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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

COMMENTS ON THE DRAFT LAW ON POLITICAL PARTIES OF MOLDOVA

by
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Endorsed by the Venice Commission
at its 71st plenary session
(Venice, 1-2 June 2007)

1. The point of departure for these comments are "Comments on the Draft Law on political parties of Moldova" of Dr Marcin Walecki dated February 2007.

2. These comments have been endorsed by the Venice Commission at its 71st plenary session (Venice, 1-2 June 2007).

3. The Draft Law is written very ambitiously. It covers a broad range of matters which have to be addressed in a comprehensive law on political parties, and I agree with Dr Marcin Walecki, who in his comments, points out that the Draft Law is an important step forward in order to amend the existing legislation on political parties of Moldova and that it offers an opportunity to create a modern political finance system and improve transparency and accountability in political party financing.

4. As a base for comments Dr Walecki explicitly mentions the standards of the Council of Europe as laid down in Recommendation Rec (2003) 4 of the Committee of Ministers to member states on common rules against corruption in the funding of political parties and electoral campaigns. The Draft Law, however, covers matters which also are dealt with in treaties of the Council of Europe and among these in the first place the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), further in decisions of the European Court of Human Rights (ECtHR)[1] and, finally, in a great number of other documents of the Council – among them guidelines and previous opinions of the Venice Commission[2] – which also have to be taken into account.

5. These comments are based on an unofficial translation transmitted to the Venice Commission. One has to be aware of possible ambiguities that may arise from difficulties of translation of the Draft into the English language. There is a short informative note attached to the draft but no explanatory memorandum.

6. The purpose of assistance provided by the Venice Commission generally is to promote good standards of constitutional law as defined in the documents mentioned above. But good standards rarely demand one specific solution of a certain constitutional problem. Usually there is a margin of appreciation within which there are several possible solutions. The choice among them is a matter for the legislator. Therefore, I restrict my comments to matters which in my view could lead to infringements of constitutional standards beyond limits defined in the documents mentioned above as for example the provision in Article 11.2 of the ECHR that no restrictions shall be placed on the exercise of the freedom of assembly and association "other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others". As a summary it has to be underlined that a control mechanism concerning funding of political parties must be developed, that improvements in internal control are necessary, that infringements of funding

[1] Cf. among others Case of United Communist Party of Turkey and others v. Turkey, Application 19392/92, judgment 30.1.1998 of the Court; Case of Refah Partisi and others v. Turkey, Applications 41340/98 and others, judgment 13.2.2003 of the Grand Chamber of the Court; Affaire Parti Socialiste de Turquie et autres c. Turquie, Requête no 26482/95, arrêt 12.11.2003.

[2] Cf. CDL-INF(2000)001 - Guidelines on prohibition and dissolution of political parties and analogous measures adopted by the Venice Commission at its 41st plenary session (Venice, 10 – 11 December, 1999), CDL-INF(2001)007 - Guidelines and Report on the Financing of Political Parties: adopted by the Venice Commission at its 46th Plenary Meeting, (Venice, 9-10 March 2001) and CDL-AD(2004)007rev - Guidelines and Explanatory Report on Legislation on Political Parties: some specific issues, adopted by the Venice Commission at its 58th Plenary Session (Venice, 12-13 March 2004). The documents of the Venice Commission are available under http://www.venice.coe.int.

rules must be made subject to effective sanctions and that independent monitoring in respect of funding should be made mandatory.

7. Article 3 (2) provides that political parties shall be prohibited "which, by their statutes and programmes convey ideas that contravene the provisions of the Constitution of the Republic of Moldova". With regard to decisions of the ECtHR this provision is too broadly drafted, as the Court has decided "qu'un parti politique peut mener campagne en faveur d'un changement de la législation ou des structures légales ou constitutionnelles de l'Etat à deux conditions : (1) les moyens utilisés à cet effet doivent être à tous points de vue légaux et démocratiques ; (2) le changement proposé doit lui-même être compatible avec les principes démocratiques fondamentaux."[3] As far as a political party pursues its goals by peaceful means any work for example for greater autonomy of a certain region cannot be used as reason to prohibit the party. Article 3 (2) therefore should be redrafted in order to comply better with the decisions of the ECtHR.

8. According to Article 7 (1) of the Draft Law only "Citizens of the Republic of Moldova … can become members of political parties". This provision excludes without exception both foreigners and stateless persons from party membership. In many opinions the Venice Commission has pointed out that such a broad exclusion is not any longer acceptable under the standards of the Council of Europe. This provision should be redrafted.

9. According to Article 9 (1) d) of the Draft Law registration of a political party requires support of not less than five thousand party members with domicile in at least half of the territorial administrative units of the second level of the country, but not less than 150 members domiciled in each of the aforementioned territorial administrative units. The requirement of five thousand members seems to be a formidably high threshold if compared to – quite fragmentary and not entirely reliable – data which are available for democracies in Western Europe. Similarly, the requirement of not less than 150 members in each of at least half of the territorial units will be almost impossible to fulfil for any group of common interest related to a limited part of the country. In my opinion these two very far reaching requirements in Article 9 (1) d) put a burden on citizens trying to exercise their rights under Article 11 of the ECHR which is potentially restrictive and as such would be disproportionate and not necessary in a democratic society. The same applies to the general prohibition in Article 3 (7) on any establishment of political parties on the basis of ethnical or racial criteria insofar as a group of this character does not act in a way which would justify application of one of the exceptions mentioned in Article 11.2 of the ECHR in that specific case.

10. Article 9 (1) d) of the Draft Law also requires that any application for registration as a political party has to include a list of members of the applying association with full details on "name, first name, date of birth, domicile, identity card, personal code, the job place and the signature". It is not clear whether all members of the applying association have to be listed at this occasion or only the required minimum of not less than five thousand. But according to Article 20(4) (which mistakenly refers to Article 7 instead of Article 9 of the Draft) in every pre-electoral year political parties are obliged to update the membership list and to submit the updated list to the Ministry of Justice. This can be understood as a requirement that every political party (if not before then at least) after registration periodically has to submit fully updated lists of party members to the Ministry. It would appear reasonable to initially check the support for an application to be registered as a political party and to clearly identify the legal representatives of a registered political party and the candidates presented and supported by a political party in general elections. However, later on successful participation in a general election should be sufficient evidence of public support; as the Venice Commission repeatedly has pointed out it would place an unreasonable burden on political parties to periodically prove

[3] Affaire Parti Socialiste de Turquie et autres c. Turquie, Requête no 26482/95, arrêt 12.11.2003, at paragraph 38 (text available in French only).

what is obvious. It therefore would be disproportionate and not necessary in a democratic society to ask for periodical compulsory submission of lists of party members to the Ministry of Justice before every upcoming election. It would definitely be disproportionate to demand submission of lists of *all* members. And, finally, any list submitted should only include the minimum of information on each supporting party member which is necessary to verify that the party has sufficient overall public support. The wealth of detailed information which is required in Article 9 (1) d) section 2 of the Draft Law goes beyond that purpose. If made public – which may be possible under Article 12 (3) – the individuals concerned could easily become victims of identity theft; their privacy should be respected and protected.

11. Articles 22 and 23 of the Draft Law provide regulations on reorganisation of political parties by merger or takeover. Their main contents seem to be to regulate procedural matters; they do not address the more important matters of possible changes in party representation in Parliament and of financial consequences for the reorganised parties.

12. According to Article 27 (1) political parties are "entitled to" – among other things – "property, buildings, equipment, publishing houses, printing house [and] transportation means". This seems to indicate that they may own and operate such facilities and assets. But according to Article 27 (3) political parties "can not undertake economic or commercial activity". Does this mean that a political party on the one hand can own and operate for example printing and publishing facilities and produce printed and published matters, but on the other hand cannot do that for third parties or – if the political party does it anyway – is allowed to do that only without economic remuneration? With the text of Article 27 as a point of departure the answer to this question is not obvious. In order to avoid unnecessary ambiguity, these provisions should be reconsidered and redrafted.

13. Article 28 (5) of the Draft Law provides that "Revenues provided in par. (1) shall be tax exempted.", and according to Article 28 (1)
"Finances of political parties can derive from the following sources:
a) party members' dues;
b) donations;
c) fund raising activities;
d) subsidies from the state budget, according to the annual budgetary law."
This provision can quite narrowly be interpreted so as to exempt from (income) taxation the four types of revenue mentioned under a) to d) when *received* by a political party. This provision can also be interpreted so as to exempt from (any kind of) taxation the four types of revenue when *received and used* by a political party. Both interpretations, but especially the latter and wider one, may cause difficulties.

a) When it comes to *income taxation* the exemption clause may be used by the political party to avoid taxation of activities for example within the framework of Article 27 (1), which in substance would be – but openly cannot be – commercial.

b) When it comes to *value added taxation* the exemption clause may be harmful to a political party, because it could make it impossible to recover VAT on purchased goods and services even if acting legally under Article 27 (1).

c) When it comes to *social security taxes,* which have to be paid by an employer on employees' salaries, an exemption of political parties as employers could entail that their employees cannot get full and proper coverage of social security systems, if payment of taxes and coverage are linked. If employees get coverage without payments of the political party as their employer, an answer will have to be found to the question, who, then, will pay the necessary money into the financing system of social security. If that is done by budget means, the corresponding appropriation will have to be identified as a subsidy and treated accordingly.

It is very much in doubt whether these problems can be solved within the framework of general legislation on political parties. A better solution would be to analyse and solve any problems of taxation of political parties in the framework of tax legislation.

14. Finally there is a far reaching and unconditional prohibition to accept financial support from abroad in Article 28 (8). The present wording could be understood as to prohibit any kind of support to political parties also from Moldovan citizens living abroad even if allowed to participate in general elections and from organisations as the Council of Europe. If that is the intention, the provision cannot be acceptable under Article 11 of the ECHR since the prohibition would not be necessary in a democratic society. If a general prohibition is not intended, it should be considered to redraft the wording of Article 28 (8).