Strasbourg, 27 January 2025 **CDL-PI(2025)001**

Or. Engl.

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

URGENT REPORT

ON THE CANCELLATION OF ELECTION RESULTS BY CONSTITUTIONAL COURTS

Issued on 27 January 2025 pursuant to Article 14a of the Venice Commission's Revised Rules of Procedure

on the basis of comments by

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I. Introduction

1. By letter of 13 December 2024, Mr Theodoros Rousopoulos, President of the Parliamentary Assembly of the Council of Europe, requested an urgent report of the Venice Commission on the following question:

> *Under which conditions and under which legal standards can a constitutional court invalidate elections, drawing from the recent Romanian case?*

2. The question refers to Decision No. 32 of the Romanian Constitutional Court of 6 December 2024 which annulled the first round of the presidential election held on 24 November 2024.

3. Ms Marta Cartabia, Mr Christoph Grabenwarter, Mr Eirik Holmøyvik, Mr Oliver Kask, Ms Inga Milašiūtė and Ms Angelika Nussberger acted as rapporteurs for this urgent report.

4. This urgent report was drafted on the basis of comments by the rapporteurs. It was issued in accordance with the Venice Commission's protocol on the preparation of urgent opinions (CDL-AD(2018)019) on 27 January 2025 and will be submitted to the Venice Commission for endorsement at its 142nd Plenary Session (Venice 14-15 March 2025).

II. Background and scope of the report

5. Presidential elections were held in Romania on 24 November 2024. A second round was due to be held on 8 December 2024 as no candidate achieved an absolute majority in the first round. On 27 November, two candidates submitted requests to the Constitutional Court of Romania to annul the results of the first round of the election, claiming violations of campaign financing regulations and voter deception by other candidates. On 28 November, the Constitutional Court ruled that there should be a recount of all ballots cast in the first round and on 2 December, it confirmed the first-round results and upheld the organisation of the runoff on 8 December. However, on 6 December the court annulled the election results, as a result of information from Romania's intelligence agencies being declassified and brought to public knowledge on 4 December 2024. The court stated that this information had revealed voter manipulation and distortion of equal opportunities for electoral competitors, through the non-transparent use of digital technologies and artificial intelligence (AI) in the electoral campaign, in violation of the electoral legislation, as well as through the financing of the electoral campaign from undeclared sources, including online. The court ruled that the electoral process should be resumed in its entirety and the incumbent President should exercise the mandate until the swearing in of the newly elected President.

6. It is not for the Venice Commission to go into the facts of the case, or into the examination of the decision by the Romanian Constitutional Court. The question put to the Venice Commission by the Parliamentary Assembly is of a general nature, and it refers to an analysis of general comparative constitutional law and European and international standards. This is the basis on which the Venice Commission will respond to this request.

7. At the same time, it should be borne in mind that the annulment of the first round of the presidential elections in Romania by the Constitutional Court of Romania, even if it is not the first court decision annulling presidential elections in Europe,[1] is special in several respects. First, the

[1] For instance, Austria's Constitutional Court annulled the results of the May 2016 presidential runoff between Alexander Van der Bellen and Norbert Hofer. The Court found that the principle of free elections had been violated, in particular through the passing on of advance information to selected media representatives by the electoral authorities, and that there had been irregularities in the counting of postal votes, although there was no evidence of intentional fraud. A repeat election was held in December 2016, which Van der Bellen won. In Bulgaria the Constitutional Court admitted five cases, all challenging the legality of the 27 October 2024 parliamentary snap elections that determined the composition of the 51st National Assembly. During the Orange Revolution, Ukraine's Supreme Court annulled the results of the 2004 presidential election runoff, in which Viktor Yanukovych was declared

Constitutional Court acted *ex officio* on the basis of a broad competence provision according to which "the Constitutional Court shall ensure the observance of the procedure for the election of the President of Romania and shall confirm the results of the vote".[2] Second, the decision is based on interference via social media and the dysfunctional use of digital technologies and AI favouring one of the candidates. Thus, the deficiency is not directly linked to the electoral process itself, but rather to the preparatory phase of the election and to the non-transparent influence on the voters. Third, while the decision relies on a breach of the provisions of the election laws, especially the laws on financing and thus on the lack of fairness of the elections, it would appear that the Court also identified an attack on the sovereignty of the State of Romania due to external influence on the election process.[3]

8. Called upon to analyse under which conditions and under which standards a constitutional court can invalidate elections, the Venice Commission will therefore also look into the three elements underlined above: the right to invalidate elections *ex officio*; the use of digital technologies and AI in electoral campaigns; and external influence by another State.

9. Another specific feature of the Romanian case is that the Constitutional Court's decision of 6 December 2024 was a revision of its own decision of 2 December 2024 in which it had confirmed the general validity of the elections. This new decision of the Constitutional Court was justified on the basis of new information, i.e. the disclosure and publication by the security services of previously classified information. This chain of events (i.e. the particular circumstances leading to this revisiting of its earlier decision by the Constitutional Court) is, however, not the subject of the Venice Commission's report. Only the evidentiary basis for such decisions is of relevance for the purpose of this report.

10. In this report, the terms "invalidation of elections", "annulment of elections" and "cancellation of election results" are used synonymously. The invalidation of elections is understood by reference to the Code of Good Practice in Electoral Matters, which provides: "*The appeal body must have authority to annul elections where irregularities may have affected the outcome. It must be possible to annul the entire election or merely the results for one constituency or one polling station. In the event of annulment, a new election must be called in the area concerned*."[4] This report will focus on the cancellation of elections in this narrow sense and will not elaborate on the confirmation of election results by constitutional courts, nor on other tasks relating to the oversight of elections.

11. Finally, while the question put to the Venice Commission by the Parliamentary Assembly focuses on constitutional courts, it should be noted from a comparative perspective that preserving fair conditions and the legality of the procedure and safeguards for annulling election results is not an exclusive task of constitutional courts. There is a wide variety of election dispute resolution systems in the electoral systems of the Council of Europe member States. Not all countries with a constitutional court provide this body with the power to adjudicate upon the validity of elections.[5] Whether the final say on the validity of the election rests with a constitutional court or another

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the winner. The Court found evidence of widespread fraud and electoral manipulation. A new runoff was ordered, resulting in Viktor Yushchenko winning the presidency.

[2] Article 146(f) of the Constitution of Romania. There is also a more concrete norm in the Romanian Law on the Election of the President that was, however, not mentioned in the judgment of the Constitutional Court, not even *e contrario*: Article 52 of that law regulates in detail the cancellation of presidential elections upon application by electoral competitors.

[3] While the decision does not explicitly mention such external influence, it is based on information from Romania's intelligence agencies including the Foreign Intelligence Service, and it includes a reference to Romania's sovereignty. According to media reports, the declassified intelligence reports revealed significant foreign interference in the election campaign, see e.g. Romania's cancelled presidential election and why it matters-BBC; The Second Round that Wasn't – Verfassungsblog.

[4] Venice Commission, CDL-AD(2002)023rev2-cor, Code of good practice in electoral matters, Guideline II.3.3.e.

[5] For example, Articles 101 and 129 of the Polish Constitution state that the Supreme Court, and thus not the Constitutional Tribunal, shall adjudicate on the validity on parliamentary and presidential elections. See the overview provided in paras 44 *et seq*. of the Venice Commission's Report on election dispute resolution, CDL-AD(2020)025, and the Replies to the questionnaire for that report, CDL-EL(2009)019.

judicial body should not be decisive for the conditions and safeguards pertaining to that decision. In countries without a constitutional court the same conditions and safeguards should apply for the public body, which should in principle be a judicial body,[6] invested with the final power to annul the election results.

III. Analysis

12. The present analysis consists of a short overview of the most relevant international and European standards and of some basic principles governing the cancellation of election results, as well as of the following more specific chapters: the competence of the constitutional court and procedural questions; substantial conditions for the cancellation of election results; and the scope and consequences of annulment decisions.

A. International and European Standards and basic principles governing the cancellation of election results

13. The Venice Commission has developed the European electoral heritage for more than two decades, in particular by a Code of Good Practice in Electoral Matters,[7] the reference document of the Council of Europe in the field and a number of reports[8] as well. The most relevant ones in the present context are the 2009 Report on the cancellation of election results[9] and the 2020 Report on election dispute resolution.[10]

14. The international standards and case-law are listed, among others, in the Venice Commission's Report on election dispute resolution.[11] The most relevant norms in the present context are the following:

- The general rules of international law on the right to free elections, namely Article 21.3 of the Universal Declaration of Human Rights of the United Nations, Article 25 (b) of the International Covenant on Civil and Political Rights (ICCPR) and – on a European level – Article 3 of the First Additional Protocol of the European Convention on Human Rights (ECHR). For the interpretation of the ICCPR, the General Comment No. 25 states that "[t]here should be independent scrutiny of the voting and counting process and access to judicial review or other equivalent process so that electors have confidence in the security of the ballot and the counting of the votes."[12] The European Court of Human Rights (ECtHR) has not applied Article 3 of Protocol No. 1 of the ECHR to presidential elections.[13] This finding does, however, not hinder the Venice Commission to take into account the Court's jurisprudence on Article 3 of Protocol No. 1 insofar as it is relevant for the understanding of the "right to hold free elections".

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[6] Venice Commission, CDL-AD(2002)023rev2-cor, Code of good practice in electoral matters, Guideline II.3.3.a.: "In any case, final appeal to a court must be possible." See also ECtHR, *Mugemangango v. Belgium* [GC], no. 310/15, 10 July 2020, para. 94 *et seq*.

[7] Venice Commission, CDL-AD(2002)023rev2-cor, Code of good practice in electoral matters. See also the related interpretative declarations of the Venice Commission, *inter alia*, CDL-AD(2024)044, Interpretative declaration of the Code of good practice in electoral matters as concerns digital technologies and artificial intelligence.

[8] See the following webpage: Main reference documents of the Venice Commission, item III.

[9] Venice Commission, CDL-AD(2009)054, Report on the cancellation of election results; see also the Replies to the questionnaire for that report, CDL-EL(2009)019.

[10] Venice Commission, CDL-AD(2020)025, Report on election dispute resolution; see also the Data collected for that report, CDL-REF(2019)010.

[11] Venice Commission, CDL-AD(2020)025, Report on election dispute resolution, paras 20 *et seq*.

[12] General Comment No. 25 adopted by the UN Committee for Human Rights (established by Article 28 of the ICCPR).

[13] See e.g. ECtHR, *Anchugov and Gladkov v. Russia*, nos. 11157/04 and 15162/05, 4 July 2013, paras 55-56. According to the Guide on Article 3 of Protocol No. 1 an application of Article 3 may in theory not be excluded "insofar as the Head of State elected has been given the power to initiate and adopt legislation or enjoys wide powers to control the passage of legislation or the power to censure the principal legislation-setting authorities". Nevertheless, such an interpretation is not part of the Court's case-law (see Guide on Article 3 of Protocol No. 1, para. 6).

- The Code of Good Practice in Electoral Matters includes the principles of universal, equal, free, secret and direct suffrage and conditions for implementing these principles, including an effective system of appeal; it states, in particular, that "the appeal body must have authority to annul elections where irregularities may have affected the outcome. It must be possible to annul the entire election or merely the results for one constituency or one polling station. In the event of annulment, a new election must be called in the area concerned."[14]
- Paragraph 5.10 of the OSCE 1990 Copenhagen Document is also relevant to election dispute resolution as it entitles everyone to "have an effective means of redress against administrative decisions so as to guarantee respect for fundamental rights and ensure legal integrity."[15]

15. Although election laws are very different – and influenced by national (political) cultures – and there is no common approach to such radical measures as the cancellation of election results, some common approaches and principles can be discerned.

16. Elections are large and complex processes, involving numerous actors as well as the voters, aimed to produce an electoral result that will "ensure the free expression of the opinion of the people", according to Article 3 of Protocol No. 1 of the ECHR. The *ex-post* annulment of an election by a constitutional court, or another judicial body deciding as the final instance, is therefore a significant event in the life of a democratic State. Annulment effectively means that the judge overrules the expression of the opinion of the people on the basis that the election was contrary to the rules. The discretion of the judge to annul elections should therefore be guided and limited by conditions set out in the law. The role of the judge is to decide if the legal conditions for annulment are met in each individual case.

17. The Venice Commission has previously noted that the electoral legislation of most Council of Europe member States typically lacks detail as to the decision-making power of the competent election dispute resolution bodies and that it leaves a wide discretion for the judge considering election matters to determine whether the irregularities are such as to require annulment of the election.[16] For this reason, the Venice Commission has made a general recommendation – which remains valid – to improve the legislation on annulment of election results.[17] It is worth noting that the ECtHR has also expressed concerns regarding electoral legislation providing election dispute resolution bodies with (too) wide discretion.[18]

18. As a rule, the voters must trust that their vote is final. The cancellation of a part of elections or elections as a whole is justified only under very exceptional circumstances (*ultima ratio* principle).[19] Thus, the Venice Commission has already established that the "cancellation of election results due to minor misconduct which has not affected the outcome could make the electoral process more vulnerable or would lead to mistrust in the judicial remedies or lead to lower interest in cycles of repeat elections, and possibly a lower turnout."[20]

19. On the other hand, as fraud or other irregularities – even on a large scale – can never be excluded, the possibility to partially or fully invalidate election results must be provided for in one form or another. This is also obvious from a comparative analysis of election laws.[21] The Code of

[14] Venice Commission, CDL-AD(2002)023rev2-cor, Code of good practice in electoral matters, Guideline II.3.3.e.
[15] Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE, 29 June 1990.
[16] See Venice Commission, CDL-AD(2020)025, Report on election dispute resolution, paras 130-132, and Venice Commission, CDL-AD(2009)054, Report on the cancellation of election results, para. 10.
[17] Venice Commission, CDL-AD(2020)025, Report on Election Dispute Resolution, para. 139.
[18] See ECtHR, *Mugemangango v. Belgium* [GC], no. 310/15, 10 July 2020, paras 109-114.
[19] Cf. Venice Commission, CDL-AD(2020)025, Report on election dispute resolution, para. 128.
[20] Venice Commission, CDL-AD(2020)025, Report on election dispute resolution, para. 127.
[21] See the explanation of the Venice Commission in the Report on election dispute resolution, CDL-AD(2020)025, para. 129 (citations omitted): "The transparency of election dispute resolution systems provides assurance to complainants and voters that electoral malfeasance has been corrected and serves as a potential deterrent to future misconduct. A country where the electoral law allows for a tolerance level for fraud, based on a certain percentage

Good Practice in Electoral Matters requires an effective system of appeal and states, in particular, that "the appeal body must have authority to annul elections where irregularities may have affected the outcome."[22]

20. These principles apply *mutatis mutandis* to elections on all different levels such as regional elections and national elections, among them parliamentary and presidential elections.

B. Competence of the constitutional court and procedural issues

1. Competence of the constitutional court

21. The Venice Commission has previously noted that it would be suitable for annulment decisions to be taken by the highest electoral body – including the central election authority of the country – and that such decisions should be reviewable by the highest judicial body, the constitutional court or a specialised electoral court when such a judicial body exists.[23] The attribution of the right to cancel elections to the constitutional court is thus in line with – although not required by – European and international standards and with the legislation in many States.[24] It is not necessary for the constitutional court to be only the final instance and to act as an appeal body. There are also cases of countries allowing electoral complaints related to election results only before the constitutional court acting as first – and at the same time final – instance.

22. The competence of the constitutional court to annul elections can be regulated either in the Constitution or in an Electoral Code applicable to all elections, in an election law regulating certain types of elections (e.g. presidential elections) only, or in the law on the constitutional court. It can be regulated explicitly or implicitly; it may be regulated in detail or with open clauses.

23. From a comparative perspective, two different approaches can be observed: in some countries, the constitutional court exercises a general control function over the elections[25] that can also be interpreted as carrying the competence to cancel election results. In other countries, there are more specific regulations on dispute resolution that explicitly define the scope of sanctions (including the cancellation of elections).[26] Under both approaches, in general the court does not act *ex officio* but rather upon request or application by groups of voters, political groups, candidates or other State organs.

2. Procedural questions

a. Initiation of the procedure, decision *ex officio*

24. Human rights standards proclaim the right to initiate a procedure of control over election results in case of valid allegations of deficiencies in the procedure. General Comment No. 25 to the ICCPR states that election results, including the counting process, should be appealable.

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of irregular votes, or where the allocation of seats takes place before the results of the repeated elections are made public does not follow international standards."

[22] Venice Commission, CDL-AD(2002)023rev2-cor, Code of good practice in electoral matters, Guideline II.3.3.e.

[23] Venice Commission, CDL-AD(2020)025, Report on election dispute resolution, para. 44. See also the ODIHR publication "2019 Handbook for the Observation of Election Dispute Resolution".

[24] According to the Venice Commission's findings in the 2020 Report on election dispute resolution, CDL-AD(2020)025, para. 45, in 31 out of 59 member States which submitted relevant information, the Constitutional Court, the highest judicial body or a specialised electoral court was the body competent to review election results.

[25] See e.g. Albania (Article 131 of the Constitution: "verification of elections"); Algeria (Article 191 of the Constitution: "proclame les résultats définitifs de toutes ces opérations."); Bulgaria (Art. 145 of the Constitution: "[The Constitutional Court shall] pronounce on any disputes concerning the legitimacy of the election of the President …"); Croatia (Article 87 of the Constitutional Act on the Constitutional Court: "controls the constitutionality and legality of elections").

[26] See e.g. Armenia (Art. 76 para. 13 of the Constitutional Law on the Constitutional Court defining the possible decisions, among others the cancellation of the elections).

25. According to the Code of Good Practice in Electoral Matters,[27] all candidates and all voters registered in the constituency concerned by alleged irregularities must be entitled to appeal. A reasonable quorum may be imposed for appeals by voters on the results of elections. Such a restriction has also been accepted by the ECtHR which stated that the right of individual voters to appeal against elections results "may be subject to reasonable limitations in the domestic legal order."[28] The Venice Commission and ODIHR have previously stated that both the preliminary and the final results should be open to challenges, and that it should be clear from the law whether a general or a restricted invalidation mechanism applies, depending upon the fulfillment of special conditions as regards evidentiary matters and the admissibility of complaints and appeals.[29]

26. International standards do not impose nor prohibit in principle *ex officio* decisions of constitutional courts. Comparative research shows that when constitutional courts have a duty to oversee elections, such a duty does in most cases not imply the power to act *ex officio*. As the Venice Commission and ODIHR have previously stated, "the electoral law should specify whether the entities vested with the power to invalidate the election results can take action without being presented with a formal complaint."[30] The Venice Commission noted in its 2009 Report on the cancellation of election results that in most countries, judicial bodies are involved in the certification or cancellation of electoral results only on the basis of complaints or appeals.[31] In cases where national legislation establishes a general duty of control or a general guarantee function of the constitutional court in relation to elections, it could be argued that such a provision would be inefficient if the constitutional court could not initiate proceedings when it learns of major fraud or abuse in the electoral process. This argument is however perhaps answered by the practical reality that candidates, parties or groups of voters who are dissatisfied with an electoral outcome can be expected to bring forward complaints if there is relevant evidence of fraud or other relevant misconduct or abuse. Moreover, an extensive *ex officio* competence of the constitutional court could put in question the value of (mostly rather short and strict) time limits for complaints if the instance reviewing the election was free to act *ex officio* after the time limit has expired.

27. It must also be borne in mind that courts, including constitutional courts, are characterised by being reactive, not agenda-setting; their power is limited by the fact that they cannot choose their cases. This assumption would be reversed if constitutional courts were given the right to act *ex officio* and to annul elections on their own initiative – this would be an enormous power for which it would be reasonable to demand a clear legal basis. In the view of the Venice Commission, the power of constitutional courts to invalidate elections *ex officio* – if any – should be limited to exceptional circumstances and clearly regulated, in order to preserve voters' confidence in the legitimacy of elections. This exceptional character of the invalidation also applies when the constitutional court has the constitutional mandate to validate elections *ex officio*, which logically implies the right to invalidate them.

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[27] Venice Commission, CDL-AD(2002)023rev2-cor, Code of good practice in electoral matters, Guideline II.3.3.f.
[28] ECtHR, *Uspaskich v. Lithuania*, no. 14737/08, 20 December 2016, para. 93. See also ECtHR, *Gahramanli and others v. Azerbaijan*, no. 36503/11, 8 October 2015, para. 69; ECtHR, *Davydov and others v. Russia*, no. 75947/11, 30 May 2017, para. 335: "The Court confirms that the right of individual voters to appeal against the results of voting may be subject to reasonable limitations in the domestic legal order. Nevertheless, where serious irregularities in the process of counting and tabulation of votes can lead to a gross distortion of the voters' intentions, such complaints should receive an effective examination by the domestic authorities. A failure to ensure the effective examination of such complaints would constitute a violation of individuals' right to free elections guaranteed under Article 3 of Protocol No. 1 to the Convention, in its active and passive aspects."
[29] See Venice Commission, CDL-AD(2020)025, Report on election dispute resolution, para. 126. See also the ODIHR publication "2019 Handbook for the Observation of Election Dispute Resolution".
[30] See Venice Commission, CDL-AD(2020)025, Report on election dispute resolution, para. 126. See also the ODIHR publication "2019 Handbook for the Observation of Election Dispute Resolution".
[31] CDL-AD(2009)054, Report on the cancellation of election results, para. 36. The Austrian Constitutional Court and the German Federal Constitutional Court, for instance, only act upon application in electoral matters, as in other types of proceedings.

b. Fairness of the procedure

28. According to the case-law of the ECtHR the decision-making process concerning challenges to election results must be accompanied by adequate and sufficient safeguards ensuring, in particular, that any arbitrariness can be avoided.[32] The procedure in the area of electoral disputes must be fair and objective and guarantee a sufficiently reasoned decision; complainants must have the opportunity to state their views and to put forward any arguments they consider relevant to the defence of their interests by means of a written procedure or, where appropriate, at a public hearing; it must be clear from the public statement of reasons by the relevant decision-making body that the complainants' arguments have been given a proper assessment and an appropriate response.[33]

29. In the same vein, the Venice Commission has stated that, regardless of which body decides on the validity of election results, the law must guarantee procedural safeguards, such as impartiality, precise norms to limit the discretion of the authority, guarantees of a fair, objective and reasoned decision, in order to prevent arbitrary decisions and to be in accordance with the ECHR.[34]

30. Furthermore, in its *amicus curiae* brief on the ECtHR Grand Chamber case *Mugemangango v. Belgium*, the Venice Commission concluded the following in relation to procedural rights in electoral disputes:[35]

> "47. In terms of procedural rights, the applicants' right to a hearing involving both parties must be protected. More specifically, the following rights must be guaranteed:
>
> > "a. The right to present evidence in support of the complaint [appeal at first instance] after it is filed;
> > b. The right to a fair, public, and transparent hearing on the complaint;
> > c. The right to appeal the decision on the complaint to a court of law".
>
> 48. The hearing must be public, as the transparency of electoral dispute procedures is very important to ensure trust in the electoral process. Decisions must be well-reasoned and made public.
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> 49. The above-mentioned procedural requirements are similar to those of Article 6 of the ECHR, but account must be taken of the specific context of elections. For example, a balance must be struck between the length and scope of hearings and the need to resolve electoral disputes promptly."

31. In the view of the Venice Commission, such procedural requirements also apply to *ex officio* decisions that lead to the annulment of the election result. A particular issue concerning the cancellation of the election result is that it will always affect other candidates, and in some cases all candidates. While the abovementioned ECtHR case-law and Venice Commission standards allow for some flexibility to adapt general procedural guarantees to the electoral context and to the exigencies of the situation, some form of hearing or consultation with the affected parties, to allow them to submit their views and evidence, must be provided for. In any case, *ex officio* decisions should take into account the claims submitted by the electoral stakeholders, as well as official complaints and appeals; and the persons who are – due to nullification of the election results – denied the mandate, as well as political parties these persons belong to, should have the

[32] See e.g. ECtHR, *Mugemangango v. Belgium* [GC], no. 310/15, 10 July 2020, para. 70.
[33] ECtHR, *Guðmundur Gunnarsson and Magnús Davíð Norðdahl v. Iceland*, nos. 24159/22 and 25751/22, 16 April 2024, para. 98 *et seq*.
[34] Venice Commission, CDL-AD(2020)025, Report on election dispute resolution, para. 45.
[35] Venice Commission, CDL-AD(2019)021, Amicus curiae brief for the European Court of Human Rights in the case of Mugemangango v. Belgium on procedural safeguards which a State must ensure in procedures challenging the result of an election or the distribution of seats, paras. 47-49 (footnotes omitted).

right to submit evidence and their arguments. The court should be obliged to take on this role to ensure that candidates and electoral stakeholders such as the election management bodies appear as parties and make submissions.

32. Bearing in mind the quite vague and general character of a number of member States' legislation on the decision-making power of the constitutional court (or other body competent to cancel election results), procedural safeguards gain particular importance. The wider the discretion for the judge considering election matters in deciding on the consequences of irregularities, especially on the particularly serious consequence of annulment, the more important the existence of strong procedural safeguards will be.

c. Time-limits

33. The Code of Good Practice in Electoral Matters includes the principle that time-limits for lodging and deciding appeals in electoral matters must be short.[36] Equally, the procedure for invalidation of election results must be speedy and timely, allowing the newly elected body to take office as soon as possible. Verification of election results after a prolonged procedure would restrict the right to stand in elections in an unproportional manner. It is crucial that competent institutions be provided sufficient resources to conduct the proceedings speedily.

34. That said, enough time should be provided to collect evidence and listen to the arguments of electoral stakeholders. In case the irregularities concern complex issues, e.g. in relation to election campaigning or campaign financing, such time-limits may be longer.

35. In this connection, it must also be noted that the decision to annul the election results should be taken as a last resort. Any violation of election rules should be susceptible to challenge as soon as it occurs. In particular, problems related to voter registration, candidate registration or access to the campaign should be resolved and such complaints should be decided before voting begins. Complaints about defects in the processes on election day, relating to election day procedures or vote counting, should, where possible, be resolved before the final verification of election results.

36. There are no clear international standards as to whether election results may be annulled after formal deadlines for filing complaints and appeals have expired and the results have been verified. If evidence of election manipulation comes to light after the process is complete (and the elected body has begun its work), there could be grounds to revise the decision validating the election results and organise a new election. While disputes decided in a court of last resort may not be opened without convincing arguments,[37] democratic governance is not possible if elections are manipulated. The legislation should enable constitutional courts or other bodies in charge of validating elections to decide whether to review decisions to verify election results on the basis of evidence that is not available in a timely manner, including, for example, evidence collected by citizen election observers, the final assessment of which often occurs after the conclusion of the legal process and the verification of the election results.[38]

37. Some legal orders allow cancelling the electoral results after the candidate has taken office, whereas others do not.[39] The possibility to cancel election results after the elected candidate has

[36] Three to five days for each at first instance. See Venice Commission, CDL-AD(2002)023rev2-cor, Code of good practice in electoral matters, Guideline II.3.3.g.
[37] See Venice Commission, CDL-AD(2016)007, Rule of Law Checklist, II.B.8.: "Res judicata *implies that when an appeal has been finally adjudicated, further appeals are not possible. Final judgments must be respected, unless there are cogent reasons for revising them."*
[38] For example, in Norway Article 16-11 (2) of the 2023 Election Act authorises the National Electoral Committee (a specialised judicial body for election complaints) to take into account the combined impact of all its decisions on election complaints, as well as relevant facts that have not been subject to appeal, when deciding on the validity of the election.
[39] See the comparative analysis by the Venice Commission, CDL-AD(2009)054, Report on the cancellation of election results, paras 70-75.

entered office may be limited to the most serious violations of the electoral procedure. Examples of cases where such cancellation may be permitted could include criminal conduct in violation of electoral procedures during a pre-election period or on election day or in the course of vote counting.[40] In the view of the Venice Commission, the legislation should clearly regulate such instances and limit them to exceptional cases.

C. Substantive conditions for the cancellation of election results

38. The main question in a procedure on the invalidation of elections is under what conditions such an invalidation should be allowed. It is therefore necessary to determine whether the integrity of the election has been irreparably damaged, i.e. whether it is damaged in such a way that it cannot be restored. The consequence would then have to be that the only remedy is a repetition of the elections (even if it is never a real "repetition" as it will always take place under changed circumstances).

1. Fundamental condition: Influence on the election result

a. Basic principle

39. The central criterion for cancelling elections, recognised by international standards and primarily by the Code of Good Practice in Electoral Matters, is the question of whether irregularities may have affected the outcome of the vote: "The appeal body must have authority to annul elections where irregularities may have affected the outcome. It must be possible to annul the entire election or merely the results for one constituency or one polling station. In the event of annulment, a new election must be called in the area concerned."[41] In the same vein, the former European Commission of Human Rights and the ECtHR have held that irregularities in the electoral process only interfere with the free expression of the opinion of the people if the irregularities led to a genuine prejudice to the outcome of the election and distort the election results.[42]

b. Level and burden of proof, guidelines for the assessment

40. This basic principle raises several questions: how can it be established that irregularities may have affected the outcome of elections, what is the required level and burden of proof? What is the threshold for concluding on "a genuine prejudice to the outcome of the election" which justifies its invalidation? Neither international standards nor national practice give common and precise answers to those questions, but they provide some elements to be taken into account.

41. In its Report on election dispute resolution, the Venice Commission has stated that "considering the extreme effects of cancellation of election results, such a decision should only be concretised in extraordinary circumstances where evidence of illegality, dishonesty, unfairness, malfeasance or other misconduct is clearly established and where such improper behaviour has distorted election results."[43] This statement suggests two requirements: 1) the decision must be based on clearly established facts which prove significant irregularities; and 2) those irregularities must have distorted election results. The second element must be interpreted in the light of the above-mentioned text of the Code of Good Practice in Electoral Matters ("where irregularities *may* have affected the outcome") and with due regard to the types of irregularities (see section 2. below); it

[40] Venice Commission, CDL-AD(2020)025, Report on election dispute resolution, para. 55; CDL-AD(2009)054, Report on the cancellation of election results, paras 70-71.
[41] Venice Commission, CDL-AD(2002)023rev2-cor, Code of good practice in electoral matters, Guideline II.3.3.e.
[42] See European Commission of Human Rights, *I.Z. v. Greece* [plenary], no. 18997/91, 28 February 1994; ECtHR, *Babenko v. Ukraine*, no. 43476/98, 4. May 1999. Conversely, if the irregularities are minor or only of a formal nature, annulment of the election result may infringe on the right to free elections in Article 3 of Protocol No. 1 of the ECHR, see ECtHR, *Riza and Others v. Bulgaria*, nos. 48555/10 and 48377/10, 13 October 2015, paras 174-176.
[43] Venice Commission, CDL-AD(2020)025, Report on election dispute resolution, para. 128.

will not always be possible, and it is not necessary, to firmly establish an actual effect on the outcome of elections.

42. In this connection, the case-law of the ECtHR shows that it is sufficient, but also necessary to show convincingly that the results of the elections could have been different in the absence of irregularities.[44] When looking at the legislation of the Venice Commission member States on the level of proof, some nuances can be observed. Some member States appear to require probability, in the sense that the judge considering election matters must establish – based on evidence – that it is more likely than not that the irregularities have affected the electoral result.[45] Other States use a more open wording allowing for annulment if it is possible that the irregularities have affected the outcome.[46] In the view of the Venice Commission, in any case the threshold for annulling an election should be high and it should only be possible if the irregularities raise genuine and objective doubts as to the veracity of the election result. Asking for proof that the election results have been affected would however establish too high a hurdle.

43. As regards the burden of proof, according to the general rule it lies with the applicant in a dispute on the election results. This includes the relevant facts (breach of the law) and – to a certain extent – also to the potential impact on the outcome of the election. The situation is different, however, in a procedure started by a (constitutional) court *ex officio*. In such a case, the court will have to show in its reasoned decision on what evidence the decision is based and why it is convinced that the irregularities may have had an impact on the outcome.

44. Another question, closely related to the foregoing considerations, is how significant each individual irregularity must be for the election outcome to justify its annulment. In this connection, it must be noted that on many occasions the invalidation of election results may be grounded not just on one single violation of the law, but on many smaller-scale irregularities that altogether lead to the conclusion of elections not being a correct reflection of the will of voters. In such cases, the invalidation decision should not be strictly related to a concrete complaint; the different irregularities must be assessed comprehensively. Ultimately, it is the impact on the results that counts and not so much the gravity of the irregularity per se.

45. Some member States explicitly regulate the threshold to some extent and require a "substantial" or "significant" effect of irregularities on the election outcome.[47] The German Federal Constitutional Court has developed in this context the "principle of minimum interference" according to which an entire election may only be declared void if electoral errors are of such weight that upholding the allocation of seats in Parliament appears intolerable (see also under section D. below).[48] As mentioned above, the ECtHR requires the possibility of a genuine prejudice to the outcome of the election, and the Code of Good Practice in Electoral Matters calls as far as possible for a limitation of the territorial scope of the invalidation.[49] The consequences of the invalidation of the election results must be less harmful than the acceptance of the election results despite their

[44] See e.g. European Commission of Human Rights, *I.Z. v. Greece* [plenary], no. 18997/91, 28 February 1994; ECtHR, *Babenko v. Ukraine*, no. 43476/98, 4. May 1999.
[45] For example, Norway and Romania.
[46] For example, Estonia, Mexico, South Korea, Serbia. The German Federal Constitutional Court has developed in this regard the requirement that "according to general life experience, a concrete and not entirely remote possibility" is that the irregularity established had an effect on the attribution of the mandates (German Federal Constitutional Court, Judgment of 19 December 2023, Guiding principle No. 3). Similarly, the Austrian Constitutional Court only requires that the irregularity *could have been of influence* on the election result; according to its established case law, this criterion is to be deemed met as soon as any provision of the electoral rules, which intends to preclude the possibility of manipulation and abuse in election procedures, was violated, without any evidence of a specific incident of manipulation – which actually changed the outcome of the election – being required (Selected Judgments of the Constitutional Court No 20.071/2016, paras. 495f, 500).
[47] For example, Estonia, South Korea, Serbia.
[48] German Federal Constitutional Court, Judgment of 19 December 2023, Guiding principle No. 4.
[49] See Venice Commission, CDL-AD(2002)023rev2-cor, Code of good practice in electoral matters, Guideline II.3.3.e.: "It must be possible to annul the entire election or merely the results for one constituency or one polling station."

deficiencies. In the view of the Venice Commission, in relation to the scope of annulment in a given case, this assessment may also need to take into account the State interest and the preservation of State sovereignty – which is expressed in free elections without foreign interference – with regard to the inherent uncertainty as to the consequences of irregularities (e.g. in case of a hybrid attack from outside).

2. Types of irregularities during the electoral cycle

a. Basic principle

46. Elections can be falsified or distorted in many ways. The Venice Commission has already noted that "in principle, any breach of electoral law affects the exercise of electoral rights, freedoms, and interests of electoral stakeholders directly or indirectly, or possibly affects the outcome of elections."[50] Whilst all violations of electoral rules may therefore in principle lead to the annulment of the election result, some States define in their legislation – with different legislative techniques – which irregularities may actually lead to an invalidation of the elections. One possibility is to draw up a list, which can be either exhaustive or exemplary. Exhaustive lists carry the risk of excluding the possibility of reacting to new forms of intrusion in the electoral process, unless the listed grounds for cancellation are rather generally worded; exemplary lists, on the other hand, provide some guidance, but do not necessarily make the process of control more foreseeable than open clauses.[51] Some States refer exclusively to the violation of election laws, others also include the violation of other laws. Whatever the technique used, the constitutional court will always have a leeway to evaluate the seriousness of the irregularity and the causality of the irregularity for the outcome of the elections. In its 2009 Report on the cancellation of election results the Venice Commission, based on the replies to the questionnaire, has drawn up a list of reasons for cancellation of election results in member States' practice.[52]

47. While the cancellation of election results must in principle be grounded on violation of law, it must be borne in mind that constitutional courts may have the competence to assess the constitutionality of electoral legislation when dealing with electoral disputes. Consequently, constitutional courts may also have the power to invalidate elections after having found that the legislation does not guarantee the right to free elections as required by the ECHR and the national Constitution, including in case the law fails to regulate important aspects of election campaigning and the main elements of elections.

48. While there are many countries where the activities of candidates or political parties are not the only possible cause for the cancellation, in a number of countries the activities of other persons (in particular mass media) cannot have such effect.[53] The Venice Commission has already stated that in general, the grounds for lodging complaints and appeals should not be limited to violations of electoral rights, freedoms and interests due to the State's decisions and actions; they should also include inactions and inadequate enforcement by public and private electoral stakeholders.[54]

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[50] Venice Commission, CDL-AD(2020)025, Report on election dispute resolution, para. 52.
[51] According to the analysis of the Venice Commission, in a number of countries, electoral laws use rather general clauses concerning the cases of cancellation. See Venice Commission, CDL-AD(2020)025, Report on election dispute resolution, para. 130.
[52] See Venice Commission, CDL-AD(2009)054, Report on the cancellation of election results, para. 79: failure to comply with the turnout requirements; errors in voter registration or candidate nomination; violations of campaign regulation (including regulation on campaign finances); violations of legislation applicable to the voting process; violations in counting or reporting; violations in allocation of mandates.
[53] See the comparative analysis by the Venice Commission, CDL-AD(2009)054, Report on the cancellation of election results, paras 17-21.
[54] Venice Commission, CDL-AD(2020)025, Report on election dispute resolution, para. 57.

49. The Venice Commission takes the view that "external influence" – not stemming from the electoral actors – can also be relevant in this context.[55] This applies to the influence of non-governmental organisations, of the media – social media in particular –, especially those sponsored and financed from abroad, and foreign State and non-State actors: External influence, including from abroad, can have the same (or even stronger) effects as internal influence (from State officials or political parties). Therefore, the interference with the electoral process by third parties acting from outside is not less detrimental and can have the same (or even more severe) consequences as a breach of election rules by candidates, political parties and State officials.

b. Challenges to proving an influence on election results

50. The types of irregularities and their occurrence at different stages of the electoral cycle may raise different challenges in terms of proof of an influence on the election result. For some irregularities during the voting and counting process, it is often possible to determine the probable impact on the election result of the affected constituencies if the number of affected votes is known, or by comparing the election result in other comparable polling stations and constituencies without such irregularities. Examples of irregularities where the probable impact on the election result can be determined objectively include double voting or counting, lost ballots or votes, lack of ballot papers for a specific party or candidate, invalid ballot papers, and incorrect invalidation of votes.

51. It can be more challenging to establish objectively the impact on the election result of other types of irregularities, typically related to the registration and campaign parts of the electoral cycle.[56] Yet violations of such rules too can substantially affect the election result. Denying candidates[57] and/or large groups of voters the right to participate in the election interferes with the principle of universal suffrage and can obviously have a direct impact on the outcome of the election. Election campaign rules pertaining to conduct, transparency and finance, as well as access to media, are aimed at ensuring equality of opportunity and the freedom of voters to form an opinion. Gross violations of these rules can tilt the playing field in favour of specific candidates and/or have a profound impact on the opinion of voters. If the judge considering election matters is left without the power to provide an effective remedy to the violation of such rules, which in extreme cases may require the election to be annulled, the rules would lose their effectiveness. The Venice Commission emphasises the particular importance of a transparent methodology and reasoning by the judge in relation to evidence of such irregularities and their impact on the results, since their consequences on the number of votes cannot easily be quantified.

c. New challenges posed by online campaigning and disinformation

52. Compared to traditional broadcast and print media, social media flow freely across borders, and in most countries social media and campaigning online are not regulated in the context of elections to the extent that traditional media and traditional campaigning are. Yet the liberal character of social media does not mean that it is beyond national regulation and enforcement in the context of elections. The increasing importance of online campaigning– including by use of AI, which has the potential to magnify the effect of disinformation and manipulation of public opinion – raises new challenges in relation to 1) campaign propaganda, disinformation and the content of campaign messaging; and 2) the rules on campaign finance and transparency, including

[55] This has been recognised, for example, in the Constitution of Malta: Article 56 explicitly mentions "foreign influence" as a possible ground for annulment of the election by the Constitutional Court, if it may reasonably be supposed to have affected the result of an election.

[56] See e.g. the decision MEX-2022-3-013 of the High Chamber of the Electoral Tribunal of Mexico, which set high standards of proof and concluded that the only irregularities that were *fully demonstrated* (related to the participation of two public servants in campaign events) were not widespread, repeated or systematic, and thus were not decisive for the election result and did not decisively violate the electoral principles of certainty, legality, impartiality and equity of elections. It stressed that the annulment of elections must be the last resource used by electoral authorities, since it implies leaving without effect the will of the voters, and it should be determined only when serious, widespread and systematic violations provided for by law are fully and objectively accredited.

[57] That said, the issue of exclusion of a voter or a candidate should normally be settled before the election.

restrictions on contributions from anonymous and foreign sources, and on misuse of administrative resources. From a legal point of view, it is important to distinguish between these two matters.

53. As concerns, firstly, campaign propaganda, it should be noted that electoral campaigns are in essence information campaigns by the candidates designed to convince the voters. Statements on policy made by candidates in the context of an election may often be regarded by their opponents as disinformation or false information. Regardless of form and medium, political statements in the context of campaigning are typically value judgments or statements that fall under the candidate's freedom of expression, unless they exceed permissible limits, e.g. in the form of hate speech against political opponents.[58] Considering the ECtHR's jurisprudence on judicial interference with campaign messaging,[59] it is currently hard to see how the form and content of campaign messaging of candidates could amount to a violation of electoral law that may lead to the annulment of the elections.

54. Ideally, States should regulate the consequences of information disorders, cyber-attacks and other digital threats to electoral integrity. One example is Norway. Following a constitutional amendment in 2022, a two-thirds majority in the Norwegian parliament can order a new election if an extraordinary event, which includes cyber-attacks and disinformation campaigns, has prevented a significant portion of the electorate from voting.[60] One may envisage similar powers to deal with electoral emergencies being attributed to constitutional courts, based on clear evidence.

55. In this connection, attention is drawn to the recent Interpretative declaration of the Code of good practice in electoral matters as concerns digital technologies and artificial intelligence, in which the Venice Commission emphasised 1) that the freedom of voters to form an opinion includes the right to have access to all kinds of information enabling them to be correctly informed before making a decision (which can be affected by online information disorders);[61] and 2) that equality of opportunity also applies to the use of digital technologies and artificial intelligence in the electoral campaign, including the functions and services of internet intermediaries.[62] The Code of Good Practice in Electoral Matters makes it clear that candidates and/or parties must be granted fair and equitable access to online media, ensuring representation without discrimination.[63] According to the Interpretative declaration, legal provisions should also be adopted to ensure that there is a minimum access to privately owned online media and to the functions and services provided by internet intermediaries, as well as to digital tools and artificial intelligence technologies to manage their campaigns.[64] In addition, fairness in content dissemination and access should be observed: Regulations should be implemented to ensure that artificial intelligence algorithms by internet intermediaries do not favour certain parties or candidates over others, maintaining a balance in the

[58] See e.g. ECtHR, *Sanchez v. France*, no. 45581/15, 15 May 2023.
[59] See ECtHR, *Kwiecien v. Poland*, no. 51744/99, 9 January 2007; ECtHR, *Kita v. Poland*, no. 57659/00, 8 July 2008; ECtHR, *Brzeziński v. Poland*, no. 47542/07, 25 July 2019.
[60] Article 54 section 5 of the Constitution of Norway: "If something extraordinary has happened which has prevented a significant portion of the electorate from voting, the sitting Storting, with the votes of two thirds of the Members, may decide that a new election to the Storting shall be held. The decision to hold a new election may only be made as far as is necessary to ensure that the electorate has the possibility to vote. The elected Members of the Storting will remain in office until the new election has been finally approved."
[61] Venice Commission, CDL-AD(2024)044, Interpretative declaration of the Code of good practice in electoral matters as concerns digital technologies and artificial intelligence, paras 5 and 35 *et seq*..
[62] Venice Commission, CDL-AD(2024)044, Interpretative declaration of the Code of good practice in electoral matters as concerns digital technologies and artificial intelligence, para. 9. When ensuring equality of opportunity online, however, due account should be taken of the significant differences as regards the influence between traditional (broadcast) media and new (online) media. See ECtHR, *Animal Defenders Intl v. UK*, no. 48876/08, 22 April 2013), para. 119: the Court noted that the information emerging from the internet and social media did not have the same synchronicity or impact as broadcasted information, given the continuing function of radio and television as familiar sources of entertainment in the intimacy of the home and because of the choices inherent in the use of the internet and social media.
[63] Venice Commission, CDL-AD(2002)023rev2-cor, Code of Good Practice in Electoral Matters, paras 18 and 19.
[64] Venice Commission, CDL-AD(2024)044, Interpretative declaration of the Code of good practice in electoral matters as concerns digital technologies and artificial intelligence, para. 44.

visibility of electoral content; and *inter alia* independent and ongoing audits of the artificial intelligence algorithms used in electoral campaigns should be enforced.[65]

56. Secondly, whilst online campaigning based on social media platforms may be novel in form and impact, in the opinion of the Venice Commission its use should still be subject to the general rules on campaign finance and transparency. The role of the judge considering election matters is to decide whether a candidate's online campaigning – and receiving campaign support from third parties, be it online or not – has violated these rules, and in relation to the consequences of such a violation, whether the violation is so significant that it may have influenced the outcome of the election.

57. One challenge in respect of social media, where content is generated by users, is how to attribute online support for a candidate to the campaign of that candidate. The simple fact that a candidate is successful in online campaigning, and that the use of social media platforms may amplify a candidate's message beyond what was possible with print and broadcast media, does not mean that the candidate has violated rules on campaign spending and transparency and thus obtained an unfair advantage. The role of the judge is to consider if any rules have been violated in receiving campaign support from third parties, be it online or not.

58. In this connection, attention is drawn again to the Interpretative declaration of the Code of good practice in electoral matters as concerns digital technologies and artificial intelligence,[66] in which the Venice Commission calls on States to regulate, *inter alia*, that online electoral advertising must always be identified as such and must be transparent regarding the identity of its sponsor and the dissemination technique being used; that funding of online activities must be transparent, with potential limits on political parties' spending on digital advertising; and that social media platforms are required to consistently disclose data on political advertising and their sponsors. According to the Interpretative declaration, banning certain forms of paid political advertising on social media during electoral periods may be an option, particularly when automated mass dissemination or micro-targeting techniques based on artificial intelligence are being employed,[67] and the option to prohibit political parties and candidates from campaigning anonymously could also be justified. Furthermore, the Venice Commission has previously stated that third parties should be free to fundraise and express views on political issues as a means of free expression, and their activity should not be unconditionally prohibited; at the same time, some forms of regulation, with comparable obligations and restrictions as apply to parties and party candidates, should be extended to third parties that are involved in the campaign, to ensure transparency and accountability.[68]

59. As mentioned above in the chapter on procedural questions, procedural safeguards for election disputes gain particular importance when it comes to decisions on cancellation of election results. The law must guarantee safeguards such as impartiality, precise norms to limit the discretion of the authority, guarantees of a fair, objective and reasoned decision, in order to prevent arbitrary decisions and to be in accordance with the ECHR. Proving violations of the law by campaigning online and via social media is particularly challenging. Well-reasoned, transparent decisions on such matters are crucial. In the opinion of the Venice Commission, such decisions should precisely indicate the violations and the evidence, and they must not be based solely on classified intelligence (which may only be used as contextual information), as this would not guarantee the necessary transparency and verifiability.

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[65] Venice Commission, CDL-AD(2024)044, Interpretative declaration of the Code of good practice in electoral matters as concerns digital technologies and artificial intelligence, para. 45.
[66] Venice Commission, CDL-AD(2024)044, Interpretative declaration of the Code of good practice in electoral matters as concerns digital technologies and artificial intelligence, para. 11.
[67] See also Venice Commission, CDL-AD(2020)037, Study - Principles for a fundamental rights-compliant use of digital technologies in electoral processes, para. 68.
[68] See Venice Commission and ODIHR, Joint Guidelines on Political Party Regulation, CDL-AD(2020)032, para. 256.

D. Scope and consequences of annulment decisions

60. The Code of Good Practice in Electoral Matters requires that it "must be possible to annul the entire election or merely the results for one constituency or polling station. In the event of annulment, a new election must be called in the area concerned."[69] In principle, the annulment of elections should be limited to the electoral units affected by the irregularities.[70] This means that if the irregularities that have affected the outcome of the election in one or more constituencies are limited to certain polling districts, only the election in these polling districts can be annulled and subject to a new election, unless a repeat election in these polling stations would not guarantee a fair election result due to possible tactical voting.[71] Conversely, if the irregularities have affected the outcome of the election in all polling districts and constituencies, then the whole election must be annulled.

61. If election results are invalidated, it is necessary to have an interim solution for the time period until the next elections: either the former office holders will stay in office, or they will be replaced by others; the latter solution is only possible if there is a clear constitutional provision regulating this issue. In any case, the interim period should be as short as possible, but it should allow enough time to organise new elections.

62. Having identified the irregularity that led to the annulment of the elections, it is important to ensure that the problem is resolved and not repeated in the new elections.

63. Another question is whether a candidate who has manipulated elections is excluded from the new elections. According to the findings of the Venice Commission in 2009, this was not the case in most member States.[72] That said, criminal conviction of candidates may lead to their ineligibility.[73]

IV. Conclusion

64. The Venice Commission has been requested by the Parliamentary Assembly of the Council of Europe to prepare an urgent report on the following question:

> *Under which conditions and under which legal standards can a constitutional court invalidate elections, drawing from the recent Romanian case?*

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[69] Venice Commission, CDL-AD(2002)023rev2-cor, Code of good practice in electoral matters, Guideline II.3.3.e.

[70] For a comparative analysis of States' legislation on – general or partial – invalidation mechanisms, see Venice Commission, CDL-AD(2020)025, Report on election dispute resolution, para. 130, and Venice Commission, CDL-AD(2009)054, Report on the cancellation of election results, paras 22-27. In Germany, the minimum interference principle was applied by the Federal Constitutional Court in its judgement 4/23 of 19.12.2023. In Norway, such a principle is codified in the 2023 Election Act §§ 16-11 (3) and 16-12 (6): "The election may only be declared invalid in the municipalities where there is a preponderance of probability that the unlawful circumstances mentioned in the first section have influenced the allocation of votes to the different lists".

[71] See e.g. the problems that arose during the 2016 presidential elections in Austria due to the publication of advance information on certain electoral units; in the first round (which was not subject of the Court decision), there was a close race between candidates no. 2 and 3 (crucial to qualifying for the second round) and supporters of candidate no. 2 run a social media campaign not to vote for no. 3 after the first results in rural districts had arrived (where the voting cabins closed already at noon). Cf. Selected Judgments of the Constitutional Court No 20.071/2016, section 2.7.2 (paras. 517-532).

[72] See Venice Commission, CDL-AD(2009)054, Report on the cancellation of election results, para. 28: "In most countries (Albania, Armenia, Bosnia and Herzegovina, Bulgaria, Croatia, Czech Republic, Finland, Greece, Latvia, Lithuania, Portugal, Russian Federation, Serbia, Slovakia, Sweden, Switzerland, Turkey, "the former Yugoslav Republic of Macedonia") the cancellation of election results because of violations of the law during the elections by a candidate does not give rise to the restriction of the candidate's right to be elected in repeated elections. In some of those countries, e.g. in Turkey, no new nomination procedure of the candidates takes place. In Sweden, it is a custom that the candidate who caused the cancellation of election results is not put up by political parties as a candidate again."

[73] See Venice Commission, CDL-AD(2002)023rev2-cor, Code of good practice in electoral matters, Guideline I.1.1.d.; Venice Commission, CDL-AD(2015)036cor, Report on exclusion of offenders from Parliament.

65. The question refers to Decision No. 32 of the Romanian Constitutional Court of 6 December 2024 which annulled the first round of the presidential election held on 24 November 2024.

66. It is not for the Venice Commission to go into the facts of the case, or into the examination of the decision by the Romanian Constitutional Court. The question put to the Venice Commission by the Parliamentary Assembly is of a general nature, and it refers to an analysis of general comparative constitutional law and European and international standards.

67. As a starting point, the Venice Commission underlines that elections are aimed to produce an electoral result that will "ensure the free expression of the opinion of the people", according to Article 3 of Protocol No. 1 of the European Convention on Human Rights (ECHR). Given the serious consequences of the *ex-post* annulment of an election, the discretion of the judge considering election matters should be guided and limited by conditions set out in the law. In this connection, attention is drawn to a previous general recommendation by the Venice Commission – which remains valid – to improve the legislation on annulment of election results.

68. As a rule, the voters must trust that their vote is final. The cancellation of a part of elections or elections as a whole can be allowed only under very exceptional circumstances (*ultima ratio* principle). On the other hand, the Code of Good Practice in Electoral Matters requires an effective system of appeal and states, in particular, that "the appeal body must have authority to annul elections where irregularities may have affected the outcome."

69. International standards do not impose nor prohibit in principle *ex officio* decisions of constitutional courts. Bearing in mind that courts, including constitutional courts, are characterised by being reactive, not agenda-setting, the Venice Commission takes the view that the power of constitutional courts to invalidate elections *ex officio* – if any – should be limited to exceptional circumstances and clearly regulated, in order to preserve voters' confidence in the legitimacy of elections.

70. According to the case-law of the European Court of Human Rights (ECtHR) the decision-making process concerning challenges to election results must be accompanied by adequate and sufficient safeguards ensuring, in particular, that any arbitrariness can be avoided. The procedure must be fair and objective and guarantee a sufficiently reasoned decision; complainants must have the opportunity to state their views and to put forward any arguments they consider relevant to the defence of their interests; decisions must be taken within reasonable time-limits. In the view of the Venice Commission, such procedural requirements in principle also apply to *ex officio* decisions that lead to the annulment of the election result.

71. The central criterion for cancelling elections, recognised by international standards and primarily by the Code of Good Practice in Electoral Matters, is the question of whether irregularities may have affected the outcome of the vote. According to the ECtHR, irregularities in the electoral process only interfere with the free expression of the opinion of the people if the irregularities lead to a genuine prejudice to the outcome of the election. The consequences of the invalidation of the election results must be less harmful than the acceptance of the election results despite their deficiencies. In the view of the Venice Commission, the decision to invalidate elections must be based on irregularities that are so significant that they may have influenced the outcome of the election.

72. While the cancellation of election results must in principle be grounded on the violation of the law, it must be borne in mind that constitutional courts may have the competence to assess the constitutionality of electoral legislation and to invalidate elections if they have found that the legislation does not guarantee the right to free elections, including in cases where the law fails to regulate important aspects of election campaigning and the main elements of elections.

73. In the opinion of the Venice Commission, it should be possible to challenge election results based on violations of electoral rights, freedoms and interests not only by the State, but also by public and private electoral stakeholders – bearing in mind that the State has positive obligations to guarantee free elections including a fair campaign; this applies also to the influence of non-governmental organisations, of the media, and of social media in particular, including those sponsored and financed from abroad, and foreign State and non-State actors.

74. The increasing importance of online campaigning – including by use of Artificial Intelligence, which has the potential to magnify the effect of disinformation and manipulation of public opinion – raises new challenges in relation to 1) campaign propaganda, disinformation and the content of campaign messaging; and 2) the rules on campaign finance and transparency, including restrictions on contributions from anonymous and foreign sources, and on misuse of administrative resources.

75. As concerns campaign propaganda, regardless of form and medium political statements in the context of campaigning are typically value statements judgments or that fall under the candidate's freedom of expression, unless they exceed permissible limits, e.g. in the form of hate speech against political opponents. Ideally, States should regulate the consequences of information disorders, cyber-attacks and other digital threats to electoral integrity.

76. Secondly, whilst online campaigning based on social media platforms may be novel in form and impact, in the opinion of the Venice Commission its use should still be subject to the general rules on campaign finance and transparency. The role of the judge considering election matters is to decide whether a candidate's online campaigning – and receiving campaign support from third parties, be it online or not – has violated these rules, and in relation to the consequences of such a violation, whether the violation is so significant that it may have influenced the outcome of the election.

77. Proving violations of the law by campaigning online and via social media is particularly challenging. Well-reasoned, transparent decisions on such matters are crucial. In the opinion of the Venice Commission, such decisions should precisely indicate the violations and the evidence, and they must not be based solely on classified intelligence (which may only be used as contextual information), as this would not guarantee the necessary transparency and verifiability.

78. The Venice Commission makes the following key recommendations:

A. Decisions to cancel election results should be taken by the highest electoral body and such decisions should be reviewable by the highest judicial body, the constitutional court or a specialised electoral court when such a judicial body exists [para. 21];
B. The power of constitutional courts to invalidate elections *ex officio* – if any – should be limited to exceptional circumstances and clearly regulated [para. 27];
C. The cancellation of a part of elections or elections as a whole can be allowed only under very exceptional circumstances as *ultima ratio* and on the condition that irregularities in the electoral process may have affected the outcome of the vote [paras 18 and 39];
D. The decision-making process concerning election results must be accompanied by adequate and sufficient safeguards ensuring, in particular, a fair and objective procedure and a sufficiently reasoned decision based on clearly established facts which prove irregularities that are so significant that they may have influenced the outcome of the election; affected parties must have the opportunity to submit their views and evidence, and the discretion of the judge considering election matters should be guided and limited by conditions set out in the law; decisions must be taken within reasonable time-limits [paras 16, 28, 31, 33];
E. It should be possible to challenge election results based on violations of electoral rights, freedoms and interests by the State, public and private electoral stakeholders, and on

influence of the media, and of social media in particular, including those sponsored and financed from abroad [paras 48 and 49];

F. States should regulate the consequences of information disorders, cyber-attacks and other digital threats to electoral integrity; candidates and parties must be granted fair and equitable access to online media, and regulations should be implemented to ensure that artificial intelligence systems by internet intermediaries do not favour certain parties or candidates over others [paras 54 and 55];

G. The general rules on campaign finance and transparency should be applied to online campaigning using social media platforms; States should also regulate that online electoral advertising must be identified as such and must be transparent, and that social media platforms are required to disclose data on political advertising and their sponsors [paras 56 and 58].

79. The Venice Commission remains at the disposal of the Parliamentary Assembly for further assistance in this matter.