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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

**DRAFT JOINT OPINION
ON THE ELECTORAL CODE
OF MOLDOVA
as of March 27, 2007**

**by the Venice Commission
and
the OSCE Office for Democratic Institutions and Human Rights
(OSCE/ODIHR)**

**on the basis of comments by
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Introduction

Mandate

1. On 27 April 2007, The Council of Europe received from the Vice-Speaker of the Parliament of the Republic of Moldova, Ms. Maria Postoico, the "Report on the implementation of recommendations provided by the Council of Europe and the OSCE/ODIHR experts", concerning amendments to the Electoral Code of Moldova. The Secretary General of the Council of Europe requested follow-up from the Secretariat following this report. Consequently, the Venice Commission was called to provide an opinion on the Electoral Code as it is in force in Moldova.

2. The Moldovan electoral system and its Electoral Code have so far been subject to a number of recommendations for improvement by the OSCE/ODIHR and the Venice Commission. The last joint opinion of the Venice Commission and the OSCE/ODIHR, that was adopted by Commission at its 66th Plenary Session in March 2006¹ actually led to amendments on the Code.

Reference Documents

3. The report is based upon:

- The Electoral Code (Law No 1381-XIII of 21 November 1997, as of 27 March 2007; CDL-EL(2007)019).
- The Constitution of the Republic of Moldova as of 29 July 1994 with the last amendments of 25 July 2003.
- Joint opinion on the Electoral Code of Moldova Adopted at the 66th plenary session of the Venice Commission (17-18 March 2006, CDL-AD(2006)001).
- Report from the Vice-Speaker of the Parliament of the Republic of Moldova on implementation of the recommendations provided by the Council of Europe experts concerning Amendment Act no. 248-XVI of 21/07/2006 to amend the Electoral Code of 27 April 2007.
- Congress of Local and Regional Authorities of the Council of Europe, OSCE/ODIHR, Statement of Preliminary Findings and Conclusions from the International Election Observation Mission to the Local Elections, 3 June 2007.
- The OSCE/ODIHR Election Observation Mission Final Report from the Parliamentary Elections, 6 March 2005.
- 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).

General remarks

4. The main recommendations in the last joint opinion were as follows:

- reducing the threshold for participation of coalitions in the allocation of parliamentary seats to that foreseen for single parties;
- avoiding distinction among Central Electoral Commission (CEC) members by making clear that it is the full commission that holds the decision-making power;
- clarifying the body responsible for and procedure of dismissal of the Central Electoral Commission members for "serious violations";
- removing the infinite cancellation of voting rights for people sentenced to imprisonment regardless of the seriousness of the offence;
- ensuring that special categories of voters can effectively exercise their right to vote;
- specifying and following the principle of proportionality in the restrictions of the right to campaign, right to free speech and expression;
- reduction of the size of the polling stations;
- securing the secrecy of the vote: no one else than the voter should be allowed to touch ballot paper once the voter collected it;

¹ CDL-AD(2006)001.

- *introducing transparency safeguards to the process of results' aggregation and requiring the Central Electoral Commission to post on its website election results, by polling stations, as soon as they have been processed in the DEC;*
- *to define clearly powers and responsibilities of the various bodies responsible for the review of complaints and appeals;*
- *considering to remove turnout requirements in order to avoid endless cycles of failed elections.*

5. *Elections in Moldova have been observed by international organisations for many years, and the election laws have been reviewed by the Venice Commission and OSCE/ODIHR. The Venice Commission and OSCE/ODIHR issued a joint opinion in 2006 and the law has been amended after that. The Vice Speaker of the Parliament has listed in the "Report on the implementation of recommendations provided by the Council of Europe and the OSCE/ODIHR experts" which recommendations have been followed and has given the reasons for why some recommendations have not been followed. More precisely, the Parliament reported that **most of the CoE experts' recommendations were accepted** and inserted in the text of the law, while **"10 objections and proposals have been partially accepted or have not been accepted with the relevant arguments"**.²*

6. *This Opinion should be read in conjunction with the Joint opinion on the Electoral Code of Moldova adopted at the 66th plenary session of the Venice Commission (17-18 March 2006, CDL-AD(2006)001), as a number of previous recommendations remain to be addressed.*

7. *The current review was prepared on the basis of an unofficial English translation of the Electoral Code 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.*

8. *Considering the structure of the Code, it regulates all direct elections and referenda in the Republic of Moldova except for those for the authorities of the Autonomous Territorial Unit of Gagauzia. This ensures that the elections and referenda, which are covered by the Code, are conducted under the same rules and principles. However, the legislator has not fully taken advantage of the combined law and has still included a number of unnecessary repetitions on issues where a reference back to articles covering the same issues would have sufficed. This would make the maintenance of the law easier and the risk of unintended differences would be reduced.*

9. *This Joint Opinion has been adopted by the Council for Democratic Elections at its ... meeting (Venice, ...) and the Venice Commission at its ... plenary session (Venice, ...).*

The Electoral System for the Parliament

The electoral system and the single constituency

10. *The system of representation for the parliament is a closed list proportional one, applied in one single constituency covering the whole country. This or similar systems are used in a number of countries and normally produces a representative parliament across the political dimension.*

11. *In the Joint Opinion on the Electoral Code of Moldova (CDL-AD(2006)001, para.17) OSCE/ODIHR and the Venice Commission underlined that:*

² Report on implementation of recommendations provided by the Council of Europe experts concerning the Amendment Act no. 248-XVI of 21/07/2006 to amend the Electoral Code, p.1.

“the Electoral Code maintains an electoral system with one single constituency covering the whole country, with a proportional distribution of seats. The possibility for national minorities to be represented in the Parliament is closely related to the matter of the electoral system itself.”

12. Directly linked to this issue of national minorities and their representation, it has recommended to refer to the Venice Commission Opinion on the interpretation of Article 11 of Recommendation 1201 (1993) of the Parliamentary Assembly of the Council of Europe (CDL-INF(96)4), which underlines *inter alia* that it is:

“necessary for States to take into account the presence of one or more minorities on their soil when dividing the territory into political or administrative subdivisions as well as into electoral constituencies.”

13. The same Joint Opinion also states that:

“in the Moldovan context, where sizeable national minorities exist and some are regionally concentrated, an electoral system meeting the distinct objectives of ensuring further consolidation of the political system and permitting an adequate participation in public life of national minorities and mainstream interests at regional level could be considered,³ as previously recommended both by the OSCE/ODIHR and the Venice Commission.”⁴

14. The Opinion suggested OSCE-ODIHR Guidelines to Assist National Minority Participation in the Electoral Process as a reference in this regard.

15. It would therefore be advisable to review the current situation whereby the whole of Moldova constitutes a single constituency, so as to ensure a closer link between voters and Members of Parliament, and to guarantee a better regional spread of Members of Parliament between the different parts of the country. In doing so, the need to find a suitable solution for the Transnistria issue in this context will need to be taken into consideration.

The threshold for winning seats

16. The threshold for participating in the allocation of seats for single parties is 4% and for coalitions (blocs) it is 8% (Article 86(2)). One would believe that coalitions should be encouraged in order to provide more cooperation and stable government. The last Joint Opinion credited the reduction of the thresholds as an improvement. The authorities should in no case go back to this welcome reduction and stick to the threshold established for political parties. In addition, it would be advisable to have a single threshold for parties and coalitions. The threshold for coalitions should therefore be reviewed.

Allocating seats after the parliamentary elections

17. Article 87 states: “(1) The distribution of parliamentary seats among the electoral contestants shall be conducted by the Central Electoral Commission through a sequential division of the number of valid votes cast for each electoral candidate, except for independent candidates, by 1, 2, 3, 4..., etc. up to the figure that corresponds to the number of seats in Parliament.”

18. This process may give a party more seats than they have candidates on the list, and that situation is dealt with (in a less precise manner) in article 88(3). If paragraph (1) instead had ended by: “...up to the figure that corresponds to the number of candidates on the list”, a party could not be able to win more seats than they have candidates and article 88(3) could be

³ The 2001 OSCE/ODIHR Guidelines to Assist National Minority Participation in the Electoral Process provide analysis of the impact of election systems on minority participation.

⁴ OSCE/ODIHR EOM Final Reports on the 1998 and on the 2001 Parliamentary Elections; Joint Opinion on the Electoral Code of Moldova, Venice Commission, OSCE/ODIHR (CDL-AD(2006)001, para. 17 ff).

deleted. In fact such language would even cover independent candidates with their results divided only once by the divisor 1. The same comment is valid for article 133(2) on local elections.

19. Article 87 (3) states that "Independent candidates shall be considered elected if they receive at least three percent of the valid votes cast in the election throughout the republic".

20. It is not clear if this is an additional requirement (in addition to fulfilling paragraph (2) on the order of quotients and votes for independent candidates) or if these two are sufficient requirements on their own. If 87 (3) is a sufficient requirement on its own, then it is mathematically redundant, since the number of votes equal to or more than three percent of the total valid votes cast will always be within the ranked quotients mentioned in Article 87 (2). However, if this is an additional requirement to be allowed to participate in the allocation of seats, then one would expect that there should be a provision to exclude independent candidates who failed to pass the required threshold from such allocation along the lines of the procedure foreseen for parties, socio-political organizations and electoral blocs in Art. 86 (3). This needs to be clarified. If Article 87 (3) is meant to be an additional requirement, then it would be more clear if it was moved up to Article 86 (2) on thresholds and independent candidates were mentioned in 86(3).

21. Article 88 (2) states that "If the last mandate to be awarded stands for more candidates with the same number of votes cast, the Central Electoral Commission shall award the mandate by lots, which fact shall be entered in a record". This provisions appears to confuse the "number of votes cast" with the ranked quotients, as well as miss wording to be sufficiently clear. The same comment is valid for Article 133 (6) on local elections.

The election administration

22. Article 33 provides the possibility to recall a member of an electoral council or bureau by the institution which nominated or appointed him/her. The Code, in this Article, provides for a condition "of a written motivation of the need of revoke". However, the law does not stipulate specific reasons for such recalls. This has the potential to undermine the independence of the commission members. Moreover, this provision is contrary to recommendation made in the Council of Europe Code of Good Practice in Electoral matters, II 3.1, which states that :

"broadly speaking, bodies that appoint members to electoral commissions should not be free to recall them, as it casts doubt on their independence. Discretionary recall is unacceptable, but recall for disciplinary reasons is permissible - provided that the grounds for this are clearly and restrictively specified in law (vague references to "acts discrediting the commission", for example, are not sufficient)".

23. According to Article 15, electoral contestants may nominate representatives with the right of consultative vote to electoral bodies. It is understandable that these members do not have the right to vote on relevant commission's decisions, however the Code remains silent as to whether these members otherwise have the same rights and responsibilities as members of commissions with deliberative vote.

24. Article 27 (2) provides that DEC's shall have 7-11 members with deliberative vote. Article 27 (4) states that:

"Candidates for 2 members of the electoral district councils of the second level are nominated by district courts, for the other 2 members, in case of local elections – by the local councils of the first level and, respectively, second level. The candidates for the other members with the right of deliberative vote are nominated by the parties and other socio-political organizations represented in Parliament at the date when the electoral district councils are constituted, proportional to the mandates".

25. Article 29 (10) prescribes that polling station electoral bureaux shall consist of 5-11 members, while Article 29 (11) says that:

“3 candidates for the electoral office members of the precinct electoral bureau are nominated by the local councils. The other members of the polling station electoral council with a deliberative vote are nominated by parties and other socio-political organizations represented in the Parliament at the date of its formation in the ratio of their representation”.

26. In 2007 local elections the OSCE/ODIHR reported⁵ that *“Due to permissible variations in the number of commission members, some political parties could not nominate DEC and precinct electoral bureaux (PEB) members unless the body in question had the maximum number of members”.* Since the number of members is limited by the Code, proportionality of representation and even representation at all of all parties present in the Parliament may pose a practical problem. Since the model chosen is to ensure inclusiveness of commissions by allowing parliamentary parties to nominate members, adequate provisions should be included in the law to guarantee that all parliamentary parties will have at least minimal representation on commissions. The OSCE/ODIHR also made a 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.⁶

27. Vis-à-vis the decision making within the commissions, there are a few minor issues which can be improved. Article 17(2) states that *“If the candidate for the position of Chairperson, Deputy Chairperson or Secretary of the commission does not receive a majority of votes, another round of elections shall be organized in which the candidates nominated for the same position in the previous round may participate.”* The requirement for the outcome of the repeated vote is, however, not specified. Nor it is stated that only two top candidates can participate in the run-off, and if more than two may participate, the requirement for being elected should be clearly stated (e.g. the highest number of votes; or more than 50% in which case one needs to specify what happens if nobody receives that kind of majority).

28. Article 18(1) defines the quorum for decisions in the CEC (half of its members) and (2) the requirements for a valid decision. Article 32(2) defines similar conditions for the decision-making in councils and bureaux at other levels. The requirement for a valid decision is that more than half of its members (five out of nine) vote in favour, regardless how many are present and voting. In certain situations, this requirement may be impractical and lead to delays. The intention, however, is to ensure that there is as much consensus within the commission as possible, which is positive.

29. The concern over the distinction between the CEC members set in Article 17(3) of the Code as explained in the 2006 Joint Opinion remains.

30. The last Joint Opinion reiterated the recommendation offered in the OSCE/ODIHR EOM Final Report on the 2005 elections that mechanisms be introduced to ensure that DEC members drawn from the judiciary are not serving as sitting judges during their term as DEC members. Of particular concern was the fact that *“this practice raises a question of a possible conflict of interest since the court, where these DEC members normally work, may also have to handle election-related complaints and appeals”.*⁷ It is regrettable that no amendment was made to the Electoral Code to address this issue.

⁵ OSCE/ODIHR Election Observation Mission Final Report, Local Elections 3 & 17 June 2007.

⁶ Recommendation 3 in OSCE/ODIHR Election Observation Mission Final Report, Local Elections 3 & 17 June 2007.

⁷ OSCE/ODIHR EOM Final Report on 6 March 2005 Parliamentary Elections, page 7.

Voters register

31. The quality of the voters register has been an issue ever since multi party elections started in Moldova. The main rule is that people shall register where they live and vote where they have registered. Those who move after the registration is closed may be assigned to a new voting location by receiving a voting right certificate confirming the removal from the previous register (Article 39(9)). The registers are kept at mayoral level and the possibilities for checking across the whole country for duplicates are limited.

32. The law still permits election day registration of voters upon presentation of proof of residence within a precinct. Such voters are added to a so-called supplementary register. The continued use of supplementary lists and the absence of sufficient safeguards against multiple voting raise concerns with regard to possible manipulations. Furthermore, the practice is contrary to the Code of Good Practice in Electoral Matters.⁸

33. More precisely, the Code of Good Practice in Electoral Matters emphasises how strictly important it is that the voters register be *permanent*,⁹ as well as *regularly up-dated*¹⁰. At the same time, the requirements for the voters lists to "be checked with voters who are on the list, at their domicile",¹¹ and to be updated every year "on the basis of the specification made at the voters' domicile",¹² may result in practice that was previously criticised by the Election Observation Mission (EOM) of the Congress of Local and Regional Authorities of the Council of Europe. During the last local elections in Moldova, the EOM stated that the voters' lists were checked via a "door-to-door" system just before the beginning of the electoral campaign, and found that this method of checking and updating voters' register opens the possibility of creating lists of different formats, including handwritten lists, and thus affect their accuracy.¹³ As noted also in the Final Report of the OSCE/ODIHR EOM to the 2007 local elections, efforts should be undertaken to ensure that voters lists are prepared in a uniform format all across the country and contain all the data required by the law.

34. It is therefore urgent that Moldova increases the reliability of the voters' lists and introduces a voter registration system in line with previous recommendations of OSCE/ODIHR, Council of Europe and the Code of Good Practice in Electoral Matters.

Nomination and registration of candidates

35. According to Article 42(6), the person who collects signatures of electors signs every paper of subscription lists in the presence of the head of the local public administration authority of the territory where the signatures are collected. However, this procedure does not guarantee the independence and impartiality of registration of candidates. Furthermore, it appears cumbersome and redundant since lists with support signatures will eventually be verified by the respective election commissions, which have legal authority to handle candidate registration – an authority which local public administration is not vested with.

⁸ Code of Good Practice in Electoral Matters, "In any event polling stations should not be permitted to register voters on election day itself", I.1.1.2.i (CDL-AD(2002)023rev).

⁹ Code of Good Practice in Electoral Matters, "electoral register must be permanent", I.1.1.2.i (CDL-AD(2002)023rev).

¹⁰ *Ibidem*, "there must be regular up-dates, at least once a year. Where voters are not registered automatically, registration must be possible over a relatively long period", I.1.1.2.ii (CDL-AD(2002)023rev).

¹¹ The Electoral Code of Moldova, Chapter 5., art. 39 (1) (CDL-EL(2007)019).

¹² *Ibidem*, Article 39 (3).

¹³ CG/BUR(13)75.

36. These are only independent candidates that are requested to present signatures in support of their candidacies. Registered parties and blocks of parties do not need to collect such signatures during an election. However, according to the Law on Political Parties, the initial registration of a political party by the authorities is conditional on the submission of a list of support signatures.

37. Article 43 (4) provides for nullification of subscription lists drawn up before the beginning date of the period of nomination of candidates. However, it is unclear whether the presence of some signatures collected before the beginning of the period of nomination of candidates, regardless of their number, would serve as the basis for nullifying the rest of the signatures on the same list, even if those were collected within the legal period. The Code should clearly indicate that only the signatures collected outside the legal period should be disqualified.

38. The Code should clearly state the procedures for the verification of documents submitted by candidates for registration (if any), as well as what happens if any of the information is found inaccurate.

39. In addition, previous Joint Recommendations raised concerns over three articles of the Code that sanction some violations contained therein with the cancellation of the candidate registration. Candidacy can be cancelled in cases when:

Article 36: "a contestant in an election receives on his/her account undeclared funds from abroad or has knowingly used such funds [...]"; in such a case, the CEC will ask the Supreme Court to nullify the registration of the contestant.

40. In case of repeat elections following nullification of elections by the Constitutional Court (Article 93) or the CEC (in Article 138), both articles stipulate that "electoral candidates who committed fraud shall be excluded from the voting ballots".

41. 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. No amendment has been entered to the mentioned norms. It can be assumed that the existing norms can, and indeed have to be, interpreted in a way that is consistent with the intended principles.

42. The observation of the 2007 local elections by the OSCE/ODIHR EOM revealed a need to further clarify the legal grounds for deregistration of candidates. Under Article 126(1) of the Electoral 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.¹⁴ 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.¹⁵

43. Article 48(3) stipulates that the order in which electoral subjects appear on a ballot is determined by the sequence of their registration by the respective election commissions. In order to avoid any confusion and possible manipulation attempts as reported during the 2007

¹⁴ See OSCE/ODIHR Election Observation Mission Final Report, Local Elections 3 & 17 June 2007.

¹⁵ See the OSCE/ODIHR Guidelines for Reviewing a Legal Framework for Elections, p. 20-21, available at http://www.osce.org/odihr/item_11_13588.html.

local elections, the order in which candidates/parties are listed on a ballot should be determined by drawing of lots and the procedures should be laid out in the Law or a CEC regulation.

Electoral campaign

44. According to Article 1, “**Electoral campaign**” refers to the time period allowed for activities aimed at influencing the voters to cast their votes for one or another candidate, commencing for each electoral contestant respectively on the day he/she is registered with the Central Electoral Commission or district electoral council, and ending on the day of his/her exclusion or the day of the election. The same Article provides a different definition of Electoral Campaign as “the preparation and distribution of information seeking to influence the voters to vote for one or another electoral contestant”. It is unclear why the Code contains two definitions of the same term in one and the same Article.

45. It is recommended that a single campaign starting date for all electoral contestants be introduced, since an early registration of a candidate may provide an unfair advantage of starting the campaign early.

46. According to Article 36 (1), “Direct or indirect funding or material support of any kind for the electoral campaign of candidates in an election and electoral contestants by foreign countries, foreign, international or joint enterprises, institutions, organisations, as well as by natural persons who are not citizens of the Republic of Moldova is prohibited.” This Article as it stands now is too broad and limits also legitimate efforts by international organisations promoting democracy and pluralism.

47. Article 47 (1) states that “Campaigning for an electoral contestant is allowed only after his/her registration with an electoral body”. This seems to be an unnecessary restriction to the right of free speech, and may be used to limit regular political discussions and activities.

48. A number of previous Joint Recommendations stated that paragraph (1) of Article 47 limited campaign rights to “*Citizens of the Republic of Moldova, parties and other social-political organisations, electoral blocs, candidates and representatives of these candidates*”. This limitation is contrary to international instruments and domestic constitutional law (“...*aliens and stateless persons shall enjoy the same rights and shall have the same duties as the citizens of the Republic of Moldova*”).¹⁶ Paragraph (1) of Article 47 also prohibits “*unethical*” campaigning. This prohibition is too broad and could be applied in a manner that would violate a person’s right to free speech and expression. This limitation on free expression and speech could prevent a robust and vigorous campaign, which is critical to election campaigning in a democracy. Such a broad prohibition is not in compliance with OSCE commitments, international standards, and domestic constitutional principles.¹⁷ Paragraph (12) of Article 47 has a similar prohibition against “unethical” campaigning that is troublesome as well. These paragraphs should be reviewed.

Turnout requirements / Voter participation thresholds

49. Despite the recommendation given in the 2006 Joint Opinion underlining that *the turnout requirement* can lead to “endless cycles of failed elections”¹⁸, the Electoral Code of Moldova maintained the provision that elections “shall be invalid if less than half of the voters included on

¹⁶ Paragraph 26.1 of the OSCE 1991 Moscow Document; Paragraph 26 of the OSCE 1999 Istanbul Document; Article 19 of the Universal Declaration of Human Rights; Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms; Articles 19, 32, and 41 of the Constitution of Moldova.

¹⁷ See para. 9.1 of the OSCE 1990 Copenhagen Document; Para. 26 of the OSCE 1991 Moscow Document; Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms; Articles 32 and 41 of the Constitution of Moldova.

¹⁸ CDL-AD(2006)001, pp. 23, 15e.

the voter rolls have participated”.¹⁹ Indeed, according to Articles 91 and 93, the Parliamentary elections are declared invalid if the turnout is lower than 50%. Repeat elections would need one-third turnout. If the requirement is still not met a new election is held with new candidates and the requirement to have a 50% turnout.

50. 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 be 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 boycott.

51. It is not more democratic to have a valid repeat election with just above one-third turnout while invalidating a first election with just below 50% turnout. As long as the electoral process is fair and transparent, turnout requirements do not impact the confidence in the elections and may rather lead to a series of elections with ever decreasing participation and an exhausted electorate. Therefore, and as it was already recommended in the previous Joint Opinion, the turnout requirement 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.

52. 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.²⁰

Size of the polling stations

53. The Electoral Code stipulates that a precinct may cover up to 3,000 voters (Article 29(2))²¹ and the precinct electoral board may have up to 11 members (Article 29(10)). Even though the number of staff allows for more than one row of voting, 3,000 voters is too high a number for one polling station.

54. It can lead to unnecessary crowds at polling stations which can then impact negatively on voting procedures. It is recommended that, provided the organisational and financial means allow, the maximum number of voters to vote at one polling station does not exceed 1,500. Indeed, smaller polling units, even if located in the same building, may improve both the voting and the counting processes. The Code may provide for exceptions from this rule in areas where it is practically impossible to have a polling station of 1,500 or less voters.

Secrecy of the vote

55. The Code of Good Practice in Electoral Matters underlines that:

“the signing and stamping of ballot papers should not take place at the point when the paper is presented to the voter, because the signatory or the person affixing the stamp might mark the paper so that the voter could be identified when it came to counting the votes, which would violate the secrecy of the ballot. The voter should collect his or her ballot paper and no one else should touch it from that point on.”²²

56. However, the Electoral Code of Moldova maintained the provision that:

¹⁹ The Electoral Code of Moldova, Article 91.

²⁰ The Code of Good Practice on Referendums recommends not to provide for (turnout or approval) quorums (CDL-AD(2007)008,III.7).

²¹ “Each precinct shall have no less than 30 and no more than 3.000 voters.” – *Ibidem*, Article 29 (1).

²² CDL-AD(2002)023rev, para. 34.

"before introducing the ballot into the ballot box, one of the members of the electoral bureau of the polling station, who is permanently situated near the ballot box, applies on the back of the ballot the special stamp of the electoral bureau of the polling station".²³

57. The Vice-Speaker of the Parliament of Moldova reported to the Council of Europe that the Moldovan Parliament "considered not necessary to change these provisions, because has not found any violation of the secrecy of the vote" since "it is not possible to see the voter's choice".²⁴

58. The OSCE/ODIHR and the Venice Commission emphasize that in order to fully comply with the provisions of the Code of Good Practice in Electoral Matters,²⁵ as well as to exclude even the potential for the violation of the secrecy of the vote, the currently existing procedure of stamping of ballots after they have been marked by the voter should be amended. The Final Report of the OSCE/ODIHR EOM on the 2007 local elections provides further evidences for the necessity of reviewing the procedure.

Media campaign

59. One problem in Moldova has been 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.

60. In response to previous recommendations, the Vice-Speaker of the Parliament states that the Broadcasting Code of 27 July 2006 and the Code of Conduct adopted by the CEC on 28 October 2005 address the problems regarding the editorial coverage of the incumbents. However, the Statement of Preliminary Findings and Conclusions from the International Election Observation Mission to the Local Elections 3 June 2007 from the Congress of Local and Regional Authorities and the OSCE/ODIHR reports that the coverage of incumbents during pre-electoral campaign still remains as a major problem. This is especially problematic when it comes to public broadcasters²⁶. Recommendations in the last Joint Opinion should be seriously considered.

61. Article 64(3) states that "[i]n the electoral period any opinion polls regarding the political preferences of the voters may be conducted only with the condition of a preliminary notification to the Central Election Commission." It seems unnecessary to require such notification, when there are restrictions anyway on the publication of results.

Right to vote

62. The Code determines the voting time from 7 a.m. to 9 p.m.²⁷ However, despite previous recommendations, the Code does not clearly provide that voters waiting in line outside polling stations at the time of polling station closing will be allowed to vote.

²³ The Electoral Code of Moldova, Article 54 (5).

²⁴ Report on implementation of recommendations provided by the Council of Europe experts concerning the Amendment Act No. 248-XVI of 21/07/2006 to amend the Electoral Code, pp.2, para. 1.

²⁵ CDL-AD(2002)023rev, I.4.

²⁶ 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>.

²⁷ Ibidem, art. 50.

63. According to Article 13(1)c, “those sentenced to imprisonment by a final decision by a court of law” do not have the right to vote. The last Joint Opinion emphasised that infinite cancellation of voting rights of individuals sentenced to imprisonment, regardless of the reason or the seriousness of the offence, was not in line with recent jurisprudence of the European Court of Human Rights (ECHR). 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.²⁸

64. A restriction on the right to be elected to Parliament is made by Article 75, providing that a candidate has to reside permanently in the country. This requirement is additional to the citizenship condition. This requirement appears to be contrary to 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”.

65. Already in previous joint opinions the problem of restriction of military personnel’s right to vote in local elections has been addressed. According to Article 123(1) they are not allowed to vote.

66. It has been noted in recent elections that most polling stations were inaccessible for people with disabilities and presented access difficulties for elderly persons. It is recommended that, as a minimum, a general accessibility principle be incorporated in the Law.

Observers

67. 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 list of reasons that may serve as basis for refusal to accredit an observer.

68. Article 63 (4) provides that:

“By the resolution of the Central Electoral Commission Resolution or of the electoral councils, shall be accredited representatives of qualified public associations from the Republic of Moldova to observe the election at the precincts. For purposes of this subsection, a “qualified” public association is one which is committed under its statute to promote human rights and democratic values, and is found by the Central Election Commission (or, in the case of regional organizations, the district electoral council) to be capable of exercising civic functions with respect to the election.”

69. It is unclear as to what would be the basis for the CEC to decide whether the organization is “capable of exercising civic functions with respect to the election”. This requirement appears redundant and creates 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.

Counting

70. A number of recommendations offered in the last Joint Opinion with regard to counting and vote tabulation procedures remain to be addressed.

71. Besides, the Code remains unclear as to what happens if the figures on the results protocols show a difference between the number of ballots in the ballot box and the number of voters that cast ballots, in particular, if the first figure is higher than the second. As it was

²⁸ ECHR, *Hirst v. United Kingdom (n.2)* – 74025/01 – 6 October 2005.

recommended, consideration should be given to making it compulsory for the relevant DEC to review the count and to take action in cases of discrepancies in the reconciliation. Furthermore, as recommended in the Final Report of the OSCE/ODIHR EOM to 2007 local elections, “the Electoral Code should provide for a clear division of responsibilities between the DEC’s and courts with regard to recounts, specifying on what grounds a recount can be requested, by whom and from which body, as well as which body should carry it out.”

Publication of results

72. As was mentioned in the 2006 Joint Opinion,²⁹ the Law does not provide any “answer to the recommendation made in the OSCE/ODIHR EOM 2005 Final Report which reads: “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 Only such a mechanism permits the conduct of a thorough analysis of the consolidated results per polling stations, to compare the results as tabulated centrally to the results as gathered at polling station level by party representatives and observers, and as a consequence to raise the level of confidence in the overall results.”

73. The recommendation offered in the last Joint Opinion remains to be addressed.

74. Additionally, Article 61(2) seems to indicate that a commission should not publish the preliminary results if an appeal related to the conduct of voting was filed with a court. However, 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.

Complaints and appeals procedures

75. In the 2006 Joint Opinion, reference was made to earlier recommendations concerning complaints and appeals procedures reiterating that:

“Consideration should be given to ensure that the law clearly defines the powers and responsibilities of the various bodies responsible for the review of complaints and appeals, to avoid conflicts of jurisdiction, and should not grant the appellants or the authorities the right to choose the appeal body.”

76. It was further stated that:

“The current complaints and appeals system would benefit from a clearer definition of the responsibilities and appears not to be in line with the recommendations of the Venice Commission Code of good practice in electoral matters.”³¹

77. The above recommendations remain valid as the Code retains the possibility for complainants to choose an appeal body, which can result in conflicts of jurisdiction, duplication of efforts and conflicting judgements. Within the judicial system itself, according to Articles 68, 89 and 92, ordinary courts and the Constitutional Court are both competent to declare the results null.

78. 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. However, it is not clear what is meant by the sentence “...shall exclude the electoral contestant, who has been cast a smaller number of valid votes, replacing him/her with the electoral contestant who has been cast a greater number

²⁹ CDL-AD(2006)001, para. 59.

³⁰ OSCE/ODIHR EOM Final Report on 6 March 2005 Parliamentary Elections, page 22.

³¹ Venice Commission, Code of Good Practice in Electoral Matters, CDL-AD(2002)023rev, para. 97.

of valid votes on sequential division." This seems to be an overly generalised way of correcting every possible fault in a protocol.

79. Article 92 states that "should the Constitutional Court determine that during the voting and vote counting the provisions of this Code were violated and affected the voting results and awarding 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.³² 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.

Penalties

80. 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 out 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.³³ It should be recommended that Article 69 be reformulated in a manner that is consistent with the right to free speech and expression."

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

Conclusions

82. Following the recommendations of the last Joint Opinion on the Electoral Code of Moldova,³⁴ the Moldovan Parliament has undertaken considerable efforts to improve the electoral legislation. The Electoral 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.

83. This Opinion should be read in conjunction with the Joint opinion on the Electoral Code of Moldova adopted at the 66th plenary session of the Venice Commission (17-18 March 2006, CDL-AD(2006)001), as a number of previous recommendations remain to be addressed.

84. The most important recommendations offered by the OSCE/ODHIR and the Venice Commission in the present Joint Opinion are as follows:

³² CDL-AD(2002)023rev, II.3.3. para. 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"*.

³³ See para. 9.1 of the OSCE 1990 Copenhagen Document; para. 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.

³⁴ Joint opinion on the Electoral Code of Moldova adopted at the 66th plenary session of the Venice Commission (17-18 March 2006, CDL-AD(2006)001).

Electoral system:

- The electoral system for the Parliament should create possibilities for adequate participation in public life of national minorities and mainstream interests at regional level;
- Turnout requirements for elections to be recognized as valid should be removed so as to avoid endless cycles of failed elections;
- The thresholds for winning seats should not be increased and consideration should be given to introducing a single threshold for parties and coalitions to gain seats in Parliament;

Election administration:

- The possibility for recall of election commission members should be reconsidered as it has the potential to undermine the independence and the stability of election administration;
- The decision-making authority of members of the Central Election Commission with deliberative and consultative vote should be made clear;

Voters lists:

- Further efforts need to be deployed to improve the reliability of the voters' list, including through the introduction of a centralized and permanent voter register;
- Should election day registration be maintained, adequate safeguards against possible multiple voting need to be instituted;
- The maximum number of voters registered per polling station should be reduced;

Right to vote:

- The provision for the denial of the right to vote to prisoners serving a sentence following a court ruling should be brought in line with the latest jurisprudence of the ECHR.

Candidate registration:

- Signature collection and verification procedures should be further streamlined in order to ensure that this administrative measure does not impede inclusive candidate registration;
- Proceedings in cases of violations of the law that can lead to the revocation of a candidacy should abide by the principle of presumption of innocence.
- The order in which electoral contestants are listed on a ballot should be determined by drawing of lots rather than by the sequence of their registration.

Secrecy of vote:

- The secrecy of vote should be better ensured by eliminating the requirement for stamping of ballots after they have been marked by voters;

Campaign:

- Restrictions to the right to campaign should be reviewed in order not to preclude a meaningful pre-electoral campaign, as well as not to contradict general principles of freedom of speech and expression;

Vote count, aggregation and publication of results:

- Further control mechanisms during the count of votes should be introduced;
- The authority of election commissions and courts with regard to invalidation of election results should be made clear;
- The Code should 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 DEC.

Complaints and appeals:

Powers and responsibilities of various bodies responsible for the review of complaints and appeals should be clearly defined so as to avoid conflicts of jurisdiction. Appellants should not be granted the right to choose an appeal body.