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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

OSCE OFFICE FOR DEMOCRATIC INSTITUTIONS AND HUMAN RIGHTS
(OSCE/ODIHR)

REPUBLIC OF MOLDOVA

DRAFT JOINT OPINION
ON THE DRAFT LAW ON CHANGES
TO THE ELECTORAL CODE

on the basis of comments by

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1. Introduction

1. By letter dated 14 April 2016, the Ambassador of the Republic of Moldova to the Council of Europe requested the opinion of the Council of Europe's European Commission for Democracy through Law (Venice Commission) on the draft law on the amendment and completion of the Electoral Code no. 1381-XIII of 21 November 1997 (CDL-REF(2016)032). The Venice Commission and the OSCE Office for Democratic Institutions and Human Rights (OSCE/ODIHR) decided to provide a joint legal opinion on the draft law.

2. The present joint opinion is based on the translations of the above-mentioned draft law, of the Electoral Code of Moldova (CDL-REF(2016)031) and of the Constitution of Moldova. It should be noted that any legal review based on translated laws may be affected by issues of interpretation resulting from translation.

3. Amendments to the Electoral Code have been made necessary by the 4 March 2016 decision of the Constitutional Court. This decision declared unconstitutional the procedure of election of the President of Moldova by 3/5 of the Members of Parliament, as well as the related rules and laws. It also revived the constitutional provisions on the direct election of the President of the Republic, to be found in Articles 78 (1, 3, 4), 85 and 89 of the Constitution, in force until the adoption of the Law no. 1115—XIV of 5 July 2000, and the corresponding Electoral Code provisions for the election of the President by direct, secret and free vote of the citizens that were repealed by the above law. This decision was consulted in English, directly on the Constitutional Court's website. All references to the original complaint (48b/2015) and the ruling by the Constitutional Court (Judgment No. 7 of 04.03.2016) are based on the translated documents.¹ On 1 April 2016, the parliament of Moldova voted to hold the presidential election on 30 October 2016.

4. The draft law amending the Electoral Code provides only amendments pertaining to the election procedure for the office of President of the Republic and the right to be elected in accordance with the Constitution in force following the decision of the Constitutional Court. It provides new wording of the restored provisions in the Electoral Code regulating the direct election of the Head of State of the Republic of Moldova and aims to update and unify the respective terminology.

5. This joint opinion should be read in conjunction with the following documents and previous joint opinions provided to the Moldovan authorities:

- Previous joint opinions issued by the Venice Commission and the OSCE/ODIHR on the Electoral Code of the Republic of Moldova and its amendments.²
- Council of Europe's Parliamentary Assembly (PACE) and OSCE/ODIHR reports on elections observed in the Republic of Moldova.³

¹ <http://www.constcourt.md/ccdocview.php?tip=hotariri&docid=558&l=en>.

² See in particular, the Joint Opinion on the draft working text amending the Electoral Code of Moldova (CDL-AD(2010)014); Joint Opinion on the Electoral Code of Moldova as of 10 April 2008 (CDL-AD(2008)022); Joint Opinion on the Electoral Code of Moldova as of March 27, 2007 (CDL-AD(2007)040); Joint Opinion on draft legislation of the Republic of Moldova pertaining to financing political parties and election campaigns (CDL-AD(2013)002). These opinions are available on the Venice Commission and OSCE/ODIHR websites: www.venice.coe.int and <http://www.osce.org/odihr/elections/195256>

³ See in particular, [Council of Europe, Parliamentary Assembly, Observation report on the 30 November 2014 parliamentary elections](#); and: [the OSCE/ODIHR Election Observation Mission Final Report on the 30 November 2014 parliamentary elections](#) and [OSCE/ODIHR Limited Election Observation Mission Final Report on the 14 and 28 June 2015 local elections](#).

- 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 2010 OSCE/ODIHR and Venice Commission Guidelines on Political Party Regulation, CDL-AD(2010)024.
- The Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE (29 June 1990) and other relevant OSCE commitments.
- Other international and regional documents that are relevant to the Republic of Moldova, including Article 3 Protocol 1 to the European Convention on Human Rights and Article 25 of the International Covenant on Civil and Political Rights (ICCPR).

6. *The present Joint Opinion was adopted by the Council for Democratic Elections at its ... meeting (Venice,...) and by the Venice Commission at its ... plenary session (Venice, ...).*

2. Analysis and recommendations

On the direct election of the President of Moldova

7. The Code of Good Practice in Electoral Matters states that any electoral system may be chosen as long as it respects the principles of the code.⁴ Similarly, OSCE participating States recognised in the 2002 OSCE Porto Ministerial Council Declaration that “democratic elections can be conducted under a variety of electoral systems.”⁵ The choice of an electoral system, provided it does not contradict international obligations and standards, is, therefore, considered to be a prerogative of a state. The reintroduction of the election of the Head of State by universal, equal, direct, secret and free voting is, in principle, not in contradiction with these approaches.

8. The Code of Good Practice also discourages introducing any major changes at least one year before the next election so as to guarantee the stability of the law.⁶ However, the Electoral Code was required to be amended following the judgment by the Constitutional Court and presidential elections have to take place in 2016.

9. The draft law avoids as far as possible divergences from the election procedure applicable to parliamentary and local elections. As the next presidential election is scheduled for 30 October, the possibilities to revise the current Electoral Code are limited. The limited scope of the draft law is reasonable in general.

On the right to stand for election

10. Regarding the right to stand for election, Article 99 of the draft law states that “Citizens of the Republic of Moldova with voting right who are at least 40 years old, had lived or have been living in the country not less than 10 years, possess the state language and meet the conditions established by this Code may stand in for the office of the President of the Republic of Moldova.” This provision contains restrictions similar to those in the revived Constitution (Article 78.2). The age threshold is the highest in Moldovan law as the required age to be elected a Member of Parliament or councillor of a local council is 18 years, and the required age to be elected mayor is 25 years. An age requirement of 40 years to stand for

⁴ CDL-AD(2002)023rev, II.4.

⁵ OSCE Ministerial Council, Decision No. 7/02, “Election Commitments”, Porto, 7 December 2002. See also, paragraph 21 of the 1996 United Nations Human Rights Committee (UNHRC) General Comment No. 25 to the ICCPR, which states “Although the Covenant does not impose any particular electoral system, any system operating in a State party must be compatible with the rights protected by article 25 and must guarantee and give effect to the free expression of the will of the electors”.

⁶ CDL-AD(2002)023rev, II.2, and Interpretative Declaration on the Stability of the Electoral Law (CDL-AD(2005)043).

the presidency, although not without precedent in other countries, could be considered high. Moreover, the requirement of 10 years residence, even if it does not imply present residence and therefore may permit candidates residing abroad to stand for election, constitutes a candidacy restriction that is overly restrictive and contrary to OSCE commitments and other international obligations and standards and could be reconsidered or reduced.⁷

11. The constitutional requirement of state language proficiency is not unreasonable for a head of state. However, in order to ensure conformity with international standards, the code should provide that the testing of language should be reasonable, objective, verifiable, and subject to effective review.⁸

On the nomination procedure

12. According to Article 102 of the draft law, candidates for the office of President of the Republic must submit lists with 15,000 support signatures of voters from at least half of the second level administrative and territorial divisions of the country. This number of required signatures is below the limit of one per cent of registered voters provided for by the Code of Good Practice in Electoral Matters.⁹ The minimum number of valid signatures for each territory is 600. While this amount may be easier to attain for political organisations with an extended and existing regional structure than for (independent) candidates with a more limited local presence, it is sufficiently low considering the number of voters in the second level administrative units (the unit with the lowest number of registered voters is Basarabeasca, with 24,318 voters).¹⁰

13. In a number of previous opinions, the Venice Commission and the OSCE/ODIHR expressed concerns on the possible abuse of rules on candidate registration (Articles 42ff of the Electoral Code) in order to exclude some candidates.¹¹ These concerns remain, in particular with regard to the absence of clearly stipulated rules for signature verification, which have not been further developed in draft Article 102. In addition, the stipulation in Article 42.5 that an individual can sign in support of only one candidate could be considered an unnecessary restriction challenging political pluralism.¹²

14. In order to sign in favour of a candidate, a voter has to complete information on his/her name, domicile, year of birth, number of identity document and date (Article 42.4 of the Electoral Code as modified by paragraph 6 of the draft law). While this is a plausible procedure to mitigate potential fraudulent or multiple signatures, the law does not provide specific

⁷ See paragraphs 7.3, 7.5 and 24 of the 1990 OSCE Copenhagen Document, Article 26 of the ICCPR, and Section I.1.1.c of the Code of Good Practice in Electoral Matters. In addition, paragraph 15 of UNHRC General Comment No. 25 to the ICCPR states that any restrictions on the right to stand must be justifiable on objective and reasonable criteria. Persons who are otherwise eligible to stand for election should not be excluded by unreasonable or discriminatory requirements such as residence. Cf. CDL-AD(2011)032, Joint Final Opinion on the Electoral Code of Armenia, par. 37.

⁸ CDL-PI(2016)004, Preliminary Joint Opinion on the draft electoral code of the Republic of Armenia as of 18 April 2016, par. 48. Paragraph 3 of UNHRC General Comment No. 25 adds that “no distinctions are permitted between citizens in the enjoyment of these rights on the grounds of... language.” See also UNHRC, *Ignatane v. Latvia*, 25 July 2001, No. 884/1999, CCPR/C/72/D/884/1999, in which limitations to the right to stand for office, based on language requirements, were ruled a violation of Article 25 ICCPR because they were not based on objective criteria and were not applied in a procedurally objective manner. See also the judgment of the European Court of Human Rights of 9 April 2002 *Podkolzina v. Latvia*, No. 46726/99.

⁹ CDL-AD(2002)023rev, I.3.ii.

¹⁰ Information provided by the Central Election Commission and updated on 31 March 2016.

¹¹ CDL-AD(2010)014, par. 38; CDL-AD(2007)040, par. 35ff.

¹² Paragraph 77 of the 2010 OSCE/ODIHR and Venice Commission [Guidelines on Political Party Regulation](#) (CDL-AD(2010)024) state that “in order to enhance pluralism and freedom of association, legislation should not limit a citizen to signing a supporting list for only one party”. See also [the OSCE/ODIHR Election Observation Mission Final Report on the 2014 parliamentary elections](#) and [OSCE/ODIHR Limited Election Observation Mission Final Report on the 2015 local elections](#).

provisions to assist sight-impaired or otherwise restricted persons who are not able to complete the required forms on their own. Providing guidance for such aspects of signature collection should be considered.

15. Contestants can officially start campaigning only upon registration by the Central Election Commission, which may result in a staggered beginning of the campaign. The OSCE/ODIHR has noted in its past election observation reports that this gave established political parties and blocs an advantage over new parties and independent candidates. The recommendation that the campaign period should begin on the same day for all contestants to ensure the equality of campaign opportunities is therefore reiterated.¹³

On the two-round system

16. In conformity with the Constitution (Article 78.3-4), the draft law provides that a candidate has to receive at least 50 per cent of the valid votes to be elected in the first round. Otherwise, a second round takes place between the two candidates having received the highest number of votes in the first round (Article 109 of the draft law). The stipulation in Article 109.5 that “the votes cast for one candidate shall be considered to be expressed against the other candidate” requires review or clarification, as it does not appear to fit with the chosen electoral system.

17. Article 114 of the Electoral Code provides for the election to be invalid if the turnout in the first round of the election is less than one third of registered voters. This turnout requirement for the validity of the first round does not appear in the Constitution and is not required in a second round. In case an election is declared invalid or null, repeated voting with the same candidates, and possibly a new election, are foreseen (Article 116-117). Moreover, the second sentence of Article 114, which refers to the absence of turnout requirement in the second round, may lead to confusion between second round and repeated voting. In interpreting Article 117.a, that there is a turnout requirement for repeated voting and given the unlikelihood of greater voter participation in such repeated voting, the stipulated turnout requirement could result in endless cycles of failed elections, leading to the vacancy of the post of President of the Republic. As emphasised in previous joint opinions, the Venice Commission and the OSCE/ODIHR recommend removing the turnout requirements as included in draft Article 114 or at least clarifying the provisions in a way that avoids potential endless cycles of failed elections.¹⁴

On voting abroad

18. The OSCE/ODIHR and PACE have previously reported on stakeholders’ concerns with regard to the lack of transparency for criteria to determine the number and location of polling stations abroad.¹⁵ The draft amendments do not refer specifically to polling stations abroad, which are dealt with by Article 29¹ of the Code (applicable to presidential elections according to Article 97.3 of the draft). Broad consensus on this issue would be welcome. The Venice Commission and the OSCE/ODIHR recommend considering the issue of polling stations abroad in light of earlier observation findings and recommendations in view of the next presidential election.

¹³ See OSCE/ODIHR Election Observation Mission Final Report on the 2014 parliamentary elections and CDL-AD(2002)023rev, Paragraph 1.3.8.

¹⁴ See CDL-AD(2008)022, par. 84-86.

¹⁵ OSCE/ODIHR Election Observation Mission and PACE Reports on the 2014 parliamentary elections. See also CDL-AD(2014)003, par. 41-43.

On the recall of the President

19. The elected President may be recalled by a referendum. Article 89 of the Constitution states that:

(1) In case of committing serious offenses infringing upon constitutional provisions, the President of the Republic of Moldova may be suspended from office by the Parliament with the vote of two - thirds of its members.

(2) The motion requesting the suspension from office may be initiated by at least one third of the members, and it must be brought to the knowledge of the President without delay. The President may give explanations on the actions for which he is being censured before Parliament.

(3) If the motion requesting suspension from office meets with approval, a national referendum shall be organised within 30 days to remove the President from office.

20. The draft law adds a sentence to Article 168 of the Electoral Code, which regulates republican referendums: "The decision on the removal from office of the President of the Republic of Moldova shall be deemed adopted by republican referendum if it has been voted by a number of voters equal to or higher than for the election of the President of the Republic of Moldova, but not lower than half of the number of voters that have participated in the referendum." While the Constitution, in Article 135, par. 1, section f, gives the Constitutional Court the power to "ascertain the circumstances justifying [...] the removal of the President of the Republic of Moldova", rules about the procedure, the deadlines and what is deemed as "serious offenses infringing upon constitutional provisions" are not included in the draft law nor, apparently, in any other piece of (draft) legislation.

21. While the Constitution does not require a further organic law on the matter, the draft amendment to the Electoral Code might not be sufficient for holding such a referendum and for terminating the mandate of the President. As noted by the Venice Commission in other opinions, there is a risk that the lack of specific procedures to implement the recall procedure creates potential for political discretion and confusion between political and legal responsibility of the President.¹⁶ In the case of Romania, the Venice Commission pointed out that the procedures regulating the dismissal of the President "may have been politically motivated rather than based on a sound legal basis".¹⁷

22. The absence of specific procedures and of clear legal criteria to recall the President of the Republic of Moldova may pose a risk in that sense. In practice, the recall procedure is a political one, not based on any clear legal criteria, which might be assessed by the Constitutional Court, and it is up to the Parliament to decide on the reasons for it. Article 169 of the Electoral Code should be revised in order to make clear that the decision on the removal from office of the President cannot be cancelled by a further referendum. Moreover, it would be advisable to amend Article 89 of the Constitution in the light of the criticism addressed by the Venice Commission to the similar provision in the draft law on the review of the Constitution of Romania (see CDL-AD(2014)010, paragraph 157-159). At any rate, the authorities should not wait for the occurrence of a case of recall to legislate the issue in detail. The Venice Commission and the OSCE/ODIHR recommend that the procedure for the recall of the President of the Republic be made more precise and, in particular, that the conditions for

¹⁶ See CDL-AD(2012)026 Opinion on the compatibility with constitutional principles and the Rule of Law of actions taken by the Government and the Parliament of Romania in respect of other State institutions and on the Government emergency ordinance on amendment to the Law N° 47/1992 regarding the organisation and functioning of the Constitutional Court and on the Government emergency ordinance on amending and completing the Law N° 3/2000 regarding the organisation of a referendum of Romania and CDL-AD(2014)010; Opinion on the draft law on the review of the Constitution of Romania (CDL-AD(2014)010), par. 157ff.

¹⁷ CDL-AD(2012)026, par. 45.

Parliament to initiate such procedure be detailed, in order to make it dependent on legal conditions and not on political considerations.

On sanctions

23. Article 69 (in force since 01.01.2016) on “legal liability” now applies also to presidential elections. The risk that the sanction of de-registration is applied in violation of the principle of proportionality remains.¹⁸ The Venice Commission and the OSCE/ODIHR recommend revising Article 69 of the Electoral Code, in order to ensure that sanctions are adopted in conformity with the principle of proportionality.

On political party and campaign financing

24. The draft law does not address political party and campaign financing in detail. Relevant provisions of the Electoral Code thus mostly remain unchanged. While a package of amendments to political party and campaign finance regulations was adopted in April 2015, addressing some previous OSCE/ODIHR, Venice Commission and Council of Europe’s Group of States Against Corruption (GRECO) recommendations, further reforms are necessary. According to the OSCE/ODIHR final report on the 2015 local elections, transparency, oversight and enforcement mechanisms continue to require improvement, in particular with regard to disclosure, comprehensive reporting and enforcement.¹⁹ In addition, for the 2014 parliamentary elections, the PACE delegation expressed its concerns due to the high level of campaign expenditure, the use of funds from abroad and, particularly, the “opaque sources of funding of some media outlets whose holding companies are allegedly registered offshore; the lack of transparency concerning media ownership; the control of the media by various businessmen and oligarchs and their close relationship with political parties.”²⁰ The Venice Commission and the OSCE/ODIHR recommend using the opportunity of the current legislative revision process to address the outstanding concerns expressed in previous opinions and election observation reports with regard to political party and campaign finance.²¹

Other issues

25. The draft law amends several articles of the Electoral Code that have been assessed by previous joint opinions of the Venice Commission and the OSCE/ODIHR, namely, CDL-AD(2008)22 and CDL-AD(2010)003. However, the amendments are mostly limited to the inclusion of the presidential election in different sections of the Electoral Code and do not change the relevant articles in substance.

26. A number of outstanding issues and recommendations from previous joint opinions and election observation reports remain to be addressed.

27. Further to issues already mentioned, reference is made to the following paragraphs of the 2010 opinion (CDL-AD(2010)014):

- Par. 42 on restrictions on the right to campaign (Article 47.2).
- Par. 43 on the prohibition of foreign subsidising and its implications on international organisations (Article 36).
- Par. 44 on the prohibition against beginning the campaign until after a candidate has been officially registered (Article 47.3).

¹⁸ See CDL-AD(2010)014, par. 38; CDL-AD(2008)022, par. 52ff.

¹⁹ OSCE/ODIHR Limited Election Observation Mission Final Report on the 2015 local elections.

²⁰ PACE report on the 2014 parliamentary elections, par. 48-49.

²¹ In particular, see the Joint Opinion on draft legislation of the Republic of Moldova pertaining to financing political parties and election campaigns (CDL-AD(2013)002).

- Par. 48 on the access to the polling station of those who queue at the time the polling station closes (Article 53.6).
- Par. 49 on mobile ballot boxes (Article 55.4): the opinion welcomed a positive step in the draft, but in the current Electoral Code, the regulation once again allows the voter to apply for mobile voting up to 15:00 on election day. Moreover, ballot papers in mobile ballot boxes should not be counted separately from other votes cast, as the number of votes given outside the polling station might be extremely low (see Article 56.4).

28. The Venice Commission and the OSCE/ODIHR recommend that the Moldovan authorities take into account in due time the above-mentioned paragraphs and recommendations of the joint opinion CDL-AD(2010)014.

29. For presidential candidates, the ballot contains information on the current place of employment of the candidate, among other information (Article 48.2 of the Electoral Code). For some candidates, the number of places of employment may be more than for others. It may lead to a situation where some candidates receive more visibility on the ballot. There is no legitimate reason to include such information, as the dissemination of candidate information should be done earlier than on election day and not through the ballot. The Venice Commission and the OSCE/ODIHR recommend considering limiting the information on the ballot to only include necessary information such as the name of the candidate, number of the candidate, and their political affiliation, if any.

30. In the “sole Article” at the beginning of the draft, there appear to be some technical discrepancies and errors, which might be due to translation. For instance, in Article 21.2, there is no phrase “parliamentary elections” as noted in paragraph 3 of the draft law and Article 29.5 has already been abrogated. Moreover, some further amendments should be provided in articles referred to in the draft Title IV. For example, some amendments similar to those provided in paragraphs 1, 4 and 8, adding a reference to presidential elections to specific articles of the Code, should be provided in a number of other instances to ensure consistency, including, for example, Articles 45.3, 48.1, 60, and 61.

3. Conclusion

31. The draft law is generally in accordance with international obligations and standards, and, if properly implemented, should enable presidential elections to take place in conformity with them.

32. However, several draft provisions would benefit from further revision or clarification. In particular, Article 114 on the invalidity of elections in case of insufficient turnout, which should be deleted or clarified in order to avoid potential endless cycles of failed elections.

33. The procedure for the recall of the President of the Republic should be clarified and submitted to legal conditions and not take place on the basis of political discretion.

34. The requirement of state language proficiency is based in the Constitution. The code should provide that the testing of language be reasonable, objective, verifiable, and subject to effective review.

35. The restriction on candidacy based on the length of residence should be removed to ensure compliance with universal suffrage. This would require a constitutional amendment.

36. The Venice Commission and the OSCE/ODIHR also recommend considering the issue of criteria for establishing polling stations abroad in view of the next presidential elections. Broad consensus on this issue would be welcome.

37. A number of issues raised in previous opinions of the Venice Commission and the OSCE/ODIHR, as well as in election observation reports, are still to be considered, through the amendment of provisions of the Electoral Code that apply to all elections, including presidential. This includes, in particular, rules on signature collection and verification, financing of electoral campaigns, the possibility of candidate de-registration as a sanction, and the restrictions, in substance or in time, on the right to campaign and on freedom of expression.

38. The Venice Commission and the OSCE/ODIHR remain at the disposal of the Moldovan authorities for any further assistance they may need.