rights at communal level as well. It was not until the FC of 1874 that the cantons were finally obliged to grant settled Swiss citizens political rights at the communal level, which led to the differentiation of political communes and citizens' com- 2

munes. From then on, the citizens' communes administered the citizens' property and could continue to treat non-citizens differently.

3 Art. 3 PRA has its first predecessor provision in Art. 4 of the Federal Act on the Election of Members of the National Council of 21 December 1850. According to that provision, voters were to exercise their right to vote where they lived, which meant that the principle of residence had applied to political rights at federal level since the beginning of the federal state. The place of residence was the place where the Swiss had their normal place of residence. Historically, domicile as an institution under civil law had gradually decoupled from the police settlement or residence permit. Since 1850, federal law had based political residence on the criterion of ordinary residence under civil law, although at that time no uniform concept of residence under civil law had developed. However, based on the guarantee of the debtor's place of jurisdiction at the place of residence (Art. 59 FC 1874), the Confederation had since 1874 developed customary law rules on domicile modelled on the French Code civil, which were first enshrined in law in Art. 3 of the Federal Act on the Civil Law Relations of Settled Persons and Residents of 25 June 1891.

4 With the Federal Act of 19 July 1872 on Federal Elections and Votes, the federal legislature specified the political domicile, according to which every Swiss citizen exercised his or her right to vote where he or she "resides as a local citizen or as a settled or resident person". A formal criterion was now added to the civil law criterion of residence, namely that of a police residence title, whereby cases were still conceivable in which Swiss citizens could establish political residence without possessing one of these residence titles. Settlement and residence permits were police permits, but at that time Swiss citizens were generally entitled to them. This residence title nevertheless had to be proven. In order to exercise cantonal and communal voting rights, the cantons could also make settlement a requirement.

5 Since these provisions only referred to federal elections and votes, the total revision of the FC in 1874 did not require any adjustment of the relevant provision of the law. It was not until 1951 that the federal legislature clarified the modalities of political domicile, according to which a person capable of voting acquires political domicile in federal matters at his place of residence, provided he does not have stronger ties to another place and if he has deposited his certificate of domicile at least ten days before the vote. Art. 3 PRA, which was introduced in 1976 and has remained unchanged since, essentially adopted

this provision. Today, the waiting period is the subject of Art. 4 PRA (in the form of a registration deadline).

II. SIGNIFICANCE OF THE PROVISION

A. General

The principle of residence is also referred to as the democratic territoriality principle, which is intended to ensure that the political will of voters is attributed to the territorial authority to which they belong and by whose decisions they are most likely to be affected. 6

Political domicile is a federal constitutional concept (Art. 39 para. 2 FC), which is concretised by Art. 3 FC. The cantons have adopted this concept, which means that today there is a uniform concept of political domicile in the Confederation. 7

At the same time, political domicile guarantees that the state organ, the people, is properly composed. This is an entitlement that is part of the freedom to vote and to be elected under Art. 34 FC and is intended to prevent "voting tourism", i.e. the temporary transfer of residence to another community in order to become entitled to vote there. 8

However, Art. 3 PRA also serves to concretise Art. 39 para. 3 FC by ensuring that a person has only one political domicile and can thus exercise his or her political rights in only one place. In addition to the actual civil law criterion of domicile, a formal registration is therefore necessary to establish political domicile, which was previously usually done by depositing the certificate of domicile, whereupon the person is entered in the electoral register. However, the certificate of domicile became superfluous due to a revision of the law on civil status and the land register in 2019 (cf. n. 22 below). 9

As a rule, the civil-law domicile of a person entitled to vote coincides with his or her political domicile, i.e. "where he or she resides with the intention of remaining permanently" (Art. 23 CC). According to Art. 1 VPR, exceptions may exist in particular for persons under guardianship, weekly residents and spouses. 10

Furthermore, for the voting rights of the Swiss abroad, a fiction is necessary with regard to their domicile, because this is in the state of residence. This ex- 11

ception is based on Art. 40 para. 2 FC and provides that Swiss abroad exercise their right to vote in their last municipality of residence or their home municipality (Art. 18 ASG). Due to the principle of democratic territoriality, the right of the Swiss abroad to vote is not a matter of course and is criticised in the doctrine.

B. Legal comparison

12 The residence requirement has a different meaning at federal and cantonal level.

13 The subjective right to vote does not depend on the place of residence with regard to political rights at federal level. If the requirements for the right to vote are met (Art. 136 FC), the person must be entered in the electoral register of the commune of residence (Art. 3 para. 1 PRA). The significance of the political domicile in this respect is merely a procedural one, according to which persons entitled to vote who are resident in Switzerland "exercise" their political rights at that place. Art. 18 ASG provides for special provisions for Swiss abroad. Likewise, according to Art. 3 para. 1 PRA, Travellers vote in their home commune (cf. n. 18 ff. below). Political rights are only exercised at this place (Art. 39 para. 3 FC). The exercise of the right to vote is also influenced by this place, in that, for example, for participation in National Council elections, it is relevant in which canton the political domicile is located (cf. Art. 149 para. 2 FC).

14 At the cantonal level, political domicile has an additional significance in addition to its procedural function, since cantonal and communal political rights depend on domicile in the canton and the corresponding commune. Political domicile is thus generally a subjective prerequisite for the right to vote. However, the cantons are free to decide whether they wish to grant the Swiss abroad the right to vote in cantonal and communal matters and thus a corresponding exception to the requirement of residence. Art. 39 para. 3 FC, on the other hand, prohibits the cantons from granting persons with political domicile in other cantons the right to vote in the canton. As a principle of unity of political domicile, this also applies at communal level and – in order to prevent the multiple exercise of the right to vote on the same matter – also at federal level.

Although it is argued in the doctrine that the cantons could create a cantonal-law concept of political domicile based on Art. 39 para. 1 FC, a different concept could cause difficulties in practice. For the determination of political domicile, the cantons explicitly refer to the PRA or adopt the corresponding terminology. 15

III. COMMENTARY ON THE TEXT OF THE NORM

A. Definition of political domicile (para. 1)

1. Political domicile

The PRA defines the place of residence relevant for voting, which is referred to as political residence. For this purpose, political domicile is fundamentally linked to the criteria of domicile under civil law pursuant to Art. 23 of the Civil Code, which the law indicates with the term "where the person entitled to vote resides". The dispatch mentions the two civil law criteria of actual and sole residence (objective requirement) and intention to remain permanently (subjective requirement). A person establishes residence as soon as he or she actually stays in a place. In order to establish residence, he or she must also have the intention to remain permanently in that place. 16

These requirements under civil law are now extended by a formal and objective criterion: registration with the competent authority. The embassy cites as a reason for this the fact that the definition of residence under civil law is not sufficient for certain cases such as separated wives, weekly residents and students. From the point of view of civil law, the cases mentioned are cases in which residence can be disputed for various reasons. The legislator apparently does not want to tolerate this uncertainty in the case of political domicile and therefore requires, as an additional prerequisite, registration with the competent authority by depositing the documents. Contrary to this argumentation, the Federal Council emphasises in its dispatch that the deposit of the certificate of domicile alone is not sufficient and that the requirements under civil law must also be met. In the cases mentioned, the uncertainty surrounding political domicile thus remains. 17

2. Travellers

18 Switzerland's treatment of Travellers is a dark chapter in the history of the federal state. There was an early connection between non-settlement and a lack of citizenship rights. The early federal state set out to naturalise people without citizenship rights (homeless people) and, in this context, to force Travellers (then called vagrants) to adopt a sedentary lifestyle as early as the 19th century, sometimes by depriving them of their children. This procedure was continued until 1973 with the "Hilfswerk Kinder der Landstrasse" programme.

19 A de facto pressure towards a sedentary lifestyle was also maintained until 1994 with regard to voting rights. Since the right to vote had always been linked to a political domicile, the authorities long took the view that if Travellers did not actually have a political domicile, they could not have the right to vote. This formalistic view only gave way to political efforts to right the wrongs done to Travellers. And it was not until 1994 that the revised Art. 3, para. 1 PRA finally came into force, enabling Travellers to exercise their voting rights in their home commune, in analogy to the Swiss abroad. The unequal treatment of the Swiss abroad, who have been able to exercise their right to vote in federal matters since 1975 without having a place of residence in Switzerland, seems particularly objectionable.

20 The term "Traveller" is not defined in detail by the law or the Dispatch. The systematic context shows that Travellers are characterised by the fact that they do not have a permanent place of residence. They may live in a place temporarily, but they have no intention of staying there permanently. Travellers within the meaning of the law are Swiss citizens. As such, they have the citizenship of a Swiss municipality and also exercise their right to vote in this home municipality in accordance with Art. 3 para. 1 sentence 2 PRA.

21 In the case of Travellers who also travel abroad, the distinction from the status of Swiss Abroad does not seem clear-cut, because for an entry in the Register of Swiss Abroad it is sufficient not to have a domicile in Switzerland as a Swiss national and merely to have established "residence" at a place abroad. In Switzerland, residence refers to the objective requirement of being in a place, without the subjective element of remaining permanently in that place.

B. Certificate of origin and other identity documents (para. 2)

The Heimatschein was previously the citizenship document for Swiss nationals in Switzerland. This must still be deposited in most cantons at the place of residence. In order to register at another place of residence, the municipality of settlement then issues a certificate of domicile or an interim certificate. Home residence permit and interim residence permit are cantonally different designations for residence permits. In particular, weekly residents require such a residence permit at their place of residence, while their political domicile remains at the place where they deposited their residence permit, which means that they continue to exercise their voting rights there. 22

When the PRA was enacted, the Federal Council justified Art. 3 para. 2 PRA as a special provision for separated spouses, since until the revision of the marriage law the separated spouse did not have an independent residence permit with which she could have been entered in the electoral register at her new place of residence. Today, the domicile of spouses is assessed separately for each spouse, which means that the provision has lost its original meaning. Nevertheless, Art. 3 para. 2 PRA opens up the possibility for a person to be entered in the electoral register even without depositing the certificate of domicile if he or she can prove that he or she is not entered in the electoral register at any other place. However, the practical significance of this possibility seems very small. 23

The provision of Art. 1 lit. c PRA, according to which the political domicile of a spouse may deviate from the civil domicile under certain circumstances, does not constitute a case of Art. 3 para. 2 PRA. This provision is one of the exceptional cases in which civil and political domicile may differ, as may also be the case with weekly residents or guardians. 24

The significance of the certificate of domicile will also continue to decline. Since 1980, the family register has formed the basis for the certificate of origin. With the enactment of the Civil Status Ordinance in 2004, the certificate of origin was defined as a civil status document. Since a revision of the civil status and land registry law in 2019, the municipalities have been given access to the data of the civil status register in order to keep their registers of residents. The certificate of domicile will thus become superfluous and a number of cantons have since also no longer required a certificate of domicile when registering for settlement or residence. However, cantonal law still determines 25

which documents must be presented when registering, and the cantons must first set up technical access for electronic searches of the civil status register.

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COMMENTARY ON

Art. 4 PRA

A commentary by Andrea Töndury / Rahel Altmann

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Art. 4 Electoral register

[1] Persons who are eligible to vote at the political domicile must be entered in the electoral register. Registrations and deletions must be carried out officially.

[2] Prior to an election or vote, entries must be made in the electoral register until the fifth day before the polling day provided the requirements for participation are fulfilled on the polling day.

[3] The electoral register is shall be available for inspection to those who are eligible to vote.

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I. HISTORY OF ORIGINS

The first attempt at a nationwide regulation of the registration of persons entitled to vote dates back to the Helvetic era: the First Helvetic Constitution of April 12, 1798, stipulated that every citizen of twenty years of age must "be enrolled in the civic register of his canton" (Art. 24). From that time on, the citizen received the right to vote in a primary or electoral assembly (Art. 28). 1

After the establishment of the federal state, the question of regulating the electoral register on a nationwide level became virulent again. The draft law of January 20, 1850, on the election of members of the National Council provided for the maintenance of a register of "citizens capable of voting" in the communes. However, the provision was not included in the law enacted on December 21, 1850. 2

In the first decades of the new federal state, a not insignificant number of citizens in the cantons found it difficult or even impossible to be entered in the electoral register and thus also to participate in federal votes. The reasons for this included the fact that the cantons at the time had different requirements for proof of eligibility to vote and that in some cantons the electoral registers were closed earlier for Swiss citizens from outside the canton than for native cantonal citizens. In order to eliminate this "unjustified inequality", the Federal Law on Federal Votes and Elections of 19 July 1872 established, among other things, in Art. 5 the principle that every Swiss citizen residing in a municipality shall be entered ex officio in the electoral register, provided that he or she is not excluded from active citizenship under the laws of the canton. Moreover, Art. 6 of the aforementioned federal law already contained the right to inspect the electoral register and a minimum requirement for closing the electoral register. However, the implementing regulations on the keeping of the electoral register in the cantons were inconsistent. Efforts to regulate them in a more uniform and detailed manner at the federal level were unsuccessful. 3

It was not until a good hundred years later, with the enactment of the PRA, that Articles 5 and 6 of the Federal Act on Federal Votes and Elections of July 19, 1872 were revised and transferred to Article 4 of the PRA. In contrast to the Federal Council's proposal, the Federal Assembly set a fixed date in paragraph 2 as the end date for the registration of voters. Since the PRA entered into force on July 1, 1978, the wording of Art. 4 has remained unchanged. 4

II. SIGNIFICANCE

A. General

5 Art. 4 regulates the register of persons entitled to vote on federal matters. The term federal affairs covers all federal votes (Art. 140-142 FC) and the elections to the National Council (Art. 149 FC). Elections to the Council of States, on the other hand, are regulated by the cantons (Art. 150 para. 3 FC) and are therefore cantonal matters.

6 The entry in the electoral register (French translation in the Confederation: registre des électeurs, in the cantons also: registre électoral or rôle électoral) is subject to exclusion from the right to vote (Art. 2). Together with political residence (Art. 3), registration is an essential formal procedural requirement for the right to vote or to cast a vote in federal matters (Arts. 5-8). For example, only persons registered in the electoral register can vote for the National Council. For eligibility for election to the National Council, however, registration in the electoral register is not a prerequisite (Art. 143 FC e contrario). All persons entitled to vote on federal matters are eligible to vote, including Swiss citizens living abroad who are not entered in the electoral register.

7 A correctly maintained electoral register guarantees the right to the correctly composed, constitutional electoral and voting body or to the lawful voting body, as well as the associated right to exclude non-voting persons. The electoral register also serves to determine the number of voters or persons entitled to vote as well as the subsequent counting and determination of the correct result. The specifications in Art. 4 are intended to prevent manipulation and thus contribute to a flawless voting and election system. The complete keeping of the electoral register is thus a central basic requirement for ensuring a voting or election result that reflects the free and undistorted will of those entitled to vote (Art. 34 para. 2 FC). The reliability and accuracy of the voting and election process and thus also the protection of the electoral register against manipulation is also protected under criminal law (Art. 282 StGB). A correctly kept electoral register builds trust and consequently serves the acceptance of a voting or election result. The entry in the electoral register is also a prerequisite for the issuance of the certificate of voting rights and subsequently for the taking of a referendum and a popular initiative. All in all, Art. 4 contains a central procedural requirement for the exercise and guarantee of political rights in Switzerland.

B. Comparison of Laws

The subject of Art. 4 is the electoral register in federal matters. The cantons and the communes are responsible for regulations on the electoral register in cantonal and communal matters, subject to the minimum requirements of the Confederation (Art. 39 FC). The cantons and communes may extend political rights within their respective spheres of competence. This tripartite division means that, in addition to the register for federal voting rights, a (different) voting register may also be kept for cantonal and communal elections and votes. The regulations in the cantons on the electoral registers differ, e.g. the inspection of the electoral register is sometimes determined in a way that deviates from federal law (cf. n. 34 ff.) or the electoral register is closed at a later date. 8

The decision to dispense with more far-reaching federal provisions on the keeping of the electoral register was justified by the fact that each municipality keeps a electoral register for communal, cantonal and federal ballots also in accordance with cantonal and communal law. Uniform federal regulations would, in the opinion of the legislature, have meant duplicate maintenance of the registers and thus considerable additional expense for the communes. 9

Insofar as the PRA and the federal implementing decrees do not contain any provisions, cantonal law applies (Art. 83 PRA). The cantonal implementing decrees on Art. 4 require the approval of the federal government in order to be valid (Art. 93 PRA). In view of the different cantonal implementing provisions, various questions of interpretation arise with regard to the implementation of Art. 4 PRA (cf. in particular on the right of inspection: n. 34 ff.). 10

III. VOTING REGISTER

A. Paragraph 1: Registration and Amendments

1. Those entitled to vote

In federal matters, the right to vote is governed by Article 136 para. 1 FC. Accordingly, all natural persons who have Swiss citizenship, have reached the age of 18 and are not under comprehensive guardianship due to permanent incapacity or are not represented by a person authorized to make provisions 11

for their children are to be entered in the federal electoral register (Art. 136 para. 1 FC in conjunction with Art. 2 PRA).

2. Political domicile

12 Entry in the federal electoral register is made at the place where the person establishes his or her political domicile. This requirement is already laid down in the Federal Constitution (Art. 39 para. 2 FC). The local determination of the registration ensures that a person cannot vote at different places at the same time. Before registration, it must be clarified in the sense of a preliminary question in which municipality the person entitled to vote lives and is registered (cf. n. 14).

13 The decisive point in time for the registration is the actual registration. Actual registration is deemed to be the deposit of the required identification documents, as a rule the certificate of residence, at the place of residence. Pursuant to Art. 3 para. 2 PRA, persons who deposit another form of identification (e.g. Heimatausweis) in a commune instead of the Heimatschein only establish political residence if they prove that they are not entered in the electoral register at the place where the Heimatschein is located. In this case, therefore, proof of the lack of entry in the electoral register at the place where the certificate of origin was deposited forms the preliminary question for establishing political domicile (cf. above) and only subsequently the basis for entry in the electoral register at the new place.

14 Due to the cumulative criteria of residence and registration, a person who is registered in a municipality but no longer lives there must be removed from the register.

15 As a rule, political residence is linked to civil residence. Under certain circumstances, however, the political domicile may differ from the civil domicile. Similarly, the place of voting entitlement cannot automatically be inferred as a specific place of residence, for example, for police purposes.

16 A separate electoral register is created for Swiss citizens living abroad, which is kept centrally in certain cantons. Persons without a fixed place of residence are entered in the electoral register of their home commune (Art. 3 para. 1 sentence 2 PRA).

3. Voting register

Neither the PRA nor the Ordinance on Political Rights (OPR) specify by which body or instance and in what form the register for federal voters is to be kept (e.g. physical or electronic form, alphabetical order, etc.). Accordingly, the Confederation in principle leaves the regulation of the modalities to the cantons (Art. 83 in conjunction with 91 PRA; cf. n. 10 above). 17

In the cantons, the electoral register is generally kept on a decentralized basis (in the communes) and electronically. The data from the population register are generally used to compile the electoral register. According to Art. 6 lit. t Federal Act of 23 June 2006 on the Harmonization of Population Registers and Other Official Registers of Persons, the population register must record voting and electoral rights at federal, cantonal and communal level. 18

Since 1 July 2022, the cantons have again had the option of introducing "e-voting" as part of trial operation, subject to the approval of the Federal Council. A nationwide introduction of e-voting would first require the creation of harmonized and coordinated voting registers. However, federal requirements for the maintenance of voting registers that go beyond Art. 4 have so far been largely ignored, even well over 150 years after the first efforts (see n. 3 above). 19

4. Registration or deletion ex officio

If a person fulfils the requirements for registration, he or she must be entered in the register immediately by the competent authority, subject to the closure of the electoral register (cf. n. 28 below), consequently without a waiting period and without any procedural act by the person (e.g. application). Likewise, the keepers of the electoral register are obliged to remove ex officio from the register persons who no longer meet the requirements. This means that once a person has moved away, he or she must be removed from the register and his or her data may no longer be processed. The electoral register must be constantly updated and must reflect the current status of those entitled to vote. The communes must carry out any necessary clarifications and rectify any inconsistencies in the register without delay. Official acts in connection with the electoral register shall in principle be performed free of charge (Art. 86 para. 1 PRA). 20

An appeal against the (refused) entry or deletion may be lodged with the respective cantonal government (Art. 77 para. 1 lit. a PRA). The prerequisite is 21

the existence of a contestable ruling by the body responsible for keeping the electoral register. Derived from the claim to the correct composition of the voting body as well as the determination of the correct result of elections and votes, the right of appeal relates not only to the entry or deletion of one's own person, but also to the entry or deletion of third parties. Due to the organ function of the electoral register, it is a prerequisite that the person lodging the complaint is entitled to vote on the matter. A voting rights complaint on the grounds of a violation of Art. 4 PRA, in particular on the grounds of deficiencies in the keeping of the electoral register, may be lodged at any time and thus irrespective of a specific vote or election.

22 Responsibility for the electoral register lies with the person keeping the electoral register. As a rule, he or she is appointed by the municipality and is part of the municipal administration (executive). The person keeping the electoral register must not only make the necessary mutations on an ongoing basis (duty to keep the register), but must also, in the event of doubt, check the requirements for the deletion or inclusion of a person (duty to investigate).

23 The age of the person and proof of Swiss citizenship can usually be verified by the communes without major effort. On the other hand, political domicile may require further clarification under certain circumstances. The same applies to uncertainties regarding capacity to judge. However, the assumption of "doubtful capacity" alone must not lead to the deletion of a person. In view of the implications of the deletion and a refusal to exercise political rights, those responsible for keeping the electoral register must always rely on legally binding orders or judgments (certificates) confirming the incapacity to judge. In accordance with Art. 449c of the Swiss Civil Code, the child and adult protection authorities (KESB) are required by law to notify the civil registry office of persons excluded from voting rights, namely those with comprehensive guardianship or a validated advance directive. The subsequent deletion therefore takes place ex officio. The same applies in the case of deletion due to the death of the person concerned or in the case of entry based on attainment of majority.

24 If the deletion is intended at the request of a third party and the situation is not clear (e.g. because the relevant documents have not been produced), the authority responsible for keeping the electoral register must make the necessary inquiries and grant the person concerned a hearing beforehand (cf. in particular the challenges in the case of changes of residence, n. 33).

The electoral register is regarded as a document. Falsifying, falsifying, removing or destroying the electoral register is punishable (cf. Art. 282 no. 1, first sentence, SCC). Criminal liability requires intentional action and is also affirmed in the case of contingent intent. 25

The electoral register relates in particular to the preparation of elections and votes. Any irregularities discovered in the run-up to the ballot must therefore be reported by voters immediately after they become aware of them. Causes for deficiencies in the keeping of the electoral register can be of a highly diverse nature: The danger of "voting tourism" seems to be rather low in federal votes and elections. However, the registration of several persons with fictitious domiciles is considered a serious deficiency - at least in the case of communal votes and elections. 26

Deficiencies in the keeping of the electoral register do not necessarily lead to the annulment of the election or voting result. Rather, the identified deficiencies must be suitable for influencing or distorting the result of the election or vote. It must be borne in mind that errors in the electoral register cannot be eradicated by a recount. As long as they are not systematic deficiencies across the board, they are seldom capable of influencing the result of a federal election or referendum. Due to the way in which communal electoral registers are kept and thus the lack of a nationwide overview, it must be ensured that a person who changes his or her place of residence during a vote or election and receives voting documents twice does not vote or elect twice in federal matters. 27

B. Paragraph 2: Cut-off date

Entries in the electoral register for federal matters must be made in accordance with Art. 4 para. 2 no later than the fifth day before the day of the election or vote. The closure of the electoral register for 4 days before a ballot serves the purpose of preparing the votes and elections in the polling stations. At the same time, the shutdown is intended to prevent "possible machinations" and to prevent errors "in the hectic rush of the last few days." 28

The deadline can generally be determined early in the case of federal votes and elections. As a rule, the Federal Council sets the voting date at least four months in advance (Art. 10 para. 1^{bis} PRA). Moreover, the National Council elections take place on a fixed date (second last Sunday in October). If the 29

Federal Council determines extraordinary election and voting dates, the possibility of timely entry in the electoral register and, if necessary, its verification by those entitled to vote must be guaranteed.

30 The requirements for entry in the electoral register must be met not on the qualifying date but on the day of the vote or election. Minor Swiss citizens who reach the age of 18 shortly before or on the day of the election or vote must therefore be registered by the communes ex officio in good time in order to safeguard their political rights at their political place of residence.

31 The provisions on keeping the electoral register apply separately to each ballot. If changes occur between two ballots with regard to registration (e.g. departure, move, death, etc.), this must be adjusted immediately, taking into account the closure of the electoral register with regard to the second ballot.

32 Paragraph 2 regulates the latest time of registration in accordance with the wording. In our opinion, later entries in the federal electoral register are inadmissible. The inadmissibility results on the one hand from the wording of the provision. On the other hand, the requirement of equal legal treatment of applicants with regard to registration or deletion must be observed. Furthermore, the provision aims at the undisturbed preparation (cf. n. 38). Cancellations, on the other hand, may exceptionally take place after the cut-off date, taking into account the right to the lawfully constituted voting body, if 1) the elimination of the prerequisites for the keepers of the electoral register is established beyond doubt, 2) a mutation in the electoral register does not interfere with the preparations and 3) any vote cast can be sorted out without further ado. Cases are conceivable in which the loss of the right to vote on the day of the vote or election is proven on the basis of a document (e.g. court judgment, death certificate) and the deletion could therefore be carried out without further clarification. However, in the absence of more far-reaching provisions in the PRA or VPR, deletion from the federal electoral register must be dispensed with even in such cases in the interests of equality of rights (cf. on the requirement for more far-reaching provisions in the PRA: n. 38 ff.).

33 Challenges in practice in connection with changes in the electoral register are identified in particular in the case of a change of residence and the corresponding subsequent retrieval of election and voting documents. In order to avoid exercising voting rights twice, voters should be able to obtain election and voting documents subsequently if they can prove that they have not al-

ready voted; as a rule, this is only possible by handing over the voting documents of the previous place of residence.

C. Paragraph 3: Inspection

Inspection of the electoral register for federal matters is open to all natural persons who are entitled to vote in federal matters (cf. the more precise wording in the French version: "par tout électeur"). 34

Legal entities are not entitled to vote. Consequently, they may not be granted access to the electoral register. However, a special question arises with regard to political parties. In certain cantons, political parties are expressly prohibited from inspecting the electoral register and from providing extracts thereof in the run-up to elections. Other cantons, however, grant political parties corresponding rights. In this respect, it is important to note that political parties and political associations, in particular initiative and referendum committees with legal personality, are granted a right of appeal in voting matters under certain conditions. However, the inspection of the electoral register by political parties regularly serves the purpose of political work (sending out election advertisements, collecting data on the electorate). In these cases, it is a misappropriation of the right of inspection, which enables individuals to check the legally constituted voting body and thus serves the exercise of their political rights. Cantonal regulations that allow the register to be disclosed to political parties are consequently only permissible for the electoral registers in cantonal and communal matters. 35

In principle, inspection relates to all the names listed in the electoral register. Only in this way can the composition of the correct voting body be verified. Art. 3 restricts the exercise of political rights to the political domicile. At the same time, the cantons are responsible for the more extensive provisions on keeping the electoral register (Art. 83 PRA). Based on this provision, it is questionable whether the exercise of the right to inspect the electoral register for federal matters is also restricted to the respective municipality or canton. Such a local restriction could, however, run counter to the purpose of inspection with regard to the federal voting body. 36

Inspection is an outflow of the right of voters to the correct composition of the voting body. As part of political rights, this right is guaranteed by Article 34 para. 1 FC. Due to the organ function of the right to vote, the claim to correct 37

composition refers not only to one's own right to vote, but also to the right to vote of third parties. Guaranteed in particular are a) the granting of one's own right to vote, b) the entry in the electoral register ex officio, and c) the admission of all those entitled to vote and the exclusion of those not entitled to vote.

38 Interpreting paragraph 3 with paragraph 2, it follows that inspection is not permitted during the closure of the electoral register and that a voting rights appeal against a refusal to allow inspection during this period would therefore come to nothing. Paragraph 3 does not contain any further restrictions on the right of inspection. At the time of the enactment of the provision, the legislator considered the restriction primarily from the perspective of avoiding "disturbances" in the run-up to votes and elections. This is hardly surprising in view of the various incidents of manipulation (cf. above on the legislative history, esp. n. 3). Although an unrestricted and unconditional access is to be assumed in principle on the basis of paragraph 3, a differentiated, constitutional interpretation is required (cf. n. 39-45 below).

39 The processing of personal data is generally associated with the risk that the privacy of individuals may be endangered. The right to inspect the electoral register, which is protected by fundamental rights, can thus collide with the fundamental right to protection of personal data (cf. Art. 13 para. 1 FC; right to informational self-determination). Special attention must therefore be paid to controlling the disclosure of personal life facts to third parties.

40 The inspection of the electoral register concerning one's own person is unproblematic from the outset and permissible at any time. However, when inspecting the data of third parties, it must be noted that such disclosure of personal data constitutes a restriction of the scope of protection of the right to informational self-determination. Particularly in the case of sensitive data, a particularly strict standard of review is appropriate when examining the requirements under Article 36 FC.

41 Particularly sensitive personal data relating to the existence of a comprehensive guardianship or a validated advance directive can be obtained - at least indirectly - from the electoral register: In the case of Swiss citizens who are not listed in the electoral register, an adult protection measure or a validated advance directive can be suspected as a result of incapacity - or even ascertained on the basis of explicit information in the register in accordance with

municipal or cantonal requirements. In addition, further personal data, namely information on nationality, can also be obtained from the electoral register: Natural persons who do not hold Swiss citizenship may not be entered in the federal electoral register.

Art. 4 para. 3 provides the formal legal basis for the processing of personal data requiring special protection (Art. 36 para. 1 FC). The access to the electoral register regulated by federal law and thus the encroachment on the constitutional right to informational self-determination can be justified by guaranteeing the fundamental political right to the correct composition of the electoral body (Art. 36 para. 2 FC). However, because of the conflict of fundamental rights and taking into account a potential contradiction with higher-level (constitutional) law, the question arises as to whether unrestricted and unconditional inspection of the electoral register is mandatory (Art. 190 FC) and consequently precludes a proportionality test under Art. 36 para. 3 FC from the perspective of the right to informational self-determination. This question must be clarified on the basis of "method pluralism". Para. 3 must be interpreted in conformity with the Constitution, taking into account the postulate of unity and freedom from contradiction of the legal order. 42

The different regulations and interpretations in the cantons regarding the right of inspection and the public access to the electoral register indicate - not least because of the reservation of approval by the Confederation (Art. 93 PRA) - that Paragraph 3 leaves a corresponding scope for interpretation in conformity with the constitution and thus for consideration of the principle of proportionality. The Canton of Zurich, for example, provides in § 9 para. 2 of the Law of 1 September 2003 on Political Rights (GPR/ZH; LS 161) that voters are "provided with information on a person's eligibility to vote" upon request. This provision was introduced because the more extensive inspection of the electoral register led to problems in the canton of Zurich. In particular, the register was inspected for irrelevant reasons, for example to find out a person's date of birth. In accordance with the principle of proportionality, the comprehensive right to inspect the register was therefore replaced by a right to information about the voting rights of a specific person. The canton of Zurich assumed that this would not impair the purpose of making the electoral register public. Other cantons have also enacted corresponding restrictions on the voting register in federal matters or interpreted their cantonal provisions accordingly. A look at practice also shows the need to take suitable 43

measures to ensure that, for example, the right of blocking in the residents' register cannot be undermined by an inspection of the electoral register. In other words, various cantons assume that the right of inspection need only be granted to the extent necessary to verify the correct composition of the voting body.

44 In our opinion, such an understanding of paragraph 3 in the sense of a contemporary, teleological and constitutional interpretation is also necessary so that the right to informational self-determination is not disproportionately restricted. With regard to the balancing of interests, it should be noted that due to the size of the federal electoral body and the decentralized organization of the electoral register for federal matters, there is generally less interest on the part of individual voters in full disclosure than, for example, in a small municipality with regard to its municipal electoral register. Individual errors in the electoral register have little effect at the federal level, whereas those in a small municipality can be of decisive importance. Overall, only those data should be disclosed that are absolutely necessary for safeguarding political rights. In terms of personnel, inspection should therefore be limited to certain persons, unless a broader inspection is required due to a more extensive interest (e.g. concrete suspicion of nationwide irregularities and manipulations).

45 De lege ferenda, it would be welcome if, in a next revision of the PRA or the VPR, the Confederation were to clarify the constitutional understanding of the right of inspection in a uniform manner for all cantons.

46 Requests to inspect the electoral register may only be made in order to safeguard political rights, namely due to doubts about the correct registration of certain persons. According to paragraph 3, no justification is required in principle. In our view, such justification may only be required if there are indications that the inspection is disproportionate or abusive. In particular, a comprehensive and unlimited inspection without assertion of comprehensible reasons, for example out of sheer curiosity (e.g. "browsing" and "rummaging" in the sense of a "fishing expedition"), appears problematic, at least in view of the fundamental rights of third parties.

47 The form of inspection is governed - in the absence of federal regulations - by cantonal law. It can be guaranteed in different ways and must be proportionate. Art. 4 can be complied with, for example, by on-site inspection or by means of restricted "online access" as well as by written or oral notification or

information. The public disclosure of the entire electoral register is delicate from the point of view of interference with fundamental rights (cf. above n. 39 ff.). As a rule, confirmation or denial of the registration of a particular person should be sufficient to guarantee political rights and, in particular, to verify that the voting body is lawfully composed (cf. above n. 43 on the regulation in the Canton of Zurich).

There is no entitlement to the publication of the electoral register or to the production of a copy (transcript or image) either on the basis of the guarantee of Art. 34 para. 1 FC or of Art. 4 para. 3 PRA. The provision of extracts from the electoral register is regulated differently at the cantonal level. In any case, no claim to the publication of an extract from the electoral register can be derived on the basis of Art. 4. Rather, the question arises as to whether the disclosure of an extract of the entry of third parties would constitute an unnecessary and thus disproportionate encroachment on their fundamental rights and would therefore have to be qualified as inadmissible. 48

Supervision of the keeping of the electoral register is generally the responsibility of the municipalities, namely the municipal council. The publication of the electoral register within the framework of supervision may be necessary, in particular if there is a suspicion of systematic deficiencies. In particular, the supervision could be of considerable importance if a more comprehensive inspection would be considered disproportionate. 49

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COMMENTARY ON

Art. 6 PRA

A commentary by Nula Katharina Frei

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Art. 6 Voting by persons with disabilities

The cantons shall ensure that any person who, due to a disability or any other reason, is permanently incapable of carrying out the procedures required for voting is able to vote.

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I. HISTORY OF ORIGINS AND SIGNIFICANCE

Article 6 of the PRA mandates the cantons to take measures to enable persons with disabilities to cast their votes independently. The provision was already included in the draft law of 1975 and was intended to take account at the federal level of the "wish expressed for years by disabled persons [to] also enable physically disabled voters (e.g. blind, lame) to exercise their political rights". 1

The provision, which was uncontroversial at the time of its creation - namely, most cantons already knew corresponding procedures for people with disabilities - is somewhat outdated. In particular, with the ratification of the UN Convention on the Rights of Persons with Disabilities (BRK) in 2014, Switzerland has subjected itself to more far-reaching obligations towards persons with disabilities, which must be taken into account when interpreting Art. 6 PRA (n. 5 ff.). Beyond the interpretation in conformity with the Constitution and international law, a revision of this provision would also be appropriate (n. 30). 2

Art. 6 PRA serves to implement the constitutional entitlement, flowing from the guarantee of political rights (Art. 34 para. 1 FC), to make the exercise of the right to vote practically possible. This claim is directly applicable even without cantonal implementation measures. The Federal Supreme Court has recognized that in the conduct of elections and votes, the normal situation of larger sections of the population, even if they are minorities, must be taken into account as far as possible by ensuring that the exercise of their right to vote is not prevented by a substantial practical obstacle as a result of the special nature of the arrangement. This also increases the legitimacy of an election or vote. Not only the majority, but also the minority must be able to participate in elections and votes without being substantially impeded. According to the case law of the Federal Supreme Court, disregard of this principle violates not only the freedom to vote and to be elected, but also the principle of equality of rights. Finally, Art. 6 PRA is also to be understood as an implementation of the prohibition of discrimination on the basis of disability (Art. 8 para. 2 FC) as well as the guarantee of the political rights of persons with disabilities (Art. 29 BRK) (see in more detail n. 5 ff.). 3

In the case of voting facilitations such as the present one - but also others - the principle of the broadest possible accessibility of an election or vote, re- 4

spectively the correct composition of the active citizenship, and the principle of secret election or vote are opposed to each other and must be weighed against each other. In particular, even in the case of voting facilitations such as proxy voting or postal or electronic voting, it must be ensured that no person entitled to vote casts his or her vote more than once and that no non-voting persons participate in the election or vote.

II. INTERPRETATION IN CONFORMITY WITH THE CONSTITUTION AND INTERNATIONAL LAW

5 Since the enactment of the PRA in 1978, both societal views towards persons with disabilities and the legal situation at the level of constitutional and international law have evolved significantly. Even a glance at the terminology, which has changed from "disabled person" to "handicapped person" to "person with disabilities", reveals that the aim today is to ensure the self-determined and equal participation of people with disabilities in society instead of treating them as passive recipients of benefits in need of assistance. In line with this changed understanding, the great importance of the political participation of people with disabilities is also increasingly recognized.

6 Article 8 para. 2 of the totally revised Federal Constitution prohibits discrimination "on the grounds of physical, mental or psychological disability". Consequently, persons with disabilities may not be discriminated against in the exercise of their political rights.

7 In addition, Art. 8 para. 4 FC obliges the legislature to take measures to eliminate discrimination against persons with disabilities. The legislature has implemented this mandate, among other things, by enacting the DDA, which is intended to eliminate disadvantages in access to public buildings and facilities, to public transport, to large residential or work buildings, to public and private services, to education and training, and in public employment. The DDA applies to elections and votes under federal law. Their implementation constitutes a "service that can be claimed by everyone" of the community in the sense of Art. 3 lit. e DDA. However, the legislative mandate of Art. 8 para. 4 FC is not exhausted with the enactment of the DDA. In particular, it would be open to the legislator to update Art. 6 PRA in application of this mandate (see n. 30).

Of great importance for the interpretation of Art. 6 PRA is the UN Convention on the Rights of Persons with Disabilities (BRK), which Switzerland ratified in 2014. Article 29 of the BRK guarantees the political rights of persons with disabilities. According to this provision, the signatory states must ensure that persons with disabilities can participate effectively and fully in political and public life on an equal basis with others, which also includes the right and opportunity to vote and be elected. In addition to abolishing discriminatory laws and dismantling exclusions of persons with disabilities from the right to vote, which still exist in many States Parties - including Switzerland (Art. 136 para. 1 FC; see OK-Seferovic Art. 2 PRA) - Art. 29 BRK mainly obligates the elimination of the numerous de facto barriers to political participation of persons with disabilities by means of proactive measures, so that persons with disabilities are enabled to participate in decision-making processes in political and public life on an equal basis with others. Among other things, Art. 29 lit. a BRK obliges states to provide electoral procedures, facilities and materials that are appropriate, accessible, easy to understand and to use. Similarly, under this provision, States must protect the freedom of persons with disabilities to vote and to choose, using assistive and new technologies where appropriate, and, when necessary and requested, persons with disabilities may be assisted in voting by a person of their choice. 8

III. MATERIAL SCOPE OF APPLICATION

In substantive terms, Article 6 of the PRA extends to elections and voting on federal matters. Most cantons provide for voting facilitations, as prescribed in Art. 6 PRA, also for cantonal and communal elections and votes (see n. 19 below). In this way, they fulfill their obligations to implement Art. 29 BRK and Art. 8 para. 2 FC to ensure equal participation in elections and votes. 9

As far as can be seen, not a single canton provides by law for facilitation of voting by persons with disabilities in assembly democracy, namely at Landsgemeinden and/or municipal assemblies. Art. 6 PRA, which only covers federal elections and votes, is admittedly not applicable to these situations. However, the provisions of constitutional and international law are relevant and must be implemented in practice if necessary. To date, there have been no systematic studies on the existence of corresponding legal facilitations in municipal decrees. 10

11 The acts necessary for voting are to be facilitated. The wording of Art. 6 PRA does not cover the processes of political decision-making that occur in the run-up to voting, even though persons with disabilities, especially those with cognitive impairments, also require support in this respect in order to be able to exercise their political rights on an equal footing with others.

12 Also excluded from the scope of application is the signing of referendum petitions and initiatives, for which persons with disabilities may also require support measures. In this regard, Art. 61 para. 1bis PRA contains a facilitation for voters who are unable to write.

IV. PERSONAL SCOPE OF APPLICATION

13 The addressees of the provision are the cantons. They must ensure that persons with disabilities (see n. 14 ff. below) can participate in elections and votes on federal matters.

14 According to its wording, the personal scope of application of Art. 6 PRA - with the exception of persons excluded from the right to vote under Art. 2 PRA - includes persons who are "permanently incapable, because of disability or for any other reason, of performing the acts necessary for voting themselves". The terminology is, as mentioned (n. 5), outdated. In accordance with its objective, the provision of Art. 6 PRA must today be interpreted in conformity with the Constitution and international law to the effect that it is not limited in its personal scope of application to "disabled persons" within the meaning of the IVG. Rather, the more modern definition of Art. 1 para. 2 BRK must be taken into account. According to this provision, persons with disabilities are those who have long-term physical, mental, intellectual or sensory impairments which, in interaction with various barriers, may prevent them from participating fully, effectively and equally in society. This BRK definition is intentionally open-ended, recognizing that the understanding of disability is constantly evolving. This social model of disability recognizes that disability arises from the interaction between biological impairments and societal barriers that prevent the person from participating fully, effectively, and equally in society.

15 In light of this human rights-based definition of "disabilities," the personal scope of Article 6 must be understood to extend to all persons who, because of a long-term physical, mental, intellectual, or sensory impairment and in in-

teraction with various barriers, are prevented from performing by themselves the acts necessary to vote. This interpretation is readily compatible with the wording of the provision, which in addition to "incapacitated persons" also covers all those who "for some other reason" cannot independently exercise their right to vote. Several cantons also use the newer terminology in their implementing legislation and speak of "persons with disabilities" or "handicapés".

16 It also follows that the personal scope of application is not limited to people with physical impairments. The fact that the legislator at the time of its creation had mainly this group in mind when he spoke of "blind and lame" in the 1975 dispatch is no longer relevant in the context of the interpretation at the time of application as well as the interpretation in conformity with constitutional and international law. Rather, it would constitute unjustified unequal treatment within the meaning of Art. 8 para. 2 FC, Art. 2 para. 2 DDA and Art. 2 para. 3 BRK to grant voting facilities only to persons with physical disabilities and not to persons with mental or psychological disabilities. Cantons that limit their implementing legislation to persons who are incapable or unable to write within the meaning of Art. 5 para. 6 PRA (cf. n. 19) have not fully complied with the legislative mandate of Art. 6 PRA.

17 By contrast, Art. 6 PRA does not extend to persons who are prevented from political participation due to a temporary health restriction. Both the wording of Art. 6 PRA ("permanent") and that of the BRK definition ("long-term") make it clear that temporary disabilities (such as those due to bedriddenness or hospitalization) are not covered by the provision. However, some cantons also provide for facilitation of voting for citizens who are ill or have had an accident, by allowing voting at home or in homes ("traveling urns").

V. MEASURES TO ENABLE PERSONS WITH DISABILITIES TO VOTE

18 Article 6 of the PRA contains a legislative mandate to the cantons, since it is they that are entrusted with conducting federal elections and votes. Federal law does not specify certain cantonal measures, but rather a result to be achieved, namely "that also those who, because of [a disability], are incapable of performing the acts necessary for voting themselves, may vote." Federal legislation in any case leaves it largely to the cantons to regulate the voting procedure, and thus the legislature already stated at the time of its creation in

1975 that it would not make sense to prescribe a specific system for facilitating the voting of "disabled" persons from the federal side, since most already knew a corresponding procedure for cantonal votes. Most cantons implemented the legislative mandate of Article 6 of the PRA in their cantonal laws on political rights, choosing various measures. Since this is a direct constitutional right of persons with disabilities (n. 3 above), in cantons without sufficient legal regulation, the practice has to make do.

A. Genuine and non-genuine substitution

19 All cantons that have a regulation provide for some form of representation. A distinction must be made between "genuine" and "non-genuine" representation, whereby these are sometimes merged in the cantonal regulations. In the case of genuine proxy voting, the proxy fills in the ballot paper of the represented person himself and takes it to the ballot box. In the case of non-genuine proxy voting, the proxy merely brings the ballot paper to the polling station and places it in the ballot box. These regulations refer to voting at the ballot box; on the other hand, there are no cantonal regulations on proxy voting in assembly democracy (n. 10 above). The following variants can be observed:

- Most cantons allow persons with disabilities - although here the groups vary, some cantons restrict themselves to persons incapable or unable to write within the meaning of Art. 5 para. 6 PRA, which as mentioned above (n. 16) is not sufficient - to be assisted or represented in filling out the ballot.
- Similarly, many cantons allow voting to be carried out by a proxy or the person concerned to be assisted in some other way, for example by allowing severely disabled voters to hand over their ballot paper to a person with an official function in the case of voting rooms that are not wheelchair-accessible. The Federal Supreme Court specifies that the messenger of the ballot paper of an elderly, disabled or ill person entitled to vote may neither arbitrarily change the ballot paper handed over to him nor replace it with another ballot paper. His only function is that of a messenger.
- Three cantons provide for the possibility of voting, on request, in the presence of a delegation of the electoral office at the home of the person concerned or in homes and hospitals.

- One canton provides in a general manner that persons with disabilities may be assisted by a person elected by them in exercising their right to vote.

In this context, assistance in voting is provided either by a person chosen by the person concerned (often in the case of postal voting) or by a person with an official function (often in the case of voting at the polling station). 20

If the ballot paper is filled in by another person (genuine proxy voting), the secrecy of the vote is no longer maintained vis-à-vis the proxy. Several cantons therefore explicitly prescribe an obligation for the proxy person to maintain silence. In the literature, a corresponding amendment to Art. 6 PRA has been called for. 21

A further problem in connection with acts of assistance in filling in ballot papers is the risk of undue influence on the person entitled to vote or abuse of helplessness. Especially in the case of persons with mental disabilities, the problem of influence is often discussed. However, this should not obscure the fact that a danger of influence exists wherever dependency relationships exist, for example within families and civil partnerships or in homes. In an older ruling, the Federal Supreme Court considered the risk to be low that a deputy exceeds his or her powers if the voter concerned has selected him or her himself or herself. Some cantons explicitly postulate a prohibition of influence by proxy. 22

The rule that no one may act as proxy for more than one person also serves to prevent abuses, and some cantons also have an express prohibition on more extensive or organized proxy voting. According to the case law of the Federal Supreme Court, such proxies are inadmissible in themselves and, depending on their extent, may lead to the annulment of an election or vote. 23

B. Vote électronique

Electronic voting could make life easier for people with visual or mobility impairments in particular, as it would allow them to cast their vote without assistance and thus in compliance with the secrecy of the ballot. 24

According to Art. 27g para. 1 VPR, the process of electronic voting must be designed in such a way that the needs of voters who are unable to cast their vote autonomously due to a disability are taken into account. The Federal Chan- 25

cellery may provide for facilitations for voters with a disability, provided that this does not significantly restrict security (Art. 27g para. 2 VPR). According to no. 4.10. of the Annex to the VEleS, facilitations may be provided for persons with a disability who are entitled to vote in order to check the evidence, and according to no. 6.1. the voting cards must, as far as possible, be designed in such a way that they allow voters with a disability barrier-free access to electronic voting.

26 However, proxy voting is prohibited in the case of electronic voting (Art. 27h para. 2 VPR).

VI. ASSESSMENT

27 The material scope of application of Art. 6 PRA is relatively narrow, being limited to voting in elections and referenda. This focus may be justified by the history of its origin, but no longer appears justified today in view of legal developments.

28 In particular, it must be taken into account that Switzerland, by ratifying the BRK, has committed itself to comprehensively guaranteeing the political rights of persons with disabilities. Art. 29 BRK not only obliges states to abolish discriminatory laws that exclude persons with disabilities or certain groups (namely persons with psychosocial or cognitive disabilities) from the right to vote. (cf. Art. 2 PRA) Rather, positive measures are intended to enable persons with disabilities to participate on an equal basis with others in decision-making processes in political and public life. In addition to the possibility of being assisted by a trusted person, this also includes, among other things, the accessibility and comprehensibility of election materials (for example, in easy language, as an audio file, in sign language or in Braille), the accessibility of polling stations and other places of political decision-making and expression, the encouragement of political parties to make their programs easily accessible and comprehensible, or the targeted political education of persons with disabilities. Recognizing that there is not one form of disability, but that the needs of people with disabilities vary, is of great importance. In practice, the focus is still too often exclusively on physical and sensory impairments, while support measures for the political participation of people with intellectual or mental impairments often do not exist.

A variety of additional measures to ensure the political rights of persons with disabilities would therefore be needed. The UN Committee on the Rights of Persons with Disabilities, which reviews state reports on the implementation of the BRK, has recommended that Switzerland ensure that electoral procedures are accessible to all persons with disabilities. However, Art. 6 PRA covers only a part of this, and the factual (as opposed to the personal) scope of application of Art. 6 PRA cannot be extended beyond the clear wording, even with an interpretation in conformity with the constitution and international law. It thus remains the case that Art. 6 PRA only prescribes facilitation for a limited aspect of voting by persons with disabilities. Certain other aspects arise from the DDA: For example, in their dealings with the population, the federal authorities must take into account the special concerns of people with hearing, visual and speech impairments (Art. 14 para. 1 DDA). Insofar as it is compatible with the principle of proportionality (Art. 11 DDA), information on political rights must therefore be prepared in a form that makes the information suitable and accessible to voters with disabilities. Some work is currently being done in this area (e.g. explanatory videos on elections and votes in sign language, voting information as an audio file or in plain language), but in general more should be done, even under the current regime, to facilitate or enable the exercise of the right to vote by persons with disabilities. Special measures would also be required if the currently applicable exclusions from voting rights (Art. 2 PRA) were abolished. 29

A revision of Art. 6 PRA or an addition to the PRA to include additional provisions to actually guarantee the political rights of persons with disabilities would therefore be desirable. In view of the diversity and situationally changing nature of "disability" (above n. 14), a conclusive regulation of measures at the legislative level is neither feasible nor sensible; rather, a statutory framework regulation is imperative, which prescribes the essential elements while at the same time preserving the leeway necessary for the application of the law to take into account the different needs of persons with disabilities. Essential elements in this sense are the obligation to take measures to facilitate voting for all persons with disabilities, as well as to enable and promote their political decision-making. When enacting these norms, care must be taken to ensure that this takes place with the involvement of persons with disabilities as well as their organizations, as stipulated in Art. 4 para. 3 BRK. 30

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COMMENTARY ON

Art. 10 PRA

A commentary by Pascal Mahon

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Title 2 Votes

Art. 10 Organisation

[1] The Federal Council shall determine the rules by which polling days are appointed. In doing so, it shall take account of the requirements of those eligible to vote, parliament, the cantons, the parties and the agencies responsible for effecting service of voting documents, and shall avoid any collisions of dates that may result from differences between the calendar year and the church year.

[1bis] The Federal Council shall determine, four months prior to the polling day at the latest, which proposals are to be submitted to a popular vote. This period of four months may be reduced in the case of emergency federal acts.

[2] Each canton is responsible for the conduct of the vote within its own territory and issues the required regulations.

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I. HISTORY AND SYSTEMATICS

A. Preliminary remarks on Title 2 of the Act

1 Art. 10 is the first of seven provisions making up Title II of the Political Rights Act, which, as its title indicates, deals with "Votations" ("Abstimmungen", "Votazioni").

2 In principle, Title II and its component provisions apply to "votes", i.e. cases in which the federal electorate, in its various forms, is called to the ballot box to take a material and concrete decision on a given subject, by voting "yes" or "no". This is the case in several hypotheses: 1°) all cases of mandatory referendum by a double majority of the people and the cantons, i.e. for all (partial or total) revisions of the Constitution, for acts approving certain international treaties and for urgent federal laws passed for more than one year and lacking a constitutional basis; 2°) all cases of compulsory referendum of the people alone (various procedural hypotheses concerning revision of the Constitution); or all cases of optional referendum, by a majority of the people alone, on federal laws, urgent federal laws in conformity with the Constitution whose period of validity exceeds one year, federal decrees (not simple), as well as acts of approval of certain international treaties.

3 These provisions - articles 10 to 15 - do not therefore apply, in principle, to the exercise of other powers of the federal electorate, such as the election of the National Council, the launching of a referendum or the launching of a popular initiative, in particular, an exercise which is governed by other titles of the law. Some of the provisions of Title 2 have their counterparts elsewhere in the law, for example in Title 3, on the election of the National Council.

B. Systematic and historical aspects of art. 10

4 As its title indicates ("Date and execution"), art. 10 deals with the date and organization of votes. In fact, the title of the provision is not the most precise and clear, as can be seen from its three language versions, which are quite different ("Anordnung" in German, i.e. rather "fixation" of the [date of] voting, and "Organizzazione" in Italian). From a historical point of view, the provision has undergone a fairly substantial evolution and modification, which does not,

however, explain this diversity of titles, and their relative imprecision, since they have not changed.

Art. 10 already existed in the original 1976 version of the law, with the same title in French ("Date et exécution"), as in German and Italian, but with a simpler content - and more in symbiosis with the title -, divided into two paragraphs. The first simply stated: "The Federal Council shall set the date of the vote", while the second - identical in every respect to the current paragraph 2 - referred to execution by the cantons: "Each canton shall ensure the execution of the vote within its territory and shall adopt the necessary measures". 5

This provision was amended by the revision of the Political Rights Act of June 21, 2002, which came into force on January 1, 2003. 1 and added para. 1bis, thus constituting the current text of the provision. The June 2002 revision, in which Parliament adopted the Federal Council's proposal unchanged and without discussion, was, as the government message emphasized, part of a "growing desire to establish a medium- and long-term timetable - easily calculable and perfectly transparent - for popular votes, a timetable that would ensure a certain continuity in the rhythm of voting and avoid jolts as far as possible". To this end, according to the Government, it was necessary to establish "in law the principles authorizing the Federal Council", on the one hand, "to lay down the rules for defining the Sundays reserved for federal referenda (para. 1)" and, on the other hand, "to determine and make public, from now on, at least four months before the day of a referendum, the matters, with the exception of urgent federal legislation, which will be put to the vote on that day (para. 1bis)". 6

II. MEANING AND SIGNIFICANCE OF THE PROVISION

A. General

As we have just seen, the object and purpose of the provision is both to establish, as far as possible, a coherent, appropriate and transparent timetable for federal votes, taking into account the many parameters that must be taken into consideration (vacations, religious calendar, etc.), and to ensure that the various parties concerned have sufficient time to prepare the campaigns leading up to the votes. To this end, the provision delegates to the Federal Council the task of laying down, in a general and abstract manner, "the rules for determining voting days", requiring it to respect a certain number of parameters to 7

be taken into consideration; on the other hand, it requires it to determine the subject of the vote at least four months in advance.

8 In the Swiss political system, this provision has a certain importance and a rather fundamental character insofar as Switzerland is characterized, from a comparative point of view, by a very high degree of direct democracy - probably the highest in the world - i.e. as a political system in which citizens are very often called upon to express their views on concrete issues by means of popular votes. It is generally accepted - albeit without empirical verification, but as a fairly reliable order of magnitude - that more than half of all popular votes held worldwide each year take place in Switzerland. This statistical statement certainly takes into account all popular votes held in the country, i.e. not only federal votes, but also communal and cantonal votes. The latter must therefore be deducted, as they are significantly more numerous than federal referenda. Nevertheless, from a comparative perspective, federal referenda alone account for a considerable number of popular votes each year.

9 Given the importance of political rights in the Swiss constitutional system, it is all the more essential that these votes be governed by clear and precise legal rules, to ensure that they take place in a regular manner, thereby guaranteeing the effective realization of these rights.

B. Cantonal law

10 As already mentioned, popular votes are even more numerous at cantonal and communal level. Most cantonal laws on political rights contain provisions more or less similar to art. 10 of the LDP, giving the cantonal executive the power to set and announce ballot dates, or to convene the electorate in advance and set ballot dates. Generally speaking, these provisions stipulate that, as far as possible, the dates should coincide with those of federal votes, the idea obviously being to avoid multiplying voting days and to concentrate federal, cantonal and communal votes on the same dates as far as possible.

III. COMMENTS

A. Paragraph 1: the voting calendar

1. The text and purpose of paragraph 1

As we have seen, para. 1, as we have seen, gives the Federal Council the power - and the mandate - to lay down "the rules for determining voting days", i.e. to establish, in the form of a general and abstract regulation, the calendar of voting days for federal votes. The provision specifies that the Government must, "[i]n doing so", take into account "the needs of voters, Parliament, cantons, political parties and organizations responsible for delivering voting material" and avoid "collisions that may result from differences between the calendar year and the religious year". The reasons for this provision, since its revision in 2002, are explained in the Federal Council's message relating to this revision. In justifying the proposed new para. 1, that "it is not easy to establish a system that allows the first two voting dates of each calendar year to be fixed", for a number of reasons, not least calendar-related: firstly, because "voting cannot take place in January and early February, as the Post Office cannot guarantee that voting material will be distributed in time for the Christmas and New Year holidays, nor can it take place in July, when a large proportion of the population is on vacation". Furthermore, the message added that "a minimum of eight weeks should separate two federal votes (there's not enough room to store voting material, and it must not be confused)". Another reason was that "from Ash Wednesday to Pentecost and Corpus Christi, the civil and religious calendars obey laws that are not always in harmony with each other". 11

A number of parameters therefore need to be taken into account, including the needs of voters, vacation periods and festivities, as well as public holidays, some of which may vary from year to year according to the religious calendar, and some of which may also vary between cantons according to different religious calendars. But we must also consider the needs of the authorities and political parties, such as the practical need to prepare and distribute voting material, or to enable political parties and other interested organizations to prepare and conduct their voting campaigns, taking into account other deadlines on the political calendar, such as elections or parliamentary sessions, for example. 12

2. Putting it into practice: Article 2a of the Ordinance on Political Rights

13 The Federal Council fulfilled its mandate under para. 1 by adopting, in a revision dated June 14 2002, a new Article 2a of the Ordinance on Political Rights (ODP) of May 24 1978, which, as its title indicates, determines the "Dates of federal popular votes". Paragraph 1 of this provision sets aside four Sundays per year, and stipulates that "the following Sundays shall be reserved for federal votes": "the second Sunday in February, in years in which Easter Sunday falls after April 10, and the fourth Sunday before Easter in other years" (let. a); "the third Sunday in May, in years when Pentecost Sunday falls after May 28, and the third Sunday after Pentecost in other years" (let. b); "the Sunday following the Federal Fast" (let. c), and "the last Sunday in November" (let. d). Para. 2 specifies that "[f]or overriding reasons", and "after consulting the cantons", the Federal Chancellery may propose to the Federal Council "to move a particular date, or to set additional dates", and para. 3 states that "there shall be no federal referendum in the month of September of the year of the complete renewal of the National Council".

14 The rule is therefore that voting day is always a Sunday, which does not mean that voting is only possible on Sundays. Early voting is in fact permitted, and even required, in that the cantons are obliged to make "early voting possible for at least two of the four days preceding voting day" (art. 7 para. 1 LDP).

15 To ensure the predictability and transparency of the calendar, Art. 2a ODP, para. 4, also stipulates that the Federal Chancellery "shall publish the dates reserved for federal popular votes in the following year, no later than June of each year".

3. Practical experience

16 In actual fact, practice today goes much further than the Ordinance requires, since the Federal Chancellery's website lists all the dates reserved for federal referenda, not just for the following year, but for the next 20 years. What's more, the ch.ch website, a joint offering from the Confederation, cantons and communes, also provides a "consolidated" calendar of upcoming cantonal and communal votes.

17 The fact that a date has been reserved does not necessarily mean that there will be one or more federal votes on that day. In fact, even if this is not very

frequent - it depends on how busy the political calendar is, and on the number of popular initiatives and other items being processed and, above all, ready to be put to the vote - it can happen that a reserved date or, more rarely, several successive reserved dates are not used. Thus, for example, in the recent past, there was no popular vote on November 27, 2022, a date that had been reserved, because "[n]o act of the Confederation [was] ready to be put to the vote on that day"; similarly, and for the same reason, there was no federal vote on March 12, 2023, the next date that had been reserved, meaning that two successive dates were not used, which is rather exceptional and apparently had not happened for almost 25 years.

In practice, over the last forty years or so, three or often four voting days have generally been used, except in federal election years, when the third Sunday reserved is used - as stipulated in art. 2a para. 3 ODP - for the election of the National Council, while the fourth is used in principle for any run-off elections to the Council of States in the cantons, so that in those years there are generally only two federal voting Sundays. 18

It is up to the Federal Council - acting on a proposal from the Federal Chancellery - to decide whether or not to hold a vote on the reserved date, and in principle to do so at least four months before that date. This deadline is implicit in para. 1bis, since it is within this period of at least four months that the Federal Council is required to determine the items to be put to the vote, as we shall see below. 19

We would also like to draw your attention to a particular and rather unusual case of a reserved date not being used, where the subjects have already been determined: that of the last-minute abandonment of a vote that had already been planned and set, as happened, due to the Covid-19 pandemic, for the vote on May 17, 2020, which was to have dealt with three subjects. At its meeting on March 18, 2020, the Federal Council decided not to hold this vote. In particular, it considered that "[t]he proper conduct of a popular vote requires not only the organization of the vote in the strict sense (logistics, exercise of the right to vote, ascertainment of the result, etc.), but also implies that citizens can freely form their opinion (art. 34 of the Constitution). Citizens must be able to form an opinion and make informed choices. This means, in particular, that a campaign must take place prior to the vote. Alongside the Federal Council, which has a statutory duty to inform citizens, civil society players (parties, committees, associations, NGOs, etc.) and the media play a 20

decisive role. Because of the COVID-19 epidemic, information sessions and public demonstrations are prohibited, and parties and other political players are not allowed to meet to set their agenda". The three items scheduled for May 17, 2020 were finally put to the vote, along with two others, in the September 27, 2020 ballot.

21 Following this rather peculiar episode, the legal regularity of which was questionable or, to say the least, debated, and in response to a motion adopted by the Chambers, in February 2023 the Federal Council expressed its wish to draw up a legal basis that would explicitly allow it, in the event of a crisis, to move a popular vote or abandon the holding of a vote that had already been set.

B. Paragraph 1bis: determination of ballot items

1. The text of paragraph 1bis

22 It is one thing to fix the calendar of dates set aside for votes, and quite another to determine the objects actually put to the vote on each of these dates. Para. 1bis, newly introduced by the June 2002 revision and in force since January 1, 2003, gives the Federal Council the competence - the mandate - to determine the (various) items to be put to the vote, and to do so "at least four months before the day of the vote", a period which may however be shortened for federal laws declared urgent. This competence means that the Federal Council can decide - as we have already seen - whether or not to order a vote on a date reserved for this purpose, at least four months before the date in question, but also, and within the same timeframe, to decide - if there is to be a vote - on the number and identity of the items to be put to the vote on that date, as well as their combination or association.

23 As explained in the 2001 message relating to the revision that introduced this provision, para. 1bis is intended to "ensure that all parties have sufficient time to prepare for the campaign leading up to the vote".

24 The law does not, however, lay down any criteria for determining these subjects, and the Federal Council therefore has a certain amount of freedom. Its choice is, however, dictated or at least framed by a number of parameters and factors that derive in part from practical contingencies, or certain principles, but sometimes also from considerations of pure political "tactics". As a general

rule, legal doctrine accepts that the Federal Council is not (entirely) free, and that it exercises an "executive competence" (Vollzugskompetenz) in fixing the timing of the vote: it has no choice, and must therefore fix the vote within an appropriate timeframe, once an object is ready to be put to the popular vote; in any case, it cannot delay - or drag out - a vote for political reasons.

2. Parameters and principles determining the Federal Council's choice

The Federal Council's choice is dictated, first and foremost, by a certain number of parameters or factors of a practical nature, the principle being, according to the Federal Chancellery, that "[n]ormally, items that are ready for a vote are put to the vote as quickly as possible". The number of items ready to be put to the vote is obviously a determining factor, but the number of items still being processed but which will soon be ready can also play a role, as can, in some cases, the number of items from the same department. 25

Other factors are also taken into account, such as calendar or deadline requirements, such as the planned date of entry into force of certain acts, or the legal processing deadlines for popular initiatives, for example. For example, under the terms of the new art. 75a LDP, introduced by a revision of September 25, 2009, and in force since February 1, 2010, the Federal Council has in principle "a period of ten months from the final vote of the Federal Assembly, but no more than ten months after the expiry of the legal periods reserved for Parliament to examine the popular initiative" to submit an initiative to a popular vote. These deadlines for the processing of popular initiatives by the Federal Assembly and the Federal Council are laid down in the Parliament Act. 26

Despite these various practical parameters, or those resulting from legal rules that do not depend on the Federal Council, the latter retains a certain amount of leeway and freedom in the choice - and combination, or association - of subjects to be put to the vote on a given date. Its choice may therefore sometimes be the result of considerations that come under a form of "political tactics", and which may occasionally earn it some criticism. 27

Thus, for example, the simultaneous submission to the vote, in June 2021, of the new CO2 law, which was subject to a referendum, with two popular initiatives in favor of banning pesticides, drew criticism from those in favor of legislative reform, all the more so as subsequent analyses showed, a posteriori, "that these initiatives targeting the agricultural world had strongly mobilized a 28

rural and conservative stratum of the population, which rejected the CO2 law at the same time".

29 The doctrine also sometimes cites the more distant example of the vote of July 6, 1947, when the Federal Council chose to put the new economic articles of the Constitution to the vote on the same day as the referendum on the AVS, with the aim of taking advantage of the popular momentum in favor of the latter to push through the promotion of agriculture.

30 Generally speaking, since 1970, ballots have most often been held on several items submitted simultaneously to the vote: three, four or five, sometimes more, up to six, rarely more. Cases in which a single item is put to the vote - which represented the vast majority before 1970 - have become rarer and are sometimes reserved for particularly urgent or important items.

3. Reducing the four-month deadline for urgent legislation

31 Para. 1bis provides, by way of exception, that the deadline of at least four months before the day of the vote set by the Federal Council for determining the items to be put to the vote "may be shortened" for urgent legislation. The 2001 message relating to the revision that introduced para. 1bis, justifies this exception as follows: "any urgent federal law [...] must be brought before the people within one year if, after it has come into force, a request for a referendum is lodged and is successful within 100 days (art. 59 LDP); the said law ceases to be valid one year after its adoption by the Chambers and cannot be renewed (art. 165, al. 2 and 4, Cst.) if the people have not accepted it, refused it or if it has not been submitted to them", so that "it must be avoided that, because it has not been submitted to them, it is reduced to nothing by the provision on the announcement of the objects put to the vote, which would be the case since the next ballot would arrive too late. The result would be a violation of direct democracy".

32 In other words, given the strict conditions of validity to which it is subject in the year following its entry into force, and the tight deadlines within which these conditions of validity must be verified, an urgent law must be able to be put to the vote, if this is requested, without a minimum period of four months having to be respected with regard to the announcement of the subject of the vote. Although the text of para. 1bis refers to urgent legislation in general terms, the exception is particularly useful, if not necessary, for urgent legisla-

tion in conformity with the Constitution, which is subject to an optional referendum, and for which deadlines are therefore particularly tight. This raises the question of whether the rule also applies to urgent laws without a constitutional basis, subject to mandatory referendum, for which a reduction in the four-month deadline does not appear objectively necessary. In such cases, the Federal Council should endeavour to respect the normal four-month deadline.

33 In any case, in recent practice, the Government has sought to respect the four-month deadline even in the case of urgent legislation subject to optional referendum, as demonstrated by the three referendums concerning the COVID-19 law. This law, which was passed on September 25 and came into force on September 26, 2020, was the subject of a (first) successful referendum request on March 2, 2021, and was put to the vote (and accepted by the people) in the referendum of June 13, 2021. The Federal Council's decree on the June 13, 2021 vote, definitively setting out the items to be put to the vote on that day, dates from March 15, 2021, less than four months before the vote. However, the Federal Council had already decided to put this item to the vote on June 13 - along with four other items - at its meeting of February 3, 2021, i.e. more than four months before the date of the vote, but before the referendum request had been successful, clearly specifying that the said item would be "submitted to the popular vote only if the referendum [...] is successful; the Federal Council's decision is therefore taken subject to this reservation". The same procedure was used for the (second) referendum against the (urgent) amendment of March 19, 2021 to the COVID-19 law, which was put to the vote in the referendum of November 28, 2021: the referendum request was successful on August 16, 2021, with the Federal Council's decree definitively fixing the items to be put to the vote on August 31, 2021, although these items had already been announced, this time "subject to" the successful outcome of the referendum request, on June 30, 2021. This was also the case for the (third) referendum against the (also urgent) revision of the COVID-19 law, aimed essentially at extending its period of validity, decided by Parliament on December 22, 2022 and to be put to the vote on June 18, 2023.

34 The practice had already been the same for the other two popular votes on urgent legislation held over the past two decades, that of February 9, 2003, concerning the Federal Act on the Adjustment of Cantonal Contributions to Costs in Health Insurance of June 21, 2002, and that of June 9, 2013, concern-

ing the revision of the Federal Asylum Act of September 28, 2012. In these two cases, however, unlike the previous ones, the referendum request had already been successful when the date of the vote was set, so that the Federal Council did not have to issue a decision "under reserve".

C. Paragraph 2: cantonal implementation

35 Paragraph 2, which has not been amended since 1976, stipulates - or reiterates - that federal votes are implemented and organized by the cantons: "Each canton shall ensure the execution of the vote within its territory and shall adopt the necessary measures". As the Federal Council's message makes clear, this provision merely reiterated the rule and practice that had prevailed until then.

36 It is therefore up to the cantons, each for its territory and its electorate or, more precisely, its fraction of the federal electorate, to convene those entitled to vote, to distribute the voting material in accordance with - and within the deadlines laid down by - federal law, and to organize the operations and conduct of the voting (ballot box voting, early voting, postal voting, possibly electronic voting, voting by citizens residing abroad, counting and recording the results, etc.). As we shall see, through other provisions of the law on political rights, federal law provides a fairly strict "framework" for the cantons in their jurisdiction and their task of carrying out federal votes.

37 In addition, for each vote, at the same time as the Federal Council determines the subjects to be voted on in accordance with paragraph 1bis, it sends the cantonal governments a circular on the forthcoming vote, reminding them of the applicable rules and asking them to ensure that all the necessary measures are taken to ensure that the vote takes place smoothly and in accordance with the law. These circulars also contain the precise and binding wording of the questions to be put to the vote, which must of course be the same throughout Switzerland.

38 Finally, in addition to these specific instructions for each vote, there are various other general circulars from the federal authorities to the cantonal governments, designed to guarantee the quality of voting in particular circumstances, notably for postal voting and voting by Swiss citizens abroad, as well as with regard to the tabulation of results.

Nevertheless, even though federal law has a relatively strong presence, the execution of federal votes by the cantons leaves room for cantonal law, so that there may be some differences between cantons on certain points that federal law does not regulate, such as the organization, composition and operation of polling stations, for example. 39

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COMMENTARY ON

Art. 10a PRA

A commentary by Pascal Mahon

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Art. 10*a* Information for persons eligible to vote

[1] The Federal Council shall continually inform persons eligible to vote about federal proposals to be submitted to a popular vote.

[2] In doing so, it shall comply with the principles of completeness, objectivity, transparency and proportionality.

[3] It shall present the most important views represented in the parliamentary decision-making process.

[4] It shall not make a recommendation on how to vote that diverges from the position of the Federal Assembly.

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I. HISTORY AND SYSTEMATICS

A. A difficult genesis

As indicated by its title, which is identical in all three language versions, Article 10a deals with information prior to - and in preparation for - popular (federal) votes, which is dealt with exclusively in Title II of the Political Rights Act. The provision therefore applies only to votes, not to elections, and should therefore be referred to as "information for citizens", rather than "information for voters". 1

This provision did not exist in the original 1976 version of the law. It was introduced by a partial revision of the law on political rights, dated October 5, 2007, which had this as its sole purpose and came into force on January 15, 2009. 2

The amendment was not initiated by the Federal Council itself, which was even strongly opposed to it, but by the Chambers, via a parliamentary initiative by the National Council's Political Institutions Committee on September 15, 2006, following fairly lengthy and heated discussions within the Federal Assembly. In a way, this revision is the consequence of a debate which, in the early 2000s, opposed two opposing tendencies, one advocating active, or more active, information of the authorities, in particular the Federal Council, on matters subject to federal referendum, the other which, on the contrary, as the Government recalled, intended to ban or prohibit, to a large extent, any intervention by the federal authorities in the campaigns preceding popular votes. 3

More specifically, on the one hand, the popular initiative "People's Sovereignty without Government Propaganda", launched in January 2003 by a "Verein Bürger für Bürger" committee and submitted on August 11, 2004, called for two new paragraphs (3 and 4) to be added to art. 34 Cst. which, among other things, would oblige the "Federal Council, the senior executives of the Federal Administration and the offices of the Confederation" to refrain "from any information and propaganda activities. In particular, they are to refrain from any intervention in the media and any participation in events concerning the vote. The only exception is a brief, one-off announcement to the population by the head of the relevant department". On the other hand, a parliamentary initia- 4

tive by National Councillor Didier Burkhalter, dated October 7, 2004, proposed incorporating into Art. 10 of the LDP "a provision requiring the Federal Council to conduct an active information campaign on matters submitted to a federal vote, and to defend the position of the federal authorities clearly and objectively".

5 In its message of June 29 2005 on the popular initiative, the Federal Council firmly opposed it, believing that it was and is its duty to inform citizens prior to federal referenda, since the guarantee of free opinion-forming conferred by Art. 34 para. 2 Cst. gives them "the right not only to know their government's opinion on a matter submitted to a vote, but also the reasons why it is for or against that matter". This "information activity of the Federal Council and the Federal Administration prior to votes must, however, comply with clearly defined criteria". Considering that the principles governing the provision of information prior to referenda were widely recognized - and had been sufficiently concretized by the internal directives put in place - the Government nonetheless judged that it was "not necessary to enshrine these principles in law", and therefore decided "not to submit an indirect counter-proposal to the popular initiative to the Federal Assembly".

6 For its part, the Political Institutions Committee of the National Council, which had been followed by that of the Council of States, chose to follow up the Burkhalter parliamentary initiative and finally decided to draw up a preliminary draft to implement it as an indirect counter-proposal to the popular initiative "Sovereignty of the people without government propaganda", which in its view sought "to silence the authorities during federal votes". The preliminary draft was favourably received during the consultation process, and the Commission then turned it into its own draft, which differed from the current text finally adopted by Parliament. The Commission's draft proposed an Art. 10a consisting of just two paragraphs, with the following wording: "The Federal Council informs the electorate in a comprehensive manner about the issues submitted to a federal vote. It shall defend the position of the Federal Assembly", for the first paragraph; para. 2 added: "It shall inform the electorate as and when required, in accordance with the principles of objectivity, transparency and proportionality".

7 Even though the Federal Council reiterated in its opinion of November 8, 2006, that such a legislative amendment was not necessary in its view - a position which, moreover, it fiercely defended practically throughout the de-

bates in Parliament - the Federal Assembly ultimately followed the proposal of the National Council's Political Institutions Committee, albeit with some structural and substantive modifications.

B. Some structural and systematic issues

In terms of structure, Art. 10a is made up of four short paragraphs, each taking up one of the ideas already contained in the two paragraphs of the Commission's draft, but adding a new idea. We will come back to each of these paragraphs in the commentary proper (Ch. III), after having highlighted, in a fairly general and synthetic way, the meaning and importance of the provision as a whole (Ch. II). Before doing so, however, it is worth making a few brief comments on the history and systematics of art. 10a. 8

First of all, it should be noted that the National Council's Political Institutions Committee, the instigator of the provision, questioned its place and suggested that other solutions or anchorings would also have been possible, given that the Federal Council's duty and activities to provide information are already governed by various provisions of federal law, such as art. 180 al. 2 Cst. and art. 10 LOGA, as well as, as the Federal Council pointed out throughout the parliamentary proceedings, art. 11 al. 2 LDP. 9

If the "delimitation" between articles 180 al. 2 Cst. and 10 and 11 LOGA, on the one hand, and art. 10a LDP, on the other, does not seem too problematic, the latter concerning "only information provided by the Federal Council during federal votes, to the exclusion of official information activities outside this framework", to quote the Commission, the coordination between art. 10a and art. 11 para. 2 LDP, as amended a few months before the adoption of the former, is much less successful, and questionable, from the point of view of systematics, at least formally. The two provisions both deal with the same subject matter - informing citizens prior to referenda - but they contain rules and principles that overlap or overlap, at least in part, while nevertheless differing in their wording. It is therefore legitimate to ask what the relationship - or delimitation - is between the two, and to what each should apply. The most reasonable approach, it seems, is to consider that one, art. 10a, applies to pre-voting information in a general way, while the other, art. 11 para. 2, applies to the concrete and precise instrument of so-called "explanations of vote", whereby the general rules and principles of art. 10a also apply to "explanations of vote" within the meaning of art. 11 para. 2. 10

11 It should also be noted that, while it explicitly sets out the Federal Council's duty to provide information and the principles that should guide - and limit - the provision of information by the authorities prior to a vote, art. 10a says nothing about the means or instruments that may - or may not - be used for this information activity, i.e. about the means by which information is provided. The National Council's Political Institutions Committee states that, when drafting the provision, it "envisaged drawing up a list of unauthorized information instruments and techniques", but that "it decided against it", notably because such a list "could not be exhaustive and would therefore only have illustrative value", giving "a false impression of security". We'll come back to this question of information vectors later.

12 Lastly, but not least, the National Council's Political Institutions Committee decided not to explicitly regulate two related issues with the proposed new provision: the financial transparency of information campaigns prior to referenda, and the applicability of the principles laid down in Art. 10a to "companies linked to the Confederation".

II. MEANING AND SIGNIFICANCE OF THE PROVISION

A. Informing the authorities - and the Federal Council - in the context of freedom to vote

13 The subject of Art. 10a - the provision of information to citizens prior to federal referenda, and by the Federal Council - is just one aspect of a much broader and much-discussed issue, that of the various interventions, from different quarters, but particularly by the authorities, of all kinds, in the run-up to referenda, in the context of what is commonly referred to as "freedom to vote". Guaranteed by art. 34 para. 2 of the Swiss Constitution, as part of the "guarantee of political rights", the freedom to vote "protects", as this provision puts it, "the free formation of the opinion of citizens and the faithful and reliable expression of their will". In other words, it "protects the members of the electorate against information and state intervention which are liable to exert an unlawful influence on the outcome of the ballot. Influence is unlawful when it has the effect that the elector is not or is no longer able to freely form or express his or her choice in a vote or election".

This issue is of considerable importance in Switzerland, given the importance of direct democracy and popular votes in the country, as we have seen. 14

As the Federal Council pointed out in 2005 in its message on the "Sovereignty of the people without government propaganda" initiative, the question of whether the freedom to vote implies an obligation on the part of the authorities to refrain from any intervention in campaigns - and thus to limit information to what is strictly necessary - or whether, on the contrary, it implies a duty to inform has been the subject of much debate, both politically and in legal doctrine. And the answer to this question has evolved considerably. While the majority tendency at first was towards an obligation to abstain, the prevailing doctrine today - and more or less since the 1990s-2000s - generally accepts that informing the authorities is "possible and even necessary", and that it therefore constitutes, within certain limits, a genuine duty on the part of the authorities in voting matters. 15

Nevertheless, the issue of official intervention and its limits remains a topical one. The question is widely discussed in the legal literature, and there are almost countless contributions, while case law is abundant and nuanced. The discussions and debates are not confined to the question of information - and intervention - by the Federal Council as such, which is the subject of art. 10a discussed here, but also touch on many other, more or less related issues: firstly, that of interventions in federal referendum campaigns by other federal authorities, such as departments of the federal administration, public enterprises or other autonomous institutions or establishments under (federal) public law, or even legal entities under private law delegated with a public task (health insurance funds); but also that of interventions in these same federal referendum campaigns by the cantons or certain inter-cantonal organizations or institutions. It is beyond the scope of this article to deal with these issues in detail and exhaustively. However, we can summarize the situation as follows. 16

The Federal Supreme Court and legal doctrine have deduced from the freedom to vote a number of requirements and principles concerning the provision of information to citizens, which define and frame the role of the authorities in campaigns preceding a vote or election. In this respect, it is important to distinguish the position of the authorities from that of other players, such as private individuals, whose interventions can only exceptionally be deemed unlawful, or the press and media. As far as the authorities are concerned, the principle is, as certain authors have summed it up very well, the obligation to 17

inform, but the prohibition on influencing or at least, and more precisely, on influencing in an "inadmissible", "illicit", "prohibited" or "undue" manner, i.e. in a way likely to distort democratic debate. As indicated, case law is abundant, and practice evolving and nuanced, based as it is on a whole series of distinctions.

18 With regard to the obligation to inform, it is now accepted that the authorities are required to provide official information to all citizens in advance of elections, in order to enable them to form their own opinions freely through these "explanations of vote". This information, which explains the purpose of the ballot and what is at stake, must be objective and exhaustive, and provided all at once, sufficiently early in the campaign; it is also accepted that the authorities may provide voting recommendations (except in the case of elections), without however falling into the category of propaganda.

19 With regard to other interventions by the authorities - referred to as circumstantial, as opposed to general official information - in and during the campaign preceding an election, a distinction must be made, first of all, from a temporal point of view, between information and interventions by the authorities that take place in ordinary times, outside a voting or election campaign, and those that take place during such a campaign: While the "government is recognized as having the right - and even the duty - to intervene in the political debate outside the pre-voting periods", it is "only in the run-up to a popular decision that the political authority is in principle obliged to refrain from any influence on the electorate, so that the latter can make up its own mind independently". A distinction must also be made between elections and referenda, as the requirement for the authority to reserve or abstain is considerably stricter in the former case.

20 In practice, distinctions are also made according to the aims of the interventions and the "quality" of the intervening authorities. Thus, "pro populo" interventions, which aim to protect the process of free formation of popular opinion by correcting false information, are contrasted with "pro domo" interventions, through which the authorities seek to defend a certain point of view in the campaign: while the former are necessary, the latter are subject to certain limits and conditions.

21 A further distinction is made between interventions by a public authority - or its authorities - in its own votes, and those by a public authority in the votes of

another public authority, either "upwards" (by a commune in a cantonal vote, or by a canton in a federal vote) or "downwards" (by a canton in a communal vote, or by the Confederation in a cantonal vote), or "to the side" (of a commune in the vote of another commune, for example), which are in principle admissible only in the presence of a direct and particular interest ("eine besondere Betroffenheit"). In fact, in this area too - under the influence of a certain body of legal doctrine - case law seems to be showing a degree of openness.

22 A few years ago, intervention by a canton in the campaign leading up to a federal referendum was only permitted on condition that the outcome of the referendum was of direct and particular interest to the canton concerned. It now considers that "[w]here the outcome of a federal vote is of significant interest to all or several cantons, the cantonal governments may express themselves publicly before the vote and issue a voting recommendation. In doing so, they must respect the principles of objectivity, proportionality and transparency as they also apply to the Federal Council. The question is somewhat different for inter-cantonal organizations and institutions: the Federal Supreme Court accepts that what applies to the cantons also applies to the Conference of Cantonal Governments, but considers that interventions by the Conferences of Cantonal Directors and other inter-cantonal institutions remain excluded, with the exception, in special cases, of certain companies owned by the cantons.

23 The duty of confidentiality applicable to the Federal Council and to the authorities of territorial public bodies also applies to the services of the Federal Administration. The same applies, at least in principle, to public establishments and other public institutions or companies, as well as to delegates (even those organized on the basis of private law) of a public task, whose jurisprudence nevertheless admits that they may take a stand in a voting campaign that particularly affects them, notably in their economic interest. This is the case, for example, with the Swiss National Bank, SUVA and recognized health insurance companies.

24 Interventions by one or more communes in the voting campaigns of another public authority, such as a cantonal referendum, appear to be subject to a special regime, which is both stricter and more permissive. In a recent ruling, the Swiss Federal Supreme Court stated that "the intervention of a commune in a campaign preceding a cantonal ballot (intervention 'upwards') is admissible

only exceptionally, under certain conditions, and must comply with certain rules, failing which the campaign is affected by a defect which may lead to the annulment of the operations [references]. First of all, a municipal authority may only intervene in a campaign relating to a cantonal election if it is prompted to do so by relevant reasons. This is the case when it intends to provide objective information to citizens or to correct manifestly erroneous information in opposing propaganda, or when the commune and its citizens have a direct and specific interest in the outcome of the ballot, which far exceeds that of the other communes in the canton". However, once these conditions have been met, i.e. "when a commune is particularly concerned, it can use all the means of influencing opinion that are usually employed in a campaign by the supporters or opponents of a project. Although it is always obliged to present the interests of the commune in an objective and concrete manner, the commune thus has more freedom in its intervention than an authority called upon to draw up an explanatory report for a ballot of its own community [references]".

25 Practice offers further distinctions and nuances. It accepts, for example, that the authorities' regime does not apply, or not to the same extent, to the personal interventions of members of an authority, who are subject to a nuanced regime and thus enjoy greater freedom of intervention, provided they act as private individuals and also appear as such, for example by not giving an official appearance to their interventions or by not using official stationery for their correspondence. This rather "liberal" regime is sometimes criticized for being somewhat "artificial" (or far removed from reality), and for making it difficult to distinguish between personal interventions and official positions.

26 In the final analysis, although there is a degree of unanimity in recognizing that the authorities responsible for organizing the vote - in this case, the Federal Council, in the case of federal votes - have a duty to provide information, in an objective and transparent manner, while respecting the principle of proportionality, and that, generally speaking, there has been a certain relaxation of practice and case law in this regard, not all controversies have disappeared, with opinions clashing on certain specific points.

27 In any case, as indicated, Art. 10a only regulates a (small) part of this vast problem, namely the information provided by the Federal Council prior to a vote, and its limits. The provision only applies to federal referenda, but the question and problem of information prior to referenda is not specific to these ref-

erenda alone, but affects all referenda, including cantonal and communal referenda, where case law is also abundant. For this reason, cantons sometimes have provisions similar to art. 10a of the LDP, which regulate the question of information prior to voting.

B. Cantonal law

In fact, in the cantons - as was also the case at federal level, with art. 11 of the LDP, prior to the adoption of art. 10a - there are usually provisions stipulating that items put to the vote must be accompanied by a message or explanatory brochure, which is generally drafted by the executive, i.e. the State Council in cantonal matters, but sometimes also by the Grand Council or one of its bodies. This message or brochure must generally be brief and objective, also setting out the opinions of important minorities and taking into account the arguments of the initiative committee or the persons responsible for the request for a popular vote. 28

More rarely, however, and particularly in more recent legislation, we also find provisions quite similar to art. 10a, which deal specifically with informing the authorities in general prior to (cantonal and/or communal) votes. This is the case, for example, with art. 32 of the Vaud law on the exercise of political rights, dated October 5, 2021, which stipulates that "[t]he Conseil d'État shall inform the electorate on an ongoing basis about the objects submitted to cantonal voting, explaining the position of the cantonal authorities" (para. 1) and that "[e]ach of its interventions must respect the principles of objectivity, transparency and proportionality" (para. 2). 29

Failure to comply with these cantonal provisions, which govern the provision of information to citizens prior to cantonal and communal votes - and set out the principles and limits of such information - may constitute a violation of the freedom to vote guaranteed by art. 34 Cst. and consequently lead to the annulment of the vote, where the conditions for such annulment are met. 30

The principles of objective, complete and transparent official information, as laid down in these cantonal provisions - and in art. 10a for federal votes - derive from the guarantee of freedom to vote in art. 34 Cst. and therefore apply to official information provided by cantonal and/or communal authorities prior to votes, even in the absence of cantonal provisions on the subject. 31

III. COMMENTS

A. Paragraph 1: a duty to provide information on a regular basis

32 Under the terms of para. 1, the Federal Council is required to "inform [...] on an ongoing basis about matters submitted to a federal vote". In a way, this provision puts an end to the controversies and discussions that previously existed on the subject, by imposing on the Federal Council a duty, an obligation to inform. The use of the present tense ("informs") is clear in this respect: the Federal Council is obliged to inform, and to do so "in an ongoing manner", on (all) matters submitted to a vote. The idea of an obligation to inform is also clear from the preparatory work. According to the National Council's Political Institutions Committee, the aim of this provision, which was intended to ratify the practice hitherto followed by the Federal Council, was to anchor a genuine "obligation on the part of the Federal Council to inform" citizens "about federal votes", a duty to inform which has as its corollary - and at the same time as its justification - their "right [...] to be fully informed by the authorities about the matters put to the vote".

33 The expression "de manière suivie" - in the French text - did not appear in the draft of the National Council's Political Institutions Committee, nor in the new wording proposed by the Council of States' Political Institutions Committee, to which both chambers finally agreed: both spoke of informing "au fur et à mesure". This expression ("de manière suivie") was therefore (presumably) introduced by the Drafting Committee, and in no way alters the content of the provision.

34 With the phrase "as and when required", the National Council's Political Institutions Committee was referring to what it called the "principle of continuity" of information, which in its view implied "that the Federal Council should set out from the outset the main reasons for its support or opposition to a project, so that its arguments can, if necessary, be challenged. The principle of continuity is in the interests of the electorate, who must be able to form an opinion within the framework of a broad opinion-forming procedure and in full knowledge of the facts". This was also the intention of the Political Institutions Committee of the Council of States, and the phrase "on an ongoing basis" must therefore be interpreted in the same way.

In fact, and without detracting from this "historical" interpretation, the expression could - and probably should - also be understood as requiring the Federal Council to inform citizens regularly, or systematically and consistently, about all the issues put to the vote, and not just some of them. Such systematic information is in line with Federal Council practice. 35

One might even wonder whether the idea of informing citizens in a single intervention at the start of a campaign is not somewhat outdated in the light of new information technologies and social networks, which allow other forces active in a campaign to intervene at any time, and in a repeated and massive way. In the words of some authors, "the authorities who assume an information function must be able to intervene quickly, and their interventions must not be limited to a given moment in the campaign corresponding to the publication of the explanatory brochure". If the "historical" interpretation of the provision seems to point in another direction, the text of para. 1, which speaks of informing "in an ongoing manner", does not preclude such a more teleological understanding of the Federal Council's duty to inform. 36

Be that as it may, if it is thus a duty of the Government, regular and ongoing information prior to federal votes is also limited and framed by a certain number of rules and principles, which are provided for and specified by the other paragraphs of art. 10a, especially para. 2. 37

B. Paragraph 2: exhaustive, objective, transparent and proportionate information

1. Introductory and general remarks

According to para. 2, the Federal Council "shall respect the principles of completeness, objectivity, transparency and proportionality". The provision thus defines the four principles that govern and limit the Federal Council's information activities prior to referenda, principles whose observance makes it possible to distinguish between information, which is permitted and even necessary, and propaganda, which is prohibited. 38

From a formal point of view, it should be noted that the initial proposal of the National Council's Political Institutions Committee had a slightly different tenor, since in para. 2 it referred explicitly only to the principles of objectivity, transparency and proportionality. 1, however, already specified that the Fed- 39

eral Council was to provide information "in a comprehensive manner", so that the principle of comprehensiveness simply became explicit with the new wording proposed by the Political Institutions Committee of the Council of States, without there being any substantive change.

40 In substance, even if the text of art. 10a para. 2 LDP is formally addressed only to the Federal Council, the principles laid down by this provision, which derive directly from the freedom to vote guaranteed by art. 34 para. 2 Cst. also apply, at least by analogy, to other federal authorities and institutions, in particular the federal administration and its agents, as well as to autonomous enterprises and establishments under federal law, when they assume or exercise an information task or activity in connection with federal votes. These principles also apply, moreover, to a certain extent at least, by virtue of the relevant provisions of cantonal law, and the requirements deriving from the freedom to vote as laid down by the case law of the Federal Supreme Court, to other authorities likely to intervene - and to the extent that they are authorized to do so - in campaigns preceding federal votes.

41 As already mentioned, while it lays down the principles that must guide the provision of information to the authorities prior to a vote, art. 10a says nothing about the means or techniques that may - or may not - be used to provide information, as the Commission has decided not to regulate this issue. This does not mean, however, that the Federal Council or the authorities responsible for information can use any instrument or technique, insofar as the means or vectors used must comply with and be employed in a manner consistent with the principles laid down in para. 2 of art. 10a, and in particular the principle of proportionality. The Federal Supreme Court rightly examined art. 10a, and in particular para. 2, that the Federal Supreme Court examined the admissibility in principle of the now systematic publication by the Federal Chancellery of explanatory videos prior to - and in preparation for - federal referenda, partially reproducing the Federal Council's "explanations of vote".

42 The four principles mentioned in art. 10a para. 2 will therefore be repeated below, in the order in which they are enumerated in the provision, even if, in doctrine, these principles are not always presented in the same way and are often presented in an order different from that of the provision - different from one work to another, moreover -. As we shall see, these principles are not always clearly and easily distinguishable, and sometimes even overlap, at least in part.

2. The principle of completeness (and accuracy)

The first principle mentioned in para. 2, that of completeness, presupposes that citizens are informed "in a complete manner". As mentioned, this principle was already present, albeit without this name, in para. 1 of the draft of the National Council's Political Institutions Committee, which referred specifically to "complete" information. To meet this requirement, the information must in principle "include any important element likely to have a significant influence on the formation of citizens' opinions, starting obviously with the opinion of the initiators, referendums or main opponents of a government or parliamentary project". 43

However, the authors point out that the Federal Supreme Court "shows a certain flexibility in this respect, and does not require that the information provided to citizens contain details of lesser importance"; "it does not have to deal with every detail or aspect of the proposal put to the vote, nor with every objection to it, but it is forbidden to pass over in silence elements that are important for the citizen's decision, or to reproduce inaccurately the arguments of the opponents of the referendum or initiative". Moreover, at least as far as the Federal Council's "explanations of vote" within the meaning of art. 11 para. 2 are concerned, the law requires that they be kept brief, so that the principle of completeness cannot be interpreted as implying an obligation on the part of the authority to go into all the details of a project or to discuss all the objections it might raise. 44

3. The principle of objectivity

The principle of objectivity requires "impartial and sober information", or "balanced (content) and sober (form) information", or else "requires the authority to provide reliable, complete and balanced information on the purpose and scope of the matter submitted to a vote", enabling citizens "to form a faithful and objective image" of this matter. For the Federal Court, the requirement of objectivity thus implies a duty not to provide "information or assertions that are outrageous or polemical in form, or erroneous, exaggerated or misleading in substance". Authorities are not, however, "bound by a duty of neutrality and may issue a recommendation; they are, however, bound by a duty of objectivity". In the words of the Commission, "they may present arguments, but they are prohibited from proselytizing". 45

4. The principle of transparency

46 The principle of transparency "requires that official interventions be unambiguously identifiable as such by the citizen". In other words, it "prohibits the authorities from exerting influence underhand", or from "acting in an opaque manner, for example by underhand financing of supporters of the position" they defend, or by amalgamating their "positions with those of a private committee by presenting indistinctly a partisan position and the official position in the information content of which they [are] the editors".

47 The requirement of transparency also presupposes that the authority "sheds full light on the sources and nature of the information it issues", and it "also requires that if there are significant uncertainties in the assessment of the initial situation, these should be clearly presented as such", insofar as "it is essential that citizens, on the basis of the data at their disposal, should be able to recognize the unreliability of forecasts and figures". So, for example, when a precise estimate is not possible, "the transparency of information [requires] that no mention be made of any concrete number in the explanatory brochure, or that mention be made of the unreliability of the estimates given, so that voters can form a correct and reliable idea of the matter". Similarly, when an authority communicates its own interpretation of a piece of legislation or a popular initiative, an interpretation which is based on mere hypotheses and not on certainties, it is obliged to indicate it as such, on pain of violating the principle of transparency.

5. The principle of proportionality

48 The principle of proportionality of information "means", according to the Commission, "that the nature, intensity and choice of the means used must be appropriate and necessary for the free formation of opinion. Ultimately, it is a question of equality of opportunity in voting campaigns".

49 This requirement, which applies in principle to all State activities under art. 5 para. 2 of the Swiss Constitution, "prohibits the authorities from using excessive means during the campaign".

50 As we have seen, no technique or means of information - no vector - is a priori prohibited. Their admissibility will depend on the manner in which they are used and the content of the information provided, which must respect the various principles set out in para. 2: objectivity and completeness, transparen-

cy and, of course, proportionality. Generally speaking, given the evolution of information technologies, it must be recognized that the authorities must be able to use communication techniques that correspond to the habits of the population. In this sense, case law recognizes their right to organize a press conference or issue a press release, as well as to make use of new audiovisual means of communication, such as the dissemination of computer graphics or explanatory videos, always provided that the principles laid down in para. 2 are respected.

In addition, and even more generally, i.e. without this being exclusively linked to pre-voting information, the use of new communication technologies, in particular the use of social media as a means of information, has increased considerably within the administration. In June 2023, the Federal Council decided to regulate the use of social networks by the federal administration. To this end, it put out to consultation, until October 2023, a draft amendment to the Ordinance of November 25, 1998 on the Organization of Government and Administration. The draft not only lays down "the conditions under which units of the Federal Administration may manage an interactive social media profile", but also establishes "an exhaustive list of the types of comment that the authorities may delete, hide or otherwise make disappear", as well as "regulating the circumstances in which these same authorities may block" a user and "prevent them from interacting with their profile". 51

6. Other rules and principles

In the view of some authors, the Federal Court seems to have added other rules or principles to the principles laid down in art. 10a para. 2. A principle of accuracy, for some, which "prohibits the authorities from communicating information that is erroneous, incomplete or simply misleading". 52

A principle of immediacy, for others, which would complement the principle of completeness "insofar as it requires that official information relating to an election be given at once, sufficiently early in the campaign, so that citizens can form an opinion about it and, if necessary, contest or supplement it". However, this seems to be the same idea as that of art. 10a, para. 1, with the expression "on an ongoing basis", which the Commission referred to as the "principle of continuity". 53

54 This shows that, as indicated, the various principles set out in art. 10a para. 2 of the LDP are not easy to delimit and even overlap or overlap, at least in part.

C. Paragraphs 3 and 4: main opinions expressed during the parliamentary procedure and voting recommendation

1. Introductory remarks

55 Paragraphs 3 and 4 of art. 10a will initially be dealt with together here, as they have a special relationship which can only be understood by looking at their history. The draft originally presented by the National Council's Political Institutions Committee contained neither para. 3 nor para. 4. However, in the second sentence of para. 1, it included a rule to the effect that the Federal Council, when called upon to inform citizens, "shall defend the position of the Federal Assembly". In this way, the draft was intended to impose an obligation on the Federal Council to defend the same position as that of Parliament before the vote. In fact, this was one of the reasons why the Government was fiercely opposed to the Commission's draft, and for a long time defended the idea of non-entrée en matière during debates in Parliament.

56 It was during the first debate in the National Council, in December 2006, that the Lower House, basing itself in particular on a legal opinion from the Federal Office of Justice, accepted a Philipp Müller proposal, which somewhat softened the text of the Commission's draft, by amending the second sentence of para. 1 as follows: "It [the Federal Council] shall not advocate a voting recommendation that differs from that formulated by the Federal Assembly". This change from an active - or imperative - to a passive formulation was intended to give the Federal Council greater flexibility, by enabling it to defend the position of Parliament, by giving the same voting recommendation as the latter, but also not to give a voting recommendation, and to limit itself to indicating that of the Federal Assembly; the only thing that was forbidden to the Federal Council was to give a voting recommendation differing from that of Parliament. Although supported by the Federal Council, this amendment did not prevent it from remaining opposed to the project.

57 This led to a second, double amendment during the second round of deliberations in the Council of States, when the latter finally agreed to go ahead with the project, and its Political Institutions Committee proposed a new wording for the entire provision, with the two new paragraphs 3 and 4 that make up

the current text. Para. 4 reproduced the Müller proposal accepted by the National Council virtually as it stood, albeit as a separate paragraph: "It [the Federal Council] does not advocate a voting recommendation that differs from that formulated by the Federal Assembly". Para. 3 was new, and was intended to make the provision even more explicitly flexible in favor of the Federal Council.

The idea was that para. 3, which explicitly requested, but also allowed, the Federal Council to set out "the main opinions expressed during the parliamentary procedure", thus authorizing the Government to also give its own opinion, possibly different from that of the Federal Assembly, while respecting the prohibition in para. 4, i.e. not to defend a voting recommendation that differs from that of the Assembly. Para. 3 was therefore conceived as a complement to para. 4, a sort of safeguard clause for the Federal Council's freedom of speech. It was at this point, moreover, that the Federal Council was able to endorse the draft - while maintaining that, in its view, the new provision was, on the whole, unnecessary. 58

2. Paragraph 3: the main views expressed during the parliamentary procedure

Para. 3 therefore stipulates that the Federal Council, when informing citizens, "shall set out the main opinions expressed during the parliamentary procedure". The juxtaposition of paragraphs 3 and 4 makes it necessary to distinguish between the "recommendation to vote", which is the subject of paragraph 4, on the one hand, and the information given to citizens on the other. 4, on the other. Para. 3 deals essentially with this general information of citizens, which is provided in particular and principally via the brochure containing the Federal Council's "explanations of vote". Para. 3 therefore seems to apply primarily to these "explanations of vote" - which were, moreover, the main focus when the provision was introduced in Parliament - which raises an initial problem of delimitation with the rule in art. 11 para. 2 of the LDP. 59

The latter contains a rather similar rule, but not completely identical in its wording, insofar as it stipulates that the Federal Council must, in its "explanations of vote", "also set out the opinion of important minorities". However, according to the meaning given to the latter provision as long ago as 1976, the opinions of "important minorities" are essentially those expressed during the parliamentary procedure, so that para. 3 of Art. 10a adds nothing in this re- 60

spect to what already existed, except that it makes a little more explicit the idea that important minorities are above all those represented in Parliament.

61 The rule - of Art. 10a para. 3, as well as of Art. 11 para. 2 - thus implies that the Federal Council must set out, in its "explanations of vote", the arguments of the principal minorities which have expressed themselves, within the Federal Assembly, on the subject submitted to the vote. For this to happen, these minorities must actually have expressed their views during the debates in the chambers, and not just in committee, or at least the rapporteur of a committee must have presented their opinion to the plenary. On the other hand, it is irrelevant whether the minority in question is quantitatively significant or has the status of a group within Parliament. What is decisive, according to the doctrine, is the importance of the objections raised against a project, in terms of shaping the opinion of citizens.

62 This brings us back to the problem and question, already raised, of the delimitation between articles 10a and 11 para. 2 of the LDP, which in this case are somewhat overlapping, and which raises the question of whether the two provisions apply cumulatively to the elements for which they are both applicable, or whether, on the contrary, their scope of application must be carefully delimited and separated. In this case, it would seem reasonable to accept the cumulative application of both provisions to the Federal Council's "explanations of vote".

63 This question begs another, however, namely whether the scope of para. 3 of Art. 10a is limited solely to the Federal Council's "explanations of vote" within the meaning of Art. 11 para. 2, or whether it also extends to other means and channels of information, such as videos published by the Federal Chancellery in the run-up to votes, for example, or oral interventions by members of the Federal Council, such as their press conferences or official speeches on television. The question is a delicate one. As part of the general information provided to citizens, the Federal Council has the right in principle, but also the duty, according to para. 3, to set out "the main opinions expressed during the parliamentary procedure". While it is undoubtedly possible to answer that the Federal Council may, in the aforementioned cases, i.e. interventions outside the framework of "explanations of vote", set out the main opinions expressed in the parliamentary or extra-parliamentary debate, it seems more difficult to affirm or admit the existence of a duty to do so, or at least to do so systematically.

Para. 3 is therefore, as we can see, not very clear, and raises as many questions as it resolves. It is, and probably was, unnecessary, given that its substantive content, i.e. the fact that the Federal Council must or may - or may and must - at least in its "explanations of vote", set out "the main opinions expressed during the parliamentary procedure", is, as we have just seen, already covered by art. 11 para. 2, but is also covered by the principles set out in para. 2 of art. 10a, in particular the principles of completeness and objectivity. As we have seen, these imply that the information provided must reflect the opinions of the authors of an initiative, the referendums and the main opponents of a government project, as well as the divergent opinions of third parties. 64

In any case, para. 3 is also and above all intended, as we have seen - and this is its main raison d'être - to authorize the Federal Council to set out its own opinion, notably in its "explanations of vote", even if this differs from that of (the majority of) the Federal Assembly. This is so long as it does not infringe the rule of para. 4, i.e. does not defend a "voting recommendation" different from that of Parliament. 65

3. Paragraph 4: the absence of a voting recommendation differing from that of the Federal Assembly

Para. 4 requires the Federal Council, as we have just seen, not to defend "a voting recommendation different from that formulated by the Federal Assembly". Unlike para. 3, the "voting recommendation". This concept refers to the constitutional provisions on popular rights, specifically art. 139 para. 5 of the Federal Constitution, which gives the Federal Assembly the power to recommend the acceptance or rejection of a popular initiative. The "recommendation to vote" is thus the act by which an authority formally and officially recommends that citizens "accept" or "reject" an item put to the vote. In principle, the power to decide on this "recommendation" lies with Parliament, which is the body that formally submits items to popular vote. 66

In federal law, this is explicitly stated in art. 139 para. 5 Cst. for popular initiatives presented in the form of a draft. In the case of acts subject to compulsory referendum on the basis of a proposal by Parliament itself, as well as votes on acts subject to optional referendum, such as laws, there is no formal "voting recommendation" in the act itself, since the recommendation is implicit: Parliament obviously recommends acceptance of its own proposals as well as that of its own acts which are opposed by a referendum. In these cases, there- 67

fore, it is only in the "explanations of vote" that the voting recommendation appears, and it is in fact the Federal Council that "gives" it.

68 As we have seen, the idea of para. 4 is to enable the Federal Council to make the Federal Assembly's voting recommendation its own, as it were, by authorizing it to associate itself with it, or to join with the Assembly, notably in its "explanations of vote". However, the provision must also authorize the Federal Council, if it so decides, not to issue a voting recommendation, but merely to indicate, notably in its "explanations of vote", that of the Assembly, without associating itself with it.

69 But, in any case, para. 4 prohibits it from issuing a voting recommendation that would differ from or diverge from that of the Assembly, i.e. that would be, since the question put to the vote is generally binary, opposed to it.

70 It is clear from the parliamentary work on Art. 10a that the Federal Council has never issued a recommendation opposed to that of the Federal Assembly, but that it has sometimes - rarely, in fact - taken the liberty of abstaining from formulating a voting recommendation, merely indicating that of the Assembly. In the last five decades, this has apparently only been the case on two occasions: the vote of February 18, 1979, on lowering the voting age to 18, and the vote of December 1, 1996, on amending the Labor Act. Already in its opinion on the initial draft of the National Council's Political Institutions Committee, dated November 8, 2006, the Federal Council, implicitly invoking the separation of powers, intended to reserve the right to retain this option, a position it maintained during the work of the Chambers. And it is true that, on a number of occasions, the Federal Council has, in its "explanations of vote", expressed reservations about the solution chosen by Parliament, while nonetheless associating itself with the Assembly's voting recommendation: this was the case during the votes on the "tax package" of May 2004, on the popular initiative "organizations' right of appeal" of November 2008, on the popular initiative "housing savings" of March 2012 and on the popular initiative "against abusive remuneration" of March 2013.

71 As we have seen, the combination of paragraphs 3 and 4 of Art. 10a was intended to enable the Federal Council to continue this practice, while retaining the prohibition, intended by Parliament, on the Federal Council defending a "voting recommendation different from that formulated by the Federal Assembly". The interpretation of art. 10a para. 4 is not easy, however. Some au-

thors take the text of the provision literally, arguing that it does not authorize the Federal Council to continue its practice of refraining from making a recommendation. In fact, interpreted strictly, the rule in para. 4, i.e. the explicit statutory prohibition on the Federal Council defending its own point of view in a dissenting voting recommendation, is problematic from a constitutional point of view, in terms of the separation of powers. Consequently, even if it is customary for the Federal Council to refrain in principle from supporting a solution that differs from that of Parliament, even when the latter has been decided without its contribution, or even against its will, and the text of art. 10a para. 4 prohibits it from defending a position opposed to that of the majority of Parliament, it seems to us that the Government should be able, at least in exceptional or special cases, to set out its own opinion in the "explanations of vote" and refrain from making a recommendation. Similarly, the Federal Council should not be bound by the absence of a recommendation from the Assembly, either because the Assembly has voluntarily refrained from making a recommendation, or because the National Council and the Council of States have been unable to reach agreement.

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COMMENTARY ON

Art. 11 PRA

A commentary by Pascal Mahon

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Art. 11 Proposals submitted to a popular vote, ballot papers and explanatory statements

[1] The Confederation shall provide the cantons with the proposals to be submitted to a popular vote and the ballot papers.

[2] Each proposal shall be accompanied by a short, objective explanation from the Federal Council that shall also take account of the opinions of significant minorities. The proposal must contain the wording of the questions on the ballot paper. In the case of popular initiatives and referendums, the initiative committee shall inform the Federal Council of their arguments and the Federal Council shall take such arguments into account in its explanatory statement. The Federal Council may amend or reject defamatory, blatantly false or excessively long statements. References to electronic sources may be included in the explanatory statement only if the author of the references declares in

writing that none of the content of the sources is illegal and that the sources are not linked to electronic publications with illegal content.

[3] Persons eligible to vote shall receive the documents required to cast a valid vote under cantonal law (ballot paper, polling card, official voting envelope, validation stamp, etc.) at least three and no more than four weeks prior to the polling day. The proposal submitted to a popular vote and the explanatory statements may be sent at an earlier date. The Federal Chancellery shall publish the proposals and the explanatory statement electronically at least six weeks prior to the polling day.

[4] The cantons may by law authorise communes to send only one copy of the proposals and the explanatory statements to each household unless a member of the household who is eligible to vote requests that personal copies be sent.

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I. BACKGROUND, SYSTEMATICS UND IMPORTANCE OF THE PROVISION

1 As indicated by its title, which is identical in all three language versions, art. 11 deals with ballot papers, ballot papers and explanations (Abstimmungsvorlage, Stimmzettel und Erläuterungen; Testi in votazione, schede e spiegazioni), with a view to (federal) popular votes, which are dealt with exclusively in Title II of the Political Rights Act, as we have already seen.

2 The provision already existed in the original version of the law, in 1976, but it was considerably more succinct, and its title slightly different. It has since been amended no less than five times. The original version contained just three paragraphs. The first was identical to the current paragraph 1, and has therefore not been modified. The second corresponds to the current para. 2, but was much briefer, being limited to a single sentence, identical to the first sentence of the current text: "The text submitted to the vote is accompanied by brief explanations from the Federal Council, which must remain objective and also set out the opinion of important minorities". The third sentence corresponds to the current para. 3, but was also shorter, stating only that "[t]he text submitted to the vote and the explanations shall be given to the electorate at least three weeks before the vote".

3 A first revision, dated March 18, 1994, modified para. 3 and added a new para. 4, which corresponds in all respects to the current para. 4 and has therefore not been amended since. Para. 3, the 1994 revision gave it a content that corresponds to the current version of its first two sentences, with one small exception. The third sentence of para. 3 was added by a subsequent revision on June 21, 2002, in force since January 1, 2003.

4 Para. 2 has been the subject of two further revisions. The first, dated June 21, 1996, in force since April 1, 1997, completed the heading of the provision and added three new sentences to the original 1976 version (N. 2 above), corresponding in all respects to sentences 2 to 4 of the current text. The second revision, dated March 23, 2007 and in force since January 1, 2008, i.e. a few months before the adoption and entry into force of art. 10a, further enriched this provision with a fifth and final sentence, which is that of the current text.

The result of this somewhat tortuous and complicated legislative evolution is a rather long and cumbersome provision, whose coordination with other provisions of the law, particularly with art. 10a, is not always easy to understand, and probably not very successful. This difficulty has already been addressed in the commentary on art. 10a, and will not be repeated here. 5

In terms of structure, art. 11 is made up of four paragraphs of varying length and relatively diverse content. In summary, paragraphs 1, 3 and 4 deal with voting material, essentially the texts submitted to the vote and the ballot papers, as well as when and how they are to be handed over to the citizens, while paragraph 2 governs what is referred to as the "voting process". 2 governs what we have referred to in the commentary on the preceding articles as the Federal Council's "explanations of vote", which accompany the voting material. We will come back to each of these paragraphs later, in the commentary proper (Ch. II). 6

First, as regards the importance of the provision in general, we can limit ourselves to referring, for the most part, to what has already been said in the commentary on art. 10 and 10a, namely that, given the significance of popular votes in the Swiss constitutional and political system, with its very high degree of direct democracy, the rules governing the organization of such votes, in particular the preparation and distribution of voting material, as well as the provision of information to citizens in the run-up to such votes, are of fundamental importance. 7

While we have already seen, in connection with art. 10a, the importance of provisions for informing citizens prior to voting, we can simply add here that, according to the case law of the Swiss Federal Supreme Court, the freedom to vote guaranteed by art. 34 Cst. implies first and foremost, with regard to the preparation of votes, and especially with regard to the texts submitted to a vote, a right to the clear and correct formulation of the questions submitted to a vote, a right to which we will return. 8

All the cantons have provisions similar to art. 11, which deal with the preparation and distribution of voting material, as well as the provision of information to the electorate by the authorities. These provisions are of such importance in guaranteeing the correct and regular exercise of political rights that the Federal Court recognizes them as cantonal constitutional law, implying a special regime with regard to its power of cognizance. 9

II. COMMENTARY

A. Paragraph 1: Voting documents and ballot papers

1. Introductory and general remarks

10 According to para. 1, which dates from the original 1976 version, states that "[t]he Confederation shall make available to the cantons the texts submitted to the vote and the ballot papers". As the Federal Council emphasized in its message, at the time, the provision merely repeated and established "the practice followed until now, whereby the Confederation provides the cantons with the voting material (ballot papers, ballot papers)". Thus, although it is up to each canton to ensure, as stipulated in art. 10 para. 2, "the execution of the vote on its territory" and to adopt the necessary measures, it is up to the Confederation to supply two of the main elements of the voting material, namely the text(s) submitted to the vote, on the one hand, and the ballot papers, on the other.

11 In fact, para. 2 of art. 11 adds - and already did at the time - that "the text submitted to the vote shall be accompanied by brief explanations from the Federal Council", so that the Confederation is in fact making three things available to the cantons. What's more, according to the practice followed for several decades, the text submitted to the vote is not really "accompanied" by the explanations of vote, but is reproduced in the brochure containing them. In practice, therefore, the Confederation provides the cantons with the brochure containing both the text submitted to the vote and the Federal Council's explanations of vote, and, separately, the ballot papers.

2. Voting texts

12 The text or texts submitted to the vote are the acts of the Federal Assembly on which the people, or the people and the cantons, depending on the type of vote, are called upon to pronounce themselves, by "yes" or "no". These are :

- federal decrees submitting to a vote of the people and the cantons draft constitutional amendments proposed by Parliament itself or resulting from popular initiatives presented in the form of draft bills (art. 140 al. 1 let. a Cst.),

- federal decrees submitting to the vote of the people and the cantons acts approving international treaties subject to mandatory referendum, i.e. treaties concerning membership of collective security organizations or supranational communities (art. 140 al. 1 let. b Cst.)
- urgent federal laws of more than one year's duration with no constitutional basis, subject to mandatory referendum by the people and the cantons (art. 140 al. 1 let. c Cst.),
- federal decrees submitting to the vote of the people (alone) popular initiatives for a total revision of the Constitution, popular initiatives conceived in general terms for a partial revision of the Constitution and rejected by the Federal Assembly, or the principle of a total revision of the Constitution, in the event of disagreement between the two Councils (art. 140 al. 2 let. a to c Cst.),
- federal laws, subject to optional referendum, i.e. submitted to the vote of the people (alone), when the referendum has been validly requested (art. 141 al. 1 let. a and b Cst.),
- federal decrees subject to an optional referendum by virtue of the Constitution or the law, i.e. subject to a vote of the people (alone), when the referendum has been validly requested (art. 141 al. 1 let. c Cst.),
- federal decrees approving international treaties subject to optional referendum, i.e. subject to popular vote (alone), where a referendum has been validly requested (art. 141 al. 1 let. d Cst.).

In all these cases, therefore, we are dealing with texts that already exist, de- 13
crees or laws that have been adopted by the Federal Assembly and have already been published in the Feuille Fédérale, so that it is logical for the Confederation to make them available to the cantons, rather than the latter having to redraft, copy or reprint them.

3. Ballot papers

Ballot papers do not exist independently of the vote, or prior to it, but are 14
produced solely with a view to a vote, and if there is a vote. Ballot papers are in fact the official documents by means of which - and on or in which - citizens express their opinion, their vote, on the texts submitted to a vote. The ballot paper therefore includes or reproduces the questions submitted to the

citizens, allowing them to answer simply, with "yes" or "no", or by marking with a cross the box corresponding to each of these two options.

15 As stipulated in art. 12 al. 1 let. a LDP, citizens are obliged to express their opinion exclusively on an official ballot paper, failing which their vote will be null and void.

16 The justification for the fact that the law gives the Confederation the competence and obligation to make these available to the cantons is therefore different from that which prevails for the texts submitted to the vote.

17 As already indicated, the freedom to vote guaranteed by art. 34 Cst. implies a right to the clear and correct formulation of the questions submitted to the vote. The wording of the question can have a decisive influence on the behavior of voters, so here too, even more than in the case of information, there is a requirement for neutrality on the part of the authority formulating the question. This right means that "the question submitted to the vote must be clear, precise, unambiguous and objective", which, according to the Federal Court, presupposes "the proper formulation of the questions submitted to the vote", which "must not be misleading, nor be drafted in such terms as to influence the citizen's decision". The question asked "should therefore be limited to expressing and succinctly describing the object submitted to the vote, without any argument for or against it appearing in the wording of the question". It must be written in a simple, easily understandable, clear and correct manner, so that citizens can decide "yes" or "no" without too much difficulty.

18 In the case of federal referenda, these requirements also imply that, even if the cantons are responsible for their practical implementation (art. 10 para. 2), and for providing citizens with voting material (art. 11 para. 3 and 4), the questions put to the vote and the ballot papers, which contain these questions, can only be formulated and presented (formally and graphically) in an identical and uniform manner throughout Switzerland. It is therefore logical that they should be produced by the Confederation and made available to the cantons.

B. Paragraph 2: the Federal Council's "explanations of vote"

1. Introductory and general remarks

19 Art. 2 of art. 11 deals with what are referred to here as "explanations of vote" (Abstimmungserläuterungen), which are also sometimes referred to as

"explanatory brochures", echoing the often-used German expression "Bundesbüchlein" (or, now, Abstimmungsbroschüre), or, in cantonal law, "message" or "explanatory message" or "explanatory report", i.e. a printed document which accompanies - or contains - the texts submitted to the vote and the ballot papers, and which is intended to inform citizens of the subject of the vote.

As far as federal votes are concerned, it is up to the Federal Council, as is clear from the text of the provision, to draw up or at least adopt these "explanations of vote", a solution which is not self-evident insofar as the objects put to the vote are always acts of the Federal Assembly, which sometimes confine themselves to putting to the vote popular initiatives, i.e. proposals emanating from a fraction of the electorate. We might therefore ask whether it would not be more appropriate for Parliament - or one of its bodies - to draw up these "explanations of vote", as is the case in some cantons. As early as 1976, however, Art. 11 para. 2 settled the matter and entrusted this responsibility to the Federal Council, rather than to the Federal Assembly, apparently for practical reasons. 20

In practical terms, "explanations of vote" are prepared by an internal working group, headed by the Federal Council spokesman and made up of representatives from the various departments of the administration and the Federal Chancellery. The resulting document is submitted to the Federal Council - in two readings - for formal adoption. 21

2. 1st sentence

The first sentence of Art. 11 para. 2, which states that "[t]he text submitted to the vote shall be accompanied by brief explanations from the Federal Council, which must remain objective and also set out the opinion of important minorities", dates from 1976. At the time, it represented an innovation, in that until then there had been no provision explicitly authorizing and prescribing such explanations by the Government in the run-up to a vote. The Federal Council had, of course, already provided such explanations for certain votes, notably by publishing an explanatory brochure (a Bundesbüchlein) for certain votes since the 1950s, but in a rather ad hoc and unsystematic way. As the Federal Council explained in its message, it was following parliamentary interventions and opinions "expressed in the press" that it decided to include this provision in its draft, the idea being to make the publication of these "expla- 22

nations of vote" an obligation. Parliament adopted the Federal Council's proposal virtually unchanged, subject to minor terminological changes.

23 The Federal Council justified this innovation as follows:

"It is above all the nature of the texts submitted to the people, which are often difficult to understand because of the increasingly complicated subjects they deal with, that justifies the addition of a commentary. It's difficult for the general public to understand the technical and economic issues involved. That's why we believe it's essential to attach an explanatory statement to the text submitted to the vote, commenting on its content as briefly and simply as possible, in everyday terms. This kind of information should enable the electorate to better grasp the scope of the texts on which it must vote."

24 It was already clear from this original text that "explanations of vote" should remain brief, i.e. concentrate on the essentials, so that they can be effectively brought to the attention of citizens, and that they "must remain objective"; we thus already find here the principle of objectivity that was later taken up, as we have seen, in the new art. 10a, added in 2007.

25 Still according to this original text, "explanations of vote" must also "set out the opinions of significant minorities", by which was meant, according to the Federal Council's message at the time, "opinions expressed by significant minorities represented in Parliament", on the understanding that "it would be difficult to take into consideration the opinions of other political minorities". In this sense, art. 11 para. 2 already contained, from the outset, the rule that the Chambers have reintroduced, albeit in a more explicit formulation, through para. 3 of the new Art. 10a adopted in the revision of October 5, 2007, in force since 2009, which states that the Federal Council "shall set out the main opinions expressed during the parliamentary procedure". With regard to these "opinions expressed by important minorities represented in Parliament", we can therefore refer to what has already been said in the commentary on art. 10a para. 3.

26 In the meantime, however, art. 11 para. 2 had already been amended, and supplemented by three new sentences, in 1996, two of which were specifically intended to extend the consideration of minority opinions other than those expressed within Parliament, namely those of initiative committees and referendum committees, as will be seen below.

3. 2nd to 4th sentences

As mentioned above, sentences 2 to 4 of para. 2 were in fact introduced by a wide-ranging revision of the Political Rights Act, which was adopted on June 21, 1996 and came into force on April 1, 1997. At that time, the Chambers of Parliament adopted the three new sentences proposed by the Federal Council, without making any substantive changes, but modifying their order. 27

The first of these three new sentences, sentence 2 of para. 2, stipulates that "[i]t must contain the exact wording of the question appearing on the ballot paper". In reality, however, the wording of this sentence is unfortunate, not to say unfortunate, insofar as the pronoun "it" grammatically refers to the subject of the first sentence of para. 2, i.e. "the text submitted to the vote". The German version explicitly confirms this understanding, and is even worse, since it explicitly uses the noun "die Abstimmungsvorlage" (the text submitted to the vote) as the subject of the second sentence. However, it is not the "voting text" (die Abstimmungsvorlage) that "must contain the exact wording of the question on the ballot paper", contrary to what the text of the provision seems to say, in both French and German, but rather the Federal Council's "explanations of vote". 28

This, at least, was the intention of the legislator, as is clear not only from the Federal Council's message, but also from its draft. The German and French versions of the second sentence of para. 2 are incorrectly worded, and only the Italian version correctly conveys the meaning of the provision, namely that it is the Federal Council's "explanations of vote" - and not the "text submitted to the vote" - that must contain the exact wording of the question. 29

This is also the practice. Indeed, it is always the Federal Council's "explanations of vote" themselves, and not the text put to the vote - which is also contained in the explanations of vote - that contain the exact wording of the question on the ballot paper. Nor is it clear that the text submitted to the vote can contain the wording of the question asked. 30

As for the other two sentences added in 1996, sentences 3 and 4 of para. 2, concern the question of whether the Federal Council's "explanations of vote" should take into account the arguments of minorities other than "the important minorities represented in Parliament". In its message, the Federal Council explained the introduction of these two new sentences as follows: 31

"The proposed text is intended to respond to a wish widely expressed during the consultation procedure on the first draft of the revision, dating from 1988, and to codify the practice well established since 1984, according to which the initiative committee or referendum committee may set out the reasons for their request in the Federal Council's own explanations on a maximum of one A4 page, the Federal Council reserving the right to modify exceptionally a text that is prejudicial to honor, contrary to the truth or too long, which it has done several times since."

In fact, until the late 1970s, the Federal Council itself drafted the opinions of referendum and initiative committees. Then, from 1984 onwards, the practice was to provide them with a page of "explanations of vote", with the Government in principle reproducing their arguments unchanged, with a few exceptions. The two new sentences introduced in 1996 continue this practice, codifying it and extending the idea expressed at the end of the first sentence of para. 2, which dates back to 1976, by specifying that, on the one hand, "[i]n the case of a popular initiative or referendum, the committee shall submit its arguments to the Federal Council, which shall include them in its explanations" (3rd sentence) and, on the other, that the "Federal Council may amend or refuse to include comments that are dishonourable, manifestly untrue or too long" (4th sentence).

32 The provision thus imposes on the Federal Council, in the case of an initiative or referendum, the obligation in principle to take up the arguments of the initiative or referendum committee. In practice, the initiative or referendum committee is asked to provide its own text, which the authorities then take over; if these texts do not meet the requirements of the fourth sentence, the authors are given a deadline to submit a corrected version. In the absence of a suitable text within this period, or if the committees waive their right to do so, it is up to the authority to draw up the committees' opinion, since the law requires it to report on these opinions, which are also the opinions of important minorities, of which the committees are a part.

33 According to some authors, any dispute as to whether the committees' opinions were taken into account, either because they were not invited to provide their arguments when they should have been, or because the authority corrected or drafted their arguments, is not separately subject to appeal, as the corresponding grievances must be raised in the context of contesting "explanations of vote". It should be remembered, however, that the Federal Coun-

cil's "explanations of vote" are in principle not subject to appeal to the Federal Supreme Court, under art. 189 para. 4 of the Swiss Constitution, so that - according to the most recent case law - they can only be challenged in exceptional cases (a posteriori control, or retrospective legal protection) and within very narrow limits.

4. 5th sentence

The fifth and final sentence of art. 11 para. 2 was introduced some ten years later than the previous two, by a partial revision of the Political Rights Act of March 23, 2007, which came into force on January 1, 2008 and was proposed by the Federal Council in the context of the introduction of the general initiative, although this revision had nothing to do with this institution. This last sentence adds to the two preceding ones, with regard to the opinions of referendum and initiative committees, that the Federal Council "will only take up references to electronic sources if their authors declare in writing that these sources do not contain illicit indications or direct the Internet user to electronic publications with illicit content". 34

As indicated in the Government's message, the aim of this clarification was "to grant a certain protection to official information appearing in the Federal Council's explanations brochure, in the face of third-party information that could be called up on the Internet from links mentioned in this same brochure", or even "to protect official information appearing in the Federal Council's explanations brochure by refusing to include electronic links that would refer to publications on the Internet whose content would be illicit". 35

The message clarified this idea as follows: 36

"For some time now, the Federal Council has been including the e-mail addresses of federal authorities on the last page of the Explanations brochure, and sometimes also those of other federal administration pages that can be consulted on the Internet. It has even mentioned the e-mail addresses of initiative and referendum committees. Mentioning links or other references to electronic sources (e.g. an SMS address from which a voter can have information sent to his or her cell phone) can nevertheless be problematic, as electronic information can easily be modified and in some cases take on an illicit character. We know that Internet pages can be constantly updated, and that a link can suddenly lead to pages whose content has been modified after the

fact. By agreeing to include references to electronic sources in the Federal Council's Explanations, the Federal Chancellery would be giving a blank cheque to the authors of these sources. However, the principle of transparency, as well as the principle of proportionality, require that the information the voter receives, and will continue to receive, is correct, and that the source of the information is mentioned by name. For this reason, the page of the Federal Council's Explanatory Memorandum on which the committees (initiative or referendum) present their arguments will have to state that they take full responsibility for the page. In addition, those responsible will have to declare in writing to the Federal Chancellery that the electronic sources mentioned neither contain any illegal information nor direct Internet users to publications with illegal content. These two measures will make it possible to prevent manipulations such as the subsequent detour of a link to another link with, for example, a racist content, and to prevent Internet users who subsequently (once the vote is over) click on an electronic link mentioned in the Federal Council's Explanations published on the Internet from coming across allegations of a racist nature, or from being led by successive references to come across allegations of this type."

C. Paragraph 3: time of delivery of voting material

37 As already mentioned, the original 1976 version of the law already included a paragraph 3, albeit considerably shorter, which simply stated that "[t]he text submitted to the vote and the explanations shall be given to the electors at least three weeks before the vote". The first two sentences of this text were given their present form by the partial revision of the Political Rights Act of March 18, 1994, which came into force on November 15, 1994. However, the third and last sentence was subsequently introduced with the revision of June 21, 2002, in force since January 1, 2003, and the text of the second sentence underwent a further minor change with the entry into force on August 1, 2008 of the Federal Act on the Formal Updating of Federal Law of March 20, 2008.

38 The Federal Council's message states that the idea in the original version of the law was to shorten the deadline, which until then had been four weeks before the date of the vote, for providing citizens with the text submitted to the vote, as well as the accompanying explanations. The change to a deadline of at least three weeks was intended to save valuable time in preparing election materials.

In 1994, however, the Chambers of Parliament decided - the idea did not come from the Federal Council, whose message was silent on the subject - to amend this provision to stipulate, as it stands today, that citizens "shall receive, at the earliest four weeks before the day of the vote, but at the latest three weeks before that date, the documents which, under cantonal law, enable them to cast their vote validly (ballot paper, legitimation card, electoral envelope, control stamp, etc.)", on the understanding that "the elector's vote shall be validly cast at the earliest four weeks before the day of the vote, but at the latest three weeks before that date".)", it being understood that "the text submitted to the vote and the explanations may however be given to them earlier". This new wording, with a double deadline for delivery of the voting material, and the possibility of providing for earlier delivery of the text submitted to the vote and the "explanations of vote", was intended to take account of the equal status of postal voting and personal voting at the ballot box, while leaving the cantons some leeway in the organization of the dispatch of the voting material and its various components. 39

With regard to the question of the deadline by which citizens must receive their voting material, it should be noted that art. 2b ODP, introduced by an amendment of June 14, 2002, contains a special rule for citizens abroad: namely, that the cantons must ensure "that the authorities competent under cantonal law are able to send voting material to Swiss citizens abroad and, at their express request, to other voters abroad no earlier than one week before the date of the official dispatch of the said material". 40

As for the third and last sentence of para. 3, introduced by the 2002 revision, according to which "the Federal Chancellery shall publish, in electronic form and no later than six weeks before the day of the vote, the texts submitted to the vote and the accompanying explanations", was intended to enable citizens to be informed in advance and to make the system "more user-friendly", as the Federal Council's message stated: 41

"Opinions expressed in various letters to the Federal Chancellery and many complaints made in appeals show that many voters would like to receive voting material earlier than at present. Similar requests concerning the preparation of pre-voting campaigns are made by political parties and other interest groups: their representatives should, they say, be able to discuss the projects in full knowledge of the facts before giving voting instructions. The same applies to the many private associations which organize series of conferences,

and which can only issue their slogans once they are familiar with the questions posed. All these reasons argue in favor of a more user-friendly system. In order not to add unduly to the cost of the pre-vote campaign, and to avoid problems for the cantons in the event of simultaneous elections, the Federal Council will refrain from distributing the voting documents earlier, in view of the strong opposition expressed during the consultation. On the other hand, the Federal Chancellery will satisfy the electorate's need for information earlier than is currently the case, by making the texts on which the people are to vote and the accompanying explanations available on the Internet no later than six weeks before the day of the vote."

42 Para. 3 settles two issues. The first is the deadline by which citizens must receive the voting material, which is between four weeks, "at the earliest", and three weeks, "at the latest", before the date of the vote, On the other hand, since January 1, 2003, the Federal Chancellery has been obliged to publish these two documents (voting text and explanations of vote) in electronic form no later than six weeks before the day of the vote.

43 Para. 3 deals secondarily with the question of voting material. With the exception of ballot papers and explanations of vote, which are governed by federal law and supplied to the cantons by the Confederation in accordance with art. 11 para. 1 and para. 2, first sentence, the rest of the voting material is governed by cantonal law. Voting materials vary from canton to canton, but generally include, in addition to the above-mentioned items, a certificate or voting card, which makes it possible to determine the identity of the person voting and to ensure that he or she is entitled to take part in the vote, an envelope in which to place the ballot paper(s), a return envelope, a control stamp, etc...

D. Paragraph 4: the right to a personal copy of voting material

44 Par. 4 of Art. 11 was introduced by the partial revision of the Political Rights Act of March 18, 1994, which came into force on November 15, 1994, on the proposal of the Federal Council. The wording of the provision was formally corrected in a subsequent revision in 2006.

45 As the Federal Council explained in its message, "the dispatch to every voter of the texts submitted to the vote is an achievement of the LDP, dating from 1976". However, particularly with the advent of equality between men and women in the field of political rights, there has been some pressure, particu-

larly in the cantons, to limit the number of copies of the ballot papers and explanations of vote to one per household, if only for reasons of cost. The Federal Council, followed by the Chambers of Parliament, thus gave in, but only in part, as the principle remains that each holder of political rights must receive one copy.

Para. 4 thus adopted provides, however, that the cantons "may, by law, em- 46
power the communes to send only one copy of the text submitted to the vote and of the explanations per household, unless a member of that household who is a qualified voter requests to receive one personally". As is clear from the text, this provision allows an exception to the principle of sending a personal copy only for ballot papers and the accompanying "explanations of vote". This does not, of course, apply to other voting material, such as ballot papers, certificates, etc., which are always sent - and must be sent - to each individual holder of political rights.

Most cantons seem to have retained the principle of one mailing to each citi- 47
zen, with only a few providing for a single mailing per household. In all cases, however, federal law imposes a double limit on this exception. On the one hand, it requires that this exception, if provided for under cantonal law, be set out in a law, by which is meant a law in the formal sense. On the other hand, it guarantees that a person with political rights must be able to request a personal copy of the text submitted to a vote, as well as "explanations of vote".

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COMMENTARY ON

Art. 12 PRA

A commentary by Pascal Mahon

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Art. 12 Invalid ballot papers

[1] Ballot papers are invalid if they:

a. are not official;

b. have been completed other than by hand;

c. do not permit the intention of the voter to be clearly recognised;

d. contain defamatory remarks or obviously irrelevant markings;

e. ...

[2] Grounds for invalidity or nullity that relate to cantonal procedures (official voting envelope, validation stamp, etc.) are reserved.

[3] In the case of electronic voting pilot schemes[28], the legislation of each canton conducting such a scheme shall determine the requirements according to which votes are validly cast and the grounds for invalidity.

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I. BACKGROUND, SYSTEMATICS UND IMPORTANCE OF THE PROVISION

1 As indicated by its title, which is similar in all three language versions, art. 12 deals with the nullity or invalidity of ballot papers. As already noted, like all the other provisions of Title 2, Art. 12 applies only to federal votes, not to elections, i.e. only to ballot papers (Stimmzettel), not to election papers (Wahlzettel). The validity or nullity (or invalidity) of the latter is regulated elsewhere, in other provisions of the law, more specifically in art. 38 para. 1 and art. 49 para. 1, which contain rules that are in part identical to those of art. 12.

2 This provision already existed in the original version of the law, in 1976, when it was taken over from the Federal Council's proposals, which the Chambers largely followed, subject to a few modifications of a more formal nature. At that time, it contained only two paragraphs, the first two in the current version, the third having been added later, during the partial revision of the Political Rights Act of June 21, 2002, in force since January 1, 2003.

3 For the rest, the text of art. 12 has undergone two further modifications. Firstly, letter e of para. 1, according to which ballot papers which "in the case of a postal vote, [...] have not been delivered to a Swiss post office" are null and void, was repealed by an amendment, dated March 22, 1991 and in force since July 1, 1992, to the former Federal Act on the Political Rights of the Swiss Abroad of December 19, 1975.

4 On the other hand, the text of Art. 12 has undergone a minor modification, consisting in replacing, in the French version of para. 2, by replacing the expression "timbre de contrôle ou estampille" with "timbre de contrôle", and another in the German and Italian versions of para. 3, with the entry into force on August 1, 2008 of the Federal Act on the Formal Updating of Federal Law of March 20, 2008.

5 In terms of structure, Art. 12 therefore comprises three paragraphs. The first lists the various grounds for nullity or invalidity of ballot papers prescribed by federal law, while the second reserves any other grounds for nullity or invalidity under cantonal law. The third, added at a later date, reserves the provisions applicable to electronic voting trials, insofar as, in this case, voting is not carried out by means of traditional ballot papers, so that the conditions of validity

of the vote are subject to specific rules. We will return to each of these paragraphs in the commentary proper (section II).

First, as regards the importance of the provision in general, reference can be made, at least in part, to what has already been said in the commentary on art. 10, 10a and 11, namely that, given the significance of popular votes in the Swiss constitutional and political system, with the very high degree of direct democracy that characterizes it, the rules governing the organization of these votes are of fundamental importance. Unlike the three preceding provisions, however, which relate in particular to the preparation and distribution of voting material, and to the provision of information to citizens in the run-up to these votes, art. 12 should probably be seen in the context of another dimension of the freedom to vote, as guaranteed by art. 34 of the Swiss Constitution. According to the case law of the Swiss Federal Supreme Court, the freedom to vote implies a right to ensure that no voting result "shall be recognized if it does not express the free will of the electorate", a right to the correct establishment and recording of results or, more precisely, in the words of the Federal Supreme Court, a "right to a regular execution of the ballot [...] as well as the right to an exact and precise counting of votes". From this right flows a requirement for precision in the qualification, sorting and counting of ballot papers, which must carefully distinguish and separate invalid or void ballot papers, blank ballot papers and valid ballot papers, as prescribed by art. 13 and 14 of the LDP, to which we will return later. 6

All cantons have provisions similar to art. 12, which deal with ballot papers, in particular their nullity or invalidity, as well as the manner in which they are to be treated in establishing and recording the results. 7

II. COMMENTARY

A. Paragraph 1: list of grounds for invalidity of ballot papers

1. Introductory remarks and general remarks

Para. 1, which dates from the original 1976 version, contains a list of causes - or cases - of invalidity of ballot papers. As stated in the Federal Council's message, the purpose of this provision is "to facilitate the task of polling stations by enabling them to judge the validity of ballot papers more easily". 8

9 The list of grounds for nullity or invalidity of ballot papers in para. 1 applies to both in-person voting at the ballot box and postal voting, but does not apply to electronic voting, for which special rules must be laid down, as specified in para. 3 of art. 12.

10 Generally speaking, the various grounds for nullity mentioned in each of the letters of para. 1 are all related to other provisions of the law, provisions which appear in Title 1 of the law, in principle in art. 5, i.e. which relate to the general principles of the right to vote and the exercise of this right. Art. 12 must therefore be read in conjunction with these other provisions of the law.

11 However, it must also be read in conjunction with art. 13 and 14 of the LDP, which follow it, since it is in these provisions that the sanction or consequence of the invalidity of the ballot papers in question is set out. According to art. 13 para. 1, "invalid ballot papers shall not be taken into consideration for the determination of the results of the vote". In concrete terms, this means that even if a ballot paper contains a "yes" or "no" vote, or remains "blank", it will be counted separately in accordance with art. 12 para. 1 (i.e. as "invalid" ballot papers), but will not be taken into account in the calculation of "yes" and "no" votes, which is decisive in determining the outcome of the vote, nor will it be taken into account in the separate count of "blank" ballot papers.

12 It should be noted that para. 1 only covers the causes of formal invalidity or nullity of ballot papers, and does not therefore regulate all cases in which a vote will not be taken into account because it is materially invalid, for example, when the person who cast it is not entitled to vote. In order to determine whether a vote is valid or invalid, the grounds for invalidity set out in para. 1 of art. 12 must therefore be supplemented not only by an examination of the nullity clauses of cantonal law, which are reserved by para. 2 of art. 12, but also by examining the grounds for material invalidity of votes.

2. Letter a: invalidity of unofficial ballots

13 According to letter a of para. 1, ballot papers that "are not official" are invalid. This first case of nullity refers to the rule of art. 5 para. 1 of the LDP, according to which "voting may only be exercised by using official ballot papers and election papers", the provision specifying that "[t]he same applies to entry ballot papers issued by the cantons with a view to computerizing the counting of votes".

The rule that only official ballot papers or election bulletins are accepted was new in 1976. Until then, "the cantons had been able to tolerate the use of sheets made available to citizens by private associations", a practice which "enabled political parties and interest groups to provide their supporters with pre-printed responses, thus facilitating their propaganda and the task of voters". Despite some resistance, the rule in art. 5 para. 1 and art. 12 para. 1 let. b of the LDP was imposed "to avoid pressure and the risk of confusion". 14

Today, this rule is considered standard practice, and is also applied by the cantons. There are only a few exceptions, for election ballots - not ballot papers - in majority elections, where unofficial ballots are sometimes, but rarely, allowed. 15

The rule is justified by the fact that the use of ballot papers other than official ballot papers, potentially of different sizes, shapes and contents, could make counting operations difficult and give rise to risks of confusion and irregularity in the counting of results. It therefore prohibits voting by means of a ballot paper copied or produced by citizens themselves or by an organization. 16

3. Letter b: invalidity of ballot papers completed other than by hand

Under letter b of para. 1, ballot papers which "are not completed by hand" are also invalid. This second case of invalidity refers to the rule in art. 5 para. 2 of the LDP, according to which "ballot papers and unprinted ballot papers must be filled in by hand", with the provision specifying that "printed ballot papers may only be altered by handwritten entries". 17

Here again, the rule is customary and fairly general, in that it is found, with identical or very similar wording, in practically all cantons, sometimes with rare exceptions. 18

Its purpose is to prevent or limit what is known as "Stimmenfang", i.e. the systematic collection, filling in or alteration of ballot papers, or the distribution of ballot papers filled in or altered in this way, to use the legal definition given by the Penal Code. Vote-grabbing is punishable by a fine under art. 282bis of the Swiss Penal Code, a provision which was introduced by the 1976 Political Rights Act and came into force with it on July 1, 1978. 19

20 This rule does not, of course, apply to electronic voting, where there is no question of ballot papers being filled in by hand, and where special provisions apply, as set out in para. 3 of art. 12.

4. Letter c: Invalidity of ballots which do not clearly express the will of the person voting

21 In accordance with letter c of para. 1, ballot papers that "do not clearly express the will of the voter" are also invalid. This third case of nullity does not refer specifically to another provision of the law, but is the result of a rule that is also fairly general and customary, found in several cantons, with identical or very similar wording. And it seems logical. If it is not possible to determine the will of the person who voted, it is logical that his or her vote should not count, and that the ballot should therefore be considered null and void or invalid.

22 While, in the case of election ballot papers, the principle of proportionality may justify or even require, in certain cases, that only partial nullity or invalidity be retained, the question is more delicate in the case of ballot papers. In this case, in fact, the question is generally binary, so that either it is possible to determine the will of the person who filled in the ballot paper, and his or her ballot paper must then be considered valid, or this is not possible, and the ballot paper must be qualified as null or invalid; the same should apply, in our opinion, in cases of serious doubt as to the will expressed by the person who voted. The principle of proportionality can - and must - play a role, however, insofar as, given the importance of political rights in our country, the competent authority, i.e. the polling station as a general rule, cannot be excessively formalistic.

5. Letter d: Invalidity of ballot papers containing remarks prejudicial to honour or marked with signs

23 Lastly, letter d of para. 1, ballot papers which "contain remarks prejudicial to honour or are marked with signs" are null and void. This fourth and last case of invalidity refers, according to the Federal Council's message, to the rule of art. 5 para. 7 LDP, according to which "[t]he secrecy of the vote must be safeguarded", a requirement which, over and above this legal provision, derives directly from the freedom to vote guaranteed by art. 34 Cst.

As already indicated, the two chambers of Parliament have slightly modified the wording of letter d in relation to the Federal Council's draft, which stipulated that ballot papers "containing indications (observations, signs, etc.) unrelated to the subject of the ballot" should be null and void. In its message, the Government explained the ratio legis of the proposed provision as follows: 24

"By prohibiting inscriptions extraneous to the subject of the ballot, the aim is to avoid any additional remarks and signs on ballot papers, each additional indication being likely to violate the secrecy of the vote. This is why it is important not only to declare void ballot papers containing remarks prejudicial to honor, but to apply this provision to all ballot papers containing additional indications."

After some lengthy discussion, Parliament preferred the current wording, according to which ballot papers that "contain remarks prejudicial to honor or are marked with signs" are void. The discussion centered on whether to limit the nullity to ballot papers containing information that would identify the voters - and thus undermine the secrecy of the ballot - and thus tolerate other signs and even possible expressions of bad humor, or, on the contrary, to be (very) strict and formalistic, excluding any sign that is unrelated to the subject of the ballot. In the end, it was the more tolerant version proposed by the National Council that prevailed, so that only those ballot papers should be considered void or invalid which either include remarks prejudicial to honor, or contain signs that make it possible to recognize the identity of the voters, i.e. which violate the secrecy of the vote. 25

Here again, therefore, we find to some extent the requirement of proportionality already mentioned above. 26

6. Letter e (repealed)

On the content of this provision, and its repeal, see N 3 above. 27

B. Paragraph 2: reservation of (other) grounds for nullity under cantonal law

The second paragraph of Art. 12, which dates back to 1976 and which the Chambers have taken over unchanged from the Federal Council's proposals, provides that "[t]he causes of nullity and annulment arising from cantonal pro- 28

cedure (electoral envelope, control stamp, etc.) are reserved". No comment was made on this in the Federal Council's message.

29 As stipulated in art. 10 para. 2 of the LDP, federal referenda are organized by the cantons, within the framework of the provisions of federal law. In particular, it is the cantons that distribute the voting material, some elements of which - in addition to those provided for and governed by federal law - are governed (solely) by cantonal law. In addition, the cantons have the mandatory power to enact legislation guaranteeing, in certain areas such as early voting and postal voting, the verification of citizenship and the "flawless counting of votes", as well as "safeguarding the secrecy of the ballot and preventing abuses".

30 It is therefore logical that para. 2 of art. 12 reserves, alongside or in addition to the causes of nullity or invalidity of ballot papers listed in para. 1, the grounds for invalidity which are governed by cantonal law. The cantons may, in fact, provide for causes of nullity or invalidity of ballot papers other than those prescribed by art. 12 para. 1, not only for cantonal and communal votes, but also, by virtue of the proviso in para. 2, for federal referenda.

31 Practically all the cantons have nullity or invalidity clauses for ballot papers that are different from - or additional to - those of federal law. And cantonal legislation sometimes distinguishes, in this respect, between nullity clauses applicable to ballot papers and those applicable to election ballot papers; similarly, with regard to ballot papers, they distinguish between general nullity clauses, applicable to both personal voting at the ballot box and postal voting, and certain specific nullity clauses which only concern postal voting. Thus, for example, certain cantonal regulations stipulate that ballot papers are null and void if "several ballot papers have been introduced into a voting envelope, regardless of the content of the ballot papers", or ballot papers "which are accompanied by an appendix", or that in the case of postal voting, the vote is invalid if "the ballot paper is not placed in the closed official reply envelope", if "the legitimation card does not bear the elector's handwritten signature", if "the reply envelope contains more than one legitimation card", or if this reply envelope "arrives at the commune after the set deadline".

32 In the case of federal votes, however, cantonal nullity clauses have their own scope only insofar as they differ from or go further than those already provided for under federal law, in para. 1. It should also be pointed out that when, in

the context of a federal vote, it is necessary to interpret a nullity clause that is provided for both by cantonal law and, in identical or largely similar terms, by art. 12 para. 1 LDP, which is relatively frequent, the competent cantonal authority - the polling station - can only interpret it in the light of its meaning as derived from federal law.

C. Paragraph 3: reservation of grounds for nullity in the case of electronic voting

The third paragraph of art. 12, according to which "the canton experimenting with electronic voting shall lay down in its law the conditions of validity and the grounds for invalidity of the vote", was added, as mentioned above, in 2002. The provision was intended to "consolidate the legal foundations on which electronic voting pilot projects are based". The Federal Council's message explained the addition of this provision as follows: 33

"Traditional forms of voting require the use of official ballots, whether for votes or elections (art. 12, para. 1, let. a, art. 38, para. 1, let. b, and art. 49, para. 2, let. a, LDP). These ballots may only be completed or modified by hand (art. 12, para. 1, let. b, art. 38, para. 1, let. c, and art. 49, para. 2, let. c, LDP). However, these conditions cannot be maintained for the pilot tests, and electronic voting will also need barriers that will establish the validity and lawfulness of the voter's expression, if only to prevent a person not entitled to vote from voting under a false name, or a person not entitled to vote from voting several times. It is up to the canton in which the pilot test with electronic voting is to take place to lay down these conditions in its law. To be valid, the canton's provisions must be approved by the Confederation (art. 91, para. 2, LDP). The Federal Council will make this a sine qua non condition for issuing the authorization referred to in art. 8a of the LDP.

It will be recalled very briefly in this connection - even if the system of electronic voting trials has been interrupted from June 2019 to March 2023 - that under the terms of art. 8a LDP, introduced by the revision of June 21, 2002, in force since January 1, 2003, the Federal Council "may, in agreement with the cantons and communes concerned, authorize the experimentation of electronic voting by limiting it to a part of the territory, to certain dates and to certain objects" (para. 1), specifying that "the verification of voter eligibility, the secrecy of the vote and the counting of all votes must be guaranteed" and that "any risk of abuse must be ruled out" (para. 3). 34

35 Para. 3 of Art. 12 supplements this provision by specifying that it is up to the canton that intends to experiment with electronic voting to set out "in its law the conditions of validity and the grounds for invalidity of the vote". As indicated, the nullity or invalidity clauses provided for in para. 1 of art. 12, as well as those traditionally set by the cantons and reserved by art. 12 para. 2 LDP, which are tailor-made for personal voting at the ballot box and postal voting, cannot be applied to electronic voting. Other provisions are therefore essential to guarantee the validity of electronic voting and provide grounds for its invalidation, thereby ensuring the fairness of the ballot. Such provisions are all the more necessary as any irregularities or manipulations in electronic voting can affect a large number of people.

36 In particular, electronic voting must guarantee "that only electors can take part in the ballot (verification of elector status)", "that each elector has a single vote and can vote only once (uniqueness of vote)", "that third parties cannot systematically and effectively intercept, modify or divert the votes cast", third parties cannot systematically and effectively intercept, modify or divert electronic votes (assurance of the faithful expression of the electorate's will)", "that third parties cannot gain knowledge of the content of electronic votes (secrecy of the vote)", and "that systematic fraud is excluded (regularity of the ballot)".

37 Cantonal provisions adopted on the basis of para. 3 are subject to approval by the Confederation, pursuant to art. 91 para. 2 LDP, which is given by the Federal Chancellery in non-contentious cases. These approved provisions are themselves one of the conditions for the Federal Council's general authorization to carry out electronic voting trials, in accordance with art. 8a of the LDP and art. 27a of the ODP.

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COMMENTARY ON

Art. 13 PRA

A commentary by Pascal Mahon

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Art. 13 Determination of the result of the vote

[1] Blank and invalid ballot papers shall be disregarded when determining the result of the vote.

[2] Where the yes-votes in a canton are equal in number to the no-votes, the vote of that canton shall be ounted towards the cantons voting no.

[3] A very close result only requires a recount if there are credible allegations of irregularities that by their nature and extent could have influenced the federal result.

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I. HISTORY, SYSTEMATICS AND IMPORTANCE OF THE PROVISION

As indicated by its title, which is virtually identical in all three language versions, Art. 13 deals with the determination of (federal) voting results, in that it lays down a number of rules relating to the determination of such results. Like the other provisions of Title 2, art. 13 applies - as already noted - only to (federal) votes, and not to elections. The determination and recording of election results are governed by other provisions of the law. 1

The provision already existed in part, in the sense that it was much shorter, in the original version of the law in 1976, when it contained only one paragraph, virtually identical to the current paragraph 1, which dealt with blank and invalid ballot papers and which had been taken over without any change from the Federal Council's proposals. 2

Paragraph 2, which deals with the case of equal "yes" and "no" votes in a canton during a federal vote, was not introduced until some twenty years later, by a partial revision of the law on political rights, adopted on June 21, 1996 and which came into force on January 1, 1997. In this respect, the two chambers adopted the Federal Council's proposals in their entirety, without discussion. 3

Paragraph 3, which governs the recounting of votes in the event of a close result, was introduced some twenty years later in a partial revision of the law, the main purpose of which was to adapt the legislation governing elections to the National Council, but which also included a number of other amendments. This revision was adopted on September 26, 2014 and came into force on November 1, 2015. Here too, the Chambers adopted the Federal Council's proposal for a new paragraph 3 without change, but not without discussion. 4

The text of Art. 13 remains unchanged. In terms of structure, the provision comprises three paragraphs. The first deals with the fate of blank and invalid ballots, the second with the question of a possible tie between "yes" and "no" votes in a canton during a federal vote, while the third lays down a rule on the recounting of votes in the event of a close result in such a vote. We will return to each of these paragraphs in the commentary proper (section II). 5

As regards the importance of the provision in general, we refer to what has already been said in the commentary on art. 10, 10a and 11, namely that, given 6

the significance of popular votes in the Swiss constitutional and political system, with its very high degree of direct democracy, the rules governing the organization of ballots are of fundamental importance. Reference can also be made to what was said in the commentary on art. 12: like art. 12, art. 13 must be linked to the dimension of the freedom to vote - guaranteed by art. 34 Cst. - which concerns the right that no voting result "shall be recognized if it does not express the free will of the electorate", the right, in other words, to the correct establishment and ascertainment of the results or, more precisely, in the words of the Federal Court, a "right to a regular execution of the ballot [...] as well as the right to an exact and precise counting of the votes". As already mentioned in relation to art. 12, this right gives rise to a requirement for precision in the qualification, sorting and counting of ballot papers, which must carefully distinguish and separate invalid or invalid ballot papers, blank ballot papers and valid ballot papers, as also prescribed by art. 14 LDP, to which we shall return later.

7 All cantons have provisions similar to art. 13, which deal with the fate of blank and invalid ballots, and, less frequently, with recounts in the event of a close result.

II. COMMENTARY

A. Paragraph 1: fate of blank and invalid ballots

1. The meaning of the rule

8 Para. 1, which dates back to the original 1976 version, therefore lays down the rule that "blank and invalid ballot papers shall not be taken into consideration in determining the result of the vote". The Federal Council's message explained the ratio legis of this rule as follows:

"A constitutional amendment comes into force when the majority of voters and the majority of cantons have accepted the project (art. 123 Cst.). A federal law or decree of general application is accepted if the majority of voters have voted in favor of it. The decisive (absolute) majority is determined on the basis of the number of valid ballots cast. Blank and invalid ballots are not taken into account.

Expressed more precisely, the rule in art. 13 para. 1 therefore means that invalid and blank ballots are not taken into account in determining the results of a vote, but rather in determining the result, i.e. the majority that accepts or rejects the object put to the vote, with only ballots (not invalid) containing a "yes" or "no" being taken into account for this purpose. 9

A careful distinction must therefore be made between two things: the counting of invalid and blank ballots in determining the results of a vote, and the counting of invalid and blank ballots, which, as stipulated in art. 14 para. 1 LDP, both of which must be counted separately in the minutes of the vote; and, secondly, these invalid and blank ballots must be taken into account in determining and calculating the majority, which determines the outcome of the vote, i.e. the acceptance or rejection of the matter put to the vote. However, it is precisely this consideration, and this consideration alone, that art. 13 para. 1 of the LDP excludes. 10

As indicated, this rule applies only to (federal) votes, and not to elections, for which other rules exist in federal law. 11

While the rule that spoiled ballots are not taken into account in determining the results of a vote is fairly obvious, it is perhaps less so, a priori, in the case of blank ballots. At least, it is sometimes discussed or fought against, by those who campaign for the "blank vote" to be taken into account, a movement that caused a stir in France, particularly on the sidelines of the 2017 presidential election, but which also had a certain echo in Switzerland, even if the movement seems to have lost some of its momentum. The question therefore deserves a brief detour. 12

2. Excursus: the question of how to take the "white vote" into account

Activists in favor of recognizing the blank vote, which they see as a protest vote, believe that blank ballots should be taken into account in voting and election results. Such an unqualified demand calls for a number of comments. 13

First of all, if it is simply a question of counting blank votes or ballots and announcing their number with the proclamation or publication of the results, the demand is not problematic. In Switzerland, as we have seen, it has already generally been put into practice. In fact, at federal level, the law on political rights stipulates, for both votes and elections to the National Council, that the minutes must indicate "the number of blank ballots", respectively "the number 14

of blank [...] ballots" and "the number of blank votes". The number of blank ballots, like the number of invalid ballots, is mentioned, by canton and globally, in the publication of voting results, and always has been.

15 If, on the other hand, the aim is to take blank votes into account when establishing the result itself, the demand is only partially admissible and likely to be put into practice: it is without too much difficulty in two-round majority elections, where it is quite possible to take blank votes into account when calculating the absolute majority in the first round, which has the effect of raising this absolute majority and thus making it more difficult to achieve. This is a political choice, which some cantons have made for the election of their government, or indeed for all elections, by a two-round majority system. This is the case, for example, in the cantons of Vaud and Geneva. But, as we have seen, this is not the case for the Confederation for the election of the Federal Council, even though such a consideration had been requested, by way of a motion, subsequently withdrawn, in 2015-2016.

16 It seems much more delicate - not to say inadmissible - to take blank ballots into account in other elections (first-past-the-post, where a relative majority is sufficient, or proportional representation), and it is even less admissible in votes on a concrete object, votes whose outcome is, by definition, binary and results in a yes or a no. If blank votes were to be taken into account in determining the result, they could only be counted as either "no" or "yes" votes, which not only fails to reflect the will of those who voted blank, but also runs counter to the principle of equality between "yes" and "no" votes. Alternatively, as is sometimes proposed, a certain percentage of blank votes should have the effect of cancelling the ballot, thereby consolidating the status quo or, in the case of elections, creating blocking mechanisms.

17 It must therefore be admitted - and this seems obvious - that, for votes at least, people who vote "blank" (or "invalid") do indeed participate in the vote, but only formally, and not materially: their vote can and must be counted as such, but it cannot be taken into account in determining the result. This is the case under federal law.

18 It is also the case in almost all cantons, with one exception worth noting. In the canton of Valais, art. 106 of the Constitution of March 8, 1907, which requires "an absolute majority of the citizens having taken part in the vote" for constitutional amendments, is still interpreted today as meaning that blank

votes are to be considered as "no" votes, which is problematic from the point of view of the freedom and equality of the vote. After initially adopting the same rule, the Valais Constituent Assembly finally abandoned it, returning to the "absolute majority of valid votes" solution in its draft of the new cantonal constitution of April 25, 2023.

B. Paragraph 2: the case of equal "yes" and "no" votes in a canton

The second paragraph of Art. 13, added in 1996 and taken over unchanged by the Chambers from the Federal Council's proposals, stipulates that "[i]f an object receives an equal number of "yes" and "no" votes in a canton, that canton shall be deemed to have rejected that object". The Federal Council's message commented on this new provision as follows: 19

"Paragraph 2 (new) is intended to clarify that, if a text submitted to a vote receives an equal number of yes and no votes in a canton, the canton is considered to have rejected the object. For the record, the Federal Assembly, in connection with the results obtained by the Canton of Schwyz in the popular vote of May 4, 1913 on the constitutional article on epidemics and epizootics - 1074 yes votes to 1074 no votes - felt authorized to declare the result null and void (FF 1913 III 479 and RO 29 [1913] 177 ff.), whereas it should have adhered to the meaning of the constitution and counted the Canton of Schwyz among the cantons that rejected the text. Article 123, paragraph 1, Cst. requires that a majority of the cantons have accepted a revision of the constitution."

The rule or clarification thus enshrined in law - as a result of a much earlier error on the part of the Federal Assembly - was in fact unnecessary insofar as, as the Federal Council points out, Art. 123 para. 1 of the old Federal Constitution already provided that a constitutional revision could only come into force if it was accepted by a double majority of the people and the cantons. The new Constitution is even more explicit and exhaustive, in Art. 142, specifying that "[a]cts submitted to a vote of the people shall be accepted by a majority of the voters" (para. 1) and that "[a]cts submitted to a vote of the people and the cantons shall be accepted when a majority of the voters and a majority of the cantons approve them" (para. 2), it being understood that, in this case, "[t]he result of the popular vote in a canton represents the vote of that canton" (para. 3). Insofar as the majority required in such a case of a vote on a specific subject, i.e. an absolute majority, implies half plus one of the votes (validly) cast, a situation where there is an equality of "yes" and "no" votes in a canton means, 20

by definition, that the said majority has not been reached, and the subject submitted to the vote must therefore be considered as rejected in the canton in question.

21 It should also be remembered that the situation is the same in double-majority votes when the votes of the cantons are equal at federal level, i.e. when an object put to the vote is accepted by 11 ½ cantons and rejected by 11 ½ cantons: in this case, as the absolute majority (of the cantons) is not reached, the object is rejected, a situation that has occurred twice in history to date, in 1866 and 1975.

22 Finally, it should be remembered that the situation is different in the event of a tie in an election, where a draw is often foreseen, which is not the case in voting.

C. Paragraph 3: the question of recounts

23 The third paragraph of art. 13 was added, as mentioned, in 2014. The aim and purpose of this addition was to lay down a new rule on the recounting of votes in the event of a close or very close result in a vote. As is clear from the Federal Council's message, the innovation was in fact intended to react to - and counteract - the equally new case law of the Federal Supreme Court, which in a 2009 ruling, based on a number of legal writings, considered that "a very close vote result [should] be treated as an 'irregularity' within the meaning of art. 77 para. 1 let. d LDP". In other words, according to this ruling, which concerned the federal vote of May 17, 2009 on the biometric passport, a very close result in a vote was to lead to a recount, automatically as it were, without the need to make it likely that irregularities had occurred in establishing the results. The Federal Supreme Court's ruling thus represented a reversal of the practice hitherto followed by the federal authorities, and by the Federal Supreme Court itself, according to which a close result alone did not constitute an "irregularity" within the meaning of art. 77 of the LDP, requiring a recount, a practice that was confirmed when the new law on political rights was adopted in 1976.

24 The idea of the new paragraph 3 added in 2014 was therefore to go back on this case law and allow "a return to the will of the historic legislator" and thus "eliminate the legal uncertainty linked to the Federal Court ruling", which moreover "did not specify the limit between a 'close result' and a 'very close

result'". The Federal Council's message also emphasized the conceptual and practical difficulties that could arise from the Federal Court's new ruling:

"A very close result, whether at cantonal or federal level, shows that a project is highly controversial. To deduce that it is the result of irregularities is to ignore the fact that it is precisely highly controversial issues that make polling station officials and scrutineers mutually more attentive to possible manipulation. In such circumstances, the media are equally vigilant. Moreover, it may well be that a very close result at federal level is the sum of clear but very contrasting cantonal results. How can the recount be centralized in such a case? Who should do it, and when? The personnel, time and space required for a recount should not be underestimated. It should be carried out at the same time throughout Switzerland, and partial results should be communicated at the same time, to avoid a cascade of doubts, speculation and suspicions that could only trigger further appeals. What's more, how can the cantons that have adopted a militia system for the vote count summon sufficient personnel in such a short space of time? Otherwise, the outcome of the vote would remain uncertain for weeks. According to art. 5, para. 2 of the Constitution, state activity must be proportionate. A recount of the result of a close cantonal ballot by the federal authority in the absence of indications suggesting an irregularity would therefore only be compatible with this principle if the result were extremely close at federal level too."

In light of this argument, the Federal Council also stated: 25

"The Political Institutions Committee of the National Council did not wish to follow the Federal Court in its attempt to equate a 'very close' election result with an irregularity [...]. On the contrary, it wants to ensure that the will expressed by the historic legislator (votes are only recounted if there is convincing evidence to suggest an irregularity) is respected. We want to ensure that the same will apply in the future. In view of the Federal Court's ruling, it would therefore be appropriate to explicitly enshrine the legislator's wishes in law. In addition, a legal basis must be created for the observation of the proper conduct of elections (see below, commentary on art. 85 of the LDP).

In fact, the 2013 draft revision also provided for the introduction of a new art. 26
85 of the Political Rights Act, on the "Observation of ballots", in parallel with and as a sort of compensation for the tightening of the rule on recounts. This provision was intended, among other things, to oblige the cantons to lay down

rules on the observation of ballots. However, despite lengthy opposition from the Council of States, which wished to follow the Federal Council's lead and only agreed to the deletion after lengthy debate and lip service in the third round, the chambers did not adopt the provision, following the majority of the National Council Commission, which had proposed deleting it.

27 Academic opinion was divided on the issue of the recount, as well as on this "return to previous practice", decided by the Federal Assembly and considered by some to be questionable from a constitutional point of view, more specifically in terms of its conformity with art. 34 para. 2 of the Constitution. The solution does not appear unreasonable, however, insofar as close or very close results in popular votes are not an uncommon phenomenon, especially in recent times: according to statistics compiled by one author in 2021, of the 637 federal votes held between 1848 and 2020, five produced a result between 49.9% and 50.1% (all between 2000 and 2020), eleven between 49.5% and 50.5% and fourteen between 49% and 51%. Yet, as this author points out, "[t]he corollary of the democratic process is the possibility that votes may produce close results, which must be accepted without being questioned on the basis of even the slightest difference in votes".

28 In any case, a few months before the new paragraph 3 came into force on November 1, 2015, the Federal Supreme Court had the opportunity to rule once again on the issue, in a decision of August 19, 2015, concerning another federal vote, that of the referendum on the Radio and Television Act, put to the vote on June 14, 2015. At that time, it also went back - referring in particular to the new art. 13 para. 3 LDP already adopted, but not yet in force - and clarified that an obligation to recount in the event of a very close result follows directly from art. 34 para. 2 of the Constitution only if the citizen complaining is able to point to concrete evidence of an erroneous count or of conduct contrary to the law by the authority; the mere fact that the result is (very) close is not enough.

29 In federal law, therefore, the situation is now clear: a close or very close result is not, in itself, grounds for a recount: it is still necessary, as the text of art. 13 para. 3 states, that "it has been made likely that irregularities have occurred and that their nature and extent could have significantly influenced the result at federal level".

This is not always the case in the cantons, some of which recognize a right to a recount in the event of close or very close results, irrespective of the existence of indications or suspicions of irregularities. Thus, for example, art. 27 of the Political Rights Act of the Canton of Berne provides that "votes shall be recounted if the result of a vote [...] is very close" (para. 1) and specifies that "the result of a vote is deemed to be very close when the difference between the yeas and the nays is less than or equal to 0.1 percent of the votes validly cast [...]" (para. 2). [...]" (para. 2, 1st sentence). A few other cantons (e.g. Graubünden, Schaffhausen, Zurich and St. Gallen) have similar regulations, sometimes with different thresholds (often between 0.1 and 0.3%), sometimes without specifying a threshold; the majority of cantons, however, adhere to a rule similar to that in federal law, namely that a close or very close result is not sufficient, as evidence of irregularity(ies) is required to justify a recount. 30

Under federal law, therefore, to justify a recount, there must be evidence or suspicion of irregularities, and the nature and extent of these irregularities must have had a significant influence on the federal result. According to case law, the irregularities in question are those affecting the counting of votes, for which there must be "concrete evidence of an erroneous count or of unlawful conduct on the part of the competent body". The Federal Court has made it clear that the closer the outcome of the vote, the less stringent the requirements for proof of such irregularities. In any case, however, even when the result is close, mere references to errors that have already been corrected are not sufficient to justify a recount, provided that these errors remain within the scope of the usual minor counting and reporting errors that exist in any recount, and do not point to any particular events that might have influenced the result. 31

With regard to the nature, or seriousness, and extent of these irregularities, which must be such as to have "significantly influenced the result at federal level", the question of a recount must be distinguished from those of the repetition of a vote that took place in an assembly or a Landsgemeinde, as well as from the annulment of a vote, again, in both cases, due to irregularities found. As far as the annulment of votes is concerned, it should be remembered that, according to case law, "[w]here irregularities are found in the counting of votes, the vote is annulled only on the twofold condition that the violation found is serious and that it may have had an influence on the outcome of the vote. In particular, the difference in votes, the seriousness of the procedural 32

defects and their impact on the vote as a whole must be taken into account. If the possibility of a different result had the procedure not been flawed is so slight that it cannot be seriously considered, the vote should not be annulled; otherwise, the flaw should be considered serious and the vote annulled. When the difference in votes is very clear, only serious irregularities are likely to call into question the validity of the result of the vote".

33 As far as the recount is concerned, and in the case of a federal vote, any irregularities must, as specified in art. 13 para. 3 of the LDP, have been such as to influence the outcome of the vote "at federal level". In other words, even if such irregularities could in themselves justify a recount in a canton (or in two or more cantons), where the result was presumably close, there is no need, under art. 13 para. 3, for a recount if the result is clear at federal level. This brings us back to the aforementioned idea of proportionality: a recount of "the result of a close cantonal ballot by the federal authority [...] would [...] only be compatible with this principle [of proportionality] if the result were also extremely close at federal level".

34 Nonetheless, this provision raises a slight difficulty of interpretation with regard to art. 79 of the LDP, especially paragraphs 2 and 2bis, provisions which predate the introduction of art. 13 para. 3 and which deal with the competences and powers of the first-instance appeal authority, i.e. the cantonal government, in disputes concerning votes. According to art. 79 para. 2, which dates back to the original version of the law in 1976, "[w]hen it finds irregularities as a result of an appeal or ex officio, [the cantonal government] shall, as far as possible before the close of the election or vote, take measures to remedy the defects found". Paragraph 2bis, introduced with the revision of March 18, 1994, already specified that, however, "the cantonal government shall reject the appeal without examining the case further if it finds that the irregularities invoked are neither of such a nature nor of such importance that they could have decisively influenced the main result of the vote or election" (para. 2bis). Although not explained in the message, this provision was undoubtedly already based on the idea of proportionality. The question remains, however, whether art. 13 para. 3 governs only cases of recount by the federal authority and whether, on the basis of art. 79 para. 2, a cantonal government could not, or even should not, order a recount if it finds serious or massive irregularities in the canton, likely to undermine citizens' confidence in the canton, even if there seems to be no doubt about the outcome of the vote at federal level. Or

if, on the contrary, art. 13 para. 3 alone, in addition to art. 79 para. 2bis, further restricts the powers of the cantonal government and also rules out a recount by the cantonal authority in such a case.

It should also be pointed out that, according to the jurisprudence of the Federal Court in cantonal voting matters, when the result of a vote is very close but a recount is not or no longer possible, due to the destruction of (part of) the ballot papers, for example, the vote must be repeated. 35

In the case of a federal vote, the legal remedies for a possible recount are those set out in articles 77 and 80 of the LDP, i.e. an appeal to the cantonal government concerned within three days of discovery of the grounds for appeal (but no later than the third day after publication of the results in the canton's official gazette), followed by an appeal to the Federal Supreme Court against the cantonal decision, an appeal in matters of public law, within five days, in accordance with articles 82 let. c, 88 al. 1 let. b and 100 al. 3 let. b LTF. 36

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COMMENTARY ON

Art. 14 PRA

A commentary by Pascal Mahon

SUGGESTED CITATION

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Art. 14 Report on the vote

[1] In every polling station, a report shall be drawn up on the result of the vote which states the total number of persons eligible to vote and the number of Swiss citizens resident abroad who are eligible to vote, the total number of voters, the total number of blank, invalid and valid ballot papers, and the number of votes cast in favour of and against the proposal.

[2] The report shall be sent to the cantonal government. The cantonal government shall compile the provisional results from the entire canton, notify the Federal Chancellery of the results and publish the same in the official cantonal gazette within 13 days of the polling day. If necessary, the cantonal government shall publish a special issue of the official cantonal gazette.

[3] The cantons shall submit the report, and if so requested, the ballot papers, to the Federal Chancellery within ten days of expiry of the period allowed for an appeal to be lodged (Art. 79 para. 3). Following validation of the result of the vote, the ballot papers shall be destroyed.

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I. HISTORY, SYSTEMATICS AND IMPORTANCE OF THE PROVISION

1 As indicated by its title, which is the same in all three language versions, art. 14 deals with the recording of votes and, like the other provisions of Title 2, applies only to (federal) votes, and not to elections, as has already been noted in the case of these other provisions. In the case of elections, the question of minutes is dealt with elsewhere in the law.

2 Art. 14 existed in almost the same wording as the current text in the original 1976 version of the law, where it already contained its three paragraphs, which had been taken over, without any change apart from a very slight editorial amendment to paragraph 1, and virtually without discussion, from the Federal Council's proposals.

3 Since then, only two relatively minor changes have been made to the provision. Firstly, paragraph 1 was slightly expanded in the revision of June 21, 1996, which came into force on November 1, 1997, to complete the list of headings to be included in the minutes, by adding, alongside the number of registered voters, the number of Swiss abroad ("including the number of Swiss abroad"). In this respect, the two chambers of Parliament adopted the Federal Council's proposals in their entirety - subject to a minor editorial amendment - and without discussion. The Federal Council had also taken advantage of the revision to change the content of the provision slightly, but only in form. According to the Federal Council's message, the addition of the obligation to mention the number of Swiss citizens abroad in the minutes was merely intended to codify "the practice that has developed".

4 The second amendment to Art. 14 concerns paragraph 2, which was clarified in the partial revision of the law of June 21, 2002, which came into force on January 1, 2003. Here too, the Federal Assembly adopted the Federal Council's proposal unchanged, with the exception of a formal detail, and without discussion. The only new feature of this revision was to set a thirteen-day deadline for the cantons to publish the results of the vote in their official gazette. We will return to the reasons for this clarification later.

5 Paragraph 3 has remained unchanged since the law came into force in 1978.

In terms of its structure, Art. 14 therefore comprises three paragraphs, dealing with the drawing up of the voting minutes by the polling station, and the contents of these minutes (para. 1), as well as the transmission of these minutes to the cantonal government, for a summary of the provisional results in the canton, in the first instance (para. 2), and then the transmission of these results to the Federal Chancellery, in the second instance (para. 3). We will return to each of these paragraphs below, in the commentary proper (section II). 6

With regard to the importance of the provision in general, reference can be made to what has already been said in the commentary on art. 10 to 13, on the significance and fundamental importance of the rules governing the organization of popular votes in the Swiss constitutional and political system, characterized by a (very) strong dose of direct democracy. This applies in particular to the correct establishment of the results of each ballot, as well as the documentation of these results, of which the minutes are a central element. As already mentioned in relation to articles 12 and 13, the guarantee of the freedom to vote (art. 34 Cst.) implies a requirement for precision in the qualification, sorting and counting of ballot papers, which must carefully distinguish and separate invalid or invalid ballot papers, blank ballot papers and valid ballot papers. It may be added that any vote - like any election - is based on the assumption that its outcome is established correctly or, to use the expression of the Federal Court, that the freedom to vote implies a "right to a regular execution of the ballot and to a precise and exact counting of the votes". This requirement gives rise to an obligation to document the results, so that it can be verified, if necessary, that they have been established correctly and in compliance with legal provisions. 7

All cantons thus have provisions similar to Art. 14 in their own areas, and in different forms, which deal with the counting of votes, the tabulation of results and the documentation of these operations, by means of minutes. 8

II. COMMENTARY

A. Paragraph 1: preparation and content of the voting minutes

Paragraph 1 of Art. 14 stipulates that "[a]fter each vote, the officials of each polling station shall draw up a report in which they shall indicate the total number of registered voters, including the number of Swiss abroad, the number of voters, the number of blank, invalid and valid ballots, as well as the 9

number of voters who accepted the project and the number who rejected it". The provision therefore deals with the drawing up of the minutes and their content.

10 As is clear from the text of the provision, the obligation to draw up minutes falls on the "officials of each polling station", and this "after each vote". It should be said, rather, for each subject submitted to a vote, insofar as separate minutes are required for each of these subjects (see N 13 below). There will therefore be as many minutes as there are polling stations in each canton, multiplied by the number of items put to the vote on the date in question.

11 It should be pointed out at this point that the federal law does not regulate the question of polling stations, which therefore falls within the competence of the cantons, as a manifestation of "the execution of the vote" within the meaning of art. 10 para. 2 LDP. All cantons have regulations on polling stations (or electoral offices), governing their composition and tasks. Generally speaking, these polling stations are set up on a communal scale - often with several polling stations or polling places per commune - often assisted by a cantonal polling station. They are made up of citizens, usually from the commune, with political tendencies or parties also represented, optionally or compulsorily, if necessary "equitably" or "fairly". This relatively open composition - in the form of a collegiate body representing the population and, where appropriate, political tendencies or parties - is seen as an additional guarantee of the correct establishment of the results. What's more, the counting of votes is often, by law, open to the public, which also contributes to the idea of transparency.

12 While the Federal Act is silent on the subject of polling stations, it does regulate the content of the minutes to be completed by each polling station, in the sense that Art. 14, para. 1 lists the various headings or references that must appear in this document, namely "the total number of registered voters, including the Swiss abroad, the number of voters, the number of blank, invalid and valid ballots, as well as the number of voters who accepted the proposal and the number who rejected it". As emphasized in the Federal Council's message, the "indications required by paragraph 1 are indispensable for verifying the data relating to the decisive majority" within the meaning of art. 13 of the LDP, and for deciding on the outcome of the vote accordingly. These data, particularly the first two (number of registered citizens and number of voters), also make it possible to determine the turnout rate. With regard to the number of invalid and blank ballots, which are not taken into account in determining the

result of the vote but are counted as such, please refer to the commentary on art. 13 (especially para. 1).

Federal law deals not only with the content of the minutes, but also with the form they must take. Art. 4 para. 1 of the Ordinance on Political Rights stipulates that "the minutes must be drawn up in accordance with the model in Appendix 1a (normal case) or 1b (initiative and counter-project)". These two appendices thus include two different models of minutes: one for votes concerning a single object or act (a constitutional revision proposed by the authorities or a referendum on a law, or a popular initiative to which no counter-proposal is opposed, for example); the other for votes concerning a popular initiative and a direct counter-proposal by the Federal Assembly, i.e. votes in which citizens are asked to answer three questions, including the subsidiary question, according to the system of art. 139b of the Federal Constitution and art. 76 of the LDP. In this specific case, the minutes therefore provide not only the number of votes cast in favor of each of the two texts and the number of votes cast against them, but also the answers to the subsidiary question, the preference between the two texts, and consequently the number of votes cast for each of the possible answers. In any case, it follows from these models that separate minutes must be drawn up for each item put to the vote. 13

B. Paragraph 2: Establishment of provisional results in the canton and communication to the Federal Chancellery

Under Art. 14, para. 2, the minutes are then "forwarded to the cantonal government", so that it can "summarize the provisional results for the entire canton, communicate them to the Federal Chancellery and publish them in the canton's official gazette within 13 days of the day of the vote. If necessary, it publishes the results in a separate issue. 14

In each canton, the cantonal government therefore has the task of centralizing the minutes, on the basis of which it "summarizes the figures and communicates the provisional totals to the Chancellery". Art. 5, paras. 1 and 2 of the ODP actually provides for a slightly different, and slightly more precise, process for centralizing the minutes and transmitting the provisional results: "The cantonal government instructs the official services designated for this purpose by cantonal law to immediately transmit, by an appropriate means, the results of the ballot to the cantonal central service responsible for collecting them" (para. 1), whereupon "[t]he cantonal central service immediately 15

transmits, in electronic form, the provisional results to the federal service designated by the Federal Council" (para. 2). The transmission of the minutes to the cantonal central service and that of the provisional results to the Federal Chancellery must therefore take place without delay.

16 Art. 5 para. 3 ODP recalls and specifies the content of these provisional results as they must be transmitted to the federal service: "The provisional results of the communes and the canton transmitted by the cantonal central service include: a. the number of electors; b. the number of yes and no votes, blank ballots and invalid ballots; c. the number of votes cast and the number of invalid ballots; d. the number of votes cast and the number of invalid ballots; e. the number of votes cast and the number of invalid ballots. in addition, in the case of popular initiatives accompanied by a counter-proposal, the number of votes recorded for each of the three questions in the minutes under the heading 'no response' and the number of votes received, in the subsidiary question, by the popular initiative and by the counter-proposal".

17 Finally, art. 5, para. 4 of the ODP stipulates that these "provisional results must not be made public before 12 p.m. on the day set for the vote".

18 Nevertheless, and subject to this reservation, the second part of art. 14 para. 2 of the law stipulates that it is the responsibility of the cantonal government to publish these provisional (cantonal) results "in the Official Gazette of the Canton", at the latest "within 13 days of the day of the vote"; the provision even specifies that, "if necessary, it shall publish the results in a separate issue". As the Federal Council's message reminds us, this publication of provisional results in the canton's official gazette is important, insofar as it constitutes the starting point of the appeal period for any challenges to these results:

"The time limit for appeals in matters of voting rights - 2nd paragraph - begins to run from the notification of the provisional cantonal result of the vote in the official publications organ (art. 75, 2nd paragraph)."

19 As we have seen, the second paragraph was amended in the revision of June 21, 2002, which came into force in 2003, to set a deadline of thirteen days for the cantons to publish the results of the vote in their official gazette. The introduction of this maximum deadline was prompted by the reform of the justice system, which made the Federal Supreme Court - and no longer the Federal Council - the competent authority to hear appeals in matters of federal

political rights, especially appeals concerning federal votes, as the Federal Council's message on this revision explained:

"The new provision gives the cantons a maximum of thirteen days in which to publish the results in their official gazette, failing which it will no longer be possible to validate the results at national level in time, since the reform of the justice system brought about by the new Constitution has made the Federal Supreme Court the new appeal body (art. 189, para. 1, let. f, Cst.), which was previously the Federal Council. This being the case, the latter will no longer be able to make its own decisions and simultaneously validate the result of the vote (cf. art. 15 and 81 LDP), which will lead to delays. Measures must therefore be taken to prevent any blockage in the smooth running of democracy, which could result from a cleverly orchestrated flood of appeals (see also the commentary on art. 15). One of these measures will be to set a deadline for cantonal authorities to publish the results of their canton in their official gazette, if necessary in a special issue, the procedure being the same as that used for federal elections (cf. the commentary on art. 52, para. 2)."

On this point, art. 6 ODP supplements and clarifies the legal provision, stipulating that "[t]he cantonal government shall immediately publish the content of the minutes of the vote, excluding any observations or decisions, in the official cantonal gazette. It shall indicate the channels of appeal within the meaning of art. 77 LDP". 20

C. Paragraph 3: transmission of minutes to the Federal Chancellery and destruction of ballot papers

Under the terms of Art. 14, para. 3, "[t]he cantons shall transmit the minutes and, on request, also the ballot papers, within ten days of the expiry of the appeal period (Art. 79, para. 3), to the Federal Chancellery. Once the result of the vote has been validated, the ballot papers are destroyed". This provision, which has not been amended since the law came into force in 1978, therefore deals with the transmission of the minutes - and no longer the provisional results - to the Federal Chancellery once the appeal deadlines have expired, on the one hand, and the destruction of the ballot papers, on the other. 21

1. First sentence: transmission of minutes

22 The provision stipulates that the minutes are to be forwarded to the Federal Chancellery by the cantons "within ten days of the expiry of the appeal period (art. 79, para. 3)". Art. 79 para. 3 LDP, to which reference is made, stipulates that "the cantonal government shall notify its decision on the appeal and the other measures taken in accordance with arts. 34 to 38 and 61 para. 2 of the Federal Law of December 20, 1968 on administrative procedure, and shall also communicate them to the Federal Chancellery". In particular, these provisions of administrative procedure oblige the authority - in this case the cantonal government as the (first) appeal authority - to notify its decisions, indicating the channels and time limits for appeal. Based on this reference, the first sentence of art. 14 para. 3 therefore means that the minutes must be sent to the Federal Chancellery within ten days of the expiry of the deadline for appealing against (any) decisions on appeal by the cantonal government. It should be remembered that cantonal government decisions on appeals in this area (i.e. decisions concerning votes, within the meaning of art. 77 para. 1 let. b LDP) are now subject to "appeal to the Federal Tribunal in accordance with the Federal Tribunal Act of June 17, 2005". This extended to the Federal Tribunal the power to rule on disputes concerning federal political rights, a power which previously belonged - in the case of appeals "concerning votes" within the meaning of art. 77 al. 1 let. b LDP - to the Federal Council. In accordance with art. 100 al. 3 let. b FSCA, this appeal to the Federal Supreme Court must be lodged within five days of notification of the cantonal government's decision on the appeal.

23 The ten-day period within which the canton must send the voting minutes to the Federal Chancellery therefore begins when the five-day period for any appeals against the cantonal government's decision on appeal expires.

24 Logically, if there has been no appeal to the cantonal government, this transmission must take place earlier, at the latest within ten days of the expiry of the deadline for lodging an appeal with the cantonal government, i.e. within three days of "the discovery of the grounds for the appeal, but at the latest on the third day after publication of the results in the official gazette of the canton" (art. 77 para. 2 LDP).

25 At the request of the Federal Chancellery, the cantons must also send the ballot papers to the Federal Chancellery within the same time limit.

2. Second sentence: destruction of ballot papers (and minutes)

As already mentioned, the second sentence of paragraph 3 deals with the destruction of ballot papers, stating: "Once the result of the vote has been validated, the ballot papers shall be destroyed". The text of the provision thus explicitly refers to the validation of the results, which is itself governed by art. 15 of the LDP, as the determining moment for this destruction. 26

The Federal Council's message gave the following explanation: 27

"Paragraph 3 specifies that ballot papers are destroyed once the results of the vote have been validated. Under current law, the cantons are required to make ballot papers available to the Federal Council. This provision is unclear.

The idea is therefore, in the words of art. 15 para. 1 LDP, to wait for the "Federal Council to establish the definitive result of the vote (validation) as soon as it has been established that no appeal has been lodged with the Federal Tribunal, or as soon as the rulings on such appeals have been handed down" before proceeding to destroy the ballot papers. 28

It should also be pointed out that art. 4 para. 3 ODP deals with the destruction not of ballot papers, but of voting records, stipulating that "[t]he Federal Chancellery shall determine the time from which the records may be destroyed". 29

The author would like to thank Mr. Beat Kuoni, legal expert in the Political Rights Department of the Federal Chancellery, for his careful review of this contribution.

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COMMENTARY ON

Art. 15 PRA

A commentary by Pascal Mahon

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Art. 15 Validation and publication of the result of the vote

[1] The Federal Council shall ascertain the result of the vote (validation) as soon as it is established that no appeal against the vote has been filed with the Federal Supreme Court, or as soon as a decision has been made on such an appeal.

[2] The validation decree shall be published in the Federal Gazette.

[3] Amendments to the Federal Constitution shall come into force on their adoption by the People and the cantons, unless the proposal provides otherwise.

[4] Where a change in the law cannot be delayed and as soon as the result of the vote is beyond dispute, the Federal Council or the Federal Assembly may bring draft legislation or federal decrees on the adoption of international treaties provisionally into force prior to the completion

of the validation procedure, or in the case of emergency federal acts, allow such acts to remain in force provisionally, or repeal the same.

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I. HISTORY, SYSTEMATICS AND IMPORTANCE OF THE PROVISION

1 As indicated by its title, which is the same in all three language versions, Art. 15 deals with the validation and publication of (federal) voting results. Like the other provisions of Title 2, the provision applies only to votes, not to elections, for which there are other provisions in the law on the validation and publication of results.

2 The provision already existed, but in a significantly shorter version, and with only three paragraphs, the first three, in the original version of the law, in 1976. The two chambers of Parliament adopted the Federal Council's proposals virtually unchanged, apart from a very slight editorial amendment to paragraph 3, and without discussion.

3 Since then, the provision has undergone only two modifications, both linked to the reform of the justice system and the transfer to the Federal Supreme Court of the jurisdiction - previously held by the Federal Council - to hear appeals for violation of federal political rights, particularly in connection with federal votes. On the one hand, the wording of paragraph 1 was amended with the adoption of the Federal Supreme Court Act (LTF) on June 17, 2005, precisely to take account of this transfer of jurisdiction.

4 In addition, the partial revision of the Political Rights Act of June 21, 2002, which came into force on January 1, 2003, added a new paragraph 4 to Art. 15. In this respect, the Federal Assembly adopted the Federal Council's proposal in full, without discussion. We will return to the reasons for this addition below.

5 For the rest, Art. 15 has undergone no further changes since the law came into force in 1978.

6 With regard to its structure, Art. 15 thus consists of four paragraphs, dealing with the validation of voting results (para. 1) and their publication in the Federal Gazette (para. 2), as well as the entry into force of amendments to the Constitution (para. 3) and the hypothesis of the provisional entry into force - or provisional maintenance in force - of certain acts prior to the definitive validation of voting results (para. 4).

With regard to the importance of the provision in general, we will simply refer to what has already been said in the commentary on art. 10 to 14, on the significance and fundamental importance of the rules governing the organization and conduct of popular votes - in particular the correct establishment of results - in the Swiss constitutional and political system. 7

All the cantons have provisions similar to art. 15, which deal with the validation and publication of cantonal and communal voting results. 8

II. COMMENTARY

A. Paragraph 1: validation of results by the Federal Council

1. The concept of validation and its evolving meaning

Paragraph 1 of art. 15 stipulates that "[t]he Federal Council confirms the definitive result of the vote (validation) as soon as it has been established that no appeal has been lodged with the Federal Tribunal or as soon as the judgments on such appeals have been handed down". As already stated in the 1975 Federal Council message, Art. 15: 9

"... defines the notion and legal character of validation, which is the establishment of the irrevocably established result of the vote."

We shall see later that this assertion of the definitive nature of validation needs to be qualified in the light of recent Federal Court case law.

As is clear from the very text of paragraph 1, validation is therefore - subject to the reservation just mentioned - the establishment of the "definitive result of the vote". It represents the "official act which establishes the content of the popular will" and the "act by which an authority ascertains both the result and the regularity of a ballot", an act which "takes effect from the moment of its publication, in the official organ provided for this purpose". The validation decision thus, in principle, formally puts an end to the procedure for adopting a norm or to the legislative procedure. 10

In the case of a vote, therefore, a distinction must be drawn between the provisional results of the ballot and their declaration, which are established immediately, in principle on the day of the vote itself, and which fall within the scope of art. 14 of the LDP, and the formal (and in principle definitive) valida- 11

tion of the ballot and its results, which takes place at a later date and is the subject of art. 15 para. 1 of the LDP.

12 As the 1975 Message also made clear, the provision now gave the Federal Council the power to validate the results of all federal votes, including votes on constitutional amendments:

"While the results of votes on federal laws and decrees have been validated by the Federal Council since 1874, the Federal Assembly has until now validated constitutional amendments itself, in the absence of a legal provision. In order to ensure complete legal certainty with regard to voting (Title 6 of the bill), and in view of the relatively minor importance of this competence and the additional workload imposed on Parliament, it seems appropriate and justified to delegate this responsibility to the Federal Council. In some cases, this delegation has been granted, due to lack of time (e.g. the Federal Decree of December 27, 1963 concerning the extension of the Confederation's financial regime)."

Since 1978, therefore, the Government has had sole authority to validate the results of all federal votes, regardless of the type of act concerned.

13 As we have seen, paragraph 1 was amended when the Federal Supreme Court Act (LTF) of June 17, 2005 came into force on January 1, 2007. Whereas the original 1976 text simply stated that "[t]he Federal Council establishes the definitive result of the vote (validation)", the end of the sentence was added, i.e. the temporal precision "as soon as it is established that no appeal has been lodged with the Federal Tribunal or as soon as the judgments handed down on such appeals have been pronounced". This addition is explained by the fact that, prior to the entry into force of the reform of the justice system and the new Federal Supreme Court Act, it was the Federal Council itself that was the appeals authority for challenges to cantonal government decisions on appeals concerning "irregularities affecting votes (appeals concerning votes)", within the meaning of art. 77 para. 1 let. b LDP. Consequently, as the authority competent both to hear appeals against votes and to validate the results of such votes, the Federal Council did not need to specify the moment of validation, which logically took place after it had itself decided on any appeals.

14 The Federal Council had in fact proposed that this logic be enshrined in law, and it was with the partial revision of March 18, 1994, which came into force on November 15, 1994: Parliament, following the Federal Council's proposal

without amendment or discussion, added a new second sentence to art. 81 of the LDP, worded as follows: "The Federal Council shall rule on the appeal before declaring the final result of the vote (art. 15, para. 1)". This clarification disappeared, however, insofar as Art. 81 of the LDP was subsequently simply repealed when the Federal Supreme Court Act was passed.

With the transfer to the Federal Supreme Court, as a result of the reform of the justice system, of the power to rule on appeals concerning votes within the meaning of art. 77 para. 1 let. b LDP, it became necessary to introduce a new clarification, namely that the validation of vote results by the Federal Council can and must only take place once it has been "established that no appeal has been lodged with the Federal Supreme Court, or as soon as the rulings on such appeals have been handed down". 15

Paragraph 1 of art. 15 LDP thus means that the Federal Council must await the outcome of any appeals to the Federal Supreme Court before validating the final results of federal referenda. And the Federal Council is bound in this respect, with regard to the regularity of the vote, by any decisions of the Federal Court, concerning for example the annulment of a vote or the ordering of a recount. This has the effect of reducing the significance of the Federal Council's validation decision, which, according to some authors, has little more than an "accounting" or "notarial" function. 16

In any case, the validation decision currently takes the form of a "decree of the Federal Council recording the result of the federal vote of ...", with the final official results of each of the items put to the vote in the vote in question appended. 17

This validation decree of the Federal Council is not, as such, subject to appeal to the Federal Court, by virtue of art. 189 para. 4 of the Constitution. 18

2. Art. 15 and "retrospective" judicial review

The rule that the Federal Council must await the outcome of any appeals to the Federal Supreme Court before validating the final results applies to "ordinary" appeals, so to speak, i.e. appeals lodged against votes within the time limits laid down in the legislation on political rights and the law on the Federal Supreme Court. 19

20 On the other hand, in view of the Federal Supreme Court's recent - and much-discussed - case law, inaugurated in 2011 and confirmed in 2019 when the first federal vote in history was annulled, this does not prevent the result of a federal vote from being called into question at a later date, once it has been validated by the Federal Council. In this case law, the Federal Supreme Court accepted, as it had previously done for cantonal votes, that it is possible to challenge retrospectively, by means of a public law appeal, and under certain specific conditions, the validity or regularity of a federal vote, even after the vote has been validated by the Federal Council, and well after the expiry of the "ordinary" appeal period, if it transpires that the vote was tainted by irregularities discovered after the event, and which could not be invoked beforehand. This is sometimes referred to as "retrospective" review - or "retrospective" or "subsequent" legal protection ("nachträgliche Prüfung") - of the regularity of a federal vote.

21 It is well known that, in a subsequent decision of March 23, 2021, the Federal Supreme Court somewhat corrected and qualified its jurisprudence, and considered as exceptional, and subject to strict conditions, the possibility of contesting a posteriori the (results of) federal votes, a possibility which it did not, however, formally call into question.

22 It follows from this case law that - contrary to what the Federal Council's 1975 message indicated - the Federal Council's validation of the results of a vote within the meaning of art. 15 para. 1 LDP is not or no longer absolutely definitive, or that this "result [is no longer] irrevocably established". As one author points out, "validation no longer completely fulfils this historic role", insofar as "jurisprudence now admits, under certain conditions, that a ballot may or must be subject to judicial review after it has been validated".

23 Another question raised by this case law, again in connection with art. 15 para. 1 LDP, is whether, in the event of a vote being annulled by the Federal Supreme Court, the Federal Council is obliged to review or partially annul its validation decree. In its ruling of April 10, 2019, the Federal Supreme Court decided to do so, and enjoined the Federal Council "to adapt its validation decree ex officio to the new ruling of the Federal Supreme Court", on pain of finding itself "in conflict with the duty imposed on it by art. 182 para. 2 Cst. to ensure the implementation of judgments handed down by the federal judicial authorities". The Federal Council justified this injunction and followed it, partially repealing the decree validating the vote of February 28, 2016, by deci-

sion of June 21, 2019. However, some experts believe that this should not - and should not - have been the case.

B. Paragraph 2: publication (of the validation) of the results in the Federal Gazette

Paragraph 2 of art. 15 stipulates that "[t]he validation decree shall be published in the Federal Gazette". This provision, which already existed in the original 1976 version of the law and has not been amended since, does not call for much comment. At most, we can point out that it falls into the category of publications in the Federal Gazette mentioned in art. 13 para. 1 let. g of the Federal Act on the Compilations of Federal Law and the Federal Gazette (Official Publications Act, LPubl) of June 18, 2004. According to this provision, "other texts that must be published by virtue of federal legislation" are published in the Feuille fédérale. 24

It follows from the text and system of art. 15 LDP - as well as from simple logic - that the publication (validation) of results in the Federal Gazette follows their validation by the Federal Council. 25

At present, the validation decree (see N 17 above) is generally published in the Federal Gazette within two to five months of the vote. In the meantime, however, the provisional official results are published on the Federal Chancellery website. 26

C. Paragraph 3: entry into force of amendments to the Federal Constitution

Paragraph 3 of Art. 15, which has also remained unchanged since the law came into force in 1978, states that "[a]mendments to the Constitution come into force as soon as they have been accepted by the people and the cantons, unless the bill provides otherwise". 27

This provision, which was not commented on in the Federal Council's 1975 message, merely reproduces, at least in its first part, Art. 195 of the Federal Constitution, which states that "[t]he Constitution, as totally or partially revised, comes into force as soon as it has been accepted by the people and the cantons". In this sense, it might at first glance appear unnecessary. 28

29 However, the purpose of this apparent repetition is to remind us of the constitutional rule, and to clarify, in relation to the two preceding paragraphs, that although the results of a federal vote must first be validated by the Federal Council (para. 1 of art. 15 LDP), and then published in the Federal Gazette (para. 2) - operations which take some time, not least because, as we have seen above, the outcome of any appeals to the Federal Supreme Court must be awaited - this does not prevent amendments to the Constitution - which are necessarily subject to mandatory referendum - from "coming into force as soon as they have been accepted by the people and the cantons", i.e. without necessarily waiting for the results of the vote to be validated and published in the Federal Gazette. Revisions to the Constitution therefore come into force, in principle, on the very day of the vote by which they are accepted.

30 In this sense, the first part of paragraph 3 confirms, or reaffirms, that the constitutional rule applies despite the duration of the validation and publication of the voting results, which therefore have no effect on the entry into force of constitutional amendments.

31 The second part of paragraph 3, namely the fact that amendments to the Constitution come into force as soon as they have been accepted by the people and cantons "unless the draft provides otherwise", is on the other hand more surprising and difficult to pin down: this proposal no longer confirms or reaffirms the constitutional rule, but on the contrary provides a derogation, or an exception, which is not contained in the Constitution. Indeed, the constitutional rule makes no provision for such an exception, and "is, at least in appearance, given to be absolute". This is despite the fact that practice tolerates exceptions - as stipulated in art. 15 para. 3, to be precise - even quite frequently, in the sense that the draft constitutional amendment submitted to the vote of the people and the cantons sometimes empowers the Federal Assembly or the Federal Council to set the date of its entry into force, as was the case, for example, for the reform of the justice system, accepted on March 12, 2000, but also for the new Federal Constitution itself, of April 18, 1999.

32 While such derogations from the rule that constitutional amendments must come into force immediately upon acceptance are relatively common in government projects, they are also sometimes found in the text of certain popular initiatives.

The derogatory rule, which delegates to the Federal Assembly or the Federal Council the power to set the date of entry into force of the constitutional amendment at a later date, may appear either in the (constitutional) text submitted to the vote itself - for example, in a transitional provision - or in the federal decree submitting this text to the vote of the people and the cantons. 33

In any case, while accepting the practice and the derogatory rule of art. 15 para. 3 of the LDP, legal doctrine generally stresses that "for democratic considerations and legal certainty, an entry into force should not be unduly delayed, particularly when it is up to Parliament or the federal government to determine it". 34

It should also be remembered that, as the legal literature emphasizes, a distinction must be drawn between the entry into force of constitutional provisions, on the one hand, and their implementation, on the other, which depends in particular on whether or not they are directly applicable. Art. 15 para. 3 of the LDP, like art. 195 of the Constitution, deals only with entry into force, not implementation. 35

Finally, it should be noted that there is some disagreement in the legal literature on the question of publication in the Official Compendium of amendments to the Constitution. For some authors, the fact that the Constitution itself in principle fixes the date of entry into force of such amendments, at the time of their acceptance, means that it is no longer necessary to publish them officially in the Official Compendium. Others, however, with whom we agree, take the view that this is not the case, and that the amendments themselves must also be published, even if they have already come into force. In practice, they are always published. 36

D. Paragraph 4: provisional entry into force of an act

1. Origin and ratio legis of the provision

Paragraph 4 of art. 15, which was introduced with the revision of June 21, 2001 and came into force on January 1, 2002, "[i]f the modification of the law does not suffer any delay and the result of the vote is indisputable, the Federal Council or the Federal Assembly may, before the validation decree is issued, provisionally bring into force a law or a federal decree approving an international agreement"; the provision adds that the authority in question may also, 37

where appropriate, "provisionally maintain in force or repeal a law declared to be urgent". The two chambers adopted the Federal Council's proposal without discussion.

38 The Federal Council's message explained the need for this new provision as follows:

"Whereas until now, decisions on appeals and the validation of voting results were the responsibility of the Federal Council, which made the former decisions and validated the latter at the same time, the reform of the justice system brought about by the new Constitution (art. 189, para. 1, let. f, Cst.) has separated these two operations. At least as a general rule, the validation of the voting result by the Federal Council should logically take place once the Federal Supreme Court has ruled on the appeals lodged by those contesting the result. We submitted proposals on this subject in the message on the new Federal Supreme Court Act (FF 2001 4000). Over the last few years, we have seen more and more evidence that having to wait for the validation decree before bringing a legislative act into force, when the contingencies of national and international law require us to act quickly in the interests of the community, leads to serious disadvantages for the country, which a majority of the people precisely do not want. As for federal laws declared urgent, there is even a systematic risk that they will cease to be in force at the end of the one-year period prescribed by the Constitution if the decree validating the people's "yes" cannot be issued in time due to the flood of appeals, as the following table 1 (corresponds to the original text, no translation) shows:

Opérations	**Temps minimal nécessaire, en jours**
Publication dans la FF /dans le RO	10 jours
Délai référendaire	100 jours
Contrôle des signatures	30 jours
Fixation de la date de la votation populaire (généralement 4 dates par an)	30 jours
Organisation correcte de la votation, d'après les normes	95 jours

Publication du résultat de la votation dans la feuille officielle du canton, recours devant le gouvernement cantonal et décision sur recours	28 jours
Dépôt du recours	5 jours
Total intermédiaire	*298 jours*
Réserve pour la décision finale du Tribunal fédéral, y compris la notification	37 jours
Procédure jusqu'à l'arrêté de validation du Conseil fédéral	15 jours
Publication dans la FF/dans le RO	15 jours
Total	*365 jours*

For all these reasons, when the result of the vote is perfectly clear, the competent authority (Federal Council or Parliament) may, even before issuing the validation decree, provisionally bring into force a federal law or decree approving an international agreement, or maintain in force an urgent federal law if the modification of the law (or its maintenance in the case of an urgent law) does not suffer any delay (art. 15, para. 4, LDP)."

The same message from the Federal Council also gave several examples of federal laws and international agreements on which a referendum had been requested and which had been - or were due to be - submitted to a popular vote, but which had "had to come into force earlier than planned once the result of the vote was known, if not immediately after the referendum had been declared successful". The message goes on to cite a dozen such cases, including the Federal Decree on Switzerland's membership of the Bretton Woods institutions and the Federal Act on Switzerland's participation in the Bretton Woods institutions in 1992, the Federal Act on the increase of import duties on fuels, dated October 9, 1992, in 1993; the Federal Decrees on accession to - and approval of - the Agreement establishing the World Trade Organization (WTO), in 1994-1995; the four Federal Acts constituting the reform of the PTT, in 1997, etc. . 39

40 The Government's intention with this new paragraph 4, which the Chambers adopted without discussion, was to give the authorities - the Federal Assembly itself or the Federal Council, as the case may be - the power to "provisionally bring into force a federal law or decree approving an international agreement" without waiting for the decree validating the results of the vote and its publication.

41 For federal votes other than those on constitutional amendments, the new paragraph 4 therefore performs a function somewhat analogous to that of paragraph 3 for votes on constitutional amendments. While such amendments normally come into force automatically (unless an exception is made), i.e. without having to be "put into force", from the moment of their acceptance by the people and the cantons, i.e. without waiting for the validation and publication of the results, paragraph 4 allows the authorities, under certain conditions, to do the same for acts other than constitutional amendments, i.e. to "provisionally bring into force a federal law or decree approving an international agreement", and to do so "before the decree validating" the popular vote is issued.

2. Excursus: art. 15 para. 4 LDP and provisional application of treaties under art. 7b LOGA

42 This power of the Federal Council to provisionally bring into force certain acts, in particular a decree approving an international treaty accepted by popular vote, without waiting for the decree validating the popular vote in question, should not be confused with the institution of provisional application of an international treaty even before its approval by the Federal Assembly, an institution introduced subsequent to art. 15 LDP, in the Federal Act on the Organization of Government and Administration (LOGA), by a revision of October 8, 2004, in force since January 1, 2005.

43 Art. 7b LOGA, the wording of which was slightly modified by a revision of June 21, 2019, in force since December 2, 2019, thus provides that "[w]hile the approval of the conclusion or modification of an international treaty is a matter for the Federal Assembly, the Federal Council may decide or agree on its provisional application without the approval of the Federal Assembly if the safeguarding of essential interests of Switzerland and a particular urgency so require" (para. 1), with the proviso that the Government "renounces provisional application if the competent committees of both Councils oppose it" (para.

1bis) and that "[t]he provisional application of an international treaty ends if, within six months of the start of provisional application, the Federal Council has not submitted to the Federal Assembly the draft federal decree approving the treaty concerned" (para. 2).

The two institutions should not therefore be confused, since they are so different in terms of their material and temporal scope, as well as their "political" importance. Whereas art. 7b LOGA potentially covers all treaties whose approval falls within the competence of the Federal Assembly, within the meaning of art. 166 para. 2 of the Swiss Constitution, art. 15 para. 4 LDP applies, possibly, only to treaties whose act of approval - already adopted by the Federal Assembly - is subject to a vote of the people (optional referendum) or to a vote of the people and the cantons (mandatory referendum) and has effectively (already) been accepted by popular vote. As a result, art. 7b LOGA applies prior to approval by the Federal Assembly, whereas art. 15 para. 4 LDP applies only to treaties that have already been approved by the Federal Assembly and, indeed, accepted by popular vote, and then only on a provisional basis and for a period ranging from a few days to a few months at most, between the vote accepting the treaty and the date of its validation. The scope of Art. 15 para. 4 LDP is therefore much narrower than that of Art. 7b LOGA, and its importance significantly less. 44

The provisional application of a treaty that has been accepted by popular vote, but whose validation has not yet been adopted and published, as provided for in art. 15 para. 4 LDP, is obviously much less politically sensitive than the provisional application, as provided for in art. 7b LOGA, of an international treaty that has not even yet been approved by Parliament. This is why provisional application is subject to very strict conditions, namely, as the text of the law states, that provisional application is required by "the safeguarding of essential interests of Switzerland and a particular urgency", and that it must be approved after the fact by the Federal Assembly. 45

3. Back to art. 15 para. 4: its use in practice and conditions of application

Since it came into force in 2002, art. 15 para. 4 has hardly been applied. The question has apparently been raised in some cases, but a solution has always been found to avoid the need for provisional enactment - or maintenance - in the sense that the validation decree has almost always been issued and pub- 46

lished before the act in question comes into force. It may also be asked whether a solution, which has apparently not been (or should not have been) used to date, might not further reduce the risk of having to resort to provisional entry into force or maintenance in force within the meaning of art. 15 para. 4 of the LDP: the provision, at least in cases where it proves necessary, of separate validation decrees for each (or for some) of the objects submitted to the same popular vote. Such a procedure, of separate or individual validation decrees, if necessary, seems legally admissible, even recommended, particularly from the point of view of the principle of proportionality, in that it would represent a milder measure than that of provisional entry into force.

47 In any case, the only known case of application of Art. 15 para. 4 to date occurred recently, in the context of the first amendment of the urgent Federal Act on the legal basis of Federal Council ordinances to overcome the COVID-19 epidemic (COVID-19 Act), of September 25, 2020. This first revision of the COVID-19 Act, adopted on March 19, 2021, also in the form of an urgent law, came into force on March 20, 2021, with effect until December 31, 2021 for some of its provisions, but until dates later than March 19, 2022 for others. This revision was also subject to a referendum, and the popular vote took place on November 28, 2021, with the law being accepted by around 62% of the citizens who took part in the vote. However, in accordance with Art. 165 para. 2 of the Swiss Constitution, this amendment should have ceased "to have effect one year after its adoption by the Federal Assembly if it has not been accepted by the people within this period", i.e. by March 19, 2022. By this date, however, the decree validating the results of the November 28, 2021 vote had not yet been adopted or published, nor was it ready to be, not least because of the numerous appeals lodged against the vote. The Federal Council therefore decided to rely on Art. 15 para. 4 of the LDP to provisionally maintain the provisions of the revised COVID-19 law in force, pending validation of these results. This was done by decree on March 11, 2002, published in the Feuille fédérale. The decree validating the results of the November 28, 2021 vote was adopted one month later, on April 11, 2022.

48 It is clear from this first case of application that, as far as form is concerned, the decision to bring into force - or maintain in force - provisionally must be published, and rightly so, in this case in the Federal Gazette. With regard to the authority to take such a decision, however, it is unclear whether the Federal Council or the Federal Assembly is responsible for deciding whether a

law or federal decree approving a treaty should be brought into force - or remain in force - provisionally, and art. 15 para. 4 is not at all clear in this respect. The text of paragraph 4 refers to both "the Federal Council or the Federal Assembly", and the preparatory work seems to indicate that it is "the competent authority (Federal Council or Parliament)", depending on the case. In the case in point, however, the decision to provisionally maintain the revised COVID-19 law in force was taken by the Federal Council, even though the revised law in question did not contain a clause delegating its implementation to the Federal Council.

As far as the substance is concerned, the two conditions laid down for such a provisional entry into force, without waiting for the results of the vote to be validated and published in the Federal Gazette, are, as is explicitly stated in the provision, on the one hand, that "the modification of the law does not suffer any delay" and, on the other hand, "that the result of the vote is indisputable". With regard to the first of these conditions, the Federal Council's message cites "serious disadvantages for the country, which a majority of the people precisely do not want" (since the popular vote has, by hypothesis, approved the act in question) that could result from "having to wait for the validation decree before being able to bring a legislative act into force, where the contingencies of national and international law require us to act quickly in the interests of the community". The examples of the "interests at stake" provided in the message (cf. N 39 above) at the time in support of the various cases referred to mostly concerned "our country's representation" in international organizations and "a number of significant additional benefits" that our country could derive from its participation in these institutions, on the one hand, as well as "the enormous financial interests of the Confederation which were at stake", or "essentially economic reasons", on the other. These examples do not, however, provide very concrete indications, and in our view the condition that "the modification of the law does not suffer any delay" should not be accepted too readily, even if this condition cannot be as strict as the corresponding one that applies to the provisional application of treaties within the meaning of art. 7b LOGA. 49

With regard to urgent laws, the condition is more concretely understandable, the risk being, as the message also states, that an urgent law "ceases to be in force at the end of the one-year period prescribed by the Constitution if the decree validating the yes of the people cannot be issued in time because of 50

the flood of appeals", which corresponds precisely to the only case, mentioned above, of application of the provision so far. In this case, not allowing the urgent law to be provisionally maintained would have the effect of creating a "hole" in the legislation, as it were, between the end of the one-year period provided for by the Constitution, when the urgent law would cease to be in force, and the moment of the decree validating the results of the vote, when the law would regain its validity and come back into force, which would not go without posing major problems of application of the law over time and legal certainty.

51 With regard to the second condition for the application of art. 15 para. 4, i.e. "that the result of the vote is incontestable", this requirement undoubtedly refers to the result of the vote itself, in particular to its more or less clear nature, i.e. the difference in votes. The clearer the result, and the greater the difference in votes, the more easily art. 15 para. 4 can be applied; conversely, the closer the result, the more restraint the authority will have to exercise in applying the provision. However, it may also be hypothesized that the closeness of the result - the difference in the number of votes - is not the only determining factor, and that the nature, or seriousness, of the objections to a voting result, in any appeal procedures that may be opened, may also play a role. The more serious the grievances, and the more likely they are to lead to the annulment of the vote, the more restraint the competent authority will have to exercise in applying art. 15 para. 4. Conversely, if the pending appeals concern grievances of little seriousness, notably irregularities a priori unlikely to lead to the annulment of the vote, the authority should enjoy greater latitude in its decision to make use - or not - of the possibility offered by art. 15 para. 4.

52 In any case, as we have seen, the federal authorities have so far shown a certain restraint, and rightly so, in the use of this provision.

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COMMENTARY ON

Art. 16 PRA

A commentary by Luka Markić

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Title 3 Election of the National Council

Chapter 1 General

Art. 16 Allocation of seats to the cantons

[1] The allocation of seats in the National Council among the cantons is based on the figures for the resident population obtained from the register-related surveys carried out as part of the census in accordance with the Census Act of 22 June 2007 in the first calendar year following the previous general elections to the National Council.

[2] Based on the binding figures for the resident population in accordance with Article 13 of the Census Act of 22 June 2007, the Federal Council shall make a binding decision on the number of seats to be allocated to each canton in the follow general election to the National Council.

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I. HISTORY OF ORIGINS

Since the founding of the modern federal state, the seats of the National Council have been distributed among the cantons in proportion to their resident population. In addition to Swiss citizens, foreigners are also counted, but not Swiss citizens living abroad. In the past, there have been various attempts to change the basis for calculating the distribution of seats among the cantons. All parliamentary reform attempts failed. Even the popular initiative (Hochstrasser Initiative) launched by National Councilor Candid Hochstrasser (KK/LU), which demanded that the distribution of seats in the National Council be based on the number of Swiss citizens, failed in 1903 due to both the popular vote and the majority of the cantons. 1

Until the 2011 National Council elections, the basis for the distribution of seats among the cantons was the result of the census of the resident population (census), which was conducted every ten years. With the entry into force of the totally revised Federal Act on the Federal Population Census of 22 June 2007, the census is now conducted as a register survey (Art. 4 para. 1 Census Act). The official registers of persons of the Confederation, the cantons and the communes serve as the data basis (art. 5 para. 2 lit. a Census Act). With the total revision of the Census Act, Art. 16 para. 1 PRA was also revised. According to the revised provision, the seats must be redistributed among the cantons for each total renewal election. The distribution is based on the figures of the register survey conducted in the first calendar year following the last general renewal elections of the National Council. This revised provision has been applied since the 2015 National Council elections. 2

II. COMPARISON OF LAWS

All cantons that provide for electoral constituencies for the election of their parliament establish rules on the basis for calculating the allocation of seats to the respective electoral constituencies, whereby three variants are conceivable. A majority of the cantons (ZH, BE, LU, SZ, OW, NW, GL, ZG, FR, SO, BS, SH, AR, AI, SG, AG, TG, VD and JU) use the number of permanent residents as the basis for allocating seats to the constituencies, as does the Confederation. 3

A minority of cantons provides for narrower calculation bases for the allocation of seats. In the cantons of Uri, Graubünden and Valais, the permanent 4

Swiss resident population of the electoral districts is decisive for the allocation of seats. In the canton of Basel-Landschaft, the number of voters in the last federal or cantonal referendum held at least twelve months before the election date shall be decisive for the allocation of seats to the electoral districts.

5 In the cantons of Ticino, Neuchâtel and Geneva, the Grand Council (Gran Consiglio or Grand Conseil) is elected in a single electoral district. Therefore, there is no need to allocate seats to the regional constituencies. However, other measures exist in the cantons of Ticino and Neuchâtel to achieve adequate regional representation. In the canton of Ticino, the lists can allocate their own election proposals to constituencies provided for by law in order to ensure regional representation. In the canton of Neuchâtel, the cantonal constitution provides that the law must ensure balanced representation of the various regions of the canton. Therefore, the Neuchâtel law stipulates that each electoral region receives a guaranteed minimum number of seats in the Grand Council. This minimum number of seats is calculated by the State Chancellery on the basis of the cantonal census of the penultimate year preceding the election, based on the resident population of the canton.

III. SIGNIFICANCE OF THE PROVISION AND CONTENT OF THE PROVISION

6 Art. 16 and 17 PRA are implementing provisions of Art. 149 para. 4 FC. This constitutional provision states that the 200 seats of the National Council shall be distributed among the cantons according to population, with each canton having at least one seat. Art. 16 PRA regulates the basis of calculation and the responsibility for the distribution of seats among the cantons. Art. 17 PRA describes the actual seat allocation procedure.

A. Para. 1: Basis for calculating the allocation of seats

7 The basis for calculating the proportional allocation of seats to the cantons shall be the resident population and not the number of persons entitled to vote. The decisive figures for the distribution of National Council seats among the cantons are those resulting from the register surveys conducted as part of the census in accordance with the Census Act in the first calendar year following the last general renewal elections to the National Council (Art. 16 para.

1 PRA). The distribution of seats among the cantons is based on their share in the permanent resident population of Switzerland (Art. 6a VPR in conjunction with. Art. 2 lit. d items 1-3 and 19 lit. a Census Ordinance). The permanent resident population includes all persons registered in Switzerland at their main place of residence.

- persons of Swiss nationality registered in Switzerland;
- foreign nationals outside the asylum process with a residence or settlement permit for at least twelve months or short-stay permits for a cumulative residence period of at least twelve months; and
- Persons in the asylum process with a total duration of stay of at least twelve months.

In the doctrine, it is argued that for reasons of constitutional and democratic theory, it is best to base the calculation regarding the distribution of seats on the permanent resident population. This is justified by the fact that parliament as a body represents not only those entitled to vote, but rather the entire population. The restriction to the Swiss resident population, on the other hand, is justified by the fact that the latter is the ideological bearer of popular sovereignty. A similar argument is made when the eligible voters are used as the basis for calculation. These are the "legal holders of popular sovereignty". However, the number of eligible voters as a basis for calculation is credited in doctrine with the fact that equality of voting power would thus probably be best preserved. All three bases of calculation are compatible with Articles 8 and 34 FC according to the established case law of the Federal Supreme Court. 8

This theoretical discussion regarding the "best" calculation basis for the allocation of seats is irrelevant for states that elect their parliaments in a single constituency and therefore do not have to allocate seats. Naturally, they escape this "resistance of viewpoints". A single electoral district turns out to be an extremely elegant solution in this respect. 9

B. Para. 2: Competence of seat allocation

Art. 16 para. 2 of the PRA determines which authority is responsible for the distribution of National Council seats among the cantons and on what basis the competent authority is to carry out the distribution. Pursuant to Art. 13, 10

Sentence 1, of the Census Act, the Federal Council establishes the population figures every four years in a binding manner and publishes them in the Federal Gazette. The figures from the register surveys conducted in the first calendar year after the general elections of the National Council are decisive for this (Art. 13 sentence 2 of the Census Act). Based on this determination, the Federal Council shall at the same time determine in a binding manner the number of seats to be allocated to the individual cantons (constituencies) in the following general renewal election of the National Council. This shall be done by ordinance.

11 Most recently, the Federal Council issued the Ordinance on the Allocation of Seats in the Overall Renewal of the National Council based on Art. 16 para. 2 PRA and the Federal Council Resolution on the Maintenance of the Numbers of the Permanent Resident Population at the End of 2020 of 1 September 2021. This Ordinance regulates the allocation of seats pursuant to Art. 17 PRA for the total renewal of the National Council for the 52nd legislative term. The next update of the figures for the permanent resident population will take place at the end of 2024. These figures will be decisive for the allocation of seats for the overall renewal of the National Council for the 53rd legislative term.

IV. EXCURSUS: LEGAL PROTECTION

12 At the cantonal level, the distribution of parliamentary seats among the electoral districts repeatedly gives rise to legal disputes. At the federal level, too, there is a possibility of legal protection with regard to the distribution of National Council seats among the cantons. Admittedly, the ordinance of the Federal Council on the distribution of seats in the overall renewal of the National Council cannot be challenged directly before the Federal Supreme Court on the basis of Art. 189 para. 4 FC. However, it is possible that the Federal Council's ordinance may be reviewed incidentally (by way of preliminary question) in the context of a challenge to the cantonal arrangement of the National Council elections as to its compatibility with higher-level law. Thus, those entitled to vote could, by means of an election complaint to the cantonal government (Art. 77 let. c PRA) or a subsequent appeal to the Federal Supreme Court (Art. 80 para. 1 PRA), namely assert calculation errors.

I would like to thank Benjamin Böhler, auxiliary assistant at the Center for Democracy Aarau, for his assistance in researching the material and for his valuable comments in reviewing the text.

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COMMENTARY ON

Art. 17 PRA

A commentary by Luka Markić

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Art. 17 Allocation procedure

The 200 seats in the National Council shall be allocated among the cantons in accordance with the following procedure:

a. *Preliminary allocation:*

The resident population of Switzerland is divided by 200. To obtain the first allocation number, the result is rounded up to the nearest whole number, unless it is already a whole number, in which case it is increased to the next highest whole number. Each canton whose population is lower than this number is allocated one seat, and is excluded from the further stages of the allocation procedure.
The resident population of the remaining cantons is divided by the number of seats that have yet to be allocated. To obtain the second allocation number, the result is rounded up to the nearest whole

number, unless it is already a whole number, in which case it is increased to the next highest whole number. Each canton whose population is lower than this number is allocated one seat, and is excluded from the further stages of the allocation procedure.
This procedure is repeated until the remaining cantons reach the final allocation number.

b. *Principal allocation*: each remaining canton is allocated as many seats as its population divided by the final allocation number.

c. *Final allocation*: the remaining seats are divided among the cantons with the highest fractions of a whole number remaining. Where more than one canton has the same remaining fraction, the canton or cantons with the lower or lowest remaining number that results from the division of their population by the first allocation number are excluded. If this also results in the same remaining number for more than one canton, the allocation of the remaining seats is decided by drawing lots.

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I. HISTORY OF ORIGINS

1 The Federal Constitution of 1848 did not define a fixed number of seats for the National Council. Rather, Art. 61 para. 1 and 2 FC 1848 stipulated that the electorate elect one member of the National Council for every 20,000 souls of the total population. The first National Council therefore had 111 members and was elected by majority vote.

2 With the introduction of proportional representation in 1919 for the election of the National Council, the distribution figure of 20,000 inhabitants per National Council was initially maintained. The D'Hondt method (now known in Switzerland as the Hagenbach-Bischoff method) was used to distribute the council seats among the cantons. It was not until 1931 that the distribution figure was increased to 22 000 inhabitants. This was followed in 1951 by an increase to 23,000 inhabitants per member of the National Council.

3 Due to the steady population growth, the Federal Council feared in 1962 that the then number of members of the National Council might increase from 196 to about 210. This prompted the framers of the Constitution to introduce a fixed number of seats for the National Council. In 1962, when the amendment to Art. 72 FC 1874 was adopted by the people and the cantons, thus setting the number of members of the National Council at 200, the Federal Councils decided, at the request of the Federal Council, to change the method of allocating seats from the Hagenbach-Bischoff method to the Hare/Niemeyer method ("method of allocation to the stronger remnants"). The reason given was that the Hagenbach-Bischoff method used up to now favored the large cantons too much. The new procedure was put into effect on June 12, 1963.

4 When the PRA was created in 1978, the seat allocation procedure according to the Hare/Niemeyer method was adopted. In 1993, the provision was revised. The revision of Art. 17 PRA became necessary because in the previous procedure for allocating National Council seats among the cantons, there was a risk that a canton would not receive a seat by reaching the first allocation figure but not the second. Such an outcome of the procedure would have violated the constitutional guarantee of seats. In order to guarantee the entitlement of each canton to at least one seat, Art. 17 lit. a PRA was amended to the effect that the advance distribution of seats based on increasing distribution figures is repeated until all remaining cantons reach the respective distribu-

tion figure. As soon as this is the case, the remaining seats are distributed proportionally among the remaining cantons as before. With the revision, the previous procedure was only minimally corrected.

II. COMPARISON OF LAWS

The cantons are free to choose the seat allocation procedure. For the Federal Supreme Court, it is not the choice of the seat allocation procedure that is decisive, but rather the final result of the allocation. The cantons mainly use two seat allocation procedures, namely the fraction procedure or Hare/Niemeyer procedure (quota procedure with equalization according to largest remainder) and the Sainte-Laguë procedure (divisor procedure with standard rounding). 5

Like the federal government, most cantons (BE, LU, UR, SZ, OW, NW, FR, SO, BS, BL, AI, SG, GR, TG, VD, VS and JU) use the simple quotient for the first allocation and the largest remainder procedure (Hare/Niemeyer procedure) for the remaining allocation. According to this procedure, the resident population of all constituencies is divided by the number of parliamentary seats to be allocated. The remaining undistributed seats are distributed to the constituencies with the largest remaining numbers. 6

The remaining cantons (ZH, GL, ZG, SH, AI and AG) use the Sainte-Laguë method for seat allocation. Here, the resident population of a constituency is divided by the allocation divisor and rounded to the nearest whole number (standard rounding). The allocation divisor must be redefined before each election in such a way that exactly as many seats can be allocated in the allocation procedure as the parliament has according to the legal requirements. 7

Until the 2017 elections to the Grand Council, Neuchâtel was the only canton to use the Hagenbach-Bischoff method (method of the largest quotient) for the allocation of seats to the electoral districts. In the canton of Neuchâtel, the number of seats to be distributed (115) was thereby increased by one (116), which reduces the division result and the number of undistributed seats. In distributing the seats not allocated in the first round, the population of each constituency was divided by the number of seats allocated to the constituency increased by one. The remaining seats were allocated to those constituencies that had the largest quotient. Since the 2021 elections, the Grand Council of the Canton of Neuchâtel (Grand Conseil) has been elected in a single con- 8

stituency. A distribution of seats among the constituencies is thus unnecessary.

9 In the cantons of Ticino (Gran Consiglio) and Geneva (Grand Conseil), the parliaments are also elected in a single electoral district. Consequently, there is no allocation of seats to electoral districts there either.

III. SIGNIFICANCE OF THE PROVISION AND CONTENT OF THE PROVISION

10 Art. 16 and 17 PRA are implementing provisions of Art. 149 para. 4 FC. This constitutional provision states that the 200 seats of the National Council shall be distributed among the cantons according to population, with each canton having at least one seat. Art. 16 PRA regulates the basis of calculation and the responsibility for the distribution of seats among the cantons. Art. 17 PRA describes the actual seat allocation procedure. This is - in addition to the mandate allocation procedure pursuant to Art. 40 et seq. PRA - the "core of the electoral system".

A. Fractional allocation procedure (largest remainder)

11 For the allocation of the 200 National Council seats to the cantons (constituencies), the fractional number procedure, also known as the Hare/ Niemeyer procedure, is applied. In principle, the population of all cantons is divided by the number of seats to be distributed. Each canton receives as many seats as the division result is contained in its population figure. The undistributed seats are distributed to the cantons with the largest remaining numbers. In arithmetic, the remainder number describes the number that remains after a division if the number to be divided (dividend) is not an exact multiple of the divisor.

12 The procedure according to Art. 17 PRA consists of an advance distribution, a main distribution and a remainder distribution.

1. Preliminary distribution (Art. 17 lit. a PRA)

13 The procedure for the allocation of National Council seats to the cantons shall begin with the advance allocation. The implementation of the advance distribution is mandatory in order to ensure that the constitutional entitle-

ment of each canton to at least one National Council seat is safeguarded (Art. 149 para. 4 sentence 2 FC). This seat entitlement results from the fact that each canton forms an electoral district for the National Council elections (Art. 149 para. 3 FC). This provision is relevant for those cantons which, due to their low population, would be left empty-handed in the distribution without a seat guarantee. With 8,670,300 inhabitants in Switzerland, the cantons of Uri (36,819), Obwalden (38,108), Glarus (40,851) and Appenzell Innerrhoden (16,293) would currently come away empty-handed in the distribution of seats without this constitutionally guaranteed seat entitlement, as they do not reach the representation figure of 43,352 inhabitants. The representation figure is obtained by dividing the population figure by the number of seats in the National Council (8 670 300 / 200). The constitutional seat guarantee and the accompanying advance distribution inevitably lead to a restriction of the equality of voting power, since the eligible voters of the small cantons do not count equally in the distribution of seats compared to the rest of the eligible voters.

In the advance distribution, the population of Switzerland is divided by 200. The next higher integer above the result is the first distribution number. Any canton whose population does not reach this first distribution figure receives one seat in the National Council and is eliminated from further distribution. 14

Next, the resident population of the remaining cantons is divided by the number of seats not yet allocated. The next highest whole number above the result forms the second distribution number. Each canton that also fails to reach this number receives one seat in the National Council and is eliminated for further distribution. This procedure is repeated until the remaining cantons reach the last distribution number. This repetition is necessary so that no canton is left empty-handed after the distribution procedure. 15

2. main distribution (Art. 17 lit. b PRA)

In the main allocation, the seats shall be allocated to the cantons in accordance with the principle of proportional representation. Each remaining canton that has not yet been allocated a seat in the advance distribution shall receive as many seats as the last distribution figure is contained in its population figure. This means that the population figure of each canton is divided by the last distribution figure. The number before the decimal point corresponds to the number of seats the canton receives in the main distribution. The number 16

after the comma (residual number) is relevant for the residual distribution in the next step.

3. residual allocation (Art. 17 lit. c PRA)

17 After the advance distribution and the main distribution, seats remain to be distributed. These are distributed within the framework of the residual distribution. In this process, the remaining seats are allocated to those cantons with the largest remaining numbers resulting from the main allocation. If several cantons reach the same residual number, they shall be eliminated in the order of the smallest remainders resulting from the division of their population figures by the first distribution figure. If these remainders are also equal, the decision is made by lot. Thus, all 200 National Council seats are distributed among the cantons.

B. Example for the National Council elections 2023

18 Using the figures for the permanent resident population at the end of 2020, the following is the distribution procedure for the 2023 National Council elections based on the rules in Art. 17 lit. a-c PRA:

19 According to Art. 1 of the Federal Council Decree on the Maintenance of the Numbers of the Permanent Resident Population at the End of 2020 of September 1, 2021, the resident population is 8,670,300 inhabitants. This results from the resident population figures of the individual cantons:

Kanton	Wohn-bevölkerung Ende 2020	Kanton	Wohn-bevölkerung Ende 2020
Zürich	1 553 423	Schaffhausen	83 107
Bern	1 043 132	Appenzell A.Rh.	55 309
Luzern	416 347	Appenzell I.Rh.	16 293
Uri	36 819	St. Gallen	514 504
Schwyz	162 157	Graubünden	200 096
Obwalden	38 108	Aargau	694 072

Nidwalden	43 520	Thurgau	282 909
Glarus	40 851	Tessin	350 986
Zug	128 794	Waadt	814 762
Freiburg	325 496	Wallis	348 503
Solothurn	277 462	Neuenburg	175 894
Basel-Stadt	196 735	Genf	506 343
Basel-Landschaft	290 969	Jura	73 709
		Schweiz	**8 670 300**

On the basis of these figures, the advance distribution (Art. 17 lit. a 1-3 PRA) must be carried out. According to Art. 17 lit. a No. 1 PRA, the resident population figure must be divided by 200 (8 670 300 / 200 = 43 351.5). The next higher whole number above the result constitutes the first distribution figure (43 352). Each canton whose population does not reach this number receives one seat. The cantons of Uri, Obwalden, Glarus and Appenzell Innerrhoden each receive one seat. These cantons are eliminated for further distribution. 20

Thereafter, the resident population of the remaining cantons is divided by the number of seats not yet allocated in accordance with Art. 17 lit. b No. 2 PRA (8 538 229 / [200-4] = 43 562.3929). The next higher whole number above the result shall form the second allocation number (43 563). Each canton whose population does not reach this number receives one seat. This is only the canton Nidwalden. It shall be eliminated from further distribution. 21

Pursuant to Art. 17 lit. a No. 3 PRA, this procedure must now be repeated until the remaining cantons reach the final allocation figure. Accordingly, the resident population of the remaining cantons is again divided by the number of cantons not yet allocated (8 494 709 / [196-1] = 43 562.6103). The next higher integer above the result is the third allocation number (43 563). This number is reached by all cantons. Accordingly, it is also the last distribution figure, which concludes the advance distribution pursuant to Art. 17 lit. a PRA. In the preliminary allocation, a total of five National Council seats were allocated to the cantons with the lowest populations. 22

23 This is followed by the main allocation pursuant to Art. 17 lit. b PRA. Each remaining canton that has not yet received a seat in the advance distribution now receives as many seats as the last distribution figure (43 563) is contained in its population figure:

Hauptverteilung		
Zürich	1 553 423 / 43 563 = 35.6592292	(35 Sitze, Rest: 28 718)
Bern	1 043 132 / 43 563 = 23.9453665	(23 Sitze, Rest: 41 183)
Luzern	416 347 / 43 563 = 9.5573537	(9 Sitze, Rest: 24 280)
Schwyz	162 157 / 43 563 = 3.72235613	(3 Sitze, Rest: 31 468)
Zug	128 794 / 43 563 = 2.95649978	(2 Sitze, Rest: 41 668)
Freiburg	325 496 / 43 563 = 7.47184537	(7 Sitze, Rest: 20 555)
Solothurn	277 462 / 43 563 = 6.36921241	(6 Sitze, Rest: 16 084)
Basel-Stadt	196 735 / 43 563 = 4.51610312	(4 Sitze, Rest: 22 483)
Basel-Landschaft	290 969 / 43 563 = 6.6792691	(6 Sitze, Rest: 29 591)
Schaffhausen	83 107 / 43 563 = 1.90774281	(1 Sitz, Rest: 39 544)
Appenzell A.Rh.:	55 309 / 43 563 = 1.26963249	(1 Sitz, Rest: 11 746)
St. Gallen	514 504 / 43 563 = 11.8105732	(11 Sitze, Rest: 25 311)
Graubünden	200 096 / 43 563 = 4.59325574	(4 Sitze, Rest: 25 844)
Aargau	694 072 / 43 563 = 15.9326034	(15 Sitze, Rest: 40 627)
Thurgau	282 909 / 43 563 = 6.49424971	(6 Sitze, Rest: 21 531)
Tessin	350 986 / 43 563 = 8.05697496	(8 Sitze, Rest: 2 482)
Waadt	814 762 / 43 563 = 18.7030737	(18 Sitze, Rest: 30 628)
Wallis	348 503 / 43 563 = 7.99997704	(7 Sitze, Rest: 43 562)
Neuenburg	175 894 / 43 563 = 4.03769254	(4 Sitze, Rest: 1 642)

Genf	506 343 / 43 563 = 11.6232353	(11 Sitze, Rest: 27 150)
Jura	73 709 / 43 563 = 1.69200927	(1 Sitz, Rest: 30 146)

In the main allocation 182 seats could be distributed among the cantons. This concludes the procedure pursuant to Art. 17 lit. b PRA.

In the preliminary allocation (five seats) and in the main allocation (182 seats), a total of 187 seats could be allocated. There remain 13 seats to be allocated. In accordance with Art. 17 lit. c PRA (distribution of remainders), these remaining seats are distributed among the cantons with the largest remainders from the main distribution. The thirteen largest remainders have the following cantons: Valais, Zug, Bern, Aargau, Schaffhausen, Schwyz, Vaud, Jura, Basel-Landschaft, Zurich, Geneva, Grisons and St. Gallen. These thirteen cantons are each allocated one additional seat. Thus, all 200 seats are distributed. The remaining distribution pursuant to Art. 17 lit c PRA is completed ahead of schedule; no cantons achieve the same remaining number. Therefore, no decision by lot is required. 24

According to the above calculation, the distribution of National Council seats among the electoral districts (cantons) is as follows: 25

Kanton	Sitze	Kanton	Sitze
Zürich	36	Schaffhausen	2
Bern	24	Appenzell A.Rh.	1
Luzern	9	Appenzell I.Rh.	1
Uri	1	St. Gallen	12
Schwyz	4	Graubünden	5
Obwalden	1	Aargau	16
Nidwalden	1	Thurgau	6
Glarus	1	Tessin	8
Zug	3	Waadt	19
Freiburg	7	Wallis	8
Solothurn	6	Neuenburg	4

Basel-Stadt	4	Genf	12
Basel-Landschaft	7	Jura	2
		Schweiz	**200**

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Art. 19 Date of the election

[1] The ordinary general election to the National Council shall be held on the second last Sunday in October. The cantonal government shall fix the earliest possible date for by-elections and supplementary elections.

[2] The Federal Council shall fix the date for an extraordinary general election in terms of Article 193 paragraph 3 of the Federal Constitution.

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I. HISTORY OF ORIGINS

The first elections for the appointment of the National Council after the foundation of the modern federal state did not take place on a uniform date. They were held on different days between October 1 and October 27, 1848. Although the Tagsatzung had not set a specific election day for the first elections, it did at least instruct the cantons in a resolution to "immediately hold the elections of members to the National Council and the Council of States [...]". What was required, however, was that the elections be held before November 6, 1848, since the constituent session of the Federal Assembly (National Council and Council of States) was scheduled for that date in Bern. 1

With the enactment of the Federal Act on the Election of Members of the National Council of December 21, 1850, the last Sunday in October at the end of the term of office was designated as election day. This election date was confirmed with the entry into force of the Federal Act concerning the Elections of the National Council of 14 February 1919. Thus, the elections for the ordinary general renewal of the National Council for the years 1851 to 1975 were held on the last Sunday in October each year. 2

Since 1979, National Council elections have been held on the second-to-last Sunday in October. The date was brought forward by one week by the Federal Act on Political Rights, which came into force in 1978. The reason given for moving the date forward was that the period between the last Sunday in October (election day) and the constituent session of the National Council, which (up to and including the 1999 elections) was held on the last Monday in November, was very short in order to determine and verify the election results and settle any election complaints. Therefore, when the PRA was created, the Federal Council proposed to bring forward the date for the National Council elections by one week. The advancement of the date for the general renewal elections and also Art. 19 PRA as a whole were adopted by both the National Council and the Council of States without discussion. 3

II. COMPARISON OF LAWS

In contrast to the Confederation, the majority of cantons do not provide for a date for the election (election day) of the cantonal parliament determined by the Constitution or the law. In these cantons, the election day is set by the 4

electoral authority (BE, LU, UR, SZ, OW, GL, SO, BS, BL, SH, AR, SG, TG, VD). The cantonal decrees concerning political rights occasionally provide for a period at the end of a current legislative period in which the election must take place, whereby the specific date is also determined by the electoral authority:

- ZH: between January and April of the election year.
- NW: at the latest on April 15 of the election year
- FR: in the fourth quarter of the election year
- AI: one week after the ordinary Landsgemeinde in the years of the general renewal elections of the National Council or, if the district has introduced the ballot box election, at the latest on the third Sunday in May
- GR: in May or June of the election year
- AG: at the latest in October of the election year
- TI: on a day in April of the election year
- NE: in April of the election year
- GE: between March 1 and April 30 of the election year.

5 Only three cantons, like the Confederation, provide for a specific election day established by statute:

- ZG: first Sunday in October of the election year.
- VS: first Sunday in March of the election year
- JU: penultimate Sunday in October of the election year.

6 Fixed election dates established by statute can only be changed by constitutional or legislative means. They thus offer a certain degree of legal and planning security for all political actors as well as for eligible voters, because the dates for the election of parliament are known for decades. In those cantons where the electoral authority determines the specific election date, the arrangement may be subject to political influence. If it becomes a political issue in advance, it can also influence elections. For example, in the 2023 renewal elections for the cantonal and governmental councils of the canton of Zurich, controversy arose with regard to the arrangement of the election date, as the

governmental council had set the election date earlier than usual (February instead of April) and thus had to accept the accusation of having "prevented a genuine election campaign".

For by-elections or supplementary elections, the cantons, in agreement with the Confederation, provide that the date is set by the electoral authority. 7

III. SIGNIFICANCE OF THE PROVISION AND CONTENT OF THE PROVISION

Art. 19 PRA establishes the date of election of the National Council for the ordinary general renewal pursuant to Art. 149 FC, as well as the competence to fix the date for by-elections and supplementary elections pursuant to Arts. 51 and 56 FC and for the extraordinary general renewal pursuant to Art. 193 para. 3 FC. 8

A. para. 1, sentence 1: Time of the ordinary general renewal

According to Art. 19 para. 1 sentence 1 PRA, the elections for the ordinary general renewal of the National Council, which takes place every four years (Art. 149 para. 2 sentence 2 FC), are held on the second-last Sunday in October. Since the election date is provided for by law, it can only be changed by way of legislation (Art. 164 para. 1 lit. a FC). The mention of the specific date in the circular letter of the Federal Council to the cantonal governments concerning the general election of the National Council therefore only has a declaratory effect. 9

Due to the statutory fixing of the date of the election, the election dates for the next elections of the ordinary general renewal are already known (22 October 2023, 24 October 2027, 19 October 2031, 21 October 2035, 23 October 2039, etc.). 10

B. para. 1 sentence 2: Date of by-elections and supplementary elections

Based on Article 19 para. 1 sentence 2 PRA, the government of the canton in which the by-election or supplementary election is to be held is responsible for determining the date of by-elections (Article 51 PRA) and supplementary elections (Article 56 PRA) to the National Council. A by-election must be held 11

if, in constituencies in which only one member of the National Council is to be elected, the elected member resigns from the National Council or dies during the legislative period. A by-election shall be necessary if the seat of a retiring member of the National Council cannot be filled either by succession or by nomination.

12 The cantonal government shall schedule the election for the next possible date. The term "next possible date" is an indeterminate legal term. It is not defined by federal law, nor are there any clues to its interpretation in the materials. However, it is obvious that the provision of the law is intended to guarantee that a vacant seat in the National Council can be filled as soon as possible and that the number of 200 deputies guaranteed by Art. 149 para. 1 FC can be restored quickly. Accordingly, a by-election or supplementary election must in principle take place on the date that "offers itself as the next possibility". Accordingly, a by-election or supplementary election shall take place on the next blanket date for the federal referenda after the vacancy occurs. The cantonal government is admittedly not bound by these blank dates. However, in analogous application of Art. 21 para. 1 PRA, when setting the date, it must necessarily observe the deadline for the submission of election proposals set by cantonal law. When setting the election date, this deadline may of course not yet have expired and the political parties and organizations must have sufficient time between the election order and the deadline for submitting the election proposals to nominate a candidate within the party or organization.

13 The provision may lead to difficulties, in particular, if the resignation of a member of the National Council occurs shortly before an upcoming general renewal. A case from the canton of Appenzell Innerrhoden can be cited as an example: The Landsgemeinde elected Daniel Fässler (CVP/AI), then a member of the National Council, to the Council of States on April 28, 2019. Fässler took office as Council of States on June 3, 2019. Due to the incompatibility rule according to Art. 144 para. 1 FC, he resigned from the National Council the day before. The inner-Rhodian National Council seat thus became vacant four and a half months before the ordinary general election. However, the cantonal government (Standeskommission) then waived the order of a by-election for the vacant seat in the National Council. In my opinion, this waiver is compatible with federal law. Art. 19 para. 1 sentence 2 PRA provides for a certain margin of discretion for the cantonal governments. The cantonal governments may waive the ordering of a by-election if the ordinary general re-

newal election takes place within six months and the functioning of the National Council is not hindered thereby. The parallel organization and holding of a by-election and an overall renewal election is not only disproportionate, the member of the National Council newly elected in the by-election could, as a rule, only participate in the autumn session before the overall renewal due to the tight time constraints. A waiver of a by-election shortly before ordinary general renewal elections is not an unusual occurrence in Switzerland. Some cantons therefore provide for their elections, which are to be organized according to cantonal law, that by-elections are to be dispensed with if the vacancy occurs no more than six months before the ordinary renewal elections.

C. para. 2: Timing of the extraordinary general renewal elections

Art. 19 para. 2 PRA regulates the timing of the extraordinary general renewal of the National Council within the meaning of Art. 193 para. 3 FC. Art. 193 FC regulates the procedure for the total revision of the Federal Constitution. Such a revision may be proposed by the People or by one of the two Councils, or it may be decided by the Federal Assembly (Art. 193 para. 1 FC). If the initiative comes from the People or if the two Councils disagree, the People shall decide on the implementation of the total revision (Art. 193 para. 2 FC). If the people approve a total revision of the Federal Constitution, a total revision of the National Council and the Council of States becomes necessary. The date for the extraordinary total renewal of the National Council is set by the Federal Council. Although the Federal Constitution does not specify any deadline or time span by which the total renewal must take place, according to unanimous doctrine it must be carried out without delay. 14

If the people approve a total revision of the Federal Constitution, an overall renewal (otherwise unknown) must also be carried out for the Council of States (Art. 193 para. 3 FC). An overall renewal of the Council of States is in principle not provided for: Since the members of the Council of States are elected according to cantonal law (Art. 150 para. 3 FC), the term of office of the members of the Council of States results from the respective relevant cantonal law. Federal law therefore does not provide for a term of office or legislative period for the Council of States. Due to the fact that an overall renewal of the Council of States has never taken place and that nothing relevant emerges from the legislative materials on Art. 19 para. 2 FC, the timing for the overall renewal of the Council of States within the meaning of Art. 193 para. 3 15

FC could lead to conflicts in practice. In particular, the question arises whether the Federal Council may also determine the date for the overall renewal of the Council of States on the basis of Art. 19 para. 2 PRA.

16 In the second edition of their standard work "Die demokratischen Rechte in Bund und Kantonen der Schweizerischen Eidgenossenschaft" (Democratic Rights in the Confederation and the Cantons of the Swiss Confederation), Hangartner/Kley/Braun Binder/Glaser take the view that on the basis of Art. 19 para. 2 PRA the Federal Council determines the date of the extraordinary general renewal without distinguishing between the general renewal of the National Council and that of the Council of States. In my opinion, however, Art. 19 para. 2 PRA is not relevant for the overall renewal of the Council of States within the meaning of Art. 193 para. 3 FC. The members of the Council of States are to be elected according to cantonal law even in the case of an overall renewal within the meaning of Art. 193 para. 3 FC (Art. 150 para. 3 FC). Consequently, this also means that the authorities designated for this purpose under the relevant cantonal law determine the date for the overall renewal of their members of the Council of States. This conclusion can also be supported by systematic considerations: Due to the positioning of Art. 19 para. 2 PRA in the 3rd title of the PRA "Election of the National Council", it must be assumed that the legislator intended Art. 19 para. 2 PRA to regulate exclusively the election of the National Council and thus explicitly not to interfere with the competence of the cantons.

17 It follows from the foregoing that, in the event of approval by the people of the total revision of the Federal Constitution, the Federal Council, based on Art. 19 para. 2 PRA, exclusively determines the date for the extraordinary total renewal of the National Council. Since, according to Art. 53 para. 1 PRA, the constituent session must take place on the seventh Monday after the election, the date of the constituent session of the newly elected National Council would also be known when the election date is set. Due to the equal status of the National Council and the Council of States (Art. 148 para. 2 FC), it is obvious that the constituent session of the Council of States - which will take place for the first time since 1848 - must be held on the same day as that of the National Council. A constituent session of the Council of States would be mandatory as a result of the overall renewal of both Councils. As a consequence, the members of the Council of States would have to be elected in the cantons by the day of the constituent session. In this sense, the Federal Coun-

cil could invite the cantons to hold elections for members of the Council of States by this date.

Since an overall renewal of both Councils in the sense of Art. 193 para. 3 FC has never occurred since the beginning of the modern federal state, Art. 19 para. 2 PRA has not yet been applied. 18

I would like to thank Benjamin Böhler, auxiliary assistant at the Center for Democracy Aarau, for his assistance in researching the material and for his valuable comments in reviewing the text.

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COMMENTARY ON

Art. 20 PRA

A commentary by Luka Markić

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Art. 20 Drawing of lots

If lots must be drawn, this takes place in the canton subject to the orders of the cantonal government, or at a federal level subject to the orders of the Federal Council.

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I. HISTORY OF ORIGINS

The Federal Law on the Election of the National Council of 14 February 1919 [NWG] already contained a provision on the competence to draw lots. Art. 28 of the National Council Act read: "If the law prescribes the drawing of the lot, it shall be carried out by the President of the cantonal government under the control of the latter. Art. 23 is reserved." The reservation in Art. 23 NWG regulated that the Federal Council was responsible for the drawing of lots in cases where the election fell on the same person in several constituencies and the person elected more than once did not declare in which constituency he accepted the election. 1

When creating the PRA, the Federal Council proposed a modified adoption of Art. 28 NWG. Instead of directly stating who is responsible for drawing lots, as in Art. 28 NWG, Art. 20 PRA only stipulates which authority is responsible for ordering the drawing of lots in each case. The new Art. 20 PRA was justified in the Federal Council's dispatch with only one sentence: "This article regulates quite generally the procedure for decisions by drawing lots." The National Council and the Council of States adopted the legislative text proposed by the Federal Council without discussion. 2

II. SIGNIFICANCE OF THE PROVISION

A. General

Art. 20 PRA is a classic norm of competence. The provision regulates which authority is competent to order the drawing of lots, should the drawing of lots occur in the cases provided for by law. However, the cases in which the lot is to be drawn do not result from Art. 20 PRA. Cases in which the drawing of lots is to be applied can be found in Art. 17 lit. c, Art. 41 par. 1 lit. f, Art. 43 par. 3 and Art. 47 par. 1 sentence 3 PRA. 3

B. Comparison of Laws

All cantons provide for a competence norm in their cantonal decrees concerning political rights for the elections to be organized according to cantonal law, which in each case designates one or more authorities for the drawing of lots. Unlike the Confederation, the cantons do not simply designate the au- 4

thority responsible for ordering the drawing of lots, but rather the authority that is actually to draw the lots. In most cases, the authority in charge of the election or the supervisory authority or its presiding member, its clerk, its weibelin or a person of trust is responsible for the drawing of lots. The responsibility in the cantons of Jura and Ticino is somewhat unusual: In the canton of Jura, the lot is drawn by the president of the cantonal court (Tribunal cantonal). In the canton of Ticino, in certain cases regulated by law, the lot is drawn by the Ufficio cantonale di accertamento, which consists of three judges of the cantonal court of appeal (Tribunale di appello).

5 The cantonal rules on the drawing of lots usually stipulate that the drawing of lots must take place in the presence of the candidates concerned or their representatives or that they must at least be invited to do so. In addition, the cantonal norms occasionally stipulate that the drawing of lots must be carried out manually, that other members of the authorities must be present at the drawing and that minutes must be kept of the drawing of lots.

6 As a curiosity, a provision from the canton of Schaffhausen concerning the competence of the drawing of lots in the case of a so-called "over-election" is to be highlighted: If, in an election by majority vote, more persons have obtained an absolute majority than there are positions to be filled, and if there is a tie between the persons, the lot drawn by the candidates shall decide.

III. COMMENTARY ON THE TEXT OF THE NORM

A. Content of the Norm

7 Art. 20 PRA regulates in general terms which authority is responsible for ordering the drawing of lots. If a decision by lot is necessary at the cantonal level, it is ordered by the cantonal government. Decisions by lot at the cantonal level are provided for in the following cases regulated by law:

- Art. 41 para. 1 lit. f PRA: in the event of an equal number of votes in the further distribution of mandates among the lists (proportional representation).
- Art. 43 para. 3 PRA: in the event of a tie in the determination of the elected and the substitutes in the event of a tie (proportional representation)
- Art. 47 para. 1 PRA: in the event of a tie (majority voting)

If lots must be drawn at the federal level, this shall be done by order of the Federal Council. The PRA provides for only one case in which the Federal Council could order a drawing of lots, in the so-called remaining distribution of the 200 seats of the National Council among the cantons (Art. 17 lit. c PRA). 8

B. Clarifications of the norm by BGE 138 II 13

In its judgment of 23 November 2011 concerning the election to the National Council in the Canton of Ticino, the Federal Supreme Court dealt in more detail with the drawing of lots pursuant to Art. 43 para. 3 PRA in conjunction with. Art. 20 PRA. In the National Council elections of 23 October 2011 in the Canton of Ticino, on the list "Partito Popolare Democratico + Generazione Giovani (PPD + GG)" both Marco Romano and Monica Duca Widmer obtained exactly 23,979 votes. Since, according to the mandate distribution, only one of the two persons could receive a mandate, a lot had to be drawn in accordance with Art. 43 para. 3 PRA. The "lot" was "drawn" by the semi-automated IT program used in the Canton of Ticino for counting the votes and publishing the results. The computer chose Monica Duca Widmer as National Councilor. 9

In its ruling on this drawing of lots, the Federal Supreme Court laid down various requirements for a drawing of lots and thus also specified, among other things, Art. 20 PRA: It held that the drawing of lots must necessarily be carried out by the cantonal government itself or by an authority commissioned by the cantonal government. The subsequent approval of a drawing of lots carried out by an authority that is not competent does not satisfy the legal requirements. Since election and voting procedures using technical aids require the approval of the Federal Council pursuant to Art. 84 para. 2 PRA, the use of a semi-automated IT program without Federal Council approval is not permitted. In the opinion of the Federal Supreme Court, the use of electronic aids in the drawing of lots does not provide a sufficient guarantee of equal probability of the candidates being drawn (50% to 50%), which also violates the equality of opportunity of all candidates resulting from the freedom of election and voting (Art. 34 para. 2 FC). In addition, the drawing of lots was carried out before the necessary verification that there were no doubts as to the correctness of the election result, and thus came into play prematurely. The Federal Supreme Court dismissed another complaint that was directed against the repeated drawing of lots and explicitly refrained from imposing any further re- 10

quirements on the process of drawing lots in addition to the detailed requirements described above, namely on the way in which the lots are mixed, the nature of the lot containers or the blindfolding of the person drawing the lot.

11 The drawing of lots in the Ticino case had to be repeated on the instruction of the Federal Supreme Court, which ordered for the specific individual case that the repetition of the drawing of lots, which had to be carried out manually, had to take place publicly by a member of the cantonal government or a delegation that did not belong to the Partito Popolare Democratico. The representatives of the political parties and the two candidates concerned had to be invited to the drawing of lots. The repeated drawing of lots took place on November 25, 2011. The draw fell on Marco Romano, who therefore became a member of the National Council. The Federal Supreme Court left open whether these additional requirements for the drawing of lots in the individual case of Ticino must be regarded as prerequisites for a valid drawing of lots. For reasons of legal certainty, however, it is recommended that these additional requirements also be observed in future lot drawings.

I would like to thank Benjamin Böhler, assistant professor at the Center for Democracy Aarau, for his help in researching the material and for his valuable comments in reviewing the text.

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COMMENTARY ON

Art. 21 PRA

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Chapter 2
Elections based on a System of Proportional Representation

Section 1 Candidature

Art. 21 Final date for submission of candidate lists

[1] Cantonal law shall specify one Monday in the August of the election year as the final date for the submission of candidate lists, and it shall stipulate the authority to which the lists should be submitted.

[2] The candidate lists must arrive at the cantonal authority on the final date for submission at the latest.

[3] The cantons shall notify the Federal Chancellery of each candidate list without delay.

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I. HISTORY OF ORIGINS

The registration deadline for election proposals or the time window for this has been brought forward in several steps over the years. The reason for this is the continuing increase in the number of lists and candidates and the bringing forward of the distribution of ballot papers to voters. The unchecked increase in the number of lists and candidates leads to an increase in the time required for checking and clearing up the election proposals and for printing the election material. 1

In the Federal Act of 14 February 1919 concerning the election of the National Council, the deadline for registration was originally set at the 20th day (third last Monday) before election day. In 1946 it was brought forward for the first time to the 34th day (fifth-last Monday), and in 1974 finally to the 48th day (seventh-last Monday) before election day. This regulation was incorporated unchanged into the new Federal Act on Political Rights in 1976. The PRA revision of 1994 introduced a time window: Cantonal law could now designate "a Monday between 1 August and 30 September of the election year" as the last date for registering to vote. With the 2014 revision, the time window was narrowed to "a Monday in August of the election year". 2

II. SIGNIFICANCE OF THE PROVISION

A. General

The second chapter of the PRA contains the rules on proportional representation as they apply to the 20 cantons that have more than one National Council seat to fill. The electoral law for the proportional representation cantons has an election proposal procedure. Anyone wishing to stand for election must be formally nominated. The National Council election law does not contain any provisions on the preliminary procedure. It is up to the parties and groups how they select their candidates. Section 1 of Chapter 2 contains the provisions on the election proposal procedure. Article 21 of the PRA regulates the election registration deadline. A binding deadline for the submission of election proposals serves to ensure the orderly preparation and conduct of the election. 3

B. Legal comparison

4 The cantons also know an election proposal procedure (registration procedure) and a binding registration deadline for parliamentary elections conducted on the basis of proportional representation. The election proposals must reach the competent authorities between the sixth-last Monday before election day (FR, OW) and the eleventh-last Monday before election day (BE).

5 For the different arrangements of the election registration deadline in the cantons for the National Council elections, see the explanations below.

III. ELECTION REGISTRATION DEADLINE

A. Determination in cantonal law (para. 1)

6 The last possible date for the submission of election proposals is a "Monday in August of the election year". Within the framework of this requirement, the cantons determine their election filing deadline.

7 Pursuant to Article 8a paragraph 1 PRA, each canton must inform the Federal Chancellery by 1 March of the election year which Monday it has set as the deadline for electoral registration (and whether it has set the clearance period at seven or fourteen days, cf. Art. 29 paragraph 4 PRA).

8 For the 2023 National Council elections, six cantons chose the first possible date (7 August 2023; eleventh last Monday or 76th day before election day: ZH, BE, GR, AG, TI, GE). Five cantons chose the tenth-last Monday (69th day) before the election date (SZ, ZG, SO, TG, VS). Four cantons chose the ninth last Monday (BL, SH, SG, VD), five cantons the eighth last Monday (LU, FR, BS, NE, JU). In each case, the date resulted from a regulation in the cantonal law or the cantonal ordinance, or it was set in the cantonal government's election order.

9 Individual cantons also know a start date for the submission of election proposals, such as the cantons of St. Gallen or Thurgau, where the cantonal government sets this date. For the 2023 National Council elections, the canton of St Gallen has set 3 April 2023 as the start of the submission deadline, which is around four and a half months before the election registration deadline (21 August 2023). In the canton of Thurgau, the earliest possible date for submitting election proposals was set for 5 June 2023, a good two months before the

registration deadline (14 August 2023). The canton of Vaud has a very short submission deadline: for the 2023 National Council elections, this was set for the period from 14 August 2023, 8 a.m., to 21 August 2023, 12 noon.

It is incumbent on cantonal law to determine the authority to which election proposals are to be submitted (Art. 21 para. 1 PRA, second sentence). According to Article 7a CPD, it is the cantonal government that designates the official body that manages and supervises the electoral business and receives the election proposals ("cantonal electoral office"). The cantons have designated the competent authority partly by law, partly by ordinance or government resolutions. As a rule, the authorities in charge of elections are the state chancelleries, in a few cantons other authorities (e.g. ZH: Statistical Office of the Canton of Zurich, LU: Department of Justice and Security, VD: Service des Communes et du logement). 10

According to the traditional circular letters of the Federal Council to the cantonal governments for the National Council elections, which are issued about a year before election day, the governments must call on voters to submit their election proposals in good time. They shall draw their attention to the submission deadlines and the content requirements for the election proposals in accordance with Article 21 et seq. PRA. In the cantons, the detailed rules of the game for the upcoming National Council elections are regularly laid down by government council resolutions ("election order") and announced on the homepages of the cantons and in the official gazettes - in each case around six to twelve months before election day. 11

B. Latest date (para. 2)

The election proposals must "arrive" at the canton at the latest on the day of the election registration deadline (according to paragraph 1). The text of the law speaks of "arrive", not of "submit". This means that the election proposals must be received by the electoral authority by the deadline. Timely posting does not meet the deadline - unlike, for example, in administrative appeal and judicial proceedings. The Federal Council explicitly states this in its circulars on the National Council elections, and the cantonal governments' election instructions and information refer to this fact. The regulation regarding the submission of optional referendums pursuant to Article 59a PRA is analogous: in order to be validly submitted, the signature sheets must "arrive" at the Federal Chancellery within the referendum deadline. 12

13 The cantons set different times for timely submission on the deadline date. For the 2023 National Council elections, the following times have been determined as the time for the last possible submission of election proposals: 9 a.m.: BS; 12 p.m.: BE, LU, FR, BL, GR, AG, VD, VS, GE, JU; 4.30 p.m.: SZ, TG; 5 p.m.: ZH, ZG, SO, SH, SG, NE; 6 p.m.: TI. All these times are considered admissible. The PRA itself recognises a filing deadline of 12 noon for cantons that provide for the possibility of a silent election in the case of a majority election (Art. 47 para. 2 PRA).

14 The submission deadline is a forfeiture deadline, not an order requirement. An election proposal submitted late is invalid. This legal consequence is implicit in the wording of Art. 21 para. 2 PRA ("must arrive no later than (...)"). It is sometimes explicitly stated in the cantonal election regulations for the National Council elections. The deadline, including the specified precise time, is a binding point in time. Election proposal procedures are characterised by a certain formal rigour. Compliance with the deadlines is of great importance here, so that the election can be properly prepared and held on time within a tight schedule (publication of the names of the candidates, clearing up of the election proposals, printing of the ballot papers, etc.).

15 Nominations that are received in time but are defective can be corrected within the purification period (see the explanations in OK-PRA on Art. 29 PRA).

16 In the meantime, in many cantons the parties can enter the election proposals directly in the cantonal election software and then print out the completed election proposal forms. In addition, it is possible to download the election proposal forms from the canton's homepage and fill them in manually. In order to be validly submitted, the election proposal forms must be sent to the competent authority in paper form and with all the necessary signatures by the deadline.

C. Notification to the Federal Chancellery (para. 3)

17 The cantons must immediately notify the Federal Chancellery of the election proposals received. "Without delay" means, according to the circular letter of the Federal Council, "without delay after the closing date for election nominations in electronic form" and in accordance with the technical requirements of the Federal Chancellery. The Federal Chancellery is particularly dependent

on rapid notification in order to identify and avoid multiple candidatures. The cantons may also send election proposals received by the Federal Chancellery before the registration deadline. However, the parties can still change the election proposals up to the deadline. All subsequent changes must be notified to the Federal Chancellery.

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COMMENTARY ON

Art. 22 PRA

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Art. 22 Number and designation of the candidates

[1] A candidate list may contain no more names of persons eligible for election than the number of seats in the National Council that have been allocated to the constituency, and no name may appear more than twice on any list. Where a candidate list contains more than the maximum number of names, the last names on the list shall be deleted.

[2] The candidate lists must provide the following details for each candidate:

a. official surname and first names;

b. the name by which the person is known in politics or in everyday life;

c. sex;

d. date of birth;

e. home address including postcode;

f. place and canton of origin; and

g. occupation.

[3] Each candidate must confirm in writing that they accept their nomination. In the absence of such confirmation, the name of the candidate shall be deleted from the list.

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I. HISTORY OF ORIGINS

1 The provision on the maximum number of candidates on an election proposal was incorporated into the PRA in 1976 from the Federal Act of 14 February 1919 on the Election of the National Council. In contrast, before the enactment of the PRA, the requirements for information on persons standing for election differed greatly in the various cantons. The PRA created uniform federal minimum requirements, which were successively extended over the years. According to the 1976 law, the following had to be stated: "surnames and first names, year of birth, occupation, home address and home town of the person nominated". With the 2002 revision, gender was added as a further obligatory information, and since then the exact date of birth has been required instead of the year of birth. Since the 2014 revision, the following must now be stated (additionally or more precisely): the official names and first names as well as the name by which a person is known politically or in everyday life. The postcode is now required for the residential address and the cantonal affiliation for the place of origin.

2 With the constant increase in the number of candidates and lists in the National Council elections, the checking of candidatures (especially for multiple candidatures) became more and more time-consuming. All the respective extensions of the minimum information on the election proposal are aimed at facilitating the corresponding official checks.

3 Whereas until 1994 persons could be nominated without their cooperation and, if necessary, had to reject their nomination in writing, since then it has been the case that every person nominated must consent to their candidacy in writing.

II. SIGNIFICANCE OF THE PROVISION

A. General

4 The provision lays down substantive requirements for election proposals. It regulates the maximum number of nominees, allows for the pre-cumulation of nominees, and contains the minimum information for nominees. It requires the nominees to give their written consent to their candidature.

B. Comparison of laws

For their parliamentary elections, the cantons have largely comparable to identical regulations concerning the number and designation of the proposed persons and usually also require the proposed persons to give their written consent to their candidacy. However, less detailed information on the candidates is regularly required than in the National Council election law. Eligible for election to the cantonal parliaments are the voters of the canton. In the ten cantons that grant the Swiss abroad the right to vote, they are also eligible for election to the cantonal parliament. 5

III. ELECTION PROPOSALS

A. Number (par. 1)

An election proposal may only contain the names of "eligible persons", i.e. persons who have the right to stand for election. All persons entitled to vote may be elected to the National Council (Art. 143 FC). All Swiss citizens who have reached the age of 18 and who are not incapacitated by reason of mental illness or infirmity are entitled to vote (art. 136 para. 1 FC). The latter are "persons who are under a comprehensive guardianship due to permanent incapacity or who are represented by a person authorised to make provisions" (art. 2 para. 1 PRA). Swiss abroad who are entitled to vote may stand for election to the National Council (Art. 15 ff. ASG in conjunction with Art. 143 FC). Eligibility to stand for election must be established by election day at the latest. Accordingly, minors may also stand for election if they reach the age of majority by the election date at the latest. 6

Anyone wishing to stand as a candidate may do so in any canton, not only in the canton of residence. Members of the National Council are "representatives of the people" (Art. 149 para. 1 FC) and represent the whole Swiss people, not individual cantons. The cantons merely form constituencies within the framework of an overall election. However, it is forbidden to stand as a candidate in more than one canton (see the explanations in OK PRA on Art. 27 PRA). 7

In election nomination procedures, those entitled to vote have a claim arising from the guarantee of political rights (Art. 34 FC) that only eligible persons are nominated. As a rule, the electoral authorities check the eligibility of those 8

nominated. In some cantons, the parties and groups must prove the eligibility of the candidates when submitting the election proposal by enclosing a certificate of eligibility issued by the municipality or a certificate of voting rights (e.g. SO, AG). Previous members of the National Council and cantonal parliaments (and in some cases other authorities) are exempt from this proof,

9 An election proposal may only contain as many names of eligible persons as there are seats to be allocated in the respective canton (constituency).

10 A name may not be listed more than twice on the election proposal. The precumulation of individual or all candidates is therefore permitted, which gives the parties the opportunity to give individual nominees greater chances of election. (In the National Council elections, voters can give one or two votes to a person when filling in the ballot paper, cf. Art. 35 para. 2 PRA).

11 If an election proposal contains more names than permitted, the last ones shall be deleted.

B. Designation (par. 2)

12 The election proposals must contain at least the following information. The provision on the minimum information is a validity requirement, not a rule of order.

1. Official name and first name (a)

13 The official names and first names are the names listed in the civil status register of the municipality. There is no freedom of choice in the spelling. The spelling in the register is decisive.

2. Name by which the person is known politically or in everyday life (b)

14 This is the name by which a person is known to the public or in the immediate environment. Frequent deviations from the official name include first names shortened in dialect (e.g. Ruedi, Toni, Käthi), the use of alliance names or the omission of the second name in the case of married persons.

15 According to the practice of the Federal Chancellery, pen names do not count as a name by which the person is known politically or in everyday life. However, these can be added in brackets to the name by which the person is known politically or in everyday life in the election proposal.

The official name must be given for the purpose of checking the candidates. On the ballot papers, on the other hand, the name by which the person is known politically or in everyday life is listed. Here, too, a pen name may be added in brackets. It is not permissible to stand for election solely under a pseudonym. 16

3. Sex (c)

In the election proposal, the sex is to be stated as it is entered in the civil status register of the municipality. 17

This information was introduced with the revision of 2002, also to facilitate the examination of election proposals (identification of candidates, checking for multiple candidacies). It is not always clear from the first names whose gender a person is (e.g. Dominique, Andrea). 18

Swiss law is based on the binary gender model (male/female) and does not recognise any other gender categories. In the amendment to the Civil Code of 18 December 2020, which facilitated the change of gender in the civil status register, Parliament adhered to the binary gender model and did not introduce a third gender category. However, the political discussion on this matter has not been concluded. The Federal Council was instructed by parliamentary motions to prepare a report. On 21 December 2022, it came to the conclusion that the social preconditions for the introduction of a third gender or for a general waiver of the gender entry in the civil status register were not currently given. 19

4. Date of birth (d)

Since 2002, the exact date of birth must be stated in the election proposal; previously, the year of birth was sufficient. This information is required to facilitate the identification of candidates and to clarify the eligibility of persons who come of age in the election year. 20

5. Residential address including postcode (e)

Candidates must state their home address, including the postcode, in their election proposal. Swiss voters abroad who wish to stand as candidates must state their address abroad and add their electoral commune in Switzerland (political domicile). 21

6. Places of origin including cantonal affiliation (f)

22 Candidates must indicate their place of origin in their election proposal, including cantonal affiliation since the 2014 revision.

7. Profession (g)

23 The election proposal must contain information on the profession of the candidate. This is subsequently published in the official publication of the election proposals and regularly on the ballot papers - and thus also serves in particular to inform the electorate. In practice, the occupation information is very inconsistent. In addition to professions in the strict sense (very few job titles are protected), professional functions are indicated (in some cases also with the addition of company names) or acquired titles. In many cantons, the indication of (current and former) political offices is implicitly or explicitly permissible in the indication of occupation. In individual cases, however, secondary occupations (e.g. association offices) are also indicated under the title of occupation, or self-descriptions are made which can no longer be understood even in the broadest sense as an occupational title. The practice is very - or all too - generous.

24 In the 2014 revision of the PRA, the Federal Council had planned to remove the compulsory indication of occupation in proportional cantons. Based on the results of the consultation, it decided not to make the change. A motion by the State Policy Committee of the Council of States to delete the occupation specification failed in the plenary session of the Council. The majority considered the occupation information, however debatable it may be in individual cases, to be useful information for the electorate.

C. Written declaration (para. 3)

25 Each nominated person must accept his or her nomination with a written declaration. This is usually done by signing the nomination form or the candidate sheet.

26 According to Article 8b paragraph 2 of the PRA, the signing of an election proposal as a signatory pursuant to Article 24 paragraph 1 of the PRA also constitutes consent to one's candidature.

If the written consent to the candidature ("confirmation") is missing, the name of the person concerned is deleted. A missing signature may be made up in a legally effective manner by way of rectification under the purification procedure pursuant to Article 29 PRA. 27

The mandatory declaration of acceptance of candidacy was introduced with the 1994 revision. Until then, the rule had been that a person could be listed on an election proposal without his or her involvement. The person nominated could subsequently reject his or her nomination with a written declaration by the Friday of the week in which the election proposals had to be submitted by Monday (Article 28 old PRA, "Rejection of the nomination"). The cantons were required to "immediately inform those nominated of the election proposal concerning them" (Art. 21 para. 3 old PRA). In practice, the regulation proved unsatisfactory, particularly because of the short withdrawal and adjustment periods. 28

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COMMENTARY ON

Art. 23 PRA

A commentary by Stefan Wyler

SUGGESTED CITATION

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Art. 23 Designation of the candidate list

Each candidate list must bear a designation that is sufficient to distinguish it from other lists. Groups that submit lists of candidates with identical elements in the main designation and that intend to combine such lists shall declare one of these candidate lists to be the parent list.

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I. HISTORY OF ORIGINS

The first sentence of the provision on the designation of election proposals was editorially only slightly modified from the Federal Law on the Election of the National Council of 1919. In the 2002 revision of the PRA, Article 23 of the PRA was supplemented with the provision that a grouping with several linked election proposals must designate a master list. 1

II. SIGNIFICANCE OF THE PROVISION

A. General

The provision formulates as a requirement for the designation of an election proposal that it be clearly distinguishable from the election proposals of other groupings and any other election proposals of the same grouping. The designation of an election proposal as a master list serves to allocate additional votes on inaccurately designated ballots in the case of groupings that submit several election proposals. 2

B. Comparison of laws

The cantons have identical or comparable provisions in their parliamentary election law regarding the designation of election proposals. Cantons that permit list combinations know similar regulations regarding the designation of master lists for groups that submit several election proposals. 3

III. DESIGNATION OF THE ELECTION PROPOSAL

Each election proposal must bear a designation that clearly distinguishes it from all other election proposals. This serves, in particular, to inform the eligible voters. The eligible voters must know which list they have before them. As a rule, the election authorities require, in addition to the complete name of the election proposal, an abbreviation or short designation. 4

The election proposals usually come from political parties. However, other groups can also submit election proposals, and even individuals can run in the National Council elections with their own election proposal. In contrast to regulations abroad, there is no party privilege. 5

6 Two or more parties or groups may also submit a joint election proposal.

7 Parties and candidate groups may submit several election proposals under the same (main) name. These must be distinguished from each other by an addition, an additional designation (Art. 8c para. 1 VPR).

8 Lists with the same designation pursuant to article 31 paragraph 1bis may only enter into a sub-list connection if they differ from each other solely by an addition identifying the gender, the wings of a grouping, the region or the age (cf. in this respect the explanations in OK PRA on article 31 PRA).

9 Groupings which submit election proposals with the same main name, or "identical elements in the main name" and wish to combine them, must, according to Article 23 PRA, second sentence, designate one of the election proposals as the parent list. Article 8c paragraph 3 VPR relativizes this provision and allows an exception: parties and groups with several election proposals do not have to designate a master list in those cases where the distinguishing feature relates solely to the regional delimitation of the lists.

10 The designation of an election proposal as a master list serves in the counting of the allocation of additional votes (blank lines) on insufficient ballot papers designated only with the list main name. In accordance with Article 37 paragraph 2bis PRA, these are allocated to the list that has been designated by the grouping as the master list. As an example: The SP runs in an electoral district with an SP women's list and an SP men's list and designates the SP women's list as the master list. Accordingly, blank lines on a ballot paper filled out manually and marked only with the list designation "SP" are counted as additional votes for the list SP Women.

11 According to Article 37 paragraph 2 PRA, an exception to this rule applies if a party or grouping in an electoral district merely submits several regional lists with the same main designation. In this case, additional votes on an imprecisely designated ballot paper bearing only the main list name shall be allocated to the list in whose region the ballot paper was submitted. The grouping need not designate a master list (cf. marg. no. 9).

12 In practice, the requirements for identical elements in the main designation or for sub-affiliated lists of lists with the same designation are handled differently in the cantons. While some cantons strictly ensure that each of these election proposals is always preceded by the same name or abbreviation, other can-

tons allow it to suffice if the identical element/name appears anywhere in the name of the election proposal or merely in a parenthesis in the appendix. Several cantons are less strict, particularly in the case of young parties: in many cantons, lists of the JUSO or Jungfreisinnige are regarded as sub-lists of the parent parties SP and FDP and are also admitted to sub-list combinations with these, even if, strictly speaking, no lists with "identical elements in the main designation" or "lists with the same designation" can be identified. This no longer corresponds to the wording of the provisions, but also does not mislead the electorate, as they should be aware that the JUSO belongs to the SP and the Jungfreisinnige to the FDP.

13 The designation of the election proposal cannot be changed after it has been submitted to the canton, unless it gives rise to confusion. In such a case, the electoral authority, as part of the rectification of deficiencies in the adjustment procedure pursuant to Article 29 PRA, shall set a deadline for the representation of the election proposal within which the designation must be changed.

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COMMENTARY ON

Art. 24 PRA

A commentary by Stefan Wyler

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Art. 24 Quorum of signatures

[1] Each candidate list must be signed by hand by a minimum number of persons who are both eligible to vote and have their political domicile in the constituency. The minimum number is:

a. 100 in cantons with 2–10 seats;

b. 200 in cantons with 11–20 seats;

c. 400 in cantons with more than 20 seats.

[2] No person eligible to vote has the right to sign more than one candidate list. They may not withdraw their signature following submission of the candidate list.

[3] The quorums in accordance with paragraph 1 above do not apply to any party that was duly registered with the Federal Chancellery at the

end of the year preceding the year of the election (Art. 76*a*) provided that it has been represented in the National Council for the same constituency in the legislative period that is due to expire or it achieved at least three per cent of the vote in the same canton at the previous general election.

[4] Any party falling within the terms of paragraph 3 above must simply submit the legally valid signatures of all its candidates together with those of its president and secretary.

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I. HISTORY OF ORIGINS

1 The provision on signature quorums has been adapted several times over the decades. As early as the National Council Election Act of 1919, there was a requirement that each ballot proposal be signed in person by at least 15 eligible voters residing in the constituency. With the enactment of the 1976 PRA, the minimum number of signatories was raised to 50. In the 1994 revision, the signing quorum was increased in a graduated manner for small, medium, and large cantons to 100, 200, and 400, respectively. In later revisions of the law - under the title of "administrative facilitations" - the rule was relaxed in favor of larger and medium-sized parties by exempting them, first under conditions, later unconditionally, from providing signatures.

2 In the 2002 revision, the requirement to provide signatures was initially waived for those parties that were registered with the Federal Chancellery, submitted a single election proposal in the canton, and were represented in the constituency during the expiring term or had obtained at least three percent of the votes in the last general renewal election. In the 2014 revision, the criterion was finally dropped whereby parties are only exempt from submitting signatures if they only submit a single election proposal in the electoral district. It was only this second relaxation of the rule that brought the parties the relief they had hoped for in many places, as the larger and medium-sized parties in most cantons have regularly been running with more than one election proposal for several National Council elections. Consequently, in the 2015 National Council elections in the canton of Bern, not a single one of the 26 election proposals was exempt from providing the 400 signatures. In 2019, the SVP, SP, BDP, FDP, Grüne, glp and EVP parties were then no longer required to submit signatures for their total of 19 election proposals, unlike the other 15 election proposals.

II. SIGNIFICANCE OF THE PROVISION

A. General

3 The purpose of the provision, according to which an election proposal must be supported by a minimum number of eligible voters, is to prevent non-serious election proposals (so-called jux lists) and to curb the "list and candidate

inflation" regularly lamented in parliamentary debates. The increase of the quorum to 50 signatures in the context of the creation of the PRA was intended to "put some stop to the frivolous or wanton deposit of lists." The goal of stemming the "flood of lists and candidates" or preventing junk lists or "beer table lists" was also used to justify the renewed increase in the minimum number of signatures during the 1994 revision.

As another approach in the effort to counteract "list inflation" even more strongly, the introduction of a printing cost contribution to the ballot papers or a deposit for this was suggested several times in the political debate - whereby the deposit would be paid back if the lists reached a certain number of votes. During the debate on the enactment of the PRA, a motion for such a deposit had been tabled in the National Council, and during the 1994 revision, the Federal Council had tabled a motion that would have allowed the cantons to introduce a printing cost contribution or deposit for this purpose. Both proposals failed in the Council plenum; for reasons of democratic policy, there was a reluctance to introduce a financial hurdle for participation in elections. 4

The standard does not achieve the goal of curbing "list and candidate inflation." When Parliament raised the quorum to 50 in 1976, 170 lists with 1947 candidates had run for election in proportional representation cantons in the previous 1975 elections. When parliament raised the quorum a second time in 1993 (to 100, 200, and 400), 248 lists with 2561 candidates had already been on the ballot in the previous 1991 National Council election. In the 2023 National Council elections, 618 lists with 5909 candidates stood for election in the proportional representation cantons. 5

Even smaller outsider groups or lone campaigners generally have no trouble meeting the not very high signature quorum. However, a look at the statistics shows that the massive increase in the number of lists and candidacies is not mainly due to outsider candidacies. In recent years, the number of nominations from parties that are represented in the National Council or have been active in politics for several years has risen sharply - from 368 in 2015 to 458 in 2019 and 553 in 2023. The established parties are running with more and more (e.g. regional, gender- or age-specific) sub-lists. The fact that established parties have been exempt from submitting signatures in accordance with the signature quorum since the 2019 elections may well have contributed to this development, even if they submit more than one election proposal in the con- 6

stituency (see N 2 above). The 65 lists subsumed by the FSO under "Other" accounted for only 10.5 percent of the lists in 2023. The share of candidates on the "other" lists in the total number of candidacies is even lower (9.1 %). It remains to be seen whether the current signature quorums prevent a few individual candidacies without absolute support in a few cases.

B. Legal comparison

7 The cantons know comparable regulations in their rules for the election of cantonal parliaments. Election proposals must be signed by a minimum number of voters, the number currently varying from 3 (NE) to 50 (GE, TI). Established parties and groups are exempt from the signature quorum under slightly different conditions in some cantons; in this case, the election proposal must be signed by one representative and one deputy. A person may only sign one election proposal and may not withdraw his/her signature.

III. QUORUM OF SIGNATURES

A. Minimum number (para. 1)

8 Each election proposal must be signed by hand by a minimum number of voters with political domicile in the electoral district.

9 Signed by hand means: signed by the voters themselves. The submission of the election proposal with the original signatures is required. Submission of signatures by fax or scan is not sufficient.

10 The voters signing an election proposal must have their political residence in the electoral district. For the candidates, on the other hand, this is not required (cf. OK-Wyler, Art. 22 PRA N. 7). Swiss voters abroad whose electoral commune is located in the electoral district may also sign an election proposal.

11 Candidates may sign their own election proposal if they have their political domicile in the electoral district and are of age at the time of submission of the election proposal. (To be a valid candidate, it is sufficient if they are of age no later than election day). Pursuant to Article 8b para. 2 of the PRA, by signing the election proposal, a candidate simultaneously declares his/her consent to his/her own candidacy within the meaning of Article 22 para. 3 of the PRA.

The minimum number of signatures for an election proposal is: 12

- 100 in cantons with 2-10 seats; (currently: LU, SZ, ZG, FR, SO, BS, BL, SH, GR, TG, TI, VS, NE, JU).
- 200 in cantons with 11-20 seats; (currently: SG, AG, VD, GE)
- 400 in cantons with more than 20 seats. (currently: ZH, BE).

These quorums are very low. As of the 2023 National Council elections, they ranged between 0.2% of voters in the cantons of Schaffhausen and Jura and 0.04% of voters in the cantons of Zurich, Lucerne and Vaud. 13

The Venice Commission (European Commission for Democracy through Law), a Council of Europe institution, considered in its 2002 "Code of Conduct on Elections" that the requirement of a certain number of signatures for the submission of a candidacy was not in principle contrary to the principle of universal suffrage. In paragraph 1.3 of the Guidelines, the Commission stated that "the nomination of individual candidates or lists of candidates (...) may be subject to a certain number of signatures." However, the law should "not require signatures of more than 1% of the voters of the constituency." The signature quorums of Article 24 para 1 PRA are far from this threshold. 14

In a decision on the invalidation of an election proposal in the Schwyz cantonal council elections, the Federal Supreme Court protected (also with reference to Article 24 PRA) the requirement of a signature quorum for election proposals. If an election proposal is supported by a certain number of voters, this shows that the proposed person has "at least a minimum of support among the population". In this sense, the signature quorum serves to prevent, or at least to make more difficult, election proposals that are not meant seriously or so-called joke lists. It is in the interest of the voters that only seriously intended election proposals are submitted to them. In order for a signature quorum for election proposals to fulfill its purpose, it must be so large that it prevents the submission of non-serious election proposals or at least effectively impedes them. At the same time, the hurdle associated with the signature quorum must not be excessively high in view of the freedom of choice flowing from Article 34 paragraph 2 FC. In the specific case of the smallest municipality Riemenstalden, which forms its own electoral district, the number of five signatures required from the municipality was very small in absolute terms, but quite high in relation to the only 53 voters of the municipalities (9.4% of the voting population). In view of the purpose of the norm, the Fed- 15

eral Court did not consider the required quorum to be excessively high, even for the smallest electoral district of Riemenstalden.

16 Some cantons require that a certificate of voting rights from the municipality be enclosed for the persons signing the election proposal when it is submitted; in other cantons, the voting rights of the signatories are verified by the electoral authority. If a submitted election proposal falls short of the quorum because individual signatures have to be deleted by the electoral authority, this constitutes a defect within the meaning of Article 29 paragraph 1 PRA according to the circular letter of the Federal Council, which can be rectified within the rectification period. The representative of the election proposal must be given a short grace period to submit the missing signatures (and certificates). In practice, it is also considered a remediable defect if not enough signatures of support were submitted or if certificates of voting rights were missing.

B. Only one nomination (para. 2)

17 A person entitled to vote may not sign more than one ballot proposition.

18 The signature may not be withdrawn after the ballot proposition has been submitted.

19 The name of a person entitled to vote who signs more than one election proposal shall be immediately deleted from all election proposals by the cantonal election authority (Art. 8b para. 3 VPR).

20 According to the Federal Chancellery, the prohibition of withdrawing a single signature implies the prohibition of withdrawing all signatures. It follows that once an election proposal has been submitted, it cannot be withdrawn. If this applies to election proposals signed by a certain number of eligible voters pursuant to Article 24 paragraph 1 PRA, it must also apply by analogy to election proposals signed by the "presiding and managing persons" of a party pursuant to Article 24 paragraphs 3 and 4 PRA. For the future, it should be considered whether - in order to create clarity - it should not be formulated directly and unambiguously in the law that once an election proposal has been submitted, it can no longer be withdrawn. (Analogous to the wording in Article 59b PRA: "A referendum cannot be withdrawn.")

C. Registered Parties (paras. 3 and 4)

Paragraph 3 states exceptions to the obligation to provide signature quorums. Accordingly, the quorums under paragraph 1 do not apply to a party that was duly registered with the Federal Chancellery at the end of the year preceding the elections (Art. 76a PRA), provided that it is represented in the National Council for the same constituency in the expiring term or that it obtained at least 3 percent of the votes in the last general election in the same canton. The facilitation applies to all lists of the party concerned in the canton (youth lists, regional lists, lists of the Swiss abroad, etc.) 21

Pursuant to Article 76a para 1 of the PRA, a political party may officially register with the Federal Chancellery if it a) has the legal form of an association within the meaning of Articles 60-79 of the Civil Code and b) is represented under the same name by at least one member in the National Council or by at least three members in three cantonal parliaments. The register of parties is public. 22

According to federal court jurisprudence, the requirement of Article 76 paragraph 1 letter b is only met if the member of the National Council has already been elected as a representative of the party concerned in the last general renewal election. A newly formed party that includes a member of the National Council who was elected as a representative of another party in the last election does not meet the requirements for registration. 23

To be exempt from providing signatures according to the quorum, the party must be duly registered at the end of the year preceding the elections. The registration must be regularly updated. Parties already registered must notify the Federal Chancellery of any changes to their statutes, name and registered office, and the names and addresses of the presiding and executive officers of the federal party. Registered parties that fail to comply with their obligation to report mutations by May 1 of the election year lose the right to exemption from the signature quorums under Article 24 para. 3 and 4 of the PRA. 24

In addition to proper registration, a party must meet another requirement to be exempt from the signature quorum in a canton: It must have been represented in the National Council for the same constituency in the expiring term or have obtained at least 3 percent of the votes in the constituency in the last general election. The results of several lists of the same party are counted together. 25

26 The exception rule of Article 24 para 3 was created in 2002 and decisively expanded in 2014 (cf. n. 2 above). In its new version, it leads to the fact that in many cantons the required signature quorums only have to be fulfilled for a minority of election proposals. The exception mutates into the rule.

27 A party that fulfills the conditions of paragraph 3 need only submit the legally valid signatures of all candidates according to Article 22 paragraph 3 PRA as well as those of the presiding and executive persons (paragraph 4).

28 The question of who the relevant presiding and managing persons of a party are shall be based on the statutes of the cantonal party.

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COMMENTARY ON

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Art. 25 Agent for the candidate list

[1] The signatories must appoint an agent for the candidate list and a deputy agent. If they fail to do so, then those persons whose names appear in first and second place as signatories to the list are deemed to be the agent and deputy agent respectively.

[2] The agent and, in the event of their incapacity, the deputy agent have the right and the obligation to make such legally-binding declarations on behalf of the signatories as may be required to obviate any objections.

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I. HISTORY OF ORIGINS

When the PRA was enacted in 1976, the provision was taken over unchanged from the Federal Act on the Election of the National Council of 1919, with only minor editorial changes. Since then, Art. 25 PRA has not been amended. 1

II. SIGNIFICANCE OF THE PROVISION

A. General

The provision regulates who the contact persons of the electoral authorities responsible for an election proposal are. It ensures that for each election proposal a representative and a deputy are designated who can act in a legally binding manner for this election proposal. 2

B. Comparison of laws

The cantons regularly require the designation of a representative and deputy for the election proposals in their parliamentary election law. 3

III. REPRESENTATIVE OF THE ELECTION PROPOSAL

A. Designation (para. 1)

A representative and a deputy must be designated for each election proposal. These are the responsible contact persons for the respective election proposal in dealings with the election authorities. In view of the short deadlines in the preparation of the election, it is important for the election authorities to have contact persons for the election proposals who can be reached quickly. It is unreasonable to expect them to contact the individual candidates, who are sometimes difficult to reach, directly in case of queries. 4

According to the wording in the law, it is the signatories of an election proposal who "designate" the representation of the election proposal. In practice, the submission of most election proposals is handled by secretariats of the parties or groups. These organize (if necessary) the signatures for the signature quorum according to Article 24 PRA and designate the persons who represent the election proposal in a legally binding manner. 5

6 Since the relaxation of the regulations on signature quorums, many election proposals no longer have any signatories at all within the meaning of Art. 24 para. 1 PRA. For the valid submission of these election proposals, only the signatures of the presiding and managing persons of the cantonal party are required (according to Art. 24 para. 4 PRA) in addition to the signatures of the candidates. This signature does not make the latter representatives of the election proposal; they only fulfill the requirement of Article 24 para. 4 PRA. A representative and a deputy must also be appointed for these election proposals. A representative and a deputy must also be determined for these election proposals.

7 The law does not describe in more detail who can be the representative of an election proposal. This can therefore be signatories as well as candidates, the executive or presiding persons of a party pursuant to Art. 24 para. 3 PRA, but also other persons (capable of acting under civil law) from the environment of a party or candidate group. The law does not limit the group of persons who may represent an election proposal. According to the circular letter of the Federal Council, the persons representing an election proposal must be entitled to vote in the electoral district - however, this does not result from the law and no compelling reason for this is apparent. For the electoral authorities it is important to have quickly available competent contact persons of an election proposal, in practice these are often employees of a party secretariat. It does not make sense to require the right to vote in the electoral district for the representations (which is not a prerequisite for candidacies either).

8 A person can only be the representative or the proxy for a single election proposal. This also applies to linked or sub-linked lists of the same grouping. This specification is not in the law, but it is stated in the circulars of the Federal Council for the National Council elections. In the case of groups with several partial lists, it may make the work easier for the authorities if one person acts as a representative for several election proposals. Nevertheless, the provision can be justified, as conflicts of interest are also conceivable between affiliated and sub-affiliated sub-lists, for example in the case of disputed issues surrounding list designations, which could give rise to confusion. And sub-lists also ultimately compete for mandates in the election.

9 If no representation and/or no substitution is designated in the submission of an election proposal, the first and second signatory persons of the election proposal are considered as such. The law does not regulate what happens if

the election proposal is exempt from providing signatures in accordance with Art. 24 para. 3 PRA. According to the circular letter of the Federal Council on the National Council elections 2023, the first and second candidate would represent the candidate. The question is probably of a theoretical nature, since the case can only arise with parties registered in the party register and these should regularly designate a representation and a deputy.

The wording of Art. 25 PRA is outdated. According to the wording of the provision, it is "the signatories" who designate "a representative of the election proposal and his deputy". These persons are then deemed to represent the signatories and make binding declarations on their behalf (cf. para. 2). This attributes a role to the signatories - in the sense of sponsorship or authorship of an election proposal - which does not correspond to reality. In the case of many election proposals of established parties, there are now no signatories at all within the meaning of Art. 24 PRA due to the relaxation of the rules on signature quorums. It is the party secretariats that designate the election proposal representatives. In the case of small parties and outsider lists, it is the party secretariats or often the candidates themselves who collect the signatures for the quorum and designate the representatives. The signatories of an election proposal are not the authors of the election proposal, but often people who have signed more or less by chance on the signature list. 10

For the future, a rewording of the provision is urgent. More recent cantonal legislations on political rights have therefore eliminated the connection between signatories and election proposal representation in their election rules. They require the designation of a representation for each election proposal, but no longer define this as the representation of the signatories. 11

B. Making declarations (para. 2).

The persons exercising the representation or the proxy of the election proposal are entitled and obliged to make "the legally binding declarations required for the removal of defects" on behalf of the signatories. Their declarations within the framework of the rectification and adjustment procedure of Art. 29 PRA are binding and obligatory for the election proposal. One can think, for example, of adjustments to list designations or list abbreviations that could give rise to confusion, the replacement of candidacies that must be deleted ex officio, questions regarding professional designations, etc. The 12

wording of this second paragraph ("on behalf of the signatories") is also outdated (cf. n. 11 above).

13 The decisive role played by persons acting as list representatives is illustrated by a decision of the Federal Supreme Court on the 2005 elections to the cantonal council of Solothurn. A person who appeared in public as a woman and had initiated a gender reassignment was listed on the election proposal with a female first name, although she was (still) registered as a man in the civil status register under a different name. The authorities then issued a short deadline to the representative of the election proposal with the request to correct the information on the election proposal - under the threat that the candidacy might be deleted from the election proposal. After the representation did not respond to the request, the candidacy was deleted. Rightly so, as the Federal Supreme Court ruled in response to an appeal by the person who had been removed from the election proposal: According to the Solothurn regulation (which corresponds to the regulation in the PRA), the signatories acted through two persons designated by them - the representation and the deputy. Therefore, the authorities had correctly addressed the request to correct the election proposal to the representation. The individual candidates had "no influence on the possible correction of the election proposals". By neither complying with the request to correct the list nor appealing the order, the representation had submitted to the deletion of the candidate in question from its election proposal in a legally binding manner and had dropped the candidacy, the Federal Supreme Court ruled (and therefore no longer examined the substance of whether the admission of the candidacy only under the male first name had been lawful).

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COMMENTARY ON

Art. 26 PRA

A commentary by Stefan Wyler

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Art. 26 Inspection of candidate lists

Those eligible to vote in a constituency may inspect the lists of candidates and the names of the signatories at the offices of the competent authority.

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I. HISTORY OF ORIGINS

The provision was introduced in 1976 when the PRA was enacted. According to the Federal Council's dispatch, it standardised the previous practice as approved by the Federal Supreme Court with regard to the freedom to vote in a decision from 1972. In order to eliminate any ambiguities, the decision was incorporated into the new law as a legal norm. 1

II. SIGNIFICANCE OF THE PROVISION

A. General

The provision states that the voters of the electoral district may inspect an election proposal and the names of the signatories. Voters have a right not only to know the individual candidates but also to know who the authors of an election proposal are. In practice, the provision is of little significance, since it is usually publicly known which group or which persons are behind an election proposal. 2

B. Legal comparison

Most cantons have practically identical provisions in their parliamentary election law. 3

III. INSPECTION OF ELECTION PROPOSALS

According to the wording of the law, "the voters of the electoral district" are entitled to inspect the election proposals. The right to inspect the election proposals explicitly refers to "the election proposals" and "the names of the signatories". The competent electoral authority under cantonal law must grant access. 4

Interested voters may inspect the election proposals and the lists of signatories "at the competent authority". There is no entitlement under federal law to be given a copy of the relevant documents. It seems permissible, for reasons of data protection, to cover the home addresses of the candidates and signatories when granting access, as long as the purpose of the access (identification of the persons behind an election proposal) is not prevented. 5

6 Inspection of election proposals on the basis of Art. 26 PRA shall be granted after the expiry of the registration deadline. The electoral authority also does not publicly communicate the election proposals received before the election registration deadline. The parties and groups have the possibility to change their election proposals until the expiry of the submission deadline. The public has no right to be informed of election proposals received before the closing date for registration, nor can parties or other political groups inspect the election proposals of their competitors before the closing date for registration on the basis of Article 26 of the PRA.

7 The fundamental decision of the Federal Supreme Court was based on a case from the canton of Schwyz. In the National Council elections of 1971, a committee called "We want to vote" had submitted an election proposal at the last minute and thus prevented silent elections. Many people now wanted to know who was behind this election proposal. However, they refused to allow access to the list of signatories on the grounds of voting and election secrecy. The Federal Supreme Court ruled that the secrecy of the ballot protected the votes of voters, but did not prevent voters from inspecting the list of signatories. On the other hand, the principle of the freedom to vote requires such an inspection. "In order to be able to exercise the right to vote in full independence and freedom, however, every voter must have the possibility of obtaining clarification of the political intention of those proposed and those proposing." A suitable means for this is the inspection of the list of candidates. It could not be ruled out that the signatories "might be exposed to certain inconveniences from time to time" if their names were disclosed on request. "However, far more weight than the interest of the signatories in the secrecy of the lists has the interest of the general public in their accessibility. (...) Anyone who signs an election proposal and thus assumes significant functions under public law must face the public, even if this is difficult for him or her."

8 The idea behind this regulation makes sense. For the sake of transparency and in accordance with the principle of freedom to vote, those entitled to vote should be able to find out which people are behind an election proposal. With a view to practice, the scope of the norm must be put into perspective somewhat. In the canton of Schwyz, in 1971, when an election proposal required 15 signatures, it was possible to find out who was behind the proposal by looking at the list of signatures. In a canton where 200 or 400 signatures are required, however, it is much more difficult today to find out who is really behind an

election proposal by looking at the signature lists. Many of the signatories have been approached as part of a broad collection of signatures and can hardly be seen as the decisive political forces behind an election proposal or as its authorship.

In practice, the granting of access on the basis of Art. 26 PRA hardly ever occurs. In general, the interested public knows which political direction a certain grouping represents and who is behind its election proposal. Cases such as the one underlying the Federal Supreme Court's landmark decision, where a completely unknown grouping submitted an election proposal at the last minute, are extremely rare. 9

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Art. 27 Multiple candidacies

[1] If the name of a candidate appears on more than one candidate list in any constituency, the name shall be deleted immediately by the canton from all the candidate lists on which it appears.

[2] The Federal Chancellery shall immediately delete from the candidate list any candidate whose name already appears on an electoral list or a candidate list in another canton.

[3] The Federal Chancellery shall immediately notify the cantons concerned of the deletions that it has made.

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I. HISTORY OF ORIGINS

The Federal Act on the Election of the National Council of 14 February 1919 already stipulated that no one may stand for election in more than one canton. The ban on running for the National Council in more than one canton, on the other hand, was not introduced until 1939. Until then, running for election in several constituencies was permitted. The ban was triggered by discussions following the election of Gottlieb Duttweiler (LdU) in 1935 in three cantons. Duttweiler accepted the election in the canton of Bern, and gave up the mandate in the cantons of Zurich and St. Gallen. The ban on multiple candidacies was now intended to prevent political bandwagons from being passed around as vote catchers. The 1976 PRA adopted this rule. 1

According to the rules in force since 1919 or 1939, multiple candidates were first requested by the canton or the Confederation to declare within a statutory period on which election proposal their name should appear. If no such declaration was received, the decision was made by lot. The Federal Act on Political Rights of 1976 changed the rule. If the nominated person did not make the desired declaration within the time limit, his or her name was deleted from all election proposals. With the 1994 revision, on the one hand, a (then two-month) window of opportunity was opened for the cantons to determine the deadline for registration, and on the other hand, the declaration of candidacy was introduced. Since then, multiple candidacies within a canton must be deleted from all election proposals by the canton without further inquiry. In the case of multiple candidacies in several cantons, the Federal Chancellery deletes from all other nominations those candidates whose name already appears on a list or nomination of another canton. 2

II. SIGNIFICANCE OF THE PROVISION

A. General

No person may stand as a candidate in more than one canton and within one canton on more than one election proposal. The provision prohibits, on the one hand, the candidature of a person in several cantons (constituencies) and the candidature of a person on several election proposals within one con- 3

stituency. It specifies the procedure to be followed in the event that multiple candidacies are identified.

4 According to the Federal Chancellery, no multiple candidacies in several cantons were identified in the 2011, 2015, 2019 and 2023 National Council elections. Multiple candidacies within cantons are also rare in practice.

B. Legal comparison

5 The cantons have largely comparable regulations for their parliamentary elections. They prohibit candidacy in several constituencies (if their parliament is elected in several constituencies) and they prohibit the candidacy of one person on several election proposals within one constituency. An exception is the canton of Glarus, where a person may stand in several constituencies in the elections to the Landrat.

III. MULTIPLE NOMINEES

A. Deletion by the canton (para. 1)

6 The provision prohibits multiple candidacies within a canton. A person who is a candidate may only do so on one nomination of the constituency. If a name appears on more than one proposal of the electoral district, the cantonal electoral authority shall delete it on all proposals.

7 For nominations that have been officially deleted, the representations of an election proposal may report substitute nominations within the purification period as part of the defect rectification procedure (Art. 29 PRA). According to this, it is permissible to re-nominate a person who has been removed from all election proposals due to multiple candidacies as a substitute proposal.

8 If, in an individual case, a multiple candidature is nevertheless discovered too late (i.e. only after the expiry of the purification period or only after the printing of the lists), it can, since 2014, still be officially declared invalid retrospectively. Invalidation is effected by publication in the cantonal official gazette and in the Federal Gazette; the names concerned are deleted from all ballot papers during the count (art. 29 para. 4, 32a and 38 para. 2 PRA, cf. the explanations in OK-Wyler, art. 32a PRA).

B. Deletion by the Federal Chancellery (para. 2)

The provision of Art. 2 prohibits multiple candidacies in several cantons. However, it is permissible to run for election in a canton other than the canton of residence (cf. OK-Wyler, Art. 22 PRA). 9

The regulation requires a central control of all candidacies from proportional representation cantons by the Federal Chancellery. The Federal Chancellery immediately removes from an election proposal those persons whose names are already on a list or an election proposal from another canton. In doing so, it leaves a person who has been nominated more than once on the election proposal that it receives first (Art. 8d para. 2 VPR). 10

The regulation is explained by the different (staggered) registration deadlines in the cantons (cf. OC-Wyler, Art. 21). If, in one canton, the clearing of the election proposals has already been completed and, if necessary, even the lists have already been printed, then persons running for election more than once can no longer be removed from the list in that canton. The deletion is therefore limited to the election proposals of those cantons in which the lists have not yet been purged at the time the multiple candidature is discovered. This is a pragmatic solution. As the Federal Council noted in its dispatch, the deliberately unlawful conduct of the candidates in question would also justify deletion from all election proposals; after all, every person proposed must confirm their election proposal by signature. 11

In order for the Federal Chancellery to be able to delete multiple candidatures, it is dependent on the cantons forwarding the election proposals received to it without delay (cf. OK-Wyler, Art. 21 para. 3 PRA). 12

The same applies to multiple candidacies in several cantons: if one is discovered too late, it can still be subsequently declared invalid (cf. above, n. 7). 13

C. Notification (para. 3)

According to Art. 27 para. 3 PRA, the Federal Chancellery immediately notifies the cantons concerned of its deletions. This rule is clarified by Art. 8d para. 3 CPD to the effect that the Federal Chancellery notifies the canton of the deletions "within 72 hours of the receipt of its election proposal" by electronic means. 14

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Art. 29 Rectification of deficiencies; Replacement candidates

[1] The canton shall examine the candidate lists and allow the agent representing the signatories a period within which to rectify deficiencies in the candidate list, alter designations that give rise to confusion, and nominate replacement candidates for candidates whose names have been officially deleted.

[2] The replacement candidates must confirm in writing that they accept their nomination. In the absence of such confirmation or where the relevant name already appears on another candidate list or the candidate is not eligible for election, the replacement candidate is deleted from the list. Unless the agent for the candidate list requests otherwise, replacement candidates are entered at the end of the candidate list.

[3] In the event of any deficiency not being rectified within the period allowed, the candidate list is deemed invalid. If the deficiency relates only to one candidate, their name is simply deleted.

[4] No candidate list may be further amended from the second Monday following the final date for submission of candidate lists. The foregoing does not apply to the official declaration of the invalidity of multiple candidacies subsequently discovered (Art. 32*a*). Cantonal legislation may reduce to one week the period allowed for rectification.

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I. HISTORY OF ORIGINS

1 The essence of the provision was already contained in the Federal Act of 14 February 1919 on the Election of the National Council and was incorporated into the PRA in 1976. When the PRA was enacted, the provision in para. 3 was added, according to which the failure to remedy deficiencies within the prescribed period would result in the invalidity of the entire nomination or the deletion of individual nominees. When the PRA revision of 1994 introduced a time window for the closing date for nominations in the cantons (cf. OK-Wyler, Art. 21 PRA), the previous one-week clean-up period was extended to two weeks. The cantons were given the option of shortening the deadline to one week. With the 2014 revision, the reservation concerning the subsequent invalidation of election proposals was inserted in para. 4.

II. SIGNIFICANCE OF THE PROVISION

A. General

2 The provision states that the cantonal electoral authority shall examine the election proposals and regulates the rectification of defects, the possible correction of list designations and the submission of substitute candidatures for officially deleted nominees within a defined rectification period.

B. Legal comparison

3 The cantons also have (differently structured) provisions in their parliamentary electoral law concerning the rectification of defects in election proposals and the submission of substitute candidatures for officially deleted nominees within a rectification period.

III. CORRECTION OF DEFECTS

A. Examination and setting of deadlines for rectifying defects (para. 1)

4 The cantonal electoral authority shall examine the nominations after their receipt. It checks whether the candidates fulfil the eligibility requirements,

whether the nominations contain all the necessary information (in accordance with Art. 22 PRA) and whether the designations and abbreviations of the nominations comply with the requirements. It also checks (if necessary) whether the necessary signatures have been submitted in accordance with the signature quorum of Art. 24 Para. 1 and whether the signatories are entitled to vote in the electoral district. In some cantons, the parties and candidate groups must enclose a certificate of voting rights from the municipality for the persons signing; in other cantons, the voting rights of the signatories are checked by the electoral authority (cf. OK-Wyler, Art. 24 PRA N. 16).

If an election proposal contains deficiencies, the cantonal electoral authority sets the representative of the election proposal (in accordance with Art. 25 PRA) a deadline within which to 5

- rectify any deficiencies in the nomination,
- change names that give rise to confusion, and
- and submit substitute nominations for candidates whose names have been officially deleted.

This deadline may be shorter than the deadline for corrections, so that the representation can still make improvements in the event of any necessary queries by the electoral authority. It is permissible to set a short period of grace (within the purification period). According to the regulation in the canton of Bern, a period of no more than three days is initially set for the rectification of defects. However, all deficiencies must have been remedied by the end of the rectification period at the latest. After expiry of the rectification period, no more changes to the election proposal are possible.

Corrections of misspelled names or other required candidate information, as well as the addition of missing information, are considered to be rectification of defects within the meaning of Art. 29 para. 1 PRA. A missing signature for the acceptance of the election proposal (Art. 22 para. 3 PRA) can also be subsequently submitted within the rectification period. If an election proposal fails to meet the quorum pursuant to art. 24 PRA because signatures are missing or have to be deleted, the missing signatures (together with any necessary certificates of voting rights) may be submitted subsequently (cf. also OK-Wyler, art. 24 PRA n. 16). 6

7 By law, the rectification of defects within the rectification period is limited to the correction of defects that the cantonal electoral authority reminds the representatives of the election proposals of by setting a deadline. If the representative of an election proposal submits proposals for correction on its own initiative (e.g. changes to professional titles or a different order on the election proposal), the electoral authority does not have to take this into account. However, it may accept such requests for amendments during the adjustment period, but must, of course, treat all parties and groups equally.

8 Pursuant to Art. 23 para. 1 PRA, each election proposal must bear a designation suitable to distinguish it from other election proposals. The cantonal electoral authority may therefore require an election proposal to change its designation (or abbreviation) if this could give rise to confusion. It will do so in particular in obvious cases, such as when two election proposals with identical names are received or when a grouping attempts to profit from an established foreign label. However, the fact that in today's diverse party landscape different groupings sometimes use the same designations (e.g. "green" or "bourgeois", "socialist") as components of their name is accepted, even if confusion may well arise here among a politically less interested section of the public.

9 According to the view taken here, the examination of the question whether a list designation within the meaning of Art. 29 para. 1 PRA gives rise to confusion is limited to the comparison with other list designations or party names. It is not the task of the electoral authorities to check whether a political self-designation of a party or list is correct in terms of content. - In the 2015 National Council elections, a voter in the canton of Fribourg demanded that the French name "Union démocratique du centre (UDC)" of the Swiss People's Party (SVP) be changed. He claimed that the SVP was not a party of the centre but a populist right-wing party, which is why the name could mislead voters. The Fribourg State Council rejected the request: A change of a list designation could only be demanded on the basis of Art. 29 para. 1 PRA if there was a risk of confusion with designations of other lists - which was not the case. The Federal Supreme Court ruled that it was not necessary to decide whether this view was correct, as the complainant's complaint was in any case unfounded. The party had borne the name UDC since 1971 and was registered under this name in the party register. It was the most strongly represented party in the

Federal Assembly and its political orientation was generally known. Thus, there is no danger of confusion for normally informed voters.

Furthermore, substitute nominations may be submitted within the purification period for candidates whose names have been officially deleted (e.g. because they are ineligible or are running for election more than once). The nomination of new candidates in the purge phase is explicitly limited to the replacement of officially deleted names. The parties and groupings may not add new candidates to the election proposal on their own initiative after expiry of the submission deadline pursuant to Art. 21 PRA (closing date for registration). 10

B. Proposals for substitutes (para. 2)

The proposed substitutes must confirm in writing that they accept the election proposal (this is analogous to the declaration of acceptance of candidacy pursuant to Art. 22 para. 3 PRA). If this written confirmation is missing, the name in question is already on another election proposal or the proposed person is not eligible, the electoral authority does not admit the substitute proposal ("the substitute proposal is deleted"). Unless the representation of the election proposal requests otherwise, the substitute candidates shall be listed at the end of the election proposal. 11

A person may also be re-nominated as a substitute proposal (but only on an election proposal) who has been deleted from all election proposals in the constituency pursuant to Art. 27 para. 1 PRA due to multiple candidature. 12

C. Invalidity (para. 3)

If a defect is not remedied in due time by the representation of the election proposal, the election proposal is invalid. If the defect concerns only one person or several persons nominated, only their names shall be deleted. 13

D. Purification period (para. 4)

The purification procedure (defect rectification procedure) is intended to enable - after the binding election registration deadline - corrections to the submitted election proposals and, within the described limits, substitute candidatures. After the expiry of the statutory clean-up period, no election proposal may be amended. While a shorter period of time set by the authorities for the correction of deficiencies may still be extended or a short period of grace may 14

be granted, any possibility of amendments to the election proposal shall be excluded upon expiry of the period of time for correction. The only exception is the official declaration of invalidity of subsequently recognised multiple candidatures in accordance with Art. 32a PRA.

15 In accordance with the present provision, the deadline for the amendment of nominations expires on the second Monday after the closing date for the submission of nominations, for which Art. 21 para. 1 PRA stipulates that the cantons must submit nominations on "a Monday in August". The law allows the cantons to shorten the deadline to one week, which is used by a majority of cantons. For the 2023 National Council elections, six of the 20 proportional representation cantons retained the 14-day deadline (ZH, BS, BL, SH, TI and NE), while the other 14 cantons provided for the seven-day deadline.

16 The canton must send a copy of each list to the Federal Chancellery within 24 hours of the expiry of the purification period at the latest. In doing so, it designates the list as purged (Art. 8d para. 4 VPR).

MATERIALS

Beschluss 314/2023 des Regierungsrates des Kantons Bern vom 22.3.2023 über die Durchführung der Nationalratswahlen vom 22.10.2023.

Beschluss 426/2023 des Regierungsrates des Kantons Zürich vom 5.4.2023 über die Erneuerungswahl der zürcherischen Mitglieder des schweizerischen Nationalrates für die Amtsdauer 2023–2027.

Botschaft des Bundesrates an die Bundesversammlung zu einem Bundesgesetz über die politischen Rechte vom 29.4.1975 (BBl 1975 I 1317).

Botschaft des Bundesrates über eine Teiländerung der Bundesgesetzgebung über die politischen Rechte vom 1.9.1993 (BBl 1993 III 445).

Botschaft des Bundesrates zur Änderung des Bundesgesetzes über die politischen Rechte vom 29.11.2013 (BBl 2013 9217).

Kreisschreiben des Bundesrates an die Kantonsregierungen vom 19.10.2022 über die Gesamterneuerungswahl des Nationalrates vom 22.10.2023, (BBl 2022 2547) (zit. Kreisschreiben BR NRW 2023).

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COMMENTARY ON

Art. 30 PRA

A commentary by Stefan Wyler

SUGGESTED CITATION

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Art. 30 Electoral lists

[1] The final candidate lists are known as electoral lists.

[2] Each list shall be provided with a reference number.

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I. HISTORY OF ORIGINS

The wording according to which the purged election proposals are called lists and the requirement that the lists be given order numbers were already contained in the National Council Elections Act of 1919 and were carried over unchanged into the PRA in 1976. According to the National Council Election Act, the lists were numbered "according to the order in which they were received". In the PRA, this passage was dispensed with "in order to prevent the often exaggerated competition according to the first numbers of the lists", as the Federal Council wrote in its dispatch. Since then, it has been left to the cantons to decide according to which rules they assign the list numbers. 1

II. SIGNIFICANCE OF THE PROVISION

A. General

The provision stipulates that the revised election proposals are to be called lists and that - for reasons of electoral organisation - they are to be given serial numbers. The rules governing the allocation of serial numbers are a matter for cantonal law. 2

B. Comparison of laws

The German-speaking cantons have adopted the wording of the PRA, according to which the cleared election proposals are referred to as lists. In cantonal parliamentary elections, lists are also assigned order numbers. The criteria used are usually party strength (which is defined differently) and/or the time at which the nominations are received; in some cases, a lot is also drawn. The cantons of Glarus, Ticino, Vaud and Geneva have a pure draw procedure in which all list numbers are drawn by lot. There are also other models, for example in the canton of Zug the lists are numbered in alphabetical order according to their name. In the canton of Zug, the lists are numbered in alphabetical order according to their designation. 3

III. LISTS

A. Terminology (para. 1)

4 The provision states that the "election proposals" are to be referred to as "lists" after they have been cleared up. This terminology corresponds to an official or academic usage. In public, in the communications of the parties and in the media, the "election proposals" are already also referred to as "lists". There is talk of the submission of lists, of men's and women's lists of a party, of list numbers, list officers, etc. In the French legal text, the election proposals are called "listes de candidatures" and the lists "listes électorales", in public one speaks simply of "listes" and also in the cantonal parliamentary electoral law, before and after the purification phase, one often speaks of "listes" without a clarifying addition.

B. Order numbers (para. 2)

5 According to this provision, the lists must be provided with order numbers (list numbers). This is required for organisational reasons: The list numbers are decisive for the order in which the lists are published, for the order of the lists in the ballot paper block, for the recording of the lists in the electoral computer system, etc. Furthermore, list numbers also serve to orientate the electorate.

6 The rules for the allocation of list numbers in National Council elections are laid down by cantonal law, and they are varied. Criteria are usually (in different forms) the party strength and/or the time of receipt of the election proposals, and in some cases lottery procedures are also used (these too in different forms).

7 Below are the rules for allocating list numbers in some selected cantons (an overview of the 2023 National Council elections can be found on the Federal Chancellery website

- Zurich: The list numbers are initially allocated according to party strength, first to the lists represented in the National Council according to the party votes obtained in the last National Council elections in the canton (the list with the highest number of votes receives the number 1), then to the lists not represented in the National Council but represented in the cantonal council according to the party votes obtained in the last cantonal council

elections, followed as the third category by (previously not taken into account) lists that are in a sub-list connection with a list represented in the National Council, again according to the party votes obtained in the last National Council election. The list numbers of the remaining lists are drawn by lot.

- Bern: The lists are numbered according to the number of party votes obtained in the last National Council elections, whereby the party votes of several lists of the same political grouping are added together. The lists of the same political grouping shall be numbered consecutively. Lists running for the first time receive an allocated list number.
- Aargau: The lists are numbered according to the party strength (number of party votes in the last National Council election) with numbers, lists of the same political grouping are additionally marked by a letter (list 1a, 1b, 1c etc.). The list numbers for newly submitted lists are drawn by lot.
- St. Gallen: The lists are numbered according to the party strength (number of party votes in the last National Council election) with numbers, lists of the same political grouping are additionally marked by a letter (list 1a, 1b, 1c etc.). The list numbers for newly submitted lists are allocated according to the order in which the lists are received; the list numbers for lists received on the same day are allocated by lot.
- Basel-Stadt: Election proposals from parties and groups that took part in the previous proportional representation election under the same name or "with an uncontested claim to succession" are assigned a traditional ordinal number.
- Thurgau: The lists are allocated according to the order of receipt of the election proposals. Among election proposals received on the same day, the list number is drawn by lot.
- Tessin, Waadt, Genf: Die Listennummern sämtlicher Listen werden ausgelost
- Zug: The lists are numbered in alphabetical order according to the initial letters of the titles (list designations).

The rules for assigning list numbers are a constant topic in debates on electoral law. Although not clearly provable, it is assumed, at least in some parties, that a low list number can give an electoral advantage. Under this assumption, 8

the distribution of list numbers according to party strength is disturbing with regard to the equal treatment of all candidate groups to be guaranteed by the electoral authority, since it favours the large parties. The allocation of the numbers according to the time of receipt of the election proposals has the disadvantage that, as practice shows, there are constant discussions about the type of changes that cause a proposal to lose the allocated number and to be considered as newly submitted. A consecutive numbering of the lists of the same grouping makes the list tableau clearer, but also reinforces the weaknesses of both models (party strength or date of receipt). Ultimately, the solution of the cantons of Ticino, Vaud and Geneva, in which all list numbers are determined by lot, appears to be the fairest, particularly with regard to equal opportunities for parties and groups.

MATERIALS

Beschluss des Regierungsrats des Kantons Bern vom 12.8.1987 «betreffend die Nummerierung der Listen bei den Nationalratswahlen» (BSG 141.122).

Botschaft des Bundesrates an die Bundesversammlung zu einem Bundesgesetz über die politischen Rechte vom 9.4.1975 (BBl 1975 I 1317).

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COMMENTARY ON

Art. 31 PRA

A commentary by Stefan Wyler

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Art. 31 Combined electoral lists

[1] Two or more electoral lists may at the latest by the end of the period allowed for rectification (Art. 29 paragraph 4) be combined with each other by means of a unanimous declaration of the signatories or their agents. Within a combined electoral list, only electoral list sub-combinations are permitted.

[1bis] List sub-combinations are valid only in the case of electoral lists with the same designation that differentiate themselves from each other solely by an additional designation indicating a distinction that is based on sex, the wing of a political group, region, or age.

[2] List combinations and list sub-combinations must be indicated on pre-printed ballot papers.

[3] Declarations relating to electoral list combinations and electoral list sub-combinations may not be revoked.

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I. HISTORY OF ORIGINS

1 With the introduction of proportional representation in the Federal Act on the Election of the National Council of 1919, (constituency-based) list combinations were made possible. Sub-list connections were not mentioned in the 1919 law, but they subsequently became established in practice and were deemed permissible according to answers given by the Federal Council to parliamentary requests. In the parliamentary discussion of the Federal Act on Political Rights of 1976, a motion seeking to prohibit non-party list connections failed after a motion for the outright deletion of list connections was withdrawn. The sub-list connection, on the other hand, was included in the law for the first time. Critics of list combinations complained in the debate that list combinations were intransparent and distorted the will of the voters by giving their vote to a list group that they might not even want to support. The supporters, on the other hand, saw list combinations as a corrective to the electoral system, which is unfavourable for small parties with sometimes small constituencies. Like the Federal Council, they also referred to the list splitting system, which would make it possible to distribute mandates proportionally among the regions in large cantons and not unilaterally favour the cities.

2 Within the framework of the PRA revision of 1994, the topic was again discussed in parliament. This time, the Federal Council requested the abolition of sub-list connections. The federal councillors did not follow him. However, certain conditions were created for entering into sub-list connections with Art. 31 para. 1bis: Sub-list connections are now only possible "between lists of the same designation which differ only by an addition to indicate gender, the wings of a grouping, the region or the age" (see on this below n. 15 ff.). On the other hand, the (in practice rare) sub-sub-list connections were abolished. In 2013, two motions were clearly rejected in the National Council which wanted to abolish non-party list connections.

II. SIGNIFICANCE OF THE PROVISION

A. General

In a list affiliation, one or more lists join together. Their votes are initially counted together in the allocation of mandates. In the first distribution, the list combination is compared to the other lists (and list combinations) as if it were a single list. In the National Council electoral law - within list combinations - sub-list combinations are also permitted. Based on the election result, the mandates are first distributed to the list combinations (and single lists); in a second distribution and possibly further distributions, the mandates are then distributed within the list combination to the possible sub-list combinations and (within these) to the individual lists. (For the distribution of mandates to the lists and list combinations in the procedures according to Hagenbach-Bischoff applicable in the National Council electoral law, cf. in detail Art. 40 ff. PRA). 3

A distinction must be made between intra-party or single-party list combinations, which comprise several lists of the same political party or grouping, and inter-party or multi-party list combinations, which comprise lists of several parties or groupings. Intra-party list combinations enable political groups to address a larger electorate by submitting several partial lists (men's and women's lists, young party lists or regional lists) with a larger number of candidates. Thanks to the combination, they do not run the risk of losing (residual) votes when the mandates are distributed among the partial lists. With non-party list combinations, the parties and groups try to make better use of the remaining votes and, thanks to the combination, to achieve additional mandates. The number of unused, weightless votes (votes that have no influence on the election result) decreases. 4

Inter-party list combinations are usually concluded between parties that are politically close to each other (for example, there are numerous bourgeois or red-green list combinations). However, this is not obligatory, and sometimes strange alliances can be observed that are solely due to electoral arithmetic. In the case of list alliances, however, the list alliance partners remain independently acting political forces, which campaign independently and also against each other. 5

6 Under certain circumstances, list connections enable medium-sized and small parties to achieve a mandate that they would not achieve on their own (especially in constituencies with few mandates and a high natural quorum). However, it cannot be said that the institute of list combination generally serves the smaller and medium-sized parties. The votes of a smaller or medium-sized party can also help a list-linked larger party to win another mandate, while the smaller party may also come away completely empty-handed under certain circumstances.

7 The institute of list affiliation does not make sense in every electoral procedure. It is particularly important in a system with small constituencies and few mandates, where the hurdle (natural quorum) for a single party to win a mandate is high (as in many cantons in the National Council elections). The "double Pukelsheim" allocation procedure used in many cantonal parliamentary elections, which results in a fine distribution of mandates according to proportional representation, does not recognise list combinations.

8 In the political debate and in teaching, the institute of list combinations is controversial. The advantages are considered to be the improvement of electoral chances for smaller and medium-sized parties in small constituencies and the possibility for parties to submit partial lists. However, list combinations, and in particular sub-list combinations, are often criticised for being non-transparent; for many eligible voters it is no longer clear (even with the corresponding indications on the ballot papers) to whom their vote will ultimately be allocated - which could violate the principle of freedom of choice. It is also sometimes criticized that the admission of list combinations could lead to "arbitrary election results", as the admission would ultimately promote.

B. Legal comparison

9 In ten cantons - as at the end of 2023 - list combinations are permitted in cantonal parliamentary elections. List combinations are permitted without restriction in the cantons of Bern, Lucerne, Obwalden, Glarus, Solothurn, Thurgau and Geneva. List combinations are also permitted without restrictions in the only constituency with proportional representation in the cantonal council elections in the canton of Appenzell-Ausserrhoden (Herisau) as well as in the constituencies not divided into sub-constituencies in the Vaud cantonal elections. In the St. Gallen cantonal council elections, list connections are

permitted among lists with the same designation that differ only by an addition to indicate gender, the wings of a grouping, region or age.

Only five cantons know sub-list connections. In Bern and in the electoral district of Herisau in the canton of Appenzell-Ausserrhoden, such are possible without restriction. In the cantons of Lucerne, Solothurn and Thurgau (as in the National Council elections) they are only valid between lists of the same designation which differ only by an addition to indicate gender, the wings of a grouping, region or age. 10

III. LINKED LISTS

A. Matching declaration (para. 1)

The provision allows for list combinations. Two or more lists may be linked. List connections are possible between partial lists of a party (intra-party list connections), but also between different parties and groupings (inter-party list connections). 11

Within a list combination, sub-list combinations of two or more lists are also permissible. Only lists that belong to the same list combination can be combined in a sub-list combination. In contrast, sub-sub-list connections are no longer permitted since the PRA revision of 1994 (this follows from the wording of the norm: "... only sub-list connections are permitted"). 12

In order for list connections and sub-list connections to be entered into with legal effect, a concurring declaration by the representatives of the election proposals is required. The representatives must agree to the list combination in the knowledge of all lists involved and all sub-list combinations entered into. According to Article 8e paragraph 1 of the VPR, the declarations must contain at least the information according to the model form pursuant to Annex 3b of the VPR: Number (if already assigned) and designation of the linked/sub-linked lists; name and signature of the representatives, remarks (e.g. designation of the sub-list links), place and date. 13

The list affiliation declaration must be submitted to the competent authority of the canton by the end of the purification period (art. 29 par. 4 PRA) at the latest. The decisive factor for the validity of list and sub-list connections is the time at which the relevant declaration is received by the competent cantonal authority (art. 8e par. 2 CPD). 14

B. Sub-list connections (para. 1bis)

15 A restriction concerning sub-list connections was introduced into the PRA with the 1994 revision. According to this, sub-list connections are "only valid between lists of the same designation which differ only by an addition identifying the sex, the wings of a grouping, the region or the age".

16 The distinguishing designation of the sub-lists of a grouping approved for sub-list combinations can refer to gender: For example, various parties have separate lists for men and women. The distinguishing addition can relate to the wings of a grouping. For example, the party "Die Mitte" in the canton of Lucerne presents a separate list of Christian Socialists (Die Mitte), or the GLP in the canton of Berne presents a list of Green Liberal SMEs. With the massive increase in sub-lists, the parties have begun to label many of their lists or assign them a specific thematic focus. Examples: FDP.Economy and Education, FDP.Environment and Energy, FDP.Culture and Sport in the Canton of Zurich, or: Green Liberal Energy, Green Liberal Creative, Green Liberal Animal and Nature in the Canton of Berne. We can only speak of party wings in the broadest sense here. The distinguishing feature can also be the region. Lists separated by canton are common in several cantons for some parties: The Center Main List South-East and The Center Main List North-West in the canton of St. Gallen or the many regional lists in the canton of Valais. (On the problem of regionally not clearly designated lists, see OK-Glaser, Art. 37 PRA N. 25ff.) Finally, separate lists of a party may differ in terms of age: In many parties, the young parties traditionally have their own lists (e.g. Juso, Jungfreisinnige, Junge SVP), but increasingly there are also separate lists with older candidates (examples from the canton of Zurich: SVP Ü55 list, senior GLP, SP 60+). s admitted to sub-listing (subsumed under the title of wings of a grouping if they cannot be qualified as regional lists).

17 The provision that sub-list combinations are possible between lists from different wings of a grouping has been interpreted generously in practice over the years and has not been regarded as a ban on inter-party sub-list combinations. For example, in the 2019 National Council elections in the canton of Basel-Stadt, the three independent parties EVP, GLP and BDP combined their lists under the common main list name "Mitte" in a sub-list connection as different wings of a grouping. And in the canton of Vaud, the three parties EVP, EDU and BDP ran their lists under the main list name "Alliance du centre" as different wings of a grouping with sub-list connections.

The doctrine, insofar as it dealt with the question at all, expressed itself rather critically. Yvo Hangartner/Andreas Kley described the practice in the first edition of the standard work "Die demokratischen Rechte in Bund und Kantonen der Schweizerischen Eidgenossenschaft" (Democratic Rights in the Confederation and the Cantons of the Swiss Confederation), published in 2000, as "(too?) generous"; Anina Weber assessed it in 2016 in a practically identical formulation as "(too) generous". Andreas Glaser and Florian Frei were stricter in an essay in 2020. With a view to the genesis of the norm, they came to the conclusion that non-partisan sub-list connections were unlawful. In 1993/1994, when enacting the provision, parliament had only wanted to allow list connections between different parties, but not sub-list connections. The latter were limited to connections within a party. In the meantime, the authors of the second edition of the work "Democratic Rights", published in 2023, have also come to this conclusion. 18

In 2021/2022, during the debate on a parliamentary initiative, the Federal Councillors stated that different parties (as in the cases from Basel-Stadt and Vaud cited above) could not be the wings of one grouping. Accordingly, sub-list combinations between lists with the same designation, where different parties form the wings, are to be regarded as inadmissible in future. The Federal Council explicitly states this in its new circular on the National Council elections. The vote of the President of the SPK-S as well as the votes of the Speaker of the SPK-S correspond to an explicit reservation of interpretation with reference to the ratio legis, which justifies a change in practice. In a landmark decision, the Federal Supreme Court upheld this legal opinion and rejected an appeal against the non-admission of a sub-list link between the "Mitte" and the EPP in the canton of Neuchâtel in the 2023 National Council elections. The historical and teleological interpretation of the provision clearly shows that sub-list connections are only permitted between lists of the same party or grouping. Nor does the ban on non-party sub-list combinations violate the equality of electoral rights guaranteed by Article 34 paragraph 2 of the Federal Constitution. 19

C. Note on ballot papers (para. 2)

The provision requires that list and sub-list connections are to be noted on the ballot papers using pre-printed forms. In the light of freedom of choice, it is imperative that voters know which alliances the individual lists have en- 20

tered into and who could benefit from their vote. The provision was introduced with the enactment of the PRA in 1976 ("so that the circumstances are clear to everyone", as the Federal Council wrote in the dispatch).

21 The reference to the list connections and sub-list connections must be made "in a readily understandable and readily apparent form", as the Federal Council states in the circular letter on the National Council elections. It is recommended that the references to the links be placed at the top of the ballot paper instead of at the bottom (which is standard at least in the larger cantons). It would also be helpful to provide voters with better information if the list abbreviations, rather than just the list numbers, were included in the references to the links. Individual cantons (such as Zurich, Bern or Thurgau) not only note the list connections and sub-list connections on the pre-printed ballot papers of the respective lists, but also include an overview of all list connections and sub-list connections at the front of the ballot paper block.

22 A list connection that has not been made known to the eligible voters is invalid. This was the ruling of the Federal Supreme Court in a case concerning the elections to the Grand Council in the canton of Vaud in March 1978. The registered list connection between the Parti radical démocratique and the Parti libéral in the electoral district of Lausanne was erroneously neither published nor noted on the electoral lists nor made known to the electorate in any way. The Federal Supreme Court considered this to be an interference with the will of the electorate, as it could not be ruled out that individual voters would have cast their vote differently if they had been aware of the list combination. According to the Federal Supreme Court, the free formation of will requires that those entitled to vote receive all important information on the election in an appropriate manner - this necessarily includes the list combinations entered into. The distribution of seats was recalculated (without the undisclosed list combination) and the seats were reallocated accordingly.

D. No revocation (para. 3)

23 Declarations of list connections and sub-list connections cannot be revoked. The provision was newly inserted with the 1994 revision "to prevent uncertainties and tactical skirmishes", as the Federal Council wrote in its dispatch. It explicitly referred to a case that had occurred in the 1987 National Council elections in the canton of Bern. A list affiliation between two groups was first declared, then revoked in writing by one group and renewed again shortly be-

fore the deadline, which a third party tried to prevent by threatening a complaint.

MATERIALS

Bericht des Bundesrates vom 13.3.1931 an die Bundesversammlung über das Postulat des Nationalrates vom 5.12.1928 betreffend die Unterlisteverbindung (BBl 1931 I S. 354).

Botschaft des Bundesrates an die Bundesversammlung zu einem Bundesgesetz über die politischen Rechte vom 28.4.1975 (BBl 1975 I S. 1317).

Botschaft des Bundesrates über eine Teiländerung der Bundesgesetzgebung über die politischen Rechte vom 1.9.1993 (BBl 1993 III S. 445).

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COMMENTARY ON

Art. 32 PRA

A commentary by Stefan Wyler

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Art. 32 Publication of the electoral lists

[1] At the earliest possible opportunity, the canton shall publish in the official cantonal gazette the electoral lists with their designations and their reference numbers as well as references to any list combinations or list sub-combinations.

[2] The Federal Chancellery shall publish the electoral lists in electronic form indicating the official surnames and first names, year of birth, occupation, place of origin and place of residence of the candidates.

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I. HISTORY OF ORIGINS

The provision according to which the cantons must publish the lists and refer to the list connections was already found in the National Council Election Act of 1919. When the PRA was enacted, this requirement was taken over, supplemented by the reference according to which the announcement must be made "as early as possible" and "in the cantonal official gazette". An additional paragraph 2 of Art. 32 was included in the PRA with the total revision of the Publication Act of 2004 and adapted to the new requirements regarding necessary candidate information with the PRA revision of 2014. 1

II. SIGNIFICANCE OF THE PROVISION

A. General

The provision regulates the official publication of the lists by the cantonal electoral authorities and the Federal Chancellery. 2

B. Comparison of laws

The cantons have comparable provisions regarding the official publication of the lists in their parliamentary elections. In addition to the lists and candidates, the list connections and sub-list connections must also be indicated (where such connections are permitted at all, cf. OK-Wyler, Art. 31 PRA N. 9 f.). 3

III. PUBLICATION OF THE LISTS

A. Cantonal official gazette (para. 1)

The cantonal electoral authority shall publicly announce the lists received in the cantonal official gazette. The publication shall mention the list designations and list abbreviations as well as the order numbers, and reference shall be made to the list connections and sub-list connections. 4

The right of voters to have the election proposals (with the references to the list connections) officially published already results from the constitutional right to vote. Official publication serves the free formation of the will of those 5

entitled to vote. It also serves to safeguard the right to ensure that only electable candidates are nominated. With the early official information about all election proposals, those entitled to vote are given the opportunity to take legal action against the candidature of (allegedly) ineligible persons.

6 The law does not specify what information must be provided on the persons standing for election in the publication in the cantonal official gazette. Accordingly, in the publication according to paragraph 1, the persons running for election may (unlike in the publication according to paragraph 2) be mentioned under the names by which they are "known in everyday life or politically" (Art. 22 para. 2 let. b PRA); they will also be listed under these names on the ballot papers. It is also advisable to indicate the year of birth and (as is compulsory for the ballot papers according to Art. 33 para. 1 PRA) the place of residence of the candidates. The publication of the occupation is optional.

7 Publication must take place "as early as possible" and "in the cantonal official gazette". The official publication of interest here refers to the purged lists and takes place after the expiry of the purge period, i.e. at a time when the lists can no longer be changed. In the meantime, the electronic official gazette has become the standard for the cantonal official gazettes.

8 The cantons now regularly publish the lists and the names of the candidates on their cantonal homepages after the submission deadline (election registration deadline). In doing so, they point out that the lists are not yet final and that there is a deadline for corrections. These publications serve to inform the public and the media and do not constitute official publications within the meaning of Art. 32 PRA. After expiry of the adjustment period, the relevant information is updated and official information is published in the Official Gazette.

B. Federal Chancellery (para. 2)

9 According to the provision, the Federal Chancellery also publishes the lists in electronic form. In doing so, it publishes the official names and first names, the year of birth, the home towns and the place of residence of the candidates.

10 This provision was introduced in 2004 with the total revision of the Publication Act. Today, it constitutes the legal basis required by the Publication Act for the (exceptional) publication by the Federal Chancellery of personal data

requiring special protection. When publishing the lists for the National Council elections, the public interest in the correct conduct of the election outweighs claims to protection of privacy. The identity of the candidates must be verifiable.

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COMMENTARY ON

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Art. 32*a* Declaration of the invalidity of candidacies

[1] If a multiple candidacy is discovered following the rectification of the candidate lists, the candidacy concerned shall be declared invalid on all the lists affected:

a. by the canton, where the same candidate appears on more than one list in that canton;

b. by the Federal Chancellery, where the same candidate appears on lists in more than one canton.

[2] The cantons concerned and the Federal Chancellery shall inform each other immediately of the candidacies that have been declared invalid.

[3] Where possible, the names of persons whose candidacy has been declared invalid shall be deleted from the lists before they are published.

[4] The declaration of the invalidity of a candidacy on lists that have already been published shall be published immediately in electronic form in the Federal Gazette and in the official gazette of all the cantons concerned.

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I. HISTORY OF ORIGINS

1 Art. 32a was added to the PRA with the 2014 revision. As the number of lists and candidatures in the National Council elections continues to grow, the Federal Council stated in its dispatch that there is a growing risk that multiple candidatures will not be discovered in time. In order to ensure a correct proportional representation election, it should therefore also be possible to subsequently declare multiple candidatures invalid.

II. SIGNIFICANCE OF THE PROVISION

A. General

2 The provision regulates how to deal with (intra-cantonal and cross-cantonal) multiple candidacies that are only discovered after the expiry of the deadline (Art. 29 PRA). It allows for the subsequent invalidation of such candidacies on all lists concerned. The purpose of allowing subsequent official deletion is to prevent unnoticed double candidacies from thwarting the correct allocation of all votes. Pursuant to Art. 38 para. 2 letter b PRA, all names of persons whose candidature has been subsequently declared invalid due to multiple candidatures must be deleted from the ballot papers when the election is determined (cf. further the explanations on Art. 38 PRA).

B. Legal comparison

3 Most cantons do not have any corresponding rules in their parliamentary election law. The fact that multiple candidacies are only discovered after expiry of the purification period is unlikely to occur in cantonal parliamentary elections and therefore does not constitute a problem requiring regulation. An exception is the canton of Graubünden, which explicitly provides for the subsequent deletion of multiple candidatures discovered after the purification period.

III. INVALIDATION OF CANDIDATURES

A. Multiple candidatures discovered subsequently (para. 1)

The provision allows for the invalidation of multiple candidacies that are only discovered subsequently - i.e.: after the expiry of the purification period of Art. 29 para. 4 PRA, the point in time after which election proposals can in principle no longer be changed. Subsequent deletion is carried out by the cantonal electoral authority if the same person is on more than one cantonal list (letter a). It is carried out by the Federal Chancellery if the same person is a candidate on lists from several cantons (letter b). 4

The rules concerning the deletion of multiple nominees before the expiry of the purification period can be found in Art. 27 PRA. Those who have been removed due to multiple candidature still have the possibility to be nominated again on a single election proposal as a substitute proposal in the sense of Art. 29 para. 2 PRA. A subsequent deletion of multiple candidates pursuant to Art. 32a PRA, on the other hand, is final; no more substitute nominations are possible here. 5

The provision has never been applied. In the 2019 National Council elections, the first election since the norm came into force, no multiple candidature was subsequently discovered, according to the Federal Chancellery. 6

B. Notification (para. 2)

The provision requires that the cantons concerned and the Federal Chancellery inform each other immediately of the subsequent invalidation of candidatures. 7

C. Cancellation before announcement (para. 3)

As far as possible, the names of persons whose candidature has subsequently been declared invalid shall be removed from the lists before they are announced. The provision has never been applied. According to the Federal Chancellery, no intra-cantonal or cross-cantonal multiple candidacies were subsequently discovered in the 2019 and 2023 National Council elections. Moreover, in many cantons - in view of the tight timetable for preparing for the elections - the process of printing the lists is likely to be started immediately after the end of the purification period. 8

D. After announcement (para. 4)

9 The invalidation of a candidature on lists that have already been announced must - for the information of those entitled to vote - be published immediately electronically and in the official gazette of all the cantons concerned and in the Federal Gazette, stating the reason (multiple candidature subsequently identified).

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COMMENTARY ON

Art. 33 PRA

A commentary by Stefan Wyler

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Art. 33 Preparation and delivery of ballot papers

[1] The cantons shall prepare ballot papers for all the electoral lists, which each contain pre-printed details of the list designation, any electoral list combination, the reference number and candidate information (as a minimum the surnames, first names and place of residence), as well as ballot papers that are not pre-printed.

[1bis] If the canton prepares vote recording vouchers instead of ballot papers, persons eligible to vote shall also receive a summary of the details of each of the candidates and of the electoral list designations, and of any list combinations and list sub-combinations.

[2] The cantons shall arrange for a complete set of all ballot papers to be delivered to each person eligible to vote at least three weeks and no more than four weeks prior to the polling day.

[3] The signatories may obtain additional pre-printed ballot papers at cost price from the cantonal chancelleries.

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I. HISTORY OF ORIGINS

1 It was not until the enactment of the Federal Act on Political Rights in 1976 that the cantons were obliged to produce ballot papers for all lists at their own expense and to send them to voters. Until then, in some cantons this had been the responsibility of the parties, which often meant that voters were not in possession of all the lists - a clear restriction of their freedom of choice. The provision on the admission of "registration vouchers" (Art. 33 para. 1bis) was included in the PRA with the 1994 revision. Finally, with the 2014 revision, the deadline for delivery of the electoral material to voters was brought forward. They now receive the documents (as in the case of referendums) at the earliest four and at the latest three weeks before the day of the ballot.

II. SIGNIFICANCE OF THE PROVISION

A. General

2 The provision states that the cantons are responsible for the production and distribution of ballot papers. They must send, at their own expense, a complete set of the ballot papers of all lists and a blank ballot paper without a form to all eligible voters in the fourth to last week before polling day.

B. Legal comparison

3 The cantons have fundamentally comparable regulations in their parliamentary election law. In the case of cantonal parliamentary elections, it is also the responsibility of the authorities to produce a complete set of ballot papers from all lists and a ballot paper without a pre-printed form and to send them to voters. The costs are borne by the cantons. The prescribed details of the candidates on the pre-printed ballot papers are the surnames and first names, year of birth, occupational title and place of residence. The last date for delivery of the electoral material to voters is sometimes closer to election day. Few cantons have rules comparable to Art. 33 para. 4 PRA concerning additional pre-printed ballot papers.

III. PREPARATION AND DELIVERY OF BALLOT PAPERS

A. Responsibility of the cantons (para. 1)

It is the responsibility of the cantons to produce the ballot papers for the National Council elections at their own expense. 4

All ballot papers must show a designation of the election in question (e.g. National Council elections 2023 or National Council elections of 22 October 2023), which - probably because it goes without saying - has not been specifically regulated. 5

The ballot paper block or the ballot paper booklet contains pre-printed ballot papers for all lists and a ballot paper without pre-print. These constitute official ballot papers within the meaning of Art. 5 para. 2 PRA. The ballot paper without pre-print does not contain any list designation or number and no names of candidates or candidate numbers. It contains only blank lines or boxes, which are to be filled in by hand by the eligible voters. It shall contain as many blank lines as there are mandates to be allocated in the constituency. 6

The pre-printed ballot papers must contain the list designations (including list abbreviations), the list order number and the reference to any list connections and sub-list connections of the list in question (cf. Art. 31 para. 2 PRA). Each candidate shall receive a candidate number consisting of the list number, the list position number and (if applicable) a check digit. The candidates' surnames and first names as well as their place of residence are mandatory. The name by which the person is known politically or in everyday life will regularly be given (art. 22 para. 2 let. b PRA). The above information is the minimum required under federal law. The cantons may print further information about the candidates on the ballot paper. In particular, the year of birth, job titles or political offices and the note "previously" in the case of re-candidates are common. If a list (including the pre-cumulative candidates) has fewer candidates than there are mandates to be allocated in the constituency, blank lines or boxes shall be printed for the list positions that are not filled. 7

Art. 7 VPR requires that sufficient space be left free on pre-printed ballot papers to enable the electorate to make the process of variegation and cumulation easily legible. This requirement, which makes sense and is necessary in practice, is a challenge, especially in large cantons with many mandates to be 8

allocated. For this reason, individual cantons have set limits for the (sometimes overflowing) professional titles.

B. Registration documents (para. 1bis)

9 According to this provision, inserted in 1994, the cantons may use machine-readable ballot papers, so-called registration slips, in National Council elections. Machine-readable ballot papers, such as those used in the canton of Ticino for cantonal and communal elections, serve as an example. If a canton sends out such registration documents to voters, it must also send them a compilation (overview) with the minimum information on lists and candidates required under paragraph 1 (containing the complete list designations, references to list connections and sub-list connections, as well as the minimum candidate information such as surnames and first names and place of residence). The use of machine-readable ballot papers in National Council elections would also have to be approved by the Federal Council in accordance with Art. 84 para. 2 PRA. In practice, this provision has not played a role so far. No canton used such recording documents in National Council elections.

C. Complete set of all ballot papers (para. 2)

10 The cantons must send a complete set of all ballot papers to eligible voters at least three and no earlier than four weeks before election day. The electoral material must reach those entitled to vote in the fourth to last week before election day. With the revision of the law in 2014, the deadline for the delivery of the election material was brought into line with the deadline that has been in force for a long time for referendums. The new regulation is made possible by limiting the time window for the election registration deadline to a Monday in August (cf. Art. 21 para. 1 PRA). According to the previously applicable regulation of 1976, ballot papers had to be sent to voters no later than ten days before election day.

11 In addition to the ballot papers and the voting instructions (Art. 34 PRA), the cantons are free to send the electoral advertising material of the parties and groups to the eligible voters (with the dispatch of the official material or in a separate dispatch). Some cantons have such a practice (e.g. BE, FR, AG, SO, JU). All parties and candidate groups are to be treated equally. In order not to let the weight of the election documents to be sent get out of hand and to limit the mailing costs, a weight limit is sometimes set for the advertising leaflets.

D. Additional ballot papers (para. 3)

The parties and candidate groups (in the wording, impractical: "the signatories") may obtain additional ballot papers with pre-printed copies of their lists from the cantonal state chancelleries at cost price. They can distribute these during the election campaign or, if a canton is aware of the state's election advertising material dispatch, have them enclosed with the propaganda material sent out, if necessary. 12

One may ask whether the distribution of additional pre-printed ballot papers to the parties is still in keeping with the times. The provision can be explained by looking back to a time when in some cantons the parties were still responsible for distributing the ballot papers. Today, the mailing of the official ballot paper block with all lists to the eligible voters must suffice. From the point of view of equal treatment, it also seems somewhat questionable if parties that are willing and able to finance this are given the opportunity to distribute additional official ballot papers of their lists. And for voters in cantons where advertising material is sent out, it is sometimes confusing (and not understood by them) if they find the same official ballot paper of a list twice in the election material, once bound in the official ballot paper block and once loose as an enclosure to the advertising leaflet of a list. 13

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COMMENTARY ON

Art. 34 PRA

A commentary by Beat Kuoni

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Art. 34 Voting instructions

The Federal Chancellery shall issue brief instructions on voting procedures prior to each general election, which are delivered along with the ballot papers to the persons eligible to vote in cantons with a system of proportional representation (Art. 33 paragraph 2).

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I. HISTORY OF ORIGINS

With the 1976 PRA, the federal legislature created a legal basis for election guidance. The provision was not included in the Federal Council's draft of the new law. It found its way into the law through the National Council's preliminary advisory committee. 1

The Federal Chancellery produced election instructions for the first time in the National Council elections of 1971 and 1975. In 1971, 3.6 million copies were printed and distributed together with the election material. The measure was connected with the introduction of women's suffrage at federal level, which enabled Swiss women to vote and be elected for the first time in the National Council elections of 1971. However, the voting instructions were not only addressed to women, but to all eligible voters, as many - especially younger - men were also assumed to need a certain amount of explanation. For financial reasons, the electoral instructions appeared in a reduced edition for the 1975 National Council elections, and were only made available to the parties and interested circles. Anchoring it in the PRA was intended to ensure that it would be available for future National Council elections and to make it independent of the Federal Chancellery's financial leeway at the time. 2

Since 1994, Art. 34 has expressly required election instructions only for general renewal elections, i.e. not also for by-elections or supplementary elections in individual cantons. The practice followed up to that time was thus codified. Furthermore, since 2007 the Federal Chancellery's duty has been limited to providing election instructions to cantons with proportional representation. However, cantons with the right to vote by majority may draw up their own election instructions and hand them out to voters. 3

II. SIGNIFICANCE OF THE PROVISION

A. General

State authorities do not have an advisory function in elections, unlike in substantive votes. They may not directly or indirectly place themselves at the service of partisan interests in the election campaign. However, case law considers support and assistance by the authorities to be permissible, provided that they are neutral with regard to the formation and expression of the voters' will 4

and, in principle, neither favour nor disadvantage candidates, parties or groups. For example, voting should be illustrated without using names of persons and groups who are actually standing for election.

5 According to the case law of the Federal Supreme Court, no constitutional right to receive voting instructions from the authorities is derived from the guarantee of the freedom to vote and to be elected under Art. 34 para. 2 FC. According to the Federal Supreme Court, there is a fundamental expectation that those entitled to vote familiarise themselves with the conditions for exercising the right to vote and to be elected; according to the Federal Supreme Court, the provision of voting instructions is not a constitutional obligation, although it is "useful" and "desirable". However, in view of the now widespread information activity of the authorities, electoral explanations are hardly imaginable without them.

B. Comparison of laws

6 Cantonal laws often oblige the cantonal authorities to provide voters with electoral instructions, at least for the general renewal elections of the cantonal parliaments. However, not all cantons have an explicit legal obligation to do so, even though - as far as can be seen - they also produce and distribute election instructions.

III. COMMENTARY ON THE TEXT OF THE NORM

A. Content of the electoral instructions

7 Art. 34 obliges the Federal Chancellery to prepare election instructions for the general renewal elections of the National Council and to distribute them to voters in cantons with proportional representation. The content of the election instructions is not expressly specified in the law. According to practice, the voting instructions should at least explain the effects of a list designation, of additional votes, of deleting, of panashing and of cumulating. The voting instructions may contain further elements, namely if these serve the free formation and expression of the will and observe the constitutional limits (cf. n. 4). Accordingly, the voting instructions also contain information on the validity requirements for completed ballot papers and on the general principles of voting. This information must be valid for all cantons with proportional

representation, which is why the election instructions only explain the basic principles of voting.

In addition to federal law, cantonal regulations are also authoritative for the election procedure (Art. 83 PRA). The cantons may therefore provide those entitled to vote with further instructions on voting and the grounds for invalidity and nullity associated with the cantonal procedure (Art. 38 para. 4 PRA). 8

Some information elements in the electoral instructions go back to impulses from the Federal Assembly. In the course of the discussion on electoral law reforms, for example, the Federal Chancellery held out the prospect to the Federal Assembly of improving the information on list connections. Accordingly, it adapted the election instructions for the 2015 National Council elections. The situation was similar with the portraits of the parties represented in the National Council. 9

Art. 34 PRA allows voters to be provided with a brief portrait of the parties represented in the National Council in addition to technical instructions. The Federal Chancellery was therefore able to introduce the party portraits in the 2007 National Council elections without amending the law. The parties represented in the National Council write the portraits themselves and submit them to the Federal Chancellery. The Federal Chancellery ensures that the texts are not too long and that all parties have equal space. A party represented in the National Council is not obliged to submit a party portrait. The Christian Social Party (CSP) Obwalden, for example, waived this option in the 2019 National Council elections because it did not put forward a candidate. 10

The purpose of the party portraits is to strengthen the position of the parties in the election campaign and to serve as an orientation for voters. The limitation to parties that are represented in the National Council in the current legislative period does not constitute a violation of equal opportunities for the groups and parties running for election. According to case law, there is a public interest in supporting parties and groupings with a solid base and a broad political spectrum of issues that offer a minimum guarantee of continuity in political activity in parliament due to mandates already won. However, state support and assistance must be based on objective criteria and access to the ballot must not be unduly restricted. 11

Other information elements in the election instructions are permissible. In previous election instructions, for example, there was a chapter on women's 12

representation in the National Council. A few years ago, with regard to possible disinformation campaigns, it was also suggested that voters be made aware of threats to opinion-forming through social bots. The inclusion of further elements must be carefully weighed up in each case. Art. 34 PRA expressly requires brief voting instructions so that important information can be easily perceived.

B. Form of the voting instructions

13 Art. 34 does not explicitly specify the form in which the voting instructions are to be drawn up, but it does require that they be sent individually to voters: voters are entitled to receive the voting instructions together with the ballot papers. In practice, voters receive the voting instructions in the form of a printed brochure. General electronic publication without personal addressing would not suffice under current law. In contrast to the voting instructions, the law does not stipulate that the voting instructions can only be sent once per household (cf. Art. 11 para. 4 PRA). Pursuant to Art. 33 para. 2 PRA, the voting instructions and the other election documents must be sent to voters - as in the case of federal referendums - in such a way that they reach the recipients no later than three and no earlier than four weeks before the election day.

14 The voting instructions shall be issued in German, French and Italian and, based on Art. 11 SpG, also in Romansh. Regardless of their political domicile, voters are entitled to receive the voting instructions in the language of their choice.

15 The Federal Chancellery provides the voting instructions not only in paper form, but also on an election platform which it offers on the Internet - as a rule in cooperation with the Parliamentary Services, the Federal Statistical Office and the cantons. The election platform contains additional information on the National Council elections, including videos explaining the electoral process. In future, information on voting and the election results will also be available on the "VoteInfo" app, which is now established for referendums.

16 The official information on elections takes into account the needs of voters with a disability. For example, the explanatory videos will be made available in sign language. In addition, for the 2019 National Council elections, the Federal Chancellery published voting instructions in plain language on the election platform as a pilot test. For the 2023 National Council elections, there

will probably be no such provision in electronic form. However, the voting instructions in plain language will be printed in a small number of copies and distributed via the specialist organisations for people with a disability.

C. Legal protection

17 The electoral instructions are a real act of the Federal Chancellery. In contrast to the explanations of the Federal Council in the case of federal referendums, which cannot be challenged on the basis of Art. 189 para. 4 FC, the election instructions constitute a suitable object of challenge for election complaints under Art. 77 para. 1 lit. c PRA. The election complaint must be addressed to the competent cantonal government, even if it cannot deal with the complaint on the merits. A direct appeal to the Federal Supreme Court is not possible, as the dispute concerns the preparation and conduct of the National Council elections; the election complaint under Art. 77 para. 1 lit. c PRA is available for this purpose.

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COMMENTARY ON

Art. 35 PRA

A commentary by Andreas Glaser

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Art. 35 Completing the ballot paper

[1] Any person who uses the ballot paper that is not pre-printed may enter the names of eligible candidates and add the list designation or reference number of an electoral list.

[2] Any person who uses a pre-printed ballot paper may delete pre-printed candidate names; they may enter the names of candidates from other electoral lists (splitting the vote). They may also delete the pre-printed reference number and electoral list designation or replace the same with the number and designation of a different list.

[3] They may enter the name of the same candidate on the ballot paper twice (accumulating).

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I. HISTORY OF ORIGIN

Art. 35 PRA goes back to Art. 13 NWG, the content of which the provision has essentially adopted. When the PRA was enacted in 1975, it was "a rewrite without any material changes". Art. 13 para. 1 NWG already provided for the use of ballot papers with or without a form and expressly permitted deletions, amendments or additions to be made to a printed ballot paper. The possibility of casting a blank ballot resulted from the fact that voters were allowed to exercise their right to vote by voting for nominees who appeared on "any of the published lists". Art. 13 para. 3 NWG stipulated that the name of a candidate could not appear more than twice on a ballot paper. Accumulation was then permitted. 1

When the NWG was enacted in 1919 in the course of the introduction of proportional representation for the National Council, the possibilities of deleting and crossing out were undisputed. The Federal Council regarded the permission to cancel votes as a logical consequence of the upstream decision in favor of the system of single-vote competition in view of the electorate's freedom of choice. Conversely, he considered panache voting to be incompatible with the system of list vote competition, as voters would interfere in an unauthorized manner in the ranking of the candidates of a party to whose seat claim they had not contributed ("free panache"). In both the National Council and the Council of States, there were clear majorities in favor of the possibility of "free panache" in combination with the preferred system of single-vote competition. 2

The Federal Council, in line with the expert commission it appointed and chaired by Emil Klöti, but contrary to the view it still held in the preliminary draft, spoke out against the possibility of cumulation, as the pre-cumulation by the parties would severely restrict the influence of voters on the ranking of candidates. Furthermore, the accumulation of votes is not easy for voters to understand. Art. 13 para. 2 NWG therefore still read in the Federal Council's draft: "It is not permitted to place the name of a candidate more than once on a ballot paper". 3

The responsible committee of the National Council, on the other hand, wanted to allow one-time cumulation, primarily to enable small parties in cantons with many seats to present lists that were as "full" as possible by means of pre- 4

cumulation. There were also calls for the possibility of triple or unlimited cumulation. The main argument against cumulation was that it creates an incentive for harmful competition between the candidates on a list. The criticism was primarily directed against pre-cumulation by the parties on the pre-printed lists, rather than against independent cumulation by the voters. The model of substitute candidates had been proposed by the opponents of cumulation. According to this model, the parties would have first defined who their preferred candidates were and then nominated substitute candidates. In the National Council, the Federal Council's proposal without cumulation and substitute candidates narrowly prevailed.

5 In the Council of States, the freedom of the voters' will was emphasized in favour of cumulation. However, the counter-arguments from the National Council and the substitute candidate system met with greater approval than in the National Council. In the end, however, cumulation won out by a narrow margin and achieved a clear majority compared to the National Council's zero solution. In the course of the settlement of differences, the majority of the National Council agreed that the panache system contained in the Federal Council draft required a corrective. In view of the decision of the Council of States, the National Council also voted in favor of the possibility of one-time cumulation. A para. 3 was therefore added to Art. 13 NWG, which read as follows: "It is not permitted to place the name of a candidate more than twice on a ballot paper".

6 On the occasion of the transfer of Art. 13 NWG to Art. 35 PRA, two amendments were tabled in the National Council with regard to the new version proposed by the Federal Council, which was unchanged in terms of content and again related to cumulation, which had already been controversial in 1919. On the one hand, a ban on cumulation was demanded. The motion was aimed at curbing competition within a list. On the other hand, a less far-reaching demand was made that accumulation should only be carried out by hand. This would have prohibited pre-cumulation on pre-printed lists. This was intended to reduce the influence of the parties. Although the Commission rapporteur acknowledged a certain potential for abuse with regard to pre-cumulation, he considered this to be generally justified by legitimate reasons, such as regional and group-related preference for certain candidates. Furthermore, one member argued that cumulation was the "most essential right of correction" of the people, expressing a remnant of personal choice. The National Council clear-

ly rejected both amendments. The Council of States agreed without discussion to the version adopted by the National Council and thus to the Federal Council's draft.

Art. 35 PRA has not been amended since its enactment. 7

II. SIGNIFICANCE OF THE PROVISION

A. General

Art. 35 PRA regulates two issues that are of paramount importance for parliamentary election law: The design of the ballot papers and the options available to voters when filling in the ballot papers. On the one hand, the provision stipulates that ballot papers may be used with or without a form (para. 1 and para. 2). Secondly, para. 1 sets out the modalities for filling in blank ballot papers, para. 2 defines the variants for changing pre-printed ballot papers, namely crossing out and crossing out, and para. 3 allows cumulation for both types of ballot papers. 8

The changeability of the lists compiled by the parties - in addition to the possibility of entering into list combinations between the parties - has a decisive influence on the operation of the proportional representation system and thus represents a significant concretization of the constitutional framework through legislation. The proportional representation laid down in Art. 149 FC is enriched with the possibilities of using lists without a form as well as deletion, cumulation and panache with personality aspects typical of the majoritarian system. 9

In view of the possibilities opened up under Art. 35 PRA, the lists compiled by the parties are ascribed the character of a "non-binding proposal", giving voters "maximum" freedom of choice. However, the numerous options available to voters harbor a not inconsiderable potential for error when evaluating the ballot papers and thus determining the election result. Not least for this reason, the sometimes stricter requirements for referendums derived from Art. 34 para. 2 FC cannot be applied to National Council elections. 10

The changeability of ballot papers is regulated conclusively in Art. 35 PRA. At the level of the ordinance, there are only a few concretizations of the law. In connection with Art. 35 PRA, it merely states that ballot papers with a pre- 11

printed form must leave sufficient space to enable the electorate to vote for a single candidate and cumulate in a legible manner (Art. 7 VPR).

12 Art. 35 para. 1 PRA contains specific requirements regarding the correct completion of ballot papers without a pre-printed form by voters. Like Art. 5 para. 2 sentence 1 and Art. 33 para. 1 PRA, the provision presupposes that ballot papers without a pre-printed form may be used for valid voting. The authorization of ballot papers without a pre-printed form is most clearly stated in Art. 33 para. 1 PRA. According to this provision, the cantons also issue ballot papers without a pre-printed form. As is clear from Art. 35 para. 1 ("Whoever uses the ballot paper without a pre-printed form"...), every voter is free to decide whether to use a ballot paper without a pre-printed form or a ballot paper with a pre-printed form.

13 Para. 2 regulates the requirements for the correct procedure when using a ballot paper with pre-printed form. The fact that ballot papers with a pre-printed form are the second permissible variant alongside those without a pre-printed form also follows from Art. 5 para. 2 sentence 2 and Art. 33 paras. 1 and 3 PRA. It is clear from Art. 33 para. 1 PRA what the pre-printed form required in para. 2 consists of. The following information must be pre-printed on the ballot paper for the respective list, i.e. for each nomination that has been adjusted and assigned an ordinal number (cf. Art. 30 PRA): list designation (cf. Art. 23 PRA), list affiliation if applicable (cf. Art. 31 para. 2 PRA), ordinal number (cf. Art. 30 para. 2 PRA) and candidate details (at least family name, first name and place of residence; cf. Art. 22 para. 2 PRA). Voters may delete pre-printed candidate names as well as the pre-printed serial number and list designation. They may also enter candidate names from other lists and replace the pre-printed order number and list designation with another.

14 Para. 3 allows candidates to be listed twice on the ballot paper when using a ballot paper with or without a pre-printed form.

15 Art. 35 PRA fulfills two functions, which are expressed in the section heading. On the one hand, it concerns requirements for the correct performance of the act of voting by completing the ballot paper and, on the other hand, the evaluation of the ballot papers cast by voters in a certain form as part of the determination of the results.

16 The title of the article ("Filling out the ballot paper") indicates the close relationship between the formal requirements and the grounds for invalidating

entire ballot papers and individual candidate votes (cf. Art. 38 PRA). Thus, the election of exclusively non-candidates on a ballot paper without a pre-printed form (cf. Art. 38 para. 1 lit. a PRA) leads to the invalidity of the ballot paper, as does the use of non-official ballot papers (Art. 38 para. 1 lit. c PRA). Of even greater practical importance is the handling of invalid candidate votes on ballot papers that are valid in principle. Art. 38 para. 2 lit. a and Art. 38 para. 3 PRA regulate how to deal with surplus candidate votes caused by cumulation.

In addition, the provisions in Art. 35 PRA have a significant material impact on the evaluation of the ballot papers when converting the votes into mandates for the lists and determining the persons elected. This function of Art. 35 PRA comes into play both with regard to the candidate votes, which are primarily decisive (cf. Art. 39 lit. c PRA), and with regard to the party votes, which are ultimately decisive for the distribution of seats (cf. Art. 39 lit. e PRA). 17

With regard to the party votes, Art. 35 para. 1 and para. 2 sentence 2 in conjunction with Art. 37 para. 1 BPR. Art. 37 para. 1 PRA means that additional votes can only be cast on a ballot paper without a pre-printed form if the voter affixes a list designation or the ordinal number of a list, or on a ballot paper with a pre-printed form if the voter does not cross out the pre-printed ordinal number and list designation. 18

Party votes resulting from candidate votes on a list can be attributed to the inclusion of these candidate names on other lists (panache) (Art. 35 para. 2 sentence 1 PRA). In this respect, the voter votes for a party other than the one entered on the ballot paper (system of individual vote competition as opposed to list vote competition). 19

The result of the votes cast for candidates on a particular list, which is decisive in determining who is elected (Art. 43 para. 1 PRA), is influenced by deletions from pre-printed ballot papers (Art. 35 para. 2 sentence 1 PRA) and the accumulation of candidate names (Art. 35 para. 3 PRA). 20

The use of the various types of ballot paper by voters has been empirically recorded by the Federal Statistical Office since the 1975 National Council elections. At that time, 42% of ballot papers remained unchanged on average across Switzerland, while 54.2% were changed and 3.6% had no party designation. In 2019, voters submitted 45% unchanged, 43.5% changed and 8.5% ballot papers with no party designation. This data shows that the majority of voters make use of the options provided for in Art. 35 PRA by either changing ballot 21

papers with a pre-printed form by crossing out, cumulating and crossing out or filling in ballot papers without a pre-printed form. In addition, the detailed statistics on panache voting provide information on the attractiveness of candidates, party discipline and affinities between different parties.

B. Comparison of laws

22 In the cantons with proportional representation in parliament, voters have largely the same options as in the National Council elections. This applies regardless of whether a constituency-based proportional representation system is used in the canton in question, a single constituency exists or the votes are counted according to double proportional representation across constituencies.

23 In accordance with the system of single-vote competition applied in all cantons, panache voting is permitted everywhere. Accumulation, on the other hand, is prohibited in the cantons of Fribourg, Valais, Neuchâtel and Geneva. The canton of Basel-Stadt, on the other hand, allows three-way accumulation. The other cantons follow the federal model of allowing candidates' names to be listed twice.

III. COMMENTARY ON THE TEXT OF THE STANDARD

A. Para. 1 (ballot papers without pre-printed form)

24 Para. 1 refers exclusively to the use of a ballot paper without a pre-printed form. The provision therefore covers the option of a voter deciding to fill in a blank ballot paper completely by hand instead of using a ballot paper with a pre-printed form. The options available to voters when filling in the ballot paper extend to the candidates on the one hand and to the lists of candidates on the other.

25 The provision initially states that the voter "may" enter the names of eligible candidates. However, in order to create a valid ballot paper, it must contain at least the name of one eligible candidate in the constituency concerned (cf. Art. 38 para. 1 lit. a PRA). Accordingly, voters may not insert a ballot paper without at least one valid candidate name. The voter may enter a maximum of as many names as there are seats to be allocated in the constituency for the purpose of determining the result (cf. Art. 38 para. 3 PRA).

In addition, the voter may affix the list designation or serial number of a list. This is a purely voluntary option. If the voter chooses not to do so, only the candidate votes are included as party votes (cf. Art. 39 lit. e PRA) in the calculation of seats for a particular list (Art. 40 - 42 PRA). If a voter affixes the designation of a particular list, this may result in additional votes in favor of the list in question (Art. 37 para. 1 PRA), which are also included in the total of party votes (cf. Art. 39 lit. e PRA), provided that fewer valid candidate votes are allocated on the ballot paper than there are members of the National Council to be elected in the constituency. The affixing of a list designation or serial number is therefore only relevant if a voter does not complete a ballot paper without a form. If a voter fails to affix a list designation or serial number in such a case, this constitutes a waiver of the right to vote. The individual's voting power is then not fully utilized. 26

B. Para. 2 (ballot paper with pre-printed form)

Para. 2 covers the possibility of using a ballot paper with a pre-printed form. In practice, this is the more common voting behavior than using a ballot paper without a form. The provision regulates the extent to which the voter may make changes to a pre-printed ballot paper that has been designed by a specific party. Deletions and entries may be made both in relation to candidate names and in relation to the list designation. 27

The first option consists of deleting pre-printed candidate names. The immediate consequence of this is that the candidate does not receive a candidate vote and falls behind in the ranking of candidates with the most votes when determining those elected. If the voter makes no changes other than deleting candidates, this does not harm the list in question. Blank lines caused by crossing out are considered additional votes for the list (Art. 37 para. 1 sentence 1 PRA), meaning that the party votes relevant for the distribution of mandates remain unchanged. Crossing out is therefore only relevant for determining the elected persons on a list; it does not affect the distribution of seats in the National Council between the parties. 28

The second option is to enter the names of candidates from other lists (crossing out). Ballot papers with a pre-printed form must leave enough space to allow the electorate to write in the names of candidates in a legible manner (Art. 7 VPR). Pancaking has a significant impact on determining the distribution of seats on the lists. By voting for a candidate in this way, the voter firstly 29

ensures that this person is given preference when determining the number of candidates on their list and, above all, that a list other than the one selected receives a party vote that is relevant for calculating the number of seats. For example, in the canton of Schwyz, if four seats are up for grabs on the SVP list and a candidate from the FDP and a centrist candidate are chosen, only 50 percent of the voters have voted SVP, but 25 percent FDP and 25 percent centrist.

30 As a third option, the voter can delete the pre-printed order number and list designation. The effects of this option can vary. If no further changes are made, deletion is meaningless if the list contains as many names as there are seats to be allocated. All candidate votes then flow as party votes to the list originally pre-printed on the ballot paper. As a result, crossing out is only significant if blank lines remain on the ballot paper, as these do not count as blank votes due to the lack of a list designation (Art. 37 para. 1 sentence 2 PRA). The originally pre-printed list therefore loses potential additional votes.

31 The fourth option of replacing the pre-printed serial number and list designation with a different one can also have very different effects on the election result. If the voter simply replaces the list designation and makes no further changes to a full list, the operation has no significance. De facto, the originally pre-printed candidates were simply crossed out and their candidate votes flow in full to the originally pre-printed list as party votes. Empty lines are added to the newly inserted list as additional votes. In practice, however, a voter is also likely to insert candidate names from the newly designated list after replacing the list designation in order to allocate party votes to the newly designated list. The names that are left in are added to the original list as candidate votes. As a result, this is a panache vote.

C. Para. 3 (cumulation)

32 para. 3 covers the use of a ballot paper with or without a pre-printed form. Accumulation is permitted in both situations. Ballot papers with a pre-printed form must leave sufficient space to allow the electorate to cumulate legibly (Art. 7 VPR).

33 The voter may list the name of the same candidate twice on the ballot paper (cumulate). Conversely, this means that candidates may not be cumulated more than twice. Consequently, in accordance with Art. 38 para. 2 lit. a PRA,

excess repetitions, i.e. the name of a candidate who appears more than twice on a ballot paper, are deleted from the ballot paper.

While cumulation has been controversial in terms of legal policy and enjoys a great deal of public attention, its practical significance for the political composition of the National Council is much less important than the options contained in para. 2. Accumulation does not in itself affect the distribution of mandates between the lists. Rather, the relevant legal consequence of cumulation is that it favors the candidates in question in the determination of those elected to a list (Art. 43 para. 1 PRA). Cumulation therefore reinforces the phenomenon of majority voting within the lists, but does not affect the basic model of proportional representation. Accumulation only indirectly leads to an increase in the party votes of another list in connection with variegation. However, the reason for this is the process of panasching, not that of cumulation. 34

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Art. 36 Votes for deceased candidates

Votes for candidates who have died in the period since the final rectification of any deficiencies in the candidate lists (Art. 29 para. 4) are counted as personal votes for those candidates.

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I. HISTORY OF ORIGIN

The provision has no predecessor in the National Council Elections Act (NWG) 1919. It was not yet included in the Federal Council's draft for the PRA 1976, but goes back to a proposal by the responsible committee of the National Council, which was adopted in plenary without discussion. The Council of States also approved it without discussion. As part of the 2014 revision, the wording of the reference to Art. 29 para. 4 was formally amended. This amendment was again not based on a draft by the Federal Council, but on a motion by the Political Institutions Committee, which was adopted without discussion in the National Council and also followed without discussion by the Council of States. 1

The reason for the first regulation of the use of votes in favor of deceased persons was two cases in the 1975 National Council elections in the cantons of Bern and Solothurn, where candidates had died between the printing of the ballot papers and the election date. The explicit standardization of the legal consequences was intended to eliminate the legal uncertainty that had arisen among voters and the authorities. The vote cast for the deceased person could not be declared invalid due to a lack of presumed knowledge on the part of the voters. However, it remained unclear whether and in what form the de facto worthless vote could be attributed to the list in question. 2

II. SIGNIFICANCE OF THE PROVISION

A. General

The provision regulates a special constellation within the system of individual vote competition. Candidate votes form the main part of the party votes that are decisive for the allocation of mandates to the lists. Candidates who die in the period between the lists being drawn up and the National Council election can no longer be effective beneficiaries of candidate votes and therefore, in principle, cannot provide any party votes. Even without the provision in Art. 36, votes in their favor would probably flow to the elected list in the form of additional votes as party votes (Art. 37 para. 1 sentence 1 PRA). Exceptionally, however, votes in favor of deceased persons would be forfeited as blank votes if there is no list designation, either because a ballot paper without a 3

pre-printed form was used and no list was designated, or because the list designation was deleted from a ballot paper with a pre-printed form (Art. 37 para. 1 sentence 2 PRA).

4 In most cases, the other regulations would already lead to a utilization of the votes, which is likely to be in the interests of the voters. In this respect, Art. 36 PRA expressly confirms that votes for deceased persons are counted as candidate votes and thus benefit the list of deceased candidates as party votes.

5 Art. 36 PRA also has its own regulatory content in the event that the voter has voted for a person who has since died. Without a special provision, the vote in favor of a deceased person would possibly go to the designated list. Whether this corresponds to the presumed will of the voters cannot be clearly determined. This could be supported by the fact that a specific person was explicitly selected from another list. If this person can no longer be effectively elected, the vote should flow to the originally elected list as an additional vote and thus as a party vote. However, the law makes the opposite assumption in Art. 36 PRA. The vote is fictitious as a candidate vote for the deceased person and therefore as a party vote in favor of the list of the panachee. As a result, the vote is cast in favor of the best-elected candidate on the list of the variegated candidates. Ultimately, the voter has only voted for the party of the deceased, as the deceased person was no longer eligible. It seems doubtful whether this does justice to the presumed will of the voters. However, the statutory solution consistently continues the effect of the panache votes in favor of the other list and is not objectionable from a constitutional point of view.

6 Art. 36 PRA is also relevant in the event that the voter uses a ballot paper without a form and does not enter a list designation. The provision means that the (invalid) vote in favor of the deceased person is not forfeited, but is deemed to be a candidate vote and thus counted as a party vote. Even in this constellation, it is questionable whether voters who expressly create an individually composed list want to support the deceased person's list with their vote. In this respect too, however, the provision is the logical consequence of the effect of candidate votes in favor of the respective list.

B. Comparison of laws

7 Many cantons do not expressly regulate the constellation of the death of a candidate between the cleansing of the lists and the election date. Insofar as

the cantons do make a provision, this corresponds to Art. 36 PRA. In the cantons of Bern, Solothurn, St. Gallen and Vaud, votes for candidates who have died since the nominations were cleared are expressly counted as candidate votes.

In cantons without explicit regulations, votes for deceased persons are also likely to be counted as candidate votes for the respective list in practice. For example, on 19 November 2018, the State Council of the Canton of Valais made a clarification in the event of the death of a candidate for the Constitutional Council in view of the election of the Constitutional Council on 25 November 2018. Among other things, the State Council stated: "The votes cast for a candidate who died before the election are valid and will be counted as such by the counting office. If a deceased candidate is among those elected on the evening of the election, his or her place is taken by the first non-elected candidate". In the canton of Lucerne, Art. 36 PRA was applied analogously in the 2019 cantonal council elections with regard to dealing with the death of a candidate. 8

III. COMMENTARY ON THE TEXT OF THE PROVISION

The scope of application of the provision covers the situation in which a candidate dies between the time when the lists are cleared in accordance with Art. 29 para. 4 sentence 1 and sentence 3 PRA, i.e. the second Monday after the closing date for registering to stand for election or, under deviating cantonal law, the first Monday after the closing date, and the day of the National Council election (cf. Art. 19 PRA). Cantonal law stipulates a Monday in August of the election year as the last date for the closing date for registering to vote (Art. 21 para. 1 PRA). 9

The deceased person must have been eligible for election to the National Council at the time the lists were cleared in accordance with Art. 143 FC. Although the deceased person was no longer eligible at the time of the election, a vote in their favor is not invalid (see Art. 38 para. 1 PRA). However, the deceased person can neither be an elected person nor a substitute (cf. Art. 43 PRA). Art. 36 PRA regulates how the vote for a deceased person is to be handled. 10

Art. 36 PRA stipulates that a vote for a person who is deceased at the time of the election is "counted" as a candidate vote. As a result, the vote is included 11

in the total number of party votes for the list in question (Art. 39 lit. e PRA). The regulation thus corresponds functionally to the figure of the additional vote. The list benefits from a vote that is not covered by a vote for an eligible person.

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COMMENTARY ON

Art. 37 PRA

A commentary by Andreas Glaser

SUGGESTED CITATION

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Art. 37 Additional votes

[1] Where a ballot paper contains fewer valid votes for candidates than the number of seats in the National Council allocated to the constituency, the lines that have not been completed on the ballot paper count as additional votes for the electoral list whose designation or reference number is entered on the ballot paper. In the absence of a designation or reference number, or if the ballot paper contains more than one of the eligible list designations or reference numbers, the uncompleted lines are not counted (blank votes).

[2] Where more than one regional list with the same designation has been submitted in any canton, additional votes on a ballot paper that does not designate the region are counted towards the list relating to the region in which the ballot paper is handed in.

[2bis] In the case of the other possible applications of Article 31 paragraph 1[bis], the additional votes are counted towards the list whose designation is entered on the ballot paper. The additional votes on insufficiently designated ballot papers are counted towards the electoral list that has been declared to be the parent list by the group.

[3] Names that do not appear on any electoral list pertaining to the constituency are deleted.

[4] Where there is a contradiction between the electoral list designation and the reference number, the electoral list designation shall take precedence.

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I. HISTORY OF ORIGIN

1 Art. 37 PRA can be traced back to different origins. Para. 1 and para. 3 can be traced back to the NWG 1919. Para. 1 goes back to Art. 14 para. 1 NWG 1919, para. 3 to Art. 14 para. 3 NWG 1919. Para. 2 and para. 4 were newly created when the PRA was enacted in 1976. Para. 2bis sentence 1 (1994) and para. 2bis sentence 2 (2002) were added in the course of later partial revisions.

2 Art. 37 para. 1 PRA was already to be found in a similar form in the Federal Council's draft of the NWG 1919, which still simply referred to "list votes". Parliament introduced the term "additional votes" in Art. 14 para. 1 NWG 1919. The idea was to make incomplete ballot papers fully valid by "counting" the blank lines as a rule. This was primarily intended to protect small parties in cantons with a large number of seats to be allocated from the de facto constraint of always having to submit full lists in order to avoid losing a large number of votes from the outset. The Federal Council had also proposed the regulation because it had rejected the option of cumulation, which was later adopted by Parliament. With slightly different wording, the provision was incorporated into Art. 37 para. 1 PRA and has not been amended since.

3 Art. 37 para. 3 PRA goes back to the first sentence of Art. 14 para. 3 NWG 1919. The entire provision read: "Names that do not appear on any list shall be disregarded; however, the votes cast for them shall be counted as additional votes if the ballot paper bears a list designation". The wording had been changed from the Federal Council's draft due to the successful Grünenfelder motion. The provision was incorporated into the PRA. In 2007, part of the article was deleted in the course of a formal clean-up ("...the votes attributable to them shall, however, be counted as additional votes if the ballot paper bears a list designation or order number; in the absence of such a designation or order number, these votes shall not count (blank votes)"), as the content was a repetition of Art. 37 para. 1 sentence 2.

4 Art. 37 para. 2 PRA, which regulates the constellation of "collective lists", was deliberately not provided for in the Federal Council's draft of the PRA. The Federal Council had come to the conclusion "that the approval of collection lists and a corresponding provision should be refrained from". The phenomenon of collective lists occurred in the 1971 National Council elections in the canton of Berne. The BGB/SVP of the Canton of Berne had one of its national

lists designated as a so-called collective list. Where there was uncertainty regarding the allocation of a list - and thus the additional votes - to a specific geographical area, the additional votes were to be allocated to the list that was considered the "collective list". The Federal Council did not want to legalize such a procedure, but rather wanted voters to provide precise information. In addition, difficulties in allocation could often be solved by "reasonable interpretation". In the National Council, however, a deviating motion (Akeret motion) prevailed, which essentially called for the current regulation. The main argument was that a clear regulation would prevent difficulties of interpretation from the outset. The aim of the regulation was to "allocate blank supplementary votes to the regional list that most closely corresponds to the will of the voters, i.e. the regional list that was submitted in their area of residence". The Council of States approved the motion without further discussion.

Art. 37 para. 4 PRA has no predecessor in the NWG 1919. It goes back to the Federal Council's draft for the PRA and was intended to establish a clear rule of interpretation in the event of contradictory information provided by the voter. 5

The enactment of Art. 37 para. 2bis sentence 1 PRA in 1994 was an indirect effect of the provision on sub-list connections in Art. 31 para. 1bis PRA. As the Federal Council did not want to allow sub-list connections, it did not propose any regulation for the resulting utilization of votes in the case of empty lines. However, after Parliament had permitted sub-list connections beyond the constellation of sub-lists with reference to a region covered by Art. 37 para. 2 PRA, there was a need for regulation with regard to the question of how to proceed with sub-lists with an addition to indicate gender, wing of a grouping or age with empty lines with regard to potential additional votes. Against this background, the responsible committee of the National Council proposed the current regulation, which was adopted by the plenary. There was no further discussion, although two minority motions were tabled. This can be explained by the fact that the issue had already been decided with the initial question of sub-list connections. 6

Art. 37 para. 2bis sentence 2 PRA from 2002 is again the consequence of the provision in Art. 23 sentence 2 PRA that was enacted at the same time. Groups that submit election proposals with identical elements in the main designation and wish to combine these with one another designate one of the election proposals as the master list. Sentence 2 refers to this master list in 7

that, in case of doubt, the blank lines are counted as additional votes. The provision "guarantees the precise legal consequence of designating a list as the parent list in the case of several lists with the same main name".

II. SIGNIFICANCE OF THE PROVISION

A. General

8 Art. 37 PRA contains regulations in the area of conflict between the list election of parties, which is characteristic of proportional representation (cf. Art. 30, Art. 40 et seq. PRA), and the options open to individual voters with regard to the persons standing as candidates (cf. Art. 35 PRA). In a proportional representation system with fixed party lists and no power for voters to make changes, the questions regulated in Art. 37 PRA do not arise. Each ballot paper is counted once in full. It is not possible for voters to not use all of their potential votes. In contrast, the system used in the National Council elections with changeable lists and individual vote competition means that each voter can mathematically cast as many votes as there are seats to be allocated. A ballot paper is valid as soon as it contains at least one name of a person standing as a candidate in the constituency (cf. Art. 38 para. 1 lit. a PRA). Without further regulation, unallocated votes, i.e. blank lines on the ballot paper, would not be counted. They would have no influence on the election result.

9 The provisions in Art. 37 PRA on the introduction of "additional votes" are an expression of the parties' desire to have as many potentially blank votes as possible attributed to their respective lists. The voters' expression of will is interpreted with the help of legal fictions in such a way that as few empty votes as possible remain. As a result, additional votes can even lead to a list being allocated more mandates than it has candidates (Art. 44 PRA).

10 The legal interpretation of the will of the voters requires justification in view of the undistorted casting of votes protected by the freedom to elect and vote (Art. 34 para. 2 FC). In a system of changeable lists, it would seem obvious to treat empty lines as empty votes and thus not to attribute them to any candidate or list. Although the extensive consideration of empty lines in the distribution of mandates serves the equality of voting power resulting from equal voting rights, it also assumes that voters do not actually express a preference. Voters are also required to have detailed knowledge of the attribution mechanisms. Overall, the regulations are difficult to understand and their effects are

likely to remain hidden from most voters. From a legal policy perspective, there is a considerable transparency problem.

In terms of constitutional law, the regulation is justifiable overall. Art. 37 PRA defines the list designation or ordinal number indicated on the ballot paper in question as the decisive criterion for attributing empty lines to certain lists (para. 1, para. 2bis sentence 1). In the event of a contradiction, the list designation applies (para. 4). In the logic of a proportional electoral system that is naturally characterized by parties, this link is understandable. A voter who uses a party list provided with a corresponding form will - at least from a generalized point of view that is considered permissible - generally agree that votes not awarded to specific candidates ultimately go to the chosen party. This can also be assumed if the attribution is mediated by the instrument of the master list (Art. 23 PRA). The justification is particularly unproblematic in cases where the list has fewer candidates than seats to be allocated from the outset - despite possible pre-cumulation. It is also possible to cast blank and therefore non-counting votes by deleting the list designation or using a ballot paper without a form and not affixing a designation. Finally, in the event of an error regarding the list number of the elected party, it is quite understandable to declare the party designations that are much more familiar to voters as decisive (para. 4) and not to give priority to the presumably randomly used ordinal number. 11

The attribution of empty lines to a particular regional list of a party (para. 2) also requires an additional fiction. The provision is not only based on the presumption that the voter wishes to allocate blank lines to the designated list. Furthermore, the law has the effect that the additional votes are allocated to the regional list of a party, even if the ballot paper is not marked with the region. The additional vote is allocated to the list in whose region the ballot paper was cast. The law therefore assumes that the voter not only wants to vote for the party indicated on the ballot paper with a blank line, but also for its regional list. Apart from delimitation difficulties, if the regional list does not refer to clearly identifiable territorial subdivisions of a canton, it is questionable why - as in the case of other, non-regional partial lists (cf. para. 2bis) - a core list to be determined should not also be the beneficiary of the additional votes in this respect. 12

Finally, the use of votes for non-eligible persons as additional votes for the designated list (para. 3) is the furthest removed from the presumed will of the 13

voter. The constitutional limits flowing from the freedom to elect and vote are exhausted with this regulation. The election of an ineligible person is likely to be closer to a panache vote than the election of an unchanged list. There is also a significant difference to the situation of surplus cumulation and multiple candidacies that are subsequently declared invalid (see Art. 38 para. 2 PRA). In these cases, the voter at least expresses the intention to vote for the candidate on the list in question. In view of the freedom of choice, it would therefore be appropriate to treat a vote for a non-candidate as a blank vote and therefore as invalid.

14 The practical significance of additional votes varies greatly between the parties on the one hand and the constituencies on the other. In the main lists of the major parties, it is marginal, whereas in the lists of smaller parties and groups, the additional votes account for a certain proportion. There are also more additional votes in the more populous cantons with a higher number of seats to be allocated than in constituencies with fewer seats. The political relevance of the additional votes would require more detailed research on a comprehensive empirical basis. However, a rough review of the results of the 2019 National Council elections suggests that the additional votes primarily benefit lists with fewer candidates than seats to be allocated. This corresponds to the main regulatory purpose, at least as far as the basic allocation of empty lines is concerned.

B. Comparison of laws

15 The instrument of additional votes exists in numerous cantons, analogous to the structure in the Confederation. This applies both to cantons with isolated elections in the individual constituencies and to cantons with double proportional representation. In the canton of St. Gallen, there is a provision that is largely identical to that of the Confederation. The cantons of Bern and Solothurn also have comparable provisions. Due to the lack of list and sub-list connections in the context of double proportional representation, the respective regulations on additional votes in the cantons concerned are much more streamlined than in the Confederation. It is limited to allocating the blank lines to the party listed on the ballot paper as additional votes.

III. COMMENTARY ON THE TEXT OF THE STANDARD

A. Para. 1 (attribution of blank lines)

In the system of individual vote competition, the sum of the votes for the candidates on a list is the relevant factor for the allocation of seats to the various lists. These votes are referred to as candidate votes (cf. Art. 39 lit. c PRA). If a voter allocates all votes in accordance with the number of seats to be allocated in the constituency, he or she utilizes the entire voting potential. 16

As there is no obligation to cast all votes, voters may leave blank lines on the ballot paper. Art. 37 para. 1 PRA covers this constellation, in which a ballot paper contains fewer valid candidate votes than there are members of the National Council to be elected in the constituency. This may be due to various reasons. A ballot paper with a pre-printed form may contain fewer candidates than seats to be allocated and the voter may refrain from completing the ballot paper. The voter may also cross out names on a ballot paper with a pre-printed form or not complete a ballot paper without a pre-printed form. In these cases, not all of the potential votes are used. 17

Without further regulation, the blank lines would not count as blank votes, as no votes other than the candidate votes would be taken into account. Art. 37 para. 1 PRA stipulates differentiated legal consequences for the constellation with blank lines. If the blank lines can be allocated to a specific list on the basis of specific indications, they are attributed to this list (sentence 1). Only if there is insufficient evidence on the ballot paper do the blank lines not count as blank votes (sentence 2). 18

Pursuant to Art. 37 para. 1 sentence 1 PRA, the blank lines count as additional votes for the list whose name or serial number is indicated on the ballot paper. This may be the case if a ballot paper without a pre-printed form is provided with a list designation but is not filled in completely. In the case of a ballot paper with a pre-printed form, it can occur if fewer candidates are listed than there are seats to be allocated or if candidates are deleted. The law assumes that the voter wants to exhaust the entire potential of votes in favor of the chosen party. In many cases, this will reflect the will of the voter, for example if a list has too few candidates from the outset. The assumption also seems obvious when a list designation is added by hand. However, it is doubtful whether this is also true for the deletion of candidates. After all, the blank 19

vote is indirectly returned to the deleted person as an additional vote in the form of a party vote.

20 According to Art. 37 para. 1 sentence 2 PRA, blank lines do not count only in exceptional cases. They are only treated as blank votes if no relationship to a specific list can be established, i.e. if there are no indications of the presumed will of the voter. This is the case if the name and serial number are completely missing or if the ballot paper contains more than one of the submitted list names or serial numbers.

B. Para. 2 (additional votes for regional sub-lists)

21 Para. 2 refers to a constellation of list or sub-list combinations regulated in Art. 31 para. 1bis PRA and Art. 8c para. 2 VPR. The special provision covers list and sub-list combinations between lists with the same name that differ only by an addition to indicate the region. The problem could be solved with the help of core lists pursuant to Art. 23 sentence 2 PRA, as stipulated for the other constellations in Art. 37 para. 2bis PRA. However, Art. 8 para. 3 VPR states that the grouping designates an election proposal as a core list, unless the distinguishing feature relates to the regional delimitation of the lists.

22 Para. 2 concerns, in the context of list and sub-list combinations between lists with a regional addition, the case in which the voter provides a blank ballot paper with a list designation that cannot be clearly assigned to a specific list within the list or sub-list combination. If, however, the designation of the sub-list is clear, Art. 37 para. 1 sentence 1 already applies and the blank votes are counted as additional votes for the clearly designated list. If the ballot paper is completed in full, the fact that the list is not clearly designated is also irrelevant, as all votes can be allocated to a list via the candidate votes. The regulation only comes into play if there are empty lines on the list in question and the name of the regionally circumscribed list is not clear. In this case, it is not immediately clear to which list the potential additional votes should be allocated as part of the list or sub-list combination.

23 The decisive criterion for the attribution of additional votes is the place of voting, i.e. the voter's political domicile. The list in whose region the ballot paper was cast benefits. The provision establishes the irrefutable presumption that the voter wishes to have blank lines counted as additional votes for the regional sub-list of the chosen party. The regional reference of the sub-lists

will often be based on subdivisions of the cantonal territory such as districts, municipalities or language regions. A classification is then relatively easy. However, delimitation difficulties can arise with designations such as east/west or urban/rural.

The provision makes it easier for parties to draw up regional lists based on districts or urban and rural areas in large cantons and in this way "to ensure an appropriately equal representation of the various regions and to guarantee a closer personal relationship between the candidate and his electorate". Otherwise, depending on the interpretation by the electoral office, there would be a risk that the blank lines would not count as blank votes due to a lack of designation pursuant to Art. 37 para. 1 sentence 2 PRA. If, as in the other cases, they had to designate a core list, this would also not be attractive for the parties, as they would have to grant a region preferential rights to the additional votes. 24

With the steady increase in regional sub-lists (1971: 22; 2003: 12; 2015: 41; 2019: 64; 2023: 72), practical delimitation issues could increasingly arise. The allocation is unproblematic if the lists are linked to definable territorial units, such as in 2023 for the centrist lists in the canton of Aargau with the additions "For the district of Baden", "For Brugg and the Zurzibiet", "For the district of Zofingen" etc. or the lists of the Green Liberals in the canton of Thurgau with the additions "District of Arbon", "District of Münchwilen" etc. and the lists of the Center in the canton of Solothurn with additions such as "Dorneck-Thierstein" or "Thal-Gäu". 25

However, designations such as "Die Mitte - Region Frauenfeld-Untersee" in the canton of Thurgau or "MitteFT.Miteinander.Für das Fricktal." in the canton of Aargau, "Die Mitte Unteres Baselbiet" in the canton of Basel-Landschaft or "SVP - Für einen dynamischen Ennetsee!" and "Alternative - die Grünen - Berg" in the canton of Zug, as these are not legally established units. It must first be determined which districts or municipalities are behind them. 26

Even more difficult to classify are lists such as "Die Mitte, Hauptliste Nord-West", "Die Mitte, Hauptliste Süd-Ost", "EVP Kanton St.Gallen, Liste St.Gallen-Wil", "EVP Kanton St.Gallen, Liste Süd" in the canton of St. Gallen or "FDP.Die Liberalen West" and "FDP.Die Liberalen Ost" as well as "Sozialdemokratische Partei (SP) Liste West" and "Sozialdemokratische Partei (SP) Liste Ost" in the canton of Solothurn. In many cases, the practice will ar- 27

rive at justifiable allocations of additional votes based on everyday language usage. From the voters' perspective, however, the attribution of empty lines due to the legal fiction with regard to the freedom to vote and to be elected (Art. 34 para. 2 FC) harbors some potential for surprises. It is doubtful whether many voters in the canton of Zurich are aware of whether they are casting their vote in the region of the list "Die Mitte - Die Junge Mitte Süd-West" or the list "Die Mitte - Die Junge Mitte Nord-Ost". These are not common geographical designations. The canton of Zurich also has areas that could be described as south-east or north-west, meaning that the classification cannot be made using the exclusion method. It remains unclear, for example, where the districts of Dietikon, Hinwil, Meilen or Uster can be assigned.

C. Para. 2bis (additional votes for other partial lists)

28 Para. 2bis covers the constellations of list and sub-list combinations between lists with an addition to indicate gender, wing of a grouping or age. Para. 2bis sentence 1 repeats the principle from para. 1, according to which the additional votes go to the list designated on the ballot paper.

29 The actual meaning of the provision is derived from para. 2bis sentence 2. The additional votes on insufficiently designated ballot papers are attributed to the list that the grouping has designated as the core list. In the cases covered by this provision, pursuant to Art. 23 sentence 2 PRA in conjunction with Art. 8c para. 3 VV. Art. 8c para. 3 VPR, an election proposal must be designated as a core list. In contrast to para. 2, the obligation to designate a core list, to which all additional votes are allocated in case of doubt, always allows for a clear attribution. The Federal Council thus correctly stated: "The system of designating the core list (Art. 23 and 37 para. 2bis) allows the precise allocation of all votes, so that the enormously time-consuming survey of the number of candidate votes and additional votes of each list within a sub-list combination and, if applicable, within a list combination of lists with the same designation has become superfluous".

D. Para. 3 (deletion of names of non-candidates)

30 Para. 3 appears at first glance to merely clarify the legal consequence of the fact that only eligible candidates may receive votes. In the case of ballot papers with a pre-printed form, this is ensured with official ballot papers (cf. Art.

33 para. 1 PRA), as all candidates have previously undergone a verification procedure. With regard to ballot papers without a pre-printed form, Art. 35 para. 1 PRA confirms that only names of eligible persons may be entered. Accordingly, ballot papers are invalid if they do not contain the name of a candidate from the constituency (Art. 38 para. 1 lit. a PRA). By analogy with names of ineligible persons, excess repetitions are deleted from the ballot paper if the name of a candidate appears more than twice on a ballot paper, as well as all names of persons whose candidacy has been declared invalid due to multiple candidacies after the nominations have been cleared (Art. 38 para. 2 PRA).

However, the significance of para. 3 goes beyond the mere deletion of names of non-candidates. The deletion has the effect of creating empty lines, which are converted into additional votes in accordance with the rules of paras. 1, 2 and 2bis. What is only indirectly apparent from the text of the law was put in a nutshell by the rapporteurs of the responsible committee of the National Council during the deliberations on the NWG 1919 in plenary. In German, the National Council stated: "If any other name is placed on the ballot paper, it will be crossed out and the line will be counted as an additional vote". In French, the explanation was as follows: "Cependant, les suffrages nominatifs ainsi annulés valent comme [...] suffrages complémentaires, lorsque le bulletin de vote porte la dénomination d'une liste". 31

Although sentences 2 and 3, which were deleted in 2008 in the course of the "formal streamlining of federal law", formally represented a dispensable repetition of Art. 37 para. 1 PRA, they clarified the full scope of the provision. In view of the complexity of the regulatory framework and the resulting legal effects as well as the associated political component, it would be helpful if the law were to continue to stipulate: "...the votes cast for them shall, however, be counted as additional votes if the ballot paper bears a list designation or ordinal number; [only] if such a designation [is missing] shall these votes not count (blank votes)". 32

E. Para. 4 (rule of interpretation in the event of inconsistency)

Para. 4 primarily applies to ballot papers without a form. A contradiction between the list designation and the ordinal number may arise if a voter affixes the list designation and the ordinal number of a list in accordance with Art. 35 para. 1 PRA. This is because the voter may not enter the correct combination of list name and serial number. A contradiction between the list designation 33

and the ordinal number can also occur on ballot papers with a pre-printed form if the voter deletes the pre-printed ordinal number and list designation and replaces it with another one (Art. 35 para. 2 sentence 2 PRA). This means that the voter may inadvertently replace only the list designation without correcting the serial number.

34 In both cases, a contradiction may arise if the voter uses the correct list designation and an order number that does not belong to it. Conversely, it could also be the case that the voter uses the correct ordinal number but an incorrect party designation. In such cases, the law stipulates that the list designation is decisive. There is no evidence of the purpose of the regulation in the materials. However, the reason for the interpretation rule is probably that voters are much more familiar with the list names corresponding to the party names than the ordinal numbers of the lists. In addition, numbers are more prone to error than combinations of letters.

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Art. 38 Invalid ballot papers and candidate votes

[1] Ballot papers are invalid if they:

a. do not contain the name of a candidate standing in the constituency;

b. are not official;

c. have been completed or altered other than by hand;

d. contain defamatory remarks or obviously irrelevant markings;

e. ...

[2] The following shall be deleted from the ballot paper:

a. superfluous repetitions if the name of a candidate appears more than twice on a ballot paper;

b. all names of persons whose candidacies were declared invalid due to multiple candidacy following the rectification of the candidate lists.

[3] If the ballot paper contains more names than there are seats to be allocated, the last pre-printed names on the list that have not been accumulated by hand shall be deleted followed by the last names that have been added by hand.

[4] Grounds for invalidity or nullity that relate to the cantonal procedure (official voting envelope or validation stamp, etc.) remain reserved.

[5] In the case of electronic voting pilot schemes, the legislation of each canton conducting such a scheme determines the requirements according to which votes are validly cast and the grounds for invalidity.

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I. HISTORY OF ORIGIN

1 The grounds for invalidity for entire ballot papers contained in para. 1 originate for the most part from the NWG 1919. Thus, pursuant to Art. 14 para. 4 NWG 1919, ballot papers were invalid if they did not contain a valid candidate's name (cf. today's para. 1 lit. a). Ballot papers containing defamatory remarks were also invalid pursuant to Art. 14 para. 5 NWG 1919 (cf. today's para. 1 lit. d). The requirement for handwritten entries and changes to the ballot paper (cf. today para. 1 lit. c) was regulated in a different context in Art. 13 para. 1 sentence 2 NWG 1919. In the course of the enactment of the PRA, a new ground for invalidity was introduced for the use of non-official ballot papers (para. 1 lit. b) as a consequence of the newly introduced obligation to use official ballot papers (Art. 5 para. 1 PRA).

2 In 1992, the provision in para. 1 lit. e enacted in 1976, according to which ballot papers were invalid if they were posted at a foreign post office in the case of postal voting, was repealed. The repeal took place as part of the reform to facilitate the political participation of voters residing abroad. Since then, they have been allowed to vote by post from abroad. Accordingly, the Federal Council stated: "In future, ballot papers submitted from abroad should therefore be valid, provided they arrive before the close of business on the last working day before the voting day. Accordingly, Article [...] 38 [...] PRA is to be amended".

3 The invalidity of individual candidate votes if a name appears more than twice on a ballot paper (para. 2 lit. a) stems from Art. 13 para. 3 NWG 1919 ("It is not permitted to place the name of a candidate more than twice on a ballot paper"). Para. 2 lit. b was added with the 2013 revision. It regulates the legal consequences in the event that a multiple candidacy is recognized too late, i.e. after the nominations have been cleared. The invalidation of individual candidate votes should not result in the loss of any votes for the list in question. The regulation was seen as necessary because there are more and more candidacies and this could also prevent double candidacies that are prohibited "retrospectively".

4 Para. 3 regarding the evaluation of ballot papers with more names than there are seats to be allocated goes back in principle to Art. 14 para. 2 NWG 1919. According to this provision, the last names were to be deleted if a ballot paper

contained more names than there were representatives to be elected. When the PRA was created, a controversy arose as to whether the last names should be deleted first in the case of surplus names or whether the last pre-printed names should be deleted instead. The Federal Council's draft of 1975 proposed that the printed names should be deleted first (and only then the handwritten names). However, the National Council committee requested that this addition be deleted. This procedure had been tried in the last elections and had caused confusion (and an electoral appeal). The National Council followed this proposal. The majority of the Committee of the Council of States proposed to follow the National Council, but there was a minority motion that again called for the printed names to be deleted as a matter of priority. However, in contrast to the Federal Council's proposal, this motion wanted to add that "only printed names" should be deleted first. In other words, not those that were printed and handwritten (i.e. cumulated by the voters). The minority motion was rejected and the Council of States followed the National Council. Art. 38 para. 3 PRA 1976 thus simply stipulated that the "last names" be deleted.

The controversy flared up again during the 2013 revision. The Federal Council did not propose any change. However, the narrow majority of the National Council committee proposed an amendment according to which - in a reversal of the deviating proposals from 1975 - the last handwritten names should be deleted. The National Council followed the proposal of the minority of the committee, namely to leave the Federal Council draft and thus the previous regulation in place. The Council of States committee then proposed the wording "... the last pre-printed names and then the last handwritten names are deleted." which was adopted in plenary without much discussion. This was supplemented by the National Council in the revision of differences - now in line with the 1975 debate - with "the last pre-printed names not cumulated by hand, then the last names filled in by hand". This change was no longer controversial in the Council of States and the paragraph was adopted in this form. The wording has remained unchanged to this day. 5

The reference in para. 4 to grounds for invalidity and nullity in connection with the cantonal procedure was newly created with a partial revision in 1994. The amendment was uncontroversial. It was neither discussed in the Federal Council's dispatch nor addressed in the councils. 6

7 Para. 5 was incorporated into the PRA with the 2001 amendment and took account of the plan to implement projects for electronic voting. Together with other parts of the revision (Art. 5 para. 3, Art. 8a, Art. 12 para. 3, Art. 38 para. 5 and Art. 49 para. 3 PRA), it forms the legal basis for trials with electronic voting. According to the Federal Council in the dispatch, the validity requirements for the traditional types of voting using official ballot papers could not be maintained for pilot trials with electronic voting; instead, the law of the canton in which a pilot trial with electronic voting is being conducted would have to make the precise distinctions between valid and inadmissible expressions of will required for electronic voting. The article was included in the Federal Council's draft and was adopted without debate in both chambers.

II. SIGNIFICANCE OF THE PROVISION

A. General

8 Art. 38 PRA is primarily aimed at the municipal electoral offices, which identify the invalid ballot papers on the basis of the legal requirements and - possibly with the help of deletions - determine the candidate votes (cf. Art. 9 para. 1 VPR). Art. 38 PRA comprises three different sets of rules in connection with defective ballot papers. Para. 1 sets out the conditions under which a ballot paper is completely invalid. Para. 2 and para. 3 contain provisions on how the authorities are to proceed when evaluating valid ballot papers with incorrect ballot papers in relation to individual candidates. Para. 4 and para. 5 refer to cantonal law for cantonal specifics of the election procedure and for electronic voting.

9 The grounds for invalidity in Art. 38 para. 1 PRA regarding ballot papers in proportional elections to the National Council are very similar to the grounds for invalidity of ballot papers in federal referendums (Art. 12 para. 1 PRA) and ballot papers in cantons with majority elections to the National Council (Art. 49 para. 1 PRA). The grounds for invalidity of the use of non-official ballot papers or ballot papers that have not been filled in by hand (or altered) and the use of defamatory statements or obvious markings are identical. The respective references to cantonal law in connection with the special features of the cantonal procedure and electronic voting in Art. 38 para. 4, Art. 12 para. 2 and Art. 49 para. 2 and Art. 38 para. 5, Art. 12 para. 3 and Art. 49 para. 3 PRA are also congruent. The practical significance of Art. 38 para. 1 PRA is consider-

able. In the 2023 National Council elections, 2,554,482 (= 98 %) valid ballot papers were offset by 40,979 (= 1.6 %) invalid ballot papers.

Only Art. 38 para. 2 and para. 3 contain specific provisions that only apply to proportional representation elections. These refer to special features that only occur in proportional representation elections. They concern cumulation more than twice, the discovery of multiple candidacies by one person in several cantons after the nominations have been adjusted and the casting of too many votes by one elector. The problem of casting too many votes can also occur in major elections in cantons with only one seat. However, this error then leads to the invalidity of the entire ballot paper (cf. Art. 49 para. 1 lit. a PRA). 10

B. Comparison of laws

The grounds for invalidity applicable to the proportional representation of the National Council are also found in cantonal law for the election of cantonal parliaments. This applies equally to cantons with isolated proportional representation in different constituencies, cantons with double proportional representation and cantons with a single constituency. Ballot papers are invalid if they are not official, have been filled in other than by hand, have been altered or contain defamatory statements or obvious markings. Ballot papers that do not contain the name of a candidate are also often deemed invalid. In other cases, the absence of a name is considered a blank vote. In both cases, this means that the ballot paper is not included in the result. 11

The treatment of incorrect candidate votes also largely corresponds to the rules for National Council elections. A vote is invalid if it is cast for a person who is not eligible. If a ballot paper contains more valid names than there are persons to be elected, the surplus votes are invalid. If the name of a candidate appears more than twice on a ballot paper, the excess repetitions are deleted. Both variants of the procedure for deleting surplus names can be found historically in the PRA. Some cantons are familiar with the original method in the Confederation. The names are deleted from bottom to top and from right to left. Other cantons, on the other hand, apply the rule currently in force in the Confederation. If a ballot paper contains more names than there are seats to be allocated, the last pre-printed names that have not been cumulated by hand are deleted, followed by the last handwritten names. 12

III. COMMENTARY ON THE TEXT OF THE STANDARD

A. Para. 1 (Invalid ballot papers)

13 Para. 1 contains the grounds for invalidating entire ballot papers. This is an exhaustive list. There are no other grounds for invalidity. The grounds must be interpreted narrowly, as they constitute a restriction of the freedom to vote and elect (Art. 34 para. 2 FC). Ballot papers declared invalid by the electoral office are not taken into account when determining the election result pursuant to Art. 40 et seq. PRA shall be disregarded in their entirety. Invalid ballot papers are not included in the election result. They are merely recorded as invalid ballot papers (cf. Art. 39 lit. b PRA).

14 An entire ballot paper is invalid if it does not contain the name of a candidate from the constituency (lit. a). This is a specific reason for invalidity for proportional representation elections. Invalidity only exists if no usable expression of will in the form of a candidate's name can be taken from the ballot paper. The provision is related to the requirements for the design of ballot papers with a pre-printed form and for the completion of ballot papers without a pre-printed form. An election proposal may only contain the names of eligible persons (Art. 22 para. 1 sentence 1 PRA). An election proposal adjusted in this sense is called a list (Art. 30 para. 1 PRA). The cantons prepare ballot papers for all lists on which, among other things, the candidate details are pre-printed, as well as ballot papers without pre-printing (Art. 33 para. 1 PRA). If a voter deletes all names on the ballot paper with pre-printed information (cf. Art. 35 para. 2 PRA) or instead only enters the names of persons who are not candidates, this invalidates the entire ballot paper. In the case of a ballot paper without a pre-printed form, the entire ballot paper is invalidated if the voter does not enter a name or only enters the names of non-candidates.

15 Ballot papers that are not official are also invalid (lit. b). The reason for invalidity is a consequence of the obligation to use official ballot papers for voting (Art. 5 para. 1 PRA). The reason for invalidity is reflected in Art. 12 para. 1 lit. a and Art. 49 para. 1 lit. b PRA for ballot papers for referendums and ballot papers for major elections. For details, please refer to the commentaries on these two provisions.

16 Ballot papers that have been completed or altered in a manner other than by hand are also invalid (lit. c). The reason for invalidity is a consequence of the

obligation to complete ballot papers without a form by hand or to amend ballot papers with a form by hand only (Art. 5 para. 2 PRA). The provision has equivalents in Art. 12 para. 1 lit. b and Art. 49 para. 1 lit. c PRA. For details, please refer to the commentaries on these two provisions.

Finally, ballot papers containing defamatory statements or obvious markings are invalid (lit. d). The reason for invalidity is not a direct result of a legal obligation when carrying out the election. The reason for invalidity is justified by the protection of voting secrecy (Art. 5 para. 7 PRA). While this may seem obvious in the case of obvious markings, which regularly allow conclusions to be drawn about the authorship, i.e. the person voting, the connection is not obvious in the case of defamatory statements. In view of the freedom to vote (Art. 34 para. 2 FC), the assumption of invalidity in lit. d is therefore only to be made under strict conditions. In particular, high demands must be placed on the obviousness of a label and the defamatory nature of a statement must not be assumed lightly. The ground for invalidity has equivalents in Art. 12 para. 1 lit. d and Art. 49 para. 1 lit. d PRA. For details, please refer to the comments on these two provisions. 17

B. Para. 2 (deletion of inadmissible names from the ballot paper)

Para. 2 regulates constellations in which errors in the voting process do not lead to the invalidity of the entire ballot paper, but only to the deletion of individual inadmissible votes on the ballot paper. The provision takes into account the proportionality (cf. Art. 36 para. 3 FC) of the restriction associated with the declaration of invalidity with regard to the freedom to vote and elect (Art. 34 para. 2 FC). The expression of will is only disregarded in the election result to the extent that this is absolutely necessary to comply with other legal provisions. The provision is closely related to Art. 37 para. 3 PRA, according to which names that do not appear on any list of the constituency are deleted. 18

The deletion of individual declarations of intent by the electoral office has the primary legal effect that the vote is not reflected in a candidate vote in favor of the person concerned. Otherwise, the ballot paper remains valid and the correctly cast votes are counted as candidate votes. Indirectly, the deletion of individual votes leads either to the creation of an additional vote for the elected list (Art. 37 para. 1 sentence 1 PRA) or to a blank vote (Art. 37 para. 1 sentence 2 PRA). The Federal Council summed up the desirable side effect from a political perspective with regard to the party-friendly allocation of addition- 19

al votes in Art. 37 PRA: "The parties do not lose a single vote as a result". From the voter's point of view, an error pursuant to Art. 38 para. 2 PRA has different effects on the election result depending on whether they have voted for a list or not. In the first case, the full voting power is retained; in the second case, the voter loses one vote, as the blank vote does not count in the result.

20 Para. 2 lit. a obliges the electoral office to delete excess repetitions, i.e. if the name of a candidate appears more than twice on a ballot paper. The reason for deletion is a consequence of the provision on cumulation (Art. 35 para. 3 PRA). According to this provision, the voter may list the name of the same candidate on the ballot paper (at most) twice. More frequent cumulation therefore logically leads to the deletion of the supposed additional candidate votes.

21 Para. 2 lit. b ensures the enforcement of the legal prohibition of double candidacies in the event that these are only noticed after the nominations have been corrected and the prohibited candidacies are therefore still on ballot papers with pre-printed forms. By enabling a subsequent official deletion, the aim is to prevent unnoticed double candidacies from thwarting the correct allocation of all votes. If a multiple candidacy is discovered after the nominations have been cleared, the candidacy in question is declared invalid on all lists concerned, namely by the canton if the same nominee appears on more than one cantonal list and by the Federal Chancellery if the same nominee appears on lists of several cantons (Art. 32a para. 1 PRA). In order for the electoral offices to carry out the deletion, the cantons concerned and the Federal Chancellery shall inform each other immediately which candidacies have been declared invalid (Art. 32a para. 2 PRA).

C. Para. 3 (deletion of surplus names from the ballot paper)

22 Para. 3 governs the case in which the voter lists too many names on the ballot paper, i.e. casts more votes than there are seats to be allocated in the canton concerned. The law lays down the rule of interpretation according to which the electoral office only deletes as many names as necessary in the interests of proportionality. Accordingly, only the surplus votes are deleted. The legal consequence is the same as in para. 2: additional votes or blank votes are cast.

23 In the original version of 1976, it was stipulated that the last names were deleted. The electoral office therefore deleted surplus names from bottom to top.

The current provision in para. 3 is more complex. In a first step, the last pre- 24
printed names that have not been cumulated by hand are deleted. In a second step, the last handwritten names are deleted. The committee spokesperson justified the thrust of a more differentiated regulation in the Council of States with a view to the regulation in force at the time as follows: "This change deliberately gives more weight to the will of the voters". The National Council also created the current, sophisticated procedure with reference to the will of the voters. On the one hand, the handwritten expression should be given more weight than the pre-printed form, and on the other hand, cumulative names, including the first pre-printed mention of the name, should not be deleted in case of doubt. The legal regulation therefore fictitiously implies the will of the voter in two respects as follows: "If a voter writes a name on a list in his or her own hand, then there is a very clear will to vote for this person" and "If a voter cumulates a name, then the will of the voter is clear that this person should be given an additional vote". The objection raised by the Federal Chancellery that the differentiated deletion rule was not practicable was ultimately not heard by the councils.

The provision is the mirror image of Art. 37 para. 1 PRA, which stipulates how 25
to proceed if an elector submits fewer valid candidate votes than there are members of the National Council to be elected in the constituency. A sideways glance at the evaluations and fictions of the will of the voters on which this standard is based shows how differentiated the law is in dealing with too few and too many votes cast. If there are too few votes, the blank lines when using a party list or placing a list designation on a blank list are assumed to contain a statement in favor of the respective party list. If there are too many votes, the pre-printed content is suppressed in favor of the handwritten statements and thus priority is given to handwritten cumulation and variegation.

D. Para. 4 (reference to cantonal law; grounds for invalidity)

Para. 4 refers to cantonal law for any further grounds for invalidity and nullity. 26
This concerns grounds for invalidity and nullity that are related to the cantonal procedure (voting envelope, control stamp, etc.). Please refer to the commentary on the corresponding provision in Art. 12 para. 2 for the cantonal particularities and structures.

E. Para. 5 (reference to cantonal law; electronic voting)

27 For trials with electronic voting, para. 5 refers to the law of the canton conducting the trial with regard to the requirements for valid voting and the grounds for invalidity. As trials with electronic voting (cf. Art. 8a PRA) require a mandatory legal basis in cantonal law, the requirements for voting and grounds for invalidity must also be regulated in this context. The general federal legal basis for the reference to cantonal law can be found in Art. 12 para. 3 PRA. For details, please refer to the relevant commentary.

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COMMENTARY ON

Art. 39 PRA

A commentary by Andreas Glaser

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Art. 39 Collating the results

Following the close of voting, the cantons shall establish the following on the basis of the reports from the polling stations:

a. the number of persons eligible to vote and the number of persons who voted;

b. the number of valid, invalid, and blank ballot papers;

c. the number of votes that the individual candidates on each list have received (candidate votes);

d. the number of additional votes for each list (Art. 37);

e. the sum of the candidate votes and additional votes for the individual lists (party votes);

f. in respect of combined lists, the total of the votes cast in favour of the group on the lists;

g. the number of blank votes.

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I. HISTORY OF ORIGIN

1 Art. 39 PRA goes back to Art. 15 NWG 1919, which obliged the cantonal governments to determine the number of candidate votes, the number of additional votes, the total number of party votes calculated from these votes and the total number of votes allocated to a list group. This corresponds to Art. 39 lit. c, d, e and f PRA. Neither the National Council nor the Council of States discussed this when the NWG was enacted in 1919.

2 When the PRA was enacted in 1976, the already common practice of listing the blank votes was enshrined in law. The provision is now contained in Art. 39 lit. g PRA. Art. 39 lit. a and lit. b PRA were inserted at the request of the National Council Committee and adopted in the National Council without debate (initially as Art. 37). The Council of States joined the National Council without discussion.

3 Art. 39 PRA has remained unchanged since then.

II. SIGNIFICANCE OF THE PROVISION

A. General

4 Art. 39 PRA is initially of a technical nature, in that the provision lays down what the cantons must establish after the close of the election. It concerns how the election results are to be processed in the cantonal official gazette. The information is included in the Federal Council's report to the National Council on the National Council elections. The compilation of the results serves the purpose of transparency for both voters and candidates and thus indirectly protects the freedom to vote (Art. 34 para. 2 PRA). The compilation of the results may give rise to a complaint about irregularities in the conduct of the National Council elections (election complaint) pursuant to Art. 77 para. 1 lit. c PRA or provide the factual basis for the substantiation and judicial assessment of the complaint.

5 In addition, Art. 39 PRA contains substantive statements that are not otherwise found in the PRA with comparable clarity. The definition in lit. e is of particular importance. According to this, the party votes are made up of the sum of the candidate votes and additional votes of the individual lists. The

party votes are the decisive factor for the distribution of National Council seats among the lists (Art. 40, Art. 41 PRA). The definition of candidate votes as the number of votes received by the individual candidates on each list (lit. c) could otherwise only be inferred from a summary of other provisions (cf. Art. 36, Art. 37 para. 1 sentence 1, Art. 38 para. 2 and para. 3 PRA). The other information is limited to the illustration of facts required by law elsewhere, for example the additional votes allocated in accordance with Art. 37 PRA (lit. d).

B. Comparison of laws

The cantons have issued requirements for the compilation of election results that are comparable to those of the Confederation. In cantons with isolated proportional representation in the individual constituencies, the information is largely identical, including the candidate votes, the additional votes, the party votes and the total number of votes for associated lists. In cantons with double proportional representation, the information on combined lists is omitted due to the lack of admissibility of combined lists. 6

III. COMMENTARY ON THE TEXT OF THE STANDARD

Pursuant to Art. 39 PRA, the cantons shall establish certain information after the end of the election on the basis of the minutes of the electoral offices. According to the title of the article, this concerns the compilation of the results. Art. 9 VPR contains a specification of the implementation of the requirement, i.e. the manner in which the cantons are to make the findings on the basis of the results of the electoral offices. The municipal electoral offices shall forward the election protocols with the other auxiliary forms and the ballot papers to the cantonal electoral office immediately after compilation (Art. 9 para. 1 VPR). 7

Art. 39 lit. a PRA stipulates the determination of the number of persons entitled to vote and the number of voters. The number of voters is determined from the electoral register (cf. Art. 4 PRA). The number of voters includes all persons who submit a ballot paper, regardless of whether it is ultimately valid, invalid or blank. 8

Art. 39 lit. b PRA requires the electoral office to make an initial differentiation between the ballot papers for the presentation of the result. The completely blank ballot papers are to be separated out first. Invalid ballot papers pursuant 9

to Art. 38 para. 1 PRA are to be separated from the non-blank ballot papers. The remainder of the ballot papers form the total of valid ballot papers. This applies regardless of whether the respective ballot paper has been completed in full (cf. Art. 37 PRA) or whether the electoral office has made deletions (cf. Art. 37 para. 3, Art. 38 para. 2 and para. 3 PRA).

10 Art. 39 lit. c PRA obliges the electoral office to compile the candidate votes as they result from the evaluation of the individual lists. The candidate votes determine who is elected. The candidates from each list who received the most votes are elected in accordance with the number of mandates achieved (Art. 43 para. 1 PRA). In practice, the largest proportion of these votes results from the lists with pre-printed forms that have not been changed. However, the options available to voters under Art. 35 PRA are also relevant to a considerable extent. For example, candidate votes are significantly influenced by deleting, crossing out and cumulating.

11 Art. 39 lit. d PRA refers to the additional votes regulated in Art. 37 PRA. The list is also of interest because it provides information on how many votes have accrued to the parties regardless of empty lines on the ballot papers as a result of legal fictions.

12 Art. 39 lit. e PRA obliges the cantons to show by far the most important political result of the National Council elections in terms of party votes. The allocation of seats to the party lists is based on this (Art. 40 f. PRA).

13 Of comparable importance is the total number of votes attributable to the list group calculated in accordance with Art. 39 lit. f PRA for the combined lists. In the case of list combinations, this is the deciding factor for the distribution of seats. Each group of linked lists is initially treated as a single list for the distribution of mandates (Art. 42 para. 1 PRA).

14 Finally, Art. 39 lit. g PRA requires the number of blank votes to be listed. This information refers to the blank votes pursuant to Art. 37 para. 1 sentence 1 PRA. These are blank lines that do not count, i.e. if the name and serial number of a list are missing from the ballot paper or the ballot paper contains more than one of the submitted list names or serial numbers. The proportion of blank votes gives an impression of the voting behavior and the effect of the legal fictions in Art. 37 PRA.

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COMMENTARY ON

Art. 40 PRA

A commentary by Irina Lehner

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Art. 40 Initial allocation of mandates to the electoral lists

[1] The number of valid party votes for all the electoral lists is divided by a number equivalent to the number of mandates to be allocated plus one. To obtain the allocation number, the result is rounded up to the nearest whole number, unless it is already a whole number, in which case it is increased to the next highest whole number.

[2] Each electoral list shall be allocated as many mandates as the number obtained by dividing the number of votes cast in favour of the list by the allocation number.

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I. HISTORY OF ORIGINS

Until 1919, the members of the National Council were elected - constitutionally 'unspoken' - according to the majority voting system (Majorz). In 1919, the changeover to the National Council election "according to the principle of proportionality" was carried out. Already during the preparatory work for the first total revision of the Federal Constitution, the proposal of proportional representation was raised for the first time, but a corresponding proposal by a deputy of the Catholic-Conservative Party was rejected. Various other parliamentary proposals followed, which also failed. The introduction of the popular initiative for a partial revision of the constitution in 1891 paved the way for the change from the major to the proportional electoral system. Popular initiatives calling for a change in the National Council electoral system were put to the vote in 1900 and 1910, but were rejected. In 1918, in the run-up to the national general strike, a third initiative with the same content was finally approved by the people and the cantons with a large majority. 1

Under the impression of the clear popular vote and the national general strike, the National Council (still elected according to the old electoral law) very quickly created the implementing legislation for the new constitutional norm. After the popular initiative had been accepted on October 13, 1918, the Federal Council submitted a draft law on November 26, 1918, the deliberations of which the Councils had already concluded on February 14, 1919. On October 26, 1919, the first - early - elections were held under the new National Council Election Law. The expected major shifts occurred: The Free Democrats lost their previous absolute majority, while the Social Democrats and cantonal peasant parties (forerunners of the BGB) recorded significant successes. 2

At that time, as today, the constitutional provision only regulated the election of the National Council according to the principle of proportional representation. The further design of the electoral system was thus left to the legislature. Although this is a "technical regulation", it nevertheless represents a "doctrine that is very complex in its details". The Federal Council draft of November 1918 already provided for the distribution of mandates among the lists according to the Hagenbach-Bischoff method of calculation. Parliament retained this provision unchanged. The principle of how mandates are distributed among the lists has not changed to this day, neither when the National Council Elec- 3

tion Law was transferred to the new Federal Law on Political Rights in 1976 nor when it was revised.

II. PROPORTIONAL REPRESENTATION AND DISTRIBUTION OF MANDATES

A. Modes of proportional representation

1. Basic Differences in Calculation Methods

4 There are various mathematical methods for calculating the distribution of mandates, which consist of the same two steps. First, the proportion of the votes obtained by each list group in the total number of votes must be calculated, resulting in a proportional ideal. This usually results in decimal fractions. However, since only whole mandates can be allocated, the second step requires rounding to obtain the final allocation of mandates.

5 Rounding can have a significant impact on election results. The various calculation methods differ essentially in how they perform the rounding. Two main groups can be distinguished. In quota methods, a divisor for the calculation of the ideal claim is fixed in the first step, but the applicable rounding rule for the second step is not fixed from the outset. In divisor methods, the second step is always rounded using the same rule, but the divisor is specified flexibly in the first step.

6 There are two rounding rules that are applied in mandate distribution: Rounding up and Standard rounding. In standard rounding, the number of fractions is rounded up if the fraction is greater than one-half and rounded down if the fraction is less than one-half. Problems can arise if two parties receive exactly half a seat entitlement, but there is just one seat left to be allocated, so that it is not possible for both parties to receive a seat or for neither party to receive this seat. In this case, a decision must be made by drawing lots.

2. Concrete calculation methods for the distribution of mandates

7 In the Confederation and the cantons there are four different calculation methods for the distribution of mandates in the proportional representation system. The calculation methods are often referred to by the name of a per-

son who was important for their development or spread. These names are also used here because of their prevalence, although other names might be more mathematically descriptive.

a. Hare/Niemeyer

The Hare/Niemeyer mandate allocation method is a quota method. It consists of two components, the quota and the majority clause, which are used in the same order for the electoral system. The quota according to Hare is determined first: The number of all votes cast is divided by the number of seats to be allocated. The achieved votes of each list are divided by this quota, which is the ideal claim of this list. This ideal entitlement is rounded down to the whole number; this is how many mandates the list in question receives in the first distribution step in the strict sense. Subsequently, the remaining mandates are distributed - in the sense of the flexible rounding step - according to the largest remainder (the 'number after the decimal point'). Niemeyer's majority clause ensures that a party with an absolute majority of the votes obtained also receives an absolute majority of mandates. 8

b. Hagenbach-Bischoff

The Hagenbach-Bischoff mandate distribution method is a divisor method with rounding. This mandate distribution method is based on the idea of a "mandate price" that should be as high as possible: Behind each mandate distributed there should be as many votes cast as possible. 9

The divisor is calculated in such a way that already in the first distribution step as many mandates as possible can be distributed. The number of all votes cast is divided by the number of seats to be allocated plus one; the result thus determined is increased to the next whole number (= divisor). The votes obtained by each list are divided by this divisor and each list receives as many mandates "as the distribution number is contained in its number of votes" (Art. 40 para. 2 PRA). This means that the mandate entitlement for the initial distribution is rounded down. In the second distribution step, the remaining mandates are distributed individually by dividing the number of votes of each list by the number of mandates already allocated to it plus one. Thus, it is hypothetically calculated what mandate price each list would pay for the additional mandate. The mandate is allocated in the second distribution step to the list 10

that can 'offer' the highest mandate price. This distribution step is repeated individually for each remaining mandate.

c. Sainte-Laguë

11 The calculation method according to Sainte-Laguë is a divisor method with standard rounding. The method is similar to the Hagenbach-Bischoff method. The decisive differences lie in the method for the computation of the divisor as well as in the rounding. First, the number of all votes cast is divided by the number of seats to be allocated - the increase in the number of seats to be allocated by one, which is necessary with Hagenbach-Bischoff, is omitted. The result thus determined is increased to the next whole number and thus the divisor is determined. The votes obtained by each list are divided by this divisor and the result is rounded using standard rounding. In contrast to rounding down (Hagenbach-Bischoff), standard rounding does not favor larger parties; it is neutral.

d. Pukelsheim

12 The Pukelsheim mandate distribution method is a double-proportional divisor method with standard rounding (simplified also called "double proportional representation" or "double Pukelsheim"). The eponymous double proportionality finds its origin in the two-part procedure: Upper and lower apportionment. In the upper allocation, the mandate claim per list is calculated on the entire electoral territory. The votes cast in each constituency are weighted (according to the number of seats allocated to that constituency), the weighted votes for the whole electoral area are added up and distributed among the lists of the whole electoral area according to the Sainte-Laguë method. The sub-allocation determines in which constituencies each list receives the mandates it is entitled to. This is done by an iterative algorithm in which the distribution of mandates is determined in repetitive calculation steps by means of approximations.

13 Proportionality, in the sense of the greatest possible equality of success values, is thus realized in the overall allocation across the entire electoral area. Within the electoral districts, it may happen that one list receives a seat to which another list would be entitled according to the proportionality within the electoral district (so-called reverse allocation of seats).

3. constitutional and international legal framework

a. Requirements of Art. 149 FC

Constitutional law provides in Art. 149 para. 2 FC that the National Council shall be elected by the people according to the principle of proportional representation. For the precise design of the electoral system within the framework of the implementation legislation, this provision leaves significant leeway. 14

The distribution of mandates, as standardized in Articles 40 to 44 PRA, is one of the foundations of any proportional representation electoral system. The method of allocating mandates to lists is not merely of mathematical interest, but of eminent importance for the actual composition of parliament. Other fundamental decisions in the design of electoral law also influence the way in which the constitutional "principle of proportional representation" is reflected in election results. These include, in particular, the admissibility of list combinations (cf. Art. 31 PRA), the size of the electoral districts (cf. Art. 149 para. 3 FC) and the possible establishment of quorums. 15

The principle of proportional representation can be concretized in different ways, and the concept of proportional representation per se can have two different meanings. On the one hand, proportional representation can represent a principle of representation that must be realized in the entire electoral area taken together (cross-electoral district proportional representation). On the other hand, proportional representation can be understood as a mere decision-making rule that is applied only within constituencies (constituency-based proportional representation). The principle of proportional representation gives high weight to the equality of success values. Depending on the conceptual understanding of proportional representation, however, equality of success value must be realized as well as possible in a different place: either across constituencies or (only) within constituencies. 16

Art. 40 and 41 PRA stipulate that the mandates are distributed among the lists according to the Hagenbach-Bischoff calculation method, but without explicitly naming it. Other mandate allocation procedures would also be possible within the framework of the applicable constitutional law, for example a change to the divisor method with standard rounding according to Sainte-Laguë. 17

18 Art. 149 para. 3 FC stipulates that the cantons form the electoral districts. Today, according to the Hagenbach-Bischoff mandate allocation system, the principle of proportional representation is implemented only within these constituencies, i.e. at the level of the cantons. In the doctrine it is disputed whether a change to a proportional representation across the constituencies would be constitutional. The doctrine predominantly denies this, since in this case the cantons would no longer form the electoral districts in accordance with Art. 149 para. 3 FC. A minority, on the other hand, is of the opinion that proportional representation systems across constituencies could also be constitutional, namely the double-proportional mandate allocation procedure according to Pukelsheim. Some doctrine affirms its constitutionality, since this procedure allows the electoral districts to be retained as subdivisions of the electoral area. In principle, this can be agreed with, but the significance of the constituencies is significantly diminished by the transfer of votes between the constituencies in the case of double proportional representation.

b. Requirements of international law

19 Art. 25 of the UN Covenant II protects certain basic elements of political rights. According to federal court case law, UN Covenant II guarantees a "lowest common denominator" of political rights. Thus, the UN Covenant II prescribes neither a majoritarian nor a proportional representation electoral system; according to the Federal Supreme Court, it protects the equality of counting values, but not the equality of success values. Thus, the provisions of the UN Covenant II under international law do not contain any relevant requirements for the precise design of the National Council election law.

c. Change in the Method of Mandate Allocation?

20 In the context of legislative revisions, a fundamental change in the mandate distribution method in the National Council electoral law has been repeatedly discussed. When the PRA was created, a National Councilor of the Evangelical People's Party submitted a motion for the introduction of the fraction method instead of the divisor method, since the previous mandate distribution system favored the large parties to a considerable extent. However, the proposer realized that the proposal currently had no political chance and withdrew it before the vote in the Council. When the PRA was revised in 1993, the Federal Council considered a change in the mandate distribution system, but rejected it. The mandate distribution according to Hagenbach-

Bischoff pursued an obvious goal: that "even behind the last mandate distributed there must be the greater number of voters than behind any conceivable last mandate distributed in a different way."

Even outside of major revision projects in the area of political rights, the federal parliament regularly receives requests for adjustments to the National Council's electoral law. Since the beginning of the cantonal development towards proportional representation across constituencies through the Pukelsheim mandate allocation method, the petitions have also focused on mandate allocation at the federal level. The first postulate concerning the introduction of the double-proportional divisor method according to Pukelsheim was submitted as early as 2003. However, with the same regularity with which they are submitted, these postulates also fail. Most recently, a parliamentary initiative of the Green-Liberal group in the National Council at the end of 2021 was not followed up. 21

B. Procedure for the Allocation of Mandates

1. procedure of the entire mandate distribution according to the PRA

The distribution of mandates for the National Council is carried out in a multi-stage procedure, which is defined in more detail in Art. 40 to 44 PRA. In each constituency, the seats there are distributed separately; this is a proportional representation system at the level of the individual constituencies. First, the number of mandates to which each list (association) is entitled is determined (Art. 40 and 41 PRA). Then, in the case of list combinations (Art. 31 para. 1 PRA), the mandates are distributed among the individual lists within the list groups (Art. 42 PRA). If sub-list connections have also been entered into (cf. Art. 31 para. 1 and 1bis PRA), the mandates of the list group must first be distributed to the sub-list groups, then to the individual lists within the sub-list groups. The final step is to determine which candidates from each list are elected (Art. 43 and 44 PRA). 22

The distribution of the mandates to the lists or list groups (first step) is again divided into two sub-steps. First, the so-called "initial distribution" is carried out: A divisor is determined and the mandates are distributed among the lists according to this number (Art. 40 PRA). As a rule, however, undistributed mandates remain. These mandates are distributed to the lists in the second 23

sub-step, the so-called residual distribution, according to further rules (Art. 41 PRA).

2. Example of initial distribution

24 The initial distribution is illustrated by the example of the National Council election results in the electoral district (canton) of Lucerne in 2019. The canton (= electoral district) had nine seats in the National Council to be distributed among the lists, and a total of 35 lists competed. Of these 35 lists, two contested individually, the others were combined in a total of three different list groups, with "mother parties" and their smaller offshoots additionally combined in sub-list groups. (Sub)list groups of the same party are each marked with a plus sign.

25 The votes were distributed as follows:

List / list group	**Number of party votes**
CVP+/FDP+	487'102
Grüne+/SP+/GLP+/IP	395'687
SVP+	293'650
EVP	8'451
SD	1'766
Total	*1'186'656*

The divisor is calculated: Number of party votes cast divided by (the number of mandates to be awarded plus one), rounded up to the next higher integer.

1'186'656 / (9+1) = 118'665.6 à divisor: 118'666 (= "mandate price")

The quotient of each list group is calculated by dividing the number of party votes of the list combination by the divisor. The number before the decimal point indicates how many mandates the list combination receives after the initial distribution.

E.g. for the SVP+: 293'650 / 118'66 = 2.47459255389075 à entitlement of the SVP+ according to the first distribution: 2 mandates

List / list group			

	Number of party votes	**Quotient (rounded)**	**Mandates**
CVP+/FDP+	487'102	4.10	4
Grüne+/SP+/ GLP+/IP	395'687	3.33	3
SVP+	293'650	2.47	2
EVP	8'451	0.07	0
SD	1'766	0.01	0
Total			*9*

In the 2019 National Council elections, the list group with CVP+ and FDP+ received four mandates, the list group Greens+/SP+/GLP+/IP three seats, and the SVP+ two. The EVP and SD, which ran without a list group, came away empty-handed. All nine seats of the constituency in the National Council could thus already be allocated in the initial allocation. Furthermore, according to Art. 42 PRA, it would have to be calculated how the mandates of the list group are to be distributed to the individual lists (or sub-list groups) which are combined in it. 26

C. Legal comparison

The vast majority of cantons elect their parliament according to a proportional representation system: Eleven cantons according to Hagenbach-Bischoff, eight according to double proportional representation, two according to Sainte-Laguë, two according to Hare/Niemeyer. Appenzell-Innerrhoden is the only canton with a pure majoritarian electoral system. The cantons of Appenzell-Ausserrhoden and Uri have a mixed system: in the canton of Appenzell-Ausserrhoden, the cantonal council members are elected according to the major system, with the exception of the (largest) electoral district of Herisau, where the mandates are allocated according to Hagenbach-Bischoff. In the canton of Uri, in the constituencies with more than five Landrat seats, elections are held according to the Pukelsheim proportional representation system, and in the smaller constituencies according to the majoritarian system. 27

28 In the cantons with Hagenbach-Bischoff, the distribution of mandates is almost or quite the same as at the federal level. Differences arise in the canton of Basel-Landschaft, which, in contrast to the federal level, forms constituency associations for all constituencies and therefore does not allocate mandates per constituency but separately in each of the four regions. The calculations of the distribution figure in all cantons with Hagenbach-Bischoff hardly differ from the federal level.

29 The cantons have always enjoyed a great deal of freedom in designing their electoral systems; major, proportional and mixed systems can all be in conformity with the federal constitution, provided that they comply with the electoral equality of Article 34 FC. When proportional representation was introduced at the federal level in 1919, ten cantons had already introduced proportional representation. The experience gained in the cantons was important for the design of the National Council electoral system at the federal level. The proportional National Council electoral law in turn influenced other cantons in revising their parliamentary electoral law: after the elaboration of the proportional representation electoral law at the federal level, various cantons switched from the previously widespread system of simple quotients to Hagenbach-Bischoff.

30 With respect to cantonal proportional representation systems, the Federal Supreme Court has recently imposed increasingly stringent requirements for the realization of equality of success values: If cantonal constitutional law provides for a proportional representation electoral system, the equality of success values must be realized as well as possible across electoral districts, not merely within them. As a result of this case law, the above-mentioned eight cantons have switched to a double-proportional electoral system since 2002.

31 The National Council election law would possibly not stand up to the Federal Supreme Court case law on cantonal parliamentary election law. The principle of proportional representation is not implemented nationwide, but merely within constituencies (i.e. at the cantonal level), and the constituencies in the form of cantons are often far too small. Whether the understanding of proportional representation as a (mere) constituency-related distribution rule can already be derived from Art. 149 para. 3 FC was left open by the Federal Supreme Court. The court pointed out that the cantons, as sovereign members of the federal state, had a different position than mere intra-cantonal

constituencies, precisely with regard to their participation in the formation of the will of the federal government. In any case, the Federal Court is bound by the regulation in the PRA according to Art. 190 FC. It will have to be observed whether the adjustments of the cantonal electoral systems at the federal level will have consequences of a political nature. It may seem objectionable that federal law places rather high demands on the cantons with regard to the parliamentary election system, but hardly fulfills these demands itself. However, the fact that in the federal parliament all attempts to change the mandate allocation procedure have so far failed, even in recent times, speaks against too high expectations of rapid changes in the election system at the federal level. At the same time, the dynamics at the cantonal level have slowed down, after the canton of Graubünden last held the first elections to the cantonal parliament with the new mandate allocation system of double proportional representation on May 15, 2022. With Obwalden, there remains one canton in which the parliamentary mandates are distributed according to the Hagenbach-Bischoff system, but the natural quorum in the majority of the electoral districts is too large, so that the electoral system could be declared unconstitutional by the Federal Supreme Court should an appeal be filed against it.

III. INITIAL ALLOCATION OF THE NATIONAL COUNCIL MANDATES TO THE LISTS

A. Distribution figure (para. 1)

1. Calculation of the distribution number

In the distribution method according to Hagenbach-Bischoff, the first step is to calculate a divisor, which is referred to in the PRA as the distribution number. For this purpose, the number of all validly cast votes (party votes pursuant to Art. 39 lit. e PRA, validity pursuant to Art. 38 PRA) is divided by the number of mandates to be allocated plus one and increased to the next whole number. 32

The calculation method according to Hagenbach-Bischoff dates back to a time when arithmetic operations were carried out without the aid of computer programs. One goal was therefore to have as few calculation steps as possible. The method of calculating the distribution figure standardized in Art. 40 Para. 1 PRA aims to be able to distribute as many mandates as possible in the initial distribution. The smaller the distribution number, the larger the number 33

that results from the division by the distribution number, so that the more mandates can be distributed in the initial distribution in the sense of Art. 40 para. 2 PRA. Therefore, according to Art. 40 para. 1 PRA, the valid votes are divided by the available mandates plus one; the result of this calculation is a smaller distribution number. This reduces the number of additional arithmetical operations required in the course of the remaining distribution pursuant to Art. 41 PRA.

34 At the same time, never more mandates may be distributed than there are seats in the constituency concerned. This is ensured by this method of calculating the distribution number by rounding up to the next higher whole number.

2. Amendments to the wording

35 The wording of the current Art. 40 para. 1 PRA underwent various changes. According to the National Council Election Act, the distribution number was already calculated by dividing the number of all valid votes by the number of mandates to be allocated increased by one and rounding up to the next higher whole number. When the PRA was introduced, this wording was adjusted. This "rewording without material change" was not supposed to actually change anything in the principle. In fact, however, the rewording had legal consequences. The quotient was now to be "rounded up" to the nearest whole number. If the result of the division was already a whole number before rounding up, this number could no longer be rounded up and therefore became the quotient directly. As a result, there was a risk that more than 200 National Council seats should have been allocated in the further calculation, as the quotient would have been too low. The provision in question was therefore reworded in the partial revision of the PRA in 1993/1994 to conform to the constitution and to be mathematically more precise, thus eliminating the risk.

36 When the wording was adapted, it would also have been conceivable for a new method of calculation to be introduced. The so-called "Prokop method" would have resulted in exactly the same distribution of mandates as the calculation using the Hagenbach-Bischoff method, but with the aid of a computer. However, the computerized method met with so many "psychological reservations" in the consultation process that the Federal Council refrained from

proposing a change in the draft. The "manual" calculation method according to Hagenbach-Bischoff was retained.

B. Initial distribution of mandates among the lists (para. 2)

1. Calculation of the initial distribution of mandates in the narrow sense.

After the calculation of the distribution number has been specified in Art. 40 para. 1 PRA, para. 2 briefly describes the mechanism of the initial distribution of National Council mandates in the narrow sense. The number of votes of each list is divided by the distribution number. This results in a number, usually with some decimal places. If necessary, this result is reduced to a whole number, and the list in question is awarded this number of mandates in the initial allocation. 37

The mandate distribution method according to Hagenbach-Bischoff is also called the divisor method with rounding. The rounding down is hidden in the last step just described above. The "shortening" means a rounding off of the mandate claims of all lists. This is not obvious from the text of Art. 40 para. 2 PRA, but it is an essential part of the initial distribution. 38

With the initial allocation according to Art. 40 para. 2 PRA, the allocation of mandates is not yet completed. As a rule, not all mandates to be allocated can be distributed to the lists during the initial distribution. Therefore, the procedure of the remainder distribution according to Art. 41 PRA is of great importance. In addition, in the case of list groups which are entitled to a mandate according to the initial distribution, the mandates must still be distributed to the individual lists (Art. 42 PRA). In any case, it must be determined which candidates on the lists will receive the mandates to which they are entitled (Art. 43 PRA). 39

2. Preference for large parties

Certain distortions of proportional representation must always be accepted in elections due to rounding, since only whole seats can be allocated. However, the Hagenbach-Bischoff method of calculation systematically favors larger parties, albeit only to a small extent, i.e. they tend to receive more seats than other allocation methods. This finding is undisputed in the literature today. In the evaluation, however, there are differences. Parts of the literature regard 40

this preferential treatment as constitutionally permissible. This effect has been known since the introduction of such mandate allocation procedures in the 18th/19th centuries. Other voices in the literature criticize this preference as an unconstitutional systematic distortion of proportionality.

41 The calculation method according to Hagenbach-Bischoff leads to a certain systematic preference of the larger parties for various reasons. Both the initial allocation according to Art. 40 PRA and the (usually necessary) residual allocation according to Art. 41 contribute somewhat to this. In the case of the initial allocation, the question arises as to the rounding of the parties' mandate entitlement, i.e. the result of dividing the number of votes obtained by the list in question by the divisor. According to Hagenbach-Bischoff, the parties' seat claims are rounded down, as is only implicit in the text of Art. 40 para. 2 PRA. This favors the large parties. By comparison, the mandate allocation method according to Sainte-Laguë uses standard rounding. Thus, the larger parties are not favored and the smaller parties are not disadvantaged. However, the residual distribution also has a great influence on distortion effects of mandate distribution methods.

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COMMENTARY ON

Art. 41 PRA

A commentary by Irina Lehner

SUGGESTED CITATION

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Art. 41 Additional allocations

[1] Where not all of the mandates have been allocated, the mandates remaining shall be allocated individually and one after the other according to the following rules:

a. the number of votes cast in favour of each electoral list is divided by a number equivalent to the number of mandates already allocated to that list plus one;

b. the next mandate is allocated to the electoral list that has the largest quotient;

c. if more than one list is entitled to the next mandate as they have the same quotient, then the next mandate is allocated to the list that achieved the highest remainder in the division according to Article 40 paragraph 2;

d. if there are still two or more lists with the same right to the mandate, the mandate goes to the list that has obtained the highest number of party votes;

e. if more than one list still has the same right to the mandate, the first mandate is allocated to the list whose candidate for the mandate has obtained the highest number of votes;

f. if more than one candidate has obtained the same highest number of votes, the mandate is allocated by drawing lots.

[2] This procedure is repeated until all the mandates have been allocated.

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I. HISTORY OF ORIGINS

1 As a rule, not all mandates can be distributed among the lists during the initial distribution. The legislator recognized this problem as early as 1919, when proportional representation was introduced, and therefore sought a method of distributing the mandates that remained undistributed during the initial distribution among the lists. In the cantons with proportional representation, there were various options for this, which were also discussed at the federal level. The Federal Council proposed to distribute the remainder in principle according to the largest quotient, and provided for a cascade of other, subsidiary rules for the distribution of the remainder. Parliament approved this proposal without discussion. The residual distribution thus introduced pursued the goal of continuing proportionality in residual distribution.

2 Today's statutory rules largely correspond to the residual distribution already introduced in 1919. When the PRA was introduced in 1976, a request was made for a fundamental change: Residual distribution should be carried out according to largest residual numbers. However, due to a lack of political support, the proposal was withdrawn and the previous system was retained without any changes of a material nature.

3 The revision of the PRA in 1994 closed a gap in the law. Previously, there was no provision for the case in which several lists had the same quotient and the same residual vote totals after the initial allocation, but had different party vote totals. It has now been explicitly stipulated that in this case the list with the higher number of party votes is awarded the mandate. In addition, Art. 40 and 41 of the PRA have been re-divided so that the initial and residual allocations are now systematically clearly separated from each other.

II. RESIDUAL ALLOCATION IN GENERAL

A. Necessity of residual apportionment

4 In rare cases, all mandates can already be allocated to the lists during the initial distribution according to Art. 40 PRA. However, the votes cast are distributed among many different lists, therefore it often happens that the distribution number according to Art. 40 para. 1 PRA is too high in a specific case to be able to allocate all mandates to lists. At the same time, it would also not be

permissible to choose a lower distribution figure, as this could lead to more mandates being distributed than the number of seats to which the respective constituency is entitled. As a rule, therefore, a residual distribution of the remaining undistributed mandates is necessary.

The PRA provides for a whole cascade of residual distribution rules. The distribution according to the largest quotient occurs very regularly. In the 2019 National Council elections, the remainder distribution procedure according to the largest quotient was applied in 13 of the 20 cantons with proportional representation. The subsidiary remainder allocation rules of Art. 41 para. 1 lit. c to f PRA, on the other hand, are potentially only actually applied in individual cases. Since the introduction of proportional representation at the federal level in 1919, there has, as far as can be seen, never been a distribution of residual mandates with distribution rules other than the calculation of the quotient. 5

B. Constitutional Requirements for the Allocation of Residual Mandates

Article 149 para. 2 of the Federal Constitution merely states that the National Council must be elected "on the basis of proportional representation". Within these limits, it is up to the legislature to determine the electoral law, in particular the distribution of mandates. What also applies to the initial distribution applies a fortiori to the residual distribution rules: different mandate distribution methods can be constitutional, provided that the principle of proportional representation is not called into question as a whole. In concrete terms, this means that at least the initial allocation and the first residual allocation rule must comply with proportional principles. 6

Certain residual distribution rules are clearly not proportional. Therefore, it seems important that they are only applied on a subsidiary basis. As long as the initial and primary remainder distribution realize proportionality as well as possible, i.e. the votes cast are converted into mandates as proportionally as possible, it can be said overall that the "principle of proportionality" is respected by the mandate distribution system. 7

C. Legal comparison

8 Cantons with majoritarian electoral systems do not, by their very nature, require a residual distribution. Also in the case of mandate distributions according to Pukelsheim, the residual distribution is omitted, since the entire mandates are distributed in a single step.

9 The cantons with a mandate distribution method according to Hagenbach-Bischoff all primarily provide for the allocation of undistributed mandates to the lists with the largest quotients. Six cantons also have exactly the same cascade of subsidiary residual distribution rules as the PRA. The canton of Thurgau does not provide for the lottery procedure; otherwise, it also has the same cascade. In two cantons, the legal situation is the same as in the Confederation before the closure of the legal loophole in 1993, i.e. there is no explicit provision for the case where several lists have unequal party vote numbers but equal quotients and equal remainders. The three cantons of western Switzerland with Hagenbach-Bischoff have fewer subsidiary remainder distribution rules. The canton of Geneva distributes the remainder on the basis of the largest quotient, subsidiarily on the basis of the largest remainder, and provides for a lottery procedure at the end. The cantons of Jura and Neuchâtel proceed directly to the lottery procedure after calculating the largest quotient.

10 In the other cantons with different forms of proportional representation, there are different methods of distributing the remainder. In the canton of Basel-Stadt (Sainte-Laguë), the primary distribution of the remainder is also based on the system of the largest quotient. This is calculated by dividing the number of votes received by the list by the number of mandates awarded to it so far times two plus one. Subsidiarily, the respective mandate is allocated to the list with the largest remainder, again subsidiarily to the list with the highest number of votes for the possibly elected person. If this is also equal, a drawing of lots takes place. In the canton of Glarus, which also has a mandate allocation procedure according to Sainte-Laguë, the lottery procedure is used directly for the remaining allocation. In the canton of Vaud with the quota procedure according to Hare/Niemeyer, the largest remainder is primarily calculated for the remaining distribution. Subsidiarily, the mandate is awarded to the list that received the fewest mandates in the initial distribution. This method of residual distribution is not found anywhere else and clearly favors the small parties. If there are several lists with the same, lowest number of mandates, lots are drawn. In the canton of Ticino (also Hare/Niemeyer), the

remaining seats are also distributed primarily by the system of the largest remainder. Subsidiarily, the seat goes to the list with the highest number of party votes; subsidiarily, again, lots are drawn.

Today, the cantons present an inconsistent picture, even within the cantons with a mandate allocation procedure according to Hagenbach-Bischoff. In this respect, this also fits in with the historical development, in which the cantons had very different, freely combined initial and residual allocation systems for a long time. Nevertheless, a clear consensus emerges among the "Hagenbach-Bischoff cantons" of German-speaking Switzerland, all of which provide for the same residual distribution system as the Confederation. 11

III. RESIDUAL DISTRIBUTION RULES IN THE PRA IN DETAIL

A. Para. 1: Residual distribution rules

1. Distribution "individually and successively

According to the wording of the law, the mandates still undistributed after the initial distribution shall be distributed "individually and successively". Thus, for the first mandate, the quotient of each list is first calculated and the first mandate is allocated accordingly (or according to the further, subsidiary rules) to the list with the largest quotient. Subsequently, for a possible second mandate, the quotient of each list is calculated again, which is now different for the list that received the first mandate of the residual distribution. The rule of residual distribution according to the largest quotient virtually requires this individual and successive procedure. 12

2. Cascade of the residual distribution rules

Art. 41 para. 1 PRA provides for a whole cascade of rules for the residual distribution. If one rule does not lead to a clear result, the following (subsidiary) one is applied. The last rule necessarily always leads to a clear decision on the allocation of the mandate in question, since the PRA provides for the drawing of lots as ultima ratio (Art. 41 para. 1 lit. f PRA). The allocation of mandates is thus regulated in detail - even in the event that two lists have received exactly the same number of party votes and the candidates eligible for the vacant seat have also received the same number of votes. There is no provision for a re- 13

count, not even in the event that the decision on the allocation of mandates to the lists is made on the basis of conceivably narrow or even completely absent differences in votes.

14 The PRA provides for distribution according to the largest quotient as the primary remainder distribution rule. This rule is an inherent part of the Hagenbach-Bischoff mandate distribution procedure. The other, subsidiary residual distribution rules, on the other hand, deviate from the idea of the highest possible mandate price and thus from the constituency-internal proportionality as it is part of the mandate distribution according to Hagenbach-Bischoff. The subsidiary redistribution rules are arranged in such a way that, in descending order, they move further and further away from the proportional representation concept of the Hagenbach-Bischoff mandate distribution. The first subsidiary rule for the distribution of the remainder according to the largest remainder (Art. 41 para. 1 lit. c PRA) follows a different understanding of proportionality, while the distribution of the remainder of a mandate to the strongest list (Art. 41 para. 1 lit. d PRA) or to the list with the strongest candidate (Art. 41 para. 1 lit. e PRA) is majoritarian. Finally, the drawing of lots as ultima ratio for the remaining distribution (Art. 41 para. 1 lit. f PRA) follows neither proportional representation nor majoritarian principles.

15 The rules for the remaining distribution in this cascade are thus arranged in a logical sequence that ensures the constitutionality of the legal regulation. The further away from the principle of proportional representation it is, the less frequently the corresponding rule will be applied. Whenever possible, mandates shall be allocated according to the principle of proportional representation.

3. residual distribution according to the largest quotient

a. Para. 1 lit. a: Calculation of the quotient

16 The primary remaining distribution according to PRA shall be made according to the largest quotient, i.e. according to how many votes are behind each distributed mandate. For each list, it is calculated how high the (hypothetical) mandate price would be that it would pay in total for each mandate allocated to it if it received the additional mandate. Specifically, this means: The number of party votes for each list is divided by the number of mandates already

allocated to it plus one, and the result is called the quotient. The result of the calculation in lit. a, however, is only designated as such in lit. b.

b. Para. 1 lit. b: Allocation of mandates

The list which achieves the highest quotient - calculated according to the rule in lit. a - shall receive the additional mandate. This continues the idea of the mandate price which is decisive for the mandate distribution according to Hagenbach-Bischoff: Each distributed mandate per list shall represent as many votes as possible. Compared to the distribution of the remainder according to the largest remainder, this rule favors the larger parties. 17

The federal legislator gave preference to the remainder distribution according to the largest quotient on the grounds that this best perpetuates proportionality. The remaining mandate distribution according to the largest quotient originates from the proportionality idea of a mandate distribution system according to Hagenbach-Bischoff. This type of residual distribution was already an integral part of the mandate distribution system as designed by Professor Hagenbach-Bischoff in 1892. This also fits the earlier division of today's Art. 40 and 41 PRA, in which the residual distribution according to the largest quotient still formed part of the first article on the distribution of mandates and did not belong to the "special cases" (then subject heading) of today's Art. 41 PRA. If one considers the distribution of mandates according to Hagenbach-Bischoff as a whole to be in conformity with the constitution, there can be no doubt that this primary residual distribution is also constitutional, even though it favors the larger parties. 18

c. Example

19 The residual distribution is illustrated by the example of the National Council election results in the electoral district (canton) of Schwyz in 2019. The canton (= constituency) had four seats in the National Council to allocate to the lists, a total of 21 lists competed, which were combined in a total of four list groups, with "mother parties" and their smaller offshoots additionally linked by means of sub-list connections. The votes were distributed as follows and the initial distribution resulted in the following:

List group	**Number of party votes**	**Mandates Initial distribution**

SVP+	75’234	1
CVP+/GLP+/ EVP	48’095	1
FDP+	47’103	1
SP+/Grüne+	33’494	0
Total		*3*

Thus, one of the four seats remained undistributed after the initial allocation. Instead, the remainder was allocated according to the largest quotient. The quotient is calculated separately for each list group by dividing the number of party votes of the list group by the number of mandates already awarded to it plus one. The group with the highest quotient receives the mandate.

E.g. for the SVP+: 75,234 / (1+1) = 37,617 (quotient)

List group	**Quotient**
SVP+	37’617
CVP+/GLP+/EVP	24'047.5
FDP+	23'551.5
SP+/Grüne+	33’494

The SVP+ has the highest quotient and therefore receives the last mandate. In total, the SVP+ receives two mandates, the CVP+/GLP+/EVP one mandate and the FDP+ one mandate. The list group SP+/Greens+ is left empty-handed.

4. Para. 1 lit. c: Residual distribution according to the largest remainder

a. Comment

20 If the distribution rule according to the highest quotient does not produce an unambiguous result, i.e. several lists have the same (highest) quotient, this first subsidiary remainder distribution rule is applied. A mandate which remained undistributed during the first distribution is distributed to the list which had the largest remainder of "unvalued" votes during the first distribution. During the initial distribution, a "mandate price" is determined in the form of the divisor. The "utilized" votes of each list are calculated by multiplying the number

of mandates allocated to the list by this mandate price. The difference between this number of utilized votes and all party votes cast for this list is the number of unutilized votes decisive for the residual distribution according to the largest remainder.

The idea behind the residual distribution according to the largest remainder is that as many of the votes cast as possible should have an influence on the distribution of mandates. Such a remainder distribution favors smaller parties, especially in smaller constituencies where they have not yet received a mandate in the initial distribution. 21

The distribution of residual mandates according to the largest remainder of "unvalued" votes in the initial distribution deviates from the proportionality idea of the initial distribution according to Hagenbach-Bischoff. The basic idea of the distribution according to the largest remainder is to utilize as many votes as possible instead of (as in the distribution according to the largest quotient) allocating the mandate to the party which can show the largest number of votes per mandate allocated to it. However, this also corresponds to the basic idea of proportional representation, so that this type of residual distribution is also constitutional. 22

b. Example

In a fictitious electoral district with five seats, three parties compete, a total of 120,000 votes are cast. The divisor is calculated: 120'000 / (5+1) = 20'000. The following is the result of the initial distribution: 23

List	**Number of party votes**	**Quotient**	**Mandates Initial distribution**
A	70’000	3.5	3
B	35’000	1.75	1
C	15’000	0.75	0
Total	*120’000*		*4*

After the first distribution, one mandate is thus still to be allocated. The quotient of each list for the first rule of the remaining allocation (Art. 41 para. 1 lit. a and b PRA) is calculated. 24

List	Number of party votes	Quotient	Mandates Initial distribution
A	70'000	3	17'500
B	35'000	1	17'500
C	15'000	0	15'000

25 The lists A and B both have the same, highest quotient. Therefore, it is now necessary to calculate the remainder of unvalued votes of the two lists according to Art. 41 Para. 1 lit. c PRA: Party votes minus (number of seats already allocated multiplied by the divisor of the initial allocation)

List A: 70,000 - (3 x 20,000) = 10,000 unvalued votes

List B: 35,000 - (1 x 20,000) = 15,000 unallocated votes

List B thus has more unvalued votes according to the previous distribution than List A. Therefore, list B receives the last mandate. In total, List A has won three mandates, List B two mandates.

5. Para. 1 lit. d: Residual distribution according to the largest number of party votes

26 If two lists have both the same, highest quotient and the same remainder of unvalued votes in the initial allocation, the party vote totals of the two lists are compared. It is the mathematically simplest rule of the remainder distribution to allocate undistributed mandates to the strongest lists. It is obvious that this gives the larger parties a considerable advantage.

27 The allocation of a remaining mandate to the list with the largest number of party votes means that the absolute number of votes is decisive for the distribution of the remainder (at least for the mandate in question). This method of residual allocation deviates from the principle of proportional representation and instead applies a majority rule. In itself, this does not correspond to the proportional representation provided for in the Federal Constitution (Art. 149 para. 2 FC). Interestingly, this variant was discussed as a primary remainder distribution rule in the first design of proportional representation for the National Council, but was described as arbitrary and therefore rejected. Nevertheless, it is applied as a second subsidiary residual distribution rule, but in practice it is of little significance. Only - but still - if all proportional mandate

distribution rules do not lead to a result, this majority rule is resorted to. Certain individual majoritarian elements are not detrimental to the character of the National Council elections and their distribution of mandates as a fundamentally proportional system, as long as they are "used with restraint" and accordingly have an effect only in "special concrete constellations". This is to be affirmed in the case of such a second subsidiary rule for the distribution of residual seats; therefore, it must be considered constitutional.

6. Para. 1 lit. e: Residual allocation according to the largest number of candidate votes

If the quotient as well as the remainder and the number of party votes are equal, the number of votes of the eligible candidate of each list shall be compared. Any remaining mandate is awarded to the list on which the person in question was able to garner the most votes. Thus, each list is ranked in descending order according to the number of votes cast by persons, and in descending order the mandates previously awarded to the list are distributed to the candidates of the list. The number of votes of the person of each list who would receive the hypothetical additional mandate is compared, i.e. the top person of each list not elected with the mandates already distributed. The list receives the additional mandate on which, of those compared, the person who has received the largest number of personal votes is to be found. 28

The distribution of the remainder according to the largest number of personal votes is not a proportional representation election, but follows the classic pattern of an election of persons in the majority system. This does not comply with the constitutional principle of proportional representation in itself. Just as in the case of the residual allocation rule according to the largest number of party votes, it is decisive for the constitutionality of this rule that it is only applied in absolutely exceptional cases if all proportional mandate allocation rules do not lead to a clear allocation of the mandate in question. 29

7. Para. 1 lit. f: Residual allocation by drawing lots

As a final "catch-all rule", the PRA provides for the drawing of lots between several lists if they have both the same highest quotient and remainder and their party votes and the candidate votes of the person in question are equal. The drawing of lots must be ordered by the competent authority and carried out manually. 30

31 It is obvious that drawing lots does not realize any representational ideas in the composition of parliament - whether in the sense of proportional representation or majority. Instead, chance decides. Once again, it must be pointed out that this case will occur extremely rarely. At the same time, an election must necessarily lead to a result, which this regulation guarantees. This legislative arrangement is therefore also constitutional.

B. Para. 2: Distribution of mandates in succession

32 Para. 1 already states that all mandates undistributed after the initial distribution shall be distributed individually and successively in accordance with the rules described above. Para. 2 repeats this principle.

I would like to thank Prof. em. Dr. Friedrich Pukelsheim and Prof. Dr. Grégoire Nicollier for their helpful explanations of the mathematical principles. I would also like to thank Elias Studer (MLaw), Joey Jüstrich and Matthias Zinniker, assistant professors at the Center for Democracy Aarau, for their stimulating comments, assistance in researching the material and reviewing the text.

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COMMENTARY ON

Art. 42 PRA

A commentary by Irina Lehner

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Art. 42 Allocation of mandates to combined lists

[1] Each group of combined lists shall initially be treated as a single list for the purposes of allocating mandates.

[2] Mandates shall be allocated to the individual lists within a group according to Articles 40 and 41. Article 37 paragraphs 2 and 2bis remain reserved.

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I. HISTORY OF ORIGINS

List combinations have been permissible since the introduction of proportional representation and the National Council Election Act in 1919, as have sub-list combinations. Therefore, it has also been necessary since 1919 to distribute the mandates awarded to the group of linked lists among the individual lists. The legislator regulated this itself, instead of leaving it to the lists concerned, and in doing so opted for a regulation that is still in force today. The relevant Art. 21 aNWG did not give rise to any comments, neither in the dispatch nor in the parliamentary debates. 1

There were various efforts to abolish the possibility of list connections or sub-list connections, but they were unsuccessful. If list or sub-list connections were no longer permissible, Art. 42 PRA would also become invalid. 2

II. SIGNIFICANCE OF THE PROVISION

A. General

List and sub-list combinations are a frequently used instrument in National Council elections and have a considerable influence on the distribution of mandates. Since they are used so frequently, the question of how the mandates obtained by the list group are allocated to the individual lists in the initial and remainder allocations pursuant to Articles 40 and 41 PRA is of essential importance. 3

B. Procedure of the distribution of mandates

1. Procedure of distribution to the lists

4 The mandates are distributed to the lists in several steps:

- Distribution of the mandates to the lists (groups) according to Art. 40 and 41 PRA.
- Distribution of the mandates to the lists or sub-groups combined in the group according to Art. 42 para. 2 PRA
- Distribution of mandates to the individual lists united in the sub-list combination according to art. 42 par. 2 PRA.

2. Example of the distribution of mandates to individual lists

5 The initial distribution is illustrated using the example of the National Council election results in the electoral district (canton) of Lucerne in 2019. The canton (= constituency) had to allocate nine seats in the National Council to the lists. A total of 35 lists competed. Of these 35 lists, two competed individually, the others were combined in a total of three different list groups, with "mother parties" and their smaller offshoots additionally linked by sub-list connections. (Sub-)list groups of the same party are each marked with a plus sign. Among others, there was a list connection between the Green Party, the SP, the GLP and the list "Integrale Politik" (IP). The group "Greens+, SP+, GLP+, IP" was treated as a single list within the distribution according to Art. 40 PRA and was awarded a total of three mandates. As an example, the distribution among the sub-list groups as well as among the individual lists for a sub-list group is calculated through here.

a. Distribution among the sub-list groups

6 The votes were distributed among the individual lists as follows:

List	**Votes**		**Sub-list group**	**Votes**
Grüne	123'739	}		
			Grüne+	145'107

Junge Grüne	11'963			
Unternehmer*innen für eine grüne Wirtschaft (Grüne)	9'405			
			SP+ (6 Listen)	160'408
			GLP+ (3 Listen)	84'227
Integrale Politik (IP)	5'945		--	5'945
			Total	*395'687*

The three mandates of the list group must now be further distributed. Pursuant to Art. 42 para. 1 PRA, the linked lists of the sub-list groups are each treated as a single list. Art. 40 PRA is applied and the divisor is calculated: Number of party votes of the entire list group divided by (the number of mandates to be allocated plus one), rounded up to the next higher whole number. 7

395,687 / (3+1) = 98,921.75 à divisor: 98,922 (= "mandate price")

The quotient of each sub-list group or list is calculated by dividing the number of party votes of the sub-list group or list by the divisor. The number before the decimal point indicates how many mandates the sub-list group receives after the initial distribution.

E.g. for the sub-list group "Greens+": 145'107 / 98'922 = 1.467 à Entitlement of the sub-list group according to the initial allocation: 1 mandate

Sub-list group/ List	**Number of party votes**	**Quotient (rounded)**	**Mandates**
Grüne+	145'107	1.47	1
SP+	160'408	1.62	1
GLP+	84'227	0.85	0
IP	5'945	0.06	0
Total			*2*

8 A further mandate must be distributed by means of a remainder distribution in accordance with Art. 41 PRA. According to Art. 41 para. 1 lit. a PRA, a quotient is first calculated for each grouping by dividing its party votes by the number of mandates already allocated to it plus one.

E.g. for the Greens: 145,107 | (1+1) = 72,553.5

Sub-list group/List	**Number of party votes**	**Quotient**
Grüne+	145'107	72'553.5
SP+	160'408	80'204
GLP+	84'227	84'227
IP	5'945	5'945
Total		

The sub-list group GLP+ has the largest quotient in terms of the "hypothetical mandate price" and is therefore awarded the last mandate of the list group. Accordingly, the sub-list groups Greens+, SP+ and GLP+ each receive one mandate.

b. Distribution among the individual lists

9 Greens+, SP+ and GLP+, which are each entitled to one mandate according to the above calculation, are sub-list groups. It must be decided last which list of the sub-list group receives the mandate in question. This mandate distribution is also calculated on the basis of Art. 40 and 41 PRA.

The divisor is calculated: Number of party votes of the entire sub-list group divided by (the number of mandates to be awarded plus one), rounded up to the next higher whole number.

145'107 | (1+1) = 72'553.5 à divisor: 72'554 (= "mandate price")

The quotient of each list is calculated by dividing the number of party votes of the list by the divisor. The number before the decimal point indicates how many mandates the sub-list group receives after the initial distribution.

E.g. for the Green List: 123,739 | 72,554 = 1.705 à Entitlement of the Green List according to the initial distribution: 1 mandate

List	Number of party votes	Quotient (rounded)	Mandates
Grüne	123'739	1.47	1
Junge Grüne	11'963	0.16	0
Unternehmer*innen für eine grüne Wirtschaft (Grüne)	9'405	0.000002	0
Total			*1*

The mandate of the sub-list group Greens+ is thus allocated to the list "Greens". The corresponding calculation must be performed for each sub-list group.

C. Legal comparison

List combinations are not permitted in all cantons. In cantons with a mandate allocation system according to Pukelsheim, list connections are excluded because they are unnecessary. In most cantons with the Hagenbach-Bischoff system, however, list connections are allowed, as well as in two other cantons with other variants of proportional representation systems. Sub-list connections exist only in a few cantons. If list or sub-list combinations are possible, they are treated in the same way in the cantons as in the Confederation, both with regard to the calculation of the distribution of first and remaining mandates and with regard to the distribution of the mandates won by the group of combined lists among the individual lists. 10

III. COMMENTARY ON THE TEXT OF THE NORM

A. Par. 1: Dealing with connected lists in the distribution of mandates

1. "Group of linked lists

The legal provision refers to a "group of linked lists". It does not explicitly name list or sub-list connections, but applies to both at the respective stage of mandate distribution. 11

2. "in the distribution of mandates"

12 The distribution of mandates among the lists in the broad sense takes place in several steps, as described above. Art. 42 para. 1 PRA is relevant for all these distribution steps: On the one hand, it applies to the distribution of mandates among the lists and list combinations according to Art. 40 and 41 PRA (step 1). However, the paragraph is equally applicable to the distribution of mandates among the sub-list groups combined in sub-list combinations pursuant to Art. 42 para. 2 PRA (step 2).

3. mechanism: "treated as a single list"

13 List connections are intended to give as many votes as possible an influence on the distribution of mandates and thus improve the equality of success values. Without list connections, this is problematic especially for votes cast for smaller lists, particularly in constituencies with few seats. The risk is that the lists in question would not receive a mandate, but would fail to meet the natural quorum. The idea of list combinations is based on the fact that it is better that at least one slightly larger list associated with the small list is awarded a mandate than that the votes for the small list have no influence at all on the distribution of mandates. However, it can also happen that a small list helps a large list to a mandate by means of list connections without benefiting from it itself.

14 Accordingly, the votes of all linked lists are added together when the mandates are distributed as a whole. The purpose of list combinations is therefore precisely that the lists concerned are treated as a single group for the distribution of mandates, which is ensured by this paragraph.

B. Para. 2: Allocation to the individual lists

1. Para. 2, sentence 1: Distribution according to Art. 40 and 41 PRA

15 The distribution to the lists combined in the list group is carried out according to the same mechanisms as the initial and residual distribution to all lists, which is why reference can largely be made to the commentary on these articles for an explanation of the same.

16 The interaction of the initial distribution (Art. 40 PRA) and the residual distribution (Art. 41 PRA) has the effect that larger parties systematically receive a

small advantage in the distribution of mandates. This applies not only to the distribution of mandates among the list groups, but also to the distribution among the individual lists. Therefore, list combinations are generally to the advantage of the larger parties within the group when it comes to the distribution of mandates stricto sensu. On the other hand, they ensure that votes for smaller parties at least influence the initial distribution of mandates.

2. Para. 2, second sentence: Reservation of Art. 37 paras. 2 and 2bis

As the only part of the entire provision, sentence 2 of para. 2 was later added to Art. 42 PRA. Art. 37 paras. 2 and 2bis, to which reference is made therein, deal with the question to which list additional votes are attributed in the case of sub-list connections. Sub-list connections were extensively discussed and newly regulated in the 1994 revision of the PRA. The Federal Council's draft proposed to prohibit sub-list connections. Parliament opted for a solution that allowed sub-list connections but limited them to lists bearing the same designation with other additions. In the course of this comprehensive new regulation, Art. 37 para. 2 and 2bis were also inserted, as well as the reservation of these articles in the distribution of mandates among the individual lists. 17

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COMMENTARY ON

Art. 43 PRA

A commentary by Irina Lehner

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Art. 43 Determining the elected members and their replacements

[1] On the basis of the number of mandates obtained, those candidates from each list that have received the highest number of votes shall be elected.

[2] The candidates that are not elected shall act as replacement candidates in the order of the number of votes that they have obtained.

[3] Where two or more candidates have received the same number of votes, their order of precedence shall be decided by drawing lots.

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I. HISTORY OF ORIGINS

The person who has received the most candidate votes shall win a mandate to which the list is entitled. This principle has not changed since the introduction of proportional representation in the Confederation. The same applies to the substitutes, who move up in the order of the votes obtained if the actually elected members of the National Council do not accept the election or resign during the legislative period. 1

Two less central issues, on the other hand, were more controversial and underwent various changes. First, it had to be regulated who would be awarded the mandate if several candidates had exactly the same number of votes. The Federal Council's draft of the NWG of 1918 provided for drawing lots in the event of a tie. The National Council commission still followed this proposal. A member of the National Council, on the other hand, proposed that the order on the list should determine who was considered elected in the event of a tie. This procedure was also known in some cantons, seemed simpler and - probably centrally - "respected" the party will better. It was countered that this could lead to injustice if the parties formed the lists according to alphabetical order. In the end, party will was prioritized over concerns of fairness, and in the 1919 NWG the rule was introduced that of two persons with the same vote, the one who received the top place on the list was considered elected. When the PRA was introduced in 1976, the issue was discussed again at the request of the Council of States. After some delay, the argument that had already been put forward in 1919, that the procedure according to the order of the list in an alphabetical order put the later candidates at an excessive disadvantage, became convincing after all. Moreover, the decision by lot was easy to carry out and equal votes rarely occurred anyway. Since 1976, the rule has remained unchanged that in the event of a tie, the lot decides which of the candidates is elected. 2

Second, a voting quorum for candidates was included in the National Council Election Act in 1919. Only candidates who had received at least half of the average votes of the candidates on the list could receive a mandate. The rationale behind this was that candidates should be able to garner at least a "minimum number of votes" in order to become members of the National Council. Although the quorum for candidates was criticized as arbitrary and complicated, the National Council and the Council of States included it in the National 3

Council Election Law in 1919. When the PRA was introduced in 1976, the quorum of candidates was cut short: following an uncontroversial proposal by the Federal Council, the "unnecessary and dispensable" quorum was abolished.

II. LEGAL COMPARISON

4 All cantons with proportional representation determine in the same way as the PRA which candidates are normally considered elected: The mandates of the list are given to those candidates who have received the most votes.

5 For the determination of the substitutes, there are two different possibilities in the cantons with proportional representation. In the cantons of Jura, Neuchâtel and Valais, substitutes are explicitly elected in this function. As a rule, however, no distinction is made in the election itself as to who runs as an ordinary member and who as a substitute; substitutes are those who are not elected. The vast majority of cantons explicitly provide - as does the Confederation - that the non-elected persons serve as substitute members in the order of the number of votes received.

6 The procedure in the event of a tie between two candidates on the same list differs even more in the cantonal parliamentary election law of the proportional representation cantons, where two different camps can be discerned. Some favor the intervention of chance, others the creative power of the parties.

7 The first group is the larger one. Most cantons provide exclusively for a drawing of lots, the same as today's PRA. However, there are also variations: The cantons of Bern and Fribourg allow the candidates to agree on the order, and the lot is used subsidiarily; the canton of Thurgau explicitly refers to the possibility of renunciation in addition to the lottery procedure.

8 In the other group of cantons, on the other hand, it is usually the case, as under the former National Council election law in the Confederation, that the order of the candidates on the list determines who is considered elected in the event of a tie. In the canton of Jura, the person who received more votes from his or her own list, i.e. fewer panashic votes, is considered elected - popularity with the electorate of one's own party is thus rewarded. Overall, therefore, in the cantonal parliamentary election law, too, preference is given to the lot, so that the lists (formed by the parties) do not acquire any further significance beyond the act of election.

III. COMMENTARY ON THE TEXT OF THE NORM

A. Para. 1: Determination of the elected persons

1. "according to the mandates obtained"

The votes of the electors shall be counted according to the system of single-vote competition: Each list receives as many votes as the total number of votes received by the persons running on it, regardless of which list number the ballot in question bore. A vote to a person running for office thus counts first and foremost for that person's list, and only secondarily for the person himself. In the electoral system of the National Council, it is therefore first calculated which list receives how many mandates according to the principle of proportional representation (cf. Art. 40 to 42 PRA). Subsequently, as many mandates per list are distributed to the candidates as the list has won. Art. 43 para. 1 PRA standardizes the distribution rule within the list. 9

2. "who have received the most votes"

Within the lists, those candidates are declared elected who have received the most votes, until all mandates due to the list are filled. Thus, a majority rule (Majorz) applies here. 10

The rule of the PRA is as clear as it is central. Even small differences in votes can make the difference between election and non-election. Moreover, the PRA also regulates the case where two candidates have the same claim to a (final) vacant mandate due to a tie (Art. 43 para. 3 PRA). Therefore, it is not intended to automatically proceed to a recount in the case of a close vote; this is only ordered if there is a suspicion that a count result could be incorrect (cf. Art. 11 CPD). 11

Examples of extremely close results in National Council elections are regularly found. For example, in the 2015 National Council elections in the canton of Zurich, a difference of 20 votes per person over 125,000 votes tipped the scales as to which of two persons became a member of the National Council. 12

B. Para. 2: Determination of the substitutes

It is not automatically necessary to hold by-elections when seats become vacant in the National Council. The PRA provides that substitutes from the 13

same list in the same constituency may succeed to the National Council. The composition of the National Council in terms of parties remains the same.

14 Substitutes come into play in two cases: if a person declared elected does not want to or cannot take office (cf. Art. 55 para. 2 PRA, if a substitute does not take office) or if a National Council member resigns during the legislative term or leaves the Council for other reasons (Art. 55 para. 1 PRA). No further act of election is required; the substitute person is immediately declared elected by the cantonal government (Art. 55 para. 1 PRA).

15 The majority rule also applies to the determination of the substitutes: the persons not elected become substitutes in the order of their number of votes. The person who has received the most votes without having obtained a mandate is thus the first substitute, and so on.

C. Para. 3: Procedure in the event of a tie

16 An election must have a result. In the PRA, this is guaranteed by the catch-all provision of Art. 43 para. 3 PRA. If several candidates have both received the same number of votes, but only one of them can obtain a seat, a lot is drawn to decide who is to be declared elected.

17 A recount is ordered if there are indications of inaccuracies in the municipal results (Art. 11 CPD). Together with the detailed statutory provision of interest here, the Federal Supreme Court has concluded from this provision of the ordinance that in the event of a tie - i.e. if there are no such indications - the lot is drawn directly without a recount. In this respect, the law and the ordinances are conclusive according to the Federal Supreme Court.

18 The drawing of lots must be ordered by the competent authority, which in the case of a cantonal drawing of lots, as in this case, is the cantonal government (cf. Art. 20 PRA). According to the Federal Supreme Court, the lottery procedure as a whole must satisfy the principles of transparency and equal treatment of the candidates. Therefore, in BGE 138 II 13, it annulled the semi-automatic drawing of lots by computer program that had taken place between two candidates with equal votes in the 2011 National Council elections in the canton of Ticino. This is the only case of a tie in the National Council elections in which a drawing of lots was necessary, since only (but still) one person could obtain a National Council mandate.

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COMMENTARY ON

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A commentary by Irina Lehner

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Art. 44 Excess of seats

Where any list is allocated more mandates than it has candidates, a supplementary election shall be held in accordance with Article 56 in respect of the mandates that cannot be allocated.

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I. HISTORY OF ORIGINS

When proportional representation was introduced at the federal level in 1919, it was already anticipated that cases might arise in which a party was allocated more mandates than it had candidates on its list. The federal legislator deliberately decided against the solution common at that time in the cantons with proportional representation. This provided for the 'remaining' seats to be distributed proportionally among the other lists. This was contrary to justice and equity. Instead, a supplementary election was to be held, in which only the group that still had unfilled mandates was allowed to submit a list. In this way, proportionality was to be preserved. According to the understanding of the National Council Election Act of 1919, the mandates distributed to the lists thus became the "property of the group" and were to remain so even if not enough candidates had stood for election. 1

This underlying idea was fleshed out in two legal norms. The first norm - of interest here - dealt specifically with the case in which a list immediately at the election had too few candidates for the number of mandates awarded to it, and referred to the second, in which the procedure of supplementary election was standardized in detail. The first provision in question was adopted in the Councils in 1919 without debate. The basic structure and this provision have survived until today without any material changes. 2

II. SIGNIFICANCE OF THE PROVISION

A. General

1. Subject matter and delimitation

Art. 44 PRA regulates the case in which a list is awarded more mandates than it lists candidates. The provision thus applies after National Council elections have been held and the mandates have been allocated to the individual lists (Art. 40-42 PRA), when these mandates must be allocated to the individual candidates on the lists - before the beginning of the legislative term. 3

Art. 44 PRA refers to the procedure of the supplementary election according to Art. 56 PRA. This provision in turn, according to the title of the corresponding chapter in the PRA, regulates "changes during the term of office", 4

specifically the moving up during the term of office in the absence of substitutes. The delimitation of the two provisions is thus based on the point in time at which mandates are allocated to individuals who were not on the original list: Art. 44 PRA concerns the time immediately after the election, Art. 56 the time during the term of office. The procedure remains the same, but for the constitutional assessment this distinction may be relevant.

2. Practical Relevance

5 Two supplementary elections have been required immediately after ordinary National Council elections, both in 1919, after the very first National Council elections with proportional representation. In the canton of Fribourg, the Catholic-Conservative Party won six of the seven seats in the National Council, but had only five candidates on its list. In the canton of Schaffhausen, the Peasants' Party was awarded both National Council seats, but had only one candidate listed. Since then, no case of application of today's Art. 44 PRA has occurred.

6 It is still conceivable that a party (also for itself) receives a surprisingly large number of mandates and has not nominated a sufficient number of candidates - especially in the case of new parties which may be limited in terms of topics. As long as this theoretical possibility exists, this provision is certainly important to prevent legal loopholes that would be politically controversial and constitutionally problematic to close only in concrete cases of application. In all likelihood, however, its practical relevance will remain limited.

B. Comparison of Laws

7 Most cantons that elect their parliament by means of a proportional representation system regulate the handling of surplus mandates similarly to the PRA. They primarily provide for the possibility of the list being supplemented by the (majority of the) signatories of the election proposal; if this possibility remains unused, a by-election is held, which is not limited to one party or list ("free election"). Four cantons proceed directly to a free by-election. In the canton of Valais, vacant seats go to the separately elected suppleants.

8 In almost all cantons, the same procedure applies to the by-election regardless of the time of the supplement: in the case of surplus mandates before the term of office, the same as for changes during the term of office. The only ex-

ception is the canton of Schwyz, which makes a distinction. In the case of supernumerary mandates, the addition to the list is possible without an election; in the case of vacant seats during the term of office, a free by-election takes place immediately. This distinction seems plausible: the principle of proportional representation requires that the composition of parliament proportionally reflects the preferences of the eligible voters at the time of the election. Therefore, it seems justified not to change the party-political composition of parliament before the term of office, although this is at the expense of the democratic legitimacy of the individual member of parliament concerned - in the case of changes during the term of office, on the other hand, a free election is to be preferred.

III. COMMENTARY ON THE TEXT OF THE NORM

A. Case of application: "If a list is allocated more mandates than it lists candidates"

Lists or election proposals submitted (Art. 21 ff.) may also list fewer names than there are seats to be allocated in the electoral district. If such a ballot paper is submitted during the election, the blank lines count as additional votes for the list whose name or number the ballot paper bears (Art. 37 para. 1 PRA). Therefore, it may happen that a list is awarded more mandates than the number of candidates it lists. 9

B. Reference to Art. 56 PRA, "Supplementary Election

1. Proportionality

The PRA assumes that the mandates "belong" to the list that is entitled to them according to the initial and remaining distribution. The party-political composition of the National Council is to remain the same in supplementary elections as it was in the distribution of mandates among the lists; proportionality is further maintained. The supplementary election procedure therefore primarily provides that the signatories of the election proposal may "supplement" the list (cf. Art. 56 PRA). In this respect, the name "supplementary election" is misleading, since precisely no (free) by-election takes place. 10

2. Criticism

11 The procedure of the "supplementary election" according to Art. 56 PRA has been criticized in the doctrine on various occasions. The fact that the signatories of the election proposal can directly determine who will become a member of the National Council, i.e. that there is no direct election within the meaning of Art. 149 para. 2 FC, is judged to be constitutionally problematic. This gives the parties very great weight. In addition, it is criticized that the provisions on the supplementary elections place party-related proportionality above the democratic legitimacy of the individual members of the National Council - which is particularly objectionable because there is no entitlement to proportional representation during the entire term of office of the National Council.

12 Proportionality is restricted in various places in the PRA, but often in constellations that rarely occur in practice. The constitutional formulation that National Council elections are conducted "according to the principle of proportional representation" (Art. 149 para. 2 FC) allows for this. Therefore, in my opinion, it would also be permissible to restrict proportionality in the interest of democratic legitimacy for supplementary elections under Art. 44 PRA, which are also rarely held.

13 It must be differentiated whether this is also necessary. Before the start of the term of office, i.e. immediately after the voters have expressed their will, their preferences must be reflected as proportionally as possible, which is guaranteed by the current regulation on supplementary elections. During the term of office, however, this can no longer be affirmed with the same absoluteness for two reasons. First, the preferences of the population naturally change over time, but are expressed only periodically, every four years, in the context of National Council elections. Second, the composition of the National Council can also change, for example, if a member changes parties. Therefore, the current rule of supplementary elections seems better justified for the filling of surplus mandates before the term of office than for the case of a replacement during the term of office according to Art. 56 PRA.

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COMMENTARY ON

Art. 45 PRA

A commentary by Marzia Piampiano

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Art. 45 Silent election

[1] If all the lists together do not list more candidates than there are mandates to be allocated, all the candidates shall be declared elected by the cantonal government.

[2] If all lists together list fewer candidates than there are mandates to be allocated, supplementary elections shall be held for the remaining seats in accordance with Article 56 paragraph 3.

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I. HISTORY OF ORIGINS

As is often the case in federal legislation, the introduction of the silent ballot also followed a cantonal model. In 1916, the canton of Neuchâtel had introduced the possibility of a silent election for supplementary elections in which fewer or the same number of persons stood as there were seats to be filled. Subsequently, the concept of the silent election was also introduced as part of the revision work in 1918/1919 for the new National Council election law, which was organised according to the principle of proportional representation. However, its inclusion in the proportional representation law was controversial. The new system of proportional representation provided that only those who were officially nominated as candidates on an electoral list could be elected. Proponents of the silent ballot were of the opinion that under these conditions, holding a ballot would no longer make sense and would degenerate into a mere formality if fewer or as many candidates were nominated as there were vacant seats to be filled. On the side of the critics, the main issues raised were the possibility of secret agreements between the parties, a feared lack of understanding on the part of the population towards an election declaration without a prior ballot, and the lack of solemnity of such an election declaration compared to a ballot. After the introduction of the silent ballot for constituencies with proportional representation was adopted in the National Council, the Council of States decided to delete the article by 17 votes to 9. Although opposition to the introduction of the silent ballot then also began to arise in the National Council, the draft was upheld by 60 votes to 23, whereupon the Council of States also unanimously followed the Commission's motion to approve the National Council's decision in order to eliminate this only remaining difference. Thus, the silent ballot found its way into Art. 22 paras. 1 and 2 of the Federal Act on the Election of the National Council. 1

Serious efforts to abolish the silent ballot were made in the context of the draft constitution of 1977. The draft of the Commission of Experts, for example, provided for an explicit ban on silent National Council elections. In the consultation process, however, this proposal met with criticism, in particular the constitutional exclusion of silent elections in single-member constituencies, as well as an encroachment on cantonal decision-making sovereignty, so that the model study of the FDJP of 1985 already dispensed with the ban. 2

3 The new Federal Act on Political Rights, adopted in a referendum on 4 December 1977, then adopted the provision on the silent ballot in a redrafted but materially unchanged form. Previously, there had only been a minority motion in the Council of States to delete the article. The proposer found it objectionable that in some cantons a ballot could take place in the renewal election for the National Council, while in others the silent ballot procedure would be applied. Similarly, with the silent ballot, there was a risk that the strongest political parties could exert pressure on potential candidates to prevent a ballot from being held. Moreover, the result of a ballot, regardless of who is elected, has a certain value, especially with regard to voter turnout. A silent ballot would also be unsatisfactory for the candidates themselves. Furthermore, fears were expressed that silent elections could reduce the interest of eligible voters in ordinary ballots. However, the objections were not heard and the motion was rejected by 18 votes to 8.

II. SIGNIFICANCE

A. General

1. Subject matter

4 Art. 45 PRA regulates the conduct of silent elections in the context of National Council elections. A silent election is the procedure whereby the proposed candidates are declared elected by an authority without a ballot because the number of candidates does not exceed the number of seats to be filled.

5 It follows from the systematics of the law that the norm is only applicable to elections held by proportional representation. This is the case in all cantons that are entitled to more than one National Council seat according to the distribution of seats applicable to the corresponding election (Art. 149 para. 2 FC and Art. 47 para. 1 PRA e contrario). The distribution of seats among the cantons is based on Art. 16 and Art. 17 PRA. Cantons that elect only one member of the National Council and therefore by majority vote may also provide for the silent election in cantonal law, but are not obliged to do so (Art. 47 para. 2 PRA). Furthermore, the provision only regulates the general renewal elections of the National Council; for changes during the term of office, the special procedural provisions pursuant to Art. 54 ff. PRA apply to changes during the term of office.

2. Practical relevance

Since the introduction of the silent election in the proportional representation cantons, there has been no silent election in 13 of 27 general renewal elections of the National Council in any of the proportional representation cantons. In the remaining 14 general elections there was a silent election in at least one of the proportional representation cantons. The canton of Appenzell Ausserrhoden, which was still entitled to several National Council seats until the 2003 elections and was thus also one of the cantons with proportional representation, had the most silent elections (eleven). 6

What is striking about the statistics on the silent National Council elections is that they generally took place in small proportional representation cantons with only two or three National Council seats. The year 1939 was an extraordinary election year in several respects. On the one hand, silent elections were held simultaneously in nine cantons; on the other hand, six of the nine cantons were larger proportional representation cantons with a number of seats between 6 and 15. This statistical discrepancy can be explained by the uncertain political situation resulting from the outbreak of the Second World War. 7

It is also striking that silent elections occurred frequently until the 1980s, but have since lost much of their practical significance, at least in the proportional representation cantons. Since 1987, there have been no silent National Council elections in any proportional representation canton. This is probably related to the fact that elections have become more contested due to the increasing number of political groupings. 8

B. Legal comparison

Silent elections have also found their way into electoral legislation in many cantons. Although the first codified form of the silent ballot came from the canton of Neuchâtel, its inclusion in federal law in the other cantonal electoral laws probably helped it to achieve a breakthrough. Following the enactment of the National Council Election Act of 1919, the silent ballot was included in more and more cantonal electoral laws. Today, half of the cantons have silent elections for their parliamentary elections. Rarely are these elections limited to the confirmation of incumbents, but in most cantons first-time candidates can also be elected by silent ballot. The cantonal regulations on silent 9

elections are largely based on federal law with regard to the requirements and the procedure, with a few exceptions.

10 The number of signatures required to submit an election proposal in those cantons in which a silent election of parliament is possible varies. It ranges from 3 signatures as a minimum to 50 signatures as a maximum requirement. The decisive factor is that the signature quorums are in reasonable proportion to the number of eligible voters in the corresponding constituency, so that the respective quorum does not have a prohibitive effect on the exercise of political rights with regard to Article 34 para. 1 FC. The fact that the Federal Supreme Court considered a signature quorum that corresponded to a share of more than nine per cent of the eligible voters in the constituency in question to be legitimate and proportionate, merely in order to make it more difficult for candidates who were not serious to stand for election, can certainly be criticised from this point of view. In principle, however, even according to federal court jurisprudence, no excessive effort should be required to submit an election proposal. Therefore, the signature quorums for the submission of election proposals should tend to be kept as low as possible.

11 Until 1954, the canton of Zug still had a right of veto whereby voters had the possibility to veto a proposal after the proposal procedure had expired and thus prevent the holding of a silent election. Like the submission of election proposals, a right of veto offers those entitled to vote the possibility of preventing a silent election, but precisely without having to submit their own election proposals for this purpose. In this respect, it forms the lower hurdle to bring about a ballot. In the case of Zug, however, the fact that the signatures of a quarter of all eligible voters in the canton would have been necessary to make use of the right of veto was problematic. The size of the quorum had a prohibitive effect and effectively made the veto a useless instrument, so it was decided to abolish it.

12 On the whole, silent elections in the cantons are more often provided for popular elections in the majority voting system than for those in the proportional voting system. This may be surprising insofar as the silent election had its origins in the proposal procedure, which was inevitably linked to the introduction of proportional representation, and was only later adapted for the majority election procedure as well. However, from the point of view of the constitutionally required democratic legitimacy of cantonal parliaments (Art. 51 FC), this development is to be welcomed.

III. SILENT NATIONAL COUNCIL ELECTIONS IN PROPORTIONAL REPRESENTATION CANTONS

According to the wording of the provision, a silent election takes place if there are no more candidates on all lists together than there are mandates to be allocated. This wording gives rise to two possible cases of application: The number of candidates can be the same as the number of mandates to be awarded or lower. The first variant is called an exhaustive silent election. The latter is referred to as a supplementary silent election, since it entails a supplementary election in addition to the declaration of election pursuant to Art. 45 para. 1 PRA (Art. 45 para. 2 PRA). 13

A. Silent ballot in general (para. 1)

1. Election proposals (first subpart)

A silent election is only possible if a closed number of electable persons has already been determined before election day, since only in this way is it possible to quantify the number of candidates at all in comparison with the number of vacant mandates. A preliminary procedure with the legal effect that in the ballot a valid vote can only be cast in favour of those candidates who have been registered for the election in due time and in a legally valid manner (so-called compulsory nomination) is therefore indispensable (cf. Art. 38 para. 1 lit. a PRA). In the proportional representation system, these candidatures automatically result from the electoral lists that are formed from the submitted election proposals within the framework of the proposal procedure (Art. 21-33 PRA). The situation is different in the majoritarian election procedure. Compared to the proportional representation procedure, the latter only requires the formation of binding electoral lists if the possibility of a silent election is to exist. 14

The election procedure is initiated by the official election order of the competent authority, which is published in the official organ of publication. According to the Federal Supreme Court, this must already make sufficient reference to the possibility of a silent election, the right of voters to submit election proposals, and the other rules governing the conduct of the election. However, the Federal Supreme Court's open wording does not allow any detailed conclusions to be drawn regarding the requirements for the content of the election order. So far, it has only been specified that a general reference 15

to the legal provisions is not sufficient, but rather that an explicit reference is required. That those entitled to vote are sufficiently informed is essential to ensure a comprehensive opinion-forming process (Art. 34 para. 2 FC). Likewise, it forms the basis for the legal fiction of consent, because the presumption of tacit consent by those entitled to vote without a legal duty to inform would be untenable from the perspective of the rule of law. It is questionable, however, whether publication in the official organs of publication, in view of its rather modest reach as experience shows, is actually able to ensure this degree of information. More active information to voters, similar to the postal delivery of voting and election documents, would mean an additional financial and logistical effort, but could remedy the situation.

16 In the next step, the voters submit their election proposals. The requirements for the election proposals are based on the provisions of Art. 21 ff. PRA. In order for those entitled to vote to bring about a surplus of election proposals by submitting an additional candidature and thus prevent a silent election or force the holding of the popular election, no excessive effort must be required of those entitled to vote to provide their signature.

17 Finally, the competent authority of the canton examines and cleans up the election proposals and, under certain circumstances, sets the signatories a period of grace to remedy formal deficiencies (Art. 29 PRA). After the expiry of the one or two-week period for correction (Art. 29 para. 4 sentence 1 and sentence 3 PRA), the nominations are called lists (Art. 30 para. 1 PRA) and, with the exception of the official declaration of invalidity of subsequently discovered multiple candidatures (Art. 29 para. 4 PRA), can no longer be amended.

2. Declaration of election (second subpart)

a. Procedure and mechanism

18 Since in the proportional representation procedure, valid votes can only be cast for the candidates on the electoral lists (Art. 38 para. 1 lit. a PRA), the number of candidates to fill the vacancies is determined at the end of the preliminary procedure. If the number of nominations is higher than the number of vacant mandates, the ballot shall take place as announced. If, on the other hand, the number of nominations does not exceed the number of vacancies, the ballot shall be dispensed with by law. Accordingly, the ballot shall be can-

celled by the competent authority and the result shall be published in the official organ of publication. The cantonal government shall declare all candidates elected. Legally, this is a purely declaratory ruling; only the signatures of the voters on the election proposals have a constitutive effect.

A silent election therefore leads to the fact that the actual act of expressing the will of those entitled to vote in the context of the ballot is omitted. It is replaced by the silence of the electorate, which is interpreted by the law as consent, based on the legal fiction of Art. 45 PRA. This states that the refraining from submitting additional election proposals, which would generate a surplus of candidatures and thus trigger the ballot, is to be understood as approval of the already existing election proposals. 19

b. Constitutionality, in particular relationship to political rights

The procedure for a silent election contradicts the guarantee of political rights (Art. 34 FC) in several respects. Incidentally, this has also been recognised by the Federal Supreme Court. It even went so far as to describe the silent election as a departure from the actual popular election. However, the fundamental question of the constitutionality of silent elections has so far been left open. In individual cases, the Federal Supreme Court has always considered silent elections to be justifiable, usually for economic and electoral policy considerations. 20

The requirement of a popular election of the National Council is enshrined in Art. 149 para. 2 FC and is given a protective status under fundamental law via Art. 34 para. 1 FC. In a direct popular election, the state body is appointed as a result of a plurality of expressions of will by those entitled to vote. Analogous to the understanding of the term in private law, an expression of will in public law also basically includes the active articulation of one's own point of view. Not contesting election proposals by refraining from submitting one's own electoral list, on the other hand, is merely passive behaviour in which those entitled to vote neither explicitly express themselves for nor against the election proposals, but abstain - perhaps even consciously and intentionally - from expressing an opinion. Even the possibility of submitting election proposals does not change the fact that the popular vote is absent in the silent election; after all, not every form of participation fulfils the requirements of a popular vote. Moreover, it is precisely the purpose of the silent election to be able to dispense with a popular election for reasons of procedural economy. 21

Silent voting thus contradicts the principle of popular election and constitutes a restriction of a constitutionally guaranteed political right (Art. 140 para. 2 FC in conjunction with Art. 34 FC).

22 The legal basis required under Art. 5 para. 1 FC for such a restriction of Art. 149 para. 2 FC would have to be enshrined in the Federal Constitution due to the hierarchical supremacy of the Constitution over the laws. A legal basis for silent National Council elections does exist in Art. 45 PRA, but this is only found at the level of federal law. The same applies to cantonal parliamentary elections. The Federal Constitution requires direct popular election (Art. 51 FC), but again does not provide for any restriction in the case of silent elections. For their part, the relevant cantonal legal bases are not able to justify the encroachment on the Federal Constitution (Art. 49 para. 1 FC). The silent election of both the members of the National Council and the cantonal members of parliament must therefore be described as unconstitutional under the federal constitution. Although this fact remains without actual or legal consequences due to the application requirement for federal laws (Art. 190 FC), the creation of a legal basis at constitutional level would be desirable in view of legal certainty as well as the postulate of the freedom from contradiction of the legal order.

23 According to settled case law of the Federal Supreme Court, Art. 34 para. 2 FC guarantees, among other things, that no election result is recognised that does not reliably and undistortedly express the free will of those entitled to vote. Furthermore, those entitled to vote must be able to make their decision on the basis of a process of opinion-forming that is as free and comprehensive as possible and to express this with their vote. Silent voting is based on the legal hypothesis that those eligible voters who do not themselves submit a nomination vote in favour of the candidates already proposed. However, in all cases where those entitled to vote do not submit a nomination for reasons other than their approval of the previous candidacies, this assumption leads to a distortion of the will of the voters. Just as, according to the prevailing doctrine, a tacit approval of the parliamentary proposal cannot be inferred from the non-invocation of an optional referendum, the fact that someone refrains from submitting additional election proposals does not correctly imply either approval or rejection of the previous election proposals. Whereas in the case of an optional referendum at least the text of the law under discussion has been definitively determined and published (cf. Art. 13 para. 1 lit. e PublG), in the

case of elections this is only the case after expiry of the proposal period. Although it is possible to inspect the election proposals during the preliminary procedure (Art. 26 PRA), these are not published and may also be subject to ongoing changes, for example by election proposals being resubmitted during the remaining period or being declared invalid during or after the purification procedure (Art. 29 para. 3 PRA, Art. 32a PRA). De facto, therefore, voters do not yet have the opportunity to express their opinion for or against all candidatures in the preliminary procedure. This would rather be the purpose of the ballot to be held later. Conclusions on the content of a waiver of the right to submit nominations are thus a pure legal fiction, the purpose of which is to democratically legitimise the candidates' declaration of election by means of a legal artifice. Due to the variability of the pool of candidates during the nomination period, those entitled to vote cannot know whether they would prevent a silent election by submitting a nomination or whether they would just bring about one, as they lack a reliable basis for their decision. Silent voting therefore affects both the free opinion-forming process and the undistorted expression of the voters' will in the election result and is thus in tension with Article 34 para. 2 FC.

A right of veto for eligible voters could mitigate the distortion of the election result as a result of the fiction of consent. Similar to the optional referendum, a certain number of eligible voters could exercise this right by submitting their signature and thus force a ballot, regardless of the number of election proposals submitted. In this way, those entitled to vote could directly refute the fiction of consent without having to submit an election proposal for it. This would also prevent election proposals that are not seriously meant from being submitted just to avert a silent election. However, it would be decisive that the use of the right of veto with regard to the signature quorum does not represent a greater procedural hurdle than the submission of an election proposal. In order to prevent sham elections from occurring as a result of a veto right, either the eligible voters would have to submit new election proposals before the ballot, or they would have to be able to cast their vote for any eligible person, or a legally defined quorum would have to apply for participation in the allocation of seats. 24

A possibility for improvement with regard to the opinion-forming process is offered by the two-stage preliminary procedure practised in some cantons for majority elections. Here, after the expiry of the initial deadline and an initial 25

adjustment, the election proposals submitted up to that point are published and a second deadline is set during which further election proposals can be submitted. This additional period creates a more transparent basis for voters to decide whether they must or want to force the ballot to be held by submitting further election proposals. However, this presupposes that during the additional period the withdrawal of election proposals already submitted during the first period is inadmissible. Otherwise, the number of election proposals would remain just as unclear as during the first deadline and the second deadline would not lead to any improvement of the information situation. If the number of election proposals already exceeds the number of mandates to be allocated after the first deadline, a second deadline can also be dispensed with for reasons of procedural economy, since in such cases a silent election and the associated restriction of political rights are out of the question.

c. Effects on democratic legitimacy

26 The Federal Supreme Court has identified (lack of) democratic legitimacy as one of the main problems of silent elections. In a democracy, the legitimacy of elected persons derives from the will of the majority of the electorate - or, in the proportional representation procedure, of a significant proportion of the same. This will of the electorate is usually explicitly reflected in the election result. In the case of a silent election, on the other hand, democratic legitimacy is based solely on the legal fiction of consent. Thus, the democratic legitimacy conveyed by silent elections is not comparable to that of an ordinary election, especially in the case of single-stage preliminary procedures. The reason for this lies not least in the fact that in fact only the signatories of the existing election proposals have expressed their explicit consent, while the behaviour of the rest of the electorate correctly does not indicate consent or rejection. For silent National Council elections, this means that, depending on the size of the constituency, the explicit democratic legitimacy is only fed by the 100 to 400 signatories of the electoral list (cf. Art. 24 para. 1 lit. a-c PRA).

27 This restriction of democratic legitimacy is particularly questionable since it concerns a parliamentary election, i.e. the election of the primary representative body of the electorate. By its very nature, this body is dependent on the broadest possible democratic legitimacy. For the election of the legislature - both at national and cantonal level - silent elections should therefore be avoided. Numerous cantons already take account of the increased require-

ment for democratic legitimacy in parliamentary elections by excluding silent elections for the legislature altogether, although these are not fundamentally alien to their electoral regulations. The canton of Zurich, for example, allows silent elections for certain "non-political offices", but not for filling the cantonal council or the Council of States seats.

The silent election is primarily justified by considerations of procedural economy. Due to the compulsory nomination and the fact that there is no legal quorum for the election to the National Council, the outcome of the election is already determined in advance if there are the same number of candidates or fewer candidates than vacant seats, which is why holding the ballot in these cases is seen as unnecessarily causing costs. However, this is somewhat at odds with the fundamental decision in favour of a direct popular election of the National Council, according to which the constitutional legislator obviously accepted the costs caused by ballots (Art. 149 para. 2 FC). However, it should be noted in favour of this argumentation that the ballot in these constellations lacks its material purpose, namely to determine the outcome of the election, and thus leads to an actual sham election. However, it must also be taken into account that not only the outcome of the election, but also the concrete election result has an independent significance. 28

It is also argued in favour of the silent ballot that an election in which eligible voters can no longer influence the outcome of the election could promote voting fatigue among eligible voters and have a negative effect on voter turnout for other, disputed election matters. However, this connection cannot be proven. It is also conceivable, however, that silent elections could affect the self-perception of eligible voters as an indispensable part of representative democracy and thus their motivation to participate in elections and votes. In any case, no fundamental added value of silent elections can be derived from this argumentation from a democratic-theoretical perspective, because such an effect would merely lead to a shift of the low voter turnout to another election or voting subject. The criticism that voter turnout is notoriously low in uncontested elections and that the resulting election results are therefore unworthy of consideration must also at least be questioned. The possibility of narrow majorities and thus "bad" election results is inherent in a democratic electoral system and therefore precisely not an expression of a specific lack of quality that would speak in favour of holding silent elections. 29

B. Silent elections in need of supplementation in particular (para. 2)

30 If all electoral lists together list fewer candidates than there are mandates to be allocated, this is a silent election in need of supplementation. While the other procedural steps in this case are also governed by Art. 45 para. 1 PRA, a supplementary election is held for the seats that remain vacant in accordance with Art. 56 para. 3 PRA. In the case of several vacancies, the proportional representation procedure shall be applied, otherwise the majority voting procedure. If the number of candidates proposed in a by-election corresponds to the number of vacant mandates, this can also be carried out in the form of a silent election.

31 The system of supplementary silent election has the consequence that the elected National Councillors of a constituency do not all have to fulfil the same requirements in order to win a seat, even in an overall renewal election. While some are elevated to office only by the signature of the signatories of their electoral list and the subsequent declaration of election, others must achieve a natural quorum, usually higher than the signature quorum for election proposals, to be elected in the supplementary election. Moreover, because the number of vacant seats is reduced accordingly after the declaration of election, the natural quorum in the supplementary election is higher than would be the case if all mandates were filled in an ordinary ballot. Although the democratic legitimacy of those explicitly elected in a ballot is greater than that of those elected silently, the National Council members elected by silent ballot thus experience a privilege compared to those elected in the supplementary ballot in that they do not have to reach this natural quorum in order to win a seat.

32 Since a ballot must be held anyway following the declaration of election to fill the mandates that remain vacant, the usual procedural economic advantages of the silent election are not applicable in the case of supplementary silent elections. The argumentation that a ballot only fulfils its formal purpose, but has no material influence on the election result, is also not applicable in constellations of a silent election that needs to be supplemented, since at least for some of the mandates the filling is only determined after the ballot and not already at the end of the preliminary procedure. Thus, the silent election in the constellations requiring supplementation loses its two most important

grounds for justification. Certain cantonal electoral laws take this into account by permitting an exhaustive silent ballot for their parliamentary elections, but not a supplementary one. In view of the constitutional and democratic concerns, the holding of a silent ballot in constellations requiring supplementary ballots in the election of the National Council would have to be dispensed with a fortiori, and instead a ballot would have to be held for all seats up for election.

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COMMENTARY ON

Art. 46 PRA

A commentary by Marzia Piampiano

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Art. 46 Election without lists

[1] If there are no lists, any eligible person may be voted for. The persons with the highest number of votes shall be elected.

[2] If a ballot paper contains more names than there are mandates to be allocated, the last names shall be deleted.

[3] In all other respects, the provisions applicable to single-member constituencies shall apply mutatis mutandis.

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I. HISTORY OF ORIGINS

A regulation for the procedure in the event that no electoral lists are submitted in the renewal election of the National Council in a proportional representation constituency was already part of the work on the enactment of the Federal Act on the Election of the National Council 1918/1919. Thus, the draft already provided that in this case a free election should take place according to a relative majority. In the detailed deliberations in the National Council, the rapporteur emphasized that the constellation of no list being drawn up at all in an electoral district would probably occur only rarely. It was further explained that the intention was to follow the rule for majority voting in single-member constituencies with a relative majority in order to keep the rule as simple as possible and to enable a decision to be made in the first ballot. The draft did not give rise to any objections in the National Council. In the Council of States, the corresponding provision was waved through without discussion, whereupon it found its way into the proportional representation law in Art. 22 para. 3. 1

As part of the work on the Federal Act on Political Rights, the provision on "proportional representation" without lists was included in the draft without any material changes. The provision remained uncontested this time as well and was anchored in Art. 46 of the PRA in only an editorially revised form. Since then, the article has remained unchanged with the exception of a terminological revision of paragraph 2, which is meaningless in terms of content. 2

II. SIGNIFICANCE OF THE PROVISION

A. General

Art. 46 PRA regulates the case when no electoral lists are submitted in the election of National Council deputies in a multi-member constituency. The norm refers only to the general renewal elections of the National Council. Special procedural provisions apply to changes in the composition of the National Council during the term of office (Art. 54 et seq. PRA). 3

As already stated in the legislative materials, proportional representation without lists is also referred to in the literature as a merely theoretical case. So far, this has proven to be true, because since the introduction of proportional 4

representation at the federal level, no case of application of Art. 46 PRA has occurred. It is also hardly conceivable in the future that no single valid candidature will be submitted for several National Council seats up for election. However, since the proportional representation procedure provides that a vote can only be validly cast for legitimately nominated candidates (Art. 38 para. 1 lit. a PRA), it is only logical to provide for a by-election procedure in the event that no candidatures are submitted. In this respect, it nevertheless seems questionable that numerous cantons do not provide for a corresponding regulation for the proportional election of their cantonal parliaments.

B. Legal Comparison

5 Some cantons have also made a provision for the case that no election proposals are submitted in the proportional election of their cantonal parliaments in an electoral district. In terms of content, these are largely parallel to federal law. Instead of proportional representation, in the absence of election proposals, a majoritarian procedure with a relative majority of votes takes place, in which votes can be cast for every eligible person. The canton of Geneva, on the other hand, has adopted a somewhat unusual regulation. If no electoral lists are submitted for an election, a relative majority election also takes place, but candidatures must again be submitted for these. The simplification in comparison to the original election procedure is that no electoral lists are required and accordingly the otherwise necessary 50 signatures do not have to be collected for an election proposal. If also in this so-called supplementary election no candidatures are received, it is up to the State Council to determine the modalities of the election or appointment.

6 However, numerous cantons, even if their parliaments are elected by proportional representation, do not provide for an explicit regulation on how to proceed in case of missing lists. However, this loophole has not been of any practical significance so far, since, as far as can be seen, there has not yet been a case in the cantonal parliamentary elections in which no electoral lists were submitted at all.

III. ELECTION WITHOUT LISTS

A. Procedure in the absence of electoral lists (para. 1)

If all lists are missing in a proportional representation constituency, according to Art. 46 para. 1 FC any person who fulfils the eligibility requirements according to Art. 136 para. 1 FC may be voted for in the ballot. Exceptionally, therefore, instead of proportional representation in a multi-person constituency, a relative majority election takes place, i.e. those persons with the highest number of votes are already elected in the first ballot. 7

The decision in favor of a majority election is obvious in view of the absence of electoral lists, since the proportional representation procedure depends on election proposals. If there are no electoral lists, proportional representation is not feasible. The factual consequence of majority elections in multi-member constituencies is, however, that it can come to splintering of the majority and with the distribution of seats to still stronger political distortions with worse representation of the minorities, than this is the case with the Majorzverfahren in single-member constituencies. 8

Following the election procedure in single-member constituencies (Art. 47 para. 1 PRA), the legislator decided against a majority election procedure with an absolute majority requirement in the first ballot. This is surprising insofar as the most common form of majority in Switzerland is the one with the requirement of an absolute majority in the first ballot. Occasionally, there are even doubts about the constitutionality of relative majority voting. In any case, it seems undisputed that a majoritarian election procedure with an absolute majority requirement in the first ballot would better contribute to the preservation of the majority principle, because such a procedure increases the probability that the elected persons "at least appear to a majority of those voting as the 'lesser evil' among the existing alternatives." Moreover, absolute majority voting does better justice to the principle of freedom to vote, since eligible voters can cast their votes in the first ballot free from considerations of electoral strategy. Only in the second ballot, when the election chances of the individual candidates can be better assessed on the basis of the results of the first ballot, does the relative majority requirement create an incentive to vote primarily for the most promising candidates, so that one's own vote does not remain ineffective. Accordingly, the reason for the decision in favor of relative majority voting is probably to be found in the need for harmonization of elec- 9

toral procedures. Since in the multi-member constituencies with proportional representation and in the single-member constituencies by law (Art. 47 para. 1 PRA) no second ballots take place, there would be a danger in an absolute majority election that the second ballot could be prejudiced by the election result from the first (and only) ballots of the other cantons. In this respect, the implementation of a relative majority election seems logical.

B. Supernumerary votes on ballots (para. 2)

10 Paragraph 2 of Art. 46 PRA regulates the procedure if the ballot paper of a person entitled to vote contains more names than there are mandates to be allocated. This provision is of decisive importance for the determination of the election result. It provides that the last names listed shall be deleted. In this respect, it is based on the same assumption as its parallel provision in Art. 38 para. 3 PRA, namely that the last names listed in each case correspond to the persons least favored by the persons entitled to vote and that a deletion is therefore in their interest.

C. Reference to majority elections in single-member constituencies (para. 3).

11 The third paragraph refers to the provisions of the majority voting procedure applicable to single-member constituencies for the other modalities of the election without lists. Since the law provides for an analogous application of the corresponding norms, it must be decided separately for each provision concerning the majority election whether and to what extent it is applicable to the election without lists.

12 The time limit for the delivery of ballot papers by the cantons can be applied without further ado also to the election without lists (Art. 48 in connection with Art. 46 para. 3 PRA).

13 The regulation of the drawing of lots in the event of a tie is also unproblematic. Since there are always several seats to be filled in the election without lists, the provision may, however, only be applied if it is a question of filling the last seat or seats and there is a tie between more candidates than there are still vacant seats. If, for example, two seats are to be filled and there is a tie between the candidates with the second best result, a decision by lot must be made (Art. 47 para. 1 in conjunction with Art. 46 para. 3 PRA). If, on the other hand,

there is a tie between the two candidates with the best result, both shall be elected and the remaining candidates shall be disregarded.

However, the provision on the invalidity of ballot papers containing the names of different persons (Art. 49 para. 1 lit. a PRA) does not apply to elections without lists. For obvious reasons, in multi-person constituencies it is unavoidable and even desirable that several persons are named on one ballot paper. The other grounds for invalidity of the majority election in single-member constituencies (Art. 49 para. 1 lit. b-d PRA) coincide with those in multi-member constituencies anyway and therefore, based on Art. 46 para. 3 PRA, also apply to the election without lists. 14

It is unclear, however, whether Art. 46 para. 3 PRA also permits an analogous application of the provisions on silent elections in single-member constituencies (Art. 47 para. 2 PRA). From a procedural point of view, this would be possible, since the election registration deadline for election proposals in proportional representation cantons is the last Monday in August at the latest (Art. 21 para. 1 and 2 PRA). If no election proposals have been received by this date, a relative majority election is held by law (Art. 46 para. 1 PRA). In single-member constituencies, cantonal law may provide for a silent election if by the seventh Monday before the election - which takes place on the second-last Sunday in October (Art. 19 para. 1 PRA) - only one valid candidature has been received by the competent cantonal authority (Art. 47 para. 2 PRA). An analogous application to elections without lists would mean that the cantons could provide for a silent election if the cantonal electoral authority receives between the election registration deadline for the proportional representation procedure and the seventh Monday before the election the same number or fewer candidatures for election in the relative majority voting procedure than mandates to be allocated. Since the silent election is permitted by federal law both in multi-member constituencies and in single-member constituencies, one could assume that it should in principle be possible for the cantons to provide for it in cantonal law also for elections without lists. In contrast, the explanations of the dispatch on the individual articles explicitly mentioned that silent elections were not permissible in the case of elections without lists. This decision was not explicitly justified, but a parallel was drawn to the single-member constituencies, in which silent elections were also out of the question at that time due to the lack of a proposal procedure. However, since November 15, 1994, silent elections are in principle also permitted in single- 15

member constituencies if the canton concerned provides for them by law (Art. 47 para. 2 PRA), it is unclear whether or to what extent this could now also apply to elections without lists. In any case, it is de facto almost inconceivable that, after no election proposals were received for proportional representation, sufficient legally valid election proposals for a silent election could be submitted within a week. Also, these considerations are rather theoretical, since a corresponding legal basis does not exist in the cantons.

16 The constellation that no electoral lists were available for the original election also gives rise to certain peculiarities with regard to a possible vacancy during the term of office. For example, a seat that has become vacant cannot be filled by substitutes from the same list, as is usually the case in constituencies with several National Council seats (Art. 55 PRA). The silent supplementary election within the meaning of Art. 56 PRA, in which three-fifths of the signatories of the corresponding list, or the executive committee of the cantonal party, propose a substitute and the latter is declared elected (Art. 56 para. 1 and 2 PRA), is also out of the question for obvious reasons. Theoretically, it would be conceivable that even without election lists, the vacancy is filled by moving up the person who achieved the next best election result in the majority election. The system of moving up, however, aims to maintain the party strengths existing at the time of the renewal election and thus the distribution of seats among the parties during a term of office. However, this only makes sense in the context of a proportional representation election, in which the party affiliation of the candidates is of decisive importance. In a majority election without electoral lists, however, the list or party affiliation of a candidate has no legal significance, which is why moving up in majority elections is completely alien to the system and cannot be justified in view of the requirement of direct popular election in Art. 149 para. 2 FC. According to what has been said, the reference in Art. 46 para. 3 PRA must also extend to Art. 51 PRA, which provides that in National Council elections by majority vote, any by-elections must also be filled in accordance with the same provisions - i.e. again by majority vote. Accordingly, if a seat in a multi-member constituency has exceptionally been filled in a majority election due to a lack of electoral lists, and if this seat becomes vacant during the legislative period, it must consequently again be filled in a majority election.

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Chapter 3 Simple Majority System

Art. 47 Procedure

[1] In constituencies where only one member of the National Council is to be elected, votes may be cast for any person who is eligible for election. The person who receives the highest number of votes shall be elected. In the event of a tie, the result shall be decided by drawing lots.

[1bis] The canton may publish electronically and in the cantonal gazette all candidacies that are notified to the cantonal electoral authority by the forty-eighth day before the election day. The published information must as a minimum include the candidates:

a. official surname and first names;

b. name by which they are known in politics or in everyday life;

c. sex;

d. home address including postcode;

e. place and canton of origin;

f. party or political group affiliation; and

g. occupation.

[2] Cantonal legislation may provide for a tacit election where only one valid nomination has been submitted to the responsible cantonal authority by 12.00 noon on the forty-eighth day (seventh Monday) prior to the election.

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I. HISTORY OF ORIGINS

A. Majority voting in single-member constituencies

1 Until 1918, all members of the National Council were elected by majority vote - with an absolute majority in initially up to three ballots. After two attempts to introduce proportional representation in National Council elections in 1900 and 1910 had failed, the third proportional representation initiative was accepted by the people and the cantons on 13 October 1918 and thus the principle of electing the National Council according to the proportional representation system was anchored in the constitution.

2 However, the Federal Act on the Election of the National Council of 1919, which implemented the new constitutional provision, already provided that in constituencies that only had to elect one representative, the election would take place by a relative majority. This special regulation for single-member constituencies, which deviated from the constitutional principle, corresponded to the proposal of the Federal Council, was continued with the enactment of Art. 47 PRA in 1976 and in principle still applies today. The new, mixed National Council election procedure was first applied in the (early) general renewal elections of 1919, when the cantons of Uri, Obwalden, Nidwalden, Zug and Appenzell Innerrhoden were single-member constituencies. In the canton of Zug, two National Council seats have been up for grabs since 1922 and three since 1995. The canton of Glarus has been a single electoral district since 1971, and the canton of Appenzell Ausserrhoden since 2003.

3 In addition to proportional representation, the adoption of the proportional representation initiative in 1918 also enshrined in constitutional law the division of electoral districts that still applies today and corresponds to the cantonal borders: each canton and each half-canton forms an electoral district in the National Council elections. Before 1918, the determination of electoral constituencies was the responsibility of parliament and many cantons consisted of several electoral constituencies.

4 The system of distributing the National Council seats among the constituencies according to a fixed distribution number, which was introduced when the federal state was founded, initially remained unaffected by the introduction of the proportional representation system. Until 1963, one member of the Na-

tional Council was elected for every 20,000 souls (22,000 from 1931 and 24,000 from 1950) of the total population, although each canton and half-canton had been entitled to at least one National Council seat since 1850 (so-called seat guarantee). Until 1963, the size of parliament was determined by the total population and the total number of National Council members to be elected varied from general renewal election to general renewal election. Only since the National Council elections in 1963 has the fixed number of 200 National Council seats applied, which are distributed among the cantons in proportion to the resident population, whereby each canton and half-canton is still entitled to at least one seat.

The majority cantons as single-member constituencies are, in summary, a result of the seat guarantee for each canton and half-canton that has existed since 1850, as well as the definition of the cantonal boundaries as constituency boundaries in the National Council elections. 5

B. Silent elections

The possibility of silent elections, i.e. elections without holding a ballot if no more candidatures are received in the proposal procedure (also registration or preliminary procedure) than there are seats to be allocated, was already provided for in federal law for the proportional representation cantons when proportional representation was introduced, but was initially still excluded in the single-member constituencies. Art. 47 para. 2 PRA, which today allows the major-majority cantons to provide for the possibility of a silent election in cantonal law, was only inserted into the PRA in 1994 and goes back to the commission motion "Silent elections in single-member constituencies". Today, each major canton can provide for silent elections in cantonal law according to its experience and needs, or prohibit such elections. It was decided to cantonalise the decision on the possibility of a silent election after the possibility of a silent election under federal law was vehemently rejected in the consultation procedure by three (UR, GL, AI) of the then five (UR, OW, NW, GL, AI) majority cantons. 6

The proposal procedure, which makes a silent election possible in the first place, initially had to last until the 30th day before the election by federal law. For better coordination with cantonal referendums that sometimes take place at the same time, the deadline for registering to vote was brought forward to 7

the 48th day (7th Monday) before the election as of 1 January 2008 at the request of the majority cantons.

8 Since 1995 and until today, only the two majorities cantons Obwalden and Nidwalden have known the possibility of a silent election to the National Council. However, this has only been done once since 1995, namely in the 1999 general renewal elections in the canton of Obwalden.

9 The canton of Appenzell Ausserrhoden, which has been a single electoral district since 2003, was a small proportional representation canton with two to three seats from 1919 to 2003. During this time, silent elections occurred in about half of the total renewal elections and thus with above-average frequency. This is politically undesirable, particularly because of feared repercussions on internal cantonal elections, which is why in the Canton of Appenzell Ausserrhoden it has been refrained from providing for the possibility of silent National Council elections in cantonal law until today.

C. Voluntary registration procedure

10 On 26 September 2014, Art. 47 para. 1bis PRA was enacted, which allows majoritarian cantons without a legal basis for a silent election to introduce a voluntary registration procedure. The amendment to the law goes back to the interpellation no. 12.3291 "Simplification of National Council elections in major cantons" by the then Appenzell Ausserrhoden National Councillor Andrea Caroni. According to the interpellant, there was considerable uncertainty among voters about the personal details of the candidates when filling in the blank ballot papers. For the candidates, the widespread dissemination of information about themselves then meant a large financial outlay. Furthermore, the Swiss abroad are not sufficiently informed in the current system and are therefore at a disadvantage. The Federal Council recognised the need for action, particularly with regard to the Swiss abroad and their need for electronically retrievable information on National Council candidates.

II. SIGNIFICANCE OF THE PROVISION

A. Scope of application of the majority voting procedure

11 Art. 47 ff. PRA are applied in cantons which, due to their population size, can only delegate one person to the National Council. Of the 26 cantons, six (UR,

OW, NW, GL, AR, AI) are currently so-called single-member constituencies in which the National Council is elected by majority vote in accordance with Art. 47 et seq. PRA.

The scope of application of the provisions on majority voting, however, extends beyond the election of the National Council in the majority cantons. In particular, majority voting can also occur in supplementary elections in proportional representation cantons in accordance with Art. 47 et seq. PRA. According to Art. 56 para. 3 PRA, this is the case if a member of the National Council retires during the term of office and 1) the seat cannot be filled by succession, 2) the right of nomination provided for in Art. 56 paras. 1 and 2 PRA is not used, and 3) only one seat is to be filled. In view of this cascade, it is hardly surprising that in the only three supplementary elections held since 1919 there has never been a majority election. 12

Furthermore, the election of members of the National Council in proportional cantons takes place according to the majorities system if no lists are available or if all lists together list one person less than the number of mandates to be allocated. Against the background of the growing number of candidates, the practical relevance of majority voting in proportional representation cantons is likely to remain low in the future. 13

B. Majority despite constitutional proportional representation

According to Art. 149 para. 2 sentence 1 FC, the members of the National Council are elected by the people in direct elections according to the principle of proportional representation. The National Council seats are distributed among the cantons according to population, with each canton having at least one seat. 14

Contrary to Art. 149 para. 2 sentence 1 FC, Art. 47 para. 1 PRA provides for the election of the deputy or deputies by majority vote with a relative majority for those cantons that have to fill only one National Council seat due to their small population. Majority voting in single-member constituencies is thus a legally provided exception to the constitutional principle of electing National Council members by proportional representation. However, since the single-member constituencies as such are, on the one hand, a consequence of the constitutionally provided division of electoral districts (each canton forms an electoral district, cf. Art. 149 para. 3 FC) and the constitutionally enshrined 15

seat guarantee (each canton has at least one seat, cf. Art. 149 para. 4 sentence 2 FC) and, on the other hand, proportional representation cannot be meaningfully carried out in single-member constituencies - at least within the constituency - the majority voting provided for by law in single-member constituencies can also be regarded as laid down in the constitution. Moreover, Art. 47 et seq. PRA are authoritative for the authorities applying the law in accordance with Art. 190 FC. It should be noted at this point, however, that if the biproportional allocation procedure ("double Pukelsheim") were applied across constituencies, the election of all National Council members by proportional representation would in principle be possible. Against this background, Weber advocates a clarification of Art. 149 para. 2 sentence 1 FC or a changeover to the double Pukelsheim procedure.

16 In Switzerland as a whole, the elections to the National Council take place in a mixed electoral procedure, which contains elements of both the majority and proportional representation principles. The proportion of National Council members elected by majority vote is currently 3% (six out of 200 MPs), while the proportion elected by majority vote is 23% (six out of 26 cantons).

17 In the majoritarian election, the votes cast are allocated directly to specific persons and are not first distributed to lists. In this respect, the majority election procedure can be described as a personality election (also personal election), which promotes the selection of MPs according to personal criteria and favours the election of strong personalities. Party affiliation does not play the same role in majoritarian elections as it does in proportional representation, as can be seen from the fact that all members of the National Council in today's single-member constituencies do not currently belong to the strongest parliamentary group in the cantonal parliament. Nevertheless, for many voters, affiliation to a particular party is likely to be a decisive electoral criterion in the majoritarian election procedure as well.

C. Electoral equality and majority voting

18 Electoral procedures must be designed in such a way that the equality of electoral rights required by Article 34 FC is ensured with its three components, equality of counting, equality of voting strength and equality of success. The equality of counting values requires that all votes are formally treated equally during the counting. Equality of voting strength or voting weight guarantees that every voter not only has his or her vote counted, but that it is used in the

same way as all other votes. Finally, equality of success value is intended to ensure that all votes have the same success, i.e. that they contribute materially and equally to the election result and are taken into account in the distribution of mandates. It requires the number of weightless votes to be limited to a minimum and is in principle of a constituency-wide nature. According to the Federal Supreme Court, electoral procedures must comply with the principle of electoral equality, regardless of whether they are based on proportional representation, majoritarian elections or a mixed system. According to the Federal Supreme Court, all three elements of electoral equality must be guaranteed as far as possible, regardless of the electoral procedure. While the equality of counting values has an absolute character, certain restrictions on the equality of voting strength and success values can be justified on factual grounds.

In majority voting, which is applied in National Council elections in single-member constituencies, the person who receives the most votes is elected. All votes that go to persons who cannot gather the majority of votes are not taken into account in the distribution of mandates and remain weightless. In the case of majoritarian elections, votes for defeated candidates cannot be taken into account due to the system, which means that the equality of success values is impaired. However, the fact that votes for defeated candidates are not taken into account is an essential feature of the majoritarian system, which is why the Federal Supreme Court's application of equality of success values to majoritarian and mixed procedures has been criticised by scholars. 19

In addition to the equality of results, the equality of voting power cannot be guaranteed across all constituencies in the National Council elections. The latter is distorted by the seat guarantee of each canton enshrined in Art. 149 para. 4 sentence 2 FC. The voting power of voters in the sparsely populated single-member constituencies is considerably greater than that of voters in the most populous cantons. The seat guarantee and thus also the distortion of the equality of voting power resulting from it is - like the division of electoral districts as such - federally motivated and inherent in the constitution itself. It is therefore to be judged as constitutional. 20

Even though the Federal Supreme Court has already referred to the National Council elections on various occasions when assessing cantonal electoral systems, it has not ruled on the constitutionality of the mixed National Council election system provided for in Art. 16 ff. PRA and, in particular, its compati- 21

bility with the requirements of electoral equality. However, it has clarified that the case law on the constitutionality of cantonal parliamentary election systems cannot be transferred to the federal level without further ado, since the election of a cantonal member of parliament differs in various respects from that of a member of the National Council. The Federal Supreme Court has also pointed out that the election procedure for the National Council is constitutionally regulated in its main features by Art. 149 FC and has raised the question of whether Art. 149 FC, in the sense of a lex specialis, would also constitutionally justify a restriction of Art. 34 FC for elections to the National Council. The doctrine is unanimously in favour of the special nature of Art. 149 FC compared to Art. 34 FC and thus the constitutionality of the restrictions on electoral equality resulting from Art. 149 FC. Irrespective of the assessment of constitutionality, the authorities applying the law are bound by the federal regulation on the basis of Art. 190 FC. How the National Council election procedure, which is constitutionally regulated in its main features, is to be designed in concrete terms, is consequently to be decided by the federal legislature and thus ultimately a political question.

D. Reform efforts

22 Against the background of the impairments of electoral equality resulting from the current division of electoral districts and the current National Council electoral system, there have been several calls in politics for a change to the nationwide election of National Council deputies according to the double Pukelsheim. The double Pukelsheim would also work in single-member constituencies due to the two-stage allocation procedure (upper allocation: nationwide distribution of seats among the parties; lower allocation: distribution of mandates among the cantons in proportion to the strength of the parties participating in the election), but there would be a transfer of votes across the constituency or cantonal borders. So far, all parliamentary motions have been rejected by the first Council to deal with them - in each case with reference to the historically and federally determined special position of the cantons as constituencies.

E. Legal comparison

23 Since 2003, the cantons of Uri, Obwalden, Nidwalden, Glarus, Appenzell Ausserrhoden and Appenzell Innerrhoden have been single-member con-

stituencies. In the overall renewal elections of 2023, only one member of the National Council will also be elected in these cantons.

In the cantons of Uri and Appenzell Innerrhoden, voters are in principle obliged to vote in the election of the National Council member. Such a statutory voting obligation is compatible with the postulate of the free right to vote. However, there is no provision for compulsory voting, i.e. an obligation to vote under penalty of law. 24

In principle, the current major-majority cantons can be divided into a group without (UR, GL, AR, AI) and a group with (OW and NW) the possibility of a silent vote, based on the cantonal legal bases that specify the election procedure for the National Council. 25

1. Majority cantons without silent elections

The basic features of the National Council election procedure in cantons that do not have a legal basis for silent National Council elections are derived from federal law. The additional applicable cantonal provisions (cf. Art. 83 PRA) primarily concern matters of organisational law such as the composition and duties of the electoral offices as well as the procedure for early and postal voting (polling stations, polling locations and monitoring, voting material, voting, grounds for invalidity, determination and announcement of the results), which the cantons are obliged to regulate in accordance with Art. 7 para. 4 and Art. 8 para. 1 PRA. 26

2. Majority cantons with silent elections

The above-mentioned provisions are also to be taken from cantonal law in cantons with silent elections. In contrast to the cantons without the possibility of a silent election, in the cantons with the possibility of a silent election there is a compulsory registration procedure (proposal procedure), which by federal law lasts until 12.00 noon on the 48th day before the election, but is otherwise to be regulated by cantonal law. The cantonal provisions on the registration procedure in the two cantons of Obwalden and Nidwalden largely coincide with Art. 21 et seq. of the Federal Constitutional Court. PRA, which regulate the election proposal procedure in the proportional representation cantons. 27

a. Canton Obwalden

28 Obwalden law regulates the election proposal procedure and the silent election for the National Council in Art. 53a AG/OW. Accordingly, the cantonal government calls on voters eight weeks before the election Sunday to submit election proposals, which can be submitted until 12.00 noon on the 48th day before the election in accordance with Art. 47 para. 2 PRA.

29 Each election proposal must be signed by at least five voters resident in the canton. The wording of this cantonal regulation raises the question of whether the Swiss abroad who do not reside in the canton but abroad are also entitled to sign election proposals in the National Council election in the canton of Obwalden. In the opinion of the author and also the legal service of the State Chancellery of the Canton of Obwalden, this is to be affirmed with regard to higher-level law. According to Art. 40 para. 2 FC, the Confederation is responsible for issuing regulations on the rights and obligations of the Swiss abroad, including with regard to the exercise of political rights in the Confederation. According to Art. 16 para. 1 ASG, Swiss abroad who have reached the age of 18 may vote in federal elections and referenda. The exclusion of the Swiss abroad from the right to vote and stand for election is also conclusively regulated by federal law in Art. 17 ASG. Accordingly, the law of the canton of Obwalden is to be interpreted in conformity with federal law in such a way that Obwalden citizens residing abroad are in principle also entitled to sign election proposals for the election to the National Council. The right of Swiss citizens living abroad to vote, which is granted by federal law, cannot be restricted by the cantonal regulation of the registration procedure. This interpretation of cantonal law is also supported by the fact that the Swiss abroad are also entitled to sign election proposals in cantons with proportional representation. No factual reasons are apparent for a different approach to the entitlement of the Swiss abroad to sign in cantons with a majority and a silent vote.

30 Candidates must be listed on the nomination form with their surname, first name, occupation and home address; if necessary, their year of birth must be indicated. Each candidate must confirm in writing that he/she accepts the nomination. In the absence of such confirmation, the name of the candidate shall be deleted. If only one valid nomination is submitted by the closing date for nominations on the 48th day before the election, the cantonal government shall declare the nominated person elected.

b. Canton Nidwalden

In the canton of Nidwalden, the silent election to the National Council is regulated in Art. 2 EG PRA/NW. For the validity requirements of a candidature and thus the requirements for an election proposal, Art. 2 para. 3 EG PRA/NW refers to Art. 60 WAG/NW. Accordingly, an election proposal must be signed by at least five active citizens, stating their own name, first name, year of birth and residential address. Each active citizen may only co-sign one election proposal per election. 31

According to the cantonal constitution, active citizenship includes all persons who have Swiss citizenship, are legally established in the canton, have reached the age of 18 and have not been deprived of active citizenship by legislation. As in the canton of Obwalden, the cantonal regulation on the election proposal procedure could, according to its wording, be understood as excluding the Swiss abroad who are not legally established in the canton from the right to sign election proposals in the National Council elections. In the sense of the author's view already expressed with regard to the Obwalden regulation, and also in the view of the Nidwalden District Administrator, such a cantonal regulation would not, however, be compatible with higher-level federal law, which grants the Swiss abroad the right to vote in National Council elections. The Nidwalden District Administrator then emphasised that the cantonal constitution and the cantonal election and voting law fundamentally regulated cantonal elections (and votes). It had not been the intention of the cantonal legislature to restrict the right of the Swiss abroad to vote in the National Council elections with the reference in Art. 2 para. 3 EG PRA. As in the canton of Obwalden, in the canton of Nidwalden Swiss abroad are therefore also entitled to sign election proposals. 32

The candidates must be designated on the election proposal with their surname, first name, occupation, year of birth and residential address. Each proposed person must confirm in writing on the election proposal that he or she accepts a possible election. The Cantonal Voting Office shall check the eligibility of the applicants and the eligibility of the proposed persons to stand for election. Nominations submitted by ineligible persons shall be eliminated; the names of nominated persons who do not have the capacity to stand for election shall be deleted. If only one valid candidature is registered by 12.00 noon on the 48th day before the election, the cantonal government shall declare that person elected. 33

3. Voluntary registration procedure

34 A voluntary registration procedure and the announcement of candidatures within the meaning of Art. 47 para. 1bis PRA is currently only known in the canton of Glarus. Candidates for office in the canton of Glarus may register their candidature for the National Council with the State Chancellery of the canton of Glarus no later than the eighth Monday before the day of the vote. In addition to the office sought, the State Chancellery must also be informed of the candidate's surname, first name, sex, date of birth, place of origin (including cantonal affiliation), occupation and place of residence (including postcode). The candidature must then be confirmed by signature. The State Chancellery then ensures that the electorate is appropriately informed of the candidacies notified within the deadline, as a rule by posting them on the canton's website. However, despite the voluntary registration procedure, all eligible persons may be elected at the ballot.

III. COMMENTARY ON THE TEXT OF THE NORM

A. Majority voting procedure (para. 1)

1. Constituencies in which only one member of the National Council is to be elected (single-member constituencies; majoritarian cantons)

35 Constituencies in National Council elections are the cantons. The term cantons also includes the former half-cantons. The 200 National Council seats are distributed among the cantons according to population, with each canton having at least one seat. The decisive factor is the share of the cantons in the permanent resident population of Switzerland, i.e. including foreign residents who are not entitled to vote and also minors. However, the number of Swiss abroad entitled to vote in the respective canton is not taken into account. Based on the permanent resident population figures and taking into account the seat guarantee of each canton, the Federal Council shall determine with binding effect how many seats the individual cantons will be allocated in the following overall renewal election of the National Council.

36 Cantons with comparatively low numbers of permanent residents are only entitled to at least one National Council seat, which must be filled by a majority vote in accordance with Art. 47 para. 1 PRA, because of the seat guarantee.

Such single-member constituencies or majoritarian cantons will be the cantons of Uri, Obwalden, Nidwalden, Glarus, Appenzell Ausserrhoden and Appenzell Innerrhoden in the overall renewal elections of 2023. The permanent resident population figures of the cantons of Uri, Obwalden, Glarus and Appenzell Innerrhoden are lower than the distribution figure, which means, on the one hand, that these cantons would be left empty-handed without a seat guarantee and, on the other hand, that the resident population of these cantons would be over-represented in the National Council, which would impair the equality of voting power.

2. Every eligible person

Unlike in the proportional representation cantons, there are no (party) lists in the majority election. In principle, votes can be cast for any eligible person. According to Art. 143 FC, all persons eligible to vote are eligible to be elected to the National Council. Pursuant to Art. 136 para. 1 FC, all Swiss citizens who have reached the age of 18 and who are not incapacitated due to mental illness or mental incapacity are entitled to vote. Persons who are excluded from the right to vote and to stand for election are persons who are under comprehensive guardianship due to permanent incapacity to judge or who are represented by a person authorised to make provisions. Swiss citizens abroad who have reached the age of 18 and who are not excluded from the right to vote are also eligible to vote in the National Council elections. Registration with the Swiss representation abroad within the meaning of Art. 19 para. 1 ASG is not required for this purpose. Only the exercise of the right to vote by Swiss citizens abroad, but not eligibility, requires registration. 37

The right to vote and to be elected in federal matters, and to that extent also eligibility to vote in National Council elections, is regulated conclusively by federal law. The cantons are not permitted to provide for further eligibility requirements - such as an age limit or a residence requirement in Switzerland or in the canton - or to otherwise deviate from the requirements under federal law. 38

For those majorities cantons that provide for the possibility of a silent election in cantonal law (currently NW and OW), it should be specified with regard to eligibility that any eligible person can be nominated for election. However, if several persons are nominated validly and in due time and silent election is therefore excluded, only persons whose names are pre-printed on the ballot 39

paper and who have been nominated in due form and in due time may be voted for (so-called numerus clausus). Votes cast for candidates whose names are not pre-printed are invalid. In this respect, there is an alignment with the proportional representation system.

40 Not to be confused with eligibility is incompatibility. Incompatibility means that a person may not simultaneously exercise two official functions or an official function and a certain private activity. A person who performs a function incompatible with a particular office may well be eligible for that office. However, after election to office, he or she must give up one of the incompatible functions.

3. Relative majority

41 In majoritarian cantons, the person who receives the most votes is elected. Consequently, the election takes place with the relative majority of the votes in a ballot. In contrast to the majority election customary in Switzerland with an absolute majority in the first ballot and a relative majority in the second ballot, the election to the National Council in single-member constituencies does not require a majority of votes, but "merely" the most valid votes in the first and also only ballot.

42 This atypical majority voting with a relative majority in one ballot is explained by the federal government's endeavour to hold the National Council elections nationwide on a single date.

4. Decision by lot in the event of a tie

43 If two eligible persons have obtained the same number of votes, the election or non-election is decided by lot. Even if the National Council elections are federal elections, the lot is to be drawn in the canton concerned by order of the cantonal government and not by order of the Federal Council. The cantonal law determines which cantonal authority draws the lot on the order of the cantonal government. The drawing of lots must effectively guarantee both candidates the same probability (50%-50%) of being elected and must in principle be carried out manually. The use of technical means in the drawing of lots requires the prior approval of the Federal Council.

44 The random element inherent in the drawing of lots may appear as a "foreign body" within the otherwise strictly formal National Council election proce-

dure. However, by drawing lots, a separate casting of lots by the eligible voters and the associated delay of the election process can be avoided. The drawing of lots as such is also unobjectionable from the point of view of the principle of democracy and equality of electoral rights.

In connection with the general renewal election of 23 October 2011 and the equality of votes of two candidates for the National Council in the canton of Ticino, the Federal Supreme Court had to rule on the right to a recount in the event of a tied vote in National Council elections. The Federal Supreme Court came to the conclusion that the recount in federal elections and votes is conclusively regulated by Art. 11 VPR, which is why a close result or a tie cannot in itself justify a claim for a recount. Consequently, in addition to the close result or the tie, concrete indications of an incorrect count or unlawful conduct on the part of the responsible bodies must be presented. If there are no such grounds for suspicion, there will be no recount, but - in the event of a tie - a direct decision by lot. 45

B. Publication of candidatures (para. 1bis)

1. Voluntary election registration and publication procedure

In contrast to proportional elections, which require the prior registration of candidates in order to determine the lists, major elections may in principle be held without a prior election registration procedure and without prior formal notification of election proposals. The group of candidates is open and any (eligible) person may be entered on the ballot paper during the ballot - subject to the obligatory registration procedure in the case of the possibility of a silent election. For practical reasons, however, a non-formal announcement of candidates by individual parties and groups usually takes place in the run-up to the ballot, even in majority elections. Already in BGE 113 Ia 291 E. 3a, the Federal Supreme Court stated that "ideally, the citizen should be able to express, disseminate and discuss all information about all possible candidates with full equality of opportunity among them, to consider the advantages and disadvantages and only decide on the basis of this information". 46

Art. 47 para. 1bis PRA allows cantons without a legal basis for silent elections and thus without a compulsory registration procedure to introduce a voluntary, formal registration procedure. In contrast to the silent election, this does not necessarily require a cantonal legal basis and can be introduced directly 47

on the basis of federal law. If the possibility of formal registration exists, candidates for office may register their candidature with the cantonal electoral authority up to the 48th day before election day, whereupon the cantonal electoral authority shall publish at least the information mentioned in letters a-g on the candidatures received electronically and in the cantonal official gazette. Cantons that have a voluntary registration procedure are requested by the Federal Chancellery - as are cantons with a silent ballot - to notify the joint registration office of the Federal Chancellery and the Federal Statistical Office of the candidatures in electronic form and also to send it the associated official gazette publication.

48 The registration procedure provided for in Art. 47 para. 1bis PRA is voluntary in two respects: On the one hand, the majority cantons without a silent election are free to introduce a registration procedure. They are not obliged to do so. If a major canton provides for the possibility of registration, candidates for office are also free to register their candidature in advance. On the occasion of the ballot, irrespective of a voluntary registration procedure, it is still possible to vote for every eligible person and not only for registered persons. A compulsory registration procedure, as takes place in the majority cantons with the possibility of a silent ballot, would not be compatible in the majority cantons without a silent ballot with the requirement under federal law that, in principle, all persons eligible to vote are eligible to vote.

49 Art. 47 para. 1bis PRA was introduced into the CPD due to the growing need of voters - especially those residing abroad - for information on candidates for office. In the proportional representation cantons, the electorate's need for information is easily met by the right to inspect and publish the lists, and in the majority cantons with a silent election, the candidacies are also made public. In contrast, before the enactment of Art. 47 para. 1bis PRA, the authorities in majoritarian cantons without a silent ballot were prohibited from preparing information on existing candidacies due to the state's duty of neutrality in elections. The conflict of objectives between state neutrality and a minimum of electronically retrievable information on candidacies for the purpose of forming the political will should be addressed by Art. 47 para. 1bis PRA.

50 The Federal Council agrees when it states in its dispatch on Art. 47 para. 1bis PRA that the use of pre-printed ballot papers with all registered candidatures and blank lines for the handwritten listing of any other eligible person would be "problematic" due to the strict neutrality required in the run-up to elec-

tions. The use of pre-printed ballot papers in a voluntary registration procedure is not provided for by law, and such official influence on the election would not be objectively justifiable - unlike in cantons that know the possibility of a silent election with a compulsory registration procedure. The use of unofficial (pre-printed) ballot papers, which is permissible in elections to the Council of States depending on cantonal law, is excluded in elections to the National Council due to the mandatory use of official ballot papers.

2. Personal data to be published

If a major canton has a voluntary registration procedure, at least the official surname and first name (subparagraph a), the name by which the person is known politically or in everyday life (subparagraph b), the sex (subparagraph c), the home address including postcode (subparagraph d), the home towns including their cantonal affiliation (subparagraph e), affiliation to a party or a political grouping (subparagraph f) and the occupation (subparagraph g) must be disclosed electronically and in the cantonal official gazette. 51

This list largely corresponds to that of Art. 22 para. 2 PRA concerning the information on the nominees required on election proposals in proportional representation cantons. However, the provisions pursue different purposes: while the disclosure of personal data in majoritarian cantons is primarily for the purpose of informing voters about candidates for office, the personal data in proportional representation cantons primarily serves to verify the eligibility of the nominees and to prevent multiple candidacies. These different purposes are probably also the reason why in majoritarian cantons at least, i.e. all, the personal data listed must be published, whereas in proportional representation cantons only the cleansed election proposals (i.e. the lists) with the official name and first name, year of birth, home towns and place of residence of the candidates may be published. 52

C. Possibility of a silent ballot (para. 2)

1. Silent election

According to Art. 47 para. 2 PRA, cantonal law may provide for a silent election. A silent election means that candidates for an office are declared elected by an authority in an administrative act if in the election registration procedure preceding the election no more persons are proposed for election than 53

there are seats to be allocated. The persons nominated by the electorate by means of election proposals in the registration procedure shall be declared elected without the electorate voting at the ballot box or by postal vote. If silent elections occur, there are regularly agreements between the political parties behind them.

54 Silent elections are judged differently in the doctrine. They are not accorded the same democratic legitimacy as actual popular elections, which is why they are sometimes viewed critically, especially in the election of parliaments. Weber is in favour of abolishing the possibility of silent elections in National Council elections in general, but at least in majoritarian cantons. If the possibility of silent elections to the National Council is retained, a corresponding legal basis should be included in Art. 149 para. 2 FC. In general, however, silent elections are tolerated for reasons of practicability and procedural economy, because no ballot should be held if there are no more candidates available than there are seats to be allocated. The Federal Supreme Court also assumes the admissibility of silent elections, provided that the voters are sufficiently informed in advance of the possibility of such an election and of the necessity of submitting election proposals in due time (obligatory registration procedure).

55 While the silent election of National Council members in proportional representation cantons has been provided for by federal law since the introduction of the proportional representation system, it was initially excluded in the majority cantons "because the entire proposal procedure applicable and developed in proportional representation does not play a role in majority elections". It was not until the enactment of Art. 47 para. 2 PRA in 1994 that the conditions for a silent election in majoritarian cantons were created. Unlike in the case of proportional representation, however, the decision as to whether a silent election should be possible was not taken by the federal legislature, but left to the major cantons (so-called cantonalisation). A silent election is therefore only possible in majoritarian cantons if this is expressly provided for by cantonal law. It is preferable to have a cantonal regulation at the legislative level, especially since it concerns the exercise of political rights. However, in connection with the elections to the cantonal government in the canton of Bern, the Federal Supreme Court also considered a regulation at ordinance level to be permissible.

The last time there was a silent election to the National Council was in the 2007 general election in the canton of Nidwalden. 56

2. Election proposal procedure

In order for a silent election to take place, an election proposal procedure must precede the election. Only in this way is it possible to determine the number of candidatures, to declare a single valid candidature, if any, as elected by silent ballot or otherwise to schedule a ballot. On the other hand, the fact that an election registration procedure has a mandatory character and - in the case of several candidatures - leads to a numerus clausus of valid candidatures is not mandatory and was not provided for when Art. 47 para. 2 PRA was introduced in 1994. It is only since 2008 that there has been a binding requirement for several valid candidatures to be listed on the ballot paper, especially since according to Art. 50 para. 1 and para. 3 lit. a PRA all candidates nominated in due time are to be listed in pre-printed form on the ballot paper and votes are invalid which are cast for candidatures which are not pre-printed. 57

The advantages of a registration procedure lie primarily in the early transparency for those entitled to vote about the candidates standing for election as well as the avoidance of uncertainties in the counting (of names that are not known in detail). Also, the certainty can be created that successful candidates would actually accept the election. 58

The nomination procedure is regulated in detail for proportional representation at federal level. For the majoritarian cantons with a silent election, on the other hand, federal law only stipulates the closing date for nominations on the 48th day (7th Monday) before the election, at 12.00 noon. Otherwise, the PRA does not contain any provisions on the nomination procedure in single-member constituencies or a reference to the relevant provisions on proportional representation. In principle, the majority councils, which permit the silent election, must enact the necessary procedural regulations in a formal law. In doing so, they must observe the requirements for the nomination procedure already arising from Article 34 FC and ensure, for example, that voters are given sufficient time to submit nominations. If the nomination procedure is not conclusively regulated in cantonal law, in view of the harmonisation of the majoritarian election procedure with a silent ballot with the proportional representation procedure, the analogous application of Art. 21 et seq. PRA and 59

Art. 8a ff. VPR on the proposal procedure in proportional representation cantons.

60 At this point, reference is made only to a few "majorz peculiarities" resulting from federal law concerning the proposal procedure:

61 While the deadline for registering to vote in the proportional representation cantons is to be determined in cantonal law in accordance with Art. 21 para. 1 PRA, the 48th day (7th Monday) before the election, 12.00 noon, is the deadline for registering to vote in the majoritarian cantons by federal law. One could conclude from Art. 8a para. 2 PRA that it is open to the major cantons with the possibility of silent elections to provide for an earlier election registration deadline that deviates from Art. 47 para. 2 PRA. In the author's view, however, setting an earlier deadline for registering to vote would not be compatible with Art. 47 para. 2 PRA. In view of the comparatively small number of election proposals to be examined in majoritarian cantons, there is also no reason to bring forward the deadline for registering for elections for organisational reasons. The deadline for registering to vote in major-majority cantons with a silent ballot is therefore prescribed by federal law and - unlike in the proportional representation cantons - cannot be brought forward.

62 No later than the day after the deadline for registering to vote, the major cantons with a silent vote must each send the Federal Chancellery a copy of all election proposals. This is the only way the Federal Chancellery can recognise prohibited multiple candidacies in different cantons and delete multiple candidates from a list or an election proposal. In fact, as a rule, the candidature in the majority canton is to be deleted, especially since the deadline for registering for elections in proportional representation cantons is regularly brought forward and the name proposed more than once is already on a list.

63 Nominations in single-member constituencies may only contain the name of one eligible person, especially since only one seat is to be filled. The sample election proposal shown in Appendix 3a of the VPR therefore appears to be unsuitable for majoritarian cantons. It is advisable to provide election proposal forms that only allow the nomination of one person. A specific designation of the election proposal for differentiation purposes can be dispensed with in single-member constituencies.

64 The cantonal legislature must regulate the quorum of signatures in majoritarian cantons with a silent election. These should be set in such a way that they

do not excessively restrict the freedom of choice of candidates and voters, but are nevertheless suitable to prevent or at least impede non-serious election proposals. In the cantons of Nidwalden and Obwalden, which permit the silent election, an election proposal must be signed by at least five voters, which satisfies these requirements. Finally, voters in majoritarian cantons, like those in proportional representation cantons, have the right to inspect the election proposals. Voters should not only be able to see who is standing for election, but also to know who has signed the nomination. According to the Federal Supreme Court, this is a suitable means of obtaining clarity about the political intentions of the nominee.

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COMMENTARY ON

Art. 48 PRA

A commentary by Katja Gfeller

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Art. 48 Ballot papers

The cantons shall arrange for a ballot paper to be delivered to each person eligible to vote at least three weeks and no more than four weeks prior to the polling day.

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I. HISTORY OF ORIGINS

When the current (mixed) National Council electoral system was introduced in 1919, the Federal Act on the Election of the National Council provided for the delivery of election material to voters on the Friday before the election Sunday. However, this provision only applied to the proportional cantons, i.e. those cantons with more than one National Council seat. The time of delivery of the ballot papers in the majority cantons, i.e. the cantons with only one National Council seat, was not regulated by federal law. It was not until the enactment of Art. 33 para. 2 PRA (for proportional representation cantons) and Art. 48 PRA (for major cantons) in 1976 that it was stipulated uniformly for all cantons that those entitled to vote should be in possession of the ballot papers ten days before election day. This period was considered necessary so that voters could study the election proposals and fill in the ballot paper in peace. 1

With Art. 33 and Art. 48 PRA, the responsibility for printing and distributing the election material was also regulated uniformly for all cantons for the first time and transferred to the public sector. Previously, this was governed by cantonal law. In certain cantons, it was not state agencies but the parties that were declared responsible for the production and distribution of the (non-official) ballot papers. With the enactment of the PRA, the cantons were then obliged to print and distribute the election documents in order to improve the equality of opportunity for candidates. This was accompanied by the introduction of the principle of compulsory use of official ballot papers, i.e. ballot papers produced and handed out by the authorities, in federal elections and votes. 2

With the partial revision of the PRA of 26 September 2014, the time of delivery of the electoral material in federal elections was brought into line with that in federal referendums and thus brought forward to the fourth to last week before election day. 3

II. SIGNIFICANCE OF THE PROVISION

A. Jurisdiction and time of service

4 Art. 48 PRA primarily determines the time or time frame for the delivery of ballot papers to voters in National Council elections in majoritarian cantons. The ballot papers must reach voters resident in Switzerland at least three weeks and at the earliest four weeks or in the fourth to last week before election day.

5 Article 48 of the PRA also enshrines in law the responsibility of the cantons (and communes) for the delivery of electoral material to voters.

B. Ballot box elections

6 In Switzerland, elections of members of public authorities can in principle be held at a meeting of the electorate or by ballot - in person or by post.

7 At cantonal level, Glarus and Appenzell Innerrhoden, two of the current six major cantons, still have assembly democracy in the form of the Landsgemeinde. In the canton of Appenzell Innerrhoden, the member of the Council of States must be elected at the Landsgemeinde. However, as Art. 48 of the PRA obliges the cantons with a majority vote to send a ballot paper to those entitled to vote, the federal legislature implicitly requires them to elect a member of the National Council by ballot. The election of a National Council member at an assembly is excluded.

C. Voting in person or by post

8 The partial revision of the PRA in 1993 put postal voting on an equal footing with voting at the ballot box. The cantons are obliged to ensure a simple procedure for postal voting. In this sense, voters receive all the documents necessary for exercising the right to vote at home by post. Voting documents are sent automatically to all persons entitled to vote. Even if a person entitled to vote wishes to cast the vote at the ballot box, he or she receives the voting documents sent to his or her home in advance.

9 The automatic delivery of voting documents also applies in principle to Swiss citizens living abroad who are entitled to vote in the National Council elections. However, Swiss citizens living abroad must register once with the com-

mune responsible for them in order to exercise their political rights. Entry in the electoral register is not automatic.

D. Legal comparison

Cantonal law generally specifies which other documents (in particular the voting card, voting envelope, explanatory notes, return envelope) must be sent to voters in addition to the ballot papers. 10

Moreover, the cantonal legal systems also stipulate by law the time of delivery in the fourth to last week before election day, although these provisions do not have any independent significance compared to Art. 48 PRA. At this point, reference is made only to the regulation in the canton of Appenzell Ausserrhoden, according to which the municipalities ensure that the election material and the election instructions are in the possession of the voters at the latest ten days before the election Sunday. This provision still dates back to the enactment of the Appenzell law in 1988 and has not yet been adapted to the legal situation in force since the partial revision of the PRA of 26 September 2014. Of course, based on Art. 48 of the PRA, the election material must also be delivered in the canton of Appenzell Ausserrhoden in the fourth-to-last week before the election day. 11

III. COMMENTARY ON THE TEXT OF THE NORM

A. Responsibility of the cantons (and communes)

Even though the National Council elections are federal elections and the federal legislature has regulated the election procedure in Art. 16-57 PRA, the cantons and communes are essentially responsible for conducting the National Council elections. This is also made clear by the circular letter to the cantonal governments issued by the Federal Council before each general election, which contains numerous instructions on the many tasks to be performed by the cantons in the National Council elections. Since the enactment of the PRA, these tasks also include the production, printing and delivery of ballot papers to voters. The costs for the preparation and delivery of the election documents are also borne by the cantons. 12

The intra-cantonal division of responsibilities for the preparation, printing and mailing of the electoral material between the canton and the communes 13

results from cantonal law. The current major cantons Glarus, Nidwalden, Obwalden, Uri and Appenzell Ausserrhoden declare the communes to be responsible for delivery. In the canton of Appenzell Innerrhoden, which has no communes, the distribution of election documents is the responsibility of the districts as the lowest administrative units.

14 If the cantons, communes or districts delegate or outsource tasks such as the printing, packaging or dispatch of election documents, they must ensure through appropriate supervision that the elections are conducted correctly and that the Federal Council's instructions concerning the conduct of the elections are complied with.

B. Time of delivery

15 Pursuant to Art. 48 PRA, the ballot papers must be delivered to voters no earlier than four weeks and no later than three weeks, i.e. in the fourth-to-last week before election day. For the delivery of election material in the proportional representation cantons, art. 33 para. 2 PRA provides for the same time. It is not clear from the law, either for the proportional representation cantons or for the majority cantons, whether the cantons send the election documents in the fourth-to-last week before election day or whether they must then reach the voters. However, if one takes into account that the time of delivery of the election material was adjusted to that of the voting documents for federal votes in the course of the partial revision of the PRA of 26 September 2014, it becomes clear that the documents must reach those entitled to vote in the fourth-to-last week before election day. This is due to the wording of Art. 11 para. 3 PRA, according to which, in the case of referendums, those entitled to vote receive the documents required under cantonal law to cast a valid vote at least three and at the earliest four weeks before the day of the vote, which must also apply to the election documents.

16 The delivery of the documents must be coordinated with the post office in such a way that the statutory delivery deadlines can be met. An untimely delivery of the election material is in principle an impairment of the free formation of will protected under Art. 34 para. 2 FC, especially since the freedom to form an opinion also implies that the legally stipulated delivery deadlines are observed and that sufficient time is thus available to deal with the profiles of the candidates. According to the Federal Supreme Court, if late delivery leads to de facto exclusion from the right to vote, it is no longer possible to speak of

the correct composition of active citizenship. The late delivery of the electoral material is an irregularity in the preparation of the National Council election within the meaning of Art. 77 para. 1 lit. c PRA, which, according to the established case law of the Federal Supreme Court, must be complained about immediately. If the voter fails to immediately complain about the late delivery of the ballot paper, even though it would have been reasonable to expect him to do so, he forfeits in principle the right to contest the election. It should be pointed out that not only those directly affected by the late delivery, but all persons entitled to vote in the matter - if they are aware of it - are obliged to complain and are then entitled to appeal. In accordance with the constant case law of the Federal Supreme Court on the annulment of elections and votes, even in the case of demonstrably late delivery of the election material, a ballot that has already been held is only annulled if it is within the realm of possibility that voters were actually unable to vote due to the late delivery and the election result could therefore be distorted.

17 An exception to the delivery deadline provided for in Art. 48 PRA applies to Swiss citizens abroad who are entitled to vote. Ballot papers may be sent to voters resident abroad no earlier than one week before they are officially sent out. This also applies to cantons that use the electronic voting channel for the general renewal elections. If the voting material arrives too late at the polling commune despite being sent in good time, or if the returned ballot paper or ballot paper arrives too late at the polling commune, the voter resident abroad may not derive any legal claims from this. Swiss abroad who wish to cast their vote in person at the ballot box and collect the voting material directly from the electoral commune must inform the electoral commune of this in writing or by coming in person. The polling commune shall retain the voting material provided that it receives the notification at least six weeks before the poll.

C. Official ballot papers

18 Pursuant to Art. 48 of the PRA, a ballot paper must be sent to those entitled to vote. Since the enactment of the PRA, only official ballot papers may be used in National Council elections. Non-official (also off-the-books) ballot papers on which political groups - mostly parties - list their candidates are not permitted.

19 In those cantons with majorities in which cantonal law provides for the possibility of a silent election in the election to the National Council, the names of

all candidates proposed within the deadline are pre-printed on the ballot paper. Conversely, in those major-majority cantons that do not provide for the possibility of a silent ballot, blank official ballot papers must be distributed. This requirement already results from the state's strict duty of neutrality in popular elections, which prohibits any influence on the free formation of will and the exercise of will. The distribution of ballot papers on which the name of the incumbent is pre-printed would also not be compatible with the prohibition of official intervention in elections resulting from the guarantee of political rights. Only the printing and mailing of party-neutral ballot papers is permissible in the sense of official assistance.

20 In contrast to the proportional representation cantons, no election instructions are distributed in the majority cantons - due to the simplicity of the majority voting procedure.

D. Election day

21 According to Art. 19 para. 1 PRA, elections for the ordinary general renewal of the National Council take place on the second last Sunday in October. By-elections and supplementary elections are scheduled by the cantonal government for the next possible date. The provision applies to all cantons, i.e. both the proportional representation and the majority cantons. The delivery of the electoral material in the fourth-to-last week before election day thus takes place at the end of September each year.

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COMMENTARY ON

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Art. 49 Invalid ballot papers

[1] Ballot papers are deemed invalid if they:

a. contain the names of more than one person;

b. are not official;

c. have been completed other than by hand;

d. contain defamatory remarks or obviously irrelevant markings;

e. ...

[2] Grounds for invalidity or nullity that relate to the cantonal procedure (official voting envelope, validation stamp, etc.) remain reserved.

[3] In the case of electronic voting pilot schemes, the legislation of each canton conducting such a scheme determines the requirements according to which votes are validly cast and the grounds for invalidity.

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I. HISTORY OF ORIGINS

1 Art. 49 para. 1 PRA, which contains a catalogue of grounds for invalidity under federal law for ballot papers in majoritarian cantons, dates back to the enactment of the PRA in 1976. Already in the Federal Act on the Election of the National Council of 14 February 1919, which regulated the National Council election procedure before the enactment of the PRA, grounds for invalidity could be found in various provisions, but these were not applicable to the majority voting procedure in single-member constituencies. Before the enactment of the PRA, the validity of ballot papers in majoritarian cantons had to be assessed exclusively on the basis of cantonal law.

2 According to aArt. 49 para. 1 lit. e PRA, ballot papers posted at a foreign post office were invalid. This made it considerably more difficult for Swiss citizens abroad who were entitled to vote to exercise their voting and electoral rights insofar as they had to travel to Switzerland to exercise their political rights. With the introduction of postal voting rights for the Swiss abroad in 1992, Art. 49 para. 1 lit. e PRA was repealed. Otherwise, the grounds for invalidity regulated in Art. 49 para. 1 PRA since 1976 have remained unchanged to this day.

3 Art. 49 para. 2 PRA, which refers to grounds for invalidity and nullity connected with the cantonal procedure, was inserted with the partial revision of 1 September 1993. The provision corresponds exactly to Art. 12 para. 2 PRA, which provides for a corresponding reservation for ballot papers in substantive votes and has already existed since the PRA was enacted in 1976. Neither the 1975 message on Art. 12 para. 2 PRA nor the message on the partial revision of the PRA of 1993, however, make any further reference to the initially differing and then concurring regulations on cantonal grounds for invalidity in proportional representation and majority cantons. It can be assumed that the enactment of Art. 49 para. 2 PRA was an editorial addition, especially since there are no apparent reasons for a different approach.

4 Art. 49 para. 3 PRA, according to which the law of the implementing canton defines the requirements for valid voting and the grounds for invalidity for trials with electronic voting, entered into force on 1 January 2003. The intention was to consolidate the legal basis for e-voting pilot projects.

II. SIGNIFICANCE OF THE PROVISION

A. Determination of the election result

According to Art. 34 para. 2 FC, the guarantee of political rights protects the free formation of will and the undistorted casting of votes. This also gives rise to a right of those entitled to vote to careful sorting and qualification of the ballot papers and to correct counting of the votes. 5

The determination of the results of the National Council elections - and in this respect also the upstream assessment of the validity of the ballot papers - is basically carried out in the municipal election offices. As a rule, these offices are composed of administrative employees and voters. The counting is therefore not carried out exclusively by the administration, but with the participation of a politically representative collegiate body. The cantons must report any deviating responsibilities to the joint reporting office of the Federal Chancellery and the Federal Statistical Office. Ultimately, the regulation of the counting procedure and also the internal cantonal responsibilities is therefore a matter of cantonal law. 6

For substantive votes, Art. 13 para. 1 PRA expressly stipulates that blank and invalid ballot papers are not taken into account when determining the result of the vote. The same applies to blank and invalid ballot papers in National Council elections. When the PRA was enacted, this was still explicitly regulated by aArt. 50 PRA for National Council elections in majority cantons. From 1994 to 2008, a corresponding provision was contained in Art. 20a PRA as a general regulation for National Council elections in major and proportional representation cantons. However, Art. 20a PRA was repealed in the course of the formal revision of federal law of 22 August 2007, since the determination that blank and invalid ballot papers were not to be taken into account was based on Art. 37 para. 1, 40, 46 para. 1 and 47 para. 1 PRA. Blank and invalid ballot papers therefore have no effect in National Council elections, even if this is no longer explicitly regulated at federal level. 7

Art. 49 PRA regulates the invalidity of ballot papers. If a ballot paper that is valid in itself contains the name of an ineligible person, it is - terminologically correct - an invalid vote. As a result, invalid votes - just like invalid ballot papers - are disregarded when determining the election result. 8

B. Catalogue of grounds for invalidity

9 Art. 49 para. 1 PRA contains a consolidated catalogue of general grounds for invalidity of ballot papers in National Council elections in single-member constituencies. The provision applies to both in-person voting at the ballot box and postal voting. Largely the same grounds for invalidity are provided for ballot papers in proportional representation in Art. 38 para. 1 PRA and for ballot papers in federal referendums in Art. 12 para. 1 PRA. The summary and listing of the grounds for invalidity was primarily intended to make it easier for the electoral and election offices to assess the validity of ballot papers.

10 Art. 49 para. 1 PRA is limited to listing formal grounds for invalidity. In formal terms, this must be a conclusive list under federal law in the interest of a uniform and rapid determination of the election result. In addition to formal grounds, however, there may also be substantive grounds for invalidity (e.g. exclusion from the right to vote within the meaning of Art. 2 of the PRA or the ineligibility of the person designated).

11 Furthermore, according to Art. 49 para. 2 PRA, reasons related to the cantonal procedure can lead to the invalidity (or nullity) of a ballot paper. The cantons also know catalogues of grounds for invalidity. In the election of the National Council, however, only those grounds for invalidity that go beyond Art. 49 para. 1 PRA are of independent significance.

12 The grounds for invalidity provided for in the PRA and in cantonal law describe circumstances in which the conduct of the voter leads to the invalidity of his or her vote. If, however, the error originates on the official side, e.g. if faulty ballot papers are issued, then it is not an invalid vote but an electoral error that may lead to the invalidation and repetition of the election.

13 Overall, when assessing the validity of ballot papers, the formal grounds for invalidity under federal law according to Art. 49 para. 1 PRA, substantive grounds for invalidity in connection with the right to vote and grounds for invalidity under cantonal law must therefore be taken into account. The decision on the validity or invalidity of a ballot paper must be based on these electoral law requirements and is not at the discretion of the deciding electoral body.

C. Comparison of laws

In the canton of Glarus, the communal election offices, consisting of at least four members and headed by the communal clerk, decide on the validity or invalidity of ballot papers. In addition to the grounds for invalidity under federal law, ballot papers are also invalid under Glarus law if they are cast without a signed voting card, if they are cast in a manner not provided for by law and if they do not clearly indicate the will of the voter. A ballot paper submitted by post is also invalid if the mailing contains more than one ballot paper or ballot envelope or if the ballot paper or ballot envelope contains more than one ballot paper or ballot envelope on the same matter. Ballot papers submitted late shall also be disregarded in determining the result. The reason for invalidity shall be noted on the ballot papers declared invalid and the invalidity shall be confirmed by signature by a member of the electoral office. 14

The canton of Glarus was the only major canton to be a member of the Vote eléctronique consortium and was thus involved in e-voting trials. After the Federal Council rejected the request of the consortium cantons to be able to offer e-voting for Swiss citizens abroad on the occasion of the 2015 National Council elections, work on the introduction of e-voting in the canton of Glarus has been suspended. The electronic voting channel is therefore not available to voters in Glarus - not even for the National Council elections - until further notice. 15

In the canton of Appenzell Ausserrhoden, the counting and thus also the assessment of the validity of ballot papers is carried out by a counting office elected by the municipal council and consisting of at least five members. In addition to the grounds for invalidity under federal law, ballot papers that are not inserted in the official voting envelope are invalid under cantonal law. Voting by post is only valid if the voting (legal) document and the voting envelope (with the ballot paper) are in the delivery envelope and the vote has arrived at the municipal office before the polls close. The cantonal law of Appenzell Ausserrhoden does not currently contain any provisions on electronic voting. 16

In the canton of Appenzell Innerrhoden, federal ballots are conducted in the districts. The assessment of the validity of ballot papers is carried out by the polling offices located at district level as part of the determination of the election results. According to cantonal law, ballot papers that do not clearly indicate the will of the person voting are invalid. Ballot papers submitted by post 17

are then invalid if they have arrived at the polling station after the polls have closed, if there are ballot papers in the same envelope with other ballot papers for the same vote that are not identical, and if the declaration that the vote corresponds to the will of the person voting is not signed. Innerrhoden law also does not yet have any provisions on electronic voting.

18 In the canton of Uri, the election results are determined by the polling station offices in the communes, whereby the control and counting can be delegated to individual office members. According to cantonal law, ballot papers are invalid if they do not clearly indicate the will of the voter, are thrown into the ballot box without an envelope or with a private envelope, are in the same envelope with other ballot papers for the same vote or election, have not been placed in the correct voting envelope or are torn. In the case of postal voting, ballot papers shall be invalid if the voting card is not enclosed, the voting card is not signed, the return envelope does not contain the required enclosures or the voting envelope is provided with information that removes the secrecy of the vote. In the event of disagreement or doubt as to whether a ballot paper is to be considered valid, invalid or blank, the polling station present shall decide. As far as electronic voting is concerned, the Uri Election and Voting Act only regulates the responsibilities for enacting further, implementing provisions and conducting trials. So far, however, attempts to supplement the law with corresponding implementing provisions have failed, which is why the law of Uri does not currently provide any grounds for invalidity for electronic voting.

19 In the canton of Obwalden, the counting and assessment of the validity of ballot papers is the responsibility of the communal electoral offices. According to cantonal law, ballot papers that are not intended for this (National Council) election, that do not clearly indicate the will of the voter, that are collected, filled in or altered according to plan and those that are not stamped when voting in person are invalid. In the case of postal voting, the vote shall also be invalid if it is received by the polling station after the polls have closed, if the voting card is not enclosed, if the voting card is not signed, if there are several identical or non-identical voting or ballot papers in the voting envelope for the same vote or election, or if the voting or ballot paper is in an unofficial or unsealed voting envelope. In the case of invalidated ballot papers, the reason must be stated on the back of the ballot paper. In the canton of Obwalden, there is a legal basis for issuing implementing regulations on electronic voting.

However, such regulations, and in this respect a regulation with reasons for invalidity in electronic voting, have not yet been issued.

20 In the canton of Nidwalden, the voting results are determined by the communal electoral offices, which also assess the validity of the ballot papers. Terminologically, the Nidwalden Introductory Act to the PRA differentiates between the validity of the (postal) vote and the validity of the ballot papers. Only the ballot papers of valid postal votes are placed in the ballot box for later counting, while preserving the secrecy of the ballot. A postal vote is valid if the voter is entered in the electoral register, the vote has been received by the polling station before the poll closes and the voting card has been signed by hand. Postal votes declared invalid shall be treated as invalid ballot papers. In addition to the invalidity rule under federal law, ballot papers that do not clearly indicate the will of the person voting are invalid. If a reply or voting envelope contains several ballot papers for the same vote, they are all invalid. They shall count together as one invalid vote. The reason for invalidity must be noted on the invalidated ballot papers. As in the canton of Obwalden, in the canton of Nidwalden there is a legal delegation of authority to the cantonal government to issue implementing provisions on electronic voting, but these have not yet been issued.

21 In the 2019 National Council elections, the assessment of the validity of the ballot papers in the current six Majorz cantons showed the following picture:

- Canton Glarus: 106 invalid ballots out of 10,578 cast = 1%.
- Canton Uri: 104 invalid ballots out of 12,282 cast = 0.8%
- Canton Appenzell Ausserrhoden: 65 invalid ballots out of 16,126 cast = 0.4%
- Canton Appenzell Innerrhoden: 147 invalid ballot papers out of 5'820 received = 2.5%
- Canton Obwalden: 285 invalid out of 14'920 ballots cast = 1.9%
- Canton of Nidwalden: 148 invalid votes out of 15,038 cast = 0.9%.

The proportion of invalid votes in National Council elections in Majorz cantons varies greatly from canton to canton, but is low overall, which can be explained by the comparatively simple majority voting procedure and the fact that only one person is to be elected.

III. COMMENTARY ON THE TEXT OF THE NORM

A. Grounds for invalidity under federal law (para. 1)

1. Names of different persons (lit. a)

22 According to Art. 49 para. 1 lit. a PRA, ballot papers are invalid if they contain the names of different persons. This ground for invalidity is - obviously - a specific feature of the election in single-member constituencies and ultimately serves to protect the undistorted casting of votes pursuant to Art. 34 para. 2 FC. Difficulties of assessment should thus be excluded from the outset and it should be ensured that the will of the electorate is clearly expressed.

2. Non-official ballot papers (lit. b)

23 According to Art. 5 para. 1 sentence 1 PRA, the official ballot papers, i.e. the ballot papers handed out to voters by the authorities, must be used for voting. This principle of the compulsory use of official ballot papers was introduced with the enactment of the PRA in 1976. Consequently, Art. 49 para. 1 lit. b PRA declares non-official ballot papers invalid. A valid vote requires the exclusive use of the ballot paper officially produced for the election in question. Voting on a forged, copied or - by individuals or organisations - self-produced ballot paper is therefore invalid. In contrast, any (slight) damage to the official ballot paper or defective printing has no influence on the official character and validity, as long as the will of the person or persons entitled to vote is still recognisable.

24 In majoritarian cantons with the possibility of a silent election, according to Art. 50 para. 1 PRA, all candidates nominated in due time must be listed on the ballot paper in pre-printed form. Conversely, the majoritarian cantons without the possibility of a silent ballot must print blank official ballot papers on which voters can list each eligible candidate by hand.

25 Prior to the enactment of the PRA, the use of both official and unofficial ballot papers was permitted in National Council elections, and even today certain cantons permit voting with unofficial ballot papers in cantonal and communal elections. Unofficial ballot papers are ballot papers on which political groups - mostly parties - list their candidate or individuals list themselves. The advantage of unofficial ballot papers is that a candidate - from a party or by

himself or herself - can thus be recommended for election directly with the election documents.

With the interpellation no. 12.3291 "Simplification of the National Council elections in major cantons", it was proposed in 2012 to also or again permit unofficial pre-printed ballot papers in major cantons. In the opinion of the interpellant, candidates and political groups should be able to have unofficial ballot papers sent with the voting documents in order to make it easier for voters - and especially the Swiss abroad - to know the necessary information about the candidates. The Federal Council, however, was clearly against the admission of non-official ballot papers in the election of the National Council in majoritarian cantons. According to the Federal Council, the compulsory use of official ballot papers is an important achievement of the 1976 PRA because it ensures equal treatment of all candidates and groups and prevents election manipulation. In the course of the partial revision of the PRA of 26 September 2014, the re-admission of unofficial ballot papers in majoritarian cantons was abandoned and the possibility of a voluntary registration procedure was introduced instead. However, this has so far only been practised in the canton of Glarus. 3. 26

3. No handwritten filling in (lit. c)

Ballot papers that are filled in other than by hand are invalid according to Art. 49 para. 1 lit. c PRA. This ground for invalidity results from the general principle according to Art. 5 para. 2 sentence 1 PRA, according to which ballot papers and ballot papers without a form must be filled in by hand. The handwritten correction of the expression of will is permissible as long as the will of the person or persons voting remains clearly recognisable. On the other hand, ballot papers that have been "pre-filled" by machine would qualify as invalid, whereby such ballot papers would regularly already lack official character. The handwriting requirement is intended to prevent so-called vote catching. This is understood to mean the planned collection, filling in or alteration of ballot papers or the distribution of such ballot papers or ballot papers. Vote catching is punishable by a fine. 27

If the Federal Council has granted a basic authorisation for the experimental use of the electronic voting channel, the provisions on voting at the ballot box and postal voting may be deviated from to the extent necessary for this pur- 28

pose. In particular, the validity requirement of handwriting may not be maintained in the case of pilot trials with electronic voting.

4. Defamatory statements or obvious markings (lit. d)

29 According to the Federal Act on the Election of the National Council of 14 February 1919, ballot papers containing defamatory remarks were already invalid. Any insulting or offensive expression is to be understood as defamatory.

30 With the enactment of the PRA, the invalidity of defamatory remarks was incorporated into the new law and supplemented by the "obvious markings". According to the Federal Council, this term includes any kind of additional signs on the ballot paper. The inadmissibility of obvious markings serves to protect the secrecy of the ballot against individual violations on the part of individual voters. The right to a secret ballot arises from the constitutional freedom to vote under Article 34 para. 2 FC and is also expressly enshrined in law in Article 5 para. 7 FC. The right includes, among other things, that the ballot papers cannot be subsequently assigned to individual voters. A violation of the right to a secret ballot is thus in particular those ballot papers that reveal the identity of the author through marking. However, comments that "merely" clarify the will of the voter can also lead to the invalidity of the ballot paper.

B. Grounds for invalidity and nullity under cantonal law (para. 2)

31 The National Council elections are federal elections and are in principle regulated by federal law. However, the National Council elections are held in the cantons or in the political communes. Pursuant to Articles 7 and 8 of the PRA, the cantons are required to enact provisions to ensure the control of voting eligibility, voting secrecy and the recording of all votes in the case of personal and postal voting, and to prevent abuses. The provisions enacted in this sense also include the cantonal regulations on the invalidity of voting and ballot papers.

32 Following the example of Art. 49 para. 1 PRA, the current six major cantons (GL, AR, AI, UR, OW, NW) have enumerated lists of grounds for invalidating ballot papers in their decrees on political rights. In each case, invalidity (not nullity) is mentioned, and in all six majority cantons a distinction is made between "general" grounds for invalidity for voting in person and by post and those that only concern voting by post. In the National Council elections,

however, only those grounds for invalidity that go beyond Art. 49 para. 1 PRA are of independent significance.

In general, according to the law of the current six majority cantons, ballot papers that do not clearly indicate the will of the voter(s) are to be declared invalid. This ground for invalidity serves to protect the undistorted casting of votes within the meaning of Art. 34 para. 2 FC. For example, a ballot paper with a name that - due to a lack of further information or contradictory information - does not clearly indicate a certain eligible person would be invalid. In this sense, illegible information could also lead to the invalidity of the ballot paper. The cantonally widespread rule according to which the submission of several ballot papers on the same matter in one ballot envelope leads to the invalidity of all ballot papers also serves to protect the undistorted casting of votes and also to prevent multiple voting. As indicated in Art. 49 para. 2 PRA, the cantons also have grounds for invalidity related to the voting envelope. In the canton of Uri, for example, ballot papers are invalid if they are not cast in the official voting envelope or if they are cast without a voting envelope. The grounds for invalidity related to the voting envelope are primarily to be understood as organisational measures to safeguard the secrecy of the ballot. 33

In postal voting, there is an increased risk of unauthorised or multiple voting compared to voting in person. To counter this increased risk, all cantons have additional grounds for invalidating postal voting. For example, incomplete documents (in particular a missing voting card or an unsigned voting card) generally lead to the invalidity of the ballot paper cast. Furthermore, handing in an unsealed voting envelope by post - in order to protect the secrecy of the ballot - results in the invalidity of the ballot paper. 34

The cantons have some leeway in enacting grounds for invalidity and can apply a stricter or less strict standard. Ultimately, however, the grounds for invalidity must be justifiable in the light of proportionality and must correspond to a public interest. Excessively formalistic requirements for voting should be avoided in view of the importance of political rights. 35

C. Grounds for invalidity in the case of attempts at electronic voting (para. 3)

The Federal Council may, in agreement with interested cantons and communes, authorise trials of electronic voting that are limited in terms of loca- 36

tion, time and subject matter. Each canton is therefore free to decide whether and to what extent it wishes to provide for this possibility.

37 Pursuant to Art. 49 para. 3 PRA, the law of the implementing canton defines the requirements for valid voting and the grounds for invalidity for trials with electronic voting. Corresponding cantonal regulations are indispensable, especially since, on the one hand, the grounds for invalidity tailored to personal and postal voting cannot be applied to electronic voting. On the other hand, manipulations can quickly affect a large number of people. Provisions should therefore be made in particular to prevent multiple voting or voting by unauthorised persons.

38 In order to be valid, the cantonal provisions require the approval of the Federal Council, which in turn is a condition for the basic authorisation of the Federal Council within the meaning of Art. 8a PRA and Art. 27a VPR. In addition to the basic authorisation, the experimental use of the electronic voting channel in the National Council elections requires authorisation by the Federal Chancellery, which is granted on the basis of art. 27e CPD and the VEleS. The details of the authorisation procedure are set out in the Federal Chancellery's guidelines on the authorisation procedure.

39 In contrast to voting in person and by post, with e-voting there is in principle the possibility of checking the validity of an electronic vote ex ante (and not only ex post). If an e-voting system is set up in such a way that it does not allow voting at all if there is a reason for invalidity, invalid electronic votes could be prevented altogether. For voters, e-voting would therefore have the advantage that they would be informed in advance by the system of any grounds for invalidity and would be able to rectify them. Transparency with regard to the validity of the vote could be clearly improved. On the part of the authorities, the automated verification of the validity of votes and the determination of the election result, which is possible with e-voting, would enable savings in personnel resources.

40 Of the major-majority cantons, trials with e-voting have so far only been carried out in the canton of Glarus. Against this background, only the canton of Glarus knows a catalogue of invalidity grounds for e-voting. However, the trials did not take place in the National Council elections, but in two federal referendums in 2015 and were limited to Swiss abroad in terms of personnel.

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COMMENTARY ON

Art. 50 PRA

A commentary by Katja Gfeller

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Art. 50 Cantons with the possibility of a tacit election

[1] If the possibility of a tacit election is recognised under cantonal law, then the names of all candidates nominated within the period allowed must appear on a pre-printed list on the ballot paper.

[2] In order to vote, the voter shall personally place a cross in the field next to the name of the candidate.

[3] The following are invalid:

a. votes for candidates whose names do not appear on the pre-printed list;

b. ballot papers on which a cross appears next to more than one candidate.

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I. HISTORY OF ORIGINS

Art. 47 para. 2 PRA, which allows majoritarian cantons to provide for the possibility of a silent election in cantonal law, was inserted into the PRA in 1994. In proportional representation cantons, however, silent elections have been possible since the introduction of proportional representation in 1918. 1

Art. 50 PRA, which supplements the (federal) regulation of silent elections in Art. 47 para. 2 PRA and essentially provides for a restriction of eligibility to the persons proposed in the application procedure (so-called numerus clausus), was only inserted with the partial revision of 23 March 2007. From 1994 to 2007, it was still possible to vote for all eligible persons (and not only those proposed in the application procedure) in the majority cantons with the possibility of a silent ballot in the event of more than a single valid application on the occasion of the ballot. 2

II. SIGNIFICANCE OF THE PROVISION

A. General

The cantonal law of the majority cantons may provide for a silent election if only one valid candidature has been received by the competent cantonal authority by the closing date for registration. If a canton has created the necessary legal basis for a silent election and only one valid candidature has been received during the registration procedure, no ballot shall take place. Instead, the single candidate is declared elected by the competent cantonal authority in an administrative act. 3

Art. 50 PRA regulates the procedure for cantons with the possibility of a silent election if several valid candidatures are received during the registration procedure, a silent election is therefore out of the question and a ballot is held. In such a case, according to Art. 50 para. 1 PRA, all candidates nominated in due time must be listed on the ballot paper in pre-printed form. In the ballot, only the pre-printed candidates are eligible for election. Votes cast for candidates who are not pre-printed are invalid. The registration procedure therefore leads to a numerus clausus of electable persons - in deviation from the principle according to Art. 47 Para. 1 PRA, according to which every electable person can be voted for. 4

5 The election procedure in majority cantons with the possibility of a silent election was aligned with that in proportional representation cantons by Art. 50 PRA. Thus, also in proportional representation cantons, there is a compulsory election registration procedure and only the candidates of the electoral district can be elected on the occasion of the ballot. Only if no election proposals are submitted and consequently no lists are available can every eligible person be voted for during the ballot in proportional representation cantons as well.

B. Legal comparison

6 Of the current six cantons (GL, UR, AR, AI, OW, NW), only in the cantons of Obwalden and Nidwalden is it possible to hold silent elections to the National Council.

7 In the canton of Obwalden, if more than one valid candidature is received by the State Chancellery by the end of the registration period on the 48th day before the election (12.00 noon), the State Chancellery shall have the proposed candidates for the National Council printed on an official ballot paper (for voting by ticking) in random order with surname, first name, year of birth, occupation and address. The addition of "previously" or "new" after the name of the candidate is permissible.

8 In the canton of Nidwalden, if there are several valid candidatures, the cantonal electoral office shall produce the ballot paper with the pre-printed candidatures immediately after the election proposals have been cleared. If, in the case of renewal elections, previous members are proposed, they shall be placed at the top of the ballot paper in the order of their voting age; otherwise, the names of the proposed persons shall be listed in alphabetical order. If the nomination has been submitted on behalf of a political interest group, the affiliation of the proposed person to this interest group shall be indicated in brackets; also, if applicable, the addition "previously" shall be added.

III. COMMENTARY ON THE TEXT OF THE STANDARD

A. Pre-printed ballot papers (para. 1)

9 If cantonal law provides for the possibility of a silent ballot, all candidates proposed in due time shall be listed on the ballot paper in pre-printed form. The

cantons (and communes) are responsible for the production of pre-printed ballot papers and their distribution to voters. Only official ballot papers may be used.

While majorities without the possibility of silent elections are prohibited from distributing pre-printed ballot papers, majorities with the possibility of silent elections are obliged to produce pre-printed ballot papers in accordance with Art. 50 para. 1 PRA. The details of the candidates to be printed and the additions ("previous", "new", party affiliation) required or permitted are determined by cantonal law. 10

Art. 7 VPR, according to which pre-printed ballot papers must leave sufficient space to allow the electorate to make their selections and cumulations legible, is not applicable in majoritarian cantons with a silent ballot, especially since only one person is to be elected. 11

B. Handwritten ticking (para. 2)

In order to cast a vote, the voter shall tick the box next to the candidate's name with his or her own hand. The requirement for handwritten ticking also results from Art. 49 para. 1 lit. c PRA, according to which ballot papers are invalid if they are filled in other than by hand. 12

It can then be concluded from Art. 50 para. 2 PRA that in cantons with the possibility of a silent election only the ticking off of candidates proposed in due time is permissible. On the other hand, it is not permissible to write down the names of other persons who are theoretically eligible under Art. 136 para. 1 FC, which is made clear by the ground for invalidity under Art. 50 para. 3 lit. a PRA. 13

C. Grounds for invalidity (para. 3)

Art. 50 para. 3 PRA adds two grounds for invalidity under federal law to the catalogue of grounds for invalidity under Art. 49 para. 1 PRA for cantons with the possibility of a silent ballot. In cantons in which a registration procedure is carried out to enable a silent ballot, the assessment of ballot papers on the occasion of a ballot must take into account, in addition to the grounds for invalidity pursuant to Art. 49 para. 1 PRA, those pursuant to Art. 50 para. 3 PRA as well as the grounds for invalidity associated with the cantonal procedure. 14

15 Pursuant to Art. 50 para. 3 lit. a PRA, votes are invalid if they are cast for candidatures that are not pre-printed. This ground for invalidity has the effect of binding the candidate to the persons proposed in the application procedure. In the absence of a silent election as a result of several valid nominations, only the candidates proposed in the registration procedure and pre-printed on the ballot paper are eligible to be elected on the occasion of the ballot - in contrast to Art. 47 para. 1 PRA. The numerus clausus of electable persons resulting from this obligation is sometimes criticised by the doctrine. According to Weber, in order to better preserve the electorate's freedom of choice, it should be possible to write down the name of each eligible person on a blank line in addition to ticking off pre-printed candidatures.

16 Majority cantons can only elect one person to the National Council due to their comparatively small population. Accordingly, Art. 50 para. 3 lit. b PRA provides that (pre-printed) ballot papers on which more than one candidature is marked are invalid. This ground for invalidity is the counterpart to Art. 49 para. 1 lit. a PRA, according to which (blank) ballot papers (in majoritarian cantons without the possibility of a silent election) are invalid if they contain the names of different persons. The provision - like Art. 49 para. 1 lit. a PRA - is intended to ensure that the will of the electorate is clearly expressed.

17 Invalid ballot papers are not taken into account when determining the election result.

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COMMENTARY ON

Art. 51 PRA

A commentary by Katja Gfeller

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Art. 51 By-elections

Articles 47–49 also apply to by-elections.

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I. HISTORY OF ORIGINS

The provision in Art 51 CPD, according to which by-elections in single-member constituencies are governed by the provisions on majority voting (Art. 47-49 PRA), has existed since the enactment of the CPD. With the partial revision of the PRA of 18 March 1994, only an editorial adjustment was made to the reference in Art. 51 of the PRA, since aArt. 50 of the PRA concerning the determination of election results was repealed as part of this partial revision. 1

In the Federal Act on the Election of the National Council of 14 February 1919, which regulated the National Council election procedure prior to the enactment of the PRA, the filling of vacancies in the National Council during the term of office was explicitly regulated in Art. 24 f. only for the proportional representation cantons. In the case of a single vacant seat, reference was made to the provisions on the election procedure in single-member constituencies (majority election with relative majority). Implicitly, there was already a provision for by-elections in single-member constituencies (where, due to the system, only one vacancy can occur) that corresponded to that of the current PRA. 2

II. SIGNIFICANCE OF THE PROVISION

A. Changes during the term of office

The members of the National Council are elected for a term of four years. The term of office begins with the constituent meeting of the National Council on the seventh Monday after the election and ends again with the constitution of the newly elected Council. 3

Changes during the term of office - for both proportional representation and majority cantons - are in principle regulated in the 5th chapter of the PRA in Art. 54 ff. PRA. Such changes result from the departure of elected National Council members during the term of office, in particular in the event of resignation or death, or also if eligibility requirements cease to apply during the term of office. A resignation from the National Council shall be notified in writing to the President of the National Council. The General Secretariat of the Federal Assembly then notifies the respective cantonal government of the resignation so that it can initiate the filling of the vacancy by means of a by- 4

election or, in proportional representation cantons, by succession or a supplementary election. The replacement is only for the remainder of the current term of office.

5 According to Art. 51 PRA, the by-election in majority cantons is governed by Art. 47-49 PRA. Systematically, it would have been more coherent to regulate Art. 51 PRA - as well as succession and by-election in proportional representation cantons - under Chapter 5 "Changes during the term of office". Thus, Art. 54 PRA concerning resignation from the National Council and Art. 57 PRA concerning the end of the term of office apply to both proportional representation and majority cantons.

B. No succession, but direct (silent) replacement election

6 If a member of the National Council elected in a single-member constituency leaves the National Council during the term of office, a direct by-election by the electorate must take place. This is in contrast to the proportional representation cantons, where a National Council office that becomes vacant during the term of office is first filled by a replacement from the same list and only secondarily by a by-election.

7 The election of a substitute in major-majority cantons can take place through a popular election at the ballot box or - in cantons with the necessary legal basis for this - also through a silent election. In cantons with a majority without the possibility of a silent election, there is no nomination procedure prior to the by-election, but - as in the case of the general renewal elections - an election by ballot takes place in any case. On the occasion of the ballot, every eligible person can be voted for, whereby whoever receives the most votes is elected. In the majoritarian cantons with the possibility of a silent election, on the other hand, a nomination procedure must also be carried out to fill vacancies during the legislative term. If there is only one valid candidature, the proposed person is declared elected. If more than one valid candidature for the vacancy is received in due time, the election shall be by ballot using pre-printed ballot papers.

C. Legal comparison

8 By-elections and supplementary elections are scheduled by the cantonal government for the next possible date. Accordingly, the major-majority cantons -

with the exception of the canton of Appenzell Ausserrhoden - know legal regulations in this regard:

In the canton of Uri, by-elections are to be held as soon as possible, as a rule within three months. 9

In the canton of Obwalden, a by-election may be omitted if general renewal elections take place within six months. 10

The Introductory Act of the Canton of Nidwalden to the PRA does not contain any provisions regarding by-elections. However, for the elections to the cantonal government and the Council of States, the cantonal election and voting law provides that by-elections can be held at any time, which should also apply to the filling of a vacant National Council seat. 11

In the canton of Glarus, a by-election must generally be held within six months of the resignation or death of a member of an authority or if the conditions for eligibility no longer apply. A by-election may be waived if the ordinary general renewal election takes place within six months. 12

In the canton of Appenzell Innerrhoden, a by-election shall be held as soon as possible if a vacancy occurs during the year of office. For important reasons, the by-election may exceptionally be postponed with the approval of the Ethics Committee, but at most until the next ordinary election. With this in mind, the Professional Ethics Committee decided not to fill the vacancy in the National Council that occurred on 3 June 2019 through a by-election, but to do so on the occasion of the federal general renewal elections on 20 October 2019. 13

In summary, the cantonal government must hold the by-election as soon as possible, i.e. as a rule within three to six months. The cantons have a certain discretion in determining the date of the by-election. This is exercised by the majority cantons with the cited regulations in a manner compatible with Art. 34 FC. The cantonal legal systems do not contain any provisions on the by-election that go beyond the date of the by-election. 14

III. COMMENTARY ON THE TEXT OF THE NORM

According to Art. 51 PRA, Art. 47-49 also apply to by-elections. The procedure for by-elections is therefore governed by the provisions on general renewal elections in majoritarian cantons. In the following, reference is made 15

only to special features and deviations, whereby a distinction is made between majoritarian cantons without and those with the possibility of a silent (by-election).

A. Majority cantons without the possibility of a silent election

16 For cantons without the possibility of a silent election, there are no significant differences to the procedure for the general election. The only special feature is that the time of the election is not determined by federal law, but must be set by the cantonal government. When setting the date for the by-election, the cantonal governments must, on the one hand, observe the requirements of cantonal law. On the other hand, they must weigh up the right of the voters to a free and comprehensive process of will formation against the interest in filling the vacancy as quickly as possible.

17 The official ballot papers, to be produced at the expense of the State, shall be sent to the voters at least three and at the earliest four weeks before the election day fixed by the cantonal government. On the occasion of the election, votes may be cast for any eligible person. The person who receives the most votes shall be elected. In the event of a tie, the decision shall be taken by lot.

18 In cantons that have a voluntary registration procedure within the meaning of Art. 47 para. 1bis PRA, such a procedure must in principle also be carried out for by-elections.

19 After the ballot has been held, the cantonal government shall immediately notify the Federal Chancellery and the General Secretariat of the Federal Assembly of the name of the elected substitute for the attention of the President of the National Council and publish it in the cantonal official gazette. A member newly elected in the context of a by-election may only participate in the negotiations after his or her election has been declared valid by the cantonal government.

B. Majority cantons with the possibility of a silent election

1. Proposal procedure

20 In cantons with the possibility of a silent election, a proposal procedure must also be carried out for by-elections, during which the voters may propose any eligible person for the by-election.

Unlike in the case of general renewal elections, the deadline for nominations in the case of by-elections is not prescribed by federal law and is thus determined by the cantonal government. In the canton of Nidwalden, the procedure is usually that a by-election date is determined and the election registration deadline is then set for the 48th day before the by-election date. As in the major-majority cantons without a silent ballot, the date of the by-election (which, in the sense of a ballot, naturally only takes place if several valid candidatures are received) must be set after weighing up the voters' right to a comprehensive decision-making process and the interest in filling the vacancy as quickly as possible. In doing so, the time required by the voters to collect nominations shall be taken into account appropriately. 21

Furthermore, the deadline for nominations, i.e. the period during which nominations may be submitted, is not prescribed by federal law, in contrast to the deadline for supplementary elections in proportional representation cantons. However, it does not seem appropriate to refer to the 30-day proposal period provided for in Art. 16 VPR for supplementary elections, especially since in the majority cantons not only certain voters but all voters can submit nominations and not only those originally nominated but any eligible person can be nominated for the by-election. 22

2. No proposal privilege

In supplementary elections in proportional representation cantons, three-fifths of the signatories of the list (art. 24 para. 1 PRA) or the executive committee of the cantonal party (art. 24 para. 3 PRA) that submitted the list on which the retired member of the National Council was included may submit a nomination, provided that a seat cannot be filled by succession. 23

In major-majority cantons with a silent election, there is no such proposal privilege. Instead, the nomination procedure is governed by cantonal law and, in principle, all voters are entitled to sign nominations for the seat that has become vacant. 24

3. Ballot in the event of several nominations

If several valid nominations are received within the nomination period, a silent election is excluded and the cantonal government must order a ballot. Even if the reference in Art. 51 PRA is limited to Art. 47-49 PRA, in the author's view, Art. 50 PRA is also applicable in the case of several valid candida- 25

tures and there must be a binding effect on the election proposals. This is all the more so since the materials in no way indicate, nor is it evident, why such a binding obligation should not exist in the case of by-elections - unlike in the case of general renewal elections. In this respect, all candidates nominated in due time must be listed on the ballot paper in pre-printed form. On the occasion of the ballot, votes can then only be cast for the candidates pre-printed on the ballot paper. Votes cast for candidates who are not pre-printed and ballot papers on which more than one candidate is marked shall be invalid.

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COMMENTARY ON

Art. 52 PRA

A commentary by Luka Markić

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Chapter 4 Publication and Validation of Election Results

Art. 52 Notice of election; Publication of the election results

[1] After the results have been established, the cantonal government shall immediately inform those elected of their election in writing and shall advise the Federal Council of the names of those elected.

[2] The canton shall publish the results obtained by each candidate and, where applicable, each list in the official cantonal gazette within eight days of the polling day at the latest, making reference to the right to contest the result.

[3] The results of general, supplementary and by-elections shall be published in the Federal Gazette. They shall also be published in full in the online version of the Federal Gazette.

[4] The canton shall send the election report to the Federal Chancellery immediately following the expiry of the period allowed for lodging an appeal contesting the election (Art. 77 para. 2). The ballot papers shall be delivered to the location appointed by the Federal Chancellery within ten days of the expiry of the period allowed for lodging an appeal contesting the election.

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I. HISTORY OF ORIGIN

1 The Federal Act on the Election of Members of the National Council of December 21, 1850 already contained provisions on the announcement of elections and the publication of election results. In contrast, the subsequent Federal Act on Elections to the National Council of February 14, 1919 no longer contained any such provisions. The Federal Council issued regulations on the notification of elections, the handling of ballot papers and the publication of election results in the Implementing Ordinance to the Federal Act on Elections to the National Council of July 8, 1919.

2 With the creation of the Federal Act on Political Rights in 1976, the provisions relating to the notification of ballots and the publication of election results, which had previously been contained in the Implementing Ordinance, were incorporated into the PRA and thus regained legal status. The new PRA provision corresponded in substance to the relevant provision in the Implementing Ordinance. Art. 52 PRA in the version of December 17, 1976 provided that after the results had been determined, the cantonal government shall immediately notify the elected candidates of their election in writing and inform the Federal Council of the names of the elected candidates (para. 1) and the cantonal government shall publish the results of all candidates in the cantonal official gazette with reference to the possibility of appeal (para. 2).

3 Since the PRA came into force in 1978, Art. 52 PRA has undergone several amendments:

- In 1986, a new para. 3 (sentence 1) was added to the provision. According to this, the results of general, supplementary and by-elections - in addition to publication in the cantonal official gazettes (Art. 52 para. 2) - must be published in the Federal Gazette. It is true that the National Council election results were already published in the Federal Gazette before 1986. As this practice had not previously been expressly regulated in any decree, this was made up for at the request of the Federal Council.

- In 1993, the legislator added a new para. 4 to Art. 52 PRA, obliging the cantons to forward the respective election protocols to the Federal Chancellery immediately after expiry of the appeal period pursuant to Art. 77 para. 2 PRA and to send the ballot papers to the place specified by the Federal Chancellery within ten days of expiry of the appeal period. In

para. 2, the legislator also replaced the term "cantonal government" with "canton".

- In 2003, para. 2 was revised to the effect that the cantons must publish the election results in the cantonal official gazette within eight days of the election day. Due to the possibility of election appeals to the Federal Supreme Court introduced with the judicial reform of the Federal Constitution (Art. 189 para. 1 lit. f FC), the legislator feared that a possible "organized flood of election appeals" could thwart the timely commencement of parliamentary work in a manner "contrary to democracy". The legislator therefore had to take measures to make such "frustration" impossible. This included setting a time limit on the official publication of cantonal results. The deadline of eight days had already been ordered by the Federal Council in 1991 by circular letter.
- In 2004, para. 3 was supplemented with a new sentence 2 as part of the enactment of the Publication Act: according to this, the electronic version of the election results must also be published in the Federal Gazette. This clarification was necessary because Art. 16 para. 3 PublA as amended on 18 June 2004 stipulated that personal data be published anonymously in the electronic form of the Federal Gazette. However, the anonymization of election results would be contrary to the public interest in the correct conduct of the election.

II. COMPARISON OF LAWS

The vast majority of cantons provide for rules on the publication of election results in their parliamentary election decrees. The definitive election results are published in the cantonal official gazette by the competent body, usually the electoral authority. Provisional election results are published on the Internet, in the media or by public notice on election Sunday. Cantons that do not have their own regulations on the publication of election results refer to the provisions of the PRA by analogy. 4

As in the National Council elections, the electoral authority notifies the elected candidates of their election in the cantonal parliamentary elections. Some cantons stipulate that the electoral authority must also refer to the provisions on rejection and incompatibility in the notice of election and provide information on legal remedies. 5

III. SIGNIFICANCE OF THE PROVISION AND CONTENT OF THE PROVISION

6 Art. 52 PRA regulates the election notification (para. 1), the publication of the election results (paras. 2 and 3), the election protocols (para. 4 sentence 1) and the handling of the ballot papers (para. 4 sentence 2). The regulations on the communication or publication of election results are of central importance for a democracy, as they represent an indispensable element of the principle of publicity of the election, which is derived from the principle of the freedom of voters to elect and vote (Art. 34 FC). The principle of publicity of the election requires that all essential steps of an election are subject to public scrutiny. To ensure that election results can be verified by the public, they must be published.

7 The provisions in Art. 52 PRA only set out rudimentary rules with regard to the procedure for determining and publishing election results. The procedure is specified both in the VPR and in the respective circular letter of the Federal Council. For the sake of clarity, these provisions will also be discussed below.

A. Para. 1: Election notification

8 After the close of voting, the competent offices in the cantons (communal, district or county authorities) must determine the election results "quickly and accurately" and then forward them to the cantonal state chancellery or the cantonal central office (cantonal electoral office). The cantonal electoral office in turn transmits this provisionally determined election result electronically to the Federal Chancellery and the Federal Statistical Office using forms 2, 4 and 5 in accordance with Annex 2 VPR. An unsigned copy of the minutes of the electoral offices (forms 4 and 5) is sent to the Federal Chancellery by post. This transmission takes place immediately, i.e. before the end of the appeal period. Form 5 in accordance with Annex 2 VPR is used to inform the Federal Chancellery, for the attention of the Federal Council, of the names of those elected and those not elected (Art. 13 para. 2 VPR).

9 On the basis of this provisionally determined election result, the cantonal governments notify those elected of their election in writing (Art. 13 para. 2 VPR). This notification is referred to as the election notification. The cantonal governments are required to notify the elected persons of their election without delay.

The notification of election has no legal effect. It merely constitutes a notification of the provisionally determined election results to the elected persons by the respective cantonal government. It should therefore not be confused with the "confirmation of election by the cantonal government" pursuant to Art. 53 para. 2 PRA, which the elected member of the National Council must present at the constituent meeting of the National Council and which can only be issued if no appeal has been lodged at cantonal or federal level or if the outcome of federal court proceedings has been determined. 10

For the sake of completeness, it should be mentioned that the notice of election does not coincide with the member of the National Council taking office. The newly elected member of the National Council only takes office when the oath or vow is taken (Art. 3 para. 1 ParlA). For this reason, the constitutionally guaranteed immunity of members of the National Council, for example, only takes effect - with exceptions - from the time they take office (Art. 162 FC). However, a member of parliament can benefit from the "pre-effective scope" of the principle of the free mandate for the period between being elected and taking office. 11

B. Para. 2: Publication of election results in the cantonal official gazette

The cantonal electoral office shall draw up a record of the election results in duplicate (Art. 12 para. 1 VPR in conjunction with Form 5 in accordance with Annex 2 VPR). The minutes must list the names of the elected and non-elected candidates on each list according to the votes received and include the corresponding personal data (first name and surname, year of birth, place of birth, place of residence and profession) (Art. 12 para. 2 VPR). The cantonal government must publish this election protocol in the cantonal official gazette immediately, but at the latest within eight days of the election day (Art. 52 para. 2 PRA in conjunction with Art. 13 para. 1 sentence 1 VPR). 12

The publication in the cantonal official gazette must contain a mandatory reference to the possibility of appeal pursuant to Art. 77 PRA. The absolute time limit for lodging an election complaint begins with the publication of the election result in the cantonal official gazette (cf. Art. 77 para. 2 PRA). 13

C. Para. 3: Publication of election results in the Federal Gazette

14 The results of general, supplementary and by-elections are published not only in the cantonal official gazette (Art. 52 para. 2 PRA), but also in the Federal Gazette (Art. 52 para. 3 sentence 1 PRA). Publication in the Federal Gazette takes place both in the printed version (Art. 16 PublA) and in the authoritative electronic version (publication platform; Art. 15 PublA).

15 Contrary to the provisions of data protection law (Art. 16b PublA), the results are published in the printed version (Art. 52 para. 3 sentence 2 PRA). The legislator thus makes it clear that the results must always be published in non-anonymized form. This provision was introduced by the legislator in 2004, as Art. 16 para. 3 PublA as amended on 18 June 2004 stipulated that personal data would be published anonymously in the electronic form of the Federal Gazette. Without the exception in Art. 52 para. 3 sentence 2 PRA, the election results would have been published without the names of the candidates in particular. However, this would have made the publication of the election results absurd. In its dispatch on the introduction of the exemption, the Federal Council rightly stated that "in the publication of the lists and election results of the National Council elections [...] the public interest in the correct conduct of the election [outweighs] claims to the protection of privacy. It must be possible to verify the precise allocation of all votes and thus the identity of all candidates who have combined votes."

16 Since 2016, the electronic version of the Federal Gazette has been the authoritative version (Art. 15 para. 2 PublA). Since then, publications in the electronic version may also contain personal data (Art. 16b para. 1 PublA). Personal data requiring special protection in accordance with Art. 3 lit. c FADP may no longer be publicly accessible and may not contain more information than is necessary for its purpose; this includes, in particular, a person's ideological, political or trade union activities (Art. 3 lit. c no. 1 FADP). However, this regulation does not apply to the publication of election results. It is in the public interest that election results are also subsequently accessible and therefore verifiable.

D. Para. 4: Election protocol and ballot papers

17 After expiry of the appeal period pursuant to Art. 77 para. 2 PRA, the cantonal governments shall immediately forward the election protocol to the Federal

Chancellery or the Federal Council (Art. 52 para. 4 sentence 1 PRA). The election protocol is Form 5 in accordance with Annex 2 VPR. It must be signed by the executive committee of the cantonal electoral office and submitted in the original. The cantonal governments must also enclose with the election protocol a copy of the relevant official gazette and any complaints received as well as their statements (Art. 14 para. 1 VPR).

Pursuant to Art. 52 para. 4 sentence 2 PRA, the ballot papers shall be sent to the place specified by the Federal Chancellery within ten days of the expiry of the period for lodging complaints. Art. 14 para. 2 VPR designates the Federal Statistical Office as the place of receipt of the ballot papers. Not only the ballot papers, but also forms 1 - 4 in accordance with Annex 2 VPR must be sent to this location (Art. 14 para. 2 VPR). However, current practice deviates from this regulation: In fact, the Federal Statistical Office takes over the election results from the cantons in electronic form, which is why it is not necessary to transmit the physical election material in accordance with Art. 52 para. 4 sentence 2 PRA and Art. 14 para. 2 VPR. The cantons must store the election material securely until they have received notification from the Federal Office that they can dispose of the material. If complaints or criminal proceedings relating to the election are still pending at the time the Federal Office is notified, the cantons are obliged to retain the election material until the proceedings have been legally concluded. However, election nomination forms with the signatories or the cantonal party's executive committee must be kept for the entire term of office of the National Council, as these are needed for any supplementary elections pursuant to Art. 56 PRA. 18

As Art. 52 para. 4 sentence 2 PRA no longer corresponds to current legal practice, this provision must be revised in the next revision of the PRA. 19

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Art. 53 Validation of the election results

[1] The constituent sitting of the newly elected National Council shall take place on the seventh Monday following the election. At this sitting, the first task shall be the validation of the results of the election. The National Council shall be held to be constituted as soon as the election of at least a majority of its members has been declared valid. The National Council shall determine the procedural rules in its regulations.

[2] Any person bearing an election certificate from their cantonal government shall have the right to a seat and to a vote at this sitting, but not to vote on the validity of their own election.

[3] In the event of substitution or of by-elections or supplementary elections, a newly elected member may participate in the sitting only if their election has been declared to be valid.

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I. HISTORY OF ORIGIN

A. Constituent sitting

1 The Federal Act on the Election of Members of the National Council of December 21, 1850, contained provisions on the constituent session of the National Council and the election scrutiny. It stipulated that the newly elected members of the National Council must "assemble without further invitation on the first Monday in the Christmas month at 10 o'clock in the morning for the constituent sitting of the National Council in the Federal City". Elected members who were "provided with a letter from a cantonal government certifying their election" were allowed to attend each constituent sitting. Elections were examined at the constituent meeting, and during the handling of objections to elections, those deputies whose election was disputed had to stand down.

2 The Federal Act on Federal Elections and Votes was enacted in 1872. The provisions of the Federal Act on the Election of Members of the National Council of 1850 relating to the time of the constituent sitting of the National Council and the scrutiny of elections were adopted without any material changes. Thus, from 1850 (beginning of the 2nd legislative period) to 1967 (beginning of the 38th legislative period), the constituent sessions of the National Council always took place on the first Monday in December.

3 In 1971, the law was amended as follows with regard to the date of the constituent session of the National Council: according to this amendment, the constituent session may be brought forward to the last Monday in November at 10 a.m. by "a resolution passed in the previous session by the National Council in agreement with the Council of States." The Federal Council justified the need for the revision in particular by stating that the change would allow "special circumstances of a calendar year" to be addressed or "the agenda to be taken into account". This was the case in 1971: the first Monday in December fell on December 6, 1971, leaving Parliament "only around 2 ½ weeks (19 days) until Christmas Day", which meant that the time available to deal with the "ordinary business of the winter session (Confederation's budget, SBB and PTT, supplementary credits, annual report and accounts of the Alcohol Board)" and the "business of the Federal Assembly" was far too short. The constituent session of the National Council of the 39th legislative period took

place on the last Monday in November, on November 29, 1971. The following 40th legislative period was opened again, as usual, on the first Monday in December (December 1, 1975).

With the creation of the Federal Act on Political Rights in 1976, a provision was also created concerning the electoral review (Art. 53 PRA as amended on December 17, 1976). Although this stated that the validity of the elections must first be decided at the constituent sitting following the election of the National Council, the legislator failed to specify the date of the constituent sitting. As a result, the date of the constituent sitting was not regulated by law from 1978 until the entry into force of the current provision in Art. 53 para. 1 PRA 2003. During this period, the dates of the constituent sessions of the National Council were set in accordance with the provisions for determining the start of the winter session. Accordingly, the constituent sessions from 1978 to 2003 took place either on the last Monday in November or the first Monday in December. 4

When the PRA was revised in 2001, the Federal Council noted in its dispatch that the date of the National Council's constituent sitting was not regulated in the law. However, as this was "an important provision within the meaning of Art. 164 FC", "the constitution is a prerequisite for the Council to be able to negotiate at all", the Federal Council proposed to Parliament that the date of the constituent meeting be regulated in the PRA. Parliament followed the Federal Council's suggestion and defined in Art. 53 para. 1 PRA as amended on June 21, 2002 that the constituent meeting of the newly elected National Council would take place on the seventh Monday after the election. 5

As early as 1994, Art. 53 para. 3 PRA had to be revised due to a legislative oversight. In its original version, Art. 53 para. 3 PRA stipulated that a newly elected member may only take part in the proceedings after their election has been declared valid. As this naturally also applies to members of the National Council newly elected by by-election, Art. 53 para. 3 PRA was amended accordingly in the 1994 revision of the PRA. 6

B. Election audit without handling election complaints

Until the 2003 judicial reform, the National Council was responsible for dealing with election complaints against the National Council elections in the last instance as part of the election review, which takes place at the constituent 7

sitting. However, with the implementation of the judicial reform, the Federal Supreme Court acquired jurisdiction to adjudicate disputes concerning violations of federal provisions on political rights (Art. 189 para. 1 lit. f FC). Since then, the Federal Supreme Court has been the court of last instance to decide on election complaints (see also Art. 77 para. 1 lit. c in conjunction with Art. 80 para. 1 BGG). The National Council is now only responsible for validating (upholding) the election as part of the election review. The legislator has thus implemented the division of the handling of complaints and the validation of elections required by "the Federal Constitution" and amended Art. 53 PRA accordingly. Parliament thus responded to the call of doctrine: According to today's ideas of the rule of law and democracy, the "conflation of the validation of an election with the simultaneous handling of election complaints by the newly elected parliament" is outmoded.

II. COMPARISON OF LAW

A. Constituent session

8 The majority of cantons define the time of the constitution of the parliament in their decrees concerning the election of their parliament or in the rules of procedure of the parliaments. In many cases, the newly elected members of the cantonal parliaments must, analogous to Art. 53 para. 1 PRA, convene for the constituent meeting at a time determined by law after the election.

9 In a minority of cantons, the government is responsible for inviting the newly elected members of parliament to the constituent meeting after the overall renewal. This variant is problematic in terms of the separation of powers because it means that the newly elected parliament is dependent on the participation of the government for its constitution. Therefore, the option whereby the date of the constitution of parliament is determined by law is to be preferred.

B. Content of the electoral review

10 All cantonal parliaments carry out an election audit as part of their constituent sessions. The content of the election audit differs from canton to canton and can be roughly divided into two categories:

In most cantons, the election audit is limited to the validation (preservation) of the election. In these cantons, the review of election complaints received is finally settled by constitutional or administrative courts. In most cantons, this separation of review and appeal bodies in electoral matters is not only in line with a long-standing doctrinal demand, but also with the requirements contained in the guarantee of legal recourse pursuant to Art. 29a FC. 11

In a few other cantons, the separation of review and appeal instances has not (yet) been implemented. In the cantons of Zurich, Lucerne, Schwyz, Thurgau and Valais, the newly elected parliament decides both on election complaints received and on the validation of its own election. This link between the validation and appeal instance is not compatible with federal constitutional requirements, as the decision of the cantonal parliament in these cantons cannot be appealed to a higher cantonal court. In the cantons of Graubünden and Vaud, the newly elected parliament is also responsible for handling election complaints and validating the election as part of the election review. However, these decisions can be appealed to the respective cantonal constitutional court, thereby complying with the guarantee of legal recourse. 12

III. SIGNIFICANCE OF THE PROVISION AND CONTENT OF THE PROVISION

Art. 53 PRA deals with the constituent meeting and not just the actual election review (as the title of the article states). The provision sets the date for the constituent sitting of a newly elected National Council and defines the point in time from which a member who moves up or is newly elected in the case of by-elections or supplementary elections may participate in the proceedings of the National Council. With the constitution - the determination of the results of the parliamentary election - the individual members' entitlement under federal law to a seat in the National Council is realized and they thereby acquire all the rights and obligations provided for by the Constitution and the law (see Art. 6 et seq. ParlA). It also establishes the National Council's capacity to act. 13

A. Para. 1

1. Constituent sitting

14 After each complete renewal of the National Council, all re-elected and newly elected members shall assemble for the constituent sitting of the National Council. The constitution of the newly elected National Council takes place on the seventh Monday after the election (Art. 53 para. 1 sentence 1 PRA). The constitution is the first meeting of the newly elected parliament in order to pass important, mostly organizational resolutions and to appoint certain new parliamentary bodies. The term of office (legislative period) of the newly elected Council (as a body) begins with the constitution, while that of the previously elected National Council ends (Art. 57 PRA).

15 The procedure for the constituent meeting is not regulated in the PRA itself, but in the Rules of Procedure of the National Council (Art. 53 para. 1 sentence 4 PRA). The agenda items for the constituent sitting are set out in Art. 1 para. 2 SO-NC and must be dealt with in the order laid down in the Rules of Procedure: The constituent sitting always begins with a speech by the oldest member of the National Council and a speech by the youngest newly elected member of the National Council (Art. 1 para. 2 lit. a SO-NC). The National Council then establishes its constitution (Art. 1 para. 2 lit. b SO-NC). The constitution is determined at the request of the provisional office. Prior to the constituent meeting, the Provisional Bureau examines whether the elections of the majority of the members of the Council have remained uncontested or have been declared valid and submits a corresponding motion to the Council (Art. 4 para. 1 lit. a SO-NC). Immediately after the constitution has been established, the Council members present whose election has remained uncontested or has been declared valid are sworn in (Art. 1 para. 2 lit. c in conjunction with Art. 5 SO-NC). After any incompatibilities have been established at the request of the provisional office (Art. 1 para. 2 lit. d in conjunction with Art. 4 para. 1 lit. b SO-NC and Art. 14 ParlA), the election of the President, First Vice-President, Second Vice-President, vote counters and substitute vote counters follows (Art. 1 para. 2 lit. e-i SO-NC).

16 The constituent sitting of the National Council ends with the performance or playing of the Swiss anthem. Although the playing of the national anthem at the beginning of a new legislative period is neither regulated by law nor by the rules of procedure, this has been the practice of the National Council since

2011. The establishment of this practice can be traced back to a 2009 motion by the then National Councillor Ada Marra (SP/VD). As the Office of the National Council clarified in response to this motion, the playing of the national anthem would "underline the ceremonial character of the start of the legislative period [...]", but it was "up to each member of the Council to sing the anthem or not".

2. Electoral examination ("determination of the constitution")

The National Council is constituted as soon as the elections have been declared valid by at least a majority of its members (Art. 53 para. 1 sentence 3 PRA). This decision of the National Council ("determination of constitution") is carried out ex officio, even if no electoral complaints have been lodged. 17

At the constituent meeting, the National Council conducts the election audit. The procedure by which the legality and validity of an election is reviewed is referred to as the election review. Until the 2003 judicial reform, the National Council dealt with pending election complaints against the election of the National Council as well as validating the election. In the course of the judicial reform, the handling of complaints and the validation of the election were split up. 18

According to the current version of Art. 53 para. 1 PRA, the election review by the National Council is accessory to the election complaints lodged with the cantonal governments and before the Federal Supreme Court pursuant to Art. 77 lit. c in conjunction with Art. 80 para. 1 FSCA. Art. 80 para. 1 BGG. Due to the precedence of election appeals, the National Council must "await the outcome of the relevant appeal proceedings before the Federal Supreme Court and take into account the result of the decisions that are binding on it". The Federal Supreme Court must deal conclusively with appeals pending before it against decisions of the cantonal governments in relation to the National Council elections before the National Council is constituted. Due to the division of responsibilities, the National Council can only determine the validity of all those elections that have not been contested before the Federal Supreme Court or whose appeals have been finally settled by the Federal Supreme Court. The National Council's scrutiny of elections is therefore limited to the validation of the election. With the validation of the election, the National Council establishes its constitution (Art. 53 para. 1 sentences 2 and 3 PRA). 19

B. Para. 2: Right to attend and vote at the constituent meeting

20 Only designated members who have a confirmation of election from their cantonal government may attend and vote at the constituent sitting of the National Council (Art. 53 para. 2 PRA). The confirmation of election from the cantonal government pursuant to Art. 53 para. 2 PRA is issued to the designated members of the National Council if no complaints have been lodged at cantonal or federal level or if the outcome of federal court proceedings relating to the contesting of the election is certain. The confirmation of election should not be confused with the notification of election pursuant to Art. 52 para. 1 PRA. The latter is merely a notification from the cantonal government to the elected person of the provisionally determined election results.

21 In addition, Art. 53 para. 2 PRA stipulates a recusal rule: members whose election is disputed must recuse themselves from their own election review ("on their own behalf"). Conversely, this means that a member whose election is contested may also participate in the assessment of elections in other cantons (constituencies). This ensures that the National Council has a quorum for the election review.

C. Para. 3: Right to participate in the event of succession, by-election or supplementary election

22 para. 3 of Art. 53 PRA regulates the right to participate of members of the National Council who have moved up or who have been newly elected by substitute or by-election. A member of the National Council who moves up or is newly elected by way of a substitute or by-election may only participate in the proceedings of the National Council if their election has been declared valid. Accordingly, neither the declaration by the cantonal government that someone has been elected as the first substitute (in the case of succession; Art. 55 para. 1 PRA), nor the election itself in the case of a by-election or by-election (Art. 56 or Art. 51 PRA) is sufficient for participation in the proceedings of the National Council.

23 The determination of the validity of the election in the case of members of the National Council who move up or are newly elected by by-election or by-election is carried out analogously to the rules of the constituent sitting of the National Council. However, the examination is not carried out by the provisional office, but by the office already appointed by then in accordance with

Art. 8 para. 1 SO-NC. The office checks whether the member's election has remained uncontested or has been declared valid. It also checks whether there are any incompatibilities pursuant to Art. 14 ParlA. If the election was valid and no incompatibilities have been identified, the Office requests the National Council to formally approve the election. If there are no countermotions, the Bureau's motion is declared adopted without a vote. After being sworn in, the new member is entitled to take part in the proceedings of the National Council.

I would like to thank Benjamin Böhler, BLaw, assistant at the Center for Democracy Aarau, for his help in researching the material and his valuable comments, as well as Janis Denzler, BLaw, assistant at the Center for Democracy Aarau, for his critical review of the text and his valuable comments.

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COMMENTARY ON

Art. 54 PRA

A commentary by Luka Markić

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Chapter 5 Changes during the Legislative Period

Art. 54 Resignation

Notice of resignation from the National Council must be given in writing to the President of the National Council.

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I. HISTORY OF ORIGIN

The Federal Act on the Election of Members of the National Council of December 21, 1850 already provided for regulations on the "completion of individual positions in the National Council during a term of office". If a National Councillor wished to resign from office and was required to hold office in their canton, they had to submit a request for resignation to "their electorate or the cantonal government concerned". For National Councillors who came from a canton without compulsory office, it was sufficient to submit a declaration of resignation to the National Council, provided it was in session. This was recorded by the National Council. If a resignation was submitted outside of National Council sessions, it had to be submitted to the Federal Council for the record. The member of the National Council was legally obliged to carry out his or her mandate until a successor was elected. 1

In contrast, the subsequent Federal Act on Elections to the National Council of February 14, 1919 did not contain any specific provisions on resignation. 2

It was only with the creation of the Federal Act on Political Rights in 1976 that a specific provision on the resignation of a member of the National Council was again included in the PRA in Art. 54. According to this provision, the member must notify the President of the National Council of his or her resignation in writing. This provision has never been revised since the PRA came into force. 3

II. COMPARISON OF LAWS

The vast majority of cantons do not include any provisions on the modality of resignation from parliament in their decrees concerning the election of their parliament. These cantons merely describe in their decrees how the parliamentary seat is to be filled in the event of the premature resignation of a member. Only in a few cantons, such as Bern and Schaffhausen, does the law explicitly stipulate that a resignation from parliament must be communicated to the president in writing. In the canton of St. Gallen, the resignation must be submitted to the State Chancellery and in the canton of Valais to the State Council. 4

5 In cantons where members of parliament are required to hold office, it is generally not possible to resign before the end of the term of office. These cantons stipulate that a member of parliament who wishes to resign from office prematurely must submit a request for resignation to the competent authority. In the canton of Nidwalden, for example, the cantonal council must approve the resignation request of a departing member; in the canton of Uri, the cantonal government decides on resignation requests from members of the cantonal council, whereby the members must remain in office until the dismissal decision is made. As the obligation to hold office at cantonal level is a "barely enforced rule" with regard to members of parliament, requests for dismissal from office are only to be submitted pro forma. These are approved by the competent authorities without further ado.

III. MEANING OF THE PROVISION AND CONTENT OF THE PROVISION

6 The term "resignation" refers to the resignation from the National Council before the end of the term of office (Art. 149 para. 2 sentence 2 FC). In the event of a resignation, the term of office of the resigning member (Art. 145 sentence 1 FC) is terminated prematurely. If, on the other hand, a member of the National Council leaves office at the end of the four-year term of office, this is logically not a resignation.

7 Art. 54 PRA does not, as might be inferred from the subject heading, form the basis for the right of a member of the National Council to resign during the term of office, but merely regulates its modality. Rather, the right of resignation of each individual member arises from the fact that there is no obligation to hold office at federal level. Every member of the National Council is therefore entitled to resign voluntarily from the National Council at any time, thus making the seat available for the successor.

A. Written declaration of resignation

8 The declaration of resignation of the outgoing member of the National Council must be made in writing. The formal requirement that the declaration of resignation must be in writing has only existed since the PRA came into force. The National Council Election Acts of 1850 and 1919 did not stipulate any formal requirements for the declaration of resignation. The introduction of the

written form requirement was not justified in the 1976 legislative process; it naturally leads to greater legal certainty.

In principle, written form in public law means that the content of the declaration must be written down on a durable medium (usually on paper) and signed by hand. In practice, however, written form is defined very broadly. According to this, the letter of resignation must be signed by hand or electronically by the member of the National Council. The resignation can be submitted by letter, fax or e-mail, whereby the resignation must be clearly attributable to the member of the National Council (e.g. by sending the resignation using the parliamentary e-mail address [domain: @parl.ch]). The resignation is ineffective if, for example, it is only declared by telephone, on social media or at a media conference. In my opinion, this broad interpretation of the term "in writing" must be taken into account in the next revision of the PRA and incorporated into the law. 9

B. President of the National Council as the addressee of the resignation

The addressee of the resignation is the President of the National Council. There is no provision for the letter of resignation to be sent by the resigning member of the National Council to another authority such as a cantonal state chancellery or the Federal Chancellery. In accordance with Art. 15 para. 1 VPR, the General Secretariat of the Federal Assembly notifies the relevant cantonal government of the letter of resignation received. 10

C. No reasons for resignation

In principle, no reasons need to be given for a resignation. However, it is quite common for the resigning member of the National Council to state their reasons for leaving early in their letter of resignation. These are occasionally read out or paraphrased in excerpts by the President of the National Council as part of the farewell ceremony for the departing member of the National Council. 11

I would like to thank Benjamin Böhler, BLaw, assistant at the Center for Democracy Aarau, for his help in researching the material and his valuable comments, as well as Janis Denzler, BLaw, assistant at the Center for Democracy Aarau, for his critical review of the text and his valuable comments.

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COMMENTARY ON

Art. 55 PRA

A commentary by Luka Markić

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Art. 55 Substitution

[1] Where a member of the National Council resigns before the expiry of the legislative period, the cantonal government shall declare the first substitute from the same list to be elected.

[2] If a substitute cannot or does not wish to assume office, the next substitute on the electoral list shall be invited to assume office in their place.

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I. HISTORY OF ORIGIN

With the introduction of proportional representation for the appointment of the National Council in 1919, a provision on succession was also established. Article 24 of the Federal Act on the Election of the National Council of February 14, 1919 provided that, in the event of a vacancy in the National Council occurring during the term of office, the cantonal government shall declare elected from the list on which the retiring member was elected the unelected candidate who received the most votes; in the event of an equal number of votes, the order of the candidates on the electoral list shall be decisive. If the substitute had already died in the meantime or was unable to vote, the successor on the list took his place. 1

The model of succession in the event of premature retirement from the National Council was undisputed in principle in the Federal Assembly. The rapporteur of the Council of States committee at the time, Councillor of States Gottfried Kunz (FDP/BE), justified the need for succession as follows: "The [...] proportional representation is based on the principle that the parties should receive the number of mandates corresponding to their numerical strength and that the mandates obtained in this way should remain the property of the parties during a term of office." Therefore, mandates that expire during a term of office must be filled by candidates from the list on which the retiring member was elected. 2

In the National Council, the discussion did not revolve around the uncontested introduction of the principle of succession, but rather around the question of which substitute may take over if two candidates on the list have the same number of votes. A motion by National Councillor Robert Schmid (FDP/ZH), according to which the lot should decide in such cases, was rejected. This weakened the influence of voters and strengthened that of party officials. 3

With the introduction of the PRA in 1975, the system of succession on leaving office during the legislative term was adopted. However, the Federal Assembly decided - contrary to the previous rule of 1919 and contrary to the proposal of the Federal Council - that if the number of votes of the replacements was equal, it should not be the order of the candidates on the electoral list but rather the drawing of lots that decided who would be elected to the National 4

Council (see Art. 43 para. 3 PRA). Art. 55 of the PRA has remained unchanged since its entry into force.

II. COMPARISON OF LAWS

5 *See in detail OK-Lehner, Art. 43 N. 5-8.*

III. SIGNIFICANCE OF THE PROVISION AND CONTENT OF THE PROVISION

A. Para. 1: First replacement person moves up (standard case)

6 If a member of the National Council resigns from the National Council before the end of the legislative term, a by-election is not automatically required. Rather, the vacant seat in the National Council is replaced by means of the succession procedure. In a by-election, the person who moves up ("substitute" according to the wording of the law) is determined on the basis of the election results of the general election of the National Council. The retiring member is replaced by a substitute from his or her original list. Substitutes are candidates who were not elected in the election (Art. 43 para. 2 PRA). The procedure for replacements maintains the balance of power between the parties at the time of the overall renewal of the National Council.

7 No further act of election is required for succession to the National Council. The replacement is declared elected by the relevant cantonal government.

8 The reason for succession without any further election procedure is that a mandate is "owned" for the entire legislative period by the list that won it in the overall renewal of the National Council. However, the fact that the replacements are declared elected without any further act of election does not diminish their legitimacy. This is because the mandates that are obtained as a result of succession in accordance with Art. 55 PRA derive their legitimacy directly from the will of the voters who (co-)elected the replacements in the overall renewal election. The legitimacy of the successor members of the National Council therefore does not differ from the legitimacy of those who enter the National Council directly after their election.

9 The succession procedure is only applied in cantons (constituencies) in which two or more National Council seats are up for grabs, i.e. in those cantons in

which the members of the National Council are elected according to the principle of proportional representation. In constituencies in which only one member of the National Council is to be elected and thus the system of majority voting is applied, a by-election is ordered in accordance with Art. 51 PRA in the event of early retirement from the National Council.

B. Para. 2: Further substitutes

para. 2 of Art. 53 PRA governs the case in which the first substitute on the list does not wish to or is unable to take up office as a National Councillor. In this case, the person in the next position on the list moves up to the National Council as a substitute. The order is determined by the number of personal votes they received in the general election (Art. 43 para. 2 PRA). In the event of a tie, the election is decided by drawing lots (Art. 43 para. 3 PRA). 10

If a seat cannot be filled using the succession procedure, a supplement by the persons responsible for the electoral list or a supplementary election shall take place in accordance with the procedure set out in Art. 56 PRA. 11

C. Excursus: Change of party by substitutes before moving up

As stated above, the procedure for replacements basically makes it possible to maintain the balance of power in Parliament for the entire legislative term. In particular, this principle can no longer be adhered to if a substitute leaves the political party or its "list support" before moving up. This circumstance is assessed differently in the doctrine: For Anina Weber, a resignation from the party or "list sponsorship", regardless of the moment of resignation, is contrary to proportional representation and violates various constitutional provisions. Tomas Poledna, on the other hand, does not see a breach of the duty of loyalty to the electorate and therefore no violation of political rights in resigning from the party or "list sponsorship". 12

In a case concerning the canton of St. Gallen, in which the elected Barbara Keller-Inhelder switched from the CVP to the SVP between her election and the constitution of the cantonal council, the Federal Supreme Court held that a change of party, regardless of whether it is made between the election and taking office or during the exercise of office, does not violate constitutional political rights. However, the Federal Supreme Court added that such party 13

changes are certainly "questionable" and are accompanied by a "loss of political credibility".

14 Even though the Federal Supreme Court did not comment on the issue of substitutes changing parties in the aforementioned ruling, it can be assumed on the basis of its reasoning that a change of party by substitutes prior to moving up does not violate political rights either. This is because the Federal Supreme Court stated in general terms that no requirements for admission to office can be derived from constitutional political rights.

15 In the light of this Federal Supreme Court case law, a change of party always has no consequences for the elected person or the person succeeding them, regardless of the time. If the legislator considers this circumstance to be objectionable, it is of course free to make provision for the consequences of a change of party.

I would like to thank Benjamin Böhler, BLaw, assistant at the Center for Democracy Aarau, for his help in researching the material and his valuable comments, and Janis Denzler, BLaw, assistant at the Center for Democracy Aarau, for his critical review of the text and his valuable comments.

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COMMENTARY ON

Art. 56 PRA

A commentary by Luka Markić

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Art. 56 Supplementary election

[1] Where a seat cannot be filled by substitution, three-fifths of the signatories to the list (Art. 24 paragraph 1) on which the member of the National Council who has resigned is entered, or the committee of the cantonal party (Art. 24 paragraph 3) that submitted the said list shall have the right to submit a further nomination.

[2] The candidate who is nominated in the foregoing manner shall be declared by the cantonal government to be elected in accordance with Article 45, following the rectification of any deficiencies in the candidate list (Art. 22 and Art. 29) and without a ballot being held.

[3] Where the right to nominate a candidate is not exercised, a popular election shall be held. This election is based on the simple majority

election system unless more than one seat has to be filled, in which case the provisions on the system of proportional representation apply.

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I. HISTORY OF ORIGIN

1 With the introduction of proportional representation for the appointment of the National Council in 1919, a provision on by-elections was also created. Article 25 of the Federal Act on the Election of the National Council of February 14, 1919 regulated the procedure in the event that a vacant seat in the National Council could not be filled according to the rules of succession. Even then, the rule was that a by-election had to take place if there was no eligible replacement on the list in question. For the by-election, the signatories of the list to which the retired member of the National Council belonged initially had the right to submit a proposal for a new replacement. At that time, the number of signatures required for a nomination was 15 signatures from those eligible to vote in the constituency concerned. If not all 15 signatures of the signatories of the original list were available, the remaining co-signatories were allowed to replace them by adding other voters. If the nomination was successful with 15 signatures, the proposed candidate was declared elected by the cantonal government in question without an act of election. If the signatories were unable to agree on an election proposal, a popular election (relative majority election) was held for the vacant seat.

2 When proportional representation was introduced, there were discussions about holding supplementary elections as popular elections. However, the Federal Assembly decided against this. The German-speaking rapporteur of the National Council's preliminary advisory committee, National Councillor Hans Sträuli (FDP/ZH), justified this by stating that "the seat in question, which has been settled, has already been awarded to the party in the main election. The party has shown that it can claim this seat and it was filled by the candidate who has now left. As a result, there should not be a new election in which the parties measure their strength again, but the party that counted the candidate who has left as one of its own should have the right to make proposals in the first instance without further ado."

3 With the introduction of the PRA in 1975, the supplementary election system was adopted but revised: As 50 supporting signatures were now required for an election proposal, the Federal Council considered it "hardly possible for all 50 signatories to agree to submit a new proposal." For this reason, the provision only stipulated that a minimum number of 30 of the original signatories had to agree on a proposal. If a valid proposal is made, the proposed candi-

date is declared elected by the cantonal government without an election act. In the event that no proposal is made, a popular election is held; if there are several vacant seats, the provisions on proportional representation apply, otherwise those on majority voting apply.

In its dispatch for the new PRA, the Federal Council stated that "filling vacant seats by a small group of electors [...] is considered undemocratic". Nevertheless, he wanted to give preference to the previous system, as the balance of power between the parties determined during the overall renewal should not change during the entire legislative period. A popular election based on the majoritarian principle to fill a vacant seat would be objectionable, as shifts in seats "would naturally work to the disadvantage of the smaller parties". The National Council and Council of States followed the Federal Council's proposal without discussion or opposition. 4

Since coming into force, Art. 56 PRA has been revised twice. In the dispatch on the first revision in 1994, the Federal Council noted that the PRA requires at least 50 supporting signatures for an election proposal; however, the law does not specify a maximum number. However, if 60 or more eligible voters sign the nomination, two supplementary elections could possibly be held for a vacant seat without an electoral act. The Federal Council therefore proposed that instead of a quorum (30 signatures), a ratio to the original number of signatures should be set. Three-fifths of all signatories of the original election proposal who were still entitled to vote were proposed as a hurdle. The National Council and Council of States followed the Federal Council's suggestion. 5

The second revision of Art. 56 PRA followed in 2003, which was an adjustment to the simplification of the signature quorum introduced for registered parties (Art. 24 PRA). According to this simplification, the election proposals of registered parties only require the signatures of the presiding and executive members of the cantonal party in addition to the signatures of all candidates. This change necessitated an amendment to Art. 56 PRA: The right of nomination for supplementary elections for registered parties is exercised in these cases by the executive committee of the cantonal party. This amendment did not lead to any discussions in the National Council and Council of States. It was adopted by both Councils. 6

II. COMPARISON OF LAWS

7 *See in detail OK-Lehner, Art. 44 PRA N. 7 f.*

III. SIGNIFICANCE OF THE PROVISION AND CONTENT OF THE PROVISION

8 The election of the National Council is based on the principle of proportional representation (Art. 149 para. 2 FC). Consequently, the PRA assumes that the mandates should remain the property of the respective list or party for the entire legislative period. In order to maintain the balance of power between the parties throughout the legislative term, the supplementary election procedure primarily provides for the signatories of the election proposal to be able to supplement the list (Art. 53 para. 1 PRA). In principle, there is no popular election (Art. 53 para. 2 PRA). This is only ordered if the right of nomination is not used (Art. 53 para. 3 PRA).

9 The supplementary election pursuant to Art. 56 PRA is not only used if a vacant seat in the National Council cannot be filled by succession pursuant to Art. 55 PRA, but also if a list obtains surplus mandates (Art. 44 PRA).

10 Since the introduction of proportional representation, there have only been three cases in which the rules on supplementary elections have been applied. The first two cases concerned supplementary elections immediately after the general election of the National Council in 1919 (see Art. 44 PRA today) and only one case concerned a supplementary election due to the impossibility of succession:

- In 1919, the Catholic Conservatives in the canton of Fribourg won one more seat than there were candidates on the list. As a result, Ernest Perrier (CC/FR) was elected to the National Council without an election.
- Also in 1919, the Social Democratic Party (SP) in the canton of Schaffhausen won one more seat than there were candidates on the list. As a result, Jakob Hefti (SP/SH) was elected to the National Council by the corresponding electoral college.
- Josef Diethelm (SP/SZ) was elected to the National Council in 1959. His last re-election to the National Council was in the 1975 general elections, when he was the only candidate on the list of the Social Democratic Party of the

Canton of Schwyz. Diethelm died in office on December 29, 1978. As there was no other candidate on the original SP list, it was impossible for a replacement to stand. As a result, 28 supporters of the SP election proposal nominated Alois Kessler (SP/SZ) as National Councillor.

A. Para. 1: Right of nomination

Contrary to the name of the provision, in a supplementary election there is no free popular vote in the first step. Rather, the signatories of the election proposal should be able to supplement the list. Depending on the circumstances, two different groups have the right of nomination: 11

Firstly, the right of nomination accrues to the signatories of the list in accordance with Art. 24 para. 1 PRA (first variant). Each election proposal must be signed by a minimum number of voters with political residence in the electoral district at the time of submission, whereby the minimum number of signatures varies depending on the size of the electoral district. Three-fifths of the signatories of the original election proposal (60 percent) are required for a valid election proposal for the supplementary election. 12

The procedure for a supplementary election pursuant to Art. 56 para. 1 variant 1 PRA is regulated in rudimentary form in Art. 16 VPR. If a supplementary election is held, the cantonal government of the relevant constituency invites the representative of the list entitled to nominate a candidate to submit an election proposal, setting a deadline of 30 days. For this purpose, the cantonal government shall provide the representative with a copy of the original election proposal, including the names and addresses of all signatories. The further procedure for submitting an election proposal is not regulated. It is therefore the responsibility of the representative of the election proposal (Art. 25 PRA) to bring about an election proposal that is signed by at least 60 percent of the original signatories within the set deadline. 13

If, on the other hand, the election proposal is submitted by a political party with administrative simplifications (Art. 24 para. 3 PRA), the cantonal party's executive committee has the right of nomination (variant 2). It is true that the original election proposal is only signed by the presiding and executive members of the cantonal party (Art. 24 para. 4 PRA). However, a resolution of the executive committee of the cantonal party is required for the submission of a valid election proposal in accordance with Art. 56 para. 1 PRA. The executive 14

committee is the executive body of a party (see Art. 69 CC). The name of the executive committee and the procedure for passing resolutions are set out in the articles of association of the respective party.

15 The procedure regarding the supplementary election pursuant to Art. 56 para. 1 variant 2 PRA is not covered by Art. 16 VPR. However, the procedure can be applied analogously: The cantonal government must invite the executive committee of the relevant cantonal party to submit an election proposal, setting a deadline of 30 days.

B. Para. 2: Appointment without an election act

16 If an election proposal is validly made in accordance with Art. 56 para. 1 PRA, the proposed candidate is declared elected in the procedure for determining silent elections (Art. 45 PRA). No popular election shall be held on the election proposal of the undersigned or the executive committee of the cantonal party.

C. Para. 3: Popular election

17 If the right of nomination is not exercised by the signatories or the executive committee of the cantonal party, the cantonal government shall order a popular election for the vacant seat, irrespective of the reason for the omission. If several seats are to be filled, these are to be elected according to proportional representation (Art. 21 ff. PRA), otherwise a relative majority election is held (Art. 47 ff. PRA). In a popular election, it is possible that the party-political balance of power may change compared to the result of the general election.

D. Criticism and legal policy proposals

18 The supplementary election procedure pursuant to Art. 56 PRA has been described as undemocratic, particularly by the Federal Council. Not only does the procedure make a popular election impossible, it could also be offensive that a small group of signatories could single-handedly determine who becomes a member of the National Council.

19 It is therefore hardly surprising that the supplementary election procedure has met with criticism from academics. The supplementary election is described as constitutionally problematic, as the signatories of the election proposal can directly determine who becomes a member of the National Council. This

means that there are no direct popular elections, as required by Art. 149 para. 2 sentence 1 FC. The supplementary election procedure serves to secure the mandates allocated to a party in the general elections. The securing of mandates by the parties thus takes precedence over the democratic legitimation of MPs through direct appointment by the voters.

According to René A. Rhinow, the situation became even more objectionable with the 2003 revision, as in some circumstances even a decision by a cantonal party executive would suffice for an "election" to the National Council. This would "de-democratize" the procedure. In addition, the legislator is not only disregarding the autonomy of the parties under association law, but is also interfering with internal party democracy. Normally, candidates for parliamentary elections are determined by party conventions, general meetings or delegate assemblies. 20

In principle, the doctrine is to be agreed with: The right of nomination in the context of "supplementary elections" is unconstitutional, as Art. 149 para. 2 sentence 1 FC requires the direct election of members of the National Council by the people. This is undermined by the right of nomination pursuant to Art. 56 para. 1 and 2 PRA. 21

In order to solve the problem in terms of legal policy, various options would be available: One option would be to abolish the right of nomination. If a vacant seat cannot be filled by succession, it would be filled by a direct popular election. However, this would inevitably lead to a subsequent debate on the election procedure to be used, particularly in the event of a vacancy. The relative majority election (Art. 56 para. 3 PRA in conjunction with Art. 47 para. 1 sentence 1 PRA), which is usually applied when a seat is vacant, would have to be rejected here. It would only favor large parties. In the case of single-member constituencies for the National Council election, the atypical majority election with a relative majority is only justified by the fact that the National Council election is to be held nationwide on a single date. This argument would no longer apply to a supplementary election. 22

Another option would be to place the supplementary election on a constitutional basis with a prior right of nomination in accordance with Art. 56 para. 1 and 2 PRA. This would solve the constitutional problems in particular. However, the accusation of "de-democratization" would then not be refuted. After all, other democracies with a long tradition also fill temporarily vacant seats in 23

parliament to the exclusion of popular elections. Moreover, it should not be denied that the problem described is only of a temporary nature, as with each overall renewal of the National Council, the member in question can either be confirmed or voted out of office by the electorate.

24 Finally, it should be pointed out that the justified discussion surrounding the constitutionality of supplementary elections pursuant to Art. 56 PRA will remain purely theoretical in the future, as the practical relevance of Art. 53 PRA has remained extremely limited: since the introduction of proportional representation, there have only been three cases of application, two of them in the first year of application. The likelihood that a case of application of Art. 56 PRA will be repeated in the foreseeable future cannot be ruled out entirely, but it can be described as low.

I would like to thank Benjamin Böhler, BLaw, assistant at the Center for Democracy Aarau, for his assistance in researching the material and his valuable comments, as well as Janis Denzler, BLaw, assistant at the Center for Democracy Aarau, for his critical review of the text and his valuable comments.

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COMMENTARY ON

Art. 57 PRA

A commentary by Luka Markić

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Art. 57 End of the legislative period

The legislative period of the National Council ends on the constitution of the newly elected National Council.

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I. HISTORY OF ORIGIN

Art. 57 was incorporated into the new PRA as a so-called "redrafting" without further justification. The provision did not lead to any discussion in either the National Council or the Council of States. 1

The predecessor provision in Art. 32 of the repealed Federal Act on Federal Elections and Votes of 1872 stated that the "term of office of the National Council [...] shall expire in the year in which it falls into complete renewal, each time on the Sunday preceding the first Monday of December". The constituent session of the National Council took place at 10 a.m. on the first Monday of December following the general elections. This meant that there was a power vacuum between midnight and the convening of the newly elected National Council. This is no longer possible with the provision in Art. 57 PRA. 2

II. COMPARISON OF LAWS

The cantons usually determine the end of the term of office of their parliaments in their decrees concerning the election of their parliament or in the parliamentary rules of procedure. Most cantons define the end of the term of office analogously to Art. 57 PRA, which means that the term of office ends after renewal elections when the newly elected parliament is constituted. 3

In a few cantons, the law stipulates a specific date on which the term of office of the newly elected parliament begins; they also explicitly or implicitly stipulate that the term of office of the previously elected parliament ends at the end of the previous day. Such regulations can be problematic in an emergency. If the newly elected parliament cannot be constituted on the date stipulated by law due to pending or successful election complaints or for unforeseen reasons, the canton will no longer have a parliament for a certain period. In my opinion, the term of office of the parliament currently in office must be extended for a nutshell in such cases in order to guarantee the functioning of the state. 4

In cantons that, by contrast, do not include any provisions in their enactments regarding the end of the parliament's term of office, it must be assumed for reasons of legal certainty that the term of office of the previously elected parliament only ends when the newly elected parliament is constituted. 5

III. SIGNIFICANCE OF THE PROVISION AND CONTENT OF THE PROVISION

6 Art. 57 PRA is the logical supplement to Art. 53 para. 1 sentence 3 PRA (commencement of the term of office). It is necessary so that the complete renewal of the National Council required by Art. 149 para. 2 sentence 2 FC can take place at all.

7 The term of office of the previously elected National Council ends when the newly elected National Council is constituted. This ends not only the previous legislative term of the National Council (as a body), but also the respective personal term of office of each individual member of the National Council. The outgoing members of the National Council from the previous legislative period lose their rights and duties as members of the Council when the newly elected National Council is constituted.

I would like to thank Benjamin Böhler, BLaw, assistant at the Center for Democracy Aarau, for his assistance in researching the material and his valuable comments, as well as Janis Denzler, BLaw, assistant at the Center for Democracy Aarau, for his critical review of the text and his valuable comments.

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COMMENTARY ON

Art. 58 PRA

A commentary by Véronique Boillet

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Chapter 1 Mandatory Referendum

Art. 58 Publication

Enactments that are subject to a mandatory referendum shall be published following their adoption by the Federal Assembly. The Federal Council shall order that a popular vote be held.

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I. HISTORY AND IMPORTANCE OF THE PROVISION

The Federal Act on Political Rights was passed in 1976. Its art. 58 LDP has not been amended since then. The Federal Council's message on this provision referred only to constitutional provisions and urgent federal decrees, because the scope of the mandatory referendum was only extended to membership of collective security organizations or supranational communities when the Federal Constitution (Cst.) was revised in 1977. 1

Art. 58 LDP is the first provision of Title 4 on referendums. Chapter 1 includes only art. 58 of the LDP, which deals with mandatory referendums. Chapter 2, comprising art. 59a to 67b of the LDP, organizes the optional referendum. 2

The practical scope of art. 58 of the LDP is relatively important, since it regulates the organization of votes on all acts of the Federal Assembly subject to mandatory referendum, i.e. between 52 and 69 votes per decade since the LDP came into force. 3

II. COMMENTARY

Art. 58 of the LDP refers to acts adopted by the Federal Assembly (A.1.) which are subject to mandatory referendum (A.2.). It stipulates that these acts must be published (B.) and put to the vote (C.). It is necessary to determine more precisely which acts are covered and to define the treatment to which they are subject. 4

A. Acts adopted by the Federal Assembly subject to mandatory referendum

1. Acts adopted by the Federal Assembly

The notion of acts adopted by the Federal Assembly must first be understood in the light of art. 163 Cst. feder. According to this provision and the interpretation given to it, these are acts which "the Federal Assembly adopts at the end of its ordinary deliberation procedure (cf. art. 71 ff LParl) and which have effects external to it - with the publication that this implies (cf. art. 2 and 11 LPubl)". These acts may take the following forms: a federal law, an ordinance, a federal decree or a simple federal decree. 5

6 Federal laws and ordinances contain rules of law, i.e. "general and abstract provisions of direct application which create obligations, confer rights or assign powers" (art. 22, para. 4, LParl).

7 Important legal provisions take the form of federal laws (art. 164 para. 1 Cst.), while others take the form of ordinances (art. 163 para. 1 Cst.).

8 Art. 164 para. 1 Cst. provides a non-exhaustive illustration of the areas deemed important that require the adoption of laws in the formal sense.

9 Acts which do not contain legal rules, i.e. other acts, are classified as simple federal decrees if they are not subject to referendum (art. 163 al. 3 Cst.). They must have been adopted by the two Councils in separate deliberations (art. 156 Cst.).

10 It should be noted that certain federal decrees issued by the Federal Assembly are intended to make matters subject to referendum under the Constitution subject to popular vote (art. 140 and 141 para. 1 let. d Cst.). In such cases, the federal decree acts as an intermediary, giving the electorate the opportunity to vote on constitutional amendments, popular initiatives or international treaties, rather than on the federal decree as such.

11 From a procedural point of view, to be validly qualified as an act of the FA, a draft act must have been the subject of concordant decisions in both Councils, followed by a final vote on the text drawn up by the Drafting Committee (art. 81 LParl and 156 Cst.).

2. Acts subject to mandatory referendum

12 Only certain acts of the Federal Assembly are subject to an optional or mandatory referendum.

13 Art. 58 LDP refers only to acts of the Federal Assembly subject to mandatory referendum, i.e. those listed in art. 140 Cst. These are urgent federal laws with no constitutional basis within the meaning of art. 140 para. 1 let. c Cst. and federal decrees designed to enable a mandatory referendum to be held on the other acts mentioned in art. 140 Cst.

14 The term "referendum" refers to "consultation of the people, or of the people and the cantons, on certain acts adopted by the Federal Assembly". This con-

sultation makes it possible to accept or reject an act, but not to modify its content. It establishes a right of veto.

When a referendum is mandatory, it must be organized by the competent authorities. In principle, the effect of a referendum is suspensive: the entry into force of the act put to the vote is conditional on its acceptance. There is one exception to this principle: in the case of urgent legislation, the referendum has a resolutory or repealing effect. As the act put to the vote is already in force, it is repealed if the vote is negative. 15

The acts referred to in para. 2 of art. 140 Cst. require a simple majority of the people (II.A.2.a), those listed in para. 1 require a double majority of the people and cantons (II.A.2.b). 16

a. Acts subject to mandatory referendum with double majority

Three categories of acts are subject to mandatory referendum with a double majority of the people and cantons (cf. art. 142 para. 2 a 4 Cst.) in accordance with art. 140 para. 1 Cst. These are: total or partial revisions of the Federal Constitution (let. a), membership of collective security organizations or supranational communities (let. b) and urgent federal legislation with no constitutional basis and lasting more than one year (let. c). 17

Total or partial revision of the Federal Constitution refers to the vote on a new Constitution drawn up following a popular initiative or on the proposal of an authority (art. 193 and art. 140 para. 1 let. a, Cst.), the vote on a popular initiative for a partial revision of the Constitution in the form of a draft (art. 139 para. 5 Cst.), the vote on a direct counter-proposal to a popular initiative for a partial revision of the Constitution in the form of a draft (art. 139 para. 5 Cst. and art. 101 LParl), the vote on a partial revision of the Constitution requested by the people in the form of a popular initiative in general terms (art. 139 al. 4, art. 156 al. 3 let. b and art. 140 al. 1 let. a, Cst.) or the vote on a partial revision of the Constitution requested by an authority (art. 194 and art. 140 al. 1 let. a Cst.). 18

The question of whether the Federal Assembly can submit acts not covered by art. 140 al. 1 let. b Cst. to a mandatory referendum is controversial. The federal authorities - and the majority of legal writers - seem to accept that international treaties of constitutional importance should be subject to mandatory referendum. 19

20 In order to clarify this last point, a draft revision of Art. 140 Cst. was drawn up by the Federal Council in response to motion 15.3557 "Compulsory referendum for international treaties of a constitutional nature". The draft provided for the addition of letter b^{bis} to Art. 140 para. 1 Cst., according to which "international treaties that contain provisions of constitutional rank or whose implementation requires an amendment to the Constitution are also subject to a mandatory referendum; provisions of constitutional rank include, in particular, those relating to the catalog of fundamental rights, nationality and citizenship rights, political rights (ch. 1), the relationship between the Confederation and the cantons and the powers of the Confederation (ch. 2), and the broad outlines of the organization and procedures of the federal authorities (ch. 3)". However, the National Council refused to discuss the draft.

21 With regard to the interpretation of the concept of accession to international treaties, the question arose as to whether it also covered treaty amendments and denunciations. The Federal Act of June 21, 2019 on the competence to conclude, amend and terminate international treaties, which came into force on December 2, 2019, clarified the situation: it led to the amendment of the LParl (art. 24 in particular) and the LOGA (art. 7a in particular) to specify that both the conclusion and the amendment and termination of international treaties are subject to referendum.

22 Urgent federal laws with no constitutional basis and lasting more than one year must be put to the vote within one year of their adoption by the Federal Assembly.

23 Art. 141a para. 1 Cst. also allows the necessary constitutional amendments to be incorporated into the federal decree approving an international treaty.

b. Acts subject to mandatory referendum with simple majority

24 Three types of act are subject to mandatory referendum with a simple majority (cf. art. 142 para. 1 Cst.):

- popular initiatives for the total revision of the Federal Constitution (Art. 138 and Art. 140 para. 2 let. a, Cst.) ;
- popular initiatives conceived in general terms for the partial revision of the Constitution in the event of rejection by the Federal Assembly (art. 139 al. 4 and art. 140 al. 2 let. b Cst.);

- the principle of a total revision of the Constitution, in the event of disagreement between the two Councils (art. 140 al. 2 let. c Cst.).

B. Publication

Following the final decision of the two Councils (art. 81 LParl and 156 al. 2 Cst.), all acts subject to mandatory referendum are published in the Feuille fédérale (art. 13 al. 1 let. d LPubl and 21 ff OPubl). It should be noted that while the publication of acts subject to optional referendum is regulated by art. 42 para. 6 OPubl, the publication of acts subject to mandatory referendum is not prescribed. 25

The Federal Gazette (FF) is the official information bulletin of the Confederation. In accordance with art. 58 LDP, decrees and laws adopted by the Federal Assembly and subject to mandatory referendum are published in the FF. 26

C. Voting

The Federal Council finally orders the vote (art. 58, 2nd sentence, LDP). 27

In accordance with art. 1 para. 4 of the Ordinance on the Organization of the Federal Chancellery (Org ChF), the Chancellery is responsible for ensuring "that popular rights can be exercised in accordance with the Constitution and the legislation on political rights, and that federal elections and votes are conducted in accordance with the rules". Art. 4 para. 2 let. d Org ChF further specifies that the Federal Chancellery "prepares and executes laws and ordinances relating to political rights". 28

On the basis of these provisions, the Federal Chancellery proposes to the Federal Council the items to be put to the vote. In practice, the aim is to put them to the vote quickly. While the FC must define the subjects for each voting date, respecting certain deadlines (cf. N 30 et seq.) and practical considerations, it nevertheless has political leeway - allowing certain subjects to be grouped together or treated separately. It should also be remembered that, although the FC's decision is not subject to appeal (art. 189 para. 4 Cst.), it must take its decisions in accordance with art. 34 Cst. which protects the faithful and reliable expression of the will of the people. 29

Article 10 para. 1bis of the LDP states that, except in the case of federal laws declared urgent, for which the deadline may be shortened, the FC must an- 30

nounce the subject of the vote at least four months in advance. The purpose of this rule is to ensure that all interest groups have sufficient time to prepare for the voting campaign. According to legal doctrine, postponement is permissible only in exceptional cases, if it is provided for by a specific provision (e.g. art. 6 para. 2 and 7 of the Federal Voting Act in the event of a pandemic), or even on the basis of art. 185 para. 3 of the Federal Constitution. The Federal Council, for its part, considers that postponement or relocation of a popular vote that has already been scheduled must be expressly provided for in the Federal Act on Political Rights. In response to the Rieder motion, the Federal Council has instructed the Federal Chancellery to prepare a draft revision.

31 Specific deadlines must also be observed for popular initiatives in accordance with art. 75a of the Federal Act on Political Rights (these are, however, orderly deadlines, the violation of which entails no consequences):

- The FC has ten months from the final vote of the FA to submit an initiative to the vote (paras. 1 and 3);
- In the event of conditional withdrawal by the initiative committee, the FC must submit the initiative to the vote within ten months of validation of the negative vote on the indirect counter-proposal (para. 2).
- However, an extension of six months is provided for if the deadlines set out in paragraphs 1-3 start between ten and three months before the National Council is fully renewed (paragraph 3^{bis}).

32 In accordance with art. 10 of the LDP, the FC determines the rules for setting voting days. The following Sundays are reserved for popular votes (art. 2a para. 1 of the Federal Ordinance on Political Rights):

- the second Sunday in February, in years when Easter Sunday falls after April 10, and the fourth Sunday before Easter in other years;
- the third Sunday in May, in years when Pentecost Sunday falls after May 28, and the third Sunday after Pentecost in other years;
- the Sunday following the Federal Fast;
- the last Sunday in November.

33 Early voting is possible earlier, in accordance with art. 7 of the LDP. Article 8 of the LDP also regulates postal voting, which also allows early voting.

It should be noted that, in the event of overriding reasons, the FC may modify or add dates at the proposal of the Federal Chancellery (art. 2a para. 2 ODP), and that no vote is scheduled for September of the year in which the National Council is renewed (art. 2a para. 3 ODP). 34

Finally, it should be noted that votes are organized by the cantons in accordance with art. 10 para. 2 of the LDP. The Federal Chancellery collates the cantonal results and officially announces the results for the whole of Switzerland. 35

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COMMENTARY ON

Art. 59a PRA

A commentary by Beat Kuoni

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Art. 59*a* Significance of the period

The request for a referendum must be submitted to the Federal Chancellery before expiry of the referendum period, either with the support of the number of cantons required by the Constitution or furnished with the required number of signatures and the certificates of eligibility to vote.

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I. HISTORY OF ORIGIN

The Federal Constitution of May 29, 1874 introduced the optional referendum in federal matters. According to Art. 89 para. 2 aBV, federal laws and generally binding federal resolutions had to be submitted to the people for approval or rejection if 30,000 voters or eight cantons so demanded. The length of the referendum period was not stipulated in the Constitution, but had to be regulated by legislation. At the request of the Federal Council, a period of 90 days was enshrined in Art. 4 of the Federal Act of June 17, 1874 on the Referendum on Federal Acts and Federal Decisions. The deadline was to be triggered by the publication of the law or the generally binding federal decree in the Federal Gazette. The PRA adopted the referendum deadline and the determination of the start of the deadline unchanged in Art. 59. 1

The number of statements of support for an optional referendum was increased from 30,000 to 50,000 signatures with the Federal Decree of March 25, 1977 on increasing the number of signatures for the referendum. This was intended to bring the quorum (again) into an appropriate relationship with the total number of voters. The introduction of women's suffrage in 1971 played an important role in this, but other arguments for the need for action were also brought into play, such as improved transportation and communication options, increased population concentration in urban agglomerations and new methods of political advertising. The referendum deadline, however, remained unchanged. 2

The provision in Art. 59a was added to the PRA in 1996 and came into force on April 1, 1997. The legal amendment was a consequence of the discrepancies that arose during the counting of the referendum against the construction of the New Rail Link through the Alps (NRLA): The count initially resulted in the narrow failure of the referendum. Following the discovery of a counting error, two interdepartmental groups counted all the signature lists again independently of each other and established that the referendum had been narrowly successful. An administrative investigation investigated the reasons for the discrepancies and laid the foundations for the PRA revision of 1996. 3

One cause of the counting problems was the former provision in Art. 65 PRA, which was used for the first time in the NRLA referendum. It allowed the Federal Chancellery to have deficiencies in the certificates of voting rights recti- 4

fied by the competent authorities under cantonal law even after the referendum deadline had expired, if the outcome of the referendum depended on it. The possibility of subsequent certification was abolished with the PRA revision of 1996. In addition, signatures now had to be received by the Federal Chancellery within the referendum deadline, whereas previously it was sufficient to post them on time according to the postmark (see N. 31). In return for these two amendments, the referendum deadline was extended from 90 to 100 days.

5 The Federal Assembly followed the Federal Council's proposals when discussing the 1996 revision of the PRA. The National Council's preliminary advisory committee had initially advocated a different concept, but this did not prevail in the National Council. It wanted to retain the referendum deadline of 90 days; however, the signatures would have had to be submitted to the competent authority under cantonal law within the referendum deadline. The certified signatures would then have had to be submitted to the Federal Chancellery within 30 days of the referendum deadline at the latest. The proposal would have extended the period during which a decree is in "limbo" due to the referendum deadline and would probably have exacerbated the problems identified by the administrative investigation because the responsibilities would not have been clearly delineated.

6 With the Federal Decree of 4.10.2002 on the amendment of popular rights, the referendum deadline, which had previously only been laid down in law, was enshrined in the Federal Constitution. The provision in Article 59 PRA thus became redundant and was repealed in the course of a revision of federal law. Since then, the reference to the referendum deadline in Art. 59a no longer refers to Art. 59 PRA, but to Art. 141 para. 1 of the Federal Constitution (FC, SR 101).

II. SIGNIFICANCE OF THE PROVISION

A. General

7 In Art. 141 para. 1 lit. a-d, the Federal Constitution specifies those enactments that must be submitted to a vote of the electorate if 50,000 voters or eight cantons so request within 100 days of the official publication of the enactment. Article 59a PRA refers to these quorums and the deadline, which it further specifies.

The optional referendum has a suspensive effect. Enactments subject to a referendum - with the exception of urgent enactments under Art. 165 FC - can only enter into force and take legal effect once the referendum deadline has expired unused or the enactment has been approved in the referendum and the result has been confirmed. The enactments for which the referendum period has expired are listed on the Federal Chancellery website. No active information is provided on the unused expiry of the referendum deadline, but all enactments subject to a referendum are kept in a database in which the use of popular rights can also be tracked. 8

The provision in Art. 59a clearly delineates the responsibilities of the actors: the Federal Chancellery is responsible for accepting signatures on behalf of the Confederation. Collecting the signatures, obtaining the certificate of eligibility to vote and submitting the signatures, on the other hand, are the responsibility of the parties requesting the referendum (referendum committees, signatories, etc.). The obligation to prove eligibility to vote is an expression of the general legal principle that the person who derives rights from an alleged fact must prove its existence (Art. 8 CC). 9

B. Comparison of laws

The cantons set deadlines of between 30 and 90 days for the collection of signatures for the optional popular referendum, although these are specified in different ways. In each case, the period begins to run from the date of official publication. 10

In nine cantons, signatures can be submitted to the competent cantonal authority without a certificate of eligibility to vote. In some cases, however, the cantons expressly provide that the certificate of voting rights can be obtained on a voluntary basis prior to submission. 11

In sixteen cantons, as in the Confederation, those requesting the referendum are responsible for obtaining the certificate of voting rights. However, the referendum deadline does not have the same meaning in all these cantons. Most are based on the federal regulation and require that the voting rights certificates are obtained within the referendum deadline and must be available to the canton at the time of submission. However, the cantons of Uri, Nidwalden, Solothurn, Schaffhausen, St. Gallen, Aargau, Valais and Neuchâtel have a rule - similar to the former federal rule in Art. 65 PRA - according to which defi- 12

ciencies in the certificate of voting rights can be rectified ex officio if the success of the referendum petition depends on it. The cantons of Ticino, Bern and Vaud also have further nuances.

13 In the canton of Ticino, signatures must be submitted within the referendum deadline to the state chancellery or the municipality responsible for certifying the right to vote. If a signature is received by the municipality in good time, it shall be forwarded by the municipality to the State Chancellery within five days.

14 In the Canton of Bern, signatures must be submitted to the office responsible for certifying voting rights by the end of the three-month referendum period at the latest. This office then has three weeks to certify the signatures and return them to the senders. Finally, the certified signatures must be submitted to the canton no later than 30 days after expiry of the referendum deadline.

15 The canton of Vaud has a similar regulation to the canton of Bern, although the deadlines are shorter: The competent authorities must return the certified signatures to the senders within two weeks of the end of the referendum period; the authors must then submit the certified signatures to the canton no later than three weeks after the end of the referendum period.

16 The canton of Glarus does not have an optional referendum at cantonal level.

III. COMMENTARY ON THE TEXT OF THE STANDARD

A. Referendum quorum

17 Art. 141 para. 1 FC stipulates the constitutional number of cantons (eight) and the number of voters (50,000) required for a referendum. Art. 59a specifies for the popular referendum that the voters must express their will in the form of a signature. This refers to a handwritten signature; prior to 1997, only the name was required to be handwritten and legible, as well as other details to establish identity such as first name, year of birth and address. Art. 67a PRA regulates how the cantonal request for a cantonal referendum is to be submitted; cantonal law and, subsidiarily, Art. 67 PRA regulate which cantonal body is responsible for this.

B. Referendum deadline

1. Start of the period

According to Art. 141 para. 1 FC, the 100-day referendum period begins with the official publication of the enactment. Federal acts and federal decrees subject to an optional referendum must be published in the Federal Gazette in accordance with Art. 13 para. 1 lit. e PublA, in all official languages simultaneously (Art. 14 para. 1 PublA). For reasons of transparency and easier predictability, enactments subject to a referendum that are passed by the Federal Assembly in the same session must generally be published in the Federal Gazette at the same time (Art. 42 para. 6 sentence 1 PublO). Publication generally takes place at the earliest ten days after the final vote (Art. 42 para. 6 sentence 2 PublO). In practice, enactments are usually published on the Tuesday after next after the final vote, i.e. after eleven days. 18

According to Art. 42 para. 6 sentence 3 PublO, a referendum bill can also be published early if it is essential for it to enter into force on time. Early publication is rare in ordinary legislation. In 2012, for example, the federal resolutions on the tax agreements with Germany, the United Kingdom and Austria were adopted on 15.6.2012 and published on 19.6.2012. The parties conducting the referendum objected to the procedure and claimed that they were disadvantaged because they had less time to prepare the referendum. However, the Federal Supreme Court recognized the urgency of the matter and protected the authorities' actions - even though the law at the time did not expressly regulate early publication. As a result of the incident, the possibility was included in Art. 42 para. 6 sentence 3 of the PublV of 7.10.2015. 19

Urgent federal acts are published in the AS on the day of entry into force at the latest in accordance with Art. 7 para. 3 PublA. Pursuant to Art. 24 para. 1 PublO, the title, the AS publication reference and - in the case of acts that are valid for more than one year - the referendum period are published in the Federal Gazette. For example, the FiREG was adopted on 30.9.2022, entered into force on 1.10.2022 and was published in the Federal Gazette on 11.10.2022, stating the referendum deadline. In practice, the notice in the BBl is usually published together with the enactments from the same session, as in the example above. Early publication only takes place in exceptional cases if it is necessary for a referendum to be held in good time. This practice is in contrast to Art. 24 para. 2 PublO, according to which the reference in the BBl 20

should appear at the same time as the publication of the legislative text in the AS. However, it makes it easier for the parties conducting the referendum to prepare for the collection of signatures and does not generally restrict the planning of the vote. The provision in Art. 24 para. 2 PublO therefore does not appear necessary to protect the rights of the people, which is why it should be adapted de lege ferenda in the opinion expressed here.

21 According to Art. 20 para. 2 APA, the time limit begins to run on the day after it is triggered. Accordingly, the 100-day period is to be calculated from the day following publication in the Federal Gazette.

22 In practice, it sometimes happens that a decree is published in the Federal Gazette inadequately. This may be the case, for example, if the published decree contains formal errors or wording that does not reflect the outcome of the parliamentary deliberations. In such cases, the Drafting Committee of the Federal Assembly arranges for a correction in accordance with Art. 58 para. 1 ParlA. In serious cases concerning an enactment subject to a referendum, it instructs the Federal Chancellery to correct the publication in the Federal Gazette with a corrigendum.

23 The legal consequences of inadequate publication for the referendum deadline are not regulated by law. In particular, the question arises as to whether or not the referendum deadline must be triggered again. This must be assessed on a case-by-case basis in good faith and in accordance with the principle of proportionality. On the one hand, the right of referendum must not be diminished by the defect. On the other hand, political actors must be prevented from abusively invoking the incorrect publication in order to delay the entry into force of a decree. From a legal point of view, the decisive factor is whether the oversight has a significant impact on the content and can be of significance for the referendum or the waiver thereof.

24 In practice, there are various examples of inadequately published decrees in which the question of retriggering the referendum deadline arose. The referendum draft of the RTVA issued on 24.3.2006 contained a substantive error in the provisions on legal protection in the German version. It was corrected on 18.7.2006 (!) and the referendum deadline was re-triggered, although the original deadline had already expired unused on 13.7.2006. Another example occurred in 2015 with the UVG revision: the published texts contained a paragraph that was deleted during the parliamentary consultation and should not

have been part of the final vote text. The error affected the texts of all official languages, even if only the French version reproduced the provision in its wording. The error was corrected and the referendum deadline was re-triggered. The last example to date concerned the FinSA, which was enacted in 2018. The referendum bill contained an article in the French version in which a paragraph was not amended in accordance with the resolutions of the Councils. The provision was controversial during parliamentary deliberations and therefore had political relevance. The error was corrected in the Federal Gazette, but the referendum deadline was not re-triggered.

A problem comparable to the publication of an erroneous referendum bill occurred in 1987/88 when, for technical reasons, the referendum bills from the autumn session were published in Italian with a delay compared to those in the other official languages. In order to ensure equal treatment of the language communities, the deadline for signatures from Italian-speaking Switzerland, i.e. from the Ticino and Italian-speaking Graubünden municipalities, was subsequently postponed. The Federal Supreme Court upheld the authorities' action, but there was a legislative aftermath that led to an amendment to Art. 59 PRA in 1996. The new provision stipulated that the "referendum period would last 90 days from the last official publication". A few years later, however, the legislator considered the legal amendment to be too rigid and reversed it. 25

The criteria on the basis of which the legal consequences of inadequate publication are assessed leave the competent authorities some room for discretion. In view of the potential scope of such decisions and the fact that the political consequences can hardly be completely ignored in the assessment, a statutory regulation was suggested de lege ferenda. 26

2. Expiry of the deadline

Art. 59a defines the referendum deadline as an absolute deadline and requires that all requirements must be submitted within the deadline. The signatures must be received by the Federal Chancellery by the last day of the deadline at the latest, i.e. they must be physically tangible. With regard to the cantonal referendum, letters from the cantons must reach the Federal Chancellery on this day in accordance with Article 67b PRA. 27

The PRA does not define by what time on the last day of the deadline the signatures can be submitted to the Federal Chancellery. From a legal perspec- 28

tive, all signatures that are submitted to the Federal Chancellery by midnight on the last day of the deadline are deemed to have been submitted on time. In practice, the Federal Chancellery occasionally accepts signatures late at night.

29 If the referendum deadline expires on a Saturday, a Sunday or a recognized public holiday, the referendum may be submitted on the next working day in accordance with Art. 20 para. 2 VPR. The regulation corresponds to the general rule for calculating administrative deadlines in accordance with Art. 20 para. 3 APA, but additionally provides for a restriction to office hours. Office hours are not specifically regulated by the federal government. Art. 10 para. 1 ArG defines daily working hours as the time from 6 a.m. to 8 p.m.; the submission of signatures should accordingly be possible until 8 p.m. in order to comply with the referendum deadline.

C. Submission

30 signatures for a popular referendum are usually submitted in person to the Federal Chancellery in a high-profile submission. The exact date and time must be agreed with the Federal Chancellery at least two to three weeks in advance. Submissions are regularly accompanied by media coverage and the authors of the referendum take the opportunity to draw attention to their concerns.

31 The signatures do not have to be delivered to the Federal Chancellery in person, but could theoretically be sent by post. However, signatures submitted by post must also reach the Federal Chancellery on the last day of the deadline; the postmark is no longer sufficient since the PRA revision of 1996. This also applies to the cantonal referendum: not only must it be decided within the referendum deadline, but it must also reach the Federal Chancellery before the deadline expires. With personal submission, the committees retain control over the number of signatures that they have actually submitted on time. The Federal Chancellery acknowledges the number of boxes and the number of signatures submitted as stated by the respective referendum committee.

32 In contrast to the submission of popular initiatives (Art. 71 PRA), the signature lists do not have to be submitted in their entirety for an optional popular referendum. Several submissions for the same referendum are conceivable and take place above all when several independent committees - sometimes for different reasons - collect signatures for a referendum. Subsequent submis-

sions of signatures within the referendum deadline are permitted, which can occur in particular if the success of a referendum is at risk and every signature is important.

The formation of a committee for an optional referendum is not legally required. In contrast to popular initiatives and election proposals, a referendum request does not necessarily require a representative body that can make binding declarations to the authorities. In practice, however, the formation of a committee is the rule and appears expedient for practical reasons in order to organize the collection, certification and submission of signatures and, not least, to manage the subsequent referendum campaign. It is possible to form several referendum committees. 33

The referendum committees are involved in the preparation of the explanatory notes for the vote. Pursuant to Art. 11 para. 2 PRA, the author committees of referendums may communicate their arguments to the Federal Council. The Federal Council must take them into account in its explanations. In practice, this generally means that it adopts and publishes the texts of the committees, provided they are not defamatory, blatantly untrue or too long. If there are several committees for a referendum, their arguments are included in the explanatory notes in the same proportion as the signatures they submitted contributed to the referendum. However, this division presupposes that the signatures are submitted separately by committee. 34

According to Art. 20 para. 1 VPR, the signature lists must be submitted separately by canton. The signature lists are therefore generally packed in a box for each canton and handed over to the Federal Chancellery one box at a time. 35

D. Certification of voting rights

According to Art. 59a, the voting rights of the signatories must be certified at the time of submission. If the certificate of voting rights is missing, the signature is invalid (Art. 66 para. 2 lit. b PRA). Subsequent certification after the referendum deadline has expired is not possible. The referendum deadline includes not only the collection of signatures, but also the obtaining of voting certificates. 36

If voting rights certificates are defective, the authors of a referendum must endeavor to correct them within the referendum deadline; the Federal Chan- 37

cellery may not rectify any defects. However, if the Federal Chancellery receives indications of problems with the certificates, it offers the referendum leaders the opportunity to intervene with the cantons concerned or, if necessary, with the competent authorities.

E. Referendum deadline in the Covid-19 pandemic

38 During the Covid-19 pandemic, the authorities restricted freedom of assembly and movement for health policy reasons. This impaired the ability to collect signatures for popular initiatives and referendums in public spaces. In turn, measures were therefore taken to ensure the exercise of people's rights.

39 On 16 March 2020, the Federal Council declared an extraordinary situation in accordance with Art. 7 EpG and thus largely froze public life. Collecting signatures for the ongoing popular initiatives and referendums became virtually impossible. The Federal Council therefore suspended the current deadlines for collecting signatures with the Ordinance of 20.3.2020 on the suspension of deadlines for federal popular petitions. The measure was intended to prevent the substance of people's rights from being undermined by the failure of popular petitions due to official measures rather than a lack of democratic support. However, according to Art. 1 para. 2 of the ordinance, the referendum deadline under Art. 59a only stood still if the Federal Chancellery was notified of the collection of signatures no later than five days after publication of the ordinance. Enactments that are not politically controversial should not be delayed and the possibility of their entry into force should not be delayed. Notifications were received for two decrees from the 2019 winter session. The deadlines were suspended until 31.5.2020, i.e. for a total of 72 days.

40 Motion 20.3419 Rieder, which was adopted by the Council of States on 17.9.2020 and by the National Council on 10.6.2021, calls on the Federal Council, among other things, to create a legal basis for the standstill of such political deadlines. This is not provided for in the planned implementation of the motion, which underlines the unique nature of the measure at the time.

41 In addition to the suspension of deadlines in spring 2020, Art. 59a PRA was temporarily superseded by a provision in the Covid-19 Act. According to Art. 2 of the Covid-19 Act, the Federal Council was able to provide by ordinance that referendum requests could be submitted within the referendum deadline with the required number of signatures but without a certificate of eligibility

to vote. The law designated the Federal Chancellery as responsible for obtaining the certificates of eligibility to vote from the relevant offices. This obligation related to signatures that were necessary for the request to come into effect. The measure was intended to allow the committees to make full use of the deadline for collecting signatures, but not to completely exempt them from the obligation to obtain the certificates of eligibility to vote on an ongoing basis (Art. 62 para. 1 PRA). However, the referendum committees made use of this option to very different extents, as the following list shows:

referendum	signatures submitted	thereof certified	source
Covid-19-Gesetz	97'878	30'166	BBl 2021 460
CO2-Gesetz	123'879	73'185	BBl 2021 462
BG über polizeiliche Massnahmen zur Bekämpfung von Terrorismus (PMT)	141'264	3'033	BBl 2021 641
Änderung ZGB (Ehe für alle)	69’392	62’241	BBl 2021 963
Änderung Covid-19-Gesetz	187’239	5’401	BBl 2021 1924
Massnahmenpaket zugunsten der Medien	109’948	4980	BBl 2021 2795
Änderung des BG über die Stempelabgabe (StG)	71'316	17'556	BBl 2021 2796
Transplantationsgesetz	70’230	19’743	BBl 2022 639
Änderung des Filmgesetzes	69’797	301	BBl 2022 640
Weiterentwicklung Schengen-Besitzstand	58’360	18’624	BBl 2022 641
	66’478	60’210	

Änderung Verrechnungssteuergesetz			BBl 2022 1058
Änderung AHVG (AHV 21)	124'337	53'791	BBl 2022 1059

42 Based on the Covid-19 Act, the Federal Council issued the Covid-19 Ordinance on Voting Rights Certification on 7.10.2020, which regulated the details of the procedure. The amendment to the Covid-19 Act of 19.3.2021 extended the exemption rule to popular initiatives, whereupon the Covid-19 Ordinance on Voting Rights Certification was completely revised. The amendment of 17.12.2021 to the COVID-19 Ordinance on Voting Rights Certificates extended the period of validity of the regulation deviating from Art. 59a once again until 31.8.2022. Since this date, referendums and popular initiatives must again be submitted including the certification of voting rights.

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COMMENTARY ON

Art. 59b PRA

A commentary by Beat Kuoni

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Art. 59*b* Prohibition of withdrawal

A request for a referendum may not be withdrawn.

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I. HISTORY OF ORIGIN

The ban on withdrawing a referendum was regulated by law in 1976 with the enactment of the PRA. The new regulation was not prompted by practical difficulties. Rather, the procedure was to be clarified in principle in order to prevent future discussions. At the same time, the Federal Council considered the risk of problematic constellations to be low. The National Council and Council of States approved the regulation without discussion. 1

The 1996 amendment to the law moved the provision from the original Art. 67 PRA to Art. 59b PRA. It was editorially revised for stylistic reasons without changing the content of the provision. 2

II. SIGNIFICANCE OF THE PROVISION

A. General

While popular initiatives can be withdrawn until the Federal Council determines the referendum (Art. 73 para. 2 PRA), the law expressly excludes the withdrawal of a referendum. The reason for this lies in the different functions of the direct democratic institutions: a popular initiative introduces an issue into the political process. It is to be dealt with by the Federal Council and Parliament and possibly a compromise is to be found in the form of a direct counter-proposal or an indirect counter-proposal. The interest in maintaining a popular initiative can therefore no longer apply and it can subsequently be withdrawn. The withdrawal does not have to be justified. 3

In contrast to a popular initiative, a referendum is merely a request to hold a popular vote on a specific act of the Federal Assembly. The decision-making process in Parliament is complete. Signatories of the referendum request do not have any substantive concerns that go beyond the demand for a referendum. A possible referendum committee does not need a negotiating pledge to help a substantive issue achieve a breakthrough in another form if necessary. For this reason, the withdrawal of referendums is considered inadmissible even without an explicit prohibition. 4

According to the Federal Council, the ban on withdrawal is intended to prevent abuse of the right of referendum and prevent "frivolity and elements of 5

gamesmanship from entering the state decision-making process". Although the provision would not be absolutely necessary from a legal perspective, it creates clarity for all stakeholders.

B. Comparison of laws

6 The majority of cantons, like the Confederation, stipulate that a referendum or a request for a referendum cannot be withdrawn. In the canton of Valais, a note to this effect must even be included on the signature list. As explained, the prohibition on withdrawing a referendum arises from the legal nature of the institute itself, which is why it also applies in those cantons that have no such provision.

7 As far as can be seen, the canton of Ticino is the only canton that expressly states that individual signatures may not be withdrawn.

III. COMMENTARY ON THE TEXT OF THE STANDARD

A. No withdrawal of the referendum petition

8 The prohibition on withdrawal applies to referendums that have been submitted to the Federal Chancellery, as the request to hold a referendum is only made when the referendum is submitted.

9 Authors of a referendum are not obliged to submit their collected signatures to the Federal Chancellery; signatories are not entitled to submit them. A corresponding obligation was considered when the withdrawal ban was introduced, but was rejected due to the lack of control and sanction options.

10 In contrast to the popular initiative, the PRA does not require a committee for the referendum that can make binding declarations to the authorities on behalf of the signatories. As a referendum may not be withdrawn, there is no compelling need for a committee. In practice, however, one or more referendum committees are always formed, which organize the collection, certification and submission of signatures and act as contact persons vis-à-vis the authorities. They are notified of the decision on the (non-)realization of the referendum and can inform the Federal Council of their arguments in accordance with Art. 11 para. 2 PRA so that it can take them into account in the explanatory notes for the vote. However, the committees do not have an actual representative function.

B. No withdrawal of individual signatures

Art. 59b initially refers to the referendum petition as a whole. This is most clearly expressed in the French version, which refers to the "demande de référendum". In practice, however, individual signatures may not be withdrawn once they have been submitted to the Federal Chancellery. This view is based, among other things, on the consideration that the quorum could be undercut by the withdrawal of individual signatures, thus preventing the referendum from being held and resulting in the referendum being withdrawn indirectly. 11

On the other hand, there is nothing to prevent signatories from withdrawing their signatures if they have not yet been submitted to the Federal Chancellery. However, it is up to the referendum committee to comply with the request. It is not obliged to submit the collected signatures and can delete an affected signature itself or not submit it at all. However, there is no right to withdraw the signature. The authorities responsible for certifying voting rights have no possibility of complying with a possible withdrawal request by the signatories. Under Art. 62 para. 2 PRA, they are obliged to return the certified signature lists to the senders (usually the committees). 12

The withdrawal of individual signatures was considered permissible prior to the enactment of the PRA. At the beginning of the 1930s, the Federal Council felt compelled to comment on the existence of such a right of withdrawal. At that time, declarations of withdrawal were received for some referendum petitions and federal legislation did not regulate the case. The Federal Council considered the withdrawal of a signature to be legally valid if it was declared before the referendum deadline expired or before the initiative request was submitted to the Federal Council. A declaration of withdrawal to the offices certifying the right to vote was also permissible. For popular initiatives, Art. 5 para. 1 lit. e of the Initiative Act of 23.3.1962 codified this practice. The Federal Council's 1975 draft for the introduction of the PRA, which was intended to replace the Initiative Act, among other things, did not provide for the possibility of withdrawing individual signatures. In the National Council's preliminary consultation committee, National Councillor Blunschy proposed such a provision, according to which signatures could have been withdrawn until the certificate of voting rights had been obtained. However, this request did not find a majority in the committee. 13

14 The current practice is criticized by academics. According to Jacquemoud, the prohibition on withdrawal under Art. 59b does not apply to individual signatures, which is why their withdrawal should already be permitted under current law. Signatures should be able to be withdrawn up to the end of the referendum period at the office responsible for certifying the right to vote. This office should then inform the Federal Chancellery and the committee of the withdrawal of the signature. Such a withdrawal option without a basis in federal law should be rejected. In view of the number of parties involved and the ongoing collection of signatures, procedural issues would first have to be clarified in order to avoid any uncertainties with regard to establishing the existence of referendums.

C. Returning to the referendum decree

15 In exceptional cases, a referendum may become irrelevant if the Federal Assembly repeals or amends a decree during the referendum period or even before a referendum is ordered. In such cases, there is no withdrawal of a referendum, but rather its basis is withdrawn. The questions that arise are discussed in connection with the ordering of the referendum; at this point, reference can therefore be made to the commentary on Art. 59c.

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COMMENTARY ON

Art. 59c PRA

A commentary by Beat Kuoni

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Art. 59c Popular vote

If the request for a referendum is successful, the Federal Council shall order the organisation of a popular vote.

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I. HISTORY OF ORIGIN

While the PRA has expressly provided for the Federal Council to order the vote for mandatory referendums since its introduction (Art. 58 PRA), a corresponding provision for the optional referendum was included in the PRA with the amendment of 21.6.1996. It enshrined the practice that had been taken for granted until then. The reorganization of the procedure for optional referendums in 1996 provided an opportunity to complete the legal provisions. 1

II. SIGNIFICANCE OF THE PROVISION

A. General

Art. 59c gives the Federal Council the power, but also the duty, to order a vote on enactments against which an optional referendum has been held. Holding a referendum is a complex process in which numerous actors are involved. While the federal, cantonal and communal authorities prepare and conduct the referendum (Art. 10 para. 2 PRA), political parties, interest groups, the media and, last but not least, the voters themselves are involved in forming public opinion and reaching a decision. The arrangement of the referendum creates binding force and predictability for all those involved. 2

Which proposals are put to the vote on which date is politically relevant and can be controversial under certain circumstances, as the timing and combination of proposals can potentially influence opinion-forming and mobilization. The order is therefore not a matter for an administrative authority, but for the Federal Council as the supreme executive and implementing authority (Art. 174 FC). The competence of the Federal Council is already laid down in Art. 10 para. 1bis PRA. Which parameters are decisive for the determination of voting proposals is commented on elsewhere. 3

While Art. 10 PRA lays down the basis for ordering referendums, the special provisions on the individual direct-democratic institutions oblige the Federal Council to order the referendum: Art. 58 regulates this for the mandatory referendum, Art. 59c for the optional referendum and Art. 75a PRA for the popular initiative. 4

B. Comparison of laws

5 In the cantons, the government is also responsible for holding the referendum. It orders the referendum if the optional referendum has been held.

6 Unlike the federal government, some cantons have special deadlines within which the vote on a referendum decree must be held if an optional referendum is held. The canton of Fribourg, for example, stipulates that the referendum must be held within 180 days of the announcement of its existence in the official gazette. In the canton of Basel-Stadt, the referendum must be held no later than one year after the resolution has been passed by the Grand Council, and in the cantons of Vaud and Neuchâtel, the State Council must put the referendum proposal to a popular vote within six months of the expiry of the referendum deadline.

III. COMMENTARY ON THE TEXT OF THE STANDARD

A. Procedure for ordering the referendum

1. Responsibilities

7 Art. 59c regulates the duty of the Federal Council to order a referendum on an enactment if the Federal Chancellery has determined that an optional referendum has been held. The order is issued at the request of the Federal Chancellery. Pursuant to Art. 3 para. 1 VPR, the Federal Chancellery must take the measures required by law to ensure that federal referendums can be held. The Federal Chancellery informs the Federal Council of all proposals that may be put to the vote and proposes a specific "voting menu".

2. Voting proposals and formal arrangement of the popular vote

8 The referendum can only be ordered if a referendum has been held. However, the Federal Council may designate an enactment for a referendum at an earlier date in accordance with Art. 10 para. 1bis PRA. This determination must take place at least four months before the date of the vote, but does not yet correspond to the formal ordering of the referendum. The Federal Council only decides on the order later and at the same time issues a circular letter to the cantonal governments containing instructions on how to prepare and hold the referendum. For example, on 15.2.2023, the Federal Council announced

the proposals for the referendum of 18.6.2023 and issued the voting order and the circular letter on 12.4.2023.

3. Voting proposals subject to reservation

Voting proposals pursuant to Art. 10 para. 1bis PRA must be determined subject to reservation if the outcome of a referendum has not yet been determined. This procedure comes into consideration if a referendum has just been submitted, if the submission is imminent or, if necessary, if the enactment is due to enter into force on a specific date. A reservation must be removed with the formal order in accordance with Art. 59c. The order should be issued as close in time as possible to the determination of the submissions, but in any case at a time when the preparatory work is not yet too far advanced. 9

For example, the proposals for the referendum on 15.5.2022 were determined subject to reservation because the referendum deadline for all enactments was still running. Once the Federal Chancellery had established that the referendums had been held, the Federal Council formally ordered the vote in mid-March. An impressive example occurred in connection with the referendum of 25.11.2012: on 4.7.2012, i.e. at the last meeting before the session-free period in July/August, the Federal Council placed five proposals under reserve. The referendum deadline for one of the decrees ended on 5.7.2012 (amendment to the Animal Diseases Act) and for the others only on 27.9.2012 (Federal Act on International Withholding Taxation and three federal resolutions on tax agreements); in these four cases, it had only been running for around two weeks. The unusually early determination of the four tax bills was due to the planned entry into force on 1.1.2013. It was already clear that the explanatory notes would have to be produced before the end of the referendum period and that the ballot papers would have to be approved for printing just a few days later. In the end, the referendums did not take place. This led to the strange situation that the ballot paper referred to just one proposal, while the voting brochure explained five proposals. The referendum was only ordered on 11.10.2012, i.e. around six weeks before the voting date, and therefore at a time when the delivery of material to the cantons is usually already complete. The procedure for scheduling the referendum on 25.11.2012 stretched the procedural framework, if not overstretched it. It should not set a precedent. 10

4. No statutory time limits

11 The law does not specify a deadline for the Federal Council to carry out the vote on a referendum decree. In this respect, the statutory regulation of the procedure differs from that of the popular initiative. For the latter, Art. 75a PRA stipulates the deadline by which the Federal Council must submit the popular initiative to the People and the Cantons. In addition, Art. 165 para. 2 and 3 FC sets out the time frame within which urgent federal acts must be put to a popular vote.

12 According to doctrine, the Federal Council is not completely free to set the date for the vote on an enactment against which an optional referendum has been held. Although the Federal Council is granted discretion, it must hold the vote within a reasonable period of time and may not arbitrarily delay the matter.

B. Exceptions to the obligation to issue an order

13 According to the Federal Council's dispatch, no exceptions should be regulated in Art. 59c. In practice, however, there have been isolated cases in which no vote was ordered. The Federal Council cites one example from the 1950s and one from the 1970s in which the referendum was not held, although a referendum was held in each case. Such exceptions are conceivable if parliament reverts to an adopted resolution.

14 Doctrine and case law consider it permissible for the authority that adopted the decree requiring a referendum to withdraw it if it has become irrelevant due to changed circumstances or if it would be pointless to put it to a referendum for other reasons. The principle applies to both mandatory and optional referendums and is explicitly provided for by law in the canton of Geneva. Political rights are not violated because the withdrawn decree has no legal effect. However, the withdrawal must be based on objective reasons and not merely on considerations of political tactics.

15 If an enactment subject to a referendum is amended before the referendum, the amending enactment is in principle subject to a separate referendum. However, in the case of decrees that are subject to a mandatory referendum, it may be appropriate to only vote on the amended decree. This was the case, for example, in the context of the financial crisis: the Federal Assembly amended the additional funding for disability insurance passed on 13.6.2008

with the federal decree of 12.6.2009 before the referendum on the original decree was held; the people and cantons then only voted on the amended federal decree.

From a procedural point of view, it should be noted that the handling of a referendum decree is concluded with its adoption in Parliament. The matter is no longer pending in the Councils and cannot be discussed again. Both the repeal and the amendment of the provisions in the referendum decree must therefore be carried out in a new (legislative) procedure and initiated using the usual parliamentary instruments in accordance with Art. 71 et seq. ParlA must be initiated. 16

C. Cancellation or postponement of ordered referendums

In special situations, the Federal Council may be faced with the question of whether a referendum must be canceled or postponed. The conditions under which this is permissible were discussed in connection with the Covid-19 epidemic after the Federal Council decided on 18.3.2020 not to hold the referendum scheduled for 17.5.2020 and to revoke the decree of 21.2.2020. Canceling an ordered vote was not unprecedented, but it was an unusual procedure. 17

The Federal Council is of the opinion that the power to order a referendum also includes the possibility of revoking the order. In the Confederation, the Federal Council is the supreme executive authority and is responsible for carrying out referendums properly. If the Federal Council is not in a position to do so, it should be able to cancel or postpone the referendum as a last resort. In contrast, doctrine holds the view that the Federal Council's general power of execution is not a sufficient basis and that a special legal basis is required to cancel or postpone a scheduled referendum. 18

In implementation of motion 20.3419, the Federal Council proposed in December 2023 that the cancellation or postponement of an ordered referendum be expressly regulated in the PRA in future. The proposal requires an actual or imminent serious disruption to the formation of the will of those entitled to vote, the casting of votes or the determination of the result in order to be able to postpone or cancel an ordered vote. The referendum should be deemed to have been ordered as soon as the Federal Council has taken the formal decision to order it. As long as the referendum proposals have been determined but the vote has not yet been formally ordered, the hurdles for 19

canceling or postponing it would be somewhat lower - although the announcement of the referendum proposals should already have a considerable politically binding effect.

D. No legal protection against the order

20 The order to hold a referendum is an act of the Federal Council within the meaning of Art. 189 para. 4 FC and cannot be challenged in court.

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COMMENTARY ON

Art. 60 PRA

A commentary by Beat Kuoni

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Section 2 The Popular Referendum

Art. 60 Signature lists

[1] The signature list (on forms, sheets of paper or cards) used by those requesting a referendum for the purpose of collecting signatures must contain the following information:

a. the canton and the political commune in which the signatory is eligible to vote;

b. the title of the enactment with the date of its adoption by the Federal Assembly;

c. reference to the fact that Any person who falsifies the result of a signature list for a referendum (Art. 282 of the Swiss Criminal Code,

SCC) or who offers or accepts bribes in connection with a signature list (Art. 281 SCC) commits an offence.

[2] Where more than one request for a referendum is submitted for signature, each request shall be the subject of a separate signature list. Signature lists for more than one request for a referendum may appear on the same page provided that it is possible to separate each signature list for the purpose of its submission.

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I. HISTORY OF ORIGIN

1 After the introduction of the optional referendum in 1874, the procedure to be followed was initially regulated by the Federal Act on Referendums and Federal Decisions, but it did not contain any explicit instructions on how the signature lists were to be designed. This was in contrast to the provisions on popular initiatives, which regulated these formal aspects from the outset. With the enactment of the Federal Act on Political Rights (PRA) in 1976, provisions on the **formal requirements for signature lists** were also enshrined in law for the first time for referendums. However, the requirements did not go beyond what was already customary for signature lists for optional referendums.

2 The provision was **revised in 1996**. In addition to the editorial adaptation of the introductory sentence in para. 1, two changes were made. Firstly, para. 1 lit. c has since required the reference to the offence of active and passive bribery under Art. 281 of the Swiss Criminal Code (SCC). This addition was not included in the Federal Council's draft, but was proposed by the National Council's preliminary advisory committee and adopted by the National Council and the Council of States without discussion. Secondly, a second paragraph was added with the previously self-evident principle that each popular request must have its own signature list.

II. SIGNIFICANCE OF THE PROVISION

A. General

3 According to Article 141 of the Federal Constitution of the Swiss Confederation (FC), 50,000 persons eligible to vote may demand that a popular vote be held on an issue that is subject to a referendum requirement. To ensure that this will can be expressed in a comprehensible manner, Article 60 PRA regulates the requirements for the signature lists. The requirements are formal **minimum requirements** for the signature lists. If the information mentioned is missing, the statements of support on the signature list are invalid according to Art. 66 para. 2 let. a PRA.

4 While the Federal Chancellery determines by decree whether the signature list for popular initiatives meets the legal requirements, **no such formal preliminary examination** takes place for optional referendums. In view of the

short collection period and the simpler situation – due to the reference to a parliamentary decree – compared to a popular initiative, the need for a preliminary examination to be concluded with a decree also appears limited. In addition, there is no institutionalized committee for optional referendums and the request cannot be withdrawn.

In addition to the minimum information, the originators of a signature collection may include **further elements** in the signature list, such as promotional statements, declarations of consent, etc. If the collected data is to be processed for further purposes, the consent of the signatories must be expressly obtained for data protection reasons. 5

B. Legal comparison

The cantons generally have **comparable provisions** regarding the formal requirements for signature lists. The cantons of Nidwalden, Ticino and Vaud require the date of publication in the official gazette rather than the date of the decree if the decree is subject to a referendum. The Canton of Solothurn requires the date of publication as well as the date of the enactment. The Cantons of Schwyz and Zug have no legal requirements for signature lists. 6

In line with the federal government, the cantons generally require that all signatories on a signature list must have their **political domicile in the same municipality**. This is not required in the Canton of Geneva, as the voter's certificate is organized centrally. 7

Some cantons require further information to be included on the signature list, such as **additional information on deadlines**. For example, in the Canton of Bern, the last possible date for submitting the list to the office keeping the electoral register must be indicated, while in the Cantons of Fribourg and Vaud, the start and end of the collection period must be indicated, and in the Cantons of Valais and Neuchâtel, the expiry of the submission period must be indicated. 8

In the cantons of Lucerne, Aargau, Basel-Landschaft and Vaud, the names and addresses of the **members of the referendum committee** must be indicated on the signature list. The canton of Lucerne also regulates which information may be optionally included on the signature list: On the one hand, the list may show who launched the referendum request, and on the other hand, any 9

justifications and explanations are admissible, provided that they are clearly separate from the request and not misleading.

10 In the Canton of Geneva, an **alternative penalty** must also be indicated. Accordingly, anyone who provides a signature other than their own or more than one signature will be subject to an administrative penalty of up to 100 francs.

III. COMMENTARY ON THE TEXT OF THE STANDARD

A. Paragraph 1

11 Paragraph 1 lists the **minimum** information that must be included on a signature list in order for a signature provided on it to be considered valid.

12 The provision does not define a **format for the signature list**, but it does list indicative formats: a sheet, a form or a card. When the Initiative Act of 1962 was enacted, the Federal Council felt obliged to clarify that the term "signature sheet" used in the law at the time did not preclude signatures from being affixed to "postcards" or "newspaper clippings", provided that these contained all the legally required information. He justified this by saying that an overly strict practice regarding the format would restrict the free exercise of the people's right. With the inclusion of the non-exhaustive list of possible formats in the PRA, the legal situation is clarified in the wording of the law itself.

13 The PRA does not provide for any formal preliminary examination of the signature lists for optional referendums. However, referendum committees may register with the Federal Chancellery before collecting signatures and send it the draft **signature list for checking**. This service provided by the Federal Chancellery is not provided for by law – in contrast to the popular initiative (Art. 69 para. 1 PRA) – but it is useful for reasons of democratic policy to reduce the risk of formal errors. The committees usually make use of this official service.

14 According to Art. 18 of the Ordinance on Political Rights (VPR), **templates of a signature list** can be obtained free of charge from the Federal Chancellery in any official language. In practice, the Federal Chancellery provides the authors of a referendum with such blank templates together with a guide containing the most important information. In addition, the Federal Chancellery publishes a neutral version of the signature list, including the address to which signed signature lists should be sent, on its website, provided that a referen-

dum committee contacts the Federal Chancellery and expresses a corresponding need.

1. Let. a

For each signature list, the political municipality and the associated canton in which the signatories are eligible to vote must be stated. The **political domicile** must be stated in accordance with Article 39 paragraph 2 FC in conjunction with Article 3 PRA. It is the place where the signatory must be registered in the electoral register in accordance with Article 4 paragraph 1 PRA. The provision continues to use the generic masculine ("the signatory") and also includes female signatories, as is also the case elsewhere in the PRA. 15

The provision refers to **the political municipality** and **the canton** in the singular. Persons eligible to vote whose political domicile differs may not sign on the same signature list. Prior to the enactment of the PRA, the advisory committee discussed whether the provision is too restrictive and whether signatories from different municipalities should be able to sign on the same signature list. Accordingly, the committee considered amending the wording and – as a further alternative – classifying the provision merely as an organizational regulation rather than a validity provision. Ultimately, the committee retained the Federal Council's proposal and instructed the administration to review the wording to make it unequivocally clear that only persons eligible to vote with the same political domicile may sign a signature list. 16

For submission, the signature lists must be **sorted by canton in accordance with Art. 20 para. 1 VPR.** The Federal Chancellery then sorts the signature lists further by municipality for the counting. 17

The office responsible under cantonal law for **certifying voting rights** checks whether all signatories in the relevant municipality are registered in the electoral register (Art. 19 para. 1 VPR). If this is not the case, the right to vote is not certified (Art. 19 para. 2 let. f VPR) and the signature is invalid. 18

According to Art. 14 para. 1 of the Ordinance on Swiss Persons and Institutions Abroad (V-ASG), **Swiss citizens living abroad** must indicate their municipality of voting and the corresponding canton. The municipality of voting is determined in accordance with Art. 18 para. 1 and 2 of the Federal Act on Swiss Persons and Institutions Abroad (ASG) in conjunction with Art. 8 V-ASG and is usually located in the last municipality of residence in Switzerland. 19

When providing their address in accordance with Art. 61 para. 2 PRA, Swiss Abroad indicate their foreign residential address so that the official office certifying the vote can recognize that the signatory is listed in the electoral register of Swiss Abroad. Some cantons maintain the electoral register centrally, so that the central office carries out the verification of voting rights.

20 In practice, it regularly occurs that in **merged communes** the original commune name is occasionally given. As long as the attribution is possible, this does not affect the validity of the signature list.

2. Let. b

21 The enactment to which the referendum relates is to be named with the correct **designation** as well as the **date of the decision** by the Federal Assembly. According to practice, the date of publication in the Federal Gazette is also indicated. The Federal Chancellery's sample forms always contain this information. However, the reference is not a legal requirement and its absence does not – in contrast to the correct designation of the decree and the date of the decision – invalidate the signature list.

22 The **designation of the enactment** corresponds to the title of the enactment as decided by the Federal Assembly and published in the Federal Gazette in accordance with Art. 13 para. 1 let. e of the Federal Act on the Compilations of Federal Legislation and the Federal Gazette (PublA).

23 The final vote in the Federal Assembly, which according to Art. 81 para. 1bis of the Federal Act on the Federal Assembly (ParlA) is to be held on the same day in both councils, is considered to be the **date of the decision**. This is also the date of enactment, as Parliament has legally and validly enacted the enactment, subject to the referendum. Signatures may only be collected from the date of publication of the relevant enactment in the Federal Gazette (Art. 141 para. 1 FC and Art. 59*a* PRA).

24 The request for a referendum must always relate to the **entire enactment** and cannot be limited to parts thereof. There is no such thing as a 'partial referendum' at federal level.

3. Let. c

25 The PRA originally only required a note stating that falsifying the result of a referendum petition was punishable under Art. 282 SCC. In 1996, the provi-

sion was amended to include the offence of election bribery under Art. 281 SCC. The order in which the **criminal offences** are listed therefore does not follow the numbering in the SCC.

Article 282 SCC specifically prohibits unauthorized participation in a referendum request and falsifying the result of a signature collection by adding, changing, omitting or deleting signatures (**electoral fraud**). For example, a person who signs a referendum request multiple times or signs it with the name and signature of a third party is committing an offense. 26

According to Art. 281 SCC, anyone who offers, promises, gives or provides a gift or other advantage to a person entitled to vote in order that they sign a referendum is liable to prosecution for **active electoral bribery**. Voters are liable to prosecution for **passive election bribery** if they accept or are promised such an advantage. However, under current law, people collecting signatures may be compensated, even if they are paid per signature collected. 27

Several initiatives at the federal level have called for a ban on paid signature gathering, but have not been able to prevail in the past. In connection with the cases of allegedly falsified signatures that came to light in 2024, the demand for a **ban on paid signature gathering** is once again under discussion. In addition to this drastic measure, there are also less far-reaching proposals at the legislative level to regulate the area. In October 2024, the Federal Chancellery itself set up a round table on the integrity of signature collections. This is intended to define quality standards for signature collections and to record them in a joint code of conduct. 28

The reference to the criminal offences is a **validity requirement** for the signature list. However, in its dispatch, the Federal Council pointed out that individual voters can also support a referendum by notifying the Federal Chancellery of their will in writing, including a certificate of eligibility to vote. In this case, the information required under a and b is necessary, but not the information under c. This note in the message caused misunderstandings during the legislative deliberations and had to be clarified: The reference to the penal provisions should only be dispensable in **exceptional cases**, namely when voters request the referendum on a referendum decree in a *personal letter* that only they sign. This exception is correct in substance. While the requirements under lit. a and b are indispensable for the expression of will and the proof of voting rights, the reference under lit. c appears as a protective mea- 29

sure in the context of collecting signatures. However, the exceptional case described is theoretical and, as far as can be seen, plays no role in practice.

B. Paragraph 2

30 The signature of a person eligible to vote can only refer to **a single request for a referendum**. This principle was not explicitly regulated by law for a long time, but was considered self-evident. In legal doctrine, it is associated with the principle of unity of subject matter. According to the view presented here, it can be derived from Art. 60 para. 1 let. b PRA by means of grammatical interpretation. According to this provision, the signature lists must refer to the respective enactment and not to the respective enactments. Since 1997, Art. 60 para. 2 PRA has clearly stated the legal situation: if signatures are collected for several referendums at the same time, a separate signature list must be provided for each referendum.

31 In the early days of the optional referendum at the federal level in the 19th century, the principle was still unclear. Consequently, there is a **precedent** in which four decrees of the Federal Assembly were successfully opposed by a single referendum request. A single signature list was created that referred to all four decrees, and the voters were able to demand a referendum on all four proposals by signing the list.

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COMMENTARY ON

Art. 60a PRA

A commentary by Beat Kuoni

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Art. 60*a* Downloading of signature lists in electronic form

Any person who downloads a signature list for requesting a referendum that has been made available online is responsible for ensuring that the signature list satisfies all the formal legal requirements.

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I. BACKGROUND

The provision in Article 60*a* of the Federal Act on Political Rights (PRA) has its origin in Postulate 99.3321 Gross. It called on the Federal Council to examine the establishment of a "special federal **homepage for launched popular initiatives and referendums** during the signature collection phase", where all signature forms could be downloaded. The Federal Council was open to the request, but advocated the creation of a legal basis. 1

With the message of November 30, 2001, regarding an amendment to the Federal Act on Political Rights, the Federal Council implemented the mandate and proposed the provisions in Art. 60*a* and 69*a* PRA to the Federal Assembly. The legal amendments were welcomed in the consultation process and were
not discussed in either the National Council or the Council of States. On **January 1, 2003, the provisions came into force**. 2

II. SIGNIFICANCE OF THE REGULATION

A. General

The introduction of the provisions in Art. 60*a* and 69*a* PRA was intended as a first step towards a comprehensive offering for the electronic exercise of political rights. The legal amendment was made in the context of the **"Vote électronique"** (e-voting) project, which continues to pursue the goal of enabling political rights to be exercised by electronic means. 3

The intention of the legislature was that Art. 60*a* and Art. 69*a* PRA should make **collecting signatures easier** and thus mitigate the consequences of the nationwide introduction of unconditional postal voting: In the 1990s, postal voting had rapidly become the dominant form of voting in Switzerland, and the previously lucrative practice of collecting signatures in front of polling stations lost some of its importance. 4

The **benefit of the authorities offering** signature lists in electronic form has remained modest in practice. The signature lists on the Federal Chancellery website are rarely downloaded and are not significant for the success of initiatives and referendums. By contrast, the importance of electronically provided 5

signature lists on the websites of initiative and referendum committees and other civil society actors has increased.

B. Comparative law

6 The cantons of **Obwalden** and **Valais** have similar regulations to those of the Confederation.

7 In addition, the Canton of **Geneva** provides that for cantonal initiatives and referendums, the committees may forward signature lists to the competent offices in the canton and communes so that they can be made available to persons eligible to vote locally.

III. COMMENTARY ON THE TEXT OF THE REGULATION

A. Service provided by the Federal Chancellery

8 The provision of signature lists in electronic form is not explicitly prescribed by the provision in Art. 60*a* PRA, but is rather a prerequisite. However, the materials make it clear that the provision was created with a new **service from the Federal Chancellery** in mind.

9 The Federal Chancellery makes the signature lists available on its website for the duration of the signature collection period. In order for the signature lists to be made available for download, the Federal Chancellery must be informed in advance that signatures are being collected for a referendum. The Federal Chancellery then creates a **neutrally-worded signature list** that meets all the formal requirements and contains no promotional material.

10 In addition, the signature lists offered contain **the respective authorship and their addresses**. The offer is therefore limited to lists of those persons and organizations who have registered with the Federal Chancellery and informed it that they intend to collect signatures. As an official service, the Federal Chancellery checks whether the respective signature list meets the legal formal requirements.

B. Regulation of responsibilities

11 Art. 60*a* PRA governs the **responsibilities** for fulfilling the legal requirements if signature lists are obtained on the internet.

The **same requirements** apply to signature lists made available electronically as apply to lists that are circulated in physical form from the outset. They must contain all the information required under Art. 60 para. 1 let. a–c PRA. If a single signature list is to be used for several referendums, it must be possible to separate the lists when they are submitted (Art. 60 para. 2 PRA). If the formal requirements are not met, the statement of support is invalid in accordance with Art. 66 para. 2 let. a PRA. According to Art. 60*a* PRA, the risk lies with the person who downloads a signature list, i.e. usually the signatories themselves. 12

The provision is deliberately formulated in abstract terms and is intended to apply regardless of the platform from which a signature list is downloaded. However, the provision is primarily intended to relieve the authorities of the burden of guaranteeing the **immutability of signature lists** that are made available electronically. If, for example, defects occur when printing signature lists, in that certain elements are lost, this cannot be attributed to the authorities. 13

Despite the allocation of responsibilities in Art. 60*a* PRA, the authorities are obliged to secure their online offering according to best practices and to ensure that the **available documents are authentic**. 14

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COMMENTARY ON

Art. 62 PRA

A commentary by Bénédicte Tornay Schaller

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Art. 62 Certificate of eligibility to vote

[1] The signature lists may be sent continuously but must be sent in good time prior to the expiry of the referendum period to the office that is responsible under cantonal law for the issuing of certificates of eligibility to vote.

[2] The office certifies that the signatories in the communes stated in the signature list are eligible to vote on federal matters, and returns the signature lists to their senders without delay.

[3] The certificate must state in words or in figures the number of certified signatures; it must be dated, bear the handwritten signature of the public official and indicate their official capacity by means of a stamp or addendum.

[4] The eligibility to vote of the signatories may be certified collectively for more than one signature list.

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I. HISTORY

A. Before 1978

1 The question of proof of voter status arose as early as the introduction of referendum and initiative rights in the 19th century. Art. 5 of the Federal Act on Popular Voting on Federal Acts and Decrees of June 17, 1874 (hereinafter referred to as the 1874 Act) stipulated that, in order to sign a request for a referendum, the right to vote of the signatories had to be "certified by the communal authority (Gemeindevorstand) of the place where they exercise their political rights". The deadline for collecting signatures was then 90 days from publication of the law or decree in the Federal Gazette.

2 The Federal Act of January 27, 1892 on the Procedure for Popular Initiative Applications and Voting on the Revision of the Federal Constitution (hereinafter referred to as the 1892 Act) stipulated in art. 4 ch. 3, that in order to be valid, the list had to "contain, at the end, a dated attestation from the commune president (syndic, mayor) or his substitute, stating that the signatories [were] able to vote in federal matters and that they [exercised] their political rights in this commune. This certificate is issued free of charge".

3 Noting that irregularities in the attestations were leading to the cancellation of a large number of signatures, the Federal Council sought to remedy the situation by issuing the regulation concerning requests for popular votes on federal laws and decrees and for revision of the federal constitution of February 23, 1897 (hereinafter referred to as the 1897 regulation). These regulations clarify both the 1874 and 1892 laws and ensure their uniform application. The question of who should certify the signatories' right to vote was clarified. Although the legislator had used the expression "communal authority" in the 1874 law and "commune president" in the 1897 law, there was no indication that he had intended to introduce a different procedure. Art. 2 of the 1897 regulation stipulates that "the right to vote of the signatories must be attested by the communal authority of the place where they exercise their political rights. This attestation must appear at the foot of each list in approximately the following form: "The undersigned, president (or other title) of the commune of ..., attests to the voting rights of the ... (number) signatories of the present list and declares that they exercise their political rights in this commune (date, signature, indication of the official capacity of the official who signed and stamp)".

When the 1892 law was revised in 1963, the wording of art. 4 was slightly modified and supplemented in order to facilitate the task of the communal authorities responsible for issuing the attestation required by law. Once again, it was pointed out that the main cause for the cancellation of signature lists lay in the inadequacy of the attestation, "which always provoked unpleasant discussions between the administration and the authors of the initiative". For this reason, the formalities already enumerated in the 1897 regulation (to which the validity of the official attestation of the lists is subject) are now set out in art. 4 al. 1 let. d of the 1892 law: "at the end of the list, the attestation of the competent authority according to cantonal law, stating that the signatories are qualified to vote in federal matters and that they exercise their political rights in the commune indicated on the list. This attestation, issued free of charge, must be dated, indicate in letters or figures the number of signatures to which it refers, be signed by the magistrate or civil servant who affixed it, and mention his or her official position by means of a stamp or an addition". 4

B. Entry into force of the LDP in 1978

Art. 62 of the LDP, which came into force in 1978, reiterated, in paragraphs 1 to 3, the requirements for attesting voter status set out in art. 5 of the 1874 law and art. 4 of the 1892 law. The LDP also introduced two new features. 5

The first new feature, enshrined in art. 62 para. 4 of the LDP, is the possibility of collectively certifying several lists of signatures "in response to repeated requests". Art. 19 of the Ordinance on Political Rights of May 24 1978 (ODP) sets out the details of collective certification. 6

The LDP also introduced the possibility of correcting defects in the attestation if the success of the referendum depended on it (art. 65 aLDP). It was also possible to eliminate such defects even after the referendum deadline had expired. Art. 19 para. 4 aODP stipulated that if a service was unable to issue an attestation within the required timeframe, it was to mention this on the list, indicating the date of receipt. The possibility of subsequent correction of attestation defects was abolished in 1997. 7

C. 1997 revision

In 1996, a partial revision of the federal legislation on political rights was proposed, following the observation that "the occasionally enormous and unpre- 8

dictable use made of political rights by some citizens" since the early 1990s (particularly with regard to requests for referendums and popular initiatives) had placed the communes and cantons (especially the more populous ones), but also the federal authorities, "in a situation that sometimes bordered on the limits of their capacities". In particular, in 1992, the backlog of referendum applications (there were no fewer than nine) posed major problems not only for those responsible for collecting signatures, but also, in some cases, for municipal electoral registrars, "especially during the festive season, despite the fact that the Federal Chancellery had sent them several circulars warning them of the difficulties they would encounter and suggesting preventive measures".

9 The most striking example was the request for a referendum against the Federal Decree on the construction of the Swiss rail link through the Alps of October 4, 1991 (NRLA): lack of time prompted the referendum committees to ask the communes to send the authenticated signatures directly to the Federal Chancellery, which hundreds of them did. The Federal Chancellery declared itself prepared to recognize as valid the signatures coming directly from the communes, provided that the items were postmarked no later than January 13, 1992 (the date on which the legal referendum deadline expired). On the other hand, it considered that any other concession could not be reconciled with the law. The referendum was narrowly defeated.

10 In this context, art. 65 aLDP, which required the competent authority to remedy defects in the certificate if the outcome of the referendum depended on it, and to eliminate such defects even after the referendum deadline had expired, was repealed. The same applies to art. 19 para. 4 aODP. In return for these repeals, referendum committees were given ten extra days to collect signatures and have them certified. The referendum deadline was extended from 90 to 100 days. Art. 59 aLDP expressly stipulated that, "in the case of popular referendums, the referendum deadline includes the drawing up of certificates of elector status". These amendments came into force on April 1, 1997.

11 This solution was preferred to various proposals aimed at making the authorities responsible for collecting certificates of voter status from signatories; given the pace at which popular rights are exercised, such a rule would have had the effect of overloading and paralyzing the sparsely-staffed department concerned, not to mention the problems involved in setting up checks and appeals, as errors were inevitable given the mass of documents to be processed.

In 1960, the Federal Council had already argued against the possibility of the federal authorities being obliged to return lists with defective certification to the initiators of the initiative or to the communal authorities; it had already mentioned that it was up to the initiators of the initiative to ensure that the certificates were sufficient, all the more so as the communal authorities returned the lists to the initiative committee, which in turn returned them to the Federal Chancellery.

In 2005, the Federal Supreme Court clarified that Art. 62 para. 1 aLDP stipulated that, in the case of popular initiatives, proof of voter status had to be obtained by the initiators from the relevant authorities before the deadline for signature collection had expired, and that there was no longer any possibility of post-clearance verification. 12

The Federal Chancellery had rejected a request from a member of the initiative committee to ensure that no signatures were declared invalid due to shortcomings in the voter registration documents, and to take responsibility for rectifying any such shortcomings. The committee member then lodged an appeal with the Federal Supreme Court against the Federal Chancellery's decision. He argued that many communes had sent back defective certificates and that the initiative committee did not have the financial and personnel resources to repair these defects. The federal judges recalled that the possibility of providing proof of voter status after the fact, as it resulted from art. 65 aLDP as it stood on December 17, 1976, had been repealed in 1997; it resulted from art. 62 al. 1 aLDP (in conjunction with art. 71 al. 1 and art. 72 al. 2 let. b LDP) and its genesis that it was up to the initiators to obtain certificates of voter eligibility; the Federal Chancellery could not issue or correct defective certificates after the fact; the deadline for collecting signatures covered, according to the clear will of the legislator, both the collection of signatures proper and the obtaining of certificates of voter eligibility; initiative committees had to take this into account when collecting signatures.

D. 2015 revision

The wording of paragraph 1 of art. 62 LDP was amended in the revision of September 24, 2014, which came into force on November 1, 2015. The original version stipulated that signature lists had to be sent "sufficiently early" before the referendum deadline expired, whereas according to the current version 13

signature lists must be sent "as and when required, but in any case sufficiently early".

14 Collecting certificates of voter eligibility as and when required largely avoids the risk of exceeding the deadline for submitting certified signatures, and also has the advantage of reducing peak workloads for the relevant authorities.

15 This change was prompted by the fact that, in 2012, popular rights were exercised particularly frequently: 50 popular petitions (referendum applications and initiatives) were submitted. Never before had the Federal Chancellery had to record so many unsuccessful popular petitions: three requests for referendums against the tax agreements with Germany, the UK and Austria, and one popular initiative. The decision to reject the request for a referendum against the tax cooperation agreement with the UK was appealed to the Federal Supreme Court. In its ruling of June 5, 2013, the Federal Court upheld the decision not to proceed with the referendum and held that it was the responsibility of the signatories of the referendum application to provide sufficient proof of their electoral status (see N 49 below).

16 Against this backdrop, on October 19, 2012, the Political Institutions Committee of the National Council (CIP-N) tabled a motion (motion 12.3975). It instructed the Federal Council to submit to Parliament a draft amendment to the Federal Act on Political Rights providing for different deadlines for, on the one hand, the submission by referendum committees and initiative committees of signatures for referendums and popular initiatives and, on the other, the certification of these signatures. The National Council passed on the motion, while the Council of States rejected it because it wanted to wait for the Federal Council's message.

17 From March 8 to June 30, 2013, the Federal Council put out to consultation a proposal to amend art. 62 para. 2 of the LDP, stipulating that the service must return all lists sent to it before the 81st day of the referendum deadline by the 95th day. He also proposed adding a paragraph 2 to art. 70 of the LDP, under which the department would return by the first day of the 17th month of the deadline for the collection of signatures all lists of signatures in support of a popular initiative that had been submitted to it before the first day of the 14th month for certification of voter eligibility.

18 This proposal was based on the idea that the majority of signatures could then be submitted for certification before the first four-fifths of the deadline, and

that the work overload experienced by municipalities when referendums and initiatives are multiplied, or on public holidays, could be avoided, automatically increasing the chances that signatures submitted at the last minute would nevertheless be taken into account for certification. This would have provided initiative and referendum committees, in particular, with much greater planning security. However, this proposal received a mixed reception during the consultation procedure: while the proposed regulations went much too far for cantons, towns and municipalities, some users criticized them as being too timid.

19 As a result, the Federal Council abandoned its proposed amendment in November 2013. Instead, it opted for a comprehensive approach to organization and information procedures, based on the legislator's original intention, which required both that signatures be handed in for certification sufficiently in advance of the deadline and that certified signatures be returned to the sender without delay (art. 62 para. 2 and 70 LDP).

20 In the final analysis, the legislator has deliberately refrained from setting a precise deadline for issuing certificates of elector status. It did, however, stipulate that the lists of certified signatures must be returned to the senders without delay. This takes account of the fact that the number of signatures to be certified can vary greatly from one department to another. Many years of experience have shown that an experienced person can issue 350 to 400 certificates per day. The new version of art. 62 para. 1 of the LDP, moreover, takes up what the Federal Court had explicitly confirmed in its ruling of June 5, 2013 (see supra N 15 and infra N 49).

21 Also in 2015, in response to a strong demand expressed during the consultation procedure, the Federal Chancellery, in collaboration with the Swiss Conference of State Chancellors, drew up an aide-memoire for authorities responsible for electoral registers. It has also revised the guidelines for authors of federal referendums and popular initiatives, to make them easier to understand. The aim of the vade-mecum is to encourage diligence on the part of popular petition committees, to reduce the peaks in activity with which the competent authorities are confronted, and to clarify the handling of evidence.

II. IMPORTANCE OF THE PROVISION

A. General

22 Art. 62 of the LDP, entitled "Attestation of voter status", has had four paragraphs since its inception. Paragraphs 2, 3 and 4 of art. 62 LDP still have the original content.

23 Art. 62 LDP is located in Title 4 of the LDP, devoted to referendums. However, it also applies to popular initiatives, by reference to art. 70 of the LDP. Similarly, art. 26 ODP on popular initiatives also refers to arts. 19 and 20 ODP (in the chapter on referendums).

24 Art. 62 of the LDP specifies the procedures to be followed when certifying voter status. The certification of signatures on lists takes place after the signatures have been collected (art. 61 LDP) and before the final decision (art. 66 and 67b LDP for referendums and art. 72 LDP for initiatives).

25 The Confederation delegates to the cantons the task of certifying the electoral status of signatories to federal referendum and popular initiative applications. In most cantons, the communes are responsible for providing this certification.

26 The requirements for voter registration apply to both federal constitutional initiatives requesting total revision (art. 138 Cst.) and those requesting partial revision (art. 139 Cst.). They also apply to all the types of referendum requests listed in art. 141 Cst. (referendum on federal laws, federal laws declared urgent and valid for more than one year, federal decrees insofar as the Constitution or law so provides, and certain international treaties).

27 The scope of art. 62 of the LDP is considerable, as the granting of signature certification is a procedural condition for the success of a referendum request or initiative. In order to establish whether a referendum application or initiative has been successful, the Federal Chancellery checks, among other things, that the certificate of elector status has been duly submitted (art. 21 ODP). The suc-
cess of the initiative itself is a condition for submission to the popular vote.

28 Art. 62 of the LDP, as a rule organizing political rights, enjoys the protection afforded by the guarantee of political rights (art. 34 para. 1 Cst.). The credibility of political rights depends on the way in which certificates of voter eligibili-

ty are processed. This is a central procedural requirement for the exercise and guarantee of political rights in Switzerland. This makes it a key issue for the functioning of direct democracy.

Voter certification, insofar as it ensures that only members of the electorate sign initiatives or referendum applications (and that they sign them only once), is also protected by art. 34 para. 2 of the Swiss Constitution, which includes the right to know the exact composition of the electorate (who signed the referendum or initiative application). It is a basic condition for guaranteeing a voting result that reflects the free and undistorted will of the electorate. It creates confidence and therefore serves to ensure that the result of the vote is accepted.

29 An appeal concerning the right to vote (Stimmrechtsbeschwerde) may be lodged with the cantonal government for violation of art. 62 LDP (art. 77 al. 1 let. a LDP). The appeal must be lodged within 3 days of discovery of the grounds for appeal, but no later than the 3rd day after publication of the results in the official cantonal gazette (art. 77 al. 2 LDP). The decision of the cantonal government may be appealed to the Federal Supreme Court (art. 80 al. 1 LDP and art. 82 let. c LTF).

An appeal to the Federal Supreme Court against the decision of the Federal Chancellery concerning the non-completion of an initiative or referendum may also be lodged in connection with the attestation of voters (art. 80 al. 2 LDP and art. 82 let. c LTF). Thus, if the Federal Chancellery declares a popular initiative or referendum unsuccessful due to an insufficient number of valid signatures, the organizing committee may appeal to the Federal Supreme Court. The organizing committee may complain that the lists of signatures accompanied by the voter's certificate were returned too late, or that the nullity of certain signatures was not clearly indicated.

30 From a criminal point of view, the authority responsible for certifying signatures is acting in an official capacity and falls under the qualified offence of art. 282 ch. 2 StGB, under which anyone who falsifies the number of signatures collected in support of a request for a referendum or initiative, in particular by adding, modifying, deleting or crossing out signatures, or by counting signatures incorrectly, will be punished by a custodial sentence of up to three years or a fine of at least 30 days. Refusal to authenticate signatures and the deliberate use of a list of invalid signatures are also punishable under art. 282

ch.1 III of the Swiss Penal Code. The result of the signature collection must have been altered and have influenced the outcome of the initiative or referendum. Since electoral fraud is an intentional offence, simple miscalculations in the counting of signatures do not constitute an offence.

31 The collection of signatures by electronic means (E-Collecting) has been discussed on several occasions, but is not permitted. In such cases, certification of voter eligibility should also be carried out electronically. The basic prerequisite for this is the electronic management of voter registers.

B. Comparative cantonal law

32 The concept of attestation of voter status is found in all cantonal legislation. The cantons have enacted provisions similar to those of art. 62 of the LDP, albeit with some specific features. Political rights in cantonal and communal matters may differ from those in federal matters. The cantons also distinguish between cantonal initiatives and requests for referendum, and those of communal scope.

33 All cantons have delegated the task of certifying signatures in connection with cantonal popular rights to the communes, with the exception of Appenzell Innerrhoden (whose State Chancellery is in principle responsible for issuing certificates of voter eligibility) and Geneva (which delegates this responsibility to the Service cantonal des votations et élections). In cantons which have delegated signature control to the communes, the competent communal authority is designated by different terms (see N 52 below).

34 As at federal level, certification is free of charge.

35 The reason for declaring a signature invalid must be stated.

36 In most cantons, the attestation must be made before expiry of the signature collection period. Some cantons, such as Solothurn, Bern and Valais, expressly stipulate a time limit within which the competent authority must certify signatures. In other cantons, it is stated that signatures must be returned as quickly as possible or immediately.

37 In some cantons (especially French-speaking ones), however, certification may be carried out after the referendum or collection deadline has passed. In the canton of Vaud, for example, attested signature lists must be returned by the municipality to the senders within two weeks of the expiry of the submis-

sion deadline; within three weeks of the expiry of the submission deadline, the authors of the referendum or initiative request must submit all signature lists to the department. In the canton of Fribourg, the communes have 20 days after submission to check the lists of signatures for an initiative and 5 days for a referendum, and return them to the cantonal Chancellery.

In the canton of Berne, lists must be sent to the responsible department for certification no later than three months after publication of the referendum item; lists must be returned to their senders with certification no later than three weeks after the date of receipt.

In the canton of Neuchâtel, it is specified that when the certification of signatures cannot be made before the date of submission of the initiative, the communal authority certifies the submission of the lists and the provisional number of signatures.

38 Many cantons, such as Vaud, Neuchâtel, Valais, Solothurn, Aargau, Schaffhausen, St. Gallen, Basel-Landschaft and Graubünden, require the authority responsible for certifying signatures, or the cantonal chancellery, to remedy any shortcomings in certification under certain conditions, in principle if the success of the initiative depends on it. This option no longer exists at federal level.

39 The possibility of issuing a collective attestation is provided for in many cantons.

40 In some cantons, such as Solothurn and Fribourg, it is expressly stated that an appeal to the Administrative Court or the Cantonal Court may be lodged against refusal of attestation.

41 In the canton of St. Gallen, a legislative project is underway to create the legal basis for electronic signature collection for cantonal initiatives and referendums (E-Collecting). Both the technical implementation and the legislative project should be completed by early 2025. E-Collecting pilot tests could therefore begin in the first half of 2025. In June 2023, the State Chancellery of the Canton of St. Gallen issued a public invitation to tender for the technical implementation of the E-Collecting platform. On this platform, citizens of the Canton of St. Gallen will in future be able to support the collection of signatures by affixing an electronic signature. The signature will automatically check whether the signatory is actually eligible to vote, and whether he or she

has already supported the initiative or referendum in question. Certification of voter eligibility will thus also be carried out electronically.

III. COMMENTARY

A. Paragraph 1: tasks of the authors of the referendum request or initiative

42 Paragraph 1 of art. 62 of the LDP is an explanatory provision, describing when (para. 2) and to whom (para. 3) the lists of signatures (para. 1) must be sent. This paragraph is addressed to the authors of the referendum request or initiative, who are responsible for complying with these requirements. It is up to them to send in the signature lists as and when required, and at least sufficiently in advance of the expiry of the referendum deadline.

1. "Signature lists

43 The object of the attestation is the signature list. The content of the signature list is specified in art. 60 LDP for referendums and art. 68 LDP for initiatives.

44 Any citizen (not just the committee) may send lists of signatures to a local authority for certification.

45 Lists of signatures to be certified must be sent by post or delivered by hand to the relevant cantonal authority.

2. Deadlines "as and when required, but in any event sufficiently in advance of the referendum deadline".

46 Art. 62 para. 1 of the LDP stipulates that signature lists must be sent "as and when required, but in any case sufficiently in advance of the referendum deadline".

The purpose of the deadline set out in art. 62 para. 1 of the LDP is to encourage the submission of lists of signatures for the certification of voter status well in advance of the deadline, in order to avoid the work overload experienced by communes in the event of a proliferation of referendums and initiatives. This gives referendum and initiative committees greater planning certainty.

Art. 62 para. 1 aLDP, in its original version in force until November 1, 2015, stipulated that signature lists had to be sent "sufficiently in advance" before the deadline expired. The 1975 message already specified that lists or signature cards should not be presented to the attestation too shortly before the expiry of the referendum deadline; consideration had to be given to the time materially necessary for the authority to carry out its work. It was already specified that it was advantageous to submit the lists in successive mailings to the competent authority. 47

The legislator added the phrase "as and when required" in 2015. This is an organizational injunction. One of the reasons for this addition was that, in 2012, the Federal Chancellery had declared that the request for a referendum against the tax cooperation agreement with the UK had failed for lack of sufficient signatures. The lists of signatures had been submitted to the cantonal office responsible for certification on the 97th day of the deadline. The cantonal office had taken special measures to issue the voter's certificates quickly, in that its staff had worked for 2 days from 7am to 10pm. The task was completed on the 99th day of the deadline. The cantonal service had then mistakenly sent the signature lists back by B Mail, and the attestations had arrived after the referendum deadline had expired. 48

On June 5, 2013, the Federal Supreme Court rejected the appeals lodged against this decision by the Federal Chancellery. It held that art. 59a and 62 para. 1 and 2 aLDP, the legislator had intended to make the authors of the referendum request responsible for the timely submission of signatures accompanied by certificates of voter eligibility; it was up to them to organize the collection of signatures and then their transmission to the service responsible for certifying their validity, in such a way that they could collect them in time and then submit them to the Federal Chancellery within the 100-day time limit; it was also incumbent on the authors to agree with the service, if necessary, that the attested signatures would be kept at their disposal rather than returned by post; their organization and planning had to anticipate delays and unforeseen circumstances that might arise in the checking and forwarding of signatures; only extraordinary situations such as strikes, natural disasters or malicious behaviour on the part of the checking authorities were reserved. 49

The High Court considered that the submission of a large number of signatures on the 97th day of the deadline did not guarantee that these signatures could still be returned before the deadline expired; the appellants had thus

failed to comply with their obligation to submit them "sufficiently early" within the meaning of art. 62 al. 1 aLDP; under these conditions, the fact that they had been sent B Mail by mistake was not decisive and appeared to be an incident with which the referendums should have reckoned; moreover, it was not certain that sending them A Mail would have enabled the deadline to be met.

50 The Federal Council's proposal to require that signature lists for referendum applications be submitted by the 81st day and that the relevant department return the lists by the 95th day of the deadline (in the case of the initiative, the department must return the lists by the 1st day of the 17th month) was not followed (see above N 17 to 19).

3. Competent authority

51 The electoral status of initiative and referendum signatories must be verified and formally attested by the competent authority under cantonal law.

52 Most cantons do not specify in their legislation which authority is competent to certify signatures on federal matters. They do not distinguish between the certification of signatures to be issued for federal political rights pursuant to art. 62 LDP and the certification to be provided for cantonal initiatives and referendum applications. Often, a provision in cantonal law states that cantonal law applies to the exercise of initiative and referendum rights in federal matters insofar as they are not governed by federal law.

Only two cantons, Valais and Nidwalden, have enacted a cantonal law implementing the federal law on political rights. The canton of Geneva, on the other hand, expressly distinguishes between the authority responsible for federal political rights under art. 62 and art. 70 of the LDP and the authority responsible for cantonal initiatives and requests for referendum: for the former, it is the commune, and for the latter, the Service cantonal des votations et élections.

53 All cantons have delegated the task of certifying signatures in connection with federal popular rights to the communes, with the exception of Appenzell Innerrhoden (whose State Chancellery is in principle responsible for providing certificates of voter eligibility). The canton of Geneva stipulates that the commune is responsible for certifying signatures within the meaning of art. 84A para. 2 LEDP/GE; communes may, however, delegate signature verification to the Service cantonal des votations et élections, with this service being in-

voiced: all Geneva communes have made use of this option, with the exception of Laconnex and Chancy.

In cantons which have delegated the control of signatures to communes, the competent communal authority is designated by various terms: either the electoral register officer (as in the cantons of Fribourg, Aargau, Berne, Graubünden, Lucerne, St. Gallen, Schaffhausen, Zurich), or the communal administration (as in the cantons of Appenzell Ausserrhoden, Basel-Landschaft, Basel-City, Glarus, Nidwalden, Uri, Ticino, Solothurn, Zug, Thurgau, Schwyz, Obwalden, Jura), or the municipal executive (Vaud, Neuchâtel, Valais). 54

The number of popular petitions has risen sharply in recent years. It often happens that signature collections are organized at the same time for several initiatives and referendums, at federal, cantonal or communal level. As a result, the Swiss municipalities are under considerable pressure. Faced with ever-increasing and more frequent requests for proof of voter status, they often find themselves under great pressure as the signature collection deadlines approach. 55

B. Paragraph 2: the authority's tasks

Paragraph 2 of art. 62 of the LDP explains how the competent authority should proceed. It addresses the competent authorities under cantonal law. Firstly, they must certify that the signatories are federal electors in the commune designated on each signature list (para. 1); secondly, they must return the lists to the senders without delay (para. 2). 56

1. "Federal voters in the designated commune".

The role of the counting office is to certify promptly that the signatories are federal electors in the commune designated on each signature list. In other words, the service must check that the person who has signed a popular initiative or referendum request is indeed registered in the electoral register of the commune appearing on the list. All natural persons of Swiss nationality, over 18 years of age, who are not under general guardianship due to a permanent incapacity of discernment or who are not represented by a proxy for incapacity are eligible to vote in federal matters (art. 136 para. 1 Cst. cum art. 2 LDP). 57

58 Federal electors are entered in the electoral register of their political domicile (art. 4 LDP). A fixed place of registration ensures that a person cannot sign a referendum petition or an initiative in different places at the same time.

59 The Swiss abroad can also sign a popular initiative or referendum. To do so, they must enter their address abroad in the address column, specifying the zip code, the name of the commune and the country, together with the details of the political commune to which they are attached in Switzerland. Since the address given is abroad, the electoral register officer will reflexively look for the signatory in the register of electors established abroad. Depending on the canton, this register may be managed by the communes or centralized by the cantonal administration. If the signatory is not listed, the signature is considered null and void.

60 The reference date for certification of voter status is the date on which the list of signatures is received by the relevant department. Certification is granted if the signatory is entered in the electoral register on the day the list of signatures is presented for certification (art. 19 para. 1 ODP). This is why it is important for the relevant department to indicate the date of receipt on each list.

2. Returning lists "without delay

61 The relevant department is obliged to return the lists to the senders without delay, as the referendum deadline must be respected. This is an injunction. It has been decided not to introduce a specific deadline.

62 The Federal Chancellery recommends processing signature lists as they arrive. It is in the interest of municipalities to proceed in this way, since the closer the deadline for filing an initiative or referendum, the more quickly the certified lists need to be returned.

63 According to the recommendations of the Federal Chancellery, the communes should have returned the certificates of elector status to the senders no later than three days before the expiry of the deadline for the collection of signatures. If the committee does not collect the lists, they must be sent A Mail. B Mail must be sent no later than ten days before the deadline for signature collection. If possible, however, it is preferable to send the lists earlier. Less than 3 days before the deadline, it is more prudent to hand deliver the certificates.

The Federal Chancellery will declare null and void any signatures whose attestation has been faxed to the Committee. 64

C. Paragraph 3: content of the attestation

Paragraph 3 of art. 62 of the LDP contains a description of the contents of the attestation. The attestation must indicate : 65

- the number of signatures attested: the service indicates in words or figures on each list or in the collective attestation the number of valid signatures and the number of invalid signatures (art. 19 para. 3 ODP);
- the date ;
- the handwritten signature of the Registrar of Electors;
- the official seal of the office; the person authorized to issue the attestation must adequately indicate his or her official capacity (by affixing a stamp of the office or by a simple indication added by hand).

The attestation is the official decision establishing the number of valid signatures per list. For this reason, it must bear the official seal, the date of the decision and the handwritten signature of the officer in charge of the electoral register. It is a decision within the meaning of Art. 5 of the Federal Law on Administrative Procedure of December 20, 1968. 66

The decision to certify or not to certify may be appealed to the cantonal government (art. 77 al. 1 let. a LDP), and then to the Federal Court (art. 80 al. 1 LDP, art. 82 let. c LTF). If an authority refuses to issue a certificate, it must give reasons for its refusal. Nor should it be excessively formal. 67

As a precautionary measure, the relevant authorities may keep a record in the electoral register of each certificate returned for the various referendums and initiatives in progress, until the outcome is published in the Feuille fédérale. Documents such as printed extracts from the electoral register or similar computer files must be kept under lock and key, and destroyed once the initiative or referendum has been successfully completed. 68

In the case of mergers of communes, the relevant authorities must take particular care to ensure that no one signs the same initiative or referendum more than once. Each of the communes concerned should maintain a voters' list on 69

which the names of signatories are crossed out. These lists can then be compared after the merger.

70 Voter certification is free of charge. Neither postage nor fees may be charged.

71 The service safeguards the secrecy of the vote (art. 19 par. 6 ODP). Voter certification is protected by secrecy. Once submitted, lists may not be consulted (art. 64 al. 2 LDP). Initiative and referendum committees are also bound by secrecy.

D. Paragraph 4: collective attestation

72 If several lists are processed at the same time, the Registrar of Electors may, in order to save time, issue a collective certificate. This possibility was introduced in 1978, when the LDP came into force.

73 Pursuant to art. 19 para. 5 ODP, the Federal Chancellery has drawn up instructions on the issue of collective attestations in accordance with art. 62 para. 4 LDP. In June 2015, the Federal Chancellery published a brochure entitled "Attestation de la qualité d'électeur", in which it sets out in detail the procedure to be followed for issuing the collective attestation and explains the requirements that a collective attestation must meet. It also presents a model of a correctly drafted collective attestation.

74 To avoid a large number of signatures being considered invalid, the collective attestation, to be drawn up on a covering letter, must comply with certain requirements:

- it must take the form of a covering letter bearing the commune's letterhead; it may not be added to the committee's letter ;
- it must contain the exact title of the popular initiative or referendum and the date of publication in the Federal Gazette. Electronic signatures and facsimile seals are prohibited. All signatures appearing on a list with any of these defects will be considered invalid;
- the certificate must show the number of valid signatures, the handwritten signature of the electoral registrar, the official seal of the department and the date.

75 Collective attestation templates are available at www.bk.admin.ch. Here is one:

Commune ..... (en-tête)

Attestation collective

Concerne : initiative populaire fédérale
« ..... »
(Titre de l'initiative populaire et date de sa publication dans la Feuille fédérale)[1]

ou

Référendum contre la loi fédérale / contre la modification du ..... de la loi fédérale du ..... sur ....
(Choisir le type d'acte qui convient et ajouter les dates et le titre exacte)

Se fondant sur les art. 62, al. 4, et 70 de la loi fédérale du 17 décembre 1976 sur les droits politiques, sur l'art. 19, al. 3, de l'ordonnance du 24 mai 1978 sur les droits politiques, et sur les instructions de la Chancellerie fédérale du 27 mai 1978, le service ..... (à désigner) de la commune de ..... (numéro postal et nom) atteste que les ..... listes ci-jointes portent ..... signatures valables de citoyens qui ont qualité d'électeur en matière fédérale et exercent leurs droits politiques dans ladite commune.

Sceau du service : .....

Préposé au registre des électeurs :
Signature manuscrite : .....
Fonction : .....
Lieu : .....
Date : .....

[1] Les informations concernant l'initiative ou le référendum doivent être reprises des listes de signatures

76 Signature lists and covering letter must be held firmly together. The covering letter must be placed on the lists and attached to them with staples, string, pins or a seal. If the resulting packets were to fall apart in transit, thousands of signatures could be declared invalid.

77 The numbering of the lists processed makes it possible to determine at any time which collective attestation relates to which list.

78 It is advisable to keep a copy of each collective attestation until the initiative or referendum has been completed.

E. Submitting attested lists to the Federal Chancellery

79 Lists of certified signatures must be deposited with the Federal Chancellery and classified by canton (art. 20 para. 1 ODP).

80 If the deadline for collecting signatures expires on a Saturday, Sunday or public holiday, the referendum application may still be submitted during office hours on the following working day (art. 20 para. 2 ODP).

81 In March 2020, the Federal Chancellery published a checklist for committees submitting initiatives, referendums and petitions. In particular, it sets out the place, date and time for filing initiatives and referendums.

F. An exception to the requirement to certify voter status during the COVID 19 epidemic

82 From September 26, 2020 to December 31, 2022, during the COVID-19 epidemic, in order to promote the exercise of political rights, a legal basis has been created to enable the Federal Council to provide that requests for referendums or popular initiatives with the required number of signatures may be submitted to the Federal Chancellery before the expiry of the deadline, without being accompanied by certificates of voter status; if necessary, the Federal Chancellery would forward the lists of signatures to the office responsible under cantonal law for certifying voter eligibility (art. 2 of the Federal Act on the legal basis for Federal Council ordinances to overcome the COVID-19 epidemic).

83 On this basis, the Federal Council first issued an ordinance concerning the attestation of voter status for popular referendums (COVID-19 ordinance attestation of voter status of October 7, 2020). In force from October 8, 2020 to

December 31, 2021, this ordinance allowed the certification of the electoral status of signatories of a referendum application to take place after the expiry of the referendum deadline for referendum applications against acts published in the Federal Gazette between June 30, 2020 and July 31, 2021.

At its meeting of May 12, 2021, the Federal Council repealed the above-mentioned ordinance and adopted the total revision of ordinance COVID-19 attestation of voter eligibility. Under the new ordinance, in addition to lists of signatures in support of referendum applications, lists of signatures in support of popular initiatives could now also be submitted with or without a certificate of elector status. This time-limited measure, in force from May 13, 2021 to August 31, 2022, applied to referendum applications against acts published in the Federal Gazette between March 30, 2021 and March 31, 2022, and to popular initiatives submitted to the Federal Chancellery between May 13, 2021 and June 30, 2022 (Art. 1 para. 2). The Federal Chancellery could hand over the lists of uncertified signatures to the competent cantonal authorities and ask them to certify them (art. 3). The relevant cantonal authorities were to return the certified lists directly to the Federal Chancellery without delay (but within 14 days of receipt at the latest) (art. 4). 84

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COMMENTARY ON

Art. 63 PRA

A commentary by Bénédicte Tornay Schaller

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Art. 63 Refusal of the certificate of eligibility to vote

[1] The certificate of eligibility to vote shall be refused if the requirements of Article 61 are not fulfilled.

[2] If a person eligible to vote has signed more than one signature list, only one signature is certified.

[3] The grounds for refusal must be stated on the signature list.

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I. HISTORY

The question of proof of voter status arose with the introduction of referendum and initiative rights in the 19th century. As far as initiatives were concerned, art. 5 para. 3 of the Federal Act of January 27, 1892 (hereinafter referred to as the "1892 Act") stipulated that "signatures which do not bear the certificate prescribed in art. 4 para. 3, or whose certificate is inaccurate or incomplete, shall be disregarded". This article also specified that "if there are signatures which emanate visibly from one and the same hand, they shall be cancelled and shall not be taken into account". 1

Five years later, noting that irregularities in the attestations were leading to the cancellation of a large number of signatures, the Federal Council sought to remedy this drawback by issuing the regulation concerning requests for popular votes on federal laws and decrees and for revision of the federal constitution of February 23, 1897 (hereinafter referred to as the 1897 regulation). Article 3 of these regulations stipulates that "if there are signatures on a list which are obviously written by the same hand, these signatures shall be crossed out as invalid, with the exception of one". 2

Paragraph 2 of art. 63 LDP, which came into force in 1978, took over the content of art. 3 of the 1897 regulations: only one signature is attested when the elector has signed the application several times. Paragraph 3 of art. 63 of the LDP also introduced a new provision. The authority responsible for verifying the electoral status of signatories must now briefly state the reasons for refusal. 3

Art. 19 para. 2 letters a to f of the Ordinance on Political Rights of May 24 1978 (ODP) specifies in detail the six formulas leading to refusal of the attestation, namely illegibility, non-identification, multiple signatures, signatures from the same hand, a non-handwritten signature and an elector who is not entered in the register of federal electors. 4

In 1997, two grounds were added to letters g and h of art. 19 para. 2 ODP, namely the absence of a handwritten signature and an incorrect date of birth. 5

The LDP had also introduced the possibility of correcting defects in the attestation if the outcome of the referendum depended on it (art. 65 aLDP). It was also possible to eliminate these defects even after the referendum deadline 6

had expired. Art. 19 al. 4 aODP stipulated that if the service was unable to issue its attestation within the required timeframe, it would note this on the list, indicating the date of receipt. The possibility of subsequent correction of attestation defects was abolished in 1997.

II. IMPORTANCE OF THE PROVISION

A. General

7 Art. 63 LDP, entitled "Refusal of attestation", has had three paragraphs since its inception. Its wording has remained unchanged since 1978.

8 Art. 63 LDP is located in Title 4 of the LDP, which deals with referendums. However, it also applies to popular initiatives, by reference to art. 70 of the LDP. Similarly, art. 26 ODP on popular initiatives also refers to arts. 19 and 20 ODP (in the chapter on referendums).

9 Art. 63 LDP sets out the procedures for refusing to certify voter status. The certification of signatures on lists takes place after the signatures have been collected (art. 61 LDP) and before the final decision (art. 66 and 67b LDP for referendums and art. 72 LDP for initiatives).

10 The provisions concerning refusal of certification apply to both federal constitutional initiatives calling for total revision (art. 138 FC) and those calling for partial revision (art. 139 FC). They also apply to all the types of referendum requests listed in art. 141 FC (referendum on federal laws, federal laws declared urgent and valid for more than one year, federal decrees insofar as the Constitution or law so provides, and certain international treaties).

11 The scope of art. 63 of the LDP is considerable, as the granting of signature certification is a procedural condition for the successful outcome of a referendum request or initiative. In order to establish whether a referendum application or initiative has been successful, the Federal Chancellery verifies, among other things, that the certificate of elector status has been duly submitted (art. 21 ODP). Success is a condition for submission to the popular vote. Refusal to issue a voter's certificate can therefore have the effect of preventing an initiative or a request for a referendum from succeeding.

12 Art. 63 of the LDP, as a rule organizing political rights, enjoys the protection afforded by the guarantee of political rights (art. 34 para. 1 FC). The credibility

of political rights depends on the way in which certificates of voter eligibility are processed. This is a central procedural requirement for the exercise and guarantee of political rights in Switzerland. This makes it a key issue for the functioning of direct democracy.

The refusal of voter certification, insofar as it ensures that only members of the electorate sign initiatives or referendum applications (and that they sign them only once), is also protected by art. 34 para. 2 of the Swiss Constitution, which includes the right to know the exact composition of the electorate (who signed the referendum or initiative application). It is a basic condition for guaranteeing a voting result that reflects the free and undistorted will of the electorate. It creates confidence and therefore serves to ensure that the result of the vote is accepted.

13 An appeal concerning voting rights (Stimmrechtsbeschwerde) may be lodged with the cantonal government for violation of art. 63 LDP (art. 77 al. 1 let. a LDP) against an unjustified refusal of certification. Indication of the reason for refusal should make it easier for the appeal authorities to determine whether the refusal is well-founded. Appeals must be lodged within 3 days of discovery of the grounds for appeal, but no later than the 3rd day after publication of the results in the official cantonal gazette (art. 77 al. 2 LDP). The decision of the cantonal government may be appealed to the Federal Supreme Court (art. 80 al. 1 LDP and art. 82 let. c LTF).

An appeal to the Federal Supreme Court against the decision of the Federal Chancellery concerning the non-completion of an initiative or referendum may also be lodged in connection with the attestation of voters (art. 80 al. 2 LDP and art. 82 let. c LTF). Thus, if the Federal Chancellery declares a popular initiative or referendum unsuccessful due to an insufficient number of valid signatures, the organizing committee may appeal to the Federal Supreme Court. The committee may complain that the lists with voter certificates were returned too late, or that the nullity of certain signatures was not clearly indicated.

14 From a criminal point of view, the authority responsible for certifying signatures is acting in an official capacity and falls under the qualified offence of art. 282 ch. 2 StGB, under which anyone who falsifies the number of signatures collected in support of a request for a referendum or initiative, in particular by adding, modifying, deleting or crossing out signatures, or by counting

signatures incorrectly, will be punished by a custodial sentence of up to three years or a fine of at least 30 days. Refusal to authenticate signatures and the deliberate use of a list of invalid signatures are also punishable under art. 282 ch.1 III of the Swiss Penal Code. The result of the signature collection must have been altered and have influenced the outcome of the initiative or referendum. Since electoral fraud is an intentional offence, simple miscalculations in the counting of signatures do not constitute an offence.

B. Comparative cantonal law

15 The concept of refusal to certify voter status is found in all cantonal legislation and regulations. The cantons have enacted provisions similar to those of art. 63 of the LDP, albeit with some specific features.

16 As at federal level, the reason why a signature is declared invalid must be stated.

17 Reasons for refusal often include illegibility of the signature, the fact that the signature is given several times, that it is from the same hand, that it is not handwritten, that the signatory is not entered in the electoral register, that the signatory is not identifiable, that the date of birth is wrong or that the signature has already been crossed out when the commune received the list. In the Canton of Zurich, cantonal law refers directly to federal law as regards the grounds for refusal of certification.

18 As under federal law, the competent authority must ensure that the same person has not signed the same application several times. In some cantons, it is specified that any person who affixes a signature other than his or her own is liable to criminal prosecution. The canton of Uri stipulates that in the case of multiple signatures, none of them is validated. This would appear to be contrary to the principle of proportionality (art. 5 para. 2 FC) and the guarantee of political rights (art. 34 FC).

19 Many cantons, such as Vaud, Valais, Solothurn, Aargau, Schaffhausen, St. Gallen, Basel-Landschaft and Graubünden, require the authority responsible for certifying signatures, or the cantonal chancellery, to remedy defects in the certification under certain conditions, in principle if the outcome depends on it. Corrections can also be made after the referendum deadline. In the canton of Neuchâtel, it is stipulated that when the signatory can be easily identified

despite incomplete information, the competent authority must eliminate the defects.

In the canton of Fribourg, the cantonal Chancellery informs persons whose signatures have been declared invalid and advises them of the legal remedies available. In a decision of 1894, the Swiss Federal Supreme Court had already recognized the right of citizens to consult signatures declared invalid if these were decisive for the initiative's non-implementation. 20

In some cantons, such as Solothurn and Fribourg, it is expressly stated that an appeal to the Administrative Court or the Cantonal Court may be lodged against refusal of certification. 21

III. COMMENTS

A. Paragraph 1: grounds for refusal of attestation

Art. 63 para. 1 of the LDP stipulates that the attestation of voter status is refused if the conditions of art. 61 of the LDP relating to signatures are not met. 22

The first condition for declaring a signature valid is that the signatory is entered in the electoral register (art. 4 LDP) on the day the list is received by the relevant department. Attestation is only granted if the signatory is entered in the electoral register on the day the list of signatures is presented for attestation (art. 19 al. 1 ODP). This is why it is important for the relevant department to indicate the date of receipt on each list.

Other conditions are that the surname, first name(s) and signature must be handwritten. These conditions are cumulative.

Art. 19 para. 2 ODP lists eight cases in which certification of voter status is refused: 23

- the signature is illegible (letter a)
- the signature is unidentifiable (letter b)
- the signature is given several times (let. c)
- there are signatures in the same hand (let. d)
- the signature is not handwritten (let. e): the "name and surname" and "signature" fields must be filled in personally by hand, and repeating quotation

marks are forbidden. The date of birth and address, on the other hand, may be printed or written by another person, and quotation marks may be used in the address field.

The law makes an exception for people unable to write (due to blindness, quadriplegia or serious hand injury). To sign an initiative or referendum request, they must ask an elector of their choice to enter their surname, first name, date of birth and address on the list. In the signature field, the person whose help has been requested must write his or her own name in capital letters, add the words "by order/p.o." and sign by hand (art. 61 al. 1bis LDP and 18a ODP).

- the elector is not registered (let. f): this may be a person who is not a Swiss citizen, a minor, a person who is not domiciled or no longer living in the commune, a weekly resident of a commune, a deceased person or a person under general guardianship due to incapacity of discernment.
- absence of a handwritten signature (letter g)
- the date of birth is incorrect (let. h): if the full date of birth (and not just the year) is required to identify a signatory (e.g. in the case of surnames and first names common in a commune), this must be indicated. If, despite an incomplete date, the person is easily identifiable, the signature should be considered valid. If, on the other hand, the date of birth is false and there is doubt as to the authenticity of the signature, it is not valid. The same applies to the address.
- the signature has already been crossed out when the commune receives the list: this ninth ground for invalidity does not appear in art. 19 para. 2 ODP, but has been added by the Federal Chancellery.

24 The competent authority under cantonal law must indicate the number of valid and invalid signatures on each list or in the collective certificate.

B. Paragraph 2: the special case of multiple signatures

25 Voters may only sign each initiative or referendum request once. Multiple signatures must be crossed out from the second onwards. The risk of encountering signatures more than once is particularly high in the case of referendums launched by different committees against the same act. To avoid having to issue several certificates of voter status for the same person, it is advisable to

create a computer file or print out an extract from the register of voters for each initiative and referendum as soon as the first lists are received. If these are kept up to date, it will subsequently be easy to see whether a voter has already signed the initiative or referendum in question.

As the deadline for collecting signatures is long for popular initiatives (18 months), it can also happen that a person signs a popular initiative in the first month of the deadline (while domiciled in a French-speaking canton), moves to a German-speaking canton and then signs the same initiative a second time seventeen months later, without any intention of falsification. In this case, neither the commune of the French-speaking canton nor the commune of the German-speaking canton has any knowledge of the certificate issued by the other commune. It is only during subsequent checks by the Federal Chancellery that this double signature may be discovered. 26

Where communes merge, particular attention must be paid to the risk of a person signing the same initiative or referendum request several times. Each of the communes concerned should maintain a voters' list on which the names of the signatories are crossed out. These lists can then be compared after the merger. 27

Signing the same initiative or referendum request several times also has penal consequences. Such behaviour constitutes electoral fraud within the meaning of art. 282 ch. 1 II StGB and is punishable by a custodial sentence of up to three years or a pecuniary penalty. The same applies to signing a request for a referendum or an initiative without being entitled to political rights (whether due to age, change of domicile or nationality) and to signing in the name of a third party, even if the author is acting as a representative of the person concerned, albeit with the latter's authorization. It is irrelevant whether the initiative or referendum request reaches the required number of signatures in any case. The offence is committed as soon as the perpetrator participates, without being entitled to do so, in one of the political rights listed in art. 282 ch. 1 II of the Swiss Criminal Code. The influence on the outcome is irrelevant. Electoral fraud, on the other hand, is an intentional offence. Thus, if a citizen signs a referendum or initiative application several times without remembering having already signed it, he or she is not committing a criminal offence. 28

C. Paragraph 3: the obligation to give reasons for refusal

29 The competent authority must identify invalid signatures and cross them out. If it refuses to issue a certificate, it must give reasons for its refusal. However, the refusal must not be excessively formal. The reason for the invalidity of a signature must be entered in the control column, using the abbreviations proposed by the Federal Chancellery.

30 In 1997, the possibility for the competent authority to remedy defects in the attestation if the outcome of the referendum depended on it, and to eliminate such defects even after the referendum deadline had expired, was abandoned.

31 An appeal may be lodged with the cantonal government against a refusal to issue an attestation if the reasons for the refusal are not given or are inadequate (supra N 13). Giving the reasons for refusal should make it easier for the appeal authorities to determine whether the refusal is well-founded.

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COMMENTARY ON

Art. 64 PRA

A commentary by Beat Kuoni

SUGGESTED CITATION

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Art. 64 Prohibition of inspection

[1] ...

[2] Signature lists that have been submitted are not returned and may not be inspected.

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I. BACKGROUND

The permissibility of inspecting the submitted signature lists was already an issue in the **19th century**. The administration occasionally allowed inspection and in 1882, in connection with a specific request for a referendum, the Federal Council addressed the question of whether third parties should be allowed to inspect the submitted signatures. The Federal Council allowed inspection (including by the press), but required prior notification. This practice subsequently became a talking point in parliament, and an unsuccessful motion was tabled to urge the Federal Council to no longer allow third-party inspection in the future. In addition, in 1894, in a case of appeal from the Canton of Nidwalden, the Federal Supreme Court recognized a general right to inspect signatures that had been declared invalid. 1

In **1956**, the Federal Department of Justice and Police explicitly stated that signature lists submitted to the competent federal authority must not be returned to the initiative committees in order to protect the signatories. Legal scholars welcomed this practice and emphasized that the names of supporters must not be published. The Federal Act on the Procedure for Popular Petitions for the Revision of the Federal Constitution (Popular Initiative Act) codified the practice and explicitly stipulated in Art. 4 para. 5 that signatures submitted to the Federal Council could neither be returned nor inspected. 2

Although the statutory regulation only applied to the right of popular initiative, in practice it was also applied by analogy to signature lists for optional referendums. The **Federal Act on Political Rights (PPA)** subsequently adopted the regulation for both the popular initiative (Art. 71 PPA) and the optional referendum (Art. 64 PPA). 3

Art. 64 of the BPR originally had the heading "Submission", as does Art. 71 of the BPR concerning the popular initiative. The original provision in Art. 64 para. 1 of the BPR related to submission and was moved to the newly created Art. 59*a* of the BPR with the **amendment of the law in 1996** in a more precise form. At the same time, Art. 64 FPR was given the heading "Exclusion of Inspection". The heading only refers to the exclusion of inspection, not to the exclusion of return, which means that the content of the standard is not fully reflected. 4

II. SIGNIFICANCE OF THE PROVISION

A. General

5 The Federal Council justified the regulation in the Initiative Act of 1962 on the one hand by stating that the signature lists become official records upon submission and therefore cannot be returned to the initiative committee even if it withdraws the popular initiative. On the other hand, the Federal Council stated that the regulation would "protect citizens from the economic, political and other pressures to which they are occasionally exposed when exercising their
political rights". In other words, the purpose of the provision is to protect **voting secrecy**.

6 The **level of protection afforded by voting secrecy** when signatures are being collected is less than when people are casting votes in elections and ballots. In particular, it does not constitute a violation of voting secrecy if the people entrusted with checking the signature lists become aware of the respective expression of will. The Federal Chancellery is also permitted to process the data in accordance with data protection regulations. Since the information concerns political views and activities, the data qualifies as particularly worthy of protection in accordance with Art. 5 let. c no. 1 of the Federal Data Protection Act (DSG).

7 The secrecy of the vote when collecting signatures for referenda and initiatives also applies in principle **before the signature lists are submitted** to the Federal Chancellery. Accordingly, Art. 19 para. 6 of the Ordinance on Political Rights (VPR) requires the offices responsible for the voter certificate to maintain voting secrecy. The handling of the data is also governed by cantonal data protection law.

B. Comparative law

8 The **cantons** often explicitly prohibit the return of the signature lists that have been submitted and the inspection of these lists.

9 However, some cantons provide for **exceptions** to the ban on inspection. In the Canton of Zurich, for example, the committee and the signatories concerned may inspect the signature lists if the referendum or initiative does not come into being and if inspection of the lists is necessary to safeguard their

rights. In the cantons of Ticino and Geneva, the committees or their representatives may inspect the signatures that have been declared invalid; in the canton of Neuchâtel, this right is granted to the voters. The canton of Schaffhausen stipulates that information may be requested about the invalidation, and the canton of Fribourg informs the persons concerned directly about the invalidated signatures if the request does not come about as a result of the invalidation.

Some cantons expressly stipulate that the **signature lists** are to be **destroyed** once their legally valid establishment has been confirmed. The Canton of Vaud expressly forbids committees from keeping copies of signature lists. 10

III. COMMENTARY ON THE STANDARD TEXT

A. Exclusion of the return of signature lists

The regulation in Art. 64 para. 2 OPR governs the **prohibition on the return of signature lists**. Persons and/or organizations who were originally in possession of the signature lists lose the power of disposition over the signature lists upon submission to the Federal Chancellery. From this point on, these are considered official files and are kept by the federal authorities. 11

The ban on return also applies to the individual **signatories of** a referendum request. They too cannot demand the return of their signature or withdraw it. 12

B. Exclusion of inspection of the signature lists

The provision in Art. 64 BPR excludes the inspection of the signature lists after their submission to the Federal Chancellery. As a **special provision** under Art. 4 of the Federal Act on Freedom of Information in the Administration (BGÖ), it takes precedence over the right of access to official documents. 13

The signatories of referendums (and, according to Art. 71 para. 2, of popular initiatives) are protected from the public taking note of their political expression of will. By contrast, signatories of **election proposals for the National Council elections do not enjoy such protection**. According to Art. 26 BPR, the voters of the respective constituency can inspect the election proposals and thus the names of the signatories at the competent authority. In the opinion of the Federal Council and the Federal Supreme Court, the authors of election proposals would fulfill a public function, and the electorate has a le- 14

gitimate interest in knowing who is behind an election proposal. The public interest – particularly with regard to the freedom of choice and freedom of voting – takes precedence over the interest in keeping the names of the signatories of election proposals secret.

15 The exclusion of inspection means that the submitted signature lists are not archived in the **Federal Archives** because this would undermine the purpose of Art. 64 para. 2 FPR. Instead, the lists are destroyed as soon as they have fulfilled their purpose. In practice, the Federal Chancellery destroys the submitted signature lists as soon as the result of the popular vote on the respective bill is known or, if the request does not materialize, as soon as the related ruling on the non-materialization has become legally binding. An empty copy of the signature list is archived in the Federal Archives, which satisfies archiving interests.

16 With regard to the question of whether Art. 64 para. 2 BPR allows inspection in **exceptional cases**, different views are represented. Some legal scholars, based on an old Federal Supreme Court ruling from 1894, assume that there is a right to inspect the lists if the competent authority declares so many signatures invalid that the request fails or threatens to fail. This legal interpretation would correspond to the possibilities of inspection as regulated by law in the Canton of Zurich. According to other legal experts, however, allowing the signature lists to be inspected would violate the secrecy of the vote and is therefore not permitted.

17 The Federal Chancellery has a strict **practice of** not allowing signature lists to be inspected, even if a request does not materialize. In the past, the rulings on the failure of a proposal to reach the required number of signatures always explicitly stated that the signatures submitted remained under seal and in the custody of the federal authorities. The relevant passage is no longer part of the rulings on the failure of a proposal to reach the required number of signatures. However, this does not change the practice. Nevertheless, it is entirely legitimate to question whether access is excluded even in cases in which effective legal protection against the ruling on non-occurrence (see Art. 80 para. 2 BPR) would be impossible without access. The purpose of Art. 64 para. 2 BPR is to protect the voting secrecy of the signatories. An overly rigid interpretation of the provision could go against the interests of the signatories, because disputes over the failure of a referendum are ultimately about the protection of the political rights of the signatories.

Since 2022, the Federal Chancellery has filed several criminal complaints in connection with **allegedly forged signatures**. In doing so, it also granted the prosecuting authorities access to the signature lists submitted to it. Under Article 194 paragraph 2 of the Swiss Criminal Procedure Code (CrimPC), administrative authorities must make their files available for inspection by the public prosecutor or the courts if there are no overriding public or private interests of confidentiality to prevent their disclosure. In particular, files may be disclosed in proceedings for electoral fraud. In the specific cases, the secrecy of the vote did not prevent the files from being handed over. This is because the protection of the will of the people, which is the purpose of the criminal proceedings under Art. 279 et seq. of the Swiss Criminal Code (SCC), outweighed the individual interest in secrecy. 18

In its report of 20 November 2024 in response to postulate 21.3607, the Federal Council addressed the issues of **e-collecting signatures** for the purposes of state policy. At the same time, it instructed the Federal Chancellery to make preparations for conducting limited practical trials of e-collecting. Furthermore, it is likely that Parliament will instruct the Federal Council to take action in the same direction. The protection of voting secrecy will also have to be ensured in the case of e-collecting, although both opportunities and risks will arise in this regard. In view of developments in this area, the question will arise sooner or later as to what extent the provision in Art. 64 BPR needs to be adapted or clarified in the light of new issues. 19

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COMMENTARY ON

Art. 67 PRA

A commentary by Matthias Lanz

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Section 3 Referendum requested by the Cantons

Art. 67 Competence

Unless cantonal law provides otherwise, the cantonal parliament shall decide whether a referendum should be requested by a canton.

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I. HISTORY OF ORIGINS

The cantonal referendum entered the Swiss legal system with the Federal Constitution of 29 May 1874. According to Art. 89 para. 2 aBV, a referendum had to be held on "federal laws as well as generally binding federal decisions" "if it is demanded by 30,000 Swiss citizens entitled to vote or by eight cantons". It is assumed that the hurdle was set at eight cantons to prevent the seven former special federal cantons from taking the cantonal referendum alone and complicating legislation. 1

The legislator first standardized the cantonal referendum in the Federal Law on Referendums on Federal Laws and Federal Decisions of June 17, 1874, Art. 6 of which stipulated the intra-cantonal competence as follows: "If Cantons request a referendum, the request must be made by the Grand Council (Cantonal Council, Land Council). The right of the people to amend such final measures under the cantonal constitution is reserved." Accordingly, the federal legislator determined that the cantonal parliaments could initiate a cantonal referendum. The cantons were free to additionally allow a referendum. A decision by the cantonal government alone, on the other hand, would not have been possible. 2

The federal law of 1874 was repealed in 1978 with the enactment of the Federal Law on Political Rights (PRA). The legislator thereby refrained from adopting the provision on the cantonal referendum without replacement. The dispatch is silent on the reasons for this, and the issue was not raised in the commissions and plenums of parliament either. One reason could have been that the provision was simply considered superfluous because no request for a cantonal referendum had ever been made up to that point. Another, that a regulation of intra-cantonal competence in a federal law should be deliberately avoided in order to avoid any encroachment on the constitutional cantonal autonomy (Art. 3 and 5 aBV). Formally, it was argued that the regulation did not belong in a law dealing with popular rights. 3

A good 20 years after the renunciation, the federal legislature decided to regulate the cantonal referendum again within the framework of a partial revision of the PRA (Art. 67-67b PRA). The Federal Council justified this step on the one hand with the now existing need to actually use the instrument. On the other hand, it saw a problem in the fact that not all cantons had defined the 4

competences for a cantonal referendum. This would not only have an effect in those cantons with a regulatory gap, but would also make it more difficult for all cantons to reach the quorum for a cantonal referendum. A subsidiary (i.e. substitute) regulation by the federal government for all cantons was therefore necessary. In the parliamentary deliberations, Art. 67-67b PRA were uncontroversial and the Councils approved the Federal Council's draft without discussion.

5 In the total revision of the Federal Constitution in 1999, the constitutional legislator took over the cantonal referendum and the quorum of eight cantons from the Federal Constitution of 1874 in Art. 141 para. 1 FC. Accordingly, the cantonal referendum can be held against federal laws, urgently declared federal laws with a term of validity of more than one year, certain federal resolutions and certain international treaties. The total revision also finally settled the doctrinal discussion on how the six former "half-cantons" are to be counted in the cantonal referendum. Only half-cantons are taken into account exclusively in the case of proposals submitted to a vote of the people and the cantons (Art. 142 para. 2-4 FC) and in the composition of the Council of States (Art. 150 para. 2 sentence 1 FC). In the case of a cantonal referendum pursuant to Article 141 para. 1 FC, all the cantons referred to in Article 1 FC shall be counted in their entirety.

II. SIGNIFICANCE OF THE PROVISION

A. General

1. Cantonal referendum: function and criticism

6 The federal constitutional legislature introduced the optional legislative referendum in 1874 for the electorate and the cantons, among other things, to compensate for the fact that the cantons had to relinquish powers due to the total revision of the Federal Constitution. This function of the cantonal referendum was also emphasized by the Commission of Experts for the Preparation of a Total Revision of the Federal Constitution in 1977. It was an emergency brake for the cantons and, moreover, promoted the involvement of the cantonal parliaments with federal projects. However, participation is limited: Although the cantons can initiate a cantonal referendum, the decision on

whether to accept or reject a bill is made solely by the voters, according to Article 141 para. 1 FC.

The cantonal referendum has been criticized time and again. The fact that it has hardly played a role in practice in the almost 150 years since its creation suggests either that there is only a limited need to use the instrument or that it is wrongly designed. Calls to lower the quorum of eight cantons, however, never gained traction. 7

Several authors raise fundamental and state policy concerns: Aubert and Grisel criticize that the cantons and their governments are simply not capable of conducting a federal referendum campaign. Aubert backs this up by saying that federal bills often have no cantonal or regional component. In these cases, he says, it is likely that the referendum cantons or the various authorities in a canton will not present a unified front. Grisel and Hangartner/Kley are also critical of the negative role of the cantons when they oppose a federal bill. A minority of the expert commission for the preparation of a total revision of the federal constitution also feared that the cantonal referendum could strain relations between the federal government and the cantons and hinder progressive concerns at the federal level. Wili and Kley see the cantonal referendum as a largely ineffective means of enforcing federalism. 8

As practice shows, the cantonal referendum can only fulfill its intended function as a right of participation of the cantons in the federal government to a limited extent. The cantons do not want to and cannot use the instrument regularly. However, it does have a certain significance and effect: as the one successful case of use shows, the cantonal referendum can play a role in special situations in which the federal legislature clearly fails to take sufficient account of cantonal competences or core concerns despite the various other instruments of participation. Since then, the cantons have also been granted the ability to successfully demand a vote. They could use this as leverage in the political process, but in reality they hardly ever do so. 9

2. Only one successful cantonal referendum since 1874

Since 1874, cantonal referendums have been attempted only very rarely and succeeded only once. In 2003, eleven cantons forced a vote on the so-called tax package, which was intended to amend various laws in the area of marriage and family taxation, residential property taxation and stamp duties. 10

However, the referendum would have been passed even without a cantonal referendum, as more than 50,000 eligible voters separately filed a popular referendum. In the referendum, the electorate clearly rejected the tax package.

11 The fact that a cantonal referendum was held for the first time on the tax package had to do with the content of the bill and the process. The bill would have led to considerable tax losses for the cantons. Moreover, after the consultation process, the bill was substantially changed at the expense of the cantons and a package solution was adopted, which was rejected by many cantons. In addition, taxes were an issue in which the cantons have significant responsibilities of their own. The fact that elections to the National Council were held in 2003 also played a role. The Conference of Cantonal Governments (KdK) and the Conference of Cantonal Finance Directors (FDK) were also responsible for the success of the cantonal referendum: they accompanied and coordinated the process (forming an opinion and making a fundamental decision on how to proceed, obtaining a legal opinion, ensuring the flow of information among the cantons, drafting a model message, etc.).

3. Unsuccessful attempts

12 More recently, the cantons of Schaffhausen, Zug, Schwyz and Nidwalden took the cantonal referendum against the determination of the basic contributions of the resource equalization, but failed in 2015 at the hurdle of eight cantons.

13 In 2014, cantonal referendums against the federal decree of September 27, 2013, approving the FATCA agreement between Switzerland and the United States and against the implementation law were unsuccessful. Only the canton of Valais submitted a referendum request in each case, which is why the quorum of eight cantons was not reached.

14 The canton of Valais also attempted to launch a cantonal referendum against the Spatial Planning Act in 2012, but did not receive the necessary support from other cantons and did not submit a petition. However, the popular referendum was successful and the bill was passed in a referendum.

15 The Money Laundering Act was to be put to a cantonal referendum in 1991, but as far as can be seen, no petition was submitted.

In 1988, the canton of Vaud considered a cantonal referendum against the Federal Act on Private International Law and unsuccessfully asked other cantons for support. 16

In 1982, a referendum against an amendment to the penal code failed. Only the Grand Council of Ticino submitted a referendum request. It was the first cantonal referendum submitted to the Federal Chancellery since the creation of the instrument. 17

4. Reasons for the Rare Use of the Cantonal Referendum

There are several reasons why cantons rarely seize the cantonal referendum and have been successful with it only once so far. 18

a. High hurdle and alternative popular referendum

Wili describes the cantonal hurdle for a cantonal referendum as "prohibitively high." At least 8 of 26 cantons, or more than 30 percent of the cantons, must call for a cantonal referendum for it to occur. In comparison, a popular referendum pursuant to Art. 141 para. 1 FC has the same effect, but can be triggered by 50,000 voters. Today, this corresponds to only about 0.9 percent of the electorate. Accordingly, a bill must meet with relatively broad cantonal opposition for a cantonal referendum. For a popular referendum, on the other hand, it may be sufficient if a small proportion of voters are against it. If, in view of the relatively low hurdle, a popular referendum becomes apparent, e.g. because one or more parties or important interest organizations announce it, there is no longer any incentive to seek a cantonal referendum. 19

b. Clear violation of cantonal interests as a hurdle

Party-political opposition to a bill is unlikely to be sufficient on its own to provoke a cantonal referendum. They only play a weakened role in the cantonal decision-making bodies (governments, parliaments, electorate), because these are composed of mixed party politics and are rarely dominated by one party. Rather, it can be assumed that cantonal interests must be clearly violated (e.g. encroachment on cantonal core competences or concerns about enforcement by the cantons) for these bodies to seriously consider taking up the demanding cantonal referendum. In contrast, clear party-political rejection of a federal bill often leads to a popular referendum. 20

c. Procedural reasons

21 The deadline for filing a cantonal referendum is 100 days from the official publication of the enactment. Especially in the past, it was difficult to go through the necessary political processes in eight cantons within this time. For example, in 1988, in contrast to today, in several cantons the decision to initiate the cantonal referendum could be contested by an optional or obligatory referendum within the canton (Basel-Stadt, Waadt, Schaffhausen, Zürich). This made it difficult or impossible to meet the deadline for the cantonal referendum. In the cantons of Appenzell Innerrhoden, Geneva, St. Gallen and Thurgau, there was no cantonal regulation of competences at all at that time. Between July 1, 1978 and March 31, 1997, this could lead to ambiguities, because at that time federal law did not (subsidiarily) define the competences in the cantons. It was also difficult in the past that certain cantonal parliaments met only a few times a year for ordinary sessions at which they could decide on a cantonal referendum. Today, the frequency of meetings is higher. Nevertheless, the time for a cantonal referendum is tight: The determination that one of the many federal bills could be problematic for a canton, the assessment of the chances of success for a cantonal referendum, the coordination with other cantons, the decision of the government and/or the parliament (preparation of the basis for the decision, preliminary discussion in the commission, agenda taking into account the business load, etc.) all take time.

d. Organizational and legal reasons

22 A cantonal referendum requires intercantonal coordination. This coordination must be relatively intensive - as the one successful example shows - and accordingly requires that a lot of political capital be invested.

23 The cantons, especially in the past, did not have the experience and structures to contest referenda and referendum campaigns at the federal level, unlike the political parties and large associations. However, it is evident in more recent practice that the cantons are intervening in federal referendum campaigns with increasing frequency and in a variety of ways.

24 According to case law and doctrine, state authorities such as the cantons must exercise restraint in the run-up to votes. In particular, this applies to referendum campaigns in the superordinate community. However, cantons that initiate a cantonal referendum may present their position in any case.

e. Other channels for the cantonal pursuit of interests

It can be assumed that the cantons can mostly effectively present their vital interests in the pre-parliamentary and parliamentary legislative process. Because the cantons have a great deal of experience as well as credibility in enforcement and because Swiss politics generally functions in a consensus-oriented manner, strong cantonal concerns often lead to adjustments in legislative projects that make a subsequent cantonal referendum seem unnecessary or at least disproportionate. The consultation procedure is of central importance here. With the KdK, the regional intergovernmental conferences, the conferences of specialist directors and the bodies for intercantonal coordination at the administrative level, there are numerous institutions that can exert influence in the interests of the cantons. Direct contact between members of the cantonal governments and members of the Federal Council and the Federal Assembly is also an important channel. Informal contacts also play a central role, e.g. between employees of the cantonal administrations and the federal administration. 25

B. Legal comparison

Art. 67-67b PRA regulate the participation of the cantons in referenda at the federal level. Naturally, there is therefore no actual equivalent in cantonal law. The provisions on the communal referendum at the cantonal level are the most suitable for comparison. With such a referendum, municipalities can demand a vote on cantonal legal acts. The communal referendum exists in seven cantons. In the cantons of Graubünden (executive), Lucerne (legislative) and Ticino (legislative), the competent municipal body is regulated on a subsidiary basis. In the cantons of Basel-Landschaft (legislative branch), Jura (legislative branch) and Solothurn (legislative branch), on the other hand, cantonal law defines the competent body in a binding manner, despite municipal autonomy. In the canton of Zurich, the municipalities are free in their determination. Only for the cities of Zurich and Winterthur does cantonal law stipulate that the decision must come from the legislature, in the event that they take the municipal referendum alone. If the municipalities do not make a regulation, the municipal assembly or the municipal parliament is responsible. 26

The overview shows that the cantons with communal referendum have a preference for the legislature as the competent state authority. This corresponds to the approach of the Confederation in Art. 67 PRA, which also gives 27

preference to the legislature for a referendum of the subordinate units of state - i.e. the cantons. On the other hand, the provision of Art. 67 PRA is subsidiary, while still three out of seven cantons have a binding provision and one has a partially binding provision. Accordingly, the federal legislature gives greater weight to cantonal autonomy in the case of the cantonal referendum than the seven cantonal constitutional and legislative bodies give to communal autonomy in the case of the communal referendum.

III. COMMENTARY ON THE TEXT OF THE NORM

A. "Determines the cantonal law ..."

28 Art. 67 PRA provides that "cantonal law" may determine the competence to take the cantonal referendum. The provision does not specify at which level of cantonal law the regulation is to be made. Since this is a question of state organization, it follows from the principle of legality under federal law of Art. 5 para. 1 FC that the regulation must be contained in a law in the formal sense. However, what is considered a law in the formal sense in the respective canton is determined solely by the respective cantonal constitution due to the cantonal organizational autonomy. In practice, the regulation is found at the constitutional level everywhere except in the canton of Geneva.

B. "... nothing else ..."

29 The competence of the cantonal parliament under Art. 67 PRA applies only if cantonal law provides "nothing else". Accordingly, it is a subsidiary regulation. The cantons are allowed to provide "otherwise". In observance of federalism, the PRA leaves the determination of the competent body "free in all directions." Accordingly, the cantons could, for example, designate the cantonal parliament as the body and provide that its decision is final, subject to an optional or mandatory referendum, or subject to one of these types of referendum voluntarily by the parliament. A decision by the electorate by means of an initiative would also be conceivable, and the cantonal government could also be declared competent.

30 Auer criticizes that the subsidiary federal provision is "hardly compatible with cantonal organizational autonomy." However, this view is too strict. The cantons are entirely free to adopt a different regulation if they wish. Moreover, they are in no way obliged to take a cantonal referendum based on the federal

regulation. Finally, almost all cantons today designate the cantonal parliament as the competent body on their own initiative under their own law.

Hangartner/Kley describe it as contrary to the system that a cantonal government can be responsible for taking the cantonal referendum. It is a legislative act that cannot be initiated by the executive, but must be reserved for the parliament or the electorate. However, this opinion is opposed by cantonal autonomy, according to which the cantons are largely allowed to organize themselves. Accordingly, it would be rather problematic if the Confederation - as in the past - were to prescribe bindingly to the cantons which body is to make the decision. In addition, there are factual reasons to designate the cantonal government, namely the high temporal urgency of the decision. However, this regulation is the great exception today. 31

The provision of Art. 67 PRA does not come into play at present, because in the meantime all 26 cantons regulate the competence for the cantonal referendum in their own law. The following table shows which body is basically responsible. In 23 cantons it is the parliament, in Appenzell Ausserrhoden and Graubünden the parliament or the government and in St. Gallen the government. 32

Canton	**Responsibility**	**Legal basis**
Aargau	Parlament (Grosser Rat)	§ 82 Abs. 1 Bst. b KV/AG
Appenzell Ausserrhoden	Parlament (Kantonsrat) oder Regierung bei Dringlichkeit	Art. 77 Abs. 1 Bst. a bzw. Art. 89 Abs. 2 Bst. d KV/AR
Appenzell Innerrhoden	Parlament (Grosser Rat)	Art. 27 Abs. 4 KV/AI
Basel-Landschaft	Parlament (Landrat)	§ 67 Abs. 1 Bst. b KV/BL
Basel-Stadt	Parlament (Grosser Rat)	§ 91 Abs. 1 Bst. a KV/BS
Bern	Parlament (Grosser Rat)	Art. 79 Abs. 1 Bst. b KV/BE
Freiburg	Parlament (Grosser Rat)	Art. 105 Bst. e KV/FR
Genf	Parlament (Grosser Rat)	Art. 84 Loi sur l'exercice des droits politiques du 15.10.1982

		(LEDP; A 5 05) i. V. m. Art. 67 BPR
Glarus	Parlament (Landrat)	Art. 92 Bst. b KV/GL
Graubünden	Parlament (Grosser Rat) oder Regierung[1]	Art. 58 KV/GR
Jura	Parlament	Art. 84 Bst. p KV/JU
Luzern	Parlament (Kantonsrat)	§ 49 Bst. a KV/LU
Neuenburg	Parlament (Grosser Rat)	Art. 61 Abs. 1 Bst. a KV/NE
Nidwalden	Parlament (Landrat)	Art. 61 Ziff. 1 KV/NW
Obwalden	Parlament (Kantonsrat)	Art. 70 Ziff. 12 KV/OW
St. Gallen	Regierung	Art. 74 Abs. 3 Ziff. 2 KV/SG
Schaffhausen	Parlament (Kantonsrat)	Art. 57 Abs. 1 Bst. b KV/SH
Schwyz	Parlament (Kantonsrat)	§ 55 Abs. 2 Bst. a KV/SZ
Solothurn	Parlament (Kantonsrat)	Art. 76 Abs. 1 Bst. g KV/SO
Tessin	Parlament (Grosser Rat)	Art. 59 Abs. 1 Bst. r KV/TI
Thurgau	Parlament (Grosser Rat)	§ 40 Abs. 1 KV/TG
Uri	Parlament (Landrat)	Art. 93 Bst. c KV/UR
Waadt	Parlament (Grosser Rat)	Art. 109 Abs. 2 KV/VD
Wallis	Parlament (Grosser Rat)	Art. 38 Abs. 3 KV/VS
Zürich	Parlament (Kantonsrat)	Art. 59 Abs. 1 Bst. a KV/ZH
Zug	Parlament (Kantonsrat)	§ 41 Bst. r KV/ZG

C. "... the cantonal parliament shall decide whether the cantonal referendum shall be taken."

33 In the absence of a provision in cantonal law, federal law designates the cantonal parliament as responsible for seizing the cantonal referendum. This is

intended to prevent a situation where, in the absence of a regulation, a canton is prevented from seizing the cantonal referendum, thereby raising the hurdle for all cantons. By cantonal parliament is meant the legislative power of the canton (subject to the voters), which is directly elected by the people. The designation (Grand Council, Cantonal Council, Land Council or Parliament) is irrelevant.

The dispatch does not explicitly state why federal law designates the cantonal parliament as the fallback solution. The argument in favor of this body is that the taking of a cantonal referendum against a federal law has a certain consequence for the relationship between the canton and the Confederation and must accordingly be democratically strongly legitimized. A government resolution cannot achieve this to the same extent. In turn, the 100-day referendum period for the cantonal referendum speaks against the electorate, which makes a timely intra-cantonal vote appear difficult or impossible. 34

The question arises whether the decision of the cantonal parliament based directly on Art. 67 PRA could be subject to a referendum within the canton if cantonal law provides for this for the corresponding type of decision. This is to be denied. If the subsidiary federal regulation applies because the cantonal law does not (differently) regulate the competence for the cantonal referendum, it is to be regarded as conclusive. This is also supported by the fact that otherwise the intention of the federal legislator to lower the hurdles for the cantonal referendum for all cantons would be undermined because an intra-cantonal vote could hardly take place in time. 35

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1. Wenn der Grosse Rat tagt, ist dieser zuständig. Zu anderen Zeiten kann die Regierung entscheiden, das Kantonsreferendum zu ergreifen oder den Grossen Rat einzuberufen, der dann einen Beschluss fällt (vgl. Bundi Caldelari, Kommentar KV/GR, Art. 58, N. 4 f.).

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COMMENTARY ON

Art. 67a PRA

A commentary by Matthias Lanz

SUGGESTED CITATION

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Art. 67*a* Form

The communication from the cantonal government to the Federal Chancellery shall indicate:

a. the title of the enactment with the date of adoption by the Federal Assembly;

b. the public body that is requesting the popular vote on behalf of the canton;

c. the provisions under cantonal law that regulate the rights to request a referendum;

d. the date and result of the vote on the decision to request a referendum.

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I. HISTORY OF ORIGINS

Art. 67a PRA - like Art. 67 and 67b PRA - originates from an amendment to the Federal Act of 1996. Reference is therefore made to the commentary on Art. 67 PRA. 1

II. SIGNIFICANCE OF THE PROVISION

A. General

Art. 67a PRA contains the formal requirements for a cantonal referendum. They apply regardless of whether the referendum request is based on the subsidiary Art. 67 PRA or on cantonal law. As with the popular initiative, the written form and the precise designation of the enactment to be voted on are required. 2

B. Comparison of laws

Cantons in which there is a municipal referendum know provisions on formal requirements comparable to Art. 67b PRA. Basel-Land specifically requires the designation of the lead municipality. Graubünden and Jura check compliance with the deadline and generally with the formal requirements. Lucerne has specific formal requirements that are very similar to Art. 67b PRA and, moreover, require that a representative of the municipalities be designated. Solothurn requires, among other things, an excerpt from the minutes and otherwise declares the provisions on the popular initiative to be applicable mutatis mutandis. The Canton of Ticino requires the designation of a representative and otherwise refers to the provisions on the popular referendum. As far as can be seen, Zurich does not have any express formal provisions for the municipal referendum, but does require the designation of a representative. 3

III. COMMENTARY ON THE TEXT OF THE NORM

A. Letter (introductory sentence)

According to the introductory sentence, the cantonal government shall inform the federal government in writing that the canton supports a cantonal referen- 4

dum. The designation of this body in federal law is noteworthy, given that the subsidiary provision of Article 67 of the PRA provides that the cantonal parliament is responsible for taking the cantonal referendum. Moreover, almost all cantons have designated the cantonal parliament in their law. However, the governments basically represent their cantons vis-à-vis the outside world. Overall, it would have been more federalism-friendly not to designate a specific body, but simply to speak of a "letter of the canton". Since this is a regulatory provision, a letter that does not originate from the cantonal government but from the body responsible for taking the cantonal referendum would nevertheless be considered legally valid.

5 The recipient of the letter is the Federal Chancellery, which also establishes that the cantonal referendum has come about.

B. Clear citation of the federal decree (lit. a)

6 This provision requires that the enactment title and the date of adoption by the Federal Constitution be mentioned in the letter. It serves to identify the federal decree in question beyond doubt.

C. Deciding body (lit. b)

7 The letter must name the body that requests the referendum on behalf of the canton. This allows the Federal Chancellery to verify whether the cantonal referendum actually originates from the competent organ (cf. lit. c). According to the dispatch, the formal requirement is necessary because federal law regulates the organ responsible for the cantonal referendum only in a subsidiary manner.

D. Provisions of cantonal law (lit. c)

8 The letter must also contain the provisions of cantonal law that regulate which body is responsible for taking the cantonal referendum. This enables the Federal Chancellery to check whether it is the same body that decided on the cantonal referendum (cf. lit. b). If there were no cantonal regulation, this would have to be noted in the letter and reference made to Art. 67 PRA.

E. Date and result of the referendum decision (lit. d)

The letter from the canton must contain the date of the referendum decision (date of the decision of the cantonal parliament or government or date of the referendum). This enables the Federal Chancellery to determine whether the resolution was issued within the referendum deadline. However, timely submission to the Federal Chancellery is also required in order to meet the deadline. 9

Furthermore, according to lit. d, the canton must indicate the result of the referendum decision. The dispatch does not comment on what exactly is meant by this. Is it only the approval or rejection of a referendum petition by the competent body? Or is the "result" the exact outcome of the vote (votes in favor, votes against and abstentions)? The argument against the former interpretation is that a letter in which it is left open whether a canton submits a referendum request is hardly conceivable. However, the interpretation according to which the canton must report the exact result of the referendum to the Federal Chancellery is also not entirely convincing. Either a canton seizes the cantonal referendum or it does not - the majority ratios in the decision are irrelevant. Moreover, if the cantonal government is the competent body, no voting result can be disclosed at all, as this would violate the principle of collegiality. In practice, the Federal Chancellery seems to assume that the exact result of the vote is meant by the result. In the case of the successful cantonal referendum against the tax package, it even indicated this in the decree (except in the case of the canton of St. Gallen, where the cantonal government took the decision). In the case of the failed cantonal referendum against the FATCA agreement, it criticized the absence of the "result of the decision of the Grand Council" although it obviously interpreted the letter of the canton of Valais as the taking of the cantonal referendum. In the case of the unsuccessful cantonal referendum against the determination of the basic contributions of the resource equalization, she only stated that the "result of the referendum decision" was reflected in the letters of the four cantons. In any case, the formal requirement demands at a minimum that the letter clearly state that the canton demands a referendum. 10

F. Regulatory requirement, not ground for invalidity

Art. 67a PRA is to be qualified as a regulatory provision. Its violation is not an independent ground for invalidity. Art. 67b para. 2 PRA does not list the viola- 11

tion of a formal requirement (according to Art. 67a PRA) as a ground for invalidity. For a referendum petition to be invalid, there must (also) be a ground for invalidity pursuant to Art. 67b para. 2 PRA.

12 The following example illustrates the legal situation: In an unsuccessful cantonal referendum of the Canton of Valais in 2013, the canton mentioned the FATCA agreement between Switzerland and the United States as the subject matter, but not the date of the federal decree (Art. 67a lit. a PRA). Furthermore, the information on the provisions of cantonal law on jurisdiction (Art. 67a lit. c) and on the outcome of the referendum decision (Art. 67a lit. d) was missing. The Federal Chancellery expressly left open whether the formal requirements under federal law had been fulfilled, because the quorum of eight cantons had been missed anyway. However, at the same time it decreed that "only" the canton of Valais had demanded a referendum in due time, thus seeming to assume the validity of the Valais referendum petition. Rightly so, because there was no reason for invalidity according to Art. 67b para. 2 PRA: The deadline had been met (lit. a), the cantonal body with subject-matter jurisdiction had taken the decision (which could be verified despite the failure to indicate the cantonal legal basis and the "result of the referendum decision"; lit. b) and it was clear (despite the absence of the date of the federal decision) for which enactment the referendum had been requested (lit. c).

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See the bibliography and list of materials for the commentary on Art. 67 PRA.

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COMMENTARY ON

Art. 67b PRA

A commentary by Matthias Lanz

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Art. 67*b* Successful request

[1] After expiry of the referendum period, the Federal Chancellery shall establish whether the request for the referendum has been submitted by the required number of cantons.

[2] A request for a referendum is declared invalid if:

a. it has not been decided on and submitted to the Federal Chancellery within the referendum period;

b. it has been decided on by a public body that is not competent to do so;

c. it is impossible to identify with any certainty the federal enactment in respect of which the popular vote is being requested.

[3] The Federal Chancellery shall provide written notification of the ruling on the success or failure of the request for a referendum by the cantons to the governments of all those cantons that have requested the referendum, and shall publish the ruling in the Federal Gazette, giving details of the number of valid and invalid cantonal requests for a referendum.

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I. HISTORY OF ORIGINS

1 Art. 67b PRA - like Art. 67 and 67a PRA - originates from an amendment to the Federal Act of 1996. Reference is therefore made to the commentary on Art. 67 PRA.

2 It should be mentioned in particular that Art. 67b para. 1 PRA was slightly amended in 2002. According to the 1996 version, the Federal Chancellery had to determine whether the referendum had been taken by the required number of "cantons or half-cantons". As a result of the 2002 amendment, the "half-cantons" are no longer mentioned in the text of the norm. The reason is that the term no longer appears in the Federal Constitution since the total revision of 1999.

II. SIGNIFICANCE OF THE PROVISION

A. General

3 Art. 67b PRA regulates the competence to verify the existence of a cantonal referendum (para. 1), the grounds for invalidity (para. 2) and the opening of the decision (para. 3).

B. Comparison of laws

4 Cantons in which there is a municipal referendum know provisions comparable to Art. 67b PRA for the examination of the formal requirements. In the Canton of Graubünden, for example, the registry office checks the documents. In the case of a cantonal referendum, however, the Federal Chancellery and not the Federal Council as the government is responsible for this.

III. COMMENTARY ON THE TEXT OF THE NORM

A. Examination (para. 1)

5 After the expiry of the 100-day referendum period in accordance with Article 141 para. 1 FC, the Federal Chancellery shall examine whether the required number of cantons have lodged a cantonal referendum. The provision corresponds mutatis mutandis to that on the popular referendum.

The quorum of eight cantons is derived from Art. 141 para. 1 FC. All cantons count as a whole. 6

The cantonal referendum - like the popular referendum - cannot be withdrawn (Art. 59b PRA). 7

B. Invalid referendum petitions (para. 2)

The law provides three alternative grounds on which a referendum petition of a canton may be invalid. An invalid referendum petition is not counted for the purpose of reaching the quorum of eight cantons. 8

1. Missing the referendum deadline (lit. a)

A referendum petition is invalid if the competent cantonal body decides on it after the 100-day referendum period has expired. However, the decision alone does not meet the deadline. According to lit. a, the referendum request must also be "submitted" to the Federal Chancellery within the deadline. According to Art. 59a PRA, this means that the request must reach the Federal Chancellery before the deadline expires and the date of the postmark is not sufficient. 9

2. Invalid body (lit. b)

A referendum petition that has been decided by a body that is not competent in the matter is invalid. The Federal Chancellery shall check in particular on the basis of the information provided in accordance with Art. 67a lit. b and c PRA whether the body that has decided to take the cantonal referendum is also the body that is actually competent. If this is not the case, the referendum petition is invalid. 3. 10

3. designation of the enactment without doubt (lit. c)

If it is unclear which federal enactment is to be put to the vote, the referendum petition is invalid. 11

4. Not: Violation of formal requirements

Violation of the formal requirements of Art. 67a PRA is not mentioned in Art. 67b para. 2 and is therefore not an independent ground for invalidity. 12

C. Decision (para. 3)

13 The Federal Chancellery (and not the Federal Council) is responsible for deciding whether or not a cantonal referendum is valid. The cantons that have submitted a referendum request must be granted the right to be heard. The Federal Chancellery shall notify the decision by order.

14 The Federal Chancellery shall decide on any popular referendum on the same enactment in a separate ruling. The signatures of persons entitled to vote and the cantonal votes shall not be counted together.

15 The decision shall be communicated in writing to the governments of all the cantons that have submitted the referendum. No direct communication shall be made to the cantons that did not participate in the cantonal referendum. Since, in accordance with Art. 67a of the PRA, the cantonal government sends the letter containing the referendum request, the decision is also communicated to the cantonal government.

16 The general public is informed by means of publication of the ruling in the Federal Gazette. The number of valid and invalid cantonal referendum petitions shall be stated. In the case of a successful cantonal referendum against the tax package, the Federal Chancellery also showed, in particular, the dates of the letters from the cantons, the cantonal legal bases, the deciding cantonal bodies, the dates of the resolutions and the voting results (in the cantonal parliament). In the event of a cantonal referendum not being held, an appeal must be made.

17 An order of the Federal Chancellery on the failure of a cantonal referendum to be held may be appealed to the Federal Supreme Court in accordance with Art. 80 para. 2 sentence 1 PRA. The appeal period is 30 days. Of the cantons, only those that have initiated the cantonal referendum are entitled to file the appeal. Based on their referendum petition, these cantons meet the requirements for the right of appeal. The others, however, do not have the right to appeal, because the cantons do not have the right to vote in a referendum triggered by a cantonal referendum. The appeal is also possible if the quorum of the cantonal referendum is clearly missed. If the Federal Chancellery determines that the cantonal referendum has taken place, no appeal is possible.

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COMMENTARY ON

Art. 73 PRA

A commentary by Corsin Bisaz

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Art. 73 Withdrawal

[1] A popular initiative may be withdrawn by its initiative committee. The declaration of withdrawal is binding provided it has been signed by an absolute majority of the members of the initiative committee who are still eligible to vote.

[2] The withdrawal of a popular initiative is permitted up to the day on which the Federal Council fixes a date for a popular vote. The Federal Chancellery shall invite the initiative committee to give notice of its decision and shall specify a short period of time within which the committee must do so.

[3] An initiative in the form of a general proposal may not be withdrawn after its approval by the Federal Assembly.

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I. HISTORY OF ORIGIN

The Federal Act of January 27, 1892 on the Procedure for Petitions and Votes concerning the Revision of the Federal Constitution did not yet recognize the right to withdraw a popular initiative. Nevertheless, in practice, the authors of popular initiatives often reserved the right to withdraw by means of a withdrawal clause on the signature sheet, even at the beginning of the 20th century. The authorities accepted this procedure. One reason for this was that at the cantonal level, specifically in the Canton of Zurich, the right of withdrawal was recognized. In legal doctrine, its admissibility was disputed. For Stüssi, it was in the nature of things that a popular initiative cannot be withdrawn. Burckhardt and, following him, Büeler and Waldkirch were also of the opinion that a popular initiative that had come into being must be put to a referendum; a "conditional submission" was inadmissible due to the lack of a sufficient legal basis. In contrast, Fleiner/Giacometti argued that "the initiators cannot reasonably be expected to insist on an initiative that they no longer want retrospectively." 1

The revision of October 5, 1950, amended the aforementioned federal law to the effect that "[t]he initiators of a popular petition [...] may authorize certain signatories to withdraw the popular petition in favor of a counter-proposal of the Federal Assembly or to withdraw it unconditionally" (rev. Art. 4 para. 4). Contrary to the Federal Council's proposal, the Federal Assembly decided that the signatories authorized to make the declaration of withdrawal should be indicated on the signature sheet (rev. Art. 4 para. 2 no. 2). It did not provide for the authorization of an "initiative committee", since, as was argued in the Council of States, "aucune disposition de loi ne prévoyait l'existence de ce comité, sa nature juridique et son fonctionnement. An initiative could even be launched without the assistance of a committee." Furthermore, the authority of the authorized signatories after the submission of the popular initiative should be limited to its withdrawal. In the absence of a legal regulation, it remained unclear what majority was required for the decision to withdraw. 2

With the decision of March 23, 1962, the matter was transferred to two new federal laws. The provisions concerning the consideration of initiatives by the Federal Assembly were incorporated into the "Business Transactions Act". The "Initiative Act" was created for the provisions that specifically "interest citizens as initiators". It was made clear that a possible withdrawal clause had 3

to be listed on each signature sheet, including the names and addresses of the persons authorized to withdraw (Art. 4 para. 3). A two-thirds majority of those entitled to do so was required for the decision to withdraw (Art. 4 para. 3). In addition, the admissibility of a withdrawal was limited to the period between the Federal Council setting the date of the vote and the Federal Assembly's approval of a popular initiative in the form of a general proposal and the decision to approve it (Art. 4 para. 4).

4 With the introduction of the PRA on December 17, 1976, the Federal Assembly simplified the option for the initiative committee – which is now mandatory – to withdraw a popular initiative by reducing the quorum: a simple majority was now sufficient (Art. 73 para. 1). In addition, a signature list had to contain an unconditional withdrawal clause (Art. 68 let. c).

5 The provision was given its current wording with the partial revision of the PRA of June 21, 1996. At the suggestion of the Federal Council, the Federal Assembly clarified that membership of an initiative committee requires the right to vote (Art. 73 para. 1), since the withdrawal of an initiative is a political right. In addition, the wording should clarify the determination of the majority required for withdrawal in the event that members leave the initiative committee. Furthermore, the Federal Chancellery has been obliged in future to invite each committee of a fully formulated popular initiative in writing to decide on the withdrawal of the initiative before the Federal Council sets the date for the popular vote (Art. 73 para. 2).

II. SIGNIFICANCE OF THE PROVISION

A. General

6 Anyone who submits an initiative should also be allowed to withdraw it. The main reason for this is the possibility that parliament will accommodate the initiators with a direct counter-proposal or an indirect counter-proposal. Historically, this aspect was in the foreground, since the procedure with the ban on a double yes disadvantaged the popular initiative in the event of a counter-proposal. The right of withdrawal enables the dialogue between parliament and the initiative committee, which is typical of the Swiss system of direct democracy, to find a compromise. In view of the unpredictability of referendums, this can still be in the interest of parliament, the initiators and, ultimately, in particular, the voters. Withdrawal of a popular initiative can also

take account of changed legal and political circumstances (lack of relevance) and prevent votes from being held in vain. Although not originally intended, the right of withdrawal became established accordingly.

Since the right of withdrawal cannot be exercised by all the individual initiators (supporters of the popular initiative), the initiative committee is authorized by law to withdraw the popular initiative. As has been developed in practice, a withdrawal clause must be added to the signature form (see Art. 68 para. 1 let. c and e PRA), which authorizes the initiative committee to withdraw the initiative. 7

The right to withdraw is the most important right of the initiative committee. It enables the committee to enter into negotiations with parliament regarding possible compromises with the popular initiative as a bargaining chip. The political role of the initiative committee after the submission of the popular initiative depends largely on the right to withdraw; as soon as it can no longer exercise the right to withdraw, its role as representative of the initiative ends. This does not mean, however, that the members of the initiative committee cannot exert political influence on the subsequent implementing legislation; anyone who has brought about a popular initiative should also be able to launch a referendum against the relevant implementing legislation. 8

According to the statistics of the Federal Chancellery, a total of 108 federal popular initiatives had been withdrawn by November 1, 2024, 29 of which were in favor of a counter-proposal, 46 in favor of an indirect counter-proposal, and 33 for other reasons. Since 2000, a total of 41 popular initiatives have been withdrawn, 10 of which were in favor of a counter-proposal, 19 in favor of an indirect counter-proposal, and 12 for other reasons. 9

B. Comparative law

A right of withdrawal is typically also granted by law or constitutionally for popular initiatives at the cantonal and municipal level. This can vary, especially with regard to the legal entity (one or more '[first] signatories'; person(s) named on the signature form). In some cases, the authors of the initiative may even provide for their own withdrawal procedure on the signature sheet; in particular, the quorum for a declaration of withdrawal is likely to be affected by the freedom of regulation. Most cantons stipulate that a popular initiative 10

must have a withdrawal clause. Provided that such a clause is not prohibited by cantonal or municipal law, it is permissible.

III. COMMENTARY

A. Para. 1

1. Any popular initiative

11 "Any popular initiative" can be withdrawn, i.e. both those for a total revision (Art. 138 FC) and those for a partial revision of the FC (Art. 139 FC). The form of the popular initiative (general proposal or detailed draft) is irrelevant. In the case of a total revision of the FC, the withdrawal concerns the preliminary vote on whether a total revision procedure should be initiated.

12 The withdrawal of a popular initiative requires that it has come into being. From a dogmatic point of view, the signatures provided can be withdrawn before an initiative has come into being, but after that only the popular initiative itself. However, for pragmatic reasons, it is not necessary for the coming into being to be certain in order to withdraw a submitted initiative in accordance with Art. 73 PRA. Furthermore, the popular initiative does not have to be declared valid in order to be withdrawn; the somewhat peculiar systematic classification of the right of withdrawal before the provision on the examination of the validity of the popular initiative (Art. 75 PRA) is likely to be related to this consideration.

2. The initiative committee

13 The initiative committee is authorized by law to withdraw "its" popular initiative. The initiative committee consists of at least seven and at most 27 "authors of the initiative" who are eligible to vote and whose names and addresses are listed on the signature list. This binding determination of its composition and the granting of the right of withdrawal suggest that the initiative committee should be qualified as a public-law association of persons.

3. The right of withdrawal

14 The political right to submit a proposal for a democratic decision-making process in the form of a popular initiative includes the right to withdraw this proposal (the popular initiative). The withdrawal is the counter-contract to

the submission of a popular initiative. Art. 73 PRA authorizes the initiative committee as such (by majority vote) to withdraw "its" popular initiative on behalf of the signatories. The right of withdrawal is therefore a political right in the sense of Article 34, para. 1 FC.

The right to withdraw a submitted popular initiative is "a very extensive right, the legitimizing and legal basis of which is weak": the initiative committee can decide whether or not to pursue the popular initiative and thus exercise a political right of at least 100,000 eligible voters. This justifies a restrictive interpretation of this right. The Federal Chancellery is obliged to check very carefully whether the conditions for withdrawal are met in each case. 15

In principle, the initiative committee is politically free to decide whether to withdraw its proposal. Accordingly, the signatories have no right to demand that the supported popular initiative not be withdrawn. At the same time, the initiative committee cannot be obliged to withdraw the popular initiative. In my opinion, based on Article 34 FC, all voters have a right to expect that the members of the initiative committee are truly free to make the decision to withdraw. In my opinion, a withdrawal can even be an abuse of rights – for example, if it is made in return for advantages in favor of members of the initiative committee. In contrast, the prevailing doctrine – probably also in view of the difficulties associated with providing the relevant evidence – points to the political freedom of the initiative committee. 16

It is not possible to partially withdraw a popular initiative (e.g. merely a paragraph of the proposed FC article), because this would constitute an impermissible intervention in the text of the initiative. This rules out any haggling between parliament and the initiative committee over the wording of the initiative text; compromises must be sought through the direct counter-proposal or the indirect counter-proposal of parliament. 17

Since a popular initiative for a total revision of the Federal Constitution concerns the initiation of a revision procedure and not a proposal for a specific substantive provision, it may be supported for a variety of reasons, including contradictory ones. In this context, the authorization to withdraw in favor of the initiative committee appears to be particularly weakly supported. 18

4. The declaration of withdrawal

19 In order to be able to legally withdraw 'its' popular initiative, the initiative committee must issue a declaration of withdrawal. The draft of the declaration of withdrawal is provided by the Federal Chancellery. The declaration of withdrawal must be signed by an absolute majority of the members of the initiative committee who are still eligible to vote at the time the decision is taken. This rules out stalemate situations, and qualified majorities are no longer necessary.

20 The declaration of withdrawal is addressed to the Federal Chancellery. The withdrawal must take place unconditionally (exception: conditional withdrawal in favor of an indirect counter-proposal in accordance with Art. 73*a* para. 2 PRA). Reasons for the withdrawal are not to be mentioned and are generally legally irrelevant.

21 If the withdrawal in a declaration of withdrawal is made dependent on different conditions than those in favor of an indirect counterproposal, the relevant declaration of withdrawal is invalid. If a member of the initiative committee agrees to the withdrawal under such different conditions, in my opinion this is also invalid – which only affects the declaration of withdrawal if the absolute majority of consenting members is lost as a result.

B. Para. 2

1. Point in time

22 In order to give the initiative committee the political freedom of action for as long as possible while still ensuring legal certainty with regard to the organization of the referendum, the withdrawal may take place up to the point at which the referendum is set by the Federal Council or up to the expiry of the period granted before that. A later declared withdrawal would be irrelevant.

23 If the Federal Supreme Court sets aside a federal vote on a popular initiative, the right of withdrawal also lapses until a new voting date is set; this is because Article 34 FC does not give voters the right to a new referendum, nor does it protect them from the withdrawal of a popular initiative. This occurred in the case of the vote on the popular initiative 'For marriage and family – against the marriage penalty', which was annulled by the Federal Supreme Court due to a lack of information that was only recognized after the fact. As a

result, the initiative committee withdrew its popular initiative, making the holding of a second referendum unnecessary.

2. Procedure

Before the Federal Council sets the date for the popular vote, the Federal Chancellery sends the initiative committee a form with a draft of a declaration of withdrawal, including a signature form. A template for such a draft can be found in the appendix to the Ordinance on Political Rights of May 24, 1978 (VPR; SR 161.11). The initiative committee is not obliged to use this template for the declaration of withdrawal. The declaration of withdrawal must in any case show that the requirements for withdrawal have been met. 24

The initiative committee must submit its decision to withdraw to the Federal Chancellery within ten days, together with all the necessary signatures of its members. 25

A legally valid withdrawal is irrevocable. It has the effect of rendering the popular initiative without object for the authorities and terminating the procedure that it has initiated. 26

The current regulation has the disadvantage that it cannot guarantee that at the time of submission, or indeed at any earlier time, the required majority of the members of the initiative committee have supported the withdrawal. It must therefore be possible for the members to revoke their support of the withdrawal as long as it has not yet been submitted. The receipt of the declaration of withdrawal should be immediately notified to the members of the initiative committee so that they can react to possible manipulation. 27

The withdrawal is published in the Federal Gazette. 28

C. Para. 3

If the Federal Assembly approves a popular initiative in the form of a general proposal, it takes on the implementation mandate and is thus obliged to implement the initiative request faithfully. The approval of the Federal Assembly of a popular initiative in the form of a general proposal is binding and final; the Federal Assembly can neither go back on nor withdraw its decision in this regard. 29

30 From this point on, there is no longer any leeway for negotiating compromises with the initiative committee; rather, the initiative committee has fulfilled its task with the approval of the popular initiative by the Federal Assembly and can no longer dispose of it. Accordingly, the initiative committee also no longer has the option of withdrawing the popular request, as Art. 73 para. 3 PRA expressly states.

31 The same must apply if the electorate has accepted a popular initiative in the form of a general proposal in the preliminary vote. In this case, the mandate to implement is given by the electorate; the authorization of the initiative committee is limited to the withdrawal on behalf of the signatories of the popular initiative and therefore does not extend to the electorate.

D. Special questions: the withdrawal as the subject of an appeal in electoral matters

32 The Federal Supreme Court infers from Article 29a FC and Article 189 para. 1 let. f FC that, despite the lack of a basis in the PRA, the withdrawal of a popular initiative can also be the subject of an appeal in electoral matters before the Federal Supreme Court. Article 80 para. 2 and 3 PRA apply by analogy. It has not been determined whether the initiative committee's decision to withdraw or the publication of the Federal Chancellery regarding the withdrawal, which can be qualified as a ruling, can be challenged. According to the view represented here, both are contestable based on Art. 82 lit. c BGG, since both are based on public law and concern the right to vote: With the withdrawal, the initiative committee exercises a political right; the ruling of the Federal Chancellery establishes and officially publishes the valid exercise of the right of withdrawal. If Art. 73 PRA is not complied with, this can therefore violate the political rights of those eligible to vote and must be contestable. In practice, this question is rarely relevant due to the object of the challenge, since most voters and thus those entitled to appeal are unlikely to be aware of the withdrawal until the declaration of withdrawal is published in accordance with Art. 77, para. 2 PRA, which means that this act would trigger the deadline.

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COMMENTARY ON

Art. 73a PRA

A commentary by Corsin Bisaz

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Art. 73*a* Unconditional and conditional withdrawal

[1] The withdrawal of a popular initiative is normally unconditional.

[2] However, if Federal Assembly has approved an indirect counter-proposal in the form of a federal act at the latest at the same time as the final vote on the popular initiative, the initiative committee may withdraw its popular initiative under the express condition that the indirect counter-proposal is not rejected in a popular vote.

[3] The conditional withdrawal becomes effective as soon as:

a. the deadline for requesting a referendum against the indirect counter-proposal has expired without a request being filed;

b. a legally binding declaration has been made that the request for a referendum against the indirect counter-proposal has failed; or

c. the Federal Council has, in accordance with Article 15 paragraph 1, validated the result of the popular vote where a request for a referendum has succeeded and the People have voted for the indirect counter-proposal.

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I. HISTORY OF ORIGIN

1 After the possibility of withdrawing a popular initiative unconditionally had been recognized, it became apparent that the legal regulation could not be entirely satisfactory in every respect. The Federal Assembly occasionally accommodated initiative committees with indirect (formerly known as "material") legislative proposals. "In order not to become the plaything of changing initiative committees," the Federal Assembly often added a conditional publication order to these, "according to which the indirect counter-proposal is to be published in the Federal Gazette (and thus trigger the referendum period) as soon as the popular initiative has been withdrawn or rejected by the people and the cantons." However, in the absence of the possibility of a conditional withdrawal, there was a risk that the initiative committee would not withdraw the initiative as a precautionary measure, or that a referendum would be called against an indirect counter-proposal as a precautionary measure, both of which could lead to unsatisfactory situations.

2 The possibility of the conditional withdrawal of a popular initiative in favor of an indirect counter-proposal of the Federal Assembly goes back to a parliamentary initiative of December 18, 2008. The reason for this was a specific case (indirect counter-proposal to the popular initiative "Living Water"). The amendment was adopted on September 25, 2009 and came into force on February 1, 2010.

II. SIGNIFICANCE OF THE PROVISION

A. General

3 Art. 73*a* of the PRA allows not only the unconditional withdrawal, which is already provided for in Art. 73 PRA, but also the conditional withdrawal in favor of an indirect counter-proposal in the form of a federal act. Such indirect counter-proposals are permissible in areas in which the Federal Assembly is competent to draft a federal act on the basis of its general legislative competence under Article 160 para. 1 FC, or the Federal Council is competent to do so under its right of initiative under Article 181 FC.

4 The importance of the indirect counter-proposal combined with the conditional withdrawal of a popular initiative should not be underestimated. Popu-

lar initiatives for a partial revision of the Federal Constitution can be used to prompt the Federal Assembly to draft or amend a federal law in a certain way. The indirect counter-proposal allows the Federal Assembly to seek alternative legislative solutions to issues addressed by the popular initiative. To a certain extent, this possibility of conditional withdrawal compensates for the lack of a legislative initiative at the federal level.

The possibility of the conditional withdrawal of popular initiatives has brought more commitment and structure to the political tug-of-war between the initiative committees and the Federal Assembly. The Federal Assembly does not become dependent on the popular initiative committee, and the committee does not take the unilateral risk that the indirect counter-proposal to its popular initiative will fail with the conditional withdrawal of the popular initiative. The solution found is in the interest of all parties. 5

The practical significance of the conditional withdrawal is impressively demonstrated by the statistics of the Federal Chancellery. According to these, a total of 108 out of 367 federal popular initiatives were withdrawn by November 1, 2024, of which 29 were in favor of a counter-proposal, 46 in favor of an indirect counter-proposal, and 33 for other reasons. Since 2000, a total of 41 popular initiatives have been withdrawn, 10 of which were in favor of a counter-proposal, 19 in favor of an indirect counter-proposal and 12 for other reasons. 6

B. Comparative law

The legal situation regarding the right of withdrawal in the cantons is generally largely the same as that at the federal level. However, only three cantons (Bern/Vaud/Zurich) provide for conditional withdrawal in favor of an indirect counter-proposal. 7

III. COMMENTARY

A. System

Article 73*a* PRA is a specification of Article 73 PRA; the conditions of Article 73 PRA also apply to conditional withdrawals under Article 73*a* paragraphs 2 and 3 PRA. Accordingly, reference is made to the commentary on Article 73 PRA. 8

B. Para. 1

9 In Eugen Huber's 'a nutshell', this paragraph states that the withdrawal of a popular initiative is 'in der Regel unbedingt' (as a rule unconditional). The brevity is at the expense of accuracy. This norm is not intended to describe how the withdrawal of a popular initiative occurs according to experience. Contrary to its wording, it is not an empirical statement. Rather, it is to be understood – normatively – to mean that a withdrawal must always (as a rule) be unconditional, unless a permissible exception applies.

10 The only permissible exception is regulated in para. 2.

11 Accordingly, the initiative committee is prohibited – as was already the case before the introduction of Art. 73a of the PRA – from making the withdrawal of the popular initiative dependent on any condition other than that regulated in para. 2. This regulation limits the options for action and thus also the political influence of the initiative committee. In particular, however, it also limits the potential for abuse, strengthens the binding nature of the declaration of withdrawal and the trustworthiness of this bargaining chip.

12 The unconditional withdrawal is likely to occur if the initiative is countered by a direct counter-proposal that will definitely be put to the vote of the people and the cantons; it is also likely in cases where the initiative committee is already satisfied with the concessions made by the authorities or no longer sees a real chance of its concerns being addressed.

C. Para. 2

13 The only condition that can be attached to a withdrawal is, according to Art. 73*a* para. 2 PRA, that the indirect counter-proposal is not rejected in a popular vote (cf. "however" in the first sentence of para. 2).

1. "Indirect counter-proposal"

14 The initiative committee may withdraw the popular initiative in favor of a (single) "indirect counter-proposal" (Art. 73*a* paras. 2 and 3, Art. 75*a* para. 2 PRA). In the German-language version, this is distinguished terminologically from the "counter-proposal" (Art. 139 para. 5 sentence 3 and Art. 139*b* para. 1 FC; Art. 76 para. 1 sentence 1, para. 1 let. b, para. 3 sentence 1 PRA) and from the "direct counter-proposal" (title of Art. 76 PRA). In the French (contre-pro-

jet) and Italian («contro-progetto») versions, however, a uniform term is used. Legal scholars are critical of this terminological distinction and often use the uniform term «counter-project»; instead of distinguishing between direct counter-projects and indirect counter-proposals, they often only distinguish between direct and indirect counter-projects – although this term is not entirely accurate either.

Direct counter-proposals within the meaning of Art. 139 para. 5 sentence 3 and Art. 139*b* para. 1 FC are at the same legislative level as the popular initiative, i.e. at the federal level always at the constitutional level. Indirect counter-proposals, on the other hand, can in principle be at any lower legislative level. By contrast, an indirect counter-proposal within the meaning of Art. 73*a* para. 2 and 3 PRA is, as the wording of the law expressly states, at the legislative level. As a resolution on a federal law, it is only subject to an optional referendum, and in the event of a referendum being held, a majority of the people is sufficient (Art. 141 para. 1 let. a in conjunction with Art. 142 para. 1 FC). 15

According to the message, the only legal connection between an indirect counter-proposal and the popular initiative concerns the deadline for scheduling the vote on the popular initiative and for the authorities to process the popular initiative. The substantive requirement for such an extension of the deadline is that the indirect counter-proposal is "closely related to the popular initiative" (see Art. 97 para. 2 and 105 para. 1 ParlA). The Federal Supreme Court had already developed this principle in the context of its case law on cantonal popular initiatives. It is often understood in doctrine and case law as a special form of the principle of unity of subject matter. In the light of Art. 34 para. 2 FC, the indirect counter-proposal must maintain equal opportunities. The indirect counter-proposal is often identified as such by a corresponding linking clause or by an alternative clause that contains a reservation of publication in view of the incompatibility of the indirect counter-proposal and the popular initiative. 16

The conditional withdrawal therefore occurs under the suspensive condition that the indirect counter-proposal comes into force, or more precisely, that the entry into force of the indirect counter-proposal can no longer be prevented by any legal barrier. The risk that a referendum will be held against the indirect counter-proposal and that the indirect counter-proposal will be rejected in the referendum is therefore no longer borne by the initiators alone. 17

18 Based on its legislative powers, the Federal Assembly may make an indirect counter-proposal to a popular initiative in the form of a federal act. This applies to all forms of popular initiative for a partial revision of the Federal Constitution. However, in the absence of a proposal for a specific outcome, some legal scholars believe that it is not permissible to make an indirect counter-proposal to a popular initiative for a total revision of the Federal Constitution.

2. Time of withdrawal

19 For a conditional withdrawal to be possible, the Federal Assembly must have approved the indirect counter-proposal 'at the latest at the same time as the final vote on the popular initiative'. This deadline is intended to prevent the conditional withdrawal from being open to any conditions.

20 If the indirect counter-proposal is rejected in the popular vote, the Federal Council must submit the popular initiative within ten months of the popular vote (Art. 75*a(a)* para. 2 PRA).

3. Form of conditional withdrawal

21 The conditions for a withdrawal (majority requirement) set out in Art. 73 para. 1 PRA also apply to a conditional withdrawal. The majority requirement for the conditional and unconditional withdrawal must be achieved individually in order to validly withdraw the popular initiative. If both the conditional and the unconditional withdrawal receive a majority, a tie-breaking question must be decided to determine whether the withdrawal should be conditional or unconditional.

4. Procedure for conditional withdrawal

22 Art. 73 para. 2 PRA also applies to conditional withdrawal. A template for the declaration of withdrawal is provided in the Annex to the VPR. The initiative committee is not obliged to use this template for the declaration of withdrawal. In all cases, the declaration of withdrawal must state that the conditions for conditional or unconditional withdrawal have been met.

D. Para. 3

23 The conditional withdrawal of a popular initiative applies as soon as the date of entry into force of the indirect counter-proposal is known, i.e. when no le-

gal barrier (referendum or popular vote) can prevent it from coming into force. When this is the case is listed in a-c:

1. Para. a and para. b

Let. a covers those cases in which no valid signatures are submitted in favour of a referendum against the indirect counter-proposal, let. b those in which valid signatures are submitted but not in the required number. If no valid signatures are submitted in favour of a referendum (Art. 73*a* para. 3 let. a PRA) or if the constitutional quorum is not reached by more than half (some of the cases under Art. 73*a* para. 3 let. b PRA), the Federal Chancellery merely publishes a notice in the Federal Gazette that the collection period has expired without being used (Art. 72 para. 1 second sentence PRA). There is no right of appeal (Art. 80 para. 2 second sentence PRA). If the quorum is missed by a smaller margin (other cases under Art. 73*a* para. 3 let. b PRA), the Federal Chancellery issues a ruling that a referendum has not been held. This opens up the possibility of legal action (Art. 66 para. 1 in conjunction with Art. 80 para. 2 PRA). 24

Unlike a popular initiative – and as suggested by lit. b – in the case of an optional referendum, no actual referendum text ("referendum") is submitted, but signatures of voters against an enactment or an amendment to an enactment. It is also inappropriate to speak of the failure of "a" submitted referendum; it would be more appropriate to speak of "the referendum". Regardless of how many referendum committees or eligible voters submit signatures in favor of the referendum – and for whatever reasons they do so – their signatures are in favor of the referendum against the indirect counter-proposal. 25

In both cases (lit. a and b), what is relevant is that the referendum does not take place and thus there is no longer any legal reason preventing the indirect counter-proposal from coming into force. With regard to the point in time, differences may arise due to the possible contestability of cases under b. 26

2. Para. c

Under c, the referendum against the indirect counter-proposal has been held, but was rejected in the popular vote. With the confirmation of this result, it is clear that there are no longer any legal obstacles to its entry into force. 27

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COMMENTARY ON

Art. 75 PRA

A commentary by Stéphane Grodecki

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Art. 75 Examination of validity

[1] If the text of a popular initiative fails to comply with the principles of cohesion of subject matter (Art. 139 para. 3 and Art. 194 para. 2 Federal Constitution) or consistency of form (Art. 139 para. 3 and Art. 194 para. 3 Federal Constitution), or if the popular initiative violates mandatory provisions of international law (Art. 139 para. 3, Art. 193 para. 4 and Art. 194 para. 2 Federal Constitution), the Federal Assembly shall declare the initiative to be invalid as a whole or in part, to the extent that this is required.

[2] There is cohesion of subject matter in a popular initiative when there is an intrinsic connection between the individual parts of the initiative.

[3] There is consistency of form in a popular initiative when the initiative is couched exclusively in the form of a general proposal or of a specific draft provision.

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I. BACKGROUND

1 When the new Federal Constitution came into force on January 1, 2000, art. 75 of the LDP was amended. In addition to modifying the references to the Federal Constitution, this new provision formally established the possibility of partial invalidation of a federal popular initiative, and introduced the condition of compliance with the imperative rules of international law: "The references to constitutional provisions in art. 75, para. 1 of the LDP must also be adapted. Mention must also be made of the presence of binding provisions of international law. Finally, the wording of the article refers to the possibilitý of partially invalidating a popular initiative, in accordance with art. 139, para. 3, nCst. The expression "if necessary" illustrates the meaning of this possibilitý: it does not constitute an enlargement of the powers of the authorities, its purpose being solely the safeguarding of the principle of proportionalitý, also in the field of popular rights (art. 5, para. 2, nCst.)".

2 It should also be noted that on January 1, 2003, its middle title ("examination of validity") was modified as part of an amendment to the law. However, this amendment did not change the scope of the provision.

II. SIGNIFICANCE OF THE PROVISION

A. General

3 Art. 75 of the LDP reiterates the conditions for the validity of federal popular initiatives set out in Art. 139 of the Federal Constitution, namely compliance with (i) the unity of subject matter, (ii) the unity of form and (iii) the imperative rules of international law.

4 While the conditions as such are laid down in the Federal Constitution, art. 75 of the LDP specifies three essential elements:

- The principle of partial invalidation (art. 75 al 1 LDP);
- The definition of the principle of unity of subject matter (art. 75 al. 2 LDP), with the introduction of the "intrinsic relationship" which permeates all federal case law on unity of subject matter;
- The definition of the principle of unity of form.

This is a provision that is materially central to the examination of the validity of a popular initiative. In practice, however, only four federal popular initiatives have been declared invalid, and one partially invalid: 5

- In 2013, the federal popular initiative "for the effective deportation of criminal foreigners (implementation initiative)" was partially invalidated by the Federal Parliament: the sentence restrictively defining peremptory rules of international law was declared invalid: "In the end, the definition given by ch. IV, 2nd phr. P-Cst. of peremptory norms of international law would open the door to expulsions and deportations that could violate jus cogens under international law and the peremptory provisions of international law under art. 139, para. 3, Cst.
- The federal popular initiative "pour une politique d'asile raisonnable" (for a reasonable asylum policy) was declared null and void by Parliament on March 14, 1996 for violating imperative provisions of public international law: "If accepted, the initiative "pour une politique d'asile raisonnable" (for a reasonable asylum policy) would violate the very substance of the main multilateral treaties in the fields of refugee law and human rights. Indeed, if applicants who have entered Switzerland illegally were to be turned back immediately without the possibilitý of appeal, it would no longer be possible to examine their case from the angle of the principle of non-refoulement. Admittedly, we would eliminate a formal contradiction between our legislation and conventional international law by denouncing the Convention relating to the Status of Refugees, the Convention for the Protection of Human Rights and Fundamental Freedoms and the United Nations Convention against Torture. However, this would still constitute a violation of binding public international law, and would jeopardize fundamental rights as basic as the right to life. The Federal Council therefore shares the conviction of the communitý of states and the new doctrine; according to the latter, it is not possible, in a state founded on the rule of law, to infringe these fundamental rights by revising the constitution. This is why the Federal Council considers that the initiative "for a reasonable asylum policy" must be declared null and void".
- The federal popular initiative "pour moins de dépenses militaires davantage de politique de paix" was declared null and void by the Federal Parliament on June 20, 1995 for violating the unity of the subject matter, even though the Federal Council advocated its validation: "The principle of uni-

tý of the subject matter enshrined in the Federal Constitution requires an intrinsic relationship between the different parts of an initiative. Subjects that have no intrinsic relationship must be the subject of separate popular initiatives. In principle, such a relationship is lacking between cutting spending on national defense and allocating part of the amounts saved to the field of social securitý. In view of the current extensive practice of the Federal Council and Parliament, and given that the exercise of popular rights should only be restricted if such a measure is indisputably necessary, the validitý of the initiative is admitted despité everything."

- The federal popular initiative "against high living costs and inflation" was declared null and void on December 16, 1977 by the Federal Parliament for violating the unity of the subject matter: "The 'intrinsic relationship' between the components of an initiative is taken for granted when objective reasons justify their being the subject of a single decision by the citizen." The initiative "against high living costs and inflation" does not allow this".
- The federal popular initiative "for the temporary reduction of military expenditure (arms truce)" was declared null and void by the Federal Parliament on December 15, 1955, even though the Federal Council advocated its validation, while questioning only the question of respect for the unity of the subject: "It can be argued that there is an intrinsic, if not logical, at least practical relationship between, on the one hand, the reduction of the ordinary military budget in 1956 (1955 is no longer taken into account) and the prohibition of any extraordinary expenditure on armaments during the same year and, on the other hand, the allocation of the savings thus obtained to the purposes indicated (Swiss works in favour of children and construction of low-cost housing; reconstruction works in war-devastated regions in neighbouring countries). As the context also indicates, the second part of the initiative is the consequence of the first.

6 These figures of 4 total invalidations and one partial invalidation should be seen in the context of the 356 popular initiatives that were successful, of which 228 were put to the vote and only 25 were accepted. The invalidation of a federal popular initiative - unlike cantonal or communal popular initiatives - thus remains very much the exception.

B. Comparative cantonal law

Although applicable only to federal popular initiatives, the theory of the "intrinsic link", enshrined in art. 75 para. 2 of the LDP to define the unity of the subject matter, has been taken up by the Federal Supreme Court in its case law on the examination of this condition for the validity of an initiative, which is binding on the cantons in application of the guarantee of political rights. It has also been taken up by several cantonal provisions, for example in the canton of Berne (art. 141 al. 2 LDP/BE), Fribourg (art. 123 al. 2 LEDP/FR), Neuchâtel (art. 97 al. 3 LDP/NE) and Vaud (art. 113 al. 3 LEDP/VD). 7

The Federal Court also points out that, while the solution of partial invalidation in the event of violation of the unity of the subject matter is enshrined in art. 75 para. 1 LDP and frequently adopted by the cantons, it is not imposed by federal law. 8

Inversely, the doctrine states that the principles developed by the Federal Court on the validity of cantonal and communal initiatives must also be adopted by the Federal Parliament when examining a federal popular initiative. 9

III. COMMENTARY

A. Total or partial invalidation: enshrining the principle of proportionality (para. 1)

According to art. 75 para. 1 of the LDP, when a popular initiative fails to comply with the principle of unity of subject matter (art. 139 para. 3 and art. 194 para. 2 of the Swiss Constitution), the principle of unity of form (art. 139 para. 3 and art. 194, al. 3, Cst.) or the imperative rules of international law (art. 139, al. 3, 193, al. 4, and 194, al. 2, Cst.), the Federal Assembly declares it null and void, in whole or in part, to the extent necessary. 10

In principle, only these conditions of validity, formally provided for by the Federal Constitution, are examined. However, it is accepted that there is an additional condition for the validity of a federal popular initiative: unenforceability. This is the only unwritten material limit to constitutional revision: "for an initiative to be invalidated on this ground, there must be manifest material reasons that render it unquestionably unenforceable". 11

12 Art.
75 LDP is thus a provision implementing several constitutional provisions:

- Articles 139 and 194 of the Federal Constitution, which set out the conditions for the validity of a federal popular initiative for the partial revision of the Federal Constitution.
- Art. 173 para. 1 let. f Cst. which confirms the competence of the Federal Parliament to rule on the validity of successful federal popular initiatives.

13 Art. 75 para. 1 LDP thus confirms that the Federal Assembly is competent to rule on the validity of a federal popular initiative. Since, in accordance with the principle of perfect bicameralism, the Federal Assembly is made up of two Councils with equal powers (art. 148 para. 2 Cst.), art. 98 para. 2 LParl applies in the event of any disagreement between them. In accordance with the in dubio pro populo principle, in the event of divergence, the initiative is deemed valid: "If the decisions of the Councils diverge as to the validity of all or part of a popular initiative, and the Council which has recognized the validity confirms its decision, the initiative or the parts in question are deemed valid" (art. 98 al. 2 LParl).

14 The Federal Assembly's decision must be limited to a purely legal review. In this respect, to facilitate its task, Parliament receives a message from the Federal Council which examines these questions (art. 97 LParl) and enables it to decide.

15 Federal law does not provide for a right to be heard for initiators before a decision is taken by the Federal Assembly, even after the Federal Council's message has been submitted. While the Federal Court has ruled that such a right does not exist in the case of parliamentary proceedings, such as before the Federal Assembly, it has recently changed its case law and confirmed that initiators should be granted a right to be heard when a cantonal executive rules on the validity of a popular initiative before the signatures have been collected. In view of the prevailing doctrinal position, which argues in favor of initiators' right to be heard, a legislative revision on this point would be desirable. However, as the law stands, and in view of BGE 123 I 63, which stipulates that the initiators can have their point of view put forward by the various forces present before Parliament, the initiators (unfortunately) have no right to be heard before the Federal Assembly takes a decision. In our view, this is problematic in view of the weight of the Federal Council's message.

Finally, the Federal Assembly's decision on the validity (or invalidity, partial or total) of a popular initiative is final. In particular, it is not subject to appeal to the Federal Supreme Court, as no federal law provides for this (art. 189 para. 4 Cst.). Nor, logically, is it subject to referendum (art. 141 al. 1 let. c Cst.). It therefore takes the form of a simple federal decree within the meaning of art. 29 LParl. 16

Art. 75 para. 1 LDP enshrines the application of the principle of proportionality to the invalidation of federal popular initiatives (art. 36 para. 3 Cst.). In its jurisprudence on cantonal initiatives, the Federal Supreme Court notes that even in the absence of an express provision in cantonal law, the possibility of partial invalidation of a popular initiative derives from the principle in dubio pro populo, and gives concrete expression, in terms of political rights, to the general principle of proportionality (art. 36 al. 3 Cst.). Thus, when only part of an initiative appears to be inadmissible (including unenforceable), the remaining part can remain as such, provided that it forms a coherent whole, can still correspond to the initiators' wishes, and respects superior law in its own right. The invalidity of a part of the initiative should only entail the invalidity of the whole if the text cannot be amputated without being distorted. 17

The Federal Council fully applies these principles when confronted with a federal popular initiative of which a part is invalid: "The invalidation of an initiative constitutes a serious infringement of the right of initiative; it must therefore be done in application of the principle of proportionalitý. The Federal Assembly must opt for the least drastic solution, i.e. partial invalidation, as long as the valid part retains a meaning and it can be assumed that, even amputated in this way, the initiative would have gathered the required number of signatures." 18

If the conditions for a partial invalidation are met, i.e. that the remaining part (i) still forms a coherent whole, (ii) can correspond to the will of the initiators and (iii) in itself respects higher law, the Federal Assembly is thus obliged to proceed with a partial invalidation only. It should be pointed out, however, that partial invalidation is only possible in the case of violation of peremptory norms of public international law, unenforceability, or even unity of subject matter, but not in the case of violation of unity of form. Indeed, in the latter case, the mixture of forms makes it impossible to impose any sanction other than total invalidation, as it is impossible to determine which part should be retained. 19

20 On the other hand, in the absence of an explicit provision to this effect, the splitting of a federal popular initiative in the event of a violation of the unity of subject matter is, in our view, impossible, even though the question is controversial in legal doctrine. The Federal Court has ruled that the splitting of a federal popular initiative may be provided for under cantonal law, but is not required under federal law. In our view, this means that the principle of proportionality does not require the splitting of a popular initiative that violates the unity of the subject matter. The split cannot therefore be made under federal law, in the absence of a legal basis authorizing it. In any case, it should be pointed out that in the event of a flagrant violation of the principle of unity of subject matter, a split - even if provided for under cantonal law - cannot be demanded.

B. Unity of subject matter: the intrinsic link (para. 2)

21 According to art. 75 para. 2 of the LDP, the unity of the subject matter is respected when there is an intrinsic link between the different parts of an initiative.

22 The requirement of unity of subject matter derives from the guarantee of political rights (art. 34 al. 2 Cst.). It prohibits the mixing, in the same subject submitted to the people, of several proposals of a different nature or purpose, which would thus force the citizen to approve or oppose the initiative as a whole, whereas he or she might agree with only part of the proposals submitted to him or her. There must therefore be an intrinsic relationship between the various parts of an object submitted to the people, as well as a unity of purpose, i.e. a relationship of connectedness which makes it appear objectively justified to combine several proposals into a single question submitted to the vote.

23 The notion of "intrinsic connection" in art. 75 para. 2 of the LDP must be interpreted as follows: the principle of unity of subject matter is inherent in the very concept of an initiative, which is intended to pose a clear question to citizens at the time of the vote. The decisive criterion is therefore whether, as proposed, the initiative enables citizens to freely express their true will.

24 The scope of the principle of unity of subject matter also varies from one field to another. As it stands, the requirements are stricter for projects stemming from a popular initiative than for those proposed by the authorities: in fact,

the rule is also intended to prevent the authors of the initiative from bringing together supporters of different reforms and thus more easily achieving the required number of signatures, at the risk, however, of giving an inaccurate reflection of popular opinion.

A further distinction can be made: the requirement of unity of subject matter is more stringent for an initiative that has been drafted from scratch than for an initiative that has not been drafted at all, since the latter contains a general proposal that it will still be up to the legislator to put into practice. 25

Unity of subject matter is a relative concept that must be assessed according to concrete circumstances. An initiative that presents itself as a set of diverse proposals, certainly all directed towards the same goal, but covering fields as diverse as economic policy, tax reform, the development of training, the reduction of working hours, the reintegration of the unemployed, etc., violates the rule of unity of subject matter. On the other hand, a popular initiative can use a variety of means, as long as these are linked without artifice to the central idea defended by the initiators. Unity of subject matter is therefore lacking when the initiative actually presents a general political program, when there is no sufficiently close relationship between the various proposals, when they are brought together in an artificial or subjective manner, when there is no central idea but two projects of a totally distinct nature, or when there is a juxtaposition rather than a complementarity of means. 26

Thus, in practice, the criterion of intrinsic material relationship between the parts of an initiative is accepted: 27

- An initiative dealing with a single theme;
- An initiative with a single goal, but with a financing clause;
- An initiative proposing a general, abstract rule, while at the same time introducing a transitional provision relating to a specific case;
- An initiative with one goal, but several means to achieve it;
- An initiative with several aspects, historically or practically linked together.

It should be noted that the approach of the federal authorities is less strict than that of the Federal Supreme Court, as they explicitly point out when they state that they have a wide margin of appreciation: "In its practice, the Federal Assembly uses this room for manoeuvre according to the principle in dubio 28

pro populo. In case of doubt, it therefore decides in favor of popular rights and considers that the unitý of the subject matter is respected. In this way, she intends to prevent the right of initiative from being too severely restricted. With regard to the assessment of cantonal popular initiatives, the Federal Tribunal applies the criterion of material connexitý somewhat more strictly but nonetheless broadly. The Federal Tribunal's case law specifies "that the principle [of unitý of the matter] is relative in nature and must be considered in the context of the particular circumstances". The electorate cannot invoke a constitutional right to have certain parts of a project (e.g. particularly important parts) submitted to it separately. Since the assessment of federal popular initiatives is ultimately the responsibility of the Federal Assembly, the abovementioned case law is not directly applicable".

29 For example, the Federal Assembly validated the popular initiative "Stop overpopulation - Yes to the sustainable preservation of natural resources", notwithstanding a text that mixed a limit on its resident population with international development cooperation: the existence of an intrinsic link between these two ideas is, to say the least, puzzling.

30 Interpreted in this way, the principle of unity of subject matter will only apply, at federal level, to clear violations of unity of subject matter.

31 A typical example of an inadmissible initiative is the popular initiative "political program", like the initiative "against high living costs and inflation", which provided for a package of economic measures and was declared null and void for violating the unity of subject matter: "The 'intrinsic relationship' between the components of an initiative is taken for granted when objective reasons justify their being the subject of a single decision by the citizen. The initiative "against high living costs and inflation" does not allow for this".

C. Unity of form: prohibition of mixtures (para. 3)

32 According to art. 75 para. 3 of the LDP, unity of form is respected when the initiative is submitted exclusively in the form of a proposal conceived in general terms, or exclusively in the form of a draft prepared from scratch.

33 In the case of a proposal in general terms, the legislative authority is tasked with drawing up a draft that gives concrete expression to the initiative's objective, whereas a draft prepared from scratch already contains a text that is drafted and untouchable by the authorities.

This provision therefore requires little elaboration. It establishes the principle of a choice between a fully drafted text or a proposal conceived in general terms. It prohibits mixing the two possibilities. 34

Academic writers point out that a violation of the unity of form is hardly conceivable in practice, since a proposal formulated in general terms is very broad. Thus, even a precise text can be qualified in this way. The only hypothesis envisaged is that of a text that "contains both elements that can only be definitive and others that cannot be, with regard to their degree of legistic perfection". 35

Only once has the Federal Assembly invalidated an initiative for violation of unity of form, in 1955, when it declared null and void the initiative "for the temporary reduction of military expenditure (arms truce)", on the grounds that it concerned several budget years. However, the doctrine points out that this was by no means a problem of unity of form. 36

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COMMENTARY ON

Art. 75a PRA

A commentary by Camilla Jacquemoud

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Art. 75a Vote

[1] The Federal Council shall submit the popular initiative to a popular vote within ten months of the final vote thereon in the Federal Assembly, but at the latest ten months after expiry of the statutory period allowed for Parliament to consider the popular vote.

[2] In the event of a conditional withdrawal in favour of an indirect counter-proposal, the Federal Council shall submit the popular initiative to a popular vote and the cantons within ten months of its validation in accordance with Article 15 paragraph 1 of the result of the popular vote rejecting the indirect counter-proposal.

[3] If a popular initiative in the form of a general proposal is approved, the draft amendment to the Constitution shall be submitted to a popular

vote and the cantons within ten months of the final vote in the Federal Assembly.

3bis The time limits in paragraphs 1–3 shall be extended by six months if they begin less than ten months but more than three months before the next general election to the National Council.

4 The procedure for dealing with a popular initiative to be followed by the Federal Council and the Federal Assembly and the deadlines that must be observed are governed by the provisions of the Parliament Act of 13 December 2002.

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I. HISTORICAL

The establishment of a deadline for the Federal Council within which initiatives and subsequent constitutional amendments must be submitted to a vote dates back to the revision of the Political Rights Act and the former Business Transactions Act of 21 June 1996, which entered into force on 1 April 1997 (I.B.). Previously, the successive legislations regulating the procedure for popular initiatives only contained provisions on the deadlines for the parliamentary handling of initiatives (I.A.). Since the voting deadlines in Art. 75a PRA begin with the end of the consideration of the initiative in the Federal Assembly or the expiry of the deadlines provided for this purpose, it is nevertheless useful to place them briefly in this more general history of deadlines for the treatment of initiatives. 1

A. Time limits for consideration (since 1892)...

1. Introduction (1892)

From the very beginning (1891), the constitutional provision that introduced the right of initiative for a partial revision of the Constitution did not set a time limit for the authorities to comment on the initiative and put it to a vote (Art. 121 aBV). The same applies to the constitutional regulation of the initiative for a total revision of the Constitution (Art. 120 aBV; cf. also Art. 113 aBV 1848). This silence is still found today in Articles 138–139 FC. 2

By contrast, the first legal regulation of the modalities of the right of initiative by the Federal Act of 27 January 1892 on the Procedure for Petitions for Popular Initiatives and Votes on the Revision of the Federal Constitution set the Federal Assembly a deadline of one year to decide whether to accept or reject the successful initiatives for the partial revision of the Constitution (Art. 7 and 8). In comparison, the law does not provide for a deadline within which the initiatives must be voted on after they have been dealt with by the Federal Assembly. Initiatives aimed at a total revision of the Constitution must be put to the vote "without further ado", as the law does not provide for a specific deadline for this (Art. 6). 3

2. Expansion and division of the subject matter (1950; 1962; 1978)

4 In the course of the 20th century, the deadline for dealing with initiatives was extended several times. In 1950, the Federal Assembly extended the time limit to two years if it was a generally formulated initiative (Art. 7) and to three years if it was dealing with a fully elaborated initiative (Art. 8). In contrast to the Federal Council, which proposed to dispense with a fixed deadline and instead introduce a more flexible regulation that could cover both times of crisis and normal situations, the Councils adhered to the principle of a fixed deadline. However, it emerged from the debates that the deputies were aware that exceptional situations could test compliance with this deadline. The amendment still did not introduce a voting deadline and confined itself to stating that the initiative would be put to the vote "without delay" "if the two Councils are unable to reach a concordant decision within the statutory period" (Art. 9).

5 In 1962, the adoption of the new Federal Act on Popular Initiatives was accompanied by a division of the subject matter: the rules on the handling of initiatives by the Federal Assembly were inserted into the new GVG (Art. 25 ff.), to which the Act on Initiatives refers (Art. 6), retaining for its part only those procedural rules that directly concern citizens (later female citizens).

6 The legal deadlines for dealing with initiatives underwent a second extension in 1976 on the occasion of the adoption of the CPD (entry into force 1978): they increased from 2 to 3 years for generally formulated initiatives and from 3 to 4 years for initiatives formulated from scratch (art. 26–27 CPD). Since 1974, the Federal Assembly has also had the option of extending these deadlines by one year "if the decisions of the Councils on a counter-proposal or a decree closely related to the popular initiative diverge" (Art. 29 para. 4 CPTA). All in all, the handling of an initiative can thus extend over a period of 4 or 5 years, not including the time needed for the Federal Council to vote on the initiative, as this has not yet been regulated.

3. Reduction (1997)

7 The revision of the PrHG and the EHG in 1996 (entered into force in 1997) brought about a complete paradigm shift. It goes back, among other things, to a motion of the National Council's State Policy Committee in 1988 and is a re-

action to the time limit – often 6, 7 years, sometimes even longer – within which votes on initiatives take place, which is perceived as being too long.

In contrast to earlier revisions, the 1996 revision accordingly shortens the time limits for dealing with initiatives: The Federal Assembly now has two years to decide on generally formulated initiatives and 30 months to decide on initiatives drafted from scratch (Art. 26–27 GVG). The latter period may be extended by one year "if at least one of the councils has adopted a decision on a counter-proposal or on a legislative act that is closely related to the popular initiative" (Art. 27 para. 5bis GRG). 8

This regulation of deadlines for parliamentary treatment is taken over when the GVG is replaced by the ParlG of 13 December 2002. The above-mentioned deadlines therefore still apply today (Art. 96, 100, 103, 105 ParlG). 9

B. ...on time limits for votes (since 1997)

1. Introduction (1997)

In addition to shortening the deadlines for dealing with initiatives, the 1996/1997 revision implemented its aim of shortening the overall duration of the initiative process by introducing additional deadlines. 10

On the one hand, the Federal Council now has a period of nine months to put the initiative to the vote. This period begins with the Federal Assembly's final vote on the initiative, but no later than the expiry of the statutory deadlines for dealing with the initiative (Art. 74 para. 1 PRA as amended until 31 December 2002). In the eyes of the Councillors, it takes account of the Federal Council's need for a certain degree of flexibility in distributing the various bills that are ready for a vote among the available deadlines, as well as the fact that in an election year there is no vote in September. The Federal Assembly may extend it without an explicit time limit "if the initiative is opposed by a legislative act (indirect counter-proposal)" (Art. 74 para. 2 PRA as amended until 31 January 2010). This provision is intended to allow the authorities to await the fate (in a referendum, if necessary) of the indirect counter-proposal before submitting the initiative to the voters. 11

On the other hand, if an initiative drafted in general terms is accepted, the Federal Assembly must adopt the corresponding constitutional amendment within two years (Art. 26 para. 2 and 6 GG). The constitutional amendment in 12

question must be put to the vote within a total of 30 months (Art. 74 para. 3 PGR as amended until 31 January 2010).

2. Extension (2003)

13 In the early 2000s, two popular initiatives calling for a drastic shortening of the procedure for dealing with impromptu initiatives (6 and 12 months in total, respectively) failed already at the signature collection stage (initiative "So that popular initiatives are put to the vote within six months [...]") or at the vote stage (initiative "For faster direct democracy [...]").

14 In contrast, the deadline for voting on an initiative was extended to 10 months by a revision of the PRA in 2002, which came into force in 2003. This amendment was not included in the Federal Council's draft. The National Council's State Policy Committee included it in the revision without providing any justification for it in the parliamentary debate. Only the then Federal Chancellor commented on this amendment and spoke of correcting an inequality, but without explaining it in more detail.

3. Modalities in the case of a conditional withdrawal of an initiative, deadline for voting on the implementation of a generally formulated initiative, clean-up (2010)

15 Voting deadlines undergo a new development with the revision of the PRA of 25 September 2009 (entered into force on 1 February 2010), which introduces the right to withdraw an initiative on condition that the indirect counter-proposal adopted by the Federal Assembly is not rejected in the popular vote (art. 73a para. 1 PRA). This new instrument in fact requires a specification of the deadline for the vote on the initiative, which is applicable if the rejection of the indirect counter-proposal prevents the conditional withdrawal from taking effect (Art. 73a para. 3 PRA e contrario), making the authorities' obligation to put the initiative to the vote topical. In this case, the law now provides for a period of 10 months for the Federal Council as well, which runs from the confirmation of the result of the vote on the counter-proposal in accordance with Art. 15 para. 1 PRA (Art. 75a para. 2 PRA). The former Art. 74 para. 2 PRA, which allowed the Federal Assembly to extend the deadline for voting on an initiative if the initiative was opposed by an indirect counter-proposal, is repealed.

In this revision, the deadline for voting on a bill to implement a generally formulated initiative was also aligned with the other deadlines: While the deadline for consideration and voting was 30 months in total and ran from the submission of the initiative, it is now 10 months and runs from the Federal Assembly's final vote on the revision (Art. 75a para. 3 LDP). This revision, which is presented as a simple reorganisation of the matter, actually leads to an extension of the deadline for the implementation process. Indeed, the Federal Assembly continues to have 2 years, i.e. 24 months, to prepare the implementation bill (Art. 104 para. 1 ParlG), plus the 10 months granted to the Federal Council to organise the referendum. In total, the handling and voting of an implementation bill can thus extend not only over 30, but over 34 months. 16

Finally, with the 2009/2010 revision, the provision on the deadlines for the referendum bill was subjected to a (genuine) formal clean-up. The provision in question is now entitled "Referendum" instead of "Treatment" – the former expressing the content more precisely than the latter – and is found in Art. 75a LDP and no longer in Art. 74 LDP (repealed) – in the more or less chronological logic of Title 5 of the LDP. 17

4. Extension of time limits in election years (2015)

The last amendment to Art. 75a LDP to date stems from the LDP revision of 2014, which was dedicated to the election procedure for the National Council. While the draft submitted by the Federal Council did not propose any change to the voting deadlines, the National Council decided in its first reading and without the proposal being up for debate to extend the various deadlines in Art. 75a LDP to 12 months. Instead of going along with this change, the Council of States adopted an alternative regulation proposed by its State Policy Commission, according to which the voting deadlines would be extended by 6 months if the start of the deadlines was between 10 and 3 months before the next general renewal of the National Council. This version finally prevailed in the National Council and entered into force on 1 March 2015 (Art. 75a para. 3bis PRA). However, it is not clear from the deliberations in the Councils what criteria the SPK-S used to delimit the relevant period for the extension as well as the duration of the extension specifically in months. 18

II. SIGNIFICANCE OF THE PROVISION

A. General

1. Background

19 The popular initiative process comprises several phases. After the initiative has been launched (Art. 68–69 PRA), signatures collected and submitted (Art. 71 PRA), the Federal Chancellery establishes the existence of the initiative (Art. 72 PRA), whereupon it is up to the Federal Council to submit a draft federal decree and a dispatch on it to the Federal Assembly (Art. 97 ParlG). Thereafter, a parliamentary phase of dealing with the initiative begins, at the end of which the Federal Assembly decides on the validity and appropriateness of the initiative and, if necessary, on the adoption of a direct or indirect counter-proposal (Art. 100 ff. ParlG).

20 If the initiative is not withdrawn (Art. 73–73a FC), the guarantee of the right of initiative (Art. 34 para. 1 FC) subsequently obliges the authorities to submit the successful and valid initiatives to the people for a vote (initiative for the total revision of the Constitution [Art. 138 para. 2 FC], generally formulated initiative [Art. 139 para. 4 sentence 2 FC]) or to the people and the cantons (initiative formulated from scratch [Art. 139 para. 5 sentence 1 FC]). The case law on standing initiatives, the substance of which is, however, also relevant at federal level, states that the vote must take place within a reasonable period of time so that the initiative retains its relevance. Similarly, the guarantee of the right of initiative dictates that initiatives drafted in general terms that have been adopted be implemented within a reasonable period of time by drafting the constitutional amendment they call for (Art. 139 para. 4 sentences 1 and 3 FC).

21 At the federal level, the task of ordering and organising votes is entrusted to the Federal Council (Art. 10 et seq. PRA, cf. also Art. 58, 59c and 73 para. 2 PRA). In particular, it is incumbent on it to set the voting dates and to distribute the voting documents among the various dates (Art. 10 para. 1^{bis} PRA).

22 Art. 75a LDP must be seen in this context. Its purpose is to concretise the temporal modalities of the obligation to put initiatives to the vote or implement them within a reasonable period of time. To this end, it sets a specific deadline (in principle 10 months) for the Federal Council to put a popular initiative (paras. 1–2) or a constitutional amendment following a generally for-

mulated initiative (para. 3) to the vote. Only the voting period in the narrower sense, i.e. from the (actual or fictitious) end of the parliamentary treatment period, has its seat in Art. 75a LDP. The deadlines within which the Federal Assembly must decide on a popular initiative and, if necessary, prepare an implementation bill are regulated in Art. 97 ff. ParlG, to which Art. 75a para. 4 PRA expressly refers.

Art. 75a LDP is located in the 5th title of the LDP, which is dedicated to the popular initiative and whose order of provisions more or less follows the course of the corresponding procedure. In contrast, it does not apply to the vote on a matter subject to an optional or compulsory referendum, even if it is a constitutional amendment initiated by the Federal Assembly. Strictly speaking, Title 5 applies indiscriminately to all forms of initiative. However, the provisions of this title were primarily designed for initiatives aimed at a partial revision of the Constitution. Some of these provisions are therefore inappropriate and consequently not applicable to initiatives aiming at a complete revision of the Constitution. However, if they are not incompatible with this type of initiative, the rules of Title 5 remain relevant, if necessary in a way adapted to the specificities of a full constitutional amendment initiative. In our view, this is the case with Art. 75a para. 1 (time limit for voting on an initiative) and 3bis (extension of this time limit) PRA. 23

It follows from the above that Art. 75a PRA is part of the system for implementing the right of popular initiative. For this reason, in our view, it enjoys the protection afforded by the guarantee of political rights (Art. 34 para. 1 FC). Indeed, this guarantee requires that "the totality of the rules establishing and organising political rights shall be respected". However, since the violation of Art. 75a PRA is not accompanied by a concrete sanction and cannot be invoked before a court, this fundamental protection remains theoretical. In the current state of legislation, it has no concrete impact on practice. 24

2. Function

The time limits for dealing with and voting on an initiative or its implementation concretise the right of initiative by weighting several divergent democratic interests in such a way that their respective consideration is ensured while respecting the principle of proportionality (Art. 5 para. 2 FC). 25

26 On the one hand, there is an interest in the voters deciding quickly on the initiative in order to ensure the topicality of the issue, which depends on the legal and factual conditions under which the initiative takes place. Thus, the initiative committees are de facto forced to abandon the initiative if many years have passed since its launch. In addition, the longer it takes to bring an initiative to the ballot, the more the electorate changes and differs from the electorate that contributed to the initiative's coming into being. An excessively long period between the submission of an initiative and the vote on it may thus amount to an undermining of the right of initiative and thus violate the guarantee of political rights (Art. 34 para. 1 FC).

27 On the other hand, the authorities have an interest in having sufficient time to comment on initiatives and to put them to the vote. In addition to parliamentary treatment in the strict sense (cf. Art. 139 para. 4 1st and 3rd sentences and 5 2nd sentence, 173 para. 1 let. f FC), which is not covered by Art. 75a LDP (cpr para. 4), this time must cover the period necessary to organise and conduct the vote in such a way as to ensure the free formation and the faithful and certain expression of the will of the people (Art. 34 para. 2 FC). This task includes not only a material dimension (announcement, preparation of material, etc.), but also an intellectual one. Indeed, the Federal Council must distribute the subjects to be put to the vote among the various dates available – 3 or 4 per year, fixed in advance (art. 2a FOPI) – taking into account various factors that may influence the free formation and the faithful and certain expression of the popular vote, in particular the time required for the debate (art. 10 para. 1bis FOPI), the complexity, the contradictory nature or even the tendency to moderate the debate on the various proposals.

3. Nature and sanctions of the time limits of Art. 75a PRA

28 The deadlines for parliamentary consideration of an initiative are often referred to either as forfeiture deadlines – after the expiry of which parliament is closed and can no longer deliberate on the initiative and a counter-proposal – or as order deadlines – the violation of which as such does not entail any legal consequences, but in certain cases may amount to an unjustified refusal to take a decision. Jurisprudence leaves it up to the cantons to decide whether or not to provide for time limits and whether or not to introduce time limits of one kind or another. At the federal level, the deadlines for dealing with the initiative in Art. 100 and 103 (cum 105) ParlG are forfeiture deadlines: if the

Federal Assembly has not passed a resolution within these deadlines, the Federal Council submits the initiative to a vote (Art. 106 ParlG). By comparison, the period granted to the Federal Assembly for drafting a constitutional amendment on the basis of an initiative drafted in general terms (Art. 104 para. 1 ParlG) is a period of order (cf. also Art. 75a para. 3 PRA).

However, the distinction between periods of order and periods of realisation is not very suitable for qualifying the deadlines for votes (on an initiative or a subsequent constitutional amendment) in Art. 75a PRA. Indeed, it makes no sense to state that after the deadline has expired, the Federal Council's right to put the initiative or its implementation to a vote lapses: the vote is the purpose of the initiative procedure. Nevertheless, according to the present commentary, the voting deadlines are not purely regulatory deadlines. Rather, the interpretation of Art. 75a PRA leads to the conclusion that they are binding deadlines. 29

First of all, the three paragraphs of Art. 75a PRA that set deadlines (paras. 1–3) are formulated categorically: they do not contain any specification such as "in principle". Only one case of deadline extension is explicitly regulated (Art. 75a para. 3bis ODSG). Secondly, although no traces of a discussion on the nature of the time limits can be found in the preparatory work, at no point in the debates is the possibility reserved for the Federal Council to exceed these time limits. On the contrary, it seems to us that the chambers start from the principle that the Federal Council is obliged to respect these deadlines. This is particularly evident from their subsequent decisions to extend the deadlines for votes from 9 to 10 months and to provide for an automatic extension of 6 months in the event of an election year (Art. 75a para. 3bis PRA). If the deadlines in Art. 75a LDP were only regulatory deadlines, such adjustments would be superfluous. It is clear from this that the Federal Assembly has opted for a clearly defined regulation of the time frame that applies to the handling and voting of initiatives. The purpose of setting a deadline for the Federal Council – to prescribe a rhythm for voting on initiatives – also argues against classifying it as a regulatory deadline. Finally, it would not be very coherent if the deadlines set for the Federal Council were not binding, while the deadlines set for the Federal Assembly are binding. 30

Failure to comply with the voting deadlines of 10 or 16 months thus violates Art. 75a PRA and the guarantee of political rights (Art. 34 para. 1 FC). However, cases remain reserved in which a failure to meet a deadline is based on a 31

legal basis, respects the principles of public interest and proportionality and preserves the substance of the deadline (Art. 5, 9 FC). This is then an alternative concretisation of the modalities of the right of initiative. As will be explained later, the present commentary assumes that the standstill of time limits can be based directly on the LDP in certain circumstances.

32 Apart from this, the mandatory character of the deadlines in Art. 75a LDP is not accompanied by any sanctions. On the one hand, exceeding a deadline does not entail any disadvantages for the Federal Council (cannot entail any disadvantages). On the other hand, citizens have no legal recourse under these circumstances to assert the violation of their political rights. Indeed, Art. 189 para. 4 FC precludes acts of the Federal Council from being brought before the Federal Supreme Court, unless the law provides for an exception. Even if, strictly speaking, the present case concerns an omission (the failure to submit an item to a vote within a certain period), it nevertheless concerns an act that falls within the competence of the Federal Council. Under current law, however, the logic of Art. 189 para. 4 FC precludes any legal protection with regard to the Federal Council's competences in the area of political rights. In the absence of a legal provision introducing an exception to this rule, the Federal Supreme Court cannot hear appeals against the denial of justice (Art. 94 BGG), which would constitute an unjustified delay or refusal to order the vote. To our knowledge, however, this question has never arisen, so there is no case law on the subject.

4. Expiry of time limits under Art. 75a PRA

a. Applicable rules

33 Apart from a specific ground for extension (para. 3bis), Art. 75a PRA does not contain any rules on the expiry of the time limits set forth therein. The LDP also does not contain a general rule on the calculation, extension, suspension and interruption of time limits.

34 According to the present commentary, the Federal Act on Administrative Procedure, which contains rules on time limits (Art. 20 ff. VwVG), is not applicable to the time limits of Art. 75a LDP. Admittedly, the application of the VwVG to the matter of federal political rights is not excluded, even if it is not an "administrative matter" (Art. 1 para. 1 VwVG) in the strict sense. Admittedly, it could also be argued that the Federal Council (Art. 1 para. 2 let. a VwVG) is-

sues a (general) ruling when it determines the subjects of a vote (Art. 10 para. 1bis PRA). However, the act that preserves the time limit according to Art. 75a PRA is not the fixing of the agenda of a vote, but the vote itself, i.e. an act of its own kind. Since a vote cannot be equated with an administrative order (cpr Art. 5 VwVG), its procedure is not subject to the procedural rules of the VwVG.

For the same reasons, it seems to us that the European Convention on the Calculation of Time Limits, which applies to the calculation of time limits in particular "in [...] administrative matters", does not regulate time limits for votes on an initiative or its implementation. 35

In these circumstances, and in the absence of an applicable rule of enacted law, it is in our view the general principles of law in which to look for rules to govern the running of the time limits of Art. 75a PRA. 36

b. Calculation

The three time limits of Art. 75a LDP (paras 1, 2 and 3) are time limits set in months. According to a general principle (cpr e.g. Art. 77 para. 1 item 3 CO, Art. 142 para. 2 CPC, Art. 110 para. 6 SCC, Art. 4 item 2 European Convention on the Agreement of Time Limits) they are calculated in quantiles: The time limit ends on the day of the last month corresponding to the day on which it began to run or, in the absence of a corresponding date, on the last day of the last month. Consequently, if the 10-month period begins to run on 22 December (dies a quo), it ends on 22 October (dies ad quem). 37

c. Extension

Art. 75a para. 3bis FADP explicitly provides a reason for extending the time limits of paras. 1–3: If the time limit begins to run between 10 and 3 months before the next general renewal of the National Council, it is extended by 6 months. 38

According to the present commentary, this is to be seen as a comprehensive regulation of the extension of the time limit of Art. 75a PRA. The silence of the DPA on any further grounds for extension is indeed qualified. This conclusion is supported not only by an argument a contrario in connection with the wording of Art. 75a, para. 3bis FADP, but also by a comparison with the deadlines for dealing with matters laid down in the ParlG (Art. 97 ff. ParlG), where 39

the grounds for extension are also precisely delimited (Art. 97, para. 2, 105, para. 1 ParlG). Moreover, although the admissibility of other grounds for extension is neither expressly reserved nor excluded in the preparatory works, the general development of the rules on treatment and voting deadlines tends to indicate that the time frame is precisely delimited by the Act and that there is no room for other grounds for extension. Finally, from a teleological point of view, the legislature has already taken into account the interest of the Federal Council in having sufficient time to organise the vote by granting a relatively long deadline when compared to the time actually used in practice.

40 Since no other provision reserves an extension of the deadlines of Art. 75a PRA, this is excluded, even if the Federal Assembly and/or the initiative committee agree to it. Indeed, it is a general principle that a statutory time limit cannot be extended (e.g. Art. 144 CPC, Art. 89 para. 1 CCP). The situation is different, however, with regard to the question of whether time limits can be suspended under Art. 75a FADP.

d. Suspension

41 The extension of time limits differs from the suspension of time limits. While both postpone the expiry of the time limit, the extension of the time limit extends the time limit, while the suspension pauses the expiry of the time limit. If the person or authority to whom a time limit has been set can take steps to meet the time limit during the suspension, the suspension is in effect similar to an extension, since the days of suspension extend the duration of the time limit accordingly. If, on the other hand, the standstill corresponds to a period during which the completion of the steps to meet the deadline (in this case, the organisation and holding of a vote) is impeded, the standstill does not amount to an extension: the usable time available to complete the steps remains the same as that originally set in the deadline.

42 The LDP does not contain an explicit rule – neither general nor specific to Art. 75a LDP – referring to the standstill of time limits. Since the rule on the extension of time limits provided for in Art. 75a para. 3^{bis} is exhaustive, according to this commentary a standstill of these time limits, which would in fact amount to an extension of time limits, is excluded.

43 On the other hand, the qualified silence of Art. 75a FADP on the grounds for an extension of time limits does not, in our view, militate against the assump-

tion that there is a gap in the law with regard to the (real) inhibition of time limits. Unlike the question of the extension of time limits, the text of Art. 75a FADP does not exclude or reserve inhibition, but does not regulate any aspect of it. As explained, its aim is to maintain a balance between the interest in preserving the timeliness of an initiative and the interest in giving the Federal Council sufficient time for the material and intellectual preparation and implementation of the vote. This interest is particularly in the service of guaranteeing free education and the faithful and certain expression of the will of the people (Art. 34 para. 2 FC). However, if this time is not available to the Federal Council or if votes cannot take place within the ordinary time frame (Art. 2a FOPI), this balance is disturbed. Finally, there is no indication of a historical will on the part of the legislature to exclude a standstill of the time limit under certain extraordinary circumstances.

It is difficult to close such a gap in general, modo legislatoris, by anticipating all hypotheses and circumstances of an inhibition. In the interest of legal certainty, a revision of the law in this sense would be preferable. A suspension of time limits must in any case respect the general principles of state activity (Articles 5, 8 and 9 FC). It must not have the aim or effect of disadvantaging or favouring one initiative over another: As a difference in treatment, it must be based on an objective and serious reason and affect equally all submissions that are within the same time frame (Art. 8 para. 1 FC). It must also be suitable and necessary to achieve the objective pursued (Art. 5 para. 2 FC), i.e. to enable the Federal Council to make good use of the entire period of 10 or 16 months for organising and holding the vote. 44

Suspension on the basis of the PRA can therefore only be considered in a situation where the organisation and/or conduct of the vote is impeded. This may be the case, for example, if the country is at war, there is a general power cut or even necessary health measures make voting and/or counting impossible. However, the mere occurrence of these circumstances is not sufficient. They must also actually and concretely lead to an obstruction. 45

The concrete effect and duration of the suspension should, moreover, depend on the nature of the impediment(s): Does it concern the organisation of the vote, its conduct or both? For example, if an event (war, general blackout, pandemic, etc.) prevents the holding of a vote while the legal deadline for voting expires, it is reasonable to assume that the deadline will be suspended until the next possible voting date. On the other hand, the mere impossibility of 46

holding a vote does not exempt the authorities from working to prepare the next possible vote if the preparatory steps are not hindered. Thus, if an event temporarily prevents the holding of a vote, but the Federal Council still has sufficient time to put the initiative to a vote at a later date and is in a position to take the relevant preparatory steps, it cannot be assumed that the time limit is inhibited.

47 An assessment of the two-month suspension of the voting deadlines of Art. 75a PRA ordered by the Federal Council on 20 March 2020 in response to the Covid 19 pandemic (Art. 1 para. 1 let. c Ordinance of 20 March 2020 on the Suspension of the Deadlines for Federal Popular Initiatives and Referendum Petitions at Federal Level) can illustrate the above. Specifically, this deadlock only concerned the initiative "For moderate immigration (limitation initiative)", whose statutory voting deadline would have expired on 20 October 2020 and was therefore extended until 20 December 2020. The Federal Council had originally scheduled the referendum on this initiative for 17 May 2020, but cancelled it – also due to the Covid 19 pandemic – and ruled out holding referendums until 31 May 2020 (Art. 2 para. 1 let. b Ordinance on the Standstill of Deadlines). As early as 29 April 2020, it decided that the referendum would ultimately have taken place on 27 September 2020, i.e. still within the deadline of 10 months from the vote of the Federal Assembly.

48 Even if the Federal Council was ultimately able to meet the voting deadline as if it had not issued a suspension, the procedure of suspending the deadline "pre-emptively" can be viewed critically with regard to possible future crisis situations. Indeed, on 20 March 2020, at the time of the annulment of the 17 May 2020 vote, the Federal Council still had 7 months to plan and organise a new vote, which could take place as early as after 31 May 2020, leaving a period of almost 5 months (until 20 October 2020) to hold the vote. In addition to the ordinary date of 27 September 2020 (Art. 2a para. 1 let. c CDP), the Federal Council had the possibility to set additional voting dates during this period for overriding reasons (Art. 2a para. 2 CDP). Under these circumstances, the suspension of the deadline for two months was not necessary and for this reason violated the principle of proportionality (Art. 5 para. 2 FC).

49 According to the interpretation proposed in this commentary, an inhibition of the time limits of Art. 75a LDP, which is within the framework described above, does not require an additional legal basis, as it can be based on the LDP, which was supplemented in a permissible manner. Different – and exor-

bitant to the subject matter of this commentary – is the question of whether there are other legal bases that allow for an inhibition of the time limits in question.

e. Interruption

In principle, the time limits of Art. 75a LDP run without interruption until the performance of the act at which they are aimed, i.e. the holding of a referendum (on an initiative [paras. 1–2] or on a constitutional amendment adopted as a result of an initiative [para. 3]). 50

However, the rare but not excluded case must be reserved that the referendum in question is later declared invalid. In such a situation, it must be noted that a new (full) voting period begins to run. In other words, the invalidated vote then acts as an act interrupting the original voting period. 51

Similarly, if an initiative is withdrawn on condition that an indirect counter-proposal enters into force (Art. 73a para. 2 PRA), if the people reject the counter-proposal after a vote with a valid result (Art. 15 PRA), which starts the period for voting on the initiative under Art. 75a para. 2 PRA, but the vote on the counter-proposal is later the subject of a retrospective "revision request", this request must, in our opinion, interrupt the period for voting on the initiative. 52

B. Comparative cantonal law

Most cantons know a system of voting deadlines for initiatives or, if they have to be voted on, for the implementation bills of adopted, generally formulated initiatives. Schematically, three systems can be distinguished: 53

Some cantons set an "absolute" voting deadline, i.e. a deadline that runs from the submission or the ascertainment that the initiative has come to fruition (Art. 29–30 KV/ZH cum § 132, 137 GPR/ZH; Art. 28 para. 3 KV/UR; Art. 64 FC/OW; Art. 55 FC/NW; Art. 119 para. 1, 124, 125 LEDP/FR; Art. 32 para. 1–2 FC/SO; § 24a IRG/BS; § 29 FC/BL; Art. 15 FC/GR; § 66 GPR/AG; Art. 82 para. 1 FC/VD; Art. 33 para. 2, 100 para. 2 FC/VS). 54

In other cantons, the voting deadline is "relative": it runs from the end of the discussion of the initiative in parliament, similar to the deadlines in Art. 75a 55

para. 1 and 3 PRA (Art. 35 para. 5, 79 para. 2 KV/ZG; Art. 81 para. 2, 82 para. 2, 83 para. 3 StWG/TG).

56 Finally, some cantons do not know any voting deadlines. However, they can set deadlines for the authorities to deal with the initiative and/or to prepare an implementation concept (Art. 59 para. 4 FC/BE cum Art. 149 ff. StWG/BE; Art. 33 FC/SZ; Art. 55 para. 3 FC/AR; Art. 44 ff. RIG/SG; Art. 62–63 FC/GE; Art. 76 FC/JU).

57 Several cantons also combine elements from different systems. In the canton of Lucerne, for example, an absolute voting period of six months governs the initiative for the total revision of the cantonal constitution (Art. 82l KRG/LU, cpr Art. 82a in the area of obligatory and optional referendum). In Schaffhausen and Neuchâtel, a relative voting period (Art. 77 para. 4 Electoral Act/SH; Art. 109 para. 4, 110 para. 5 LDP/NE) is supplemented by an absolute period if the initiative aims at a total revision of the cantonal constitution (Art. 79 Electoral Act/SH; Art. 108 para. 1 LDP/NE). As far as the Canton of Ticino is concerned, it establishes an absolute voting deadline of two years from the publication of the coming into being of the initiative (or of 60 days if the initiative aims at a total revision of the Constitution) and a relative deadline of 60 days from the conclusion of the deliberations (Art. 46, 90 FC/TI).

58 As with the treatment deadlines, it is up to cantonal law to determine whether voting deadlines are binding or regulatory deadlines. Some cantons expressly provide for their extension (Art. 117 para. 2 LEDP/FR; § 24a para. 1 and 4 IRG/BS; Art. 15 FC/GR; Art. 82 para. 2 FC/VD; Art. 33 para. 2 FC/VS) or even their standstill (§ 24a para. 3 IRG/BS) under certain conditions. Moreover, in the absence of an explicit qualification (which is often the case), doctrine points out that case law (in connection with processing deadlines) tends to hold that they are regulatory deadlines.

III. COMMENT

A. Time limit for putting an initiative to the vote (paragraph 1)

1. Subject matter ("to put an initiative to the popular vote")

Art. 75a para. 1 FADP grants the Federal Council a deadline of ten months from the Federal Assembly's final vote on the initiative or the expiry of the deadlines set for it to put a popular initiative to the vote. 59

The object of the time limit in Art. 75a para. 1 PRA is thus the holding of a vote, i.e. a "procedure in the course of which the [active] citizens who constitute the electorate (the people) decide on the acceptance or rejection of a proposal", in this case a popular initiative, in the form of a ballot. 60

The time limit refers exclusively to the phase of the initiative process after parliamentary consideration. In principle, the Federal Assembly orders the submission of a popular initiative to a vote in a federal decree, in which it declares the initiative valid and issues a recommendation on it (Art. 98, 100, 103 ParlG). An exception, however, is the situation in which the Councils have not passed a federal decree on the initiative within the set time limit (Arts. 100, 103, 106 ParlG). In this case, it is exceptionally up to the Federal Council to remedy this deficiency by ordering the principle of the vote itself (Art. 106 ParlG). 61

In both cases, it is then up to the Federal Council to work towards compliance with the voting deadline. As the executive authority (Art. 174 FC), it sets the date of the vote (Art. 10 para. 1bis PRA) and takes the preparatory steps (Art. 11 PRA) that enable the cantons to hold the vote on their respective territories (cf. Art. 10 para. 2 PRA). In principle, it defines the subjects that will be the subject of the next vote in the form of a decree and delegates to the Federal Chancellery to take all measures necessary for the vote. 62

The deadline is met if the vote actually takes place before its expiry. The mere fixing of the date of the vote is therefore not yet sufficient to meet it. If the vote takes place and is later declared invalid, this interrupts the deadline. The initiative must then be put to the vote again (subject to its withdrawal) and a new period of 10 months begins to run in accordance with Art. 75a para. 1 PRA. 63

64 According to the present commentary, all valid initiatives (Art. 139 para. 3 FC, Art. 75 LDP) that are not withdrawn (Art. 73–73a LDP) fall within the time limit of Art. 75a para. 1 LDP, including initiatives aiming at a total revision of the Federal Constitution (Art. 138 FC). Initiatives for a total revision of the Federal Constitution (Art. 138 para. 2 FC) as well as generally formulated initiatives (Art. 139 para. 4 second sentence FC) must be submitted to a vote of the people, while initiatives reformulated from scratch must be submitted to a vote of the people and the cantons (Art. 139 para. 5 first sentence FC).

65 Due to the obligation to put them to the vote at the same time as the initiatives to which they are opposed (Art. 139b FC, Art. 76 PRA), direct counter-proposals, i.e. alternative constitutional revisions to the initiative proposed by the Federal Assembly, indirectly fall within the voting time limit of Art. 75a PRA if the initiative is upheld despite its adoption, even if they are the subject of a federal decree separate from the initiative (cf. Art. 101 para. 2 ParlG). Art. 75a para. 1 PRA, on the other hand, does not set a deadline for the vote on the direct counter-proposal as such. If the initiative is withdrawn and only the direct counter-proposal remains, it is not subject to the voting period of 10 months. De lege ferenda, a voting deadline similar to that in Art. 75a para. 1 LDP would prevent a substantial delay from causing the counter-proposal to lose its raison d'être.

66 Indirect counter-proposals that also propose an alternative regulation to the initiative, but in the form of a sub-constitutional act that does not necessarily have a formal exclusionary relationship with the initiative, are also not subject to the time limit of Art. 75a para. 1 LDP. If a referendum is held against an indirect counter-proposal, neither the Constitution nor the law specify a time limit within which the vote must take place. If the initiative is upheld despite the indirect counter-proposal, the Federal Council is under pressure to put it to a vote quickly so that the vote on the initiative, which must take place within ten months (Art. 75a para. 1 PRA), takes place as soon as the fate of the counter-proposal has been decided. This pressure is lacking, on the other hand, if the initiative is withdrawn, either definitively or on condition that the indirect counter-proposal is definitively adopted (Art. 73a para. 2 PRA).

2. Starting point

a. Main starting point: Actual conclusion of parliamentary treatment ("final vote of the Federal Assembly")

In principle, the time limit of Art. 75a para. 1 PRA begins with the conclusion of the parliamentary phase of the handling of the initiative, i.e. with the final vote of the Federal Assembly on the federal resolution on the initiative (Art. 81 para. 1 let. c ParlG). This resolution decides on the validity of the initiative (Art. 1) and on the voting recommendation on it (if it is drafted from scratch) or on its acceptance or rejection (if it is drafted in general terms) (Art. 2). 67

The final vote on the federal decree on the initiative takes place in both chambers on the same day if the National Council and the Council of States have passed concurring resolutions on the initiative (Art. 81 para. 1bis ParlG), after they have each deliberated at first reading (Art. 74 ParlG) and, if necessary, settled their differences (Art. 89 ff. ParlG). 68

However, it may happen that the chambers are unable to pass concordant resolutions on the initiative. If one chamber rejects the conciliation proposal on the voting recommendation in the case of a drafted initiative, then according to Art. 98 para. 3 ParlG only Art. 2 of the federal decree concerning the voting recommendation is deleted. In this case, it seems to us that a final vote on the resolution (Art. 81 para. 1 let. c ParlG), which relates exclusively to the validity of the initiative (Art. 1), can take place. 69

Although this seems to us to be the result of an omission that can be corrected by analogous application rather than a deliberate decision, Art. 98 para. 3 ParlG does not refer to the acceptance or rejection of an initiative drafted in general terms (cpr "voting recommendation", "conciliation proposal"). The procedure for settling differences in this regard has a special feature: if a chamber decides a second time to reject the initiative, this second rejection is considered final (Art. 95 let. e ParlG). If one assumes in this context that the mechanism of Art. 98 para. 3 ParlG is not applicable, Nico Häusler points out that the text of Art. 81 ParlG excludes a final vote on the initiative, since it presupposes that both chambers have adopted the enactment to be put to a final vote (Art. 81 para. 1 let. c ParlG), moreover by passing concurrent resolutions on it (Art. 81 para. 1bis ParlG). 70

71 However, if one adheres to the wording of Art. 75a para. 1 PRA, then in the absence of a final vote, the time limit of Art. 75a para. 1 PRA would only begin to run with the expiry of the treatment periods set for the Federal Assembly (Art. 103, 105 ParlG). However, such a conclusion contradicts the (systematic and teleological) logic of the article, which states that a final decision by the Federal Assembly sets the voting period in motion. It is probably due to an omission, which can be explained by the fact that there is hardly any practice for dealing with initiatives drafted in general terms, rather than a qualified silence. According to the present Commentary, if the practice refrains from applying Art. 98 para. 3 PRA by analogy to the rejection of an initiative in general form and from holding a final vote on the validity of the initiative, the (second) rejection by a Council, which definitively seals the fate of the initiative (Art. 95 let. e PRA), must entail the commencement of the time limit of Art. 75a para. 1 PRA. Under these circumstances, it is not appropriate to wait for the expiry of the deadline for consideration by the Federal Assembly (Art. 103 para. 1, 105 ParlG).

72 Finally, despite the requirement that the final vote takes place after the chambers have adopted concurring resolutions, it is possible for the chambers to ultimately adopt divergent resolutions in the final vote, with one chamber adopting the federal resolution with a recommendation and the other chamber rejecting it (Art. 81 para. 3 ParlG). In this case, the chambers are deemed to have refrained from making a voting recommendation, which is contrary to their constitutional duty to express themselves (Art. 139 para. 4 and 5 FC). Nevertheless, in order to preserve the citizens' right to a quick decision on an initiative, this situation definitively ends the parliamentary phase and allows the voting period of Art. 75a PRA to begin, even if the deadlines for parliamentary consideration (Art. 100, 103, 105 ParlG) have not yet expired.

b. Subsidiary starting point: Fictitious end of parliamentary treatment ("expiry of the statutory time limits reserved for parliament to deal with the initiative")

73 The actual conclusion of the parliamentary treatment of the initiative only marks the beginning of the period for voting on the initiative if it takes place within the statutory deadlines for parliamentary treatment (Art. 100, 103, 105 ParlG). If the Federal Assembly fails to deal with the initiative within the set deadlines or to pass a concurring resolution on the initiative, the Federal

Council is obliged to order the popular vote without waiting for its decision (Art. 106 ParlG).

In such a situation, Art. 75a para. 1 PRA equips the deadline for the vote on an initiative with a starting point subsidiary to the final vote of the Federal Assembly: the expiry of the statutory deadline for parliamentary consideration of the initiative. Instead of the actual end of parliamentary treatment, it is then the fictitious end that occurs through the forfeiture effect that marks the beginning of the 10-month period. This system limits and makes predictable the maximum total period (period for parliamentary consideration [Art. 100 or 103 para. 1 PRA], extended if necessary [Art. 105 PRA] + period for voting [Art. 75a para. 1 PRA], extended if necessary [Art. 75a para. 3bis PRA]) that can elapse between the submission of an initiative and the vote on it. 74

In the case of the initiative for the total revision of the Constitution, Art. 96 ParlG merely stipulates that the Federal Assembly shall submit the initiative to a vote of the people, without expressly setting a deadline for this. In our view, however, it would violate the guarantee of political rights (Art. 34 para. 1 FC) to infer from this that the Federal Assembly is not obliged to deal with the initiative within a reasonable period of time. As assumed by the majority of doctrine, the Federal Assembly should in any case not exceed a time limit of two years, which corresponds to the time limit for dealing with initiatives drafted in general terms (Art. 103 para. 1 ParlG). According to the present commentary, the expiry of such a time limit should consequently also mark the subsidiary start of the time limit of Art. 75a para. 1 PRA. Otherwise, a delay or an unjustified refusal by the Federal Assembly to deal with the initiative would result in the vote on the initiative being prevented indefinitely. 75

c. Additional starting point: Federal Council decision refusing or revoking confirmation of a vote (unwritten)

As already mentioned, it is conceivable that a vote on an initiative could be declared invalid, resulting in the start of a new voting period within the meaning of Art. 75a para. 1 PRA. 76

Art. 75a LDP does not regulate the question of when this new voting period begins. According to the present commentary, this is an actual gap, which is due to the fact that the legislator did not anticipate this question. In our view, in order to fill this gap, it is necessary to take into account the procedure fol- 77

lowed after the annulment of the vote, which in turn depends on the reasons that led to this annulment.

78 Thus, if a new parliamentary procedure on the initiative takes place, the rules of Art. 75a para. 1 on dies a quo can be applied mutatis mutandis without further ado, since a new final vote would have to take place within a certain period.

79 If the parliamentary procedure is not continued, it must be decided whether the period begins to run anew from the court decision declaring the vote invalid or – after the substantive declaration of invalidity – from the Federal Council decision refusing or revoking the validity of the result (Art. 15 PRA). Even if this entails the risk that the Federal Council delays its action, the second solution seems more appropriate to us. After all, validation is the act that establishes the result of the vote in a binding and definitive manner. With its rejection or revocation, the procedure formally ends. Moreover, this starting point reflects Art. 75a para. 2 PRA, whose dies a quo is the date of validation of the result of the vote on the indirect counter-proposal and not the date of the vote.

3. Duration ("ten months")

80 The period for voting on an initiative under Art. 75a para. 1 LDP runs for a duration of ten months, calculated in quantiles. As a reminder, only the post-parliamentary steps for the material and intellectual organisation of the vote need to be taken during this phase.

81 Since the period begins to run from the final vote of the Federal Assembly, if this takes place within the statutory time limits of the ParlG, the Federal Council does not benefit from any remainder of the treatment period laid down in the ParlG in addition to the 10 months prescribed by Art. 75a para. 1 PRA.

82 In view of the calendar of available voting dates (4 per year outside the election year) (Art. 2a PRA) and the obligation to determine the objects of a vote at least 4 months in advance (Art. 10 para. 1^{bis} PRA), the Federal Council has in principle concretely 2 freely selectable dates to put the initiative to the vote. In practice, the average period between the final vote of the Federal Assembly and the vote in the case of initiatives voted on since 2010 is around 6.3 months (excluding extended deadlines under Art. 75a para. 3^{bis} PRA).

Within this period, the Federal Council is free to make use of the discretionary power granted to it by its status as the supreme executive authority of the Confederation (Art. 174 FC) to determine the date of the vote on an initiative. He does not have to take instructions from the Federal Assembly in this regard. However, it must safeguard the free formation and the faithful and certain expression of the will of the people (Art. 34 para. 2 FC), which means that it must perform its task taking into account the complexity, contradictory nature or even the propensity to enliven the debate of the various items to be put to the vote. 83

The duration of the time limit is extended by six months if it begins to run during a certain period before the overall renewal of the National Council (Art. 75 para. 3bis ParlG). According to the present commentary, it can be suspended very exceptionally. 84

B. Time limit for putting a conditionally withdrawn initiative to the vote if the indirect counter-proposal is rejected (paragraph 2)

1. Purpose ("to put the initiative [...] to the vote [if the indirect counter-proposal is rejected]")

Like the deadline in Art. 75a para. 1 LDP, the deadline in Art. 75a para. 2 LDP also has as its object that an initiative be put to the vote. Accordingly, reference can be made to the previous remarks on this term. However, Art. 75a para. 2 PRA refers to the special context in which the people reject an indirect counter-proposal even though the initiative committee had withdrawn the initiative on condition that this counter-proposal would not fail in the popular vote (Art. 73a para. 2 PRA). In such a case, the withdrawal of the initiative has no effect, since the condition to which it is attached has not occurred (Art. 73a para. 3 PRA e contrario). Finally, if the initiative committee does not decide to withdraw the initiative unconditionally (Art. 73 para. 1 PRA), the authorities are still obliged to put the initiative to the vote. 85

Under these circumstances, starting the period for voting on a conditionally withdrawn initiative from the final vote of the Federal Assembly, as provided for in Art. 75a para. 1 FC, would entail the risk that, given the referendum period of 100 days (Art. 141 para. 1 let. a FC) and the obligation to announce a vote at least four months in advance (Art. 10 para. 1bis FC), this period would expire before the fate of the indirect counter-proposal, and thus also of the 86

initiative, was sealed. For this reason, Art. 75a para. 2 PRA stipulates that the period only begins to run on the date of confirmation of the result of the vote in which the indirect counter-proposal was rejected.

87 The text of Art. 75a para. 2 LDP aims to submit the initiative "to a vote of the people and the cantons". Now, however, only the initiative drafted from scratch is subject to the double majority requirement (Art. 139 para. 5 FC). However, Art. 75a para. 2 PRA seems to us to be applicable also to a generally formulated initiative (which is only submitted to a vote of the people). According to prevailing opinion, it is not excluded to oppose such an initiative with an indirect counter-proposal. Consequently, it should also be permissible to conditionally withdraw the initiative. Moreover, the wording of Art. 73a PRA does not exclude this. Moreover, the preparatory work on the introduction of the conditional withdrawal of the initiative shows no will on the part of the Federal Assembly to exclude this mechanism in the case of an initiative drafted in general terms. In this context, it seems to us that the restrictive wording of Art. 75a para. 2 PRA is merely the result of an omission due to the few occurrences of generally worded initiatives in practice and the rapid pace of legislative work.

88 In the case of the initiative for a total revision of the Federal Constitution, on the other hand, the previous majority doctrine precludes it from containing substantive proposals. In this context, the Federal Assembly cannot propose an alternative to such an initiative, even in indirect form, which precludes a conditional withdrawal of the initiative. The rule of Art. 75a para. 2 PRA is therefore irrelevant for this type of initiative.

89 Finally, it should be noted that neither Art. 75a para. 2 PRA nor the Constitution attaches a time limit to the vote on the indirect counter-proposal. According to the present commentary, the Federal Council must adhere no less to a reasonable deadline in order to preserve the initiative guarantee (Art. 34 para. 1 FC). After all, the longer the vote on the counter-proposal takes, the longer the vote that must take place on the initiative in the event that the counter-proposal is rejected, which can undermine the initiative. De lege ferenda, in our view, at least if the initiative has been conditionally withdrawn, a time limit for the vote on the indirect counter-proposal should be set that is identical to that in Art. 75a LDP (10 months).

2. Date of commencement

a. Ordinary starting point: executive confirmation of the rejection of the indirect counter-proposal ("date of confirmation of the result of the vote on the counter-proposal")

The voting period of Art. 75a para. 2 PRA begins with the validation of the result of the vote rejecting the indirect counter-proposal. This act constitutes a declaratory decision by the Federal Council. It only comes into effect after any complaints in connection with the vote, which must be submitted within three days (Art. 77 para. 2 PRA), have been settled (Art. 15 para. 1 PRA). 90

Having the period start from the decision on validity and not from the date of the vote itself is intended to prevent the rejection of the indirect counter-proposal from being declared invalid while the vote on the initiative is still being prepared or has even already taken place. Since the effect of the initiative depends on the failure of the indirect counter-proposal (Art. 73a para. 3 PRA), this mechanism is indispensable from the point of view of legal certainty and guaranteeing the free formation and faithful and certain expression of the will of the people (Art. 34 para. 2 FC). Indeed, citizens cannot be required to vote on an initiative where the effect of withdrawal has not been definitively clarified. 91

b. Extraordinary starting point: retroactive judicial confirmation of the rejection of the indirect (unwritten) counter-proposal

According to the present commentary, if the vote on the indirect counter-proposal is exceptionally subject to "retrospective" judicial review, i.e. after the results have been confirmed in accordance with Art. 15 FC, while the vote on the initiative has not yet taken place, the vote on the initiative must be suspended for as long as the fate of the vote on the indirect counter-proposal has not yet been decided, in order to protect the free formation of the will and the faithful and certain expression of the will of the people (Art. 34 para. 2 FC) as well as legal certainty. In this respect, Art. 75a para. 2 PRA has a loophole which the legislature was unable to observe and which the legal process developed by the Federal Supreme Court requires to be closed. 92

If the vote on the counter-proposal is indeed declared invalid, the duty of the authorities to put the initiative to the vote now depends (once again) on the 93

fate of the counter-proposal, so that the time limit of Art. 75a para. 2 PRA is interrupted.

94 If, on the other hand, the invalidity petition is rejected, the question arises as to whether the Federal Council must again be granted a full period of 10 months to put the initiative to the vote, or whether the period that has already expired until the submission of the revision petition must be taken into account. In view of the obligation to give at least four months' notice of the subject of a ballot (Art. 10 para. 1bis PRA) and the time needed to organise the ballot, it seems more appropriate to us to assume a new full period of 10 months. In other words, the submission of a motion "for repetition" of the vote on the indirect counter-proposal interrupts the running of the deadline of Art. 75a para. 2 LDP, while the rejection of the motion marks the dies a quo of a new voting deadline.

95 By comparison, the vote on an initiative whose conditional withdrawal due to the failure of the indirect counter-proposal did not become effective as soon as it took place is a reason that should preclude a "retroactive" annulment of the vote on the indirect counter-proposal. In fact, the Federal Supreme Court ties the annulment of a vote in this context to several conditions, including the protection of legal certainty, which would be impaired as soon as the annulment of the vote on the counter-proposal would have to result in the annulment of the vote on the initiative.

c. Additional starting point: Federal Council decision refusing or revoking confirmation of a vote (unwritten)

96 Finally, like Art. 75a para. 1 PRA, in the event of a cancellation of the vote on the initiative (the withdrawal of which did not become legally valid due to the failure of the indirect counter-proposal), Art. 75a para. 2 PRA must be supplemented to the effect that, if the parliamentary procedure is not renewed, the Federal Council decision refusing or revoking the validity of the result (Art. 15 PRA) marks the starting point for a new ten-month period for the vote on the initiative.

3. Duration ("ten months")

97 The confirmation of the result of the vote on the indirect counter-proposal triggers a voting period of 10 months. Thus, the time that elapsed between the

Federal Assembly's final vote on the initiative and the initiative's conditional withdrawal is not retroactively deducted from the voting period.

Since all indirect counter-proposals on the basis of which an initiative has been conditionally withdrawn have come into legal force, it is not possible in practice to state the average duration for holding a vote after the rejection of the indirect counter-proposal. However, since these cases also involve the conduct of a vote on a constitutional amendment, there is prima facie no reason why it should differ significantly from the average duration of the conduct of a vote on the initiative in an "ordinary" case. 98

C. Time limit for voting on the implementation of a general initiative (paragraph 3)

1. Subject matter ("[to put to the vote] the constitutional amendment [...] relating to [a generally held initiative]")

The time limit in Art. 75a para. 3 PRA also refers to the holding of a referendum, the modalities of which are the same as the referendums referred to in Art. 75a paras. 1 and 2, but the subject of which is the constitutional amendment following the adoption of an initiative conceived in general terms, and not the initiative itself. 99

Art. 75a para. 3 PRA is applicable exclusively to selective constitutional amendments that follow generally formulated initiatives. It therefore does not refer to a comprehensive constitutional amendment that follows on from an initiative adopted in this sense (Art. 138 cum 193 para. 1 FC), which must also be the subject of a vote by the people and the cantons (Art. 140 para. 1 let. a FC). 100

As a reminder, the initiative, which is of a general nature, indicates the direction of a desired constitutional amendment without definitively formulating the wording of this amendment. If the Federal Assembly approves the initiative, it directly drafts the corresponding constitutional amendment (Art. 139 para. 4 sentence 1 FC), which must "strictly reflect the content and objectives of the initiative" (Art. 104 para. 2 ParlG). If it rejects the initiative, it submits it to a vote of the people (art. 139 para. 4 sentence 2 cum. 140 para. 2 let. b FC). If the people vote in favour, the Federal Assembly is obliged to draw up the constitutional amendment demanded by the initiative (art. 139 para. 4 sen- 101

tence 3 FC). Since this is a constitutional amendment, the implementation drawn up by the Federal Assembly is subject to a mandatory referendum and must be approved by the people and the cantons (Art. 140 para. 1 let. a FC).

10 2 The implementation of the initiative drafted in general terms within a reasonable period of time is protected by the guarantee of political rights (Art. 34 para. 1 FC). The time limit in Art. 75a para. 3 PRA refers to the post-parliamentary phase of this process. The Federal Assembly, for its part, has a period of two years from the approval of the initiative to draft the constitutional amendment (Art. 104 para. 1 PARlG). However, the law does not provide a mechanism to sanction a delay or a refusal by the Federal Assembly to legislate (cpr Art. 189 para. 4 FC).

10 3 In accordance with a constitutional requirement (Art. 156 para. 3 let. b FC), on the other hand, the law provides a mechanism to ensure that a decision on implementation is taken if only differences between the Councils prevent its adoption by the Federal Assembly. Art. 104 para. 3 ParlG reads: "If the Councils cannot agree on a joint draft for a partial revision, or if one or both of them reject the draft, the decisions taken by them in the last deliberation shall be submitted to a vote of the people and the cantons". This provision applies if the Houses have each adopted a draft resolution but one House rejects the proposal of the conciliation conference (cpr Art. 93 para. 2 ParlG) or one (or both) Houses reject the draft revision in the final vote on it (cpr Art. 1 para. 3 ParlG).

10 4 If one of these situations occurs, it is up to the people and the cantons to separate the bills adopted by one and the other chamber in their final detailed deliberations in the form of a vote on these two variants. Irrespective of the question of the precise subject matter and modalities of this vote, which goes beyond the subject matter of this commentary, we believe that the time limit of Art. 75a para. 3 PRA should also apply here, at least by analogy, if the vote is on a constitutional amendment that follows a general initiative.

2. Starting point ("final vote of the Federal Assembly")

a. Ordinary starting point: actual conclusion of parliamentary treatment ("final vote of the Federal Assembly")

10 5 The time limit for voting on a constitutional amendment that is based on an initiative drafted in general terms begins with the final vote of the Federal As-

sembly (Art. 81 ParlG) that approves the revision in question (Art. 75a para. 3 PRA). This dies a quo also applies if one of the two chambers rejects the draft resolution on the constitutional amendment in this final vote (Art. 104 para. 3 ParlG).

On the other hand, in the event that Art. 104 para. 3 ParlG is applied as a result of the rejection of the proposal of the Unification Conference by a Council, no final vote on the draft resolution on constitutional revision takes place. In this case, we believe it is appropriate to fill a gap in Art. 75a para. 3 PRA by stating that the two-year period runs from the vote leading to the rejection of the unification proposal. 106

Since there is no mechanism to force the Federal Assembly to adopt a constitutional amendment, and since the Federal Council has no competence of its own to adopt a constitutional amendment itself, the Federal Council cannot logically order a vote on a non-existent subject (cpr Art. 106 ParlG). For this reason, in contrast to para. 2, Art. 75a para. 3 PRA does not provide for a subsidiary dies a quo. 107

b. Additional starting point: Federal Council resolution refusing or revoking the confirmation of a voting result (unwritten)

Finally, like the votes on initiatives, the vote on the constitutional amendment implementing an initiative drafted in general terms is to be declared invalid only in very exceptional cases. In this case, we believe that it is the decision of the Federal Council to deny or revoke the validity of the result (Art. 15 PRA) that marks the beginning of a new voting period of 10 months. 108

3. Duration ("ten months")

As with the other deadlines of Art. 75a LDP, the Federal Council has a duration of ten months to organise and conduct the referendum. The time that the Federal Assembly may not have used within the two-year period to prepare the constitutional amendment does not extend the period available to the Federal Council. 109

In the absence of a corresponding practice, it is not possible to state the average length of time that passes in practice between the Federal Assembly's final vote and the popular vote. Again, however, there is no reason why it should 110

differ significantly from the average length of time it takes to conduct the vote on the initiative in an "ordinary" case.

D. Extension of time limits (paragraph 3bis)

11 1 While the first three paragraphs of Art. 75a set voting deadlines, paragraph 3bis sets out the extension of these deadlines, in our opinion in an exhaustive manner. It makes them conditional on the dies a quo of the relevant deadline (defined by the appropriately interpreted paragraphs 1–3) falling within a specified period before the next overall renewal of the National Council, i.e. between 10 and 3 months before the election.

11 2 Although this provision was not commented on when it was adopted in 2014, it is understandable that its rationale is to take into account the fact that an election year includes not four but only three dates for referendums (Art. 2a para. 3 ODP), thus limiting the dates available to the Federal Council to put the initiative to a vote. It is also conceivable that the intention is to relieve the Federal Chancellery during this period. However, we do not know the criteria that led to the delimitation of the period that is decisive for the extension. Moreover, it should be noted that the need to have sufficient time and voting dates in the election year had already been taken into account when the "ordinary" voting period was originally set at 9 months.

11 3 The general renewal of the National Council refers to the election of all deputies forming this chamber every four years (Art. 149 para. 2 BVG), as opposed to a possible by-election (Art. 51 PRA) or supplementary election (Art. 56 PRA).

11 4 The National Council is also completely renewed before the end of the four-year legislative period if the people agree to the principle of a total revision of the Constitution (Art. 193 para. 3 FC). The law does not regulate the temporal modalities of this selective total renewal. Unlike periodic renewal, it is not predictable. It is therefore not covered by the rule that in principle four votes are held per year (Art. 2a paras. 1 and 3 ODP). If necessary, it should therefore take place on an additional voting date and not overlap with the other voting items. In our view, it is therefore not covered by Art. 75a para. 3bis PRA. This, moreover, already follows from the wording of the provision, which implies periodicity by referring to the "next" renewal, and from its logic, which consists in fixing the extension of the deadline in relation to a foreseeable date.

The periodic general renewal of the National Council takes place (every four years) on the penultimate Sunday in October (Art. 19 para. 1 LDP). The relevant period for renewal between 10 and 3 months before the renewal thus always runs from one day of December of the year preceding the election to one day of July of the election year. It therefore extends over seven months. 11 5

All terms that begin to run during this period are automatically renewed. A corresponding resolution of the Federal Council or the Federal Assembly is not required. The duration of the extension is 6 months, bringing the total period to 16 months. 11 6

De lege ferenda, it should be noted that this system of automatic extension by the same duration for all deadlines that begin to run between 10 and 3 months before the election does not achieve its presumed objective of giving the Federal Council as many choices as usual when setting the date for the vote on the initiative. Outside an election year, the Federal Council in principle has the choice between two voting dates to put the initiative to the vote. However, the mechanism of Art. 75a para. 3bis PRA does not preserve this balance: 11 7

- If the voting period begins to run immediately before the standstill period (i.e. immediately before the December deadline), the Federal Council has only one voting date at its disposal. For example, if the Federal Assembly had held the final vote on an initiative on the last day of its 2022 winter session, i.e. on 16 December 2022, the deadline for voting on this initiative would not have been extended, as the relevant period for the extension would have started on 22 December 2022, given the overall renewal of the National Council on 22 October 2023. Consequently, the Federal Council would have had until 16 October 2023 to put the initiative to the vote. Due to the obligation to announce a vote at least four months in advance (Art. 10 para. 1bis PRA) and the calendar of voting dates, which concretises Art. 2a PRA, the vote on the initiative could only have taken place on one voting date, namely 18 June 2023.
- If, on the other hand, the deadline begins to run during the standstill (i.e. until the deadline in July), there are no longer two, but three or even four dates available for the vote. For example, if the Federal Assembly adopts a decision on an initiative on 17 March 2023, the deadline for the vote on the initiative, taking into account the extension, runs until 17 July 2024, leaving the Federal Council with the following 3 dates to set the vote: 26. Novem-

ber 2023, 3 March 2024 and 9 June 2024. If the final vote is held on 16 June 2023, the deadline runs until 16 October 2024, giving the Federal Council the option of ordering the vote on 26 November 2023, 3 March 2024, 9 June 2024 or 22 September 2024.

11 8 In other words, the current system does not prevent the loss of a voting date in certain circumstances and offers one or even two additional voting dates in other circumstances. In light of this, it should be noted that for the four initiatives that have so far been affected by an extension of the deadline, the average time between the final vote and the vote was approximately 10.3 months. Thus, the current system has not led to abuses, at least so far.

E. Time limits for dealing with the initiative: Reference to the Parliament Act (paragraph 4)

11 9 Art. 75a PRA concludes with a reference to the ParlG when it comes to the handling of an initiative by the Federal Council and the Federal Assembly and the time limits in this regard. This division of the matter is a historical decision by the legislature. However, the deadlines for the parliamentary handling of an initiative are decisive for the application of Art. 75a para. 1 PRA, as their expiry constitutes the subsidiary start of the deadline for the vote on an initiative.

12 0 The handling of an initiative by the Federal Council and the Federal Assembly is the subject of an entire chapter (3) in a title (5) of the ParlG (Art. 96–106).

12 1 As already mentioned, the initiative for the total revision of the Constitution is not subject to any explicit time limits (Art. 96 ParlG). Nevertheless, it must be dealt with within a reasonable period, which in any case should not exceed two years, analogous to what is provided for generally formulated initiatives (Art. 103 para. 1 ParlG).

12 2 In the case of an initiative aimed at a partial revision of the Constitution, Art. 97 para. 1 let. a ParlG sets a deadline of one year from the submission of the initiative for the Federal Council to submit to the Federal Assembly a draft federal decree as well as a dispatch on it. The period is extended by six months if the Federal Council prepares a counter-draft or a draft decree that is closely related to the popular initiative (Art. 97 ParlG).

For its part, the Federal Assembly has a period of 30 months from the submission of a drafted initiative to decide whether to recommend its acceptance or rejection (art. 100 ParlG), or of 2 years from the submission of an initiative drafted in general terms to decide whether to accept or reject it (art. 103 para. 1 ParlG). By decision of the Federal Assembly, these time limits may be extended by one year if one of the Councils has "adopted a decision on a counter-proposal or a draft enactment that is closely related to the popular initiative" (Art. 105 para. 1 ParlG). 12 3

Overall, the following time limits may thus elapse between the submission of the initiative and the vote on it: 12 4

In the case of an initiative drafted from scratch:

- If the Federal Assembly does not extend the treatment period on the basis of a counter-proposal: 40 months (30 months treatment period + 10 months voting period) or 46 months (40 months + 6 months extension) if the period begins to run between 10 and 3 months before the next general renewal of the National Council.
- If the Federal Assembly extends the period of consideration on the basis of a counter-proposal: 52 months (30 months period of consideration + 1 year, i.e. 12 months, extension + 10 months voting period) or 58 months (52 months + 6 months extension) if the period begins to run between 10 and 3 months before the next general renewal of the National Council.

In the case of an initiative drafted in general terms:

- If the Federal Assembly does not extend the treatment period due to a counter-proposal: 34 months (2 years, i.e. 24 months, treatment period + 10 months voting period) or 40 months (34 months + 6 months extension) if the period begins to run between 10 and 3 months before the next general renewal of the National Council.
- If the Federal Assembly extends the treatment period on the basis of an (indirect) counter-proposal: 46 months (2 years or 24 months treatment period + 1 year or 12 months extension + 10 months voting period) or 52 months (46 months + 6 months extension) if the period begins to run between 10 and 3 months before the next overall renewal of the National Council.

12 5 Finally, as regards the implementation of an adopted initiative in general terms, the Federal Council also has a period of one year from adoption to submit a draft and a dispatch to the Federal Assembly (Art. 97 para. 1 let. b ParlG), with a period of two years from adoption for the Federal Assembly to draft the decree. As already mentioned, however, failure to comply with this deadline has no concrete consequences.

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COMMENTARY ON

Art. 76 PRA

A commentary by Camilla Jacquemoud

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Art. 76 Direct counter-proposal

[1] Where the Federal Assembly decides to submit a counter-proposal, three questions are put to the voters on the same ballot paper. Each person who is eligible to vote may state, without reservation:

a. whether they prefer the popular initiative to the law currently applicable;

b. whether they prefer the counter-proposal to the law currently applicable;

c. which of the two proposals should become law where both the People and the cantons prefer both proposals to the law currently applicable.

[2] The absolute majority shall be established separately for each question. Questions that have not been answered shall be disregarded.

[3] Where both the popular initiative and the counter-proposal are accepted, the result of the third question shall be decisive. The proposal that secures a higher number of popular votes and a higher number of cantonal votes shall become law.

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I. HISTORY

A. System of the pure alternative (until 1988)

1 In its original version, valid until 1988, Art. 76 PRA structured the vote on an initiative and a counter-proposal in the form of a "pure alternative". The two proposals were put to a simultaneous vote. Each ballot paper could reject both proposals, accept one of them and reject the other, or remain blank. Approval of both proposals, on the other hand, resulted in the invalidity of the ballot paper (prohibition of double yeses). The absolute majority was calculated for both proposals together.

2 This system was the subject of much criticism, which increased in the late 1970s after three votes in which an initiative and a counter-proposal were rejected even though together they had received more votes than the status quo.

B. Subsidiary question system (since 1988)

1. Status quo in the event of disagreement between the people and the cantons (until 2003)

a. Constitutional revision

3 In 1984, in response to this criticism and demands for change, the Federal Council proposed changing the modalities of the voting procedure so that citizens could henceforth vote in favour of both the initiative and the counter-proposal (allowing a double yes vote) and indicate the ranking between the two by answering a run-off question.

4 The Federal Councillors adopt this system of double voting with a run-off question (called "Haab" after its main developer), but pass it in the form of an amendment to the Constitution (Art. 121bis aBV). This was adopted by the people and the cantons on 5 April 1987 and came into force one year later.

b. Adaptation of the PRA to the new legislation

5 Instead of revising Art. 76 PRA in line with the new Art. 121bis aBV, the Federal Assembly subsequently repealed this provision on 1 January 1989 in the

course of a revision, the main subject of which was the structure of the voting procedure on an initiative and a counter-proposal in the Councils.

Only in 2000, on the occasion of a package of legislative amendments following the entry into force of the new Federal Constitution, did the Federal Assembly adopt a new Art. 76 PRA, which concretises the constitutional requirements (now enshrined in Art. 139b FC). 6

2. Rule of the highest sum of the percentages of popular and popular votes (since 2003)

a. Revision of the Constitution

The system of voting on an initiative and a counter-proposal undergoes a final revision in 2003 with the introduction of the so-called "sum of the percentages" rule (Art. 139b para. 3 FC). This rule is intended to prevent the stalemate that had prevailed until then if, when answering the question on the ballot, the majority of the people are in favour of the initiative and the majority of the cantons are in favour of the counter-proposal, or vice versa (cpr Art. 121bis para. 3 third sentence aBV; Art. 139 para. 6 FC as amended until 31 July 2003). In the event of a disagreement between the People and the Cantons on the run-off question, the bill that receives the highest sum of the votes of the People and the Cantons, expressed as a percentage, is now adopted (Art. 139b para. 3 FC). 7

b. No effect on the PRA

The amendment of the Constitution in the direction of the percentage rule is not transferred to Art. 76 PRA. Since this provision does not explicitly state that dissent between the people and the cantons in the run-off question thwarts the adoption of the constitutional amendment, its amendment probably seemed superfluous. 8

Art. 76 PRA underwent a slight adjustment in 2010, which was of a legal rather than a substantive nature. The Federal Assembly gave it the title "Direct counter-proposal" on the occasion of the revision of the PRA, which introduced the possibility of withdrawing an initiative on condition that an indirect counter-proposal comes into force (Art. 73a PRA). 9

II. SIGNIFICANCE OF THE PRIVISION

A. General

1. Background

10 Art. 76 PRA is located in the 5th Title of the PRA, which is dedicated to the popular initiative. It concretises Art. 139b FC, which lays down the principles for the procedure of the popular vote on an initiative and a counter-proposal.

11 As the title indicates, Art. 76 PRA applies only to the vote on (an initiative and) a direct counter-proposal. The counter-proposal is an act adopted by the Federal Assembly as an alternative to the initiative. It is "direct" if it represents an alternative not only in terms of content but also formally, i.e. if it is opposed to the initiative in a procedure at the end of which only one legal act enters the legal order. In comparison, the "indirect" counter-proposal, which is not affected by Art. 76 PRA, proposes a substantively alternative regulation, but does not stand in a formally alternative relationship to the initiative.

12 The procedure of voting on an initiative and a direct counter-proposal only concerns initiatives that aim at a partial revision of the Constitution and are drafted from scratch. According to prevailing opinion, other initiatives (aimed at a total revision of the Constitution or formulated in general terms) cannot be the subject of a direct counter-proposal (Art. 139 para. 5 FC, identical to Art. 101 ParlG).

13 The voting procedure on an initiative and a counter-proposal according to the "Haab" system, concretised in Art. 76 PRA, is relevant if the initiative is not withdrawn after the counter-proposal has been accepted (Art. 73 PRA). The authorities are then obliged to put the initiative and the counter-proposal to the vote (cf. Art. 140 para. 1 let. a FC). In this case, Art. 139b FC orders a simultaneous vote on the two bills (para. 1), permits their double adoption and stipulates that they shall be decided by a run-off vote if they both receive a double majority of the people and the cantons (para. 2). Art. 76 PRA concretises these rules by specifying the voting questions (para. 1), the calculation of majorities (para. 2) and the determination of the result of the vote in the case of double adoption of initiative and counter-proposal (para. 3). It thus contains rules both on how citizens can express their will and on how their votes are taken into account in determining a result.

2. Functions

When the Federal Assembly opposes an initiative with a direct counter-proposal, the voters must vote on an alternative with three terms: Status quo, initiative or counter-proposal. Art. 76 PRA, which concretises Art. 139b FC, regulates the voting procedure on this alternative. The existence of such general-abstract rules, which set out the modalities of the vote in a sufficiently clear and precise manner, is essential to ensure that the vote can be scrutinised for regularity and that its outcome can be considered a faithful and certain expression of the will of the people (Art. 34 para. 2 FC). 14

The system established by Art. 139b FC and Art. 76 PRA ensures procedural equality between the three options of status quo, initiative or counter-proposal. In other words, it ensures that the procedure does not influence the outcome of the vote, but remains neutral in the sense that it arithmetically guarantees the same chances of success for initiative and counter-draft and does not make it more difficult to overturn the status quo than with other constitutional amendments. However, like any other constitutional amendment, both the initiative and the counter-proposal must be approved by a double majority of the people and the cantons in order to be valid (Art. 140 para. 1 let. a, 142 para. 2 FC). The procedure thus ensures compliance with federalism in connection with a vote on alternative constitutional revisions. 15

The procedure according to Art. 139b FC and Art. 76 PRA also enables citizens to vote on the initiative and the counter-proposal in such a differentiated manner that this can be considered as a (formal) expression of their (substantive) will. By combining two main votes and a run-off question, every citizen can express each of the 13 non-contradictory orders of preference that can regulate the relationship between the counter-draft, the initiative and the status quo through his or her vote. By linking the questions to each other, it is also avoided that the vote leads to a contradictory overall result. This arrangement thus serves not only the (individual) freedom of content of the vote, but also the (collective) protection of the faithful and secure expression of the will of the people, both of which derive from the guarantee of political rights (Art. 34 para. 2 FC). 16

B. Comparative cantonal law

17 In almost all cantons, the system of voting on an initiative and a counter-proposal corresponds mutatis mutandis (without the double majority requirement) to that of the Confederation (e.g. Art. 36 FC/ZH; Art. 60 para. 2 FC/BE; Art. 125 para. 5 PRA/FR; Art. 33 para. 3 PRA/VD; Art. 34 para. 4 FC/VS; Art. 113 PRA/NE; Art. 63 para. 3 FC/GE). Only two cantons, Jura and Aargau, stand out on this point.

18 In the canton of Jura, the initiative and the counter-proposal are also put against the status quo independently of each other in a double, simultaneous main vote. However, if both the initiative and the counter-proposal are accepted, there is no run-off vote. The bill that received more votes is accepted (Art. 76 para. 5 Cst./JU , Art. 93 para. 2 PRA/JU).

19 As far as the Canton of Aargau is concerned, it does provide for a simultaneous vote on the initiative and the counter-proposal, but the vote on the initiative is a main vote, whereas the vote on the counter-proposal is a contingent vote (Art. 65 para. 3 KV/AG). The vote on the counter-proposal is only taken into account if the initiative is rejected. Thus, if both drafts achieve an absolute majority, only the initiative is accepted (§ 59 para. 2 GPR/AG).

III. COMMENT

A. Questions to be voted on in a vote on an initiative and a counter-proposal (paragraph 1)

1. Uniform ballot paper

20 Art. 76 para. 1 PRA concretises the voting modalities in the case of a vote on an initiative and a direct counter-proposal by specifying that three (different) questions shall be placed on one (single) ballot paper. In doing so, it implements the first instruction of Art. 139b para. 1 FC, according to which the voters vote on the initiative and the counter-proposal in the same ballot ("simultaneously"). The aim of this simultaneity is to ensure equality of opportunity between the initiative and the counter-proposal.

21 Nevertheless, the voters vote on two different items. Each citizen votes primarily on the initiative (Art. 76 para. 1 let. a PRA) and the counter-proposal

(Art. 76 para. 1 let. b PRA), and secondarily on his or her preference between the initiative and the counter-proposal if both are adopted (Art. 76 para. 1 let. c PRA). The Federal Assembly otherwise decides on the initiative and the counter-proposal in the form of two separate federal decrees (Art. 101 para. 2 PARlG).

2. Main questions (letters a and b)

a. Independent votes

The first two questions on the ballot paper enable each voter to express his or her opinion on the initiative and the counter-proposal as if they were submitted to them separately (Art. 76 para. 1 let. a and b PRA). Specifically, the questions are as follows: a) Do you accept the popular initiative "[title]"? b) Do you accept the federal decree of [date] concerning [thematic title of the counter-decree as counter-draft"]? 22

Both the initiative and the counter-proposal are directed against the current regulation (the status quo). In order to overthrow the status quo, both must receive an absolute majority of the votes of the people and the cantons (Art. 140 para. 1 let. a, 142 para. 2–4 FC). Otherwise, the bill is rejected. 23

The votes on the initiative and the counter-proposal are thus independent of each other. Each item can either be accepted or rejected. If both are rejected, there is no constitutional amendment. This is particularly the case if one bill is accepted by the majority of the people and the other by the majority of the cantons. If only one of the proposals is accepted, the constitution is revised in this sense. If both the initiative and the counter-proposal are adopted, an eventual run-off vote between the two proposals will decide, thus avoiding a double constitutional amendment. 24

b. Allowing double approval

Art. 76 PRA, like Art. 139b para. 2 FC, allows citizens to vote in favour of both the initiative and the counter-proposal ("[c]every voter can declare without reservation"). Thus, approval of one of the bills is no longer a prerequisite for voting on the other bill. The Federal Assembly itself can recommend dual consent (art. 102 para. 1 let. b ParlG). Specifically, the ballot papers may contain 9 combinations: Yes/Yes; No/No; Yes/No; No/Yes; White/Yes; White/No; Yes/White; No/White; White/White; White/White. 25

26 Thanks to the allowance of the "double yes", citizens can express their preference for one of the two revisions (initiative or counter-proposal) over the status quo. In combination with the separate calculation of the majority, this modality makes it possible to express nine preferences between the initiative, the counter-proposal and the status quo. The secondary question makes it possible to express the remaining 4 of 13 possible non-contradictory preferences.

27 By comparison, in the pure alternative system, ballots that agreed with both the initiative and the counter-proposal were invalid and consequently not taken into account in determining the result of the vote. A blank vote that referred to only one of the proposals meant de facto the rejection of that proposal. This system did not allow for a sufficiently differentiated vote, which could also have a distorting effect on the overall result of the vote and promoted the status quo beyond the common requirements for any constitutional amendment. This was because of the 13 possible orders of preference between the initiative, the counter-draft and the status quo, only 4 could actually be expressed. Under these circumstances, it was possible for the initiative and the counter-proposal to be rejected even though the majority of the electorate would have wanted a constitutional amendment.

3. Subsidiary question

a. Exclusion of a double constitutional amendment

28 Since it is permissible to vote in favour of both the initiative and the counter-proposal, it is possible - even though this has never happened before - for both proposals to receive a double majority of the people and the cantons and thus for both to be adopted (Art. 142 para. 2 FC). However, since the initiative and the counter-proposal are in a (material and formal) alternative relationship to each other, it is excluded that this double approval leads to a double constitutional amendment.

b. Expression of a preference between the initiative and the counter-proposal in the case of a double adoption

29 In order to implement this limit, Art. 139b para. 2 FC and Art. 76 para. 1 let. c and para. 3 PRA provide for the two proposals to be directly opposed to each other in a third, simultaneous, subsidiary question, separate from the main

questions, which asks the citizens "which of the two texts should enter into force if the people and the cantons prefer the two texts to the one in force" (Art. 76 para. 1 let. c PRA). The question is specifically: c) If the people and the cantons adopt both the popular initiative "[title]" and the counter-proposal (federal decree of [date] on [thematic title of the decree opposed as a counter-proposal]): Should the popular initiative or the counter-proposal then enter into force?

In contrast to the vote on the initiative or the counter-proposal, the answers that citizens can give to the key question are not "yes" or "no" (or a blank vote), but "initiative" or "counter-proposal" (or a blank vote). The run-off question thus inevitably leads to a choice between these two proposals. If one proposal receives the majority (from the sum of the votes of the people and the cantons), the other inevitably unites only a minority. For example, if the initiative receives 51 per cent of the votes, the counter-proposal has 49 per cent. It is therefore not possible, as in the case of the main votes, for both proposals to receive a majority of the people and the cantons. 30

The answer to the key question is independent of the answers to the main questions on the initiative and the counter-proposal. It is possible not to answer it or to answer only this question (cf. also Art. 76 para. 2 sentence 2 PRA). This system makes it possible to express the 13 possible non-contradictory orders of preference between the initiative, the counter-proposal and the status quo , including the 4 indicating a preference between the initiative and the counter-proposal if both are preferred to the status quo or vice versa if the status quo is preferred to them. 31

B. Calculation of majorities (paragraph 2)

1. Separate calculation

Art. 76 para. 2 PRA implements the system of double voting on initiative and counter-proposal with a run-off question by stipulating that votes are counted and absolute majorities are calculated separately for each subject (1st sentence) and that unanswered questions are not taken into account (2nd sentence). This means that a blank vote on one of the questions (partial blank ballot), e.g. the preference between initiative and status quo , is not taken into account when calculating the majority required to answer that question. How- 32

ever, it will be taken into account in calculating the majority required to answer the other questions if it expresses an opinion on those questions.

33 By way of illustration, if out of a total of 2,600,000 ballot papers in question, 50,000 ballot papers are not cast in favour of the initiative and 70,000 are not cast in favour of the counter-proposal, the absolute majority of the people is already reached at 1,275,000 votes in favour ([2,600,000-50,000] : 2) for the initiative, while for the counter-proposal it is already reached at 1,265,000 votes in favour ([2,600,000-70,000] : 2).

34 In order to make this calculation possible, the number of yes votes, the number of no votes and the number of unanswered ballot papers are indicated separately for each main question in the voting protocol, as well as the number of respective votes for the initiative or the counter-proposal and the number of blank votes for the run-off question. The number of ballot papers that are not eligible at all (completely blank or completely invalid) shall be entered in a separate item (Art. 4 para. 1 ODP and Annex 1b ODP).

2. Expression of indifference between an item and the status quo.

35 The separate calculation of the majority makes it possible to vote blank only on the initiative or the counter-proposal without this blank vote being interpreted as a rejection of that item. Thus, it is possible to agree or disagree with one item and express indifference between the other item and the status quo. Each item has the same chance of being approved as if it were put to the vote alone.

36 For comparison: In the old system, the absolute majority was calculated jointly for the initiative and the counter-proposal. Partially blank ballots were taken into account when calculating the joint majority threshold. A blank vote on only one of the proposals meant de facto that one rejected that proposal, as the ballot paper nevertheless increased the absolute majority threshold for that proposal as well. This system prevented the four orders of priority between initiative, counter-proposal and status quo, expressing indifference between the status quo and one of the items. More generally, it distorted the expression of the popular will, as partially blank ballots helped to raise the threshold for an absolute majority for an item to which, however, those ballots had given as much preference as to the status quo.

C. Result of the vote in the event of double acceptance of the initiative and the counter-proposal (paragraph 3)

1. Scope of the run-off question (1st sentence)

a. Possible scope

As already mentioned, the admissibility of the double adoption of the initiative and the counter-proposal means that it is possible for both of these items to be adopted by the people and the cantons. Since the Constitution cannot be revised in these two mutually exclusive directions, the current voting system directly contrasts the initiative and the counter-proposal in a run-off question that allows citizens to express their preference between these two proposals if both are adopted (Art. 139b para. 2 FC cum 76 para. 1 let. c PRA). 37

The subsidiary nature of the question of preference between the initiative and the counter-proposal already follows from the wording as formulated by Art. 76 para. 1 let. c PRA ("if the people and the cantons prefer the two texts to the system in force"). Art. 76 para. 3 first sentence. PRA confirms the possible significance of the run-off vote by stating that "if both the popular initiative and the counter-proposal are adopted, the result obtained from the answers to the third question shall carry the decision". Thus, in contrast to the main votes, the vote on the run-off question is not unconditionally taken into account. Its potential significance is only actualised if both the initiative and the counter-proposal are adopted in response to the main questions. In all other cases, only the results of the main votes are decisive. However, the result of the run-off vote shall be determined in all cases, including those in which only the main votes are decisive. 38

b. Additional condition for the adoption of the initiative or the counter-proposal

The system of the run-off question makes the adoption of a constitutional amendment conditional on its acceptance by the people and the cantons (Art. 140 para. 1 let. a FC) if both the initiative and the counter-proposal are adopted. In this case, the constitutional amendment must not only have been accepted by the people and the cantons in response to the main votes - which is a sufficient condition for the acceptance of a constitutional amendment in all 39

other cases - but must also have been preferred in response to the run-off question.

2. Result of the run-off vote (2nd sentence)

a. (Artificial) requirement of a double majority

40 According to the will of the legislature, the preference for the initiative or the counter-proposal expressed in response to the leading question must command a double majority of the people and the cantons in order to triumph over its alternative. Art. 76 para. 3 second sentence. PRA stipulates that the bill that "attracts the largest number of electoral votes and the largest number of votes of the Estates" shall enter into force. However, this rule must be read in conjunction with Art. 139b para. 3 FC in order to grasp its scope.

41 Until 2003, no constitutional amendment was adopted if, in the answer to the run-off question, one proposal received a majority of the popular vote and the other a majority of the votes of the Estates. This blockade favoured the status quo and distorted the will of the people. To remedy this situation, Art. 139b para. 3 FC now mitigates the consequences of a divergence between the people and the cantons. As expressed in Art. 76 para. 3 second sentence. PRA ("the most electoral votes and the most cantonal votes" [emphasis added]), however, the double absolute majority of the people and the cantons remains implicitly the basic rule when answering the run-off question.

42 In our view, however, this distinction between an ordinary rule when an answer achieves a double majority and a special rule when it does not is artificial. The fact is that Art. 139b para. 3 FC dispenses with the requirement of a double majority and instead provides for another criterion – the majority of the sum of the votes of the people and the cantons – which makes it possible to decide between an initiative and a counter-proposal in all situations. Indeed, a bill that achieves a popular and cantonal majority (e.g. 51% of the popular vote and 12 cantons [52.17%]) necessarily receives the higher sum of the percentages of the popular and cantonal votes (103.17% vs. 96.83%). The absolute majority calculated according to Art. 139b para. 3 FC is therefore relevant in all cases, not only in the case of differences between the people and the cantons. Instead of the bill that collects "the most electoral votes and the most votes of the Estates" (cf. Art. 76 para. 3 sentence 2 PRA), the bill with the most

electoral votes and the most votes of the Estates emerges as the winner (cf. also the Italian version: "il maggior numero di voti del Popolo e dei Cantoni").

b. (Actual) requirement of the highest sum of popular and cantonal votes.

It follows from the above that the outcome of the vote on the subsidiary question - if it is to unfold its scope - is determined by a special majority: The bill is adopted which gathers the highest sum of the votes of the voters and the cantons (Art. 76 para. 3 2nd sentence PRA cum 139b para. 3 FC). 43

If an answer to the run-off question attracts the majority of the popular vote and the majority of the votes of the cantons, it necessarily also attracts the majority of the sum of the popular vote and the votes of the cantons. In this case, which is the normal case according to the conception of the constitutional legislator and the legislator, no additional calculation is necessary. 44

Conversely, if one bill achieves a popular majority and the other a majority of the cantons (both bills have each achieved a double majority in answer to the main question), Art. 139b para. 3 FC prescribes a method known as the "sum of the percentages", in which the electoral and cantonal votes received by each bill are converted into percentages and then added together. 45

Under this method, each canton is worth about 4.348%, and each "half-canton" is worth about 2.174%. The total sum of the popular and the cantonal votes is equal to 200 % (100 % of the votes of the citizens and 100 % of the votes of the cantons). The absolute majority is calculated from this total. It is thus achieved by the proposal for which the sum of the votes converted into percentages exceeds 100 %, irrespective of whether this proposal received a minimum of more than 50 % of the popular votes and more than 50 % of the votes of the cantons. In other words, the winning bill is the one that receives the highest sum of popular and Estates votes expressed as a percentage. 46

As an example, one can imagine that when answering a subsidiary question with a total of 2,500,000 responses, an initiative receives 13 cantons, 4 "half-cantons" and 1,200,000 popular votes, while its counter-proposal receives 7 cantons, 2 "half-cantons" and 1,300,000 votes. Converting these results into percentages, the initiative receives approximately 65.22% of the cantonal votes and 48% of the popular votes, and the counter-draft receives approximately 34.78% of the cantonal votes and 52% of the popular votes. In total, 47

therefore, the initiative receives 113.22 % of the popular and cantonal votes and the counter-draft 86.78 %. In this case, therefore, it is the initiative that achieves the majority, since it has received more than 100 % of the votes (and logically a higher percentage than the counter-draft).

48 The criterion of the sum of the percentages is neutral towards the initiative and the counter-proposal. It respects the equality between these two proposals and prevents the status quo from being unduly favoured, even though both the initiative and the counter-proposal were adopted by a double majority of the people and the cantons in response to the main questions. In our opinion, however, this special majority constitutes an unjustified interference with the equality of voting rights. It gives more influence to (citizens of certain) cantons than to voters (of other cantons). However, this unbalanced influence cannot be justified from a constitutional point of view at the stage of the subsidiary question. After all, the vote on the run-off question is not about whether an item is accepted (> 50%) or rejected (< 50%), but about deciding between two constitutional amendments that have already been accepted according to the modalities of a compulsory referendum. It therefore does not fall within the scope of the double majority rule (Art. 140 para. 1 let. a FC). The criterion of the highest sum of the votes of the people and the cantons also deviates from the meaning of the double majority. It is no longer a question of bringing together a minimum number of bodies that agree on a subject (Art. 142 para. 2 FC), but of granting the cantons a mathematical influence on the answer to the subsidiary question. However, such an influence of the cantons finds no justification either in the principle of federalism or in any other general principle.

49 According to the present commentary, therefore, only the majority of the people should be decisive for the outcome of the vote on the run-off question, as the authorities had also intended in the total revision of the Constitution. However, such a paradigm shift requires a revision of Art. 139b para. 3 FC and Art. 76 para. 3 sentence 2 PRA.

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COMMENTARY ON

Art. 76a PRA

A commentary by Goran Seferovic

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Title 5a Register of Political Parties

Art. 76a

[1] A political party may be officially registered with the Federal Chancellery:

a. if it has the legal form of an association in terms of Articles 60–79 of the Swiss Civil Code; and

b. if it is represented in the same name by at least one member in the National Council or by at least three members in each of any three cantonal parliaments.

[2] For entry in the Register of Political Parties, the association shall file the following documents and information with the Federal Chancellery:

a. a copy of its legally valid constitution;

b. the name and headquarters of the party in accordance with the constitution;

c. the names and addresses of the president and secretary of the national party.

[3] The Federal Chancellery shall maintain a register of the information filed by political parties. This shall be a public register. The Federal Assembly shall enact an ordinance to regulate the details of the register.

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I. HISTORY OF ORIGINS

1 Parties appeared late in Switzerland; they did not exist in the Federal Assembly of 1848. The cantonal liberal movements of the 1830s in particular resisted being called a "party", as the term was discredited. The Freisinnige Volkspartei was not founded until 1873 and the first parliamentary group in the Federal Assembly, the "Radical Democratic Group of the Federal Assembly", was not constituted until 1878. The need for parties also only arose with the declining influence of the liberal elite in the early federal state towards the end of the 1870s. Politics now depended on the participation of the people, but the majority of the people were not interested in politics or did not have the education and leisure to take an interest in politics. The political parties jumped into this gap and now supported the political decision-making of the electorate. From then on, the importance of the parties increased in parallel with the importance of the people's rights, although it was precisely the people's rights that led to the political parties in Switzerland exerting less influence on state decisions than in other countries.

2 Accordingly, political parties were not an issue for constitutional law doctrine for a long time either, as legislation and constitutional law ignored them. "Constitutional law, however, with its duties and its powers, knows nothing of parties" wrote Johann Caspar Bluntschli in 1869, meaning that the norms of constitutional law should not distinguish between parties and that the institutions and offices of the state should not be exercised according to party criteria.

3 The Federal Constitution has only mentioned parties since the total revision in 1999. Since then, art. 137 stipulates that political parties participate in the formation of the opinion and will of the people. Although formal constitutional law did not mention the parties before, it was of course undisputed at the end of the 20th century that political parties today have a central function in state politics. It may be related to a still widespread scepticism towards an increased party statehood that art. 137 FC merely states what has long been valid anyway. The normative content of the constitutional provision is also rather low. The doctrine considers it inadmissible to give political parties legal or financial advantages on the basis of art. 137 FC that go beyond the provisions of organisational law. In particular, art. 137 FC cannot be the basis for di-

rect party financing, although Hangartner, for example, feared that art. 137 would one day be used as a basis for financial aid to the parties.

Despite the unclear scope of art. 137 FC, the Federal Council used this provision to establish – together with art. 39 para. 1 FC – the party register provided for in art. 76a PRA, which at the same time was to form a new title in the PRA. The Federal Council was also aware of the scepticism towards a stronger party statehood, claiming in its dispatch that it only wanted to regulate the party system in a "moderate manner". The party register was nothing more than the logical continuation of the decision of the constitutional legislator to anchor the parties in the FC. At the same time, however, the Federal Council did not conceal the fact that a party register was the prerequisite for any further type of party regulation, whereby art. 76 PRA could form the basis for further regulations of political parties. However, the federal government now essentially bases its regulations on the transparency of political funding on art. 39 para. 1 FC. 4

II. SIGNIFICANCE OF THE PROVISION

A. General

The practical significance of the provision has so far been limited, since the only relief that registration brings is that the party is exempt from the quorums under art. 24 para. 1 PRA under certain circumstances. The provisions on party financing are not linked to the party register, but to the concept of "political party represented in the Federal Assembly" (art. 76b para. 1 PRA). 5

The significance lies rather in the fact that a party register, if one is to follow the argumentation of the Federal Council, is the logical next step that must follow the mention of the parties in art. 137 FC (cf. already above n. 4). The Federal Supreme Court also followed this assessment and, with reference to art. 137 and 147 FC, held that the federal legislature could also attach consequences to the registration of parties under art. 76a PRA, which would not have to be limited to elections, such as the facilitation under art. 24 para. 3 and 4 PRA. The register formed the basis for a party regulation "in general". 6

In terms of legal policy, art. 76a PRA can thus form an administrative starting point for the whole issue of increased party statehood. However, art. 137 FC offers no basis for this. The doctrine also sometimes discusses whether art. 7

137 FC could form the constitutional basis for transparency regulations on party financing (cf. already above n. 4).

8 Registered parties enjoy a further preferential treatment under tax law, because according to art. 33 para. 1 lit. i no. 1 DBG and art. 9 para. 2 lit. l no. 1 StHG, membership contributions and donations to parties that are registered in the federal party register may be deducted from income. However, the same also applies to parties that are represented in a cantonal parliament or have obtained at least three per cent of the votes in cantonal parliamentary elections.

B. Legal comparison

9 For a long time, the cantons had no counterparts to the register of political parties under art. 76a PRA. The federal party register only refers to the exercise of political rights at federal level, although art. 76a para. 1 lit. b somewhat inconsistently also refers to their representation in the cantonal parliaments for the registration possibilities of parties.

10 The canton of Fribourg has had a cantonal party register since 2009, whereby the modalities are largely modelled on the PRA. The register goes back to a motion that called for such a register in order to relieve the parties of having to collect a number of signatures from voters for their electoral lists. Similarly, the canton of Vaud introduced such a party register in 2021 with the same justification as the canton of Fribourg, which is also based on art. 76a PRA for the modalities.

III. COMMENTARY ON THE TEXT OF THE NORM

A. Requirements for official registration (para. 1)

1. Definition of political party

11 Official registration is open to political parties. In accordance with the fact that political parties were not mentioned in the Constitution until the total revision of the FC in 1999, the term political party was also not legally defined before (cf. already above n. 3). Strangely enough, however, the PRA does not define the important concept of political party, but to a certain extent already presupposes it in art. 76a PRA. Only the Federal Assembly Ordinance defines

the political party as an "association which, on the basis of its statutes, primarily pursues political purposes". Thus, from the outset, only associations come into question as political parties within the meaning of art. 76a PRA, which is why the definition is rightly criticised as circular.

The question of whether an association primarily pursues political purposes must be based on the purpose of the association as defined in its statutes. The political purpose must not form a mere secondary purpose of the association, whereby the distinction between main purpose and secondary purpose is used in civil law primarily with regard to the economic secondary purpose and thus cannot be adopted without further ado for the political main purpose. 12

2. Legal form of the association

On the one hand, the constitution as an association is a conceptual feature of political parties, as defined by art. 2 of the Regulation on the Register of Political Parties. On the other hand, the legal form of an association within the meaning of art. 60–79 of the Civil Code is a prerequisite for official registration under art. 76a para. 1 lit. a of the PRA. Since political parties in Switzerland have always chosen the form of association, this restriction of the corporate form may have been undisputed. Nevertheless, the legislator thereby excludes any other form of company and associations of persons, which constitutes a restriction of freedom of association. Particularly in the case of the simple partnership, it is sometimes argued in the doctrine that such a partnership should not be excluded per se. The relevant criterion here seems to be the question of permanence, which the Federal Council also emphasised several times in its dispatch on the revision of the PRA. 13

3. Minimum number of political mandates

Another precondition for registration is a minimum number of political mandates, which is supposed to guarantee both the permanence and the seriousness of an association or a political party. The message speaks somewhat paternalistically of "trial balloons" and "mayflies" who are to be denied the benefit of registration. However, art. 2 of the Political Parties Register Ordinance can only claim significance for the registration of a party and not for its existence. Nevertheless, in tax law norms, the federal government and the cantons already link the entry in the party register to the question of whether dona- 14

tions to parties are tax deductible. At least at the federal level, however, the entry in the register of political parties is only one of several alternative criteria. The party register nevertheless provides for a certain gradation between more relevant parties, which enjoy certain administrative and tax advantages, and the other parties.

15 A political party can register if it is represented either by one member in the National Council or by three members each in three different cantonal parliaments. This regulation favours parties that have a certain importance at the federal level. In the opinion of the Federal Supreme Court, the member of the National Council must already have been elected as a representative of the party in question.

B. Documents and information (para. 2)

16 The Federal Chancellery (Political Rights Section) is responsible for registration; it maintains the register of parties. The PRA mentions as documents and information to be submitted by the association a copy of the legally valid statutes, the statutory name and registered office of the party, and the names and addresses of the presiding and managing persons of the federal party. For the purpose of registration, the Federal Chancellery has drawn up a form based on art. 3 of the Ordinance on the Register of Political Parties, which is available free of charge in both electronic and paper form.

C. Register and Parliamentary Ordinance (para. 3)

17 The Federal Chancellery maintains the register of parties, which is public and can be viewed both on the internet and on site; 14 parties are currently listed in it. The information on the internet is currently provided with the notice that the information will only be updated at the request of the parties. However, since art. 4 of the Regulation on the Register of Political Parties subjects the parties to an immediate reporting obligation with regard to changes in the obligatory information, this is not a request by the parties. This reporting obligation is backed up by the legal consequence that parties lose their relief under art. 24 paras. 3 and 4 PRA if they have not complied with the reporting obligation by 1 May of the election year.

18 The order of the Federal Chancellery refusing entry in the register of parties is directly contestable before the Federal Supreme Court.

With art. 76a para. 3 PRA, the legislature mandates the Federal Assembly to regulate the details of the register in a parliamentary ordinance. The Federal Council justified this by referring to art. 163 para. 1 and art. 164 para. 2 FC. Art. 164 para. 2 FC concerns the delegation of legislative powers, which means that the Federal Assembly assumed that the Register of Political Parties Ordinance should not only contain enforcement provisions. Art. 164 para. 2 FC also concerns the case where the Federal Assembly, as legislator, delegates to itself the competence to regulate a matter by means of a legislative delegation. The Federal Assembly has complied with this mandate by enacting the Ordinance on the Register of Political Parties. 19

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COMMENTARY ON

Art. 90 PRA

A commentary by Goran Seferovic

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Chapter 2 Transitional Provisions, Implementation and Commencement

Art. 90 Transitional provisions

[1] This Act does not apply to any matters or appeals that relate to elections or popular votes that have taken place prior to its coming into force. The foregoing also applies to referendums and popular initiatives that have been submitted prior to its coming into force. In such cases, the previous law applies.

[2] On expiry of 18 months from the date on which this Act comes into force, signature lists shall be accepted only if they comply with the provisions of this Act.

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I. HISTORY OF ORIGINS

Paragraphs 1 and 2 of the transitional provisions were already introduced when the PRA was enacted in 1976 and have not been amended since. 1

However, the provisions have lost their meaning over time. Paragraphs 3 and 4 were already repealed in 2008; they fell victim to a "de-cluttering of federal law". Paragraph 3 concerned the popular initiative of the Social Democratic Party on freedom of the press from 1935, which the authorities had delayed for years for political reasons. The initiators could not formally withdraw the initiative after the Second World War due to the lack of a withdrawal clause, which is why it was written off by law. Paragraph 4 was inserted in 1978 and concerned an adjustment of the distribution of seats in the National Council after the foundation of the Canton of Jura. 2

In the case of paras. 1 and 2, the Federal Council was probably not sure whether these provisions could also have been repealed during the formal revision of federal law. 3

II. COMMENTARY ON THE TEXT OF THE PROVISION

Art. 90 of the PRA is a classic transitional provision that deals with the temporal applicability of the newly introduced provisions. Elections and votes that took place before the entry into force of the PRA, as well as referenda and popular initiatives that were submitted beforehand, were to be assessed entirely according to the previous law. This was to prevent the applicable law from changing in the course of such proceedings. 4

Para. 2 additionally specified this transitional regulation with regard to the signature lists to be submitted for referendums and popular initiatives. Here the PRA was based on the collection period for popular initiatives, which was already 18 months from publication in the Federal Gazette when the PRA was enacted in 1976. Both paragraphs, which are still in force today, have lost their original meaning. 5

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