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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

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

REPUBLIC OF MOLDOVA

JOINT OPINION

**ON AMENDMENTS TO THE ELECTORAL CODE AND OTHER RELATED LAWS
CONCERNING INELIGIBILITY OF PERSONS CONNECTED TO POLITICAL
PARTIES DECLARED UNCONSTITUTIONAL**

**Approved by the Council for Democratic Elections at its 78th meeting
(Venice, 5 October 2023)
and adopted by the Venice Commission at its 136th Plenary Session
(Venice, 6-7 October 2023)**

on the basis of comments by

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I. Introduction

1. By letter of 24 July 2023, Mr Igor Grosu, the Speaker of the Parliament of the Republic of Moldova, submitted a request for an opinion of the Venice Commission on the draft Law on the amendment of certain normative acts (the implementation of certain considerations of the Decision of the Constitutional Court no. 10/2023 on the check of the constitutionality of the Political Party 'Șor'). The draft Law was then adopted by the Parliament on 31 July 2023 ([CDL-REF\(2023\)032](#), hereinafter: the Law).

2. More precisely, the request asks the following questions:

- In the context of implementing the Decision of the Constitutional Court, which, first and foremost has a preventive purpose, thus aims at limiting the participation in the political activity of such parties, would a three-year restriction to candidate (to persons holding leadership positions or elected office of a party which had been declared unconstitutional) be efficient and proportional?
- Is there any previous experience in European countries in this regard, or any references that would support such a restriction?

3. As this Opinion relates to the electoral field, it was prepared jointly by the Venice Commission and ODIHR. This Opinion, that was requested on the basis of the draft Law, covers the provisions contained in the promulgated Law.

4. Mr Srdjan Darmanović, Mr Michael Frendo, Ms Janine Otálora Malassis and Mr Kaarlo Tuori acted as rapporteurs for this opinion. Ms Marla Morry and two members of ODIHR Core Group of Experts on Political Parties, Ms Lolita Čigāne and Ms Barbara Jouan Stonestreet, were appointed as experts for ODIHR.

5. On 4-5 September 2023, a joint delegation composed of Mr Darmanović, Mr Frendo and Mr Tuori for the Venice Commission, assisted by Mr Pierre Garrone and Mr Domenico Vallario from the Secretariat of the Commission, and Mr Goran Petrov from the Secretariat of ODIHR, had online meetings with the Minister of Justice and other representatives of the ministry; the Legal Committee on Appointments and Immunities of the Parliament; independent members of Parliament; the Central Electoral Commission; the Office of the People's Advocate; representatives of the civil society and of the European Union. The Electoral Bloc of Socialists and Communists was not available for meetings. This joint opinion takes into account the information obtained during the above-mentioned meetings. The Commission and ODIHR are grateful to the Moldovan authorities for the excellent organisation of these meetings.

6. This opinion was prepared in reliance on the English translation of the Law. The translation may not accurately reflect the original version on all points.

7. This Joint Opinion was drafted on the basis of comments by the Venice Commission's rapporteurs and ODIHR experts and the results of the meetings on 4-5 September 2023. It was approved by the Council for Democratic Elections at its 78th meeting (Venice, 5 October 2023) and examined at the joint meeting of the Sub-Commission on Democratic Elections and Latin America on the same day. Following an exchange of views with Mr Eduard Serbenco, State Secretary, Ministry of Justice of the Republic of Moldova, it was adopted by the Venice Commission at its 136th Plenary Session (Venice, 6-7 October 2023).

II. Background and scope of the Joint Opinion

8. The request by the Speaker of the Parliament of Moldova follows a decision of the Constitutional Court of the Republic of Moldova on 19 June 2023 to declare the political party

Şor unconstitutional. The Constitutional Court found this party to be unconstitutional as a result of the fact that “the party and its leaders, consciously, persistently, methodically and non-transparently had been using financial means of illegal origin in their activity to distort democratic processes and undermine the existing constitutional order”;¹ moreover, the political party was involved in vote buying. As a result, the Constitutional Court concluded that the actions of the political party Şor were detrimental to the sovereignty and independence of the Republic of Moldova, emphasising that the authorities had previously applied the most severe measures apart from the declaration of unconstitutionality, such as the cancellation of the candidates’ registration, and this had not influenced in any way the conduct of the political party Şor in the subsequent electoral campaigns. Therefore, the Constitutional Court considered that the only appropriate measure was to declare the unconstitutionality of the party and stressed that the declaration of the unconstitutionality of the political party was mainly aimed at preventing “the emergence of future dangers to the constitutional democratic order”. The Constitutional Court stated that representatives and members of the “Şor” Political Party who, at the date of this decision, are holding seats in the Parliament of the Republic shall continue to exercise their mandates as independent deputies, without the right to join other parliamentary factions.” Within the framework of the preparation of this judgement, the Constitutional Court had requested an *amicus curiae* brief of the Venice Commission. The Commission had concluded, among other things, that the declaration of unconstitutionality of a political party must be a measure of exceptional nature and a last resort, and in addition to meeting the requirements of legality and proportionality, the dissolution of a party must be necessary in a democratic society.²

9. With the aim of putting in place a “preventive system to protect democracy”, as stated in the accompanying Information Note, the Parliament of Moldova prepared the draft Law under consideration that was then voted into the Law.

10. The main provisions of the draft amending the Electoral Code originally provided for the ineligibility, for three years, of:

- Members of the executive body of the party;
- Members of the party who held an elected office at the date of the ruling of the Constitutional Court;
- Members of the party who were on the lists of alternate candidates.

11. The Electoral Code, which would be amended by the draft law, covers, in addition to parliamentary elections, also presidential and local elections. Ineligibility to be elected would extend to all these elections.

12. The draft Law was introduced in the parliament by members of the ruling PAS party on 10 July and the expedited first reading took place in the parliament on 14 July.³ Following a short period of public consultations, the draft law was voted on 31 July 2023 in a second reading with some amendments: it now foresees a five-year ban from all elective offices for members of the executive body of a party declared unconstitutional and members of such party who hold an elected office at the time of the decision of the Constitutional Court. Candidates nominated by such a political party in past elections of all types were removed from the draft Law prior to its adoption and are therefore not subject to the ban.⁴ Procedural amendments related to the liquidation of a party following a judgment of the Constitutional Court remain in the revised draft.

¹ § 151 of the judgement, to be found (in Romanian) at [Curtea Constituțională a Republicii Moldova \(constcourt.md\)](https://constcourt.md).

² Venice Commission, [CDL-AD\(2022\)051](#), Republic of Moldova - Amicus curiae brief on declaring a political party unconstitutional.

³ Currently, the parliament comprises just two parliamentary factions, the ruling PAS party, and a faction in the opposition that includes the Communist party and the Socialist party. The MPs of the former Şor party faction are now serving as independent MPs.

⁴ According to the information provided by the Central Electoral Commission, this reduced the number of individuals potentially affected from more than 6,000 to 641, as pertains to the Sor Party.

The Law is now divided into three parts, relating to amendments to the Electoral Code; amendments to the Law on Political Parties; and amendments to the Criminal Code. The representatives of the parliament argued that the Law had to be swiftly adopted, despite the severity of the impact on citizens' electoral rights, in light of the above-noted Constitutional Court decision and due to the end of parliamentary session before the recess and the need to legislate before the start of the candidate registration process for the upcoming local elections on 5 November.

13. The amendments to the Law on Political Parties provide in particular that “the attributes of political parties declared unconstitutional by the decision of the Constitutional Court may not be used by other political parties, electoral blocs, other electoral contenders, participants in a referendum or initiative groups. The finding of the use of such attributes is a ground for the refusal to register the political party by the Public Service Agency and the refusal to register an electoral subject by the competent electoral body for participation in any elections” (Article 4(6) of the Law). The Law also introduces new procedures to carry out the liquidation of political parties declared unconstitutional. Further, an amendment to the Electoral Code mandates the de-registration of an electoral subject if found liable for vote-buying by a competent electoral body, regardless of the severity of the offence (Article 102(5)(f)).

14. Amendments to the Criminal Code include increased sanctions for political parties and electoral candidates to accept funds from organised criminal activities or prohibited sources. In addition, new crimes are introduced “passive political corruption”, that is acceptance by public persons in the exercise of the mandate obtained following the elections, of goods, services, privileges or advantages in any form, undue to them, in order to resign from (leave) a political party and/or join another political party; and 3) “active political corruption”, that is giving to public persons in the exercise of the mandate obtained following the elections, goods, services, privileges or advantages in any form, undue to them, in order to resign from (leave) a political party and/or join another political party.

15. The Law was then promulgated by the President of the Republic and came into effect on 14 August.

16. The questions asked by the Speaker of Parliament focus on the amendments to the Electoral Code. The Joint Opinion will therefore not provide a separate examination of the two other chapters of the Law (the amendments to the Law on Political Parties and to the Criminal Code) except as they pertain directly to the right to stand for election.

17. According to information provided by their lawyers, “the Şor Party’s current (independent) Members of Parliament applied to the Moldovan Constitutional Court, requesting a review of the constitutionality of the Banning Legislation and interim measures suspending the effect of the Banning Legislation. The request for interim measures was rejected by the Constitutional Court on 8 August 2023. That decision is final and is not subject to appeal. There is no indication as to when the substantive application will be determined.” On 17 August 2023, they applied to the European Court of Human Rights for interim measures, which in turn were refused.

18. On 3 October 2023, the Constitutional Court of the Republic of Moldova admitted an appeal by the Şor Party’s current (independent) Members of Parliament and declared Article 16(2)(e) of the Electoral Code (which had introduced the ineligibility to be elected discussed in this opinion) unconstitutional. On 4 October 2023, the Parliament of the Republic of Moldova adopted a new Article 16(2)(f) of the Electoral Code which provides for new causes for ineligibility to be elected. The Venice Commission and ODIHR are not in a position to analyse these amendments in the present Opinion.

19. The Venice Commission and ODIHR's task is not to analyse the constitutionality of the Law, let alone the content of the Constitutional Court's decision, nor up to what extent the Law is necessary to ensure the implementation of that judgement. The *scope of the Joint Opinion* is to analyse the conformity of the restrictions provided by the Law with international standards, and OSCE human dimension commitments, in particular with the right to stand for election, which is an aspect of universal suffrage.

III. Analysis and recommendations

A. Procedural aspects

1. Principles

20. The Venice Commission and ODIHR have consistently expressed the view that any successful changes to electoral legislation should be built on at least the following three essential elements:

- 1) clear and comprehensive legislation that meets international obligations and standards and addresses prior recommendations;
- 2) the adoption of legislation by broad consensus after extensive public consultations with all relevant stakeholders; and
- 3) the political commitment to fully implement such legislation in good faith, with adequate procedural and judicial safeguards and means by which to timely evaluate any alleged failure to do so.

21. Moreover, the Venice Commission's Code of Good Practice in Electoral Matters (the Code)⁵ recommends that the fundamental elements of electoral law, in particular the electoral system proper, membership of electoral commissions and the drawing of constituency boundaries, should not be open to amendment less than one year before an election, or should be written in the constitution or at a level higher than ordinary law. In reference to this recommendation, the Code's Explanatory Note cautions that in adopting amendments, "care must be taken to avoid not only manipulation for the advantage of the party in power, but even the mere semblance of manipulation [...] Even when no manipulation is intended, changes will seem to be dictated by immediate political interests."⁶

2. Application to the present case

22. The Law was adopted with the votes of the majority in Parliament six weeks after the judgement of the Constitutional Court and slightly more than four months before the next local elections called for 5 November 2023, with the stated aim to implement the Constitutional Court's judgment. This opinion and its recommendations are without the prejudice to the Constitutional Court judgment.

23. When addressing stability of electoral law, the Code does not explicitly refer to the right to vote and to be elected. The purpose of the present Opinion is not to take a general stance on whether this principle should apply to other aspects of electoral law than those expressly mentioned in the Code.

⁵ Venice Commission, [CDL-AD\(2002\)023rev2-cor](#), Code of Good Practice in Electoral Matters, II.2.b. See also [CDL-AD\(2005\)043](#), Interpretative Declaration on the Stability of the Electoral Law, and (*mutatis mutandis*) ECtHR, 8 July 2008, *Georgian Labour Party v. Georgia*, no. 9103/04, § 88.

⁶ *Ibid.*, §§ 64-65.

24. The Venice Commission and ODIHR would, however, like to underline the particularity of the present situation. The authorities amended the legislation with the stated aim to implement the judgement of the Constitutional Court and the principle of stability of electoral law cannot be invoked to prevent the timely implementation of a judgement if it requires legislative changes to comply with constitutional norms and principles. Moreover, while adoption of legislation by broad consensus after extensive public consultations with all relevant stakeholders is always preferable, the absence of consensus should not be an obstacle to the execution of the judgement. However, it is important to note that the Constitutional Court judgement did not explicitly mandate any legislative amendments for the judgement to be fully implemented.

B. Substantive aspects: the restriction of the right to be elected

1. Introduction

25. The Law lays down the ineligibility to hold elective office for “persons who hold the quality of member of the executive body of the political party declared unconstitutional, as well as the individuals that hold elective functions on behalf of the unconstitutional political party, for a period of 5 years from the day of the pronouncement of the decision of the Constitutional Court.” Ineligibility extends to all elected offices and applies:

- *Ratione personae*: a) to members of the executive body of a party declared unconstitutional and b) to members of such party who hold an elected office – on the day of the pronouncement of the Constitutional Court’s decision determining the unconstitutionality of a political party.

- *Ratione temporis*: five years from the day of the pronouncement of the Constitutional Court’s decision determining the unconstitutionality of a political party.

26. The ban of political parties as collective entities, although not so frequent in democracies, is a relatively well-known topic and almost all democratic systems recognise and regulate some form of ban of political parties that are perceived as a threat to the democratic system. The Venice Commission and ODIHR have addressed this issue, *inter alia*, in the Joint Guidelines on Political Party Regulation.⁷ The issue was also specifically addressed by the Venice Commission in the Guidelines on prohibition and dissolution of political parties and analogous measures.⁸ The Venice Commission has also been repeatedly called in the past to assess legislation providing ineligibility to be elected in the case of electoral and criminal offenders. It has also provided a comparative report on the subject.⁹ The Venice Commission expressed the view that the withdrawal of the right to serve as a representative due to criminal conviction for serious offences should be considered as a means of preserving democracy and the voters’ trust in it.¹⁰ The case under consideration is, however, different. The individuals affected by the Law have not been convicted of any criminal offence. The Venice Commission and ODIHR are therefore called to assess a Law which introduces a restriction, on the ground of membership in a party declared unconstitutional, to the right to be elected of certain individuals who – at the time of prohibition – were exercising an executive function in that party or holding an elective office.

⁷ [CDL-AD\(2020\)032](#), §§ 106ff.

⁸ [CDL-INF\(2000\)001](#).

⁹ Venice Commission, [CDL-AD\(2015\)036cor](#), Report on exclusion of offenders from Parliament.

¹⁰ Venice Commission, [CDL-AD\(2017\)025](#), Amicus curiae brief for the European Court of Human Rights in the case of Berlusconi v. Italy on the minimum procedural guarantees which a state must provide in the framework of a procedure of disqualification from holding an elective office, § 11.

2. Relevant international and regional treaties, standards and OSCE commitments¹¹

27. Political rights of participation are enshrined in Article 3 of Protocol No. 1¹² to the European Convention on Human Rights; Article 25.b¹³ of the International Covenant on Civil and Political Rights (complemented by Article 2(1) on the prohibition of discrimination),¹⁴ Article 21¹⁵ of the Universal Declaration of Human Rights and the 1990 OSCE Copenhagen Document.¹⁶ In the specific case of the European Convention on Human Rights, the European Court of Human Rights has held that the right to free elections relates to the right to vote, and the passive aspect, namely the right to stand as a candidate for election.¹⁷ Article 25 ICCPR is of particular relevance for eligibility to be elected in presidential and local elections, which are not covered by Article 3 of Protocol No. 1 to the ECHR. In its General Comment on Article 25 of the ICCPR, the Human Rights Committee points to the connection between passive and active electoral rights: the effective implementation of the right and the opportunity to stand for elective office ensures that persons entitled to vote must have a free choice of candidates. The General Comment also emphasises that any restrictions on the right to stand for election must be justifiable on objective and reasonable criteria and that persons who are otherwise eligible to stand for election should not be excluded by unreasonable or discriminatory requirements such as education, residence or descent, or by reason of political affiliation.¹⁸ The General Comment further underlines that political opinion may not be used as grounds to deprive any person of the right to stand for election.¹⁹

28. Furthermore, the United Nations High Commissioner for Human Rights has stated that “participation is a hallmark of democracy”²⁰, additionally, it has considered that “wide-reaching

¹¹ On the international standards applicable to the right to vote and be elected, see, for example, Venice Commission, Report on Term Limits; Part II, Members of Parliament, and Part III, Representatives elected at Sub National and local level and executive officials elected at sub national and local level [CDL-AD\(2019\)007](#), §§ 13ff.

¹² Right to free elections.

The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature.

¹³ Article 21.

Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions:

[...].

(b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors.

¹⁴ Ukraine ratified the Covenant in 1973, available in: <https://indicators.ohchr.org/>.

¹⁵ 1. Everyone has the right to take part in the government of his country, directly or through freely chosen representatives.

2. Everyone has the right of equal access to public service in his country.

3. The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.

¹⁶ CSCE/OSCE, [Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE](#), 29 June 1990, paras. 6-7 and 24, whereby OSCE participating States committed “[t]o ensure that the will of the people serves as the basis of the authority of government, the participating States will (...) respect the right of citizens to seek political or public office, individually or as representatives of political parties or organizations, without discrimination” (para. 7.5) and that any restriction on rights and freedoms must “be strictly proportionate to the aim of th[e] law” (para. 24).

¹⁷ ECtHR, *Tănase v. Moldova* [GC], 27 April 2010, no. 7/08, § 155.

¹⁸ United Nations. Human Rights Committee. CCPR/C/21/Rev.1/Add.7. 27 August 1996. General Comment 25, § 17. Cf. Venice Commission, CDL-AD(2018)010, Report on Term Limits - Part I – Presidents, § 66.

¹⁹ United Nations. Human Rights Committee. CCPR/C/21/Rev.1/Add.7. 27 August 1996. General Comment 25, § 17.

²⁰ United Nations. Human Rights Council. A/HRC/30/26. 23 July 2015. Promotion, protection and implementation of the right to participate in public affairs in the context of the existing human rights law: best practices, experiences, challenges and ways to overcome them. Report of the Office of the United Nations High Commissioner for Human Rights, § 4.

restrictions or deprivations of electoral rights may not be compatible with guarantees of equality and non-discrimination under international law”.²¹

29. Article 3 of Protocol No. 1 to the ECHR applies to electoral rights concerning national parliaments and other “legislatures”. However, according to the ECtHR, “legislature” does not necessarily mean the national parliament alone but municipal councils, district councils and regional assemblies may be covered by Article 3 of Protocol No. 1 if they exercise “inherent primary rulemaking powers and form part of the legislature”. Yet, “the power to make regulations and by-laws, which is conferred on the local authorities in many countries, is to be distinguished from legislative power”, including at the regional level.²² Article 25 ICCPR and Article 3 of Protocol No. 1 to the ECHR enshrine the principle of equal treatment of all citizens in the exercise of their electoral rights.²³ In the practice of the ECtHR, restrictions of local electoral rights have been examined under the anti-discrimination clause of Article 1 of Protocol No. 12, which includes a general prohibition of discrimination, not limited merely to Convention rights.²⁴ This article forbids discrimination in the enjoyment of any right set forth by law on any ground, including political or other opinion. The Republic of Moldova has not ratified Protocol No. 12.

30. The amendments adopted by the Parliament of the Republic of Moldova introduce a restriction to the right to free elections enshrined in Article 3 of Protocol No. 1 to the ECHR and Article 25 ICCPR, more precisely to the passive aspect of universal suffrage (the right to be elected).²⁵

31. The right to stand for elections is not absolute. In its advisory opinion on the assessment, under Article 3 of Protocol No. 1 to the Convention, of the proportionality of a general prohibition on standing for election after removal from office in impeachment proceedings,²⁶ the European Court of Human Rights reminded essential elements of its case-law on the limitation of the rights guaranteed by this provision:

“b) The concept of “implied limitations”

81. In *Selahattin Demirtaş* ([(no. 2) [GC], no. [14305/17](#), 22 December 2020], §§ 387-88), the Court underscored the principle of implied limitations: (...)

(...)

“388. The concept of ‘implied limitations’ means that the traditional tests of ‘necessity’ or ‘pressing social need’ which the Court uses in the context of its analyses under Articles 8 to 11 of the Convention are not applied in cases concerning Article 3 of Protocol No. 1. Rather, the Court first sets out to ascertain whether there has been arbitrary treatment or a lack of proportionality. Next, it examines whether the limitation has interfered with the free expression of the opinion of the people (see *Mathieu-Mohin and Clerfayt*, [2 March 1987, no. 9267/81], § 52, and *Ždanoka*, [[GC], 16 March 2006, no. 58278/00], § 115).”

²¹ United Nations. Human Rights Council. A/HRC/30/26. 23 July 2015. Promotion, protection and implementation of the right to participate in public affairs in the context of the existing human rights law: best practices, experiences, challenges and ways to overcome them. Report of the Office of the United Nations High Commissioner for Human Rights, § 8.

²² See Guide on Article 3 of Protocol No. 1 to the European Convention on Human Rights, Right to free elections, https://www.echr.coe.int/Documents/Guide_Art_3_Protocol_1_ENG.pdf.

²³ ECtHR, *Partija “Jaunie Demokrāti” and Partija “Mūsu Zeme” v. Latvia* (dec.), 29 November 2007, nos. 10547/07 and 34049/07.

²⁴ ECtHR, *Selygenenko and others v. Ukraine*, 21 October 2021, nos. 24919/16 and 28658/16.

²⁵ See Venice Commission, Code of Good Practice in Electoral Matters, [CDL-AD\(2002\)023rev2-cor](#), I.1.

²⁶ Advisory opinion on the assessment, under Article 3 of Protocol No. 1 to the Convention, of the proportionality of a general prohibition on standing for election after removal from office in impeachment proceedings, [Request no. P16-2020-002](#) by the Lithuanian Supreme Administrative Court, 8 April 2022.

c) Legitimate aim

82. Unlike Articles 8, 9, 10 and 11 of the Convention, Article 3 of Protocol No. 1 does not itself set out a list of aims which can be considered legitimate for the purposes of that Article (see *Tănase*, [[GC], 27 April 2010, no. 7/08], § 164).

(...)

The Court also specified that where an immediate threat to democracy or independence had passed, measures that were concerned with identifying a credible threat to the State interest in particular circumstances based on specific information should be preferred to operating on a blanket assumption that a certain category of persons posed a threat to national security and independence.

d) Impact of the political and historical context

86. In *Tănase* (cited above), the Court acknowledged that any electoral legislation must be assessed in the light of the historical and political context of the country concerned, but that restrictions on electoral rights should be individualised as time passes. It stated:

(...)

“159. [...] in *Ādamsons [v. Latvia]* (no. [3669/03](#), §§ 123-28, 24 June 2008), the Court emphasised that with the passage of time, general restrictions on electoral rights become more difficult to justify. Instead, measures had to be ‘individualised’ in order to address a real risk posed by an identified individual.”

The Court also specified that where an immediate threat to democracy or independence had passed, measures that were concerned with identifying a credible threat to the State interest in particular circumstances based on specific information should be preferred to operating on a blanket assumption that a certain category of persons posed a threat to national security and independence.

87. Regarding the time-limit for restrictions on electoral rights, the Court held in *Ždanoka* (cited above):

“135. It is to be noted that the Constitutional Court observed in its decision of 30 August 2000 that the Latvian parliament should establish a time-limit on the restriction. In the light of this warning, even if today Latvia cannot be considered to have overstepped its wide margin of appreciation under Article 3 of Protocol No. 1, it is nevertheless the case that the Latvian parliament must keep the statutory restriction under constant review, with a view to bringing it to an early end. Such a conclusion seems all the more justified in view of the greater stability which Latvia now enjoys, *inter alia*, by reason of its full European integration ... Hence, the failure by the Latvian legislature to take active steps in this connection may result in a different finding by the Court (see, *mutatis mutandis*, *Sheffield and Horsham v. the United Kingdom*, 30 July 1998, § 60, *Reports* 1998-V; see also the follow-up judgment to that case, *Christine Goodwin v. the United Kingdom* [GC], no. [28957/95](#), §§ 71-93, ECHR 2002-VI).”

e) Procedural safeguards

88. For the purpose of supervising the compatibility of an interference with the requirements of Article 3 of Protocol No. 1, the Court must scrutinise the relevant domestic procedures and decisions in detail, in order to determine whether sufficient safeguards against arbitrariness were afforded to the applicant and whether the relevant decisions were sufficiently reasoned (see *Abil v. Azerbaijan*, no. [16511/06](#), § 34, 21 February 2012).”

32. In its examination of compliance with Art. 3 of Protocol No. 1, the Court has thus applied two main criteria: whether there has been arbitrariness or a lack of proportionality, and whether the restriction has interfered with the free expression of the opinion of the people. The Court has

also underlined “the need to assess any electoral legislation in the light of the political evolution of the country concerned, which means that unacceptable features in one system may be justified in another.”²⁷

33. In the case *Ždanoka v. Latvia*, the Court also emphasised that “*active participation*” is a way of conduct giving rise to the restriction of the right to stand for elections²⁸. In a later case, *Ādamsons v. Latvia*,²⁹ it insisted on an individualised approach of the measure taking into account their actual conduct. In *Etxebarria and Others v. Spain*, it did not find a violation of Article 3 of Protocol No. 1 in a case where the applicants’ candidatures had been annulled on the grounds that they were pursuing, with a different political party, the activities of the three political parties which had been declared illegal and dissolved on account of their support for violence and for the activities of the ETA, a terrorist organisation. The Court found that the national authorities had had considerable evidence enabling them to conclude that the electoral groupings in question wished to continue the activities of the political parties concerned. It insisted on the fact that the authorities had taken decisions to cancel applications on an individual basis.³⁰

34. The case-law of the European Court on Human Rights makes a distinction between the restrictions on the right to vote and the right to stand for election. “Stricter requirements may be imposed on the eligibility to stand for election to parliament, as distinguished from voting eligibility”.³¹ At the same time, the Court has stated that the right to be elected is “inherent in the concept of a truly democratic state”.³²

35. Concerning the deprivation of the right to vote and to be elected, the Code of Good Practice in Electoral Matters states:

- i. provision may be made for depriving individuals of their right to vote and to be elected, but only subject to the following cumulative conditions:
- ii. it must be provided for by law;
- iii. the proportionality principle must be observed; conditions for depriving individuals of the right to stand for election may be less strict than for disenfranchising them;
- iv. The deprivation must be based on mental incapacity or a criminal conviction for a serious offence;
- v. Furthermore, the withdrawal of political rights or finding of mental incapacity may only be imposed by express decision of a court of law.”³³

36. The latter requirement must be read together with the case-law of the European Court of Human Rights, which accepted a voting ban that applied only to persons convicted of certain well-determined offences or to a custodial sentence exceeding a statutory threshold.³⁴

37. The United Nations Human Rights Committee in its General Comment No. 25 has issued a series of applicable guidelines. First, it recognises the right to be voted and to have access

²⁷ Venice Commission, [CDL-AD\(2019\)007](#), Report on Term Limits; Part II, Members of Parliament, and Part III, Representatives elected at Sub National and local level and executive officials elected at sub national and local level, referring to ECtHR, *-Mohin and Clerfayt v. Belgium*, 2 March 1987, no. 9267/81, § 52 and *Ždanoka v. Latvia [GC]*, 16 March 2006, no. 58278/00, §§ 103-104 and 115.

²⁸ ECtHR, *Ždanoka v. Latvia [GC]*, 16 March 2006, no. 58278/00, § 126.

²⁹ ECtHR, *Ādamsons v. Latvia*, 1 December 2008, no 3669/03, § 125.

³⁰ ECtHR, *Etxebarria Barrena Arza Nafarroako Autodeterminazio Bilgunea and Aiarako and others v. Spain*, 30 June 2009, nos. 35579/03, 35613/03 and 35626/03, § 53.

³¹ ECtHR, *Melnichenko v. Ukraine*, 19 October 2004, no. 17707/02, § 57. See also Venice Commission, [CDL-AD\(2002\)023rev2-cor](#), Code of Good Practice in Electoral Matters, § 6.

³² ECtHR *Podkolzina v. Latvia*, 9 April 2002, no. [46726/99](#), para. 35.

³³ Venice Commission, [CDL-AD\(2002\)023rev2-cor](#), Code of Good Practice in Electoral Matters, I.1.1.d.

³⁴ ECHR *Scoppola v. Italy (no. 3) [GC]*, 22 May 2012, 126/05.

to public service guaranteed by Article 25 of the ICCPR;³⁵ additionally, any restrictions on the right to stand for election must be justifiable on objective and reasonable criteria, particularly, persons should not be excluded by unreasonable or discriminatory requirements such as by reason of political affiliation;³⁶ finally, political opinion may not be used as a ground to deprive any person of the right to stand for election.³⁷

38. Based on the above, any restrictions to the right to stand for election should be prescribed by law, pursue a legitimate aim, be justifiable based on objective, reasonable and non-discriminatory criteria, be proportionate, with sufficient procedural safeguards afforded to the individual to protect against arbitrariness. Any restrictions on electoral rights should be individualised and assessed against a given country's political and historical context.

3. Prescribed by law

39. In order to be compatible with the ECHR, any interference with Article 3 of Protocol no. 1 to the ECHR shall in the first place be prescribed by law, meaning that it should be sufficiently clear and foreseeable. The principle of foreseeability entails that an average person should be able to be aware and foresee, at all times and to a reasonable degree, consequences stemming from their actions to regulate their conduct accordingly.³⁸ In principle, legislation should not have retroactive effect and exceptions to this rule should be clearly outlined in legislation, strictly limited to compelling public-interest reasons and only if in conformity with the principle of proportionality.³⁹ Regarding the introduction of new provisions disqualifying a candidate in presidential elections, or on being a prime minister or minister, the UN Human Rights Committee has for instance considered that when the law-making process introducing such restrictions was highly linked in time and substance to other proceedings, in the specific case impeachment proceedings against an individual, the said restrictions lacked the necessary foreseeability and objectivity and thus amounted to an unreasonable restriction under Article 25 (b) and (c) of the ICCPR.⁴⁰ In addition, it is not clear whether the term "executive body" applies only to central executive body of the party or also to the local bodies, which is not congruent with the principles of legal certainty and foreseeability

4. Legitimate aim

40. Art. 3 of Protocol 1 does not include an explicit list of legitimate aims, such as Articles 8-11 of the Convention, nor does the Court apply the tests of "necessity" or "pressing social need". Yet, as the Commission summarises in its 2019 report on term-limits, the aim a state pursues must be compatible with the principle of the Rule of Law and the general objectives of the Convention.⁴¹

41. According to the Explanatory Note of the draft Law, the latter is intended to implement "a preventive mechanism resulting from the unconstitutional declaration of a political party". The European Court of Human Rights has recognised that the setting up of self-protection mechanism

³⁵ United Nations. Human Rights Committee. CCPR/C/21/Rev.1/Add.7. 27 August 1996. General Comment 25, § 1.

³⁶ United Nations. Human Rights Committee. CCPR/C/21/Rev.1/Add.7. 27 August 1996. General Comment 25, § 15.

³⁷ United Nations. Human Rights Committee. CCPR/C/21/Rev.1/Add.7. 27 August 1996. General Comment 25, § 17.

³⁸ ECtHR, *The Sunday Times v. the United Kingdom* (No. 1), no. [6538/74](#), 26 April 1979, § 49. See also Venice Commission, [CDL-AD\(2016\)007](#), Rule of Law Checklist, § 58.

³⁹ Venice Commission, [CDL-AD\(2016\)007](#), Rule of Law Checklist, § 62.

⁴⁰ See UN Human Rights Committee, [Communication no. 2155/2012](#), Views / adopted by the Committee at its 110th session, 10-28 March 2014, para. 8.4.

⁴¹ Venice Commission, [CDL-AD\(2019\)007](#), Report on Term Limits; Part II, Members of Parliament, and Part III, Representatives elected at Sub National and local level and executive officials elected at sub national and local level, § 16.

to preserve the democratic order, for instance by excluding from the legislature any senior officials who had committed gross violations of the Constitution or breached their oath provided for in the Constitution constituted a legitimate aim.⁴² The Court also recognised the legitimacy of the aim of ensuring loyalty to the State or the integrity of public office holders and public trust in public institutions, in the case of the judiciary.⁴³ The Constitutional Court justified its decision to declare the political party Şor unconstitutional by the fact that its judgement was “first and foremost a forward-looking act of democracy, defending itself against a real danger.” The stated aim to defend the Constitution and the integrity of the democratic State, by preventing a political party from taking power unconstitutionally, as expressed in the decision of the Constitutional Court which led to the prohibition of the political party Şor, is legitimate and may justify restrictions to the right to be elected. Similarly, the stated aim to implement a decision of a Constitutional Court would also *prima facie* constitute a legitimate aim if such was mandated by the decision.

5. Proportionality

42. It remains to be ascertained whether the measures proposed in the Law are proportionate and exempt of arbitrariness. Regarding the proportionality of restrictions to political rights, the European Court of Human Rights has underlined the need to assess any electoral legislation in the light of the political evolution of the country concerned, which means that unacceptable features in one system may be justified in another.⁴⁴ The margin of appreciation is wide, but it is not all-embracing.⁴⁵ Although a state enjoys considerable latitude in establishing the criteria governing eligibility to stand for election, which may vary in accordance with the historical and political factors specific to each State, they should have a common origin in the need to ensure both the independence of elected representatives and the freedom of choice of electors: if past activities of certain politicians broadly disqualify them from holding public elected office, the voters should be capable of coming to this conclusion themselves and not voting for these politicians in future elections if they run for office. The introduction of ineligibility provisions where a state bars certain individuals from running for public office may be seen as an act of discrimination, if not based on objective, reasonable and non-discriminatory criteria, in line with the fundamental principles of a democratic state.

43. In case 10/2023, the Constitutional Court carried out a thorough study to conclude that the declaration of unconstitutionality of the political party Şor, a measure of an exceptional nature, has to be decided, since previously various measures to quell the party’s illegitimate activities had been issued without success. So, it concluded, reiterating that the declaration of unconstitutionality of a political party has a preventive purpose, that the restriction was in conformity with the principle of proportionality.

44. However, the Venice Commission and ODIHR consider that a clear distinction has to be drawn between the political party that has been declared unconstitutional and the rights of individuals who militate or militated within that political party. The prohibition of the party does not directly affect the rights of all these individuals.

45. While the grounds referred to by the Constitutional Court for pronouncing the unconstitutionality of the political party Şor may also by extension be applicable to individuals seeking electoral office with the same illegitimate aims, the Law proposes to render ineligible individuals who have militated in such political parties for the sole reason of being members of its executive bodies or holding elective functions.

⁴² ECtHR, [Advisory Opinion on the assessment, under Article 3 of Protocol No. 1 to the Convention, of the proportionality of a general prohibition on standing for election after removal from office in impeachment proceedings](#), 8 April 2022, § 83.

⁴³ *Ibid.* §§ 84-85.

⁴⁴ ECtHR, *Mathieu-Mohin and Clerfayt v. Belgium*, 2 March 1987, no. 9267/81, § 52; *Ždanoka v. Latvia* [GC], 16 March 2006, no. 58278/00, §§ 103-104 and 115.

⁴⁵ ECtHR, *Hirst v. the United Kingdom* (No. 2) [GC], 6 October 2005, no. 74025/01, § 82.

46. As appears from the case-law of the European Court of Human Rights and the Code of good practice in electoral matters, the principles of proportionality and prohibition of arbitrariness imply the individualisation of the measures taken.

47. The restriction provided for in the Law has a broad application *ratione personae*, insofar as it would apply to the members of the executive body of a party declared unconstitutional and to members of such party who hold an elected office – at the time of pronouncement of the unconstitutionality by the Constitutional Court. The question has therefore to be raised whether that restriction constitutes a proportionate measure. The restriction applies automatically – without further assessment of the individual conduct by an independent and impartial body or decision of a court - on the sole basis of the party membership and holding of a specific position. The restriction also applies indiscriminately without distinguishing between party members who may have actively contributed to the illegitimate acts attributed to the political party, from those who were only performing neutral duties or were unaware of the potential unlawful acts committed by the party. This means that the restrictions on the right to be elected apply to a group of people, without an individualised assessment of their active involvement in the illegitimate activities of the prohibited parties.⁴⁶

48. The Venice Commission has highlighted that “[t]he exercise of political power by people who seriously infringed the law puts at risk the implementation of [the] principle [of legality], which is on its turn a prerequisite of democracy, and may therefore endanger the democratic nature of the state. It is therefore justified to restrict their right to be elected”.⁴⁷ It may be acknowledged that members of executive bodies of a party as well as MPs representing this party in the legislative body are not just ordinary members who are generally not involved in the decision-making process of the party and the exercise of its everyday policies. On the contrary, they are in principle in the very core of party policies and activities, as party leadership along with the parliamentary group is the most important decision-making circle in the political organisation. While some of them may have seriously infringed the legislation, thus leading to the declaration of unconstitutionality of the party by the Constitutional Court, not all persons targeted by the law are necessarily responsible, or even aware, of the actions which led to such consequences for the party. In particular, the Law refers to party members holding an elected office, which would also encompass elected members of a local council, village or even small town who may only be remotely involved in the decision-making process of the party. The Law does not provide for individualised decisions and considers a whole group as collectively responsible for these violations. This leads in practice to a general, automatic and indiscriminate application of restrictive measures, thus going against the principles of proportionality and prohibition of arbitrariness guaranteed by Article 3 of Protocol 1 to the ECHR and other international treaties and standards in the field of elections.

49. It is noted that the ineligibility to be elected would extend to local elections. As underlined by the European Court of Human Rights, the proportionality of the restriction should also be assessed from the perspective of the requirements of the proper functioning of the institution to which the person will belong once elected and more generally the constitutional system and democracy as a whole in the State concerned.⁴⁸ Even if it could happen, it seems unlikely that the members of a local council, village or even small town would fall under the category of mandate-holders which may jeopardise the democratic order, which would also weigh negatively on the assessment of the proportionality of the restriction and would require, in addition, a proper verification of the existence and seriousness of the risk to the democratic order coming from the activities of those members of local councils.

⁴⁶ ECtHR, *Ādamsons v. Latvia*, no. [3669/03](#), 24 June 2008, § 125.

⁴⁷ Venice Commission, [CDL-AD\(2015\)036cor](#), Report on exclusion of offenders from Parliament, § 168.

⁴⁸ ECtHR, *Advisory Opinion on the assessment, under Article 3 of Protocol No. 1 to the Convention, of the proportionality of a general prohibition on standing for election after removal from office in impeachment proceedings*, 8 April 2022, § 95.

50. The issue of proportionality also needs to be examined in the context of the severity of the restrictive measures to be imposed on those persons found liable for actions that led to their party being declared unconstitutional. In this respect, as noted earlier, the European Court of Human Rights has made clear that an indefinite ban from running for political office is in any case a disproportionate measure. In one case,⁴⁹ it held that increasing a 10-year legal restriction on being elected by an additional 10 years without justification given by Parliament or the Government was manifestly arbitrary. The draft Law initially proposed a relatively short 3-year prohibition from running for office for the concerned individuals. However, prior to its second reading this term was increased to 5 years without any reason for the increase provided. This gives the appearance of an arbitrarily determined restrictive measure. In addition, applying a standardised measure to all concerned persons can itself be seen as a disproportionate measure in light of the fact that there may be varying levels of culpability for individuals determined responsible for the actions that led to the banning of their party. As such, establishing a range of measures that are proportionately applied would be more appropriate.

51. The potential “interference with the free expression of the opinion of the people” also links restrictions on the eligibility to the freedom of expression, guaranteed in Art. 10 ECHR. Electoral campaigns are most important contexts for expressing and advocating political opinions. The same considerations are relevant for all the elections covered by the electoral code.⁵⁰

6. Procedural safeguards and effective remedy

52. Moreover, the European Court of Human Rights has stressed the need to afford sufficient procedural safeguards against arbitrariness in the framework of the process of the domestic authorities making such individual assessments.⁵¹ This includes the right to be heard, the right to present evidence, the right to be represented by a lawyer, the right to defence, the right to a sufficiently reasoned decision, and the possibility to contest the decision to an independent judicial body. Since the ineligibility to be elected applies *ex lege*, it is not possible to legally challenge the exclusion of the right to stand for election on its merits, contrary to the principle of access to justice, one of the pillars of the Rule of Law.⁵² As there is no individual assessment of each case, the person concerned will not be heard nor be provided with a reasoned decision that would be subject to judicial review nor have access to an effective remedy for the violation of the right to stand for election.

53. In conclusion, the legal basis for the imposition of such a limitation of the right to stand for election is too wide to be proportionate to the legitimate aims pursued.⁵³ The restriction on the right to be elected, in order to ensure a proper balance between the legitimate defence of democracy and the protection of individual political rights, must be limited to those persons who had an active participation in the actions that led to the declaration of unconstitutionality of the

⁴⁹ ECtHR, [Ādamsons v. Latvia](#), no. 3669/03, 24 June 2008.

⁵⁰ On a possible violation of Article 10: the ECtHR has held in *Hirst v. the United Kingdom* (No. 2) [GC], 6 October 2005, no. 74025/01, § 89 : “The Court considers that Article 3 of Protocol No. 1 is to be seen as the *lex specialis* as regards the exercise of the right to vote and (...) finds that no separate issue arises under Article 10 of the Convention”: This applies also to the right to be elected: ECtHR, *Ždanoka v. Latvia* [GC], 16 March 2006, no. 58278/00, § 141; *Etxeberria Barrena Arza Nafarroako Autodeterminazio Bilgunea and Aiarako and others v. Spain*, 30 June 2009, nos. 35579/03, 35613/03 and 35626/03, § 70.

⁵¹ See *Political Party “Patria” and others v. Republic of Moldova*, 4 August 2020, nos. [5113/15](#) and 14 others; *Miniscalco v. Italy*, 17 September 2021, no. [55093/13](#); *Galan v. Italy* (dec.), 17 June 2021. See also *Podkolzina v. Latvia*, 9 April 2002, no. [46726/99](#), in which the court stated that that the principle of effective guarantee of rights requires that the procedure for assessing a candidate’s eligibility should provide sufficient safeguards to prevent arbitrary decisions.

⁵² Venice Commission, [CDL-AD\(2016\)007](#), Rule of Law Checklist, II.E. This principle is protected by the procedural aspect of Article 3 of Protocol No. 1 to the ECHR.

⁵³ ECtHR *Kiliçgedik and others v. Turkey*, 14 December 2010, nos. 4517/04, 4527/04, 4985/04, 4999/04, 5115/04, 5333/04, 5340/04, 5343/04, 6434/04, 10467/04 and 43956/04), § 48.

party; for instance, concretely endangering the democratic system of the country or vote buying⁵⁴ and must be assessed on an individual basis with adequate procedural safeguards, including the possibility to challenge the decision.

7. Specific measures

54. Two other amendments in the Law directly affect the right to stand for election and, in this respect, also need to be examined for compliance with the proportionality principle. A new provision in the Law on Political Parties (Article 4(6)) provides that the attributes of political parties declared unconstitutional (name, symbol, logo, etc.) may not be used by other political parties and electoral subjects. Using such attributes will result in refusal to register the political party by the Public Service Agency or refusal to register the electoral subject by the competent electoral body. While a prohibition on use of the attributes of a banned political party may not, as such, breach any international standard, the automatic refusal to register a political or electoral subject for use of such attributes is disproportionate in light of the nature of the act. Alternative remedial measures, such as warnings and a range of fines would be in line with the proportionality principle as applied to such conduct. This same analysis is applicable to a new provision in the Electoral Code which mandates de-registration of an electoral subject if found liable for vote-buying by a competent electoral body, regardless of the severity of the conduct (Article 102(5)(f)). Introduction of a range of administrative sanctions and their individualisation, with de-registration reserved only for the most serious cases or patterns of vote-buying, would be in line with the principle of proportionality.

IV. Conclusion

55. By letter of 24 July 2023, Mr Igor Grosu, Speaker of the Parliament of the Republic of Moldova, submitted a request for an opinion of the Venice Commission on the Law on the amendment of certain normative acts (the implementation of certain considerations of the Decision of the Constitutional Court no. 10/2023 on the check of the constitutionality of the Political Party 'Şor'). As this Opinion relates to the electoral field, it was prepared jointly by the Venice Commission and ODIHR. The provisions on the ineligibility to be elected addressed in this Joint Opinion were declared unconstitutional by the Constitutional Court on 3 October 2023. On 4 October 2023, the Parliament of the Republic of Moldova adopted a new Article 16(2)(f) of the Electoral Code which provides for new causes for ineligibility to be elected. The Venice Commission and ODIHR are not in a position to analyse these amendments in the present Opinion.

56. The Law was adopted with the votes of the majority in Parliament, six weeks after the judgement of the Constitutional Court it was intended to implement and a bit more than four months before the next local elections called for 5 November 2023, with the stated aim to implement the Constitutional Court's judgment and enforce a preventive mechanism resulting from the unconstitutionality of the political party Şor.

57. The Venice Commission and ODIHR would like to underline the particularity of the present situation. The authorities amended the legislation with the stated aim to implement the judgement of the Constitutional Court. The principle of stability of electoral law cannot be invoked to prevent the timely implementation of a judgement if it requires legislative changes to comply with constitutional norms and principles. Moreover, while adoption of legislation by broad consensus

⁵⁴ On a possible violation of Article 10: the ECtHR has held in *Hirst v. the United Kingdom* (No. 2) [GC], 6 October 2005, no. 74025/01, § 89: "The Court considers that Article 3 of Protocol No. 1 is to be seen as the *lex specialis* as regards the exercise of the right to vote and (...) finds that no separate issue arises under Article 10 of the Convention": ECtHR. This applies also to the right to be elected: ECtHR, *Ždanoka v. Latvia* [GC], 16 March 2006, no. 58278/00, § 141; *Etxebarria Barrena Arza Nafarroako Autodeterminazio Bilgunea and Aiarako and others v. Spain*, 30 June 2009, nos 35579/03, 35613/03 and 35626/03, § 70.

after extensive public consultations with all relevant stakeholders is always suitable, the absence of consensus should not be an obstacle to the execution of the judgement. However, it is important to note that the Constitutional Court judgement did not explicitly mandate any legislative amendments for the judgement to be fully implemented.

58. The Law which provides for the ineligibility to be elected in presidential, parliamentary and local elections, for five years, of members of the executive body of a party declared unconstitutional and members of such a party who hold an elected office, restricts the right to stand for election as enshrined, *inter alia*, in Article 3 of Protocol 1 to the ECHR and Article 25 ICCPR.

59. While this restriction may respond to the legitimate aim to defend the Constitution and the integrity of the democratic State, it applies automatically on the sole basis of the party membership and holding of a specific position, and indiscriminately without distinguishing between party members who may have actively contributed to the illegitimate acts attributed to the political party, from those who were only performing neutral duties or were unaware of the potential unlawful acts committed by the party. The restriction affects a large group of persons, making them collectively responsible for the illegitimate activities of the party they belong to, thus lacking individualisation and therefore due process guarantees. This goes against the principle of proportionality and could lead to arbitrariness.

60. The Venice Commission and ODIHR therefore recommend to the Moldovan authorities, if they wish to prevent certain members of parties declared unconstitutional from holding certain elected offices:

- introducing adequate criteria and an effective individual assessment that would limit restrictions of the right to be elected only to those members and/or elected officials of the party whose activities have endangered the Constitution and the integrity of the democratic State, through their actions and expressions, and/or actively pursued the (illegal) goals of the unconstitutional parties;
- affording to these persons the full range of procedural safeguards in the assessment process, including a sufficiently reasoned decision and the possibility to challenge the limitation of rights by providing an opportunity to seek judicial review of the decision to deprive them of the right to stand for election.

61. The implementation of these recommendations is essential to avoid upsetting the balance between the legitimate aim of the protection of the State's democratic order and national security and the need to protect individual's electoral rights, without disproportionately undermining the essential role played by all political actors in ensuring pluralism nor threatening the representative nature of the legislature.

62. The Venice Commission and ODIHR remain at the disposal of the Moldovan authorities for further assistance in this matter.