



Strasbourg/Warsaw, 7 June 2010

CDL-AD(2010)014

Opinion No. 576 / 2010

Or. Engl.

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

AND

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

JOINT OPINION
ON THE DRAFT WORKING TEXT
AMENDING THE ELECTION CODE
OF MOLDOVA

Adopted by the Council for Democratic Elections
at its 33rd meeting
(Venice, 3 June 2010)
and by the Venice Commission
at its 83rd Plenary Session
(Venice, 4 June 2010)

on the basis of comments by
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I. INTRODUCTION

1. The proposed amendments to the Election Code (hereinafter “the Code”) were drafted by the Government of the Republic of Moldova in March 2010. Following an official request from the Moldovan authorities forwarded to the Venice Commission on 10 March 2010, and in line with standard practice, the OSCE/ODIHR and the Venice Commission have undertaken a joint expert review of the proposed amendments.

2. The present opinion should be read in conjunction with the Joint Opinions of the OSCE/ODIHR and the Venice Commission on the Election Code of Moldova of 2006, 2007 and 2008. The draft amendments are assessed for their compliance with OSCE commitments and other international standards for democratic elections. This opinion focuses on the extent to which the proposed amendments address previous recommendations.

3. The current review was prepared based on an unofficial English translation of the Election Code. As the reviewers did not have the possibility to consider the amendments in the original language, they cannot guarantee the accuracy of the translation, including the numbering of articles, paragraphs and sub-paragraphs. The content of any legal review based on translated laws may be affected by issues of interpretation resulting from translation.

4. This review is based on the following documents:

- Election Code of Moldova, Law No 1381-XIII of 21 November 1997, as of 10 April 2008 (CDL(2008)082).
- Amendments to the Election Code of Moldova, June 2009, Law No 24-XVII and 25-XVII of 15 June 2009 (CDL-EL(2010)012).
- The Constitution of the Republic of Moldova as of 29 July 1994 including the amendments of 25 July 2003.
- OSCE/ODIHR – VC Joint Opinion on the Election Code of Moldova adopted at the 66th plenary session of the Venice Commission (17-18 March 2006, CDL-AD(2006)001).
- OSCE/ODIHR – VC Joint Opinion on the Election Code of Moldova as of 27 March 2007 adopted at the 73rd plenary session of the Venice Commission (14-15 December 2007, CDL-AD(2007)040).
- OSCE/ODIHR – VC Joint Opinion on the Election Code of Moldova as of 10 April 2008 Adopted at the 76th plenary session of the Venice Commission (17-18 October 2008, CDL-AD(2008)022).
- 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).
- OSCE/ODIHR Election Observation Mission Final Report, Local Elections 3 & 17 June 2007.
- OSCE/ODIHR Election Observation Mission Final Report, Parliamentary Elections 5 April 2009.
- OSCE/ODIHR Election Observation Mission Final Report, Early Parliamentary Elections 29 July 2009.

5. The present Opinion was adopted by the Council for Democratic Elections at its 33rd meeting (Venice, 3 June 2010) and by the Venice Commission at its 83rd plenary session (Venice, 4 June 2010).

II. EXECUTIVE SUMMARY

6. The Election Code regulates all direct elections and referenda in the Republic of Moldova except those for the Autonomous Territorial Unit of Gagauzia. The Code as amended up to June 2009 represented a sound basis for the organisation of genuinely democratic elections.

7. The proposed amendments of March 2010 demonstrate a genuine effort by the Moldovan authorities to address the shortcomings reflected in previous Joint Opinions and Final Reports of OSCE/ODIHR Election Observation Missions. They would represent a major improvement to the Code if they were to be adopted by Parliament. However, the draft amendments do not address some previous recommendations that are essential. The Moldovan authorities are strongly encouraged to consider these outstanding recommendations all the more as the relevant articles of the Code are already being amended by the current amendments in other respects.

8. Past recommendations that have been fully or partially addressed by the draft amendments are as follows:¹

- to remove turnout requirements for elections to be recognised as valid in order to avoid potential endless cycles of failed elections;
- not to increase legal thresholds for winning parliamentary seats;
- to remove the requirements for candidates with multiple citizenships winning a seat in parliament to renounce other citizenship(s) in order to be able to take up the seat;
- to reconsider the possibility of recalling election commission members as this has the potential to undermine the independence and the stability of election administration;
- to oblige the Central Election Commission (CEC) to publish detailed election results by polling station on its website as soon as they have been processed by the district electoral commissions;
- to institute adequate safeguards against possible multiple voting in case election day registration is to be maintained;
- to define clearly powers and responsibilities of various bodies responsible for the review of complaints and appeals so as to avoid conflicts of jurisdiction;
- not to grant the appellants the right to choose an appeal body and to require that complaints be filed in court only after an appeal has been taken to the higher electoral body;
- to clarify the decision-making authority of CEC members with deliberative and consultative vote;
- to regulate the conditions for de-registering candidates or lists of candidates.

9. The following essential recommendations remain to be addressed:

- to remove the possibility for annulment of an entire list if it falls under the minimum of candidates because individual candidates have been deregistered;
- to review restrictions to the right to campaign in order not to preclude a meaningful pre-electoral campaign, as well as not to contradict general principles of freedom of speech and expression;
- to streamline further signature collection and verification procedures in order to ensure that they do not impede inclusive candidate registration;
- to grant the conscripts the right to vote in local elections;
- to create possibilities for adequate participation in elected bodies of national minorities and mainstream interests at regional level.

¹ These recommendations were considered as not addressed in the Joint Opinion on the Election Code of Moldova as of 10 April 2008 (CDL-AD(2008)022).

Further efforts are required to address concerns raised in previous joint opinions regarding accuracy of voters' lists.

III. THE JUNE 2009 AMENDMENTS

10. The Election Code was most recently amended in June 2009 just before early parliamentary elections of July 2009. The electoral threshold for political party representation in the parliament was reduced from six to five per cent. Thresholds were further changed by the proposed amendments and will be commented upon below.

11. The turnout requirement for an election to be valid was lowered from half to one third of registered voters and eliminated in the case of repeat elections.² These amendments can be considered an improvement, since the probability for repeat elections is reduced and a repeat election will be valid regardless of the turnout. As a result, endless cycles of failed elections should be avoided.

IV. PROPOSED MARCH 2010 AMENDMENTS

1. The electoral system for Parliament

12. In the 2007 Joint Opinion, the Venice Commission and the OSCE/ODIHR stressed the importance of taking into account sizable national minorities living on the territory of the Republic of Moldova when deciding on an electoral system. It was recommended that "*The electoral system for the Parliament should create possibilities for adequate participation in public life of national minorities and mainstream interests at regional level*".³

13. The proposed amendments do not introduce any changes to the electoral system for parliamentary elections in order to address this concern. The recommendation above therefore remains relevant.

The inclusion of pre-electoral alliances or blocs

14. The proposed amendments revert back to the situation before the adoption of the 2008 amendments, which removed the possibility for parties to form pre-election alliances or blocs. In line with previous recommendations, pre-election alliances and blocs would once again be allowed thereby reducing the potential for lost votes in parliamentary elections. This could also allow for greater opportunities for smaller parties to gain representation in the parliament.⁴

The decrease in the threshold for winning parliamentary seats

15. Draft amendments envisage lowering the threshold for political party representation in the parliament to four per cent, which is in line with a previous recommendation.⁵ In another positive step, the threshold for independent candidates to gain a parliamentary seat would also be reduced from three to two per cent. The proposed threshold for electoral blocs would be set at six per cent.

16. These thresholds have been changed several times since 2000 and were a subject of a number of recommendations by the OSCE/ODIHR and the Venice Commission. The 2007 Joint Opinion stated that "...one would believe that coalitions should be encouraged in order to

² The amended articles of the Code were Articles 86, 91 and 93.

³ Joint Opinion on the Election Code of Moldova as of 27 March 2007 (CDL-AD(2007)040), para. 12.

⁴ Amendments are proposed to various relevant code articles to reflect the allowance of such alliances or blocs and a definition is added to Article 1.

⁵ Joint Opinion on the Election Code of Moldova as of 10 April 2008 (CDL-AD(2008)022), para.15.

provide more cooperation and stable government.”⁶ While the proposed reduced thresholds represent an improvement, the recommendation to maintain the threshold at low level for both political parties and electoral blocs remains valid.

2. Candidacy and voting rights

Right to vote

17. In previous Joint Opinions, the OSCE/ODIHR and the Venice Commission have noted that, according to the European Court of Human Rights, restrictions on the right to vote which affect all convicted prisoners in an 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.⁷ The proposed changes address a previous recommendation to narrow the cases where those deprived of liberty are also deprived of the right to vote and to make the restriction proportionate to the committed crime.⁸

18. The category of persons who have been sentenced to deprivation of liberty and who have lost their right to vote is further narrowed. In a change from previous formulation in Article 13(1), the draft amendments suggest that individuals convicted of serious crimes would retain their right to vote, while those convicted of very and exceptionally serious crimes would be stripped of this right. Therefore, the restriction to the right to vote would become proportionate to the crime committed. In response to a previous recommendation, the amendments also clarify that the above restrictions only apply to individuals who are serving a sentence and have pending criminal records. However, the revised provisions look still too broad regarding deprivation of the right to be elected of citizens convicted or who have pending criminal records.⁹

19. The right to vote in local elections is still denied to conscripted military personnel, an issue that has been raised in previous Joint Opinions. The proposed amendments do not address this issue. Neither do they address previous recommendations to adopt minimum guarantees for elderly voters and voters with disabilities on general accessibility issues.¹⁰

Right to be elected

20. Up to recent amendments (23 December 2009), the Election Code provided for an incompatibility between double citizenship and membership of Parliament (Articles 13(2)b¹ and 75(2)-(4)).¹¹ The Election Code does not provide any more for such incompatibility: the law adopted on 23 December 2009 amending these provisions takes into consideration the previous Venice Commission and OSCE/ODIHR recommendations in this regard.¹² As just confirmed by the European Court of Human Rights, such restriction was a violation of the right of double nationals against non-discrimination guaranteed by Article 17 of the European

⁶ CDL-AD(2007)040, para. 16.

⁷ Joint Opinions adopted in 2007 and 2008: CDL-AD(2007)040, para. 63 and CDL-AD(2008)022, para. 19. See also the judgment by the European Court of Human Rights on *Hirst v. United Kingdom* (No.2), Application no. 74025/01, 6 October 2005.

⁸ CDL-AD(2008)022, para. 21.

⁹ CDL-AD(2008)022, para. 28.

¹⁰ CDL-AD(2008)022, para. 22.

¹¹ Extract from the Law amending the Election Code of Moldova of 23 December 2009: “Art. V. – The Electoral Code no.1381-XIII of 21.11. 1997 (Republic of Moldova “Official Monitor”, 1997, no.81, art. 667), with subsequent changes, is modified as follows:

1. Art. 13, para. (2), letter b1) is abrogated.

2. Art. 19, para. (1), the word “exclusively” is deleted.

3. Art. 20, para. (2), letter b), the text “or obtaining the citizenship of another country” is deleted.

4. Art. 75, para. (2)-(4) are abrogated.”

¹² CDL-AD(2008)022, para. 31-32.

Convention on Nationality, as well as of the European Convention for the Protection of Human Rights and Fundamental Freedoms (Article 3 of the First Protocol and Article 14 of the Convention).¹³ The amendments of 23 December 2009 are therefore welcome.

3. The election administration

21. Article 16 of the Code was supplemented by a new paragraph stipulating that CEC members are to take an oath to uphold the constitution, refrain from making political statements and be impartial during the term of their mandate. This is a positive step and could help strengthen the impartiality of CEC members.

22. Paragraph (e) of Article 22 would be replaced with a new formulation which simplifies the old provision and calls on the CEC to keep a Register of Electoral Officials who can be appointed to district and precinct electoral bodies.

23. Amendments also envisage the establishment of a Centre for Continuous Training on Elections, which would operate as a subdivision of the CEC and provide specialised training sessions to electoral officials and upon request to other actors involved in the electoral process, including political parties, observers, mass-media, local public administration, etc. Establishment of the Centre is welcome and has the potential to further enhance the professionalism of election officials and administration of elections.¹⁴ Article 27(2), read in conjunction with paragraph 1(a) of Final and Transitory Provisions of the amendments, requires that starting from 2013 only individuals that attended training courses at the Centre for Continuous Training on Elections will be able to become members of election commissions.

24. Articles 27(2) and 29(10) on the composition of District Electoral Councils (DEC) and Precinct Election Bureaus (PEB) are amended to stipulate that they be composed of an odd number of members.¹⁵ This should facilitate the work of electoral bodies as it reduces the possibility of a tie vote resulting in inaction. In case of PEBs, the deadline for their composition has been shortened from 20 to 25 days before election day.

25. Articles 15(2) and 22(p) change the terminology for party agents assigned to election commissions from members of election commissions with consultative vote to simply representatives of electoral competitors in commissions. Previous Joint Opinions recommended that rights and duties of commission members with consultative vote be clarified and the suggested rewording removes the ambiguity as to the role of such agents.

26. Amendments redraft paragraphs 3 and 4 of Article 27 on the nomination of members to DEC and PEBs. The reformulated paragraphs offer greater clarity on the nomination process and harmonise the procedure for nominations to electoral bodies for all elections. Furthermore, they make clear that the members nominated by political parties are selected according to the parties' strength in parliament also for referenda and local elections.

27. The draft amendments address the previous concern about the possibility to recall a member of an electoral body without providing an explanation. Under the new Article 33(2) the reasons why a member may be recalled are now specified. There is also a requirement that the electoral body from which the member is being recalled adopts a decision to ascertain the recall and in case of a challenge, a confirmation by the higher electoral body is required.

¹³ European Convention on Nationality (Strasbourg, 6.XI. 1997, ETS No. 166), article 17.1; European Court of Human Rights, *Tănase v. Moldova* (Application no. 7/08), Grand Chamber judgment, 27 April 2010; Code of Good Practice in Electoral Matters (CDL-AD(2002)023rev), I. 1.1., b, para. 6.

¹⁴ The Centre would be established through the addition of a new Article 26(1) to the Code. The financing and the organisation of the Centre are to be determined by the CEC.

¹⁵ The DEC are to consist of a minimum of seven and a maximum of 11 members. The PEBs are to have minimum five and maximum 11 members.

28. However, a previous recommendation to include adequate provisions to guarantee that all parliamentary parties have at least a minimal representation on commissions and to enable the participation of parties that have a strong regional presence has not been acted upon.

29. The formation and functioning of polling stations abroad and of the corresponding PECs would be governed by a new Article 29¹. This article provides more procedural details for voting abroad and is a welcome development. An amendment to Article 76 would allow voting abroad to take place on consecutive two days provided that the first day precedes election day. Regarding the two consecutive days of voting, both institutions recommend that the CEC publishes detailed regulations ensuring security and integrity of voting abroad.¹⁶ This would expand the opportunity for those residing abroad to exercise their right to vote. Considering the public debate that took place in connection with the 2009 parliamentary elections, draft amendments suggest that besides polling stations established in diplomatic and consular missions, polling stations abroad may also be opened in other localities provided the government of a host country grants consent to their establishment. Paragraph 2 of the Final and Transitory Provisions of the amendments also provides that the Government of the Republic of Moldova, jointly with all relevant stakeholders, is to assess the need and opportunities for opening of additional polling stations abroad. Such steps have the potential to address the long-standing issue of broadening the franchise for an allegedly high number of Moldovan citizens living abroad in accordance with the principle of universal suffrage.

4. Voter registration

30. The quality of voters' lists has been a matter of continuous concern. The past recommendation has been to establish a centralised single voter register, which would help eliminate the possibility of duplicate entries, ease the updates, as well as reduce the risks related to the use of so-called supplementary voters' lists. This is now being realised through the implementation of the Law on the Concept of State Automatic Information System "Elections" and the creation by the CEC of a State Register of Voters, as provided for in new Article 38¹ of the Election Code.

31. The State Register of Voters is extracted every 31 January from the State Population Register. According to amended Article 39, voters' lists for each polling station are drawn from the State Register of Voters. Voters who declared a change of domicile or temporary residence address (the latter being the default choice) up to 30 days before an election, will be included into the voters' lists under their new declared address. It appears that voters changing their address beyond that deadline will be issued a voting certificate by the precinct election commission at the previous address certifying the change and will be asked to sign the voters' list next to his/her name to prevent him/her from voting at the previous address. Voters will be able to review their entries in the voters' lists and to request corrections up to five days before elections.

32. Article 53(2), which is not being revised by the proposed amendments, states that "the voters from the area of the polling station who are not included in the voters' lists shall be included in a supplementary list after presenting a document certifying their legal domicile or residence is located in the area of the respective polling station. The voters who came to the polling station with a certificate confirming the eligibility to vote shall be also included in the supplementary list." Based on the above provisions, it appears that voters can be included in supplementary voters' lists in two cases: 1) when presenting a voting certificate issued by another PEC due to a change of residence and 2) when not finding themselves in regular voters' lists, but presenting documentation which proves domicile or temporary residence in the respective precinct. In general, the situations in which voters are added to the supplementary

¹⁶ See Article 29¹, par. 5 of the draft Law.

voters' lists should be narrowed in order to avoid potential doubts regarding the integrity of voters' lists and possibilities for multiple voting.

33. Article 40(1) is amended to prescribe that voters' list be posted on the CEC website 20 days before the elections. In addition, a new paragraph (i) is added to Article 30, which guarantees access for voters, observers and electoral competitors to the information contained in the State Register of Voters, as well as in voters' lists. The latter amendment, however, seems to contradict Article 38¹ (6) stating that a person may only have access to his or her own information. This should be clarified and balance found between the need for protection of personal information and the need for transparency in the electoral process.

34. The new provisions related to voter registration would apply for general local elections of 2011 to allow time for the CEC to develop the necessary regulations on the creation and management of the Register. Attention should be paid to previous recommendations made pertaining to ensuring the publicity of the voter register, access of voters to the data on the register, allowing for a sufficient scrutiny period and revision mechanisms when adopting regulations governing the Register. In particular, the link and the exchange of information between the existing State Population Register and the newly created State Register of Voters should be explained.

5. Candidate registration and de-registration

35. In a positive step, amendments are proposed to Article 48 which would implement prior recommendations that the drawing of lots to determine the order of appearance of electoral contestants on a ballot be held only after all candidates have been registered. There is also a requirement that representatives of candidates, mass-media and accredited observers be invited to observe this process.

36. Paragraph 3¹ of Article 44 is amended to clarify the fact that a candidate can run for different elective positions on behalf of only one political party or electoral bloc during the same election as previously recommended.¹⁷

37. A new paragraph is added to Article 44 specifying that candidates shall not use administrative resources in electoral campaigns and requiring public authorities/institutions to treat all candidates equally in the provision of goods and services. Although this new paragraph is welcomed and addresses previous recommendations to fully detail in the Code the prohibition on the use of administrative resources, the placement of the paragraph in Article 44, which governs the registration of candidates, does not seem logical. The paragraph would be better placed in Article 47 which regulates campaigning.

38. Shortcomings in Articles 42 and 43, which regulate the collection of signatures in support of independent candidates, indicated in previous Joint Opinions remain unaddressed.¹⁸ In addition, prior concerns over the provisions of the Code that regulate the de-registration of candidates have not been addressed in the amendments. The current wording of the Code implies that any violation of the Code can lead to de-registration regardless of the severity of the violation. The recommendation to review these provisions and to introduce the principle of proportionality in the de-registration process remain valid.¹⁹

39. Also, concerns over Article 126(1) which calls for the de-registration of the entire list of candidates when the total number of candidates on a party's or bloc's list falls below the required minimum due to the withdrawal of candidates have not been addressed.

¹⁷ CDL-AD(2008)022, para. 45.

¹⁸ CDL-AD(2007)040, para. 35-43.

¹⁹ CDL-AD(2008)022, para. 51-58.

6. Electoral Campaign

Campaign activities

40. The draft amendments alter Article 47, which regulates campaigning. The reformulated article is shorter and more precise. All paragraphs related to the work of the media during an electoral campaign have been deleted from Article 47 and moved to a reformulated Article 64 and a new Article 64¹ regulating the general principles of media coverage of elections. The reorganisation of these two articles is a positive development as it makes the Code more logical and regroups provisions dealing with the same topic together for easier reference. The amended articles also provide clearer guidance to candidates and media on their responsibilities during elections.

41. Some of the concerns expressed in previous recommendations over the potential limitations of the right of free expression and speech have been addressed through the amendments, while others have not.

42. The term “unethical campaigning” has been removed from Article 47 as recommended in prior Joint Opinions as it was too broad and could have been applied in a restrictive manner.²⁰ The new paragraph 2 of Article 47 states that restrictions may be placed on the right to campaign by other existing laws and standards, and lists instances when this right may be restricted. Whether or not this paragraph affects the free speech and expression, as well as rights of candidates, will largely depend on how this paragraph is interpreted and applied.

43. Article 36(1), which could be interpreted to limit the legitimate efforts by international organisations to promote democracy and pluralism, as was noted in the last two Joint Opinions, has not been addressed.

44. The prohibition against beginning the campaign until after a candidate has been officially registered remains. As noted in paragraph 45 of the 2007 Joint Opinion, this prohibition represents an unnecessary restriction to the right of free speech and should not be used to limit normal political discussion and activity. The only restriction that would be justified is on the use of free airtime/space in media and of public places for posters or campaign events, as well as on campaign-related spending.

The campaign and the mass-media

45. As previously mentioned, the legal provisions concerning the conduct of mass media during elections have been consolidated into a re-written Article 64 and a new Article 64¹. The new articles clarify the role and responsibilities of mass media in covering electoral campaigns as recommended in previous Joint Opinions.

46. The prohibition against any editorial reporting on campaign activities contained in Article 47(4), which has been criticised in previous Joint Opinions, has been deleted and replaced in Article 64(7) with a provision that explicitly allows mass media to cover the campaign and to “inform the public about all electoral issues, free from any interference from public authorities, electoral competitors/candidates or other entities.” It could be added that the editorial coverage by electronic media needs to be balanced and that particular care has to be taken in the coverage of incumbents in their daily work so that it cannot be interpreted as hidden campaigning.

²⁰ CDL-AD(2008)022, para. 59 and CDL-AD(2007)040, para. 44-48.

47. Although not all the previous recommendations concerning the media have been reflected in the amendments, the majority have. The new provisions represent a positive attempt to make the regulations related to the conduct of media clearer and fair for all candidates and media. The issue of advantageous coverage being granted to institutional candidates by state owned media is also addressed and clarified.

7. Voting and vote counting

48. A new paragraph 6 added to Article 53 would allow the PEBs to prolong voting for up to two hours to allow those voters who are in line to vote when the poll closes to exercise their right to vote. This amendment aims to address the concern raised in previous Joint Opinions that the Code did not explicitly provide voters waiting in line at the time of closing of voting with an opportunity to exercise the right to vote. However, the draft article states that the extension of voting hours would only be possible if "...the district electoral council issued a permission to prolong the voting, and that the Central Election Commission has been preliminary notified about this". These seem to be unnecessary conditions. The right to vote should be unconditional for those qualified to vote arriving at a polling station on time. Furthermore, it is recommended not to limit the prolongation to two hours, but to simply state that those waiting in line will be granted an opportunity to vote.

49. The procedure for mobile voting is improved to allow for only written requests from voters. This is a positive step and complies with recommendations to improve the security of the mobile voting process.²¹ The deadline for applying for mobile voting has also been changed from 15:00 on election day to 15:00 on the day before the election. This should also increase the integrity of the mobile voting process and improve the efficiency of the voting process. In addition, a new requirement has been added for those voters who are incarcerated at the time of the election: the administrator of the detention facility should forward all requests for mobile voting and the list of voters to the relevant electoral bureau. This should make it easier for those incarcerated to exercise their right to vote.

50. A number of recommendations with regard to counting and tabulation made in the previous three joint opinions remain to be addressed.²²

51. In implementation of a previous recommendation, Article 61(1) requires that preliminary results of parliamentary and general local elections be broken down by precinct and be posted on the CEC website as soon as they are processed.²³

52. A new sentence added to Article 60(2¹) specifies that the "recounting [of ballots] may be ordered by the body entitled to validate the election results based on justified reasons and will take place in maximum of 10 days since the date of elections." While this provision represents an improvement as compared to the current formulation in the Code, it does not adequately address the concerns raised in previous Joint Opinions. In particular, the provision is still unclear on what the "justified reasons" can be, and which body is authorised to carry out a recount. Furthermore, the new provision does not provide for a clear division of responsibilities between the DEC and the courts with regard to recounts as recommended in paragraph 75 of the last Joint Opinion.

8. Observers

53. The draft amendments address a number of previous recommendations concerning observers. A requirement that any refusal to register an observer be "justified" and a possibility

²¹ CDL-AD(2008)022 para. 70-71.

²² CDL-AD(2006)001, para. 51-56 and 57-60; CDL-AD(2007)040, para. 70-71; CDL-AD(2008)022, para. 73-78.

²³ CDL-AD(2008)022, para. 79; CDL-AD(2007)040, para. 72.

of an appeal to the higher electoral body and courts in cases of refusal of registration has been added to Article 63. However, the lack of details as to what could be considered a “justified” denial of registration is problematic.²⁴

54. In a welcome development, Article 63 is amended to clearly spell out the rights of observers. However, amendment to Article 63(3) appears to require that interpreters of international observers be also accredited by the CEC. Such requirement would place an additional administrative burden both on international observer organisations and the CEC, but also appears redundant as interpreters do not carry out observation activities *per se* and only facilitate the work of accredited observers.

55. The draft amendments do not clarify the requirement included in Article 63(4), which states that in order to be accredited by the CEC, an observer organisation needs to be “*able to exercise civic functions during the elections.*” As stated in the 2008 Joint Opinion, this requirement is ambiguous, as 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.²⁵ Furthermore, the requirement appears redundant and may create unnecessary restrictions for domestic observers.²⁶

56. The draft amendments also provide for the establishment of a new Protocol Office of Accredited International Observers as part of the CEC to “ensure the efficient activity of the international observers”. The details are to be outlined in regulations promulgated by the CEC. While the creation of such Office could be regarded a positive step if it is meant to facilitate the work of observers and to designate staff specifically responsible for liaison with observer organisations, an adjustment to a formulation could be considered to ensure that it does not imply any co-ordination or control over the work of observers.²⁷

9. Turnout requirements

57. Previous Joint Opinions recommended removing turnout requirements from Articles 91, 93, 171 and 199. The 2009 amendments lowered the turnout requirements included in Articles 91 and 93, thus partly addressing previous recommendations.

58. The proposed amendments reduce the turnout requirement for national referenda to be valid as stipulated in Article 171 from three fifths to one half of voters included in the voters’ lists and for local referenda, as provided for in Article 199, from one half to one-third of registered voters. For referenda, such turnout requirements may be acceptable in specific circumstances. However, in accordance with the Venice Commission Code of Good Practice on Referendums, turnout requirements for referenda are not advisable.²⁸

59. According to Article 198 (1), two cumulative conditions need to be met in order to recall a mayor through a local referendum: 1) the number of votes in favour of the revocation should be at least as many as the number of votes s/he received during the mayoral election and 2), the number of votes in favour of the revocation should be more than half of those participating in the referendum. Such a solution is unusual but should be considered acceptable.

10. Complaints and appeals procedures

²⁴ Guidelines on an internationally recognised status of election observers (CDL-AD(2009)059), III. 1.4, ii; see also III. 1.4, v.

²⁵ CDL-AD(2008)022, para. 82-83.

²⁶ Guidelines on an internationally recognised status of election observers (CDL-AD(2009)059), III. 1.4, ii.

²⁷ Guidelines on an internationally recognised status of election observers (CDL-AD(2009)059), III. 1.7, vi.

²⁸ Code of Good Practice on Referendums (CDL-AD(2007)008rev), III. 7.

60. Articles 65 and 66 are re-written to further specify the powers and responsibilities of various bodies responsible for reviewing complaints. The option to file a complaint with the electoral body or the court has been deleted and replaced with a requirement that complaints be filed in court only after having first appealed to the higher electoral body. Both of these changes address longstanding recommendations.

61. The new provisions clearly lay out the hierarchy to be followed in the filing and deciding on complaints. The jurisdiction of various bodies is also clearly delineated; these bodies are instructed to forward any complaint not under their jurisdiction to the competent authority within two days of receiving the complaint.

62. The timeframe for reviewing complaints has been clarified and it is now specified that the “days” mentioned in Article 67 refer to “calendar” days.

63. A new requirement that the court should give priority to complaints on registration of candidates and accuracy of voters’ lists is positive as these cases should be resolved first in order to ensure the protection of the rights of citizens.

64. In Article 69, the words “actions against the honour and dignity of candidates” are deleted and replaced with “do not affect the reputation or the rights of others, the authority and impartiality of the judicial power.” This appears to be an attempt to implement the recommendation made in the 2006 Joint Opinion that Article 69 be reformulated in a manner that is consistent with the right of free speech and expression.²⁹ It is, however, unclear how the proposed change would remedy the situation since the new phrase is equally subject to various interpretations.

65. Paragraph 3 of Article 69 is amended to elaborate the reasons why a court may de-register a candidate. This is a welcome amendment as it addresses previous concerns that the provisions on candidate de-registration were too vague and clearly narrows the possibilities for de-registering a candidate.

66. The 2008 Joint Opinion pointed out that “recommendations related to the cases of de-registration of entire lists resulting from withdrawal of candidates have not been acted upon.”³⁰ The proposed amendments do not envisage changes to Articles 79 and 126(1), which prescribe the minimum number of candidates on lists for parliamentary and local elections, respectively. Such requirements constitute unreasonable limitations on the abilities of parties and blocs to put forward candidate lists and should be reconsidered. As a minimum, the Code 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. The Code could also state that in cases when individual candidates are de-registered or withdraw, parties and/or blocs that put forward the list should be given a short deadline to replace those candidates in order to avoid an automatic annulment of the entire list when the number of remaining candidates falls below the required number.

67. A new criminal penalty is added to Article 70 clearly specifying that voting multiple times and stuffing ballot boxes are against the law and are punishable. Two new administrative offences are added to Article 71: 1) for illegal posting of electoral propaganda materials and 2) for offering money, gifts, and free material goods to voters. However, the proposed wording of Article 71(p) appears to suggest that offering money, gifts and free material goods to voters is only prohibited if not paid for from the electoral fund of a candidate, what would seem to go

²⁹ Joint Opinion on the Election Code of Moldova as of 20 March 2006 (CDL-AD(2006)001), para. 106.

³⁰ CDL-AD(2008)022, para. 57.

against the actual intention of the provision. The wording of the Article 71(p) should therefore be reviewed.

68. An amendment to Article 71(2) designates the Ministry of Interior as the investigating body for alleged administrative offences. The assignment of this duty to a specific state body is a positive step. In addition, a new paragraph 3 of Article 71 calls on public officials and chairpersons of electoral bodies to inform the Ministry of Interior of any actions which they believe amount to administrative offences for further investigation by the Ministry.

69. In the last Joint Opinion (paragraph 91), the interpretation of Article 92 was raised as it could be read to give the Constitutional Court the authority to declare the entire election null even if violations were found only in isolated precincts or districts. The Code of Good Practice in Electoral Matters calls for repeat elections to be held only in those areas where the violations were established.³¹ The added paragraph (2) to Article 92 attempts to address this concern.

70. However, the new paragraph also seems to imply that despite the invalidation of results of elections in some polling stations and the conduct of repeat elections in those polling stations, the CEC will proceed with awarding mandates to some elected candidates before repeat elections take place. Such approach is not satisfactory as there is no guarantee that the repeat elections will not impact the overall allocation of mandates given the fact that Moldova has only one electoral constituency. The allocation of seats must therefore take place after the results of the repeated elections are made public.

11. Awarding of mandates

71. Article 88(4) related to the awarding of mandates by the CEC is amended to further clarify the procedure to be used when there is a vacant mandate.

72. The timeframe for the Constitutional Court to confirm the legality of elections has been extended from 10 days to thirty days after they receive the documents from the CEC.

12. Referenda

73. The proposed amendments envisage that in addition to the adoption of a new constitution, revisions to the Constitution may also be subject to a national referendum. The parliament is to decide on the conduct of the referendum within six months from the submission of the initiative. The proposal put forward for a referendum is considered adopted if it gains the simple majority of votes of those participating in the referendum. In addition, the turnout requirement of half of registered voters applies to all national referenda (see para 58).

74. In line with Article 143 of the Constitution, any revision of the Constitution is adopted by two-thirds majority vote in parliament. Voting can take place only six months after the submission of the initiative for revision. As it stands, the Election Code including the amendments does not seem to adequately ensure respect for this constitutional provision. Venice Commission and OSCE/ODIHR ultimately consider that it is up to the democratic institutions of Moldova to address this issue.

75. In addition, the Constitution stipulates that constitutional revisions related to the sovereignty, independence, unity and permanent neutrality of the state (Article 142.1 of the Constitution) can only be adopted through a referendum. In such cases, the constitutional requirement is that at least one half of the voters on the voters' lists vote in favour. This wording is now repeated in Article 168(1) of the Code.

³¹ CDL-AD(2002)023rev, II. 3.3 para. 101.

13. Other matters

76. The timeframe for holding early elections in the event of the dissolution of a parliament stated in Article 76(3) has been changed from within 45 days of the dissolution decree becoming effective to not earlier than 60 days but not later than three months from the dissolution of the parliament.

V. CONCLUDING REMARKS

77. If adopted by parliament, the proposed amendments would improve the Election Code and enhance the quality and integrity of the election process. They also have the potential to increase the level of public trust in the institutions of government. If implemented in good faith and with the necessary political will the amendments should resolve many of the issues that have arisen in prior elections related to the administration and conduct of elections.

78. The Moldovan authorities should be commended for having proposed these changes and having followed upon many of previous recommendations made by the Venice Commission and the OSCE/ODIHR. The Moldovan authorities are strongly encouraged to consider any other essential outstanding recommendations made in this and previous Joint Opinions before submitting the final draft amendments to parliament for adoption.