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on

Draft Organic Law of the Republic of Moldova

"On Governmental Agent"

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Executive summary

The present report offers comments on the draft law of the Republic of Moldova on the Governmental Agent, which regulates the activity of the Governmental Agent of the Republic of Moldova before the European Court of Human Rights. While the draft law contains many useful provisions and ideas, the conclusion is that it is not yet ripe for submission to Parliament. In particular, a clearer distinction needs to be made between the Agent's "core business" of representing the Republic of Moldova before the Court, and other responsibilities, notably his tasks in the framework of the execution of judgments and decisions of the Court. A number of technical issues is discussed, including the need for definitions and the use of terminology. The larger part of the report is devoted to detailed discussion of the various provisions and to alternative proposals.

The following general recommendations were suggested:

- Make a clear distinction between the role of the Government Agent as the representative of the Government before the European Court of Human Rights on the one hand and other responsibilities on the other hand, including, in particular, in the area of execution of judgments and decisions of the Court.
- Introduce references, wherever appropriate, to the international legal basis of a provision and use as much as possible the terminology used in the international instruments.
- Reconsider the power of the Government Agent to decide autonomously on issues concerning litigation before the Court and possibly other issues, in particular the execution of the Court's judgments and decisions, bearing in mind the need for "shared ownership" of human rights under the Convention.
- Distinguish clearly between various types of authorities (administrative authorities subordinate to the Government, authorities independent of the Government, courts) to which this draft law is addressed.
- Avoid drawing direct consequences in terms of responsibility from friendly settlements and unilateral declarations.
- Consider referring issues that do not relate to the Government Agent's status, powers and tasks to different pieces of legislation or regulation, and focus on procedures to ensure the fulfilment of the Agent's main tasks.
- Consider referring issues of an administrative or budgetary nature to subordinate regulation.
- Redraft various Articles as proposed below.

Introduction

Upon request of the Council of Europe, the consultants assessed the draft law of the Republic of Moldova "on Governmental Agent" ("the draft law"). They referred to the English translation of the text of the draft law as it stood in May 2014 and with a translation into English of the "Informative note to the draft Law on the Governmental agent", submitted to the Council of Europe by the Ministry of Justice of the Republic of Moldova.

In the present report, the consultants will first make a number of comments of a general nature. Subsequently, the draft law will be assessed on an article-by-article and paragraph-by-paragraph basis.

It is important to stress that a fulfilment of the Government Agent's tasks and responsibilities and a smooth functioning of the Agent's office are of utmost importance for any State Party to the European Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") and need to be facilitated by appropriate means. This point is valid not only with regard to the defence of a democratic State Party governed by the rule of law in the proceedings before the European Court of Human Rights ("the Court"), but even more importantly when it comes to the execution of unconditional obligations stemming from the Court's judgments.

The following comments, which are often critical of the structure and wording of the draft law, must be read in light of this introductory statement.

General remarks

Terminology used

As a preliminary comment, it is necessary to note that the assessment is based on unofficial translations of the relevant documents, elaborated for the purpose of this assessment only. Henceforth, the consultants will refrain from making comments of a purely linguistic nature, since these might be irrelevant in the original language. On a general note, however, it is advised to use wherever possible the terminology of the underlying official texts, notably the Convention, the Rules of Court and the Rules of Procedure of the Committee of Ministers. Where, for example, in the translated texts the terms "plaintiff", "judgement", "friendly settlement agreement", "unilateral statement" or "enforcement" appear, these should be replaced by "applicant", "judgment", "friendly settlement", "unilateral declaration" and "execution" as these are used in the Convention, the Rules of Court or the Court's case law. Likewise, the representatives of Governments are usually referred to as either "Government Agent" or "Agent of the Government", rather than "Governmental Agent". In

the present report, the term "Agent" will be used. Of a more marginal nature, at least under present circumstances, is suggested to replace wherever appropriate, the word "State" by "Party" or "High Contracting Party" when the Republic of Moldova is not specifically referred to, with a view to the future accession of the European Union to the Convention. Finally, even though in the present report the Agent will be referred to in the masculine form, it should be clear that the reference is made to the office, and not to the Agent as a person.

Substantial comments

Turning to more substantial matters, it is important to recall that the international law basis of the office of the Agent is Rule 35 of the Rules of Court on "*Representation of Contracting Parties*", which reads: "*The Contracting Parties shall be represented by Agents, who may have the assistance of advocates or advisers*". This is also the *only* international legal basis of the office. This rule has, in the course of many years, become practice, not only in the context of the Convention, but also in the context of other international judicial bodies. A first conclusion to be drawn from this is that it is important to clarify, already in the title of the draft law, the relation with the Convention, in order to avoid any possible confusion with other international procedures. A second conclusion to be drawn from the reference to the Agent in the Rules of Court is of a more far-reaching nature for the details of the draft law. Its international legal basis puts the responsibility of representing the Government before the Court on a different level from any other responsibility or assignment. In other words, whereas other responsibilities are purely a matter of domestic regulation and may be fulfilled by any other authority according to domestic custom, tradition, regulation or law, the task of representing the Government before the Court is part and parcel of the office of the Agent. This is the only characteristic that all Agents in forty-seven States Parties to the Convention have in common and *conditio sine qua non* of their office. In fact, this is already recognized in the definition of the term "Agent" in Article 2 of the current draft law. In order to properly fulfil this primary task, it is essential that the Agent has a sufficient level of authority, so as to enable the Court to conduct a proper examination of the cases before it, in accordance, notably, with Article 38 of the Convention. It is recognised that that such basis may well be laid down in the form of a specific law on the Agent's office, as currently foreseen in Moldova. However, in line with the above considerations, it would appear logical to structure the draft law in accordance with this distinction: representation before the Court on the one hand, and other, additional, responsibilities on the other, while keeping a prominent role for the other stage, or corollary, of the Convention proceedings, namely the execution of the Court's judgments and decisions taking note of friendly settlements or unilateral declarations.

It needs to be stressed that these comments are not at all intended to discourage a combination of responsibilities within the Agent's office. On the contrary, it has appeared extremely useful for the Agent to engage in areas such as:

- supervision by the Committee of Ministers, under Article 46, paragraph 2, of the Convention, of the execution of Court judgments and decisions against the Agent's own State and, possibly, against other High Contracting Parties;
- the national procedure for drawing up a nomination for the post of judge in the Court under Article 22 of the Convention;
- drawing up a list of *ad hoc* judges under Article 26, paragraph 4, of the Convention;
- representation of the Government in the Steering Committee for Human Rights of the Council of Europe and its subordinate bodies;
- representation of the Government in other international human rights complaints procedures;
- national reports to human rights monitoring bodies of the Council of Europe and other international human rights organs;
- drafting of domestic human rights related legislation;
- human rights education.

That being said, it remains important to distinguish all of this from the Agent's core business of representation before the Court. Not only is it illusory in practice, but also principally wrong to structure the promotion and protection of human rights to such a large extent around one specific office. It would risk creating the false impression that the promotion and protection of human rights is simply one person's job and nobody else's, and might weaken the commitment and involvement of others. Shared "ownership" for human rights, in particular when it comes to the execution of the Court's judgments and decisions, is of utmost importance.

Turning to the present draft law, it is advised to make a clearer distinction between the Agent's core business and other responsibilities, and not exacerbate all provisions with the full breadth of the mandate envisaged. In carrying out these other responsibilities, the Agent's office does not require the same level of authority as it needs in the representation before the Court, since they may – or even should – be carried out by others as well.

Article-by-article comments

Title

In line with the above general comments, an appropriate title for the draft law would be:

"Law on the Agent of the Republic of Moldova under the European Convention for the Protection of Human Rights and Fundamental Freedoms."

Chapter I: General provisions

Article 1: Purpose and scope of the law

In the first paragraph, three objectives of the draft law are put on an equal footing: contribute to the observance of the Convention, representation before the Court and representation before the Committee of Ministers. The first objective is much more than the other two of an aspirational nature – in a different law tradition it might appear in a preamble – and cannot simply be attained by this draft law. The third objective, as has been explained should not be on an equal footing with the second. The following alternative is therefore proposed:

> "(1) This law has the purpose, in order to contribute to the observance of the Convention for the Protection of Human Rights and Fundamental Freedoms, to regulate the representation of the Republic of Moldova before the European Court of Human Rights, as well as related responsibilities."

The second paragraph has two flaws: there is reference to a term of office, which in reality is not regulated in the draft law, and the execution of judgments and decisions is mentioned twice. As concerns the issue of the term of office, the position of Government Agent is not inherently of a temporary nature, like for example the office of judge in the Court. Whereas the fixed term of office of judges is the Court is primarily inspired by the notion that the judges should stay sufficiently connected with the law and legal practice of the State in respect of which they were elected, such considerations do not apply to the Agent, who is normally based in the State he represents. That being said, introducing a fixed term of office is fully a matter of domestic preference, provided the term is sufficiently long to match the expert nature of the office. Since there is no term of office mentioned in the current draft, the reference is deleted from the proposal hereunder. As concerns the execution of judgments and decisions, it is obvious that – among the "other responsibilities" mentioned in the general comments – it is the most important one in the wording of the draft law. It is therefore proposed to mention it here specifically (but not twice, as in the current version). The proposal therefore reads as follows:

> "(2) This Law shall establish the statute, powers and duties of the Government Agent as the representative of the Republic of Moldova before the European Court of Human Rights and while carrying out other tasks, including in the process of execution of judgments and decisions of the European Court."

Article 2: Terms and expressions used

The first suggestion is to reconsider the need for each separate definition. Terms such as "friendly settlement" and "interstate case" are relevant merely in the context of one specific Article and, moreover, are being defined in the Convention. In any case, there does not seem to be a need to define the term "representative of the applicant" or even to use it at all in the draft law.

The second suggestion, irrespective of the result of a reconsideration of the need for definitions, is to look carefully at the following order of the terms listed, which does not appear fully logical. For obvious reasons, the Agent is listed up front, but it would appear useful to subsequently mention the Convention and the Court, then the applicant/application, inter-state cases, procedural terms as friendly settlement, unilateral declaration and interim measure, and finally the Committee of Ministers and the various Moldovan Ministries. As concerns the latter, the question arises whether it should not be "Ministers" rather than "Ministries" which require definition, if any definition of these is required at all. Both variants appear in the text of the draft law. It is advised to use "Ministers" wherever appropriate.

The third suggestion is to refer wherever possible to relevant provisions of the Convention and to stay as closely as possible to their wording. For instance, a friendly settlement is currently defined as an agreement between the parties presented to the Court. However, a friendly settlement is only ready for execution once it is sanctioned by the Court. A definition of "friendly settlement" would therefore ideally look as follows:

> "Friendly settlement: agreement concluded between the parties to a case in accordance with Article 39 of the Convention."

The definition of "interim measures" deserves special attention, since the current draft wrongly assumes that it has been established by the Court that a violation is occurring or, if the measure were not taken, will occur. Here too, it is important to stay close to the international law basis of the interim measure, as follows:

> "Interim measure: procedural measure ordered by the European Court in accordance with Rule 39 of the Rules of Court."

Unlike some other terms, the draft law does not define the term "authority" at all. The informative note seems to confirm that it is meant to be a generic notion that covers at least both the public administration and the judiciary, if not also the legislator. The term therefore distinguishes neither between these two (or even three) branches of State power, nor between governmental authorities and administrative bodies independent of the Government, while distinctions of this kind may be highly relevant with respect to obligations placed on them invariably by the Agent, who is part of the Government.

Chapter II: Statute and term of office

Article 3: Legal status of the Government Agent

In line with the comments above, it is proposed to draft the first paragraph as follows:

> "(1) The Government Agent shall represent the Government of the Republic of Moldova before the European Court of Human Rights. He shall also carry out other responsibilities as specified in this Law, notably with regard to the execution of judgments and decisions of the Court."

Concerning paragraph 2, it is proposed to single out the present draft law from the other instruments listed, as follows:

> "(2) In addition to this Law, the status and responsibilities of the Government Agent are regulated by the Constitution of the Republic of Moldova, the Convention, the Rules of Court and other instruments relevant to the Agent's office.

While the provision in paragraph 3 is an adequate reflection of the Agent's broad responsibility as representative of the Government as such, it is important to flag a possible need for a regulation of situations of conflict between the Agent's two superiors.

In line with comments made above, paragraph 3 should refer to the *Minister* of Justice, rather than to the *Ministry*, even more so since this reference is accompanied by a reference to the Prime *Minister*. This does not hold true for paragraph 4, in which, however, the words "*during the term of office*" may be deleted, as they may in paragraph 5 and in the title of Chapter II.

Article 4: Appointment and dismissal

Paragraph 2 is limited to two instances only, dismissal or death of the Agent, and seems to ignore any possibility of resignation or retirement. Moreover, the need for temporary replacement may not only occur in case of death of the Agent. The following alternative wording is therefore proposed:

> "(2) The Government Agent shall be in office until the moment of his resignation, dismissal, retirement or death. If so required, the Minister of Justice shall appoint a person to temporarily replace the Government Agent."

Still on that last issue, it may be worthwhile to consider the creation of a post of Deputy Agent, who may replace the Agent in any situation when the latter is unable to fulfil his duties.

On paragraph 5, the question arises why the office of Agent would be incompatible with another public office. This question is all the more pertinent given some of the proposed additional tasks of the Agent in Article 5. Where the Agent participates in Committee of Ministers meetings, in meetings of the Steering Committee for Human Rights or in domestic law making, his functioning is not different from any Government official exercising these functions, such as the staff of the Permanent

Representation to the Council of Europe, policy officers in capital or legislators. Seen from the perspective of a narrow definition of the office of Agent, based on Rule 35 of the Rules of Court, the Agent *is* in fact exercising another public office when carrying out such responsibilities and, as said before, there are no objections to this whatsoever.

Article 5: Duties and assignments

The main comment concerning Article 5 builds on the earlier proposed structuring of the draft law along a distinction between representation before the Court and other responsibilities. The preferred option might be to transpose all text on other responsibilities to a separate Chapter towards the end of the draft and delete it from Article 5. It would have the additional benefit of clarifying the scope of subsequent Articles, which generally seem to be inspired by the Agent's litigation function only. Should the preference nevertheless be to keep Article 5 all-embracing, the first paragraph should concern the representation before the Court and be followed by a second paragraph, which may be further structured by subparagraphs. These subparagraphs may contain all the material currently laid down in paragraph 2, subparagraphs b. to o. The precise drafting, however, merits further attention, since the current version suffers from a lack of clarity. Generally speaking, a much clearer distinction needs to be made between:

- involvement in the process of supervision of the execution of European Court judgments in the Committee of Ministers, including coordination of executive measures at the domestic level (current subparagraphs b. to h. and j.);
- involvement in the Steering Committee for Human Rights of the Council of Europe (current subparagraph i.);
- advice on domestic legislation (current subparagraph k. and to a certain extent d.);
- provision of information (current subparagraphs l. to o.).

In grouping the respective tasks along these lines, a more transparent and concise formulation may be attained. The consultants stand ready to submit further drafting proposals in this regard.

With regard to subparagraph j., it must be borne in mind that the Agent is part of the executive branch of State power and that the draft law does not lay down any conditions for such intervention or reopening.

The remainder of Article 5 is related to the Agent's representative function before the Court only, which is further proof of the exceptional nature of that particular task among the additional tasks. This should be cleared up in the final formulation.

Paragraph 3 begs the question of how the sole discretion to formulate the Government's position before the Court relates to the Agent's subordination to the Prime Minister and Minister of Justice. In this regard, comments at Article 3, paragraph 3 should be recalled. It should be borne in mind that the Agent's role as Government representative before the Court is not far removed from that of an advocate in any kind of litigation. It is never the advocate, but always the "client" – in this case: the Government – who ultimately decides what line to take before a court. It should not be forgotten that – should the Court ultimately find a violation of the Convention – it is usually some other authority, not the Agent himself, who has to bear the consequences. From that perspective, a sole discretion of the Agent in deciding which line to take before the Court may prove counterproductive. The consultants also refer in this regard to Article 14 on interstate cases. There is no *a priori* reason why the balance laid down in that Article is not maintained with regard to individual applications. Insofar as the present provision is intended to settle any potential dispute between interested Government offices *on the exact formulation of the Government's position*, it would appear more viable to introduce a duty of cooperation and coordination, leaving the Agent's final discretion on such formulation as a means of last resort. In any case, it should be made clear that "formulating the position" is not identical to "deciding on the position".

Finally on paragraph 3, the specific references to friendly settlements and unilateral declarations would seem superfluous and should therefore be deleted, since these are mere species of the generis "position of the Government before the Court". Maintaining these references would risk excluding the Agent's powers in other procedural settings not implying the taking of a position, such as responding to factual questions of the Court, responding to requests for interim measures, deciding on an invitation to intervene as a third party *et cetera*.

Concerning paragraph 4, suggestion at Article 4, paragraph 2 should be recalled, to appoint a deputy Agent. The current wording, moreover, suggests a difference between the chief of Department and the Ministry of Justice, which is difficult to understand in the light of Article 3, paragraph 4, and Article 7, paragraph 1, which would imply that the chief of Department is an official of the Ministry of Justice. Be that as it may, the consultants recall their suggestion to replace "Ministry" by "Minister" throughout the text.

Article 6: Obligations

This Article raises questions in two respects. Firstly, it is not quite clear whether it is exclusively related to all duties and assignments listed in the previous Article or merely to the Agent's litigation function. Secondly, the distinction between "duties" (title of Article 5) and "obligations" (title of Article 6) is confusing, at least in the English translation. Since the larger part of this Article concerns issues of confidentiality, one option might be to focus this Article fully on those issues, starting with its title, and place the Article in Chapter III on representation. Another possibility might be to

incorporate the contents of this Article into Articles 3 and 4. Should the provision not be focused on the issues of confidentiality, it is suggested speaking for example of "underlying principles of the Agent's activity".

Article 7: Secretariat

The first question is whether it is really necessary to regulate the composition of the Agent's secretariat by law. Paragraph 2 refers to an order of the Ministry of Justice. It would seem preferable to regulate all matters currently set out in Article 7 by such order. The draft law could then simply establish that organisational matters are being dealt with in a separate ministerial order, to be issued and adapted at the proposal of the Agent. If however Article 7 is maintained in its current form, the text seems open to some improvement. The term "authorities" appears twice, without it being clear which authorities are meant. Judges and prosecutors are referred to as "employees of the authorities", which seems not an acceptable formulation, certainly not for judges.

Article 8: Material security of the Agent's activity

In its current version, this Article does not give rise to any suggestions or other comments.

Article 9: Advisory council of the Government Agent

This Article contains a major flaw. Whereas the text spells out in detail the composition of the envisaged advisory council, it is silent on the background, task and added value of such organ. Failing any convincing explanation to the contrary, it appears unhelpful to burden the sensitive relation between the usual stakeholders – Court, Agent, domestic authorities – with an extra player in the field. In this respect, it should also be borne in mind that the context is a contentious procedure, which has to respect strict deadlines and other formalities. However, these objections are not necessarily valid in relation to other tasks of the Agent. In particular in the preparation of national nominations for the elections of judges to the Court or for the list of possible *ad hoc* judges – currently not foreseen in the draft law – an advisory council as proposed may have an important role to play. Unless the advisory council's mission is specified more in detail, its creation may well be foreseen by the law, but left up to the Agent's discretion in practice.

Chapter III: Representation

Article 10: Contentious proceeding

This Article is generally acceptable and adequate. Paragraph 6 requires some further clarification, preferably in the text of the provision itself. It may be useful specifically to restrict access to information to the materials and comments exchanged between the Agent and other authorities, at

least before the Court's judgment or decision in a case becomes final, in order not to undermine the procedural position of the State in the proceedings before the Court.

Article 11: Friendly settlement

A reference to Article 39 of the Convention may be included here. In line with comments on Article 2, references to the applicant's representative may be deleted here.

Paragraph 1 raises the same issue that came up with regard to paragraph 3 of Article 5. It is not considered productive to vest the Agent with the automatic and autonomous power to decide on the conclusion of a friendly settlement, which normally will be executed by another authority. It may nevertheless be efficient to grant such power with regard to settlements with a low financial or similar interest, which do not raise any issues of principle.

Paragraph 2 refers to a formal notice, which seems to sit ill with the confidential nature of friendly settlement negotiations. Without further explanation, a formal notice seems to have zero added value. Friendly settlement negotiations, apart from their confidentiality, would appear to flourish rather by informality, at least at the preparatory stages, than by a formal start. The requisite formality is sufficiently ensured by the final signatures of the parties and the verification thereof by the Court.

In line with comments to paragraph 1, the words "if necessary" should be deleted from paragraph 4. Coordination – if not more than that – with the authority or authorities which have a stake in the case is highly desirable in the light of subsequent execution of the terms of the settlement.

The added value of paragraph 5 is questionable. On the one hand, certain measures may well be overlooked in the summing up laid down in this paragraph; on the other hand it is remarkable that "judgements" appears as one possible element of a friendly settlement. It is incomprehensible how a judgment – which is after all the prerogative of the independent judiciary – could be availed of by a Government official as a measure to secure a settlement with a third party.

In paragraph 6 the term "on behalf of" should be replaced by "from".

Article 12: Unilateral declarations

The issue set out in paragraph 1 is open to debate. There is no formal necessity for a friendly settlement to have been explored in vain, in order for the Government to issue a unilateral declaration. Though this is the customary course of events, the question is justified whether, failing such necessity, it is wise to introduce formal rules and exclude possible unforeseen developments.

The concise provision set out in paragraph 2, apart from containing a clerical error in the reference to previous Articles, cannot stand by itself. A unilateral declaration is simply different in nature from

either a contentious procedure or a friendly settlement. The previous provisions therefore cannot simply be copied to be used in the preparation of a unilateral declaration, which, as the term implies, is done within the Government itself and does not imply the Court or the applicant. That being said, there does not seem to be a great need for detailed rules on a unilateral declaration other than granting the power to the Agent to propose a unilateral declaration, perhaps including a reference to the Court's case law on the material requirements of such declaration.

Article 13: Interim measures

A reference to Rule 39 of the Rules of Court may be inserted in paragraph 1. Furthermore, in paragraph 1 the term "the authorities of" should be deleted. It is the Republic of Moldova itself that is answerable to the Court, including when the latter requests interim measures. In paragraph 3 the term "on behalf of" should be replaced by "from".

Article 14: Interstate cases

The consultants refer to comments concerning Article 5, paragraph 3, in support of the present drafting of this Article. A reference to Article 33 of the Convention may be inserted here. The text of paragraph 2 could be improved by adding after "In an interstate case…" the words "…, including where the Republic of Moldova acts as a respondent Party".

Furthermore, the question arises why this Article is lacking a provision similar to current Article 15, paragraph 4. Lodging an interstate application, after all, is politically even more sensitive than intervening as a third party to pending proceedings and would therefore *a fortiori* require the approval of the Minister of Foreign Affairs.

Article 15: Intervention

On a general note, the text needs to recognize that it is the State, not the Agent, that intervenes. Otherwise, the decision to intervene should be governed by the same rule which governs other decisions on the State's position before the Court.

In paragraph 1, a reference to Article 36, paragraph 1, of the Convention should be included. It is observed that – in cases which are open to intervention based on the applicant's nationality – the Rules of Court do not use the term "notification", but "transmission". It is recommended either to use the latter term, or to delete the first semi-sentence of this paragraph.

In paragraph 2, a reference to Article 36, paragraph 2, of the Convention should be included and the formulation should be amended accordingly. The formal power to invite a Party to intervene does not rest with the other Parties, but with the President of the Court. This is not to say that Parties could not consult each other on possible interventions, as long as informal terminology is used here. In the

context of paragraph 3, this would imply avoiding the term “require”, or even “request”, and use the term “suggest”.

Article 16: Resubmission

The text of this Article is prone to some improvement. Firstly, a reference to Article 43, paragraph 1, of the Convention should be included. Secondly, the word “may” is superfluous here and should be deleted. Thirdly, the word “require” is too strong and should be replaced by “request” in conformity with the Convention. Fourthly, the term “resubmission” should be replaced by “referral” in conformity with the Convention. Fifthly, the term “judgements” should be replaced by “Chamber judgments”. And finally, it may be useful to reproduce the three months term from the Convention in the present Article.

Article 17: Examinations and conclusions required in the Court proceedings

The need for this Article in addition to Article 7, particularly its paragraph 4, should be questioned. Failing any convincing explanation to the contrary, it is suggested to delete the whole Article. If need be, the contents of paragraph 2 of this Article may be transferred to Article 8.

Chapter IV: Enforcement

As to this chapter, the consultants recall the suggestion to distinguish between the issues of representation before the Court and all the other issues, while keeping a prominent role for the execution of the Court’s judgments and decisions.

It is also suggested to use “execution” instead of “enforcement”, but this may be purely a matter of translation.

Article 18: Writ of execution

With regard to paragraphs 1 and 2: This provision gives the quality of “writ of execution” to the Court’s final judgments and decisions on friendly settlements and unilateral declarations. It needs to be pointed out that the Convention in no way requires such a transformation into domestic legal system of the Court’s judgments and decisions, while the former are just declared binding on the High Contracting parties concerned (Article 46, paragraph 1) and the latter’s character is only indirectly specified by the Convention, through the supervision of their execution (Article 39, paragraph 4; the Court’s power to restore an application to its list of cases under Article 37, paragraph 2). The “writ of execution” is therefore not a notion or a characteristic under the Convention as the obligations stemming from the Court’s judgments and decisions have a clear basis in international law as an autonomous legal order. The consultants are uncertain about the exact

meaning of the notion of "writ of execution" in Moldovan law. Should this notion entail that a domestic authority is entitled to take measures to execute the Court's judgment or decision, which includes the power to determine these measures of execution, this would risk creating conflicts between the domestic authorities' understanding of the implications of the Court's judgment or decision on the one hand and the power of supervision of execution conferred on the Committee of Ministers under Articles 46, paragraph 2, and 39, paragraph 4, of the Convention and on the Court under Article 37, paragraph 2, of the Convention on the other hand. This risk would increase with regard to remedial measures other than payment of just satisfaction. Thus in case that the idea of conferring the quality of "writ of execution" on the Court's judgments and decisions is retained, which is not recommended, it might be useful to limit the scope of the quality of "writ of execution" to payment of just satisfaction.

Paragraph 2 raises two additional points.

The first point has already been invoked above and is related to the Agent's discretion to conclude a friendly settlement or to make a unilateral declaration that sets out obligations for other authorities, not necessarily dependent on the Government; at least a certain level of agreement of these authorities (or their subordination to a body with the decision making power with respect to them) is needed. The Agent's action would otherwise alter the division of powers vested in various authorities, including courts, by the Constitution and other laws.

The second point needs to be seen also in light of paragraph 3, which refers to the finality of the Court's judgments and decisions, "as it is stipulated in the Convention". Paragraph 3 is partly incorrect as the Convention only deals with the finality of judgments and this notion is not automatically applicable to decisions by analogy. Moreover, while the Court's judgments are published the day of their delivery and the moment when they become final can therefore be established with certainty, the decisions are communicated by ordinary mail only. Precisely because the Convention is silent on the issue of finality of decisions, which is at the same time not a matter for domestic law to regulate, it is not possible either to define the finality of the Court's decisions in domestic law or simply to rely on the Convention in this regard.

Once more, if the quality of "writ of execution" given to the Court's judgments and decisions is kept, it is recommended, with respect to the Court's decisions, referring to the date on which starts running the time limit to execute the terms of friendly settlements or unilateral declarations. It would be possible to use the same solution with regard to the Court's judgments as well.

Finally it is important to note that this provision does not define the status, powers or tasks of the Agent and as formulated now is therefore outside the scope of the law. This reason also speaks in favour of deletion of Article 18 unless it describes procedures in which the Agent is involved.

Articles 19 and 20: Enforcement of individual measures and enforcement of general measures

A) proposal for an alternative definition of the Agent's role in respect of the measures of execution

Before making specific comments to the current draft of Articles 19 and 20, the consultants would first submit for consideration an alternative specification of the Agent's role in the draft law, based on the idea of the Agent's cooperation with, and coordination rather than direction of, the relevant authorities. In fact, this solution would build on the principle enshrined in Article 10, paragraphs 1 and 2, of the draft law with respect to the proceedings before the Court and be developed in the area of execution of the Court's judgments or decisions.

The law would first reiterate, as a matter of principle, the authorities' (including the courts') obligation to take all the necessary individual and general measures of execution of the Court's final judgments which are binding on the Republic of Moldova under Article 46, paragraph 1, of the Convention. What these measures may usually entail, would be defined in Article 2, with a possible reference to the idea of *restitutio in integrum* pursued by individual measures and to the preventive (or even remedial) nature of general measures of execution. It may be better to put emphasis on the objectives of such measures rather than to try to list them.

Moreover, all the relevant authorities shall be under a duty imposed by law to cooperate with the Agent whose role shall consist in the coordination of their activities in the process of execution of the Court's judgments.

It would then come to define the Agent's role itself, giving him a certain leeway in choosing the best means to fulfil it.

As soon as possible after the delivery of the judgment by the Court, the Agent shall analyse it in order to identify both individual and general measures of execution needed. He shall then inform the relevant authorities of his analysis and coordinate their efforts in a way he considers to be the most appropriate and efficient in the context of a particular judgment, including by inviting them to communicate, in writing and in the time limit he sets for this purpose, what concrete measures they have taken or adopted to execute the judgment or intend to take or propose to this effect, together with the foreseeable timetable of their adoption. It may be unnecessary to develop these ideas further as the Agent can naturally convene a meeting with the authorities concerned whenever he finds it useful, provide them with guidance on how to execute the judgment in accordance with the State's obligations under Article 46 of the Convention, etc. It would be helpful, however, specifically to mention the Agent's right to inform the Government (the Prime Minister or the Minister of Justice; see comments on Article 21 of the draft law below) of any difficulties encountered and propose solutions to tackle them.

Paragraphs 5 and 7 of Article 19, in light of the comments below, could be maintained as it seems useful to have some specific provisions on payment of just satisfaction.

The provisions setting out the above process would apply *mutatis mutandis* to the Court's decisions of acceptance of friendly settlements or unilateral declarations. As already noted in comments on Chapter III of the draft law, it should be borne in mind that the undertakings expressed by the Agent in the proceedings before the Court require a prior agreement of the authorities concerned, which should ultimately facilitate the execution.

It is essential to highlight that such a solution, in addition to fitting well into the concept of "shared ownership of the Convention", making all the authorities involved co-responsible for the execution, has another important advantage: it in no way interferes with the powers conferred on the various authorities, irrespective of them being administrative bodies or courts, by the Constitution and laws and fully respects their possible independence or autonomy from the Government.

B) detailed comments on Articles 19 and 20 in case the above alternative proposal is not favoured

On Article 19, the following comments should be made.

It would be better to move the contents of paragraph 1 to Article 2 comprising definitions.

Paragraph 2 sets out the Agent's obligation to inform the authorities involved within one month after the finality of the Court's judgment or decision about the necessity to adopt individual measures and "their enforcement manner". On the one hand, the time limit creates a tension, as the Agent may not be in a position to define the way of executing the Court's judgment or decision in one month. On the other hand, in specific cases this time limit may prove to be too long, e.g. when the Court has ordered the applicant's immediate release from custody. In addition, the provision follows the pattern of an Agent directing all the authorities with what they should do, in spite of their powers under the Constitution and laws, which is also inconsistent with the shared responsibility of all the national authorities to implement the Convention and execute the Court's judgments and decisions.

The exact meaning of paragraph 3 is unclear and seems rather to fit to the informative note to explain the philosophy of the authorities' action.

The meaning of paragraph 4 is understood as requiring the domestic authorities that have been made aware of the proceedings before the Court to inform on their own motion the Agent about their action with respect to individual measures. The wording of this paragraph would also benefit from its simplification and possibly also from the deletion of a relationship with individual measures of execution. Unlike in other situations covered by this Article, paragraph 4 does not deal with the execution of the Court's judgments and decisions, but rather with the authorities' action triggered or

taken in parallel to the Strasbourg proceedings. It may be useful to put such a general obligation on the relevant authorities already during the proceedings before the Court.

Paragraph 5 gives unconditional priority to payments of sums awarded by the Court in its judgments or decisions. This is in line with international law. Nonetheless, the Agent, prior to concluding friendly settlements or making unilateral declarations, must avoid frictions with the Ministry of Finance or other interested authorities as to the State's capacity to honour its undertakings. Once more, the Agent cannot act without any regard to the position of other authorities.

The first sentence of paragraph 6 does not call for any comments. The second sentence raises three concerns. Firstly, its provision may not be in line with the international obligations of the State, as the Convention does not contain such a rule. Secondly, the reference to the finality of decisions is problematic, as has already been pointed out. Lastly, the use of the word "definitive" at the end of the provision is probably an error of translation, as it is hardly different in meaning from the word "final" used above.

The second part of paragraph 7 seems unclear, but it may result from a problematic translation and should probable read instead:

> "… who shall verify whether all the conditions for payment have been met."

The comments formulated with regard to paragraphs 1 and 3 of Article 19 apply *mutatis mutandis* to paragraphs 1 and 3 of Article 20. In addition, Article 20, paragraph 2, would lead us to reiterate concerns as to the Agent's capacity to identify and propose all the general measures of execution needed, apparently without any coordination with the authorities involved.

Article 21: Government surveillance

Although the principle of the Agent's obligation to submit a yearly report on the execution of the Court's judgments and decisions to the Government, which should exercise control, discuss the report and send it further to Parliament, does not call for any particular comments, three points can be singled out.

Firstly, the authorities' obligation to report to the Agent also on a yearly basis, set out in paragraph 2, is not in line with the State's obligation to report to the Committee of Ministers usually within six months running from the finality of the Court's judgment. It is noted that Article 10, paragraphs 1 and 2, apparently do not apply here, as they are integrated in Chapter III, while they provide a useful solution to the problem of a timely reporting to the Committee of Ministers. However, Article 24, paragraph 4, may well go in this direction.

Secondly, the "Government surveillance" of the execution and ultimately of the exercise of the Agent's function in this field is not well articulated with the Agent's responsibility (or subordination) to the Prime Minister and the Minister of Justice, laid down in Article 3, paragraph 3, i.e. not to the Government as a whole.

Thirdly, it is suggested suggest envisaging not only the Agent's obligation to report to the Government on their request, as in paragraph 5, but also giving the Agent the right to call on the Government to overcome major difficulties that may occur in the process of execution, and thus to involve the highest political level in the search for adequate solutions (see above the proposal for an alternative definition of the Agent's role in this field).

Article 22: Parliamentary control

Needs to benoted at the outset that the differences in meaning between the notions of "parliamentary control" and "Government surveillance" are not entirely clear to the consultants, which is without prejudice to a number of recommendations coming from the Council of Europe's organs, in particular the Parliamentary Assembly, to involve national parliaments in the process of execution of the Court's judgments. Reporting to, and debate in, Parliament is the obvious way of giving practical effect to this call for involvement.

The questions appear as to whether yearly reporting to the Government and "periodical" reporting to Parliament are supposed to cover essentially the same activity, as the Agent's yearly report to Government should be later submitted to Parliament; whether the provision, contained in paragraph 2 *in fine*, saying that "Parliament may propose other general measures", sits well with the powers vested with Moldovan Parliament by the Constitution.

Finally, as regards paragraph 3, it is hardly appropriate to impose by law an obligation on Parliament to organize hearings on the Agent's report. This paragraph should be deleted or replaced by an obligation on the Agent to appear before Parliament if so requested.

Article 23: Register of judgments and decisions, translation and publication

Keeping a register of the Court's judgments and decisions against Moldova, provided for in paragraph 1, does not call for any further comments, as it does not seem to create any consequences with regard to the functioning of the Convention system.

It should be made clear in paragraph 2 that "official" translation does not confer authenticity on this version of the Court's judgments and decisions, the authentic version of which is exclusively that of the language(s) in which the Court delivered them. Unless the word "official" is relevant from the point of view of intellectual property rights as a kind of work (Article 2, paragraph 4, of the Berne

Convention for the Protection of Literally and Artistic Works), it can be deleted in order to avoid confusion.

It is not clear to us whether the idea underpinning paragraph 3 is precisely that the Agent provides a translation or a summary "at the request" of an authority only, as the Agent may at the same time decide not to accede to such a request, or whether this key idea is to be found rather in paragraph 4. Be it as it may, financing of the Agent's office is already dealt with in Article 8 of the draft law and it does not look unreasonable to propose that the Agent may simply provide translations or summaries as part of his activity. It is therefore suggested to delete paragraph 4 and adopt the following wording for paragraph 3:

> "The Government Agent may also ensure a translation of a judgment or decision of the European Court against another High Contracting party or a summary thereof."

It should be further noted that paragraphs 5 to 8 seem to relate to translations, not to the Court's judgments and decisions in their authentic version in one of the Court's official languages, while translation is mentioned only in the second sentence of paragraph 5. If this assumption is wrong, authentic versions of these judgments and decisions can be found on Internet via HUDOC and the added value of these paragraphs can be questioned from this perspective. On the assumption that translation is in fact referred to here, the following should be noted.

The first sentence of paragraph 5 seems to say an obvious thing. If the translation is financed from the State budget, it is supposed to ensure the awareness of the national authorities about the judgments and decisions concerned. As to the second sentence of this paragraph, its added value is entirely unclear in light of paragraph 7, should all these translations be published on the Agent's website.

The added value of paragraph 6, stating a principle of access of anyone to the Court's judgments and decisions against Moldova, is open to doubt in light of the existence of HUDOC and of the provision of paragraph 7. Should a provision of a law be needed to this effect, one single paragraph could read:

> "All the translations of the European Court's judgments and decisions effected on the basis of this Article shall be published on the Government Agent's official webpage and may be republished free of charge on the official webpage of any other authority."

Paragraph 8 calls for two comments. First, while it may be necessary explicitly to provide for a possibility for the Agent to ask for publication of a document in the Official Monitor of the Republic of Moldova, a summary of a judgment or a decision is not a binding document whose wording could have any immediate effect in any legal system. The publication of a summary of a judgment or a decision, alongside the publication of laws and regulations, can create a false impression of this being a binding document in itself. Second, the publication and dissemination of a judgment of the Court is

usually considered as highly pertinent precisely in the context of general measures. Seen from this angle, the restriction of publication in the Official Monitor to texts "solely… relevant for the adoption of … individual measures" is not entirely understandable to us.

Article 24: Reporting to the Committee of Ministers

Like in other places, a reference to the international law context of this Article would be desirable. Also, the relationship between the Agent and the permanent representative of Moldova to the Committee of Ministers needs to be clarified.

Therefore propose the following wording is proposed:

> "(1) Within the framework of the supervision by the Committee of Ministers of the execution of the Court's judgments and decisions as set out in Article 46, paragraph 2, and Article 39, paragraph 4, of the Convention, the Agent is responsible for the submission of action plans and action reports concerning the execution of judgments and decisions relating to the Republic of Moldova.
>
> (2) At the invitation of the representative of the Republic of Moldova in the Committee of Ministers, the Agent may participate in the Committee's examination of judgments and decisions concerning the Republic of Moldova.
>
> (3) During the reporting, the provisions of Articles 19 and 20 shall be applied accordingly."

Article 25: Resolutions and decisions of the Committee of Ministers

The only comment that could be made in respect of this provision consists in asking about the meaning of the word "issued" in connection with the regulation contained in the draft law, as the Committee of Ministers' activity in the field of supervision of execution of the Court's judgments and decisions is obviously not regulated by any domestic legal provisions.

Article 26: Interpretation, revision and correction of obvious errors

The provision seems to refer to the Rules of Court (and not "Regulations"), which might be seen as a problem of translation into English, but the provision's added value can be questioned. Without setting any conditions or procedures to be respected at domestic level, the provisions of the Rules of Court apply and filing a request for interpretation, revision or correction may simply be regarded as part of the Agent's role of representation before the Court. In the event that the provision is nevertheless retained, it would be better placed in Chapter III.

Chapter V: Regress

Article 27: Individual regress

As a general comment, it is found that this provision, except for its paragraph 6, should rather be part of a law on the State's responsibility for damages, as it primarily regulates other issues that the Agent's status, powers or tasks. It is also not entirely clear to which "persons" other than "civil servants" this provision may apply, as the personal scope thereof is not defined and is potentially unlimited.

With regard to paragraph 1, apart from a possible problem of terminology ("infringement"), the acceptability of singling out the action of a particular person (or a civil servant) on the basis of a friendly settlement agreement or a unilateral declaration, is questionable. As highlighted above, both of these are primarily the acts of the executive branch of the State power, namely the Agent, which the Court has only approved, without judicially establishing a violation of the Convention. Though the idea is understandable of making those responsible for a violation of the Convention accountable in the most appropriate way, any proceedings of this kind, at least those based on the State executive's conclusion that there has been a violation of the Convention, risk challenging this conclusion, moreover when, formally speaking, one person reached this conclusion only.

It is noted that in order to clarify the meaning of "individual regress", paragraph 2 refers in general terms to other pieces of legislation, while underlining the principle of individual approach to each case.

Paragraph 3 sets out the limitation period with respect to any of the regress proceedings. Apart from the issue of finality of the Court's decisions, dealt with above, it should be noted that the period of three years is quite long, compared to the time limit for lodging an application with the Court (six months under the current text of Article 35, paragraph 1, of the Convention, four months according to Protocol no. 15). This problem is exacerbated by the starting point of this period which is not related to an action of a particular person (or civil servant), but to a future event which may occur years, if not more than a decade, after that action. This conception sits ill with the principle of legal certainty and with the rights of the individual responsible for the violation. The exact meaning of the second sentence of paragraph 3 is not understandable when it comes to both the words "other limitation terms that are applicable" and "except the terms stipulated by the penal law" and the consultants are not in a position to comment on it.

Paragraphs 4 and 5 form a particularly clear illustration of the pertinence of the general comment on this Article as a whole, as they do not deal with the Agent's status, powers or tasks.

Paragraph 6 finally speaks about the Agent and his obligation of notification. Its text suffers from certain shortcomings that may in part be attributable to its translation ("infringement" or "on behalf of"). More substantially, the Agent has an obligation ("shall") to notify the relevant authorities, but the object of such an obligatory notification is not specified. The text continues by specifying that the Agent "may explain how an action … led to [the violation]". Thus the Agent is apparently not obliged to explain this kind of considerations. Even more importantly, the Agent's obligation of notification may pose a threat to the fulfilment of his primary task, which is to represent the State before the Court, as it may be prejudicial to the willingness of the authorities (and of the responsible individuals concerned) to provide all the pieces of information necessary in the proceedings before the Court. Lastly, concerns with respect to friendly settlements or unilateral obligations, expressed above, should be reiterated.

Article 28: Institutional regress

The comments with regard to Article 27, paragraph 1, of the draft law apply to a certain extent *mutatis mutandis* with regard to Article 28, paragraph 1, even if the regress under the latter provision is exercised vis-à-vis the authorities, not the individuals.

In paragraph 2 the term "on behalf of" should be replaced by "from".

There are no particular comments on paragraphs 3 to 5.

Chapter VI: Implementation

Article 29: General notifications

Apart from the suggestion to change "notice" to "notify" in paragraph 1, this paragraph does not call for any further comments. The term "notifications" is understood as meaning what paragraph 1 precisely describes.

In paragraph 2, there might be a problem in the translation of the underlying idea by "shall be compulsory for examination by the authorities". It should be noted, however, that the outcome of such an examination is not specified in positive terms. The exact meaning of the restrictive clause at the end of this paragraph should be clarified. The current wording suggests that the authorities are obliged to examine the Agent's notification without giving it any practical effect, as this notification cannot have any impact on any individual case.

Paragraph 3 creates a right of any authority to consult the Agent on a confidential basis with respect to an individual case. As pointed out above under Article 2, though the term "authority" is used, the consultants are not certain about its real scope. A consultation process possessing this kind of

features needs to be ruled out with respect to courts, since they are independent and decide normally after having publicly heard the parties and examined all the evidence previously gathered. In any case, such a confidential consultation is probably a departure from a normal course of administrative or judicial proceedings and seems objectionable on this ground. In addition, this paragraph apparently deals with a different issue than paragraphs 1 and 2 do, and if retained, it would benefit from standing as a separate provision.

Article 30: Information on the evolution of judgments

There is a problem with the terminology used, as the intention probably is to tackle the development of the Court's case law. It is not entirely clear what is meant by the word "simultaneously". If the Agent is not obliged, already by virtue of the first sentence, to accede to each and every request, the second sentence seems to be rather superfluous. It is suggested to lay down only the principle that the Agent may prepare notes on the development of the Court's case law to the attention of relevant authorities, without giving any details.

Article 31: Cooperation with other institutions and mechanisms of protection of human rights

Although setting out of the principle of cooperation is welcomed, the added value of this very provision is not clear, as this cooperation does not seem to concern the core business of the Agent, namely the representation before the Court and the coordination of the execution of the Court's judgments and decisions. Given his role and tasks, the Agent would cooperate naturally with all the national institutions dealing with human rights issues. Also the civil society cannot be considered an "institution" or "mechanism" for the protection of human rights.

Article 32: Compatibility of legislation

With regard to paragraph 1, it is not clear whether the Agent's right to submit reports ("notifications") on the "compatibility of legislation" relates to normative texts in force or to draft normative texts. Should the first option be correct, there is no apparent difference in nature of this right with that enshrined in Article 29. If the Agent were (also) entitled to comment on draft normative texts (this tends to be confirmed by the informative note), such a conception would benefit from a specification of the Agent's place in the process of preparation of draft legal texts. The words "term of office" at the end of the first sentence may suffer from a problem of translation and should instead refer to the Agent's role, tasks or status. In addition, if the Agent is not obliged, already by virtue of the first sentence, to accede to every request to submit a report, the second sentence seems to be rather superfluous.

Paragraph 2 may easily be incorporated into paragraph 1, which, in light of the above remarks, could simply say that the Agent is entitled to issue recommendations on the compatibility of existing and draft legislation with the standards of the Convention and the Court's case law.

Chapter VII: Final and transitory provisions

The first sentence obviously needs updating.

The third sentence is potentially far-reaching and unrealistic. No indication is given in the informative note about the foreseeable extent of the Governments obligations under subparagraphs a. and b. If the entry into force of this draft law does not require numerous or extensive amendments of existing laws, which *a priori* does not seem to be the case, these amendments would better be done in the present draft law. If there is no clear vision of the extent of this obligation of adjustment, six months may not be enough to do so.