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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

**JOINT OPINION
ON THE ELECTION CODE
OF MOLDOVA
as of 10 April 2008**

**Adopted by the Venice Commission
at its 76th Plenary Session
(Venice, 17-18 October 2008)**

**on the basis of comments by
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I. Introduction

Mandate

1. In April 2008, the Parliament of the Republic of Moldova adopted amendments to the Election Code. Following an official request from the Moldova authorities forwarded to the Venice Commission on 28 August, and in line with their usual co-operation, the OSCE/ODIHR and the Venice Commission have undertaken a joint expert review of the Election Code of Moldova (hereinafter "the code") as amended.

2. The present opinion should be read in conjunction with the Joint Opinion of the Venice Commission and the OSCE/ODIHR, adopted by the Venice Commission at its 73rd Plenary Session in December 2007.¹ It focuses on the extent to which the amendments have addressed previous recommendations, and assesses the amendments against OSCE commitments and international standards for democratic elections.

3. The current review was prepared on the basis of an English translation of the Election Code provided by the Parliament of Moldova² without the possibility to consider the original language. Thus, it does not warrant the accuracy of the translation reviewed, including the numbering of articles, paragraphs, and sub-paragraphs. Any legal review based on translated laws may be affected by issues of interpretation resulting from translation.

4. The present Opinion was adopted by the Venice Commission at its 76th plenary session (Venice, 17-18 October 2008).

Reference Documents

5. This Joint Opinion is based upon:

- The Election Code (Law No 1381-XIII of 21 November 1997, as of 10 April 2008; CDL(2008)082; hereinafter "the code" provided by the Parliament of Moldova).
- The Constitution of the Republic of Moldova as of 29 July 1994 with the last amendments of 25 July 2003.
- The Joint opinion on the Election Code of Moldova adopted at the 73rd plenary session of the Venice Commission (Venice, 14-15 December 2007, CDL-AD(2007)040; hereinafter "the last Joint Opinion").
- The Joint Opinion on the Election Code of Moldova as amended on 22 July, 4 and 17 November 2005 adopted by the Venice Commission at its 66th plenary session (Venice, 20 March 2006, CDL-AD(2006)001).
- The Code of Good Practice in Electoral Matters. Guidelines and Explanatory Report. adopted by the Venice Commission at its 52nd session (Venice, 18-19 October 2002, CDL-AD(2002)023rev).
- The Interpretative Declaration on the Stability of the Electoral Law adopted by the Council for Democratic Elections at its 15th meeting (Venice, 15 December 2005) and the Venice Commission at its 65th plenary session (Venice, 16-17 December 2005, CDL-AD(2005)043).
- Council of Europe, Parliamentary Assembly, *Honouring of obligations and commitments by Moldova* (doc. 11374, 14 September 2007; Report Committee on the Honouring of Obligations and Commitments by Member States of the Council of Europe (Monitoring Committee); Co-rapporteurs: Mrs Josette DURRIEU, France,

¹ CDL-AD(2007)040.

² The Election Code (Law No 1381-XIII of 21 November 1997, as of 10 April 2008), CDL(2008)082.

Socialist Group and Mr Egidijus VAREIKIS, Lithuania, Group of the European People's Party).

Executive summary

6. The Election Code regulates all direct elections and referenda in the Republic of Moldova except those for the authorities of the Autonomous Territorial Unit of Gagauzia. The 2007 joint opinion³ concluded that "*Following the recommendations of the last Joint Opinion on the Election Code of Moldova,⁴ the Moldovan Parliament has undertaken considerable efforts to improve the electoral legislation. The Election Code as amended up to March 2007 provides a good basis for the organisation of genuinely democratic elections, despite the fact that some Venice Commission and OSCE/ODIHR recommendations have not been reflected in the revised text. Thus, the key challenge for the conduct of genuinely democratic elections remains the exercise of political will by all stakeholders, and a good faith implementation of the electoral legislation.*"

7. Considering the main recommendations underlined in the last joint opinion, here is an executive summary of the recommendations fully, partially or not implemented in the Election Code as of 10 April 2008.

8. Recommendations partially implemented:

- to bring in line the provision for the denial of the right to vote to prisoners serving a sentence following a court ruling with the latest jurisprudence of the ECHR;
- to abide by the principle of presumption of innocence proceedings in those cases of violations of the law that can lead to the revocation of a candidacy;
- to better ensure the secrecy of the vote by eliminating the requirement for stamping of ballots after they have been marked by voters;
- to introduce further control mechanisms during the counting of votes;
- to clarify the authority of election commissions and courts with regard to invalidation of election results;
- to improve the reliability of the voters' list, including through the introduction of a centralised and permanent voters' register.

9. Recommendations which have not been implemented:

- to create possibilities for adequate participation in elected bodies of national minorities and mainstream interests at regional level;
- to remove turnout requirements for elections to be recognised as valid in order to avoid potential endless cycles of failed elections;
- not to increase thresholds for winning seats;
- to reconsider the possibility of recalling election commission members as the instability of their status has the potential to undermine the independence and the stability of election administration;
- to oblige the Central Election Commission to publish detailed election results by polling station on its website as soon as they have been processed by the district electoral commissions;
- to clarify the decision-making authority of members of the Central Election Commission with deliberative and consultative vote;
- to institute adequate safeguards against possible multiple voting in case election day registration is to be maintained;
- to streamline further signature collection and verification procedures in order to ensure that they do not impede inclusive candidate registration;

³ CDL-AD(2007)040, par. 82-84.

⁴ Referring to the previous Joint opinion on the Election Code of Moldova adopted at the 66th plenary session of the Venice Commission (17-18 March 2006, CDL-AD(2006)001).

- to review restrictions to the right to campaign in order not to preclude a meaningful pre-electoral campaign, as well as not to contradict general principles of freedom of speech and expression;
- to define clearly powers and responsibilities of various bodies responsible for the review of complaints and appeals so as to avoid conflicts of jurisdiction;
- not to grant appellants the right to choose an appeal body.

II. The April 2008 amendments

10. The amendments introduced this year are not comprehensive, and have not addressed most of the previous recommendations. While some of the amendments bring about technical improvements to the organisation of the electoral process, it is unfortunate that some of them, such as new restrictions to the right to be elected, represent a setback. Overall, the extent to which the amendments addressed previous recommendations of OSCE/ODIHR and the Venice Commission has been limited.

11. The amendments touch upon the following issues:

- The removal of pre-election alliances (blocs);
- Change of threshold for winning seats in the parliament;
- Nomination of candidates;
- Restrictions to the right to be elected;
- Restrictions to the right to vote;
- The Central Election Commission members;
- The ballot;
- Voter identity;
- Reconciliation of the vote count;
- Complaints and appeals procedures.

III. The Electoral System for Parliament

The electoral system

12. In their last Joint Opinion, the Venice Commission and OSCE/ODIHR, as well as in other previous opinions, stressed the importance of taking into account sizable national minorities living on the territory of the Republic of Moldova when deciding on an electoral system. It was recommended that "*The electoral system for the Parliament should create possibilities for adequate participation in public life of national minorities and mainstream interests at regional level*".⁵

13. The amendments have not introduced any changes to the electoral system of the Parliamentary Elections, thus the authors of this review note that previous recommendations of the Venice Commission and the OSCE/ODIHR vis-à-vis the electoral system remain relevant and should be considered.

The increase of the threshold for winning parliamentary seats

14. The threshold for winning seats in the parliament has been changed several times. In 2005, it was lowered from 6% to 4% for parties and from between 9 and 12% to 8% for blocs. The OSCE/ODIHR and the Venice Commission have credited the previous reduction of threshold as an improvement and in their last Joint Opinion have specifically advised that "*The authorities should in no case reverse this welcome reduction and stick to the threshold established for political parties*". It was also noted

⁵ CDL-AD(2007)040, beginning of par. 84.

that “*One would believe that coalitions should be encouraged in order to provide more cooperation and stable government*”.⁶

15. Instead, the April 2008 amendments have raised the threshold for participating in the allocation of seats from 4 to 6% of the valid votes in the country as a whole (Article 86(2)). The new 6% threshold is rather high (even though there are countries with even higher thresholds). Such a high threshold may lead to a high number of wasted votes.⁷ It is therefore recommended to keep the threshold lower than this.

The removal of pre-electoral alliances

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

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

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

IV. Candidacy and voting rights

Right to vote

19. In their last Joint Opinion, the OSCE/ODIHR and the Venice Commissions had noted that “*According to the ECHR, restrictions of the right to vote affecting all convicted prisoners in a general, automatic and indiscriminate manner are incompatible with Article 3 of the First Protocol (Right to free elections) to the Convention for the Protection of Human Rights and Fundamental Freedoms*”.⁸

20. An amendment to Article 13(1)c of the Election Code narrowing down the restriction to a smaller group of “*persons convicted to deprivation of liberty by a final judgment of the law court for serious, very serious and exceptionally serious crimes*.”⁹ The amendment to Article 13(1)c is an improvement, even though it lacks precision. It is also not clear whether the paragraph also includes those whose sentence has been fully served. Should this be the case, it would be unacceptably harsh. The code should further state that only explicit court decisions should remove the voting right and such decisions should only happen under sever circumstances.¹⁰

⁶ CDL-AD(2007)040, par. 16.

⁷ Additionally, one should refer to a similar recommendation from the Parliamentary Assembly of the Council of Europe in its Doc. 11374, *Honouring of obligations and commitments by Moldova* (14 September 2007), par. 12, 45-46.

⁸ CDL-AD(2007)040, par. 63.

⁹ The end of the sentence was not translated in the translation provided.

¹⁰ Code of Good Practice in Electoral Matters (CDL-AD(2002)023rev), I. 1.1., d, v.

21. It is necessary to note that according to the Criminal Code of the Republic of Moldova, any crimes, for which the Criminal Code prescribes a punishment of above five years in prison, are considered serious. Thus, it may be advisable to further review this article and relevant provisions of the Criminal Code to provide for specific cases in which the court of law makes a decision on deprivation of the right to vote, where it is proportionate to the committed crime and serves the aim of the punishment declared in Article 61(2) of the Criminal Code of *“reinstating social justice, correction of the convicted, as well as prevention of new crimes”*.

22. As already mentioned in previous joint opinions, according to Article 123(1), conscript military personnel is not allowed to vote in local elections. This issue was not addressed by the amendments. Neither did the amendments introduce the previously recommended general accessibility principle to allow minimum guarantees for elderly voters and voters with disabilities.

The right to be elected

23. Article 13(2) lists the categories of persons who “may not be elected”. Such a wording is ambiguous. Should it be understood as listing restrictions to the right to stand as a candidate, or as listing restrictions to the right to take a mandate? In other words, is Article 13(2) dealing with ineligibility or with incompatibility? In the former case, the restrictions of article 13(2) would provide ground to reject a candidacy before the elections; in the latter case, the restrictions would theoretically only apply when taking the mandate.

24. In fact article 13(2) mixes up together the two situations. Some restrictions clearly seem to deal with the right to stand as a candidate, in particular: restrictions applying to persons who do not have the right to vote [13(2)b], to *“persons convicted to deprivation of liberty by a final judgment of the law court and whose criminal record is not extinguished”* [13(2)c], and to *“persons deprived of the right to occupy responsibility functions by a final decision of the law court”* [13(2)d]. It is less clear for the two other restrictions, which could be interpreted as incompatibilities, although it is not clearly specified: *“serving military men”* [13(2)a] and *“persons who have beside the Republic of Moldova nationality and other nationality for the position of deputy in the conditions of Art. 75’ [13(2) b’]*.

25. For the sake of clarity, it is recommended avoiding the use of the wording “right to be elected”, in favour of the legally clearer “right to stand as a candidate”. It is also recommended to regulate incompatibilities in a separate and clearer provision.

26. Beyond the above mentioned ambiguity, the restrictions established by article 13(2) deserve more substantive attention:

27. An amendment to Article 13(2)c excludes persons *“convicted to deprivation of liberty by a final judgment of the law court serving their sentence in detention centers or who have uncovered criminal record for committing serious, very serious, or exceptionally serious crimes”* and a new Article 13(2)d denies passive suffrage to *“persons deprived of the right to occupy responsibility functions by a final decision of the law court”*.

28. The restriction brought by amendments to Article 13(2)c may be excessive. Article 13(2)d already provides for denial of passive suffrage to those persons who have been *“persons deprived of the right to occupy responsibility functions by a final decision of the law court”*, thus recognising that denial of a right to hold an official position is something upon which a court may specifically decide as a form of punishment. It is advisable to further review the provision under Article 13(2)c and relevant provisions of the Criminal

Code to provide for specific cases in which a court may deprive a person of the right to be elected, where it is proportionate to the committed crime and serves the aim set in Article 61(2) of the Criminal Code of “*reinstating social justice, correction of the convicted, as well as prevention of new crimes*”.

29. In general, any limitations to the right to be elected going beyond those ensuing from restrictions to active suffrage appear contrary to the provision of Article 38(3) of the Moldovan Constitution, which says that “*The right to stand for election shall be guaranteed, under the law, to all citizens of the Republic of Moldova enjoying the right to vote*”.

30. A new paragraph to article 13(2) denies the right to “*be elected*” in parliamentary elections to “*persons who have, beside the Republic of Moldova nationality, another nationality for the position of deputy in the conditions of Art. 75*”. Article 75(3) states that a person may stand as a candidate with multiple citizenships, provided he/she upon election denounces other citizenships than the Moldovan. This must be considered as an incompatibility.

31. Beyond the mere question of the wording, restrictions of citizens’ rights should not be based on multiple citizenship. The Code of Good Practice in Electoral Matters quotes¹¹ the European Convention on Nationality, ratified by Moldova in November 1999, which unequivocally provides that “*Nationals of a State Party in possession of another nationality shall have, in the territory of that State Party in which they reside, the same rights and duties as other nationals of that State Party.*”¹²

32. Moreover, this restriction could be a violation of the Convention for the Protection of Human Rights and Fundamental Freedoms, articles 3 of the first Protocol¹³ and 14 of the Convention.¹⁴

33. An amendment to Article 13(3) specifies which categories of officials “*shall cease their activity in the position that they hold, upon their registration as electoral competitors*”. This specification is welcome.

34. Article 13(3) is amended to specify exactly which positions are incompatible with candidacies. This is good since the provision has been rather general before.

V. The election administration

35. Concerns expressed in the last Joint Opinion over the absence of provisions clarifying rights and responsibilities of contestants’ representatives nominated to electoral bodies with consultative vote remained unaddressed by the amendments.

36. The amendments have changed the Article 17(6) to remove the limit for the number of terms for the CEC members.

¹¹ Code of Good Practice in Electoral Matters (CDL-AD(2002)023rev), I. 1.1., b, par. 6.

¹² European Convention on Nationality (Strasbourg, 6.XI.1997, ETS No. 166), Article 17.1.

¹³ First Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocol No. 11 (Paris, 20.III.1952, ETS No. 009); Article 3 – Right to free elections:

The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature.

¹⁴ Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocol No. 11 (Rome, 4.XI.1950, ETS No. 005); Article 14 – Prohibition of discrimination:

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

37. The amendments to Article 18(2) and introduction of Article 18(2¹) of the code provide clarifications to the decision-making process of the CEC and the order of submitting special opinions for CEC members with dissenting vote. This is positive.

38. The amendments made in Articles 19(1) and 20(2)b introduced additional requirements for CEC membership, namely a 10-year experience record in the legal or public administration, and the possession of the Moldovan citizenship exclusively. It is not easy to see the justification of the latter requirement. If Moldova accepts multiple citizenships in general, one should not make such citizens second rank citizens by limiting their rights.¹⁵

39. Article 32 has been amended to assign the material liability for “*keeping and returning of the goods received from Central Election Commission*” to the chairpersons of electoral councils and bureaus.

40. The amendments did not address the previously raised concern over the possibility to recall a member of an electoral council or bureau by the institution which nominated or appointed him/her according to Article 33.

41. The recommendation in the last Joint Opinion to include “adequate provisions” to “*guarantee that all parliamentary parties will have at least minimal representation on commissions*”¹⁶ and the OSCE/ODIHR’s recommendation “*to consider as part of the formula for forming commissions enabling the participation of parties that in some regions of the country have a stronger presence than national parties represented in the parliament*”¹⁷ have not been addressed by the amendments.

VI. Voters’ lists

42. On 15 May 2008, the Moldovan Parliament adopted a Law on the Concept of State Automatic Information System “Elections”, which tasked the Central Election Commission to develop and introduce an electronic system facilitating the preparation, conduct and tabulation of election results. The Concept envisages *inter alia* creation of a centralised electronic voter register to eliminate the need for paper voters’ lists and to exclude the possibility of multiple voting¹⁸.

43. The implementation of this new Law could potentially address a number of concerns raised in the last Joint Opinion¹⁹. Recommendations made in March 2006 Joint Opinion²⁰ pertaining to ensuring publicity of the voter register, access of voters to the data on the register, allowing for a sufficient scrutiny period, as well as existence of revision mechanisms remain valid.

VII. Candidates Registration and De-registration

Nomination

44. An amendment to Article 13(2)c excludes persons “*convicted to deprivation of liberty*”. An addition to Article 41 specifies that parties contesting the elections “*may*

¹⁵ See the European Convention on Nationality, ref. ETS 166.

¹⁶ CDL-AD(2007)040, par. 26.

¹⁷ Recommendation 3 in OSCE/ODIHR Election Observation Mission Final Report, Local Elections 3 & 17 June 2007.

¹⁸ During 3 June 2007 local elections, the CEC implemented an electronic voter list pilot project in three polling stations in Chisinau, where voters were electronically crossed out from a common database as having cast their ballots. See the OSCE/ODIHR Election Observation Mission Final Report, Local Elections 3 & 17 June 2007.

¹⁹ CDL-AD(2007)040, par. 31-34.

²⁰ CDL-AD(2006)001, par. 46-50.

nominate for the electoral candidate their members and also persons without any political affiliation". This provision must be read in conjunction with the prohibition on forming pre-electoral blocs and coalitions introduced by the amendments, since its rationale appears to be to avoid different political parties building *de facto* pre-electoral coalitions. While this is clearly consistent with the prohibition of pre-electoral blocs, such restrictions to political parties' freedom to choose candidates on their lists is better avoided, even if it concerns other parties' members. This would allow a party not running for a certain election to support another list, a move which should be permitted in particular when pre-electoral blocs are not allowed. If a person runs against his/her own party's list, then it should be left to the discretion of the party to take action. As a matter of principle, parties running in an election should be able to compose their lists as they see fit.

45. Article 44 has been supplemented by provision 3¹, which states that "*A person may aspire to more electoral position but only from one party*". It is taken for granted that the limitation applies to elections held at the same time. This could be specified, and one could specify that running as an independent candidate is permitted even if a person runs as a party candidate in another race.

Registration

46. Shortcomings in Articles 42 and 43, which regulate the collection of signatures in support of independent candidates, indicated in the last Joint Opinion have remained unaddressed.²¹

47. Amendments made to Article 44 clarifying a start date for submission of registration documents, as well as setting a minimum period between "*the passing of the decision on the place and time for receiving documents and the actual time for receiving the documents*" are positive. However, the code remains unclear on the issue of procedures for the verification of documents submitted by candidates for registration, as well as what happens if any of the information is found inaccurate.

48. An amendment to article 48(3) slightly changes the process for deciding the sequence of electoral contestants on the ballot. It seems that the sequence is still according to the time the nomination is filed, but for nominations received on the same day it is stated that the sequence within that group is decided by lots. The addition to article 44(2) specifies that there needs to be at least 24 hours between the announcement of time and place for receiving the nominations and the start of receiving such documents. This, together with the lots, seems to provide for fair arrangements for the placement on the ballot where parties are provided for the same possibilities for getting a good placement on the ballot.

49. It is recommended to determine the order of appearance of contestants on the ballot by drawing of lots carried out openly and transparently, only after the registration of all electoral competitors, and preferably in the presence of representatives of all electoral competitors and the media.

50. An amendment to article 134 has clarified the sequence on the ballot for the two remaining candidates in possible runoffs in mayoral elections.

De-registration

51. A new provision 6¹ in Article 46 states "*The withdrawal demand of the candidate from the list presented during the term established by paragraph (6) will be examined by*

²¹ CDL-AD(2007)040, par. 35-43.

the respective competent organs of the party during 3 days.” The reading of this provision is uneasy. In particular, while it is assumed that it is to the competent organ of the party that a withdrawal demand is submitted by the candidate, it would be useful to specify it. In addition, the next steps of the procedure, after the party’s organs examine the request for withdrawal, are not specified, in particular modalities for notifying the body of registration.

52. Amendments to several articles of the code have provided some improvement to the issue of de-registration of candidates due to violation of the Electoral Code, a question mentioned in previous Joint Opinions. The amendments have introduced a requirement to have a “final court decision” for the application of the cancellation of registration

53. The following three new provisions were added to Article 69:

“2. For violation of the present Code Central Elections Commission may apply or may request application to the electoral competitors following sanctions:

a) admonishment;

b) annulment of registration;

3. Admonishment is applied by a Central Elections Commission decision, and the annulment of registration, by a final court decision.

4. Admonishment is applying for violation of the present Code, except Articles 70 and 71.”

54. Amendments to Articles 26, 93 and 138 of the code have reflected this principle and provide some clarity in the application of cancellation of registration and non-registration. The introduction of a court procedure for de-registration is a welcome development, as it is assumed it would provide the defendant with adequate procedural guarantees; however, some concerns expressed in previous joint opinions remain:

55. The joint recommendations stressed the need that any proceedings that should lead to such a sanction should abide by the principle of presumption of innocence. The code should also specify that such decisions should not lead to the cancellation of the mandate of an elected candidate. These recommendations are reiterated.

56. In addition, the current wording of the code implies that any “violation of the code” may constitute possible grounds for de-registration, without consideration of its gravity. The provisions of the code should be reviewed in order to guarantee that minor offences do not result in such drastic sanctions as de-registration of a candidate. A September 2007 decision of the Chisinau Court of Appeal excluding candidates for repeat mayoral elections in the villages of Buteni and Chirca in implementation of article 138, illustrates the need to introduce a principle of proportionality.²²

57. Finally, recommendations related to the cases of deregistration of entire lists resulting from withdrawal of candidates have not been acted upon. Under Article 126(1) of the Election Code, a party taking part in local elections is obliged to submit a certain minimum number of candidates on a party list which corresponds to 1/2 of the number of mandates in a given district council. Similar provision exists for parliamentary elections, as stated in Article 79. During the 2007 local elections, the above requirement was used by some election commissions as grounds for annulment of entire candidate lists following withdrawal of some candidates, when the number of remaining candidates fell below the required number.²³

²² The Chisinau Court of Appeal ruled on 4 September 2007 that two candidates, who had won the elections in June in the villages of Buteni and Chirca, were guilty of violation of the electoral code and had to be excluded from repeat elections. These candidates were excluded although the CEC had argued in the courts that in both cases there was no convincing evidence for violations of the Code, and that the violations alleged by the plaintiff were of minor nature.

²³ See OSCE/ODIHR Election Observation Mission Final Report, Local Elections 3 & 17 June 2007.

58. The Law should clarify that the withdrawal or exclusion of some candidates from a list of a party, that was already registered and thus has fulfilled all legal registration requirements, should not result in automatic deregistration of the entire list – a measure that should be generally regarded as a last resort in a democratic society.²⁴

VIII. Electoral campaign

Campaign activities²⁵

59. Concerns over potential limitations of the right of free expression and speech in paragraphs (1) and (12) of Article 47 of the code also remain unaddressed. These paragraphs should be reviewed.

60. The concern over Article 36(1), which can be interpreted as limiting legitimate efforts by international organisations promoting democracy and pluralism, which was noted in paragraph 47 of the last Joint Opinion, remains unaddressed.

61. Article 47(13) has been amended to state that local public authorities are obliged to establish “a *minimum number of places specially designed for electoral purposes*”. This could limit possible misinterpretation of this provision, which in the past led to restrict meetings with voters.

62. The addition of a paragraph (15) to article 47 to regulate advertisement on the Internet and via mobile telephones is an attempt to cover new technologies.

The Campaign and the Media

63. Shortcomings identified in the previous joint opinions have remained unaddressed, in particular the fact that “*news and current affairs programmes of some channels have reported on incumbents’ activities or offered them airtime immediately prior to the elections in such a way that one would perceive it as campaigning. On the other hand, Article 47(4) is rather extreme in not allowing any editorial reporting on the meetings of electoral competitors with the voters and similar events, apparently for fear of giving an advantage to some competitors. Leaving all campaign reports to paid or free advertisements may not provide the public with the best information on political differences*”.²⁶

64. This regulation creates a disproportionate advantage to the incumbents in the media, confirmed by election observation reports.²⁷ These recommendations are reiterated and should be seriously considered.

IX. Voting and Counting

Ballot Security and Secrecy of the vote

65. Ballot papers will now bear both the electoral district number and the polling station number printed on them, according to a change to article 49(2). This replaces the previous practice on stamping the ballot at the polling station, which the amendments

²⁴ See the OSCE/ODIHR Guidelines for Reviewing a Legal Framework for Elections, pages 20-21, available at http://www.osce.org/odihr/item_11_13588.html.

²⁵ For references to the previous Joint Opinion within this point, see CDL-AD(2007)040, par. 44-48.

²⁶ CDL-AD(2007)040, par. 59.

²⁷ Statements of Preliminary Findings and Conclusions of the International Election Observation Mission, Local Elections, 3 and 17 July 2007; available at <http://www.osce.org/odihr-elections/23665.html>.

have removed [former Article 54(5)]. Earlier opinions have been critical to the stamp because it was applied after the ballot had been filled out by the voter. The new arrangement is therefore an improvement. It could however render the logistics for printing and distribution of ballot papers much more complex.

Suspension of voting

66. Article 51 of the code has been supplemented by a paragraph (1¹) that reads “*On the local elections, in case when the procedure of ballot was suspended according to par. 1 did not restart during 2 hours, the ballot is considered suspended for a period which did not get by 2 weeks and Central Elections Commission in 3 days will adopt a decision about the day when will restart the suspended ballot. The procedure of ballot will restart in the same legal conditions*”.

67. The reason for including such a special provision for local elections is not readily apparent. The code does not provide specific conditions, under which the voting should be suspended for a longer time, rather than be re-located as prescribed by Article 51(1). This may lead to arbitrary interpretation of circumstances and decisions that may affect the voting process.

68. It is understandable that there may be special circumstances under which voting may not continue, or even be re-located to another venue, however any such circumstances should be clearly listed in the code, and closing of voting after 2 hours of suspension should not be foreseen. The relevant election commission (or in specific circumstance another relevant authority) should make a justified decision on such a prolonged suspension of voting before such suspension takes place and such a decision should be subject to appeal to a court. In addition, circumstances that may lead to such a long period of suspension of voting are possible under any election, and not only local elections.

Voter identification documents

69. Article 53(3) has been amended to include a list of valid identity documents for voter identification. This clarification is welcome.

Security of the mobile voting process

70. Article 55(4) has been supplemented with a sentence that reads: “*The requests are made prior 2 weeks of the beginning of the elections until the 15:00 hour in the day of election*”. This refers to requests for voting at the place of residence for people who can not come to the polling station on election day due to health reasons “*or based on other justified grounds*”.

71. The deadline and modalities introduced in article 55(4) for a mobile voting team are positive and should make the process easier to monitor. To complete this security measure, it is however recommended that all requests for mobile voting are recorded in written form before the actual voting. Further, all written requests should be reconciled with the number of ballots in the mobile ballot box after the opening of the mobile ballot box.

Closing

72. The Election Code determines the voting time from 7 a.m. to 9 p.m.²⁸ However, despite previous recommendations, the amendments to the code did not clearly provide

²⁸ *Ibid*, Article 50.

that voters waiting in line outside polling stations at the time of polling station closing will be allowed to vote.

Counting and recounting of ballots

73. A new paragraph (2¹) has been added to Article 60 that reads: *“In case of disagreement with preliminary results, before validation the results by the courts electoral candidates may address to this courts to restart the number of votes”*.

74. The paragraph does not include on what terms such a request has to be granted. Does that mean that any request will lead to a recounting or does the request have to be justified?

75. This amendment only partially addresses the concerns raised in paragraph 71 of the last Joint Opinion, in so far as it still does not *“provide for a clear division of responsibilities between the DEC and courts with regard to recounts”*, neither does it specify which body should carry out the recount.

76. Besides, it was recommended to give consideration to making it compulsory for the relevant DEC to review the count and to take action in cases of discrepancies in the reconciliation, i.e. conducting a recount without having to wait for a specific request to do so.

77. A number of recommendations offered in the 2006 Joint Opinion with regard to counting and vote tabulation procedures also remain to be addressed.²⁹

78. Amendments to Article 62 provide that all electoral materials, including invalid and annulled ballots after the elections are stored at the same place, i.e. the court of law in the area where the district electoral council is situated. This is a positive change that would permit easier administration of post-election recounts.

Publication of results

79. A long standing recommendation that *“The CEC should provide detailed election results, by polling stations, available on its website as soon as they have been processed in the District election commissions”*³⁰ has not been addressed.

80. Additionally, a concern remains regarding the indication in Article 61(2) of the code that a commission should not publish the preliminary results if an appeal related to the conduct of voting was filed with a court. Nevertheless, the code should provide provisions to ensure the rapid publication of preliminary results, by polling station, so as to ensure optimal transparency.

81. The last Joint Opinion made the point that *“the need for transparency is just as high, and possibly higher, in such cases. Furthermore, the outcomes of any possible court case can find reflection in the final results”*.³¹

Observers

82. As noted in the last Joint Opinion *“According to Article 63(1), the district electoral council may deny an accreditation to an observer and is obliged to inform the nominating party of grounds for the denial. However, the Code does not provide a clear*

²⁹ See CDL-AD(2006)001, par. 51-56 on counting and par. 57-60 on result tabulation; the last Joint Opinion referenced CDL-AD(2007)040 also underlines these unaddressed recommendations, par. 70-71.

³⁰ CDL-AD(2007)040, par. 72.

³¹ CDL-AD(2007)040, par. 74.

list of reasons that may serve as basis for refusal to accredit an observer". This issue has not been addressed in the amendments.³²

83. Furthermore, the amendments did not clarify as to what would be the basis for the CEC to decide whether the organisation is "*able to exercise civic functions during the elections*" as provided in Article 63(4), in order to decide on the accreditation of observers' groups. The Joint Opinion repeats that this requirement appears redundant and may create unnecessary restrictions for domestic observers. Moreover, the code does not provide any concrete and objective criteria, as well as the procedure for the CEC to make a decision about the capability of the organisation.

X. Turnout requirements / Voter participation thresholds

84. Despite the recommendation given in the last Joint Opinion and in the 2006 Joint Opinion underlining that *the turnout requirement can lead to "endless cycles of failed elections"*,³³ the Election Code of Moldova maintained the provision that elections shall be declared invalid "*if they were attended by less than 1/2 of the persons registered in the electoral lists*".³⁴

85. Participation is important for representative democracy, but imposed turnout requirements do not necessarily improve participation in an effective manner. Moreover, turnout requirements proved to be ineffective and troublesome in some recent cases in post-communist countries. In fact, it may potentially contribute to electoral malfeasance committed in an effort to have a successful election. Moldova itself was faced with turnout requirement problems and failed elections in the case of the 2005 Election of the Mayor of Chisinau. Furthermore, the turnout requirements also bear the potential for abuse by political forces, by providing them an opportunity to influence the process by calling for a boycott.

86. As was already recommended in the previous joint opinions, turnout requirements should be removed from Articles 91 and 93. The same comment is valid for Articles 136 on local elections and 171 and 199 on referenda, even though the turnout requirements here are lower and absent for repeat local elections. Bearing in mind the problems that might be generated by turnout requirements, many countries do not consider them even as a precondition for the validity of the referenda.³⁵

XI. Complaints and appeals procedures

87. The previous joint opinions have repeatedly recommended that the powers and responsibilities of the various bodies responsible for the review of complaints and appeals should be clearly defined in order to avoid conflicts of jurisdiction, and that the code should not grant the appellants or the authorities the right to choose the appeal body,³⁶ which is not in line with the Code of Good Practice in Electoral Matters.³⁷ These recommendations have not been adequately addressed.

88. Article 65(1) was amended to read "*Voters and electoral competitors may contest the actions (inaction) and decisions taken by the electoral committees and councils, actions (inactions) of electoral candidates in electoral bodies respecting the system of electoral hierarchic authorities and courts*".

³² CDL-AD(2007)040, par. 67.

³³ CDL-AD(2006)001, pp. 23, 15e.

³⁴ The Election Code of Moldova, Article 91.

³⁵ The Code of Good Practice on Referendums recommends not to provide for (turnout or approval) quorums (CDL-AD(2007)008,III.7).

³⁶ CDL-AD(2007)040, par. 75-79.

³⁷ Code of Good Practice in Electoral Matters, CDL-AD(2002)023rev, par. 97.

89. This amendment fails to fully address the above recommendations, since a mere reference in this provision to *“the system of electoral hierarchic authorities and courts”* does not resolve the issue of potential conflicts of jurisdiction between courts and election commissions. Also, it is not clear whether the reference to hierarchy in the judicial system resolves issues arising out of Articles 68, 89 and 92, which permit both ordinary courts and the Constitutional Court to declare the results null.

90. In addition, as noted in the last Joint Opinion, Article 68(3) of the code appears to vest courts with authority to introduce changes to final result protocols in case any mistakes are revealed.³⁸ The amendments failed to clarify what is meant by the sentence *“...shall exclude the electoral competitor which got less validly expressed votes, replacing him with another electoral competitor, which got a bigger validly expressed votes, in a decreasing order.”* This seems to be an overly generalised way of correcting possible faults in a protocol.

91. Article 92 states that *“If the Constitutional Court finds that during the elections and/or during the counting of votes violations of this Code had occurred, which impacted the outcome of elections and attribution of mandates, the elections shall be declared null”*. This might be interpreted as giving the Court authority to declare an election in the whole country null even if the violation was isolated to certain precincts or districts. In line with the Code of Good Practice in Electoral Matters, repeat elections should be held in areas where the facts of violations were established.³⁹ In addition, if the vote in the whole country has to be repeated, the criteria for declaring an election invalid may be regarded as overly stringent.

XII. Penalties

92. According to Article 69, individuals who commit any action against the honour and dignity of candidates shall be held legally accountable. The 2006 Joint Opinion pointed out⁴⁰ that the article *“is too broad and could be applied in a manner that would violate a person’s right to free speech and expression. This broad prohibition could lead to a violation of Article 10 ECHR, OSCE commitments, and domestic constitutional principles.”* It should be recommended that Article 69 be reformulated in a manner that is consistent with the right to free speech and expression.”

93. Although the Article does not stipulate what sanction is applicable, the recommendation to reconsider the formulation of the given provision is reiterated.

XIII. Other matters

94. Article 119 has been amended to specify that the term in office of Mayors of towns (municipalities), villages (communes) and councillors in district, town (municipal) and village (commune) councils starts from the moment of validation of election results. This is a positive change that takes into consideration the possibility of lengthy post-election appeals.

³⁸ CDL-AD(2007)040, par. 78.

³⁹ CDL-AD(2002)023rev, II.3.3. par. 101 *“The powers of appeal bodies are important too. They should have authority to annul elections, if irregularities may have influenced the outcome, i.e. affected the distribution of seats. This is the general principle, but it should be open to adjustment, i.e. annulment should not necessarily affect the whole country or constituency – indeed, it should be possible to annul the results of just one polling station. This makes it possible to avoid the two extremes – annulling an entire election, although irregularities affect a small area only, and refusing to annul, because the area affected is too small. In zones where the results have been annulled, the elections must be repeated”*.

⁴⁰ CDL-AD(2006)001, par. 103.

⁴¹ See par. 9.1 of the OSCE 1990 Copenhagen Document; par. 26 of the OSCE 1991 Moscow Document; Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms; and Articles 32 and 41 of the Constitution of Moldova.

95. Although a new sentence in Article 128 which clarifies that “*The modification of electoral lists shall be made under the conditions of chapter 80 which shall be applied accordingly*” is a welcome clarification, inclusion of this sentence under Article 128, which otherwise speaks about voters’ lists seems out of place. It is recommended to move this sentence to a more relevant place in the code or under a new article.

96. Clarification in Article 134 regarding the order of including candidates on the ballot in the second round of mayoral elections is welcome.

97. Inclusion in Article 138 of a paragraph (3) which states that “*Repeated ballot shall be organized according to the provisions of chapters 9 and 10 and is considered valid whatever the number of voters that took part to the elections*” is a positive clarification.

Conclusive remarks

98. Considering the changes in the Election Code of Moldova as recommended in the present Opinion as a matter of priority, the Venice Commission and OSCE/ODIHR invite the authorities to implement all these recommendations **before** the parliamentary elections scheduled for 2009. They also invite the authorities to consider the other important recommendations contained in the previous joint opinions.