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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

REPUBLIC OF MOLDOVA

DRAFT OPINION

**ON PROPOSED NEW ARTICLE 37
OF THE LAW ON THE PEOPLE'S ADVOCATE
FINANCE PROVISIONS**

On the basis of comments by:

**Mr Jorgen Steen SORENSEN (Member, Denmark)
Ms Lydie ERR (Member, Luxembourg)**

**This document has been classified restricted on the date of issue. Unless the Venice Commission decides otherwise, it will be declassified a year after its issue according to the rules set up in Resolution CM/Res(2001)6 on access to Council of Europe documents.*

I. Introduction

1. By letter of 3 November 2017, Mr Cotorobai, People's Advocate of Moldova, requested the Venice Commission to prepare an opinion on the Draft Amendments to Article 37 of the Law on the People's Advocate proposed in Article LXXIX of the draft Law on amendments and completion of some legislative acts (CDL-REF(2017)050, "the draft amendments").
2. Mr Sorensen and Mrs Err were invited to act as rapporteurs for this opinion.
3. On 29 November 2017, a delegation of the Commission, composed of Mrs Err and Mrs Martin from the Secretariat, visited Chisinau and met with representatives of NGOs, with Mr Creanga, Chairman of the Committee on Economy, Budget and Finance of the Parliament, with Mr Armasu, Minister of Finances and Mr Olofsson, EU High-Level Adviser on Public Finance Management of the Ministry of Finance and with Mrs Vacarciuc, Secretary General of the Office of the People's Advocate.
4. The delegation would like to thank the authorities as well as Mrs Gutjahr, Head ad interim of the Council of Europe's office in Chisinau, for having organised these meetings with a very short notice. In the context of the presentation and adoption of the 2018 State Annual budget to the Parliament, the delegation is particularly grateful to the Minister of Finances and to the Chairman of the Committee on Economy, Budget and Finance of the Parliament for having taking time for a fruitful exchange of views with the delegation.
5. The present opinion was prepared on the basis of contributions by the rapporteurs and on the basis of unofficial translations of the Draft Amendments to Article 37 of the Law on the People's Advocate proposed in Article LXXIX of the draft Law on amendments and completion of some legislative acts. Inaccuracies may occur in this opinion as a result of incorrect translations.
6. *This opinion was adopted by the Venice Commission at its ... Plenary Session (Venice, ... 2017).*

A. General remarks

7. In 2015, at the request of the People's Advocate, the Venice Commission prepared an opinion on the Law on the People's Advocate of the Republic of Moldova of 30 April 2014 (see CDL-AD(2015)017, hereinafter "the 2015 opinion", and CDL-REF(2015)018, hereinafter "the 2014 Law").
8. The opinion was fundamentally positive, noting a "step forward in the efforts made to reform this institution, with a view to strengthening it and making it more effective", and noting that overall, the provisions of the law were "in accordance with the applicable standards" (§§78-79). The Commission nonetheless made several recommendations.
9. The institution of the People's Advocate was constitutionalised in April 2017, as recommended by the Venice Commission in its opinion (CDL-AD (2015)017, § 80, see below). The 2014 Law was amended in 2015 and 2016 (CDL-REF(2017)054).

II. Analysis

B. Background

10. In its 2015 opinion the Venice Commission had welcomed Article 37.3 of the Law on the People's Advocate, according to which "the annual budget of the office is approved by the

parliament, at the proposal of the People's advocate". This provision was indeed in line with previous recommendations of the Venice Commission.

11. The 2015 opinion also commented on Article 37.5 of the Law that provides that the People's Advocate Office may be financed from other sources than the State budget, on the sole condition of not being prohibited by law. While there are no International or European standards prohibiting the funding of Ombudsman institutions from sources other than the state budget, the opinion underlined that this may be seen as detrimental to the independence and the appearance of independence of the Institution. It was therefore strongly recommended that the Law explicitly stipulate that the budgetary allocation should be adequate to the need to ensure full, independent and effective discharge of the tasks of the institution, based on indicators such as the number of complaints lodged with the People's Advocate in the previous period of reference. The Law should also provide for the autonomous management, by the Office, of the budgetary allocation at its disposal.

12. It was also noted that, under Article 37.3 of the Law, "the reduction of the approved costs related to the Office activity is allowed only by the Parliament decision". Given the particular significance of the financial provision of the People's Advocate Office for the independence of the institution, the opinion considered that it would be important to add a clause in the Law stating that the public authorities should not use the budgetary process for allocating/reducing funds from the budget in a manner that interferes with the independence of the People's Advocate institution".¹

13. These comments are still valid since Article 37 (Financial provision of the Office) has not been modified since then and reads:

"Article 37. Financial provision of the Office

(1) The Office has its own budget, which is part of the state budget.

(2) The costs of the Office activities for the planning of the annual budget are estimated for at least two next years.

(3) The annual budget of the Office is approved by the Parliament, at the proposal of the People's Advocate. The reduction of the approved costs related to the Office activity is allowed only by the Parliament decision.

(4) The Parliament remits to the Government the annual approved budget of the Office for its inclusion into the draft state budget for the respective budget year.

(5) The Office may have other financial sources not prohibited by the Law."

14. According to the draft amendments under consideration, Art.37 would be deleted in its current form and would be replaced with the following provision:

"Article 37. Office funding

(1) The Office is funded from the state budget within the limits of budget allocations approved through the annual budget law.

(2) The Office Budget is elaborated, approved and administrated under the rules and procedures established by the Law on public finances and budgetary-fiscal responsibilities."

15. The Venice Commission was not provided with explanatory notes of the amendments, nor with the full text of the Draft law, nor with the Law on Public Finances referred to in the draft amendment under consideration.

¹ CDL-AD (2015) 017 §75

16. In its request for an opinion, the People's Advocate argued that the draft amendment "*constitutes a serious regress in ensuring the independence from the Government of the Moldovan National Human Rights Institution and puts under threat the financial and functional autonomy of the Office of the People's Advocate in accordance with the Paris principles.*"

17. It is worth mentioning that the Centre of Human Rights of the Republic of Moldova, which has been taken over by the People's Advocate institution since the enactment of the 2014 Law, was accredited by the Sub-Committee on Accreditation of the International Coordinating Committee of national Institutions for the Promotion and protection of human rights (with "B" status).

18. According to the NGOs the delegation met, the People's Advocate has never issued a statement or taken any action that could have led to any retaliating measures or open criticism by the authorities. This institution is rather criticized by the civil society for its inactivity.

19. During the exchange of views, the delegation learned that since 2014, the budget of the Office has never been reduced. Moreover, the budget proposal made by the Ombudsman has always been fully accepted both by the government and by Parliament, which has the final say on the State annual budget.

20. In addition, the Chairman of the Committee on Economy, Budget and Finance informed the delegation that the draft amendments under consideration have not been submitted by the government to Parliament yet. They would therefore not affect the preparation of the State annual budget of 2018 which has started on 30 November 2017 and should be finalised by 15 December 2017.

21. This preliminary stage of procedure of the draft amendments under consideration was confirmed by the Ministry of Finances.

C. Standards

22. The Venice Commission has examined the draft amendments in the light of the key texts on the Ombudsman institution, as well as of existing good practices in the field.

23. While there are no binding international standards applicable to the ombudsman institution, the *United Nations Principles relating to the status of national institutions*, adopted by the General Assembly in its Resolution 48/134 of 20 December 1993, commonly known as "the Paris Principles", represent the most widely followed guidelines outlining the basic elements of any national human rights institution.

24. More specifically, the Paris principles state: "*2. The national institution shall have an infrastructure which is suited to the smooth conduct of its activities, in particular adequate funding. The purpose of this funding should be to enable it to have its own staff and premises, in order to be independent of the Government and not be subject to financial control which might affect its independence.*"

25. In addition, the Council of Europe has produced a number of documents reflecting the best practices for human rights institutions, such as various recommendations of the Committee of Ministers and of the Parliamentary Assembly, the Congress of Local and Regional Authorities of the Council of Europe. As to the Council of Europe standards, the basic principle is laid down in Art. 7.7 of Rec 1615(2003) on the institution of Ombudsman, stating that it is "*essential for any institution of ombudsman to operate effectively*" that there are "*guaranteed sufficient resources for discharge of all responsibilities allocated to the institution, allocated independently*

of any possible interference by the subject of investigations, and complete autonomy over issues relating to budget and staff.”

26. The Venice Commission has consistently recommended in its opinions that the budgetary allocation of funds for the operations of the institution of the Ombudsman should be adequate to the need to ensure full, independent and effective discharge of the responsibilities and functions of the institution. The Commission has further recommended that given the exceptionally sensitive nature and particular significance of the finance provisions for the independence of the Ombudsman Institution, provision should be made in the relevant laws that the public authorities shall not use the budgetary process for allocating funds from the budget in a manner that interferes with the independence of the institution of the Ombudsman.²

D. Analysis of the draft amendment

27. Law no. 70 of 13.04.2017 introduced a new Chapter III, specifically devoted to the People's Advocate, in the Constitution. New Chapter III reads:

THE PEOPLE'S ADVOCATE

Article 59

Statute and Role of the People's Advocate

(1) The People's Advocate shall ensure the promotion and protection of human rights and fundamental freedoms.

(2) A person may be appointed as People's Advocate if he/she enjoys impeccable reputation, has high professional competence and notorious activity related to the defense and promotion of human rights.

(3) The People's Advocate shall be appointed by the Parliament, with the vote of the majority of the elected Members of Parliament, based on a transparent selection procedure provided by the law, for a non-renewable term of seven years. During the term of office, the People's Advocate shall be independent and impartial. He/she cannot be subject to any imperative or representative mandate.

(4) The People's Advocate shall not be legally liable for the opinions expressed in relation to the exercise of the mandate.

(5) The People's Advocate cannot carry out any other remunerated function, except for didactic, scientific or creative activities. The People's Advocate has no right to carry out political activity and cannot be a member of any political party.

(6) Any interference in the activity of the People's Advocate, deliberate ignorance of referrals and recommendations presented by the People's Advocate, as well as any impairment of his/her activity is subject to legal liability in accordance with the law.

(7) The People's Advocate may be dismissed from office with the vote of 2/3 of the elected Members of Parliament, in accordance with the procedure established by the law, which shall provide for a prior hearing before vote.

(8) The organization and functioning of the People's Advocate institution shall be determined by organic law.”

28. The Venice Commission welcomes the introduction into the Constitution of a specific Chapter devoted to the People's Advocate institution. As stated in its 2015 opinion, “a constitutionally defined mandate and status are essential, especially in a young democracy, for the consolidation and strengthening of this institution and its efficiency”.³ Giving specific

² Venice Commission, Compilation of Venice Commission opinions on the Ombudsman institution, CDL-PI(2016)001.

³ CDL-AD (2015)017, §22 and §§20-23 and 80

constitutional guarantees is definitely a sign of the importance and respect granted to the institution and its functioning.

29. Against this background, the amendment of current Article 37 of the Law, which contains some important guarantees might be seen as in contradiction with the recent steps towards the strengthening of the institution. Indeed, the proposed new wording of Article 37 appears as a step backwards, notably because it is less detailed, makes only a general reference to the applicable laws, and removes the need for the People's Advocate's proposal for the budget.

30. According to the Minister of Finances, the purpose of this draft amendment was first and foremost to respond to the so-called "principle of the 3 Es" (i.e. economy, effectiveness and efficiency) of Public Administration and Performance. The draft amendment under consideration is part of a more general Law which aims at simplifying and unifying the budgetary rules regarding all independent institutions of the State. It is presented as a technical adjustment to fit with international recommendations regarding the effectiveness and efficiency of the public administration. The Minister explained that the existence of different financial rules for each independent institution has rendered the process of allocation and control of funds extremely complicated. The draft amendment therefore allegedly aims also at simplifying all such procedures by putting all independent institutions under the same rules of Public Law and the same liability and "budgetary-fiscal responsibilities" as foreseen under public fiscal law.

31. The Commission's delegation drew the attention of the Minister to the specificity of the People's Advocate status, which is since April 2017 a constitutionally entrenched institution, and more specifically to the detrimental effect of the proposed new wording of Article 37 of the Law on People's Advocate. The Minister acknowledged that these specific elements might indeed not have been properly considered when drafting the amendment under consideration. He claimed that there existed absolutely no intention to put an end to the budgetary independence of the institution, nor to interfere in it. Indeed, the People's Advocate benefits from a separate budget line, which was confirmed by a document provided by the Chairman of the Committee on Economy, Budget and Finance of the Parliament. The Minister had no intention to modify this. The Ministry was also considering using the terms of the draft under consideration only for the court of Audit, as provided for in Article 133 of the Constitution, instead of applying it at to all independent institutions. A final decision on this has not been taken, yet.

32. Furthermore, the Minister insisted on the fact that the draft amendments under consideration had been made public in order to have a large public consultation. They were at a very early stage of their preparation, and would not be presented to the Parliament in view of the adoption of the 2018 state annual budget.

33. The Venice Commission is of the view that, irrespective of the declared intentions of the Moldovan authorities to improve the economy, effectiveness and efficiency of the Moldovan institutions, amending the current wording of Article 37 of the Law on the Ombudsman – a provision which the Commission has previously found to be positive and in line with its previous recommendations – would necessitate a strong justification and would need to maintain the current level of protection of the financial independence of the People's Advocate. This is not the case as concerns the new wording of Article 37 under consideration.

34. Indeed, the wording "within the limits of budget allocations approved through annual budget law" may be interpreted as an additional limitation, which does not exist under the current law. The explicit need for the People's Advocate to present his or her own budget proposal should not be removed from Article 37. Even assuming that such need may be derived from other general legislation, it is an important guarantee which has its place in the specific legislation on the process of budgetary allocation to the Ombudsman. Assuming that it may be legitimate for the government to have a say as regards the correspondence between the requested budget

and the needs and expected results of the institution, it is for parliament to decide upon the final allocation of the Ombudsman's budget. It is then up to the Ombudsman him or herself to live up to the general principles of economy, effectiveness and efficiency. It should be underscored that this is a precondition to the "complete autonomy over issues relating to budget and staff" recommended by the Parliamentary Assembly.⁴ In this sense, the Venice Commission has in previous occasions suggested that the government be obliged to include the ombudsman's draft proposal into the global draft budget submitted to Parliament *without any change*.⁵ It seems that this has been the case in Moldova since 2014, although the possibility for intervention by the government does not appear to be excluded, despite the lack of an explicit reference to it in current Article 37.

35. In the light of the above, the Venice Commission finds that the proposed new wording of Article 37 of the 2014 Law fails to maintain the guarantees of financial independence of the People's Advocate which are set out in Article 37 as currently in force.

III. Conclusions

36. The Venice Commission welcomes that, since its opinion of 2015 on the 2014 Law on the People's Advocate of the Republic of Moldova, the institution has been entrenched in the Constitution and several of its recommendations have been followed in amendments to the 2014 Law. These developments confirm the commitment of the authorities of the Republic of Moldova towards strengthening the institution of the People's Advocate.

37. However, the Venice Commission finds that the proposed amendment of article 37 of the Law of the People's Advocate goes in the opposite direction, significantly weakening the financial independence of this institution. The Commission therefore recommends reconsidering it.

38. The Venice Commission remains at the disposal of the People's Advocate and of the authorities for further assistance in this matter.

⁴ See Article 7.7 of Rec 1615(2003).

⁵CDL-AD(2004)041 - Joint Opinion on the Draft Law on the Ombudsman of Serbia by the Venice Commission, the Commissioner for Human Rights and the Directorate General of Human Rights of the Council of Europe adopted by the Venice Commission at its 61st Plenary Session (Venice, 3-4 December 2004), §35; CDL-AD(2007)020 - Opinion on the possible reform of the Ombudsman Institution in Kazakhstan adopted by the Venice Commission at its 71st Plenary Session (Venice, 1-2 June 2007), §§28 and 30.VI.