Eastern Partnership-Council of Europe Facility Project on "Good Governance and Fight against Corruption"

Activity 3.5: "Pilot Activity"

Integrity Testing – Aspects of Implementation

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Content

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1. SUMMARY

At the request of the National Anticorruption Centre of the Republic of Moldova, this Technical Paper assesses several questions concerning the implementation of integrity testing. One can summarise the questions and their answers as follows:

1. *Can one distinguish the use of special investigative means for criminal proceedings from those for integrity testing?*

   The **difference** between using special investigative means in criminal investigations and in other contexts is a **standard feature** of most if not all legal systems in this world.

2. *To what extent are secret audio-visual records – made by public officials or private citizens – of corruption offences admissible as evidence in court under international and standards and the European Convention on Human Rights (ECHR)?*

   If such recordings are legal under domestic law, they can be fully used as evidence in court. As for illegal recordings, the European Court of Human Rights (ECtHR) does **not generally exclude** evidence from court proceedings if it had been collected in violation of Article 8 ECHR (right to privacy). Should the recordings have a good standard of quality, it is likely that films, photos, or audio-tapes of criminal actions would meet the requirements of authenticity, reliability and accuracy, as defined by the ECtHR.

3. *Is it admissible to involve third persons (non-investigators) in confidential integrity tests?*

   The use of informants, confidential persons, and other forms of citizen-police co-operation are **generally recognised** in criminal procedure law. The same is true for the use of (non-investigator) public officials.

4. *Is it possible to prosecute non-targeted (non-corruption) crimes that were accidently recorded during the integrity testing?*

   Evidence on **other serious** crimes (not targeted by the integrity test) could be used in court, when obtained accidently during an integrity test.

5. *Would integrity tests in principle violate the independence of judges, if they would apply to them in the future?*

   Integrity tests aim at eliminating or substantially reducing the number of bribery incidents. They therefore **protect** the **independence** of courts. Furthermore, independence of judges does **not** protect judges as a **person**, but only the independence of their **decision making**. Integrity tests do not aim at influencing the outcome of a trial and are thus leaving the independence of judges untouched.

6. *Is it possible to oblige the public official/employee to stay in office until the end of disciplinary procedures (dealing with the outcome of integrity tests)?*

   In general, civil servants – as any other employee – cannot leave office from one day to another. In Council of Europe member States, different **minimum periods of notice** apply which, for example, can take up to six months. Such minimum periods of notice are not forced labour under the ECHR. It is also possible to determine a negative result of an integrity test **after** a public official has left office, as long as he/she can contest the result in court.

7. *Is a prohibition of 5 years for corruption offenders to work in public service proportionate?*

   Compared internationally, a prohibition of 5 years for corruption offenders to hold public office appears to be not only **proportionate**, but a rather **lenient** time frame. In the **United States** for example, corruption offenders are prohibited **forever** from holding any office in the future.

2. INTRODUCTION AND TERMS OF REFERENCE

As indicated in the letter by the Minister of Justice of the Republic of Moldova on 26 November 2012 addressed to the Council of Europe, the authorities of the Republic of Moldova had made a request to the Council of Europe to provide an opinion on the Draft Law "On Professional Integrity Testing" and on the Draft Law[1] "On Amendment of Certain Laws". The Council of Europe Secretariat provided the Opinion as of 8 January 2013.[2]

In December 2013, the Parliament of the Republic of Moldova adopted both Draft Laws with some modifications. They came into force on 25 February 2014 and on 14 August 2014, respectively.[3] In view of the modifications, the National Anticorruption Centre has asked the Council of Europe through its Eastern Partnership Project on Corruption to provide a Technical Paper on whether the following provisions of the revised Criminal Code would still be in line with international standards:

- Illicit enrichment (Article 330/2)
- Extended confiscation (Article 106/1)
- Special confiscation (Article 106)

The above topics are dealt with by a Technical Paper of September 2014 (Part 1).[4]

The National Anticorruption Centre furthermore asked the Council of Europe to review also certain follow-up questions concerning the part of the Opinion of 2013 dealing with integrity testing. In this regard, the National Anticorruption Centre submitted the following questions:

1. Can one distinguish the use of special investigative means for criminal proceedings from those for integrity testing?

2. To what extent are secret audio-visual records – made by public officials or private citizens – of corruption offences admissible as evidence in court under international standards and the European Convention on Human Rights (ECHR)?

3. Is it admissible to involve third persons (non-investigators) in confidential integrity tests?

4. Is it possible to prosecute non-targeted (non-corruption) crimes that were accidently recorded during the integrity testing?

5. Would integrity tests in principle violate the independence of judges, if they would apply to them in the future?

6. Is it possible to oblige the public official/employee to stay in office until the end of disciplinary procedures (dealing with the outcome of integrity tests)?

7. Is a prohibition of 5 years for corruption offenders to work in public service proportionate?

The answer to above additional questions is the subject of this Technical Paper (Part 2). The Technical Paper draws from the previous Opinion insofar as its analysis continues to be valid for the adopted version of Law No. 325. The Technical Paper is based solely on the English

[1] www.justice.gov.md/public/files/transparenta_in_procesul_decizional/L_modificare_CP_s_a_AL_coruptie_07-10-2013.pdf (Romanian).

[2] ECCU-BO-MD-2/2012, http://www.coe.md/images/stories/Articles/Expertises_and_reports/2013.01_eccu-bo-2_2012-moldova-th.pdf.

[3] Law No. 325, of 23 December 2013, on professional integrity testing ("privind testarea integrităţii profesionale"), http://lex.justice.md/md/351535/ (Romanian and Russian), was published on 14 February 2014 and, pursuant to its Article 21, entered into force on that date of publication only for employees of the National Anti-corruption Centre that are to be tested by the Information and Security Service. For other public agents, Law No. 325 entered into force on 14 August 2014. Law No. 326, of 23 December 2013, on amending certain laws ("pentru modificarea şi completarea unor acte legislative"), http://lex.justice.md/md/351753/ (Romanian and Russian), entered into force on 25 February 2014.

[4] http://www.coe.int/t/DGHL/cooperation/economiccrime/corruption/Projects/EaP-CoE%20Facility/EaP_TP_default_en.asp.

translations of Law No. 325, as submitted by the Moldovan authorities. It focuses on the compatibility of the draft amendments with Council of Europe and other international anti-corruption standards. It does not assess the Moldovan law in its entirety or the details of the "Draft law on amendments and additions to some legislative acts" (concerning integrity testing).

The Council of Europe standards relevant for this Technical Paper are:

- Criminal Law Convention on Corruption (ETS 173);
- European Convention on Human Rights (ETS 5);
- Recommendation Rec2005(10) on "special investigation techniques" in relation to serious crimes including acts of terrorism;
- Recommendation (94)12 of the Committee of Ministers to Member States on the Independence, Efficiency and Role of Judges.

As far as this Technical Paper reviews the compliance of Law No. 325 with the Constitution of the Republic of Moldova, it does so from the perspective of international constitutional standards and good practices. Compliance of the Law with international standards will depend to a large extent on implementation, which is not the focus of this Technical Paper. At the same time, this Technical Paper can only focus on evident aspects of compliance, but cannot assess all ramifications Law No. 325 could possibly have in cross-relation with other Moldovan laws and practices.

The main objective of this Technical Paper is to assess compliance with international anti-corruption standards. While those standards also take into account international constitutional law and human rights aspects, this paper cannot anticipate or replace opinions and decisions rendered by the competent organs of the Council of Europe (European Court of Human Rights, Venice Commission, etc.).

3. DELINEATION OF CRIMINAL PROCEEDINGS AND DISCIPLINARY INTEGRITY TESTING

Can one distinguish the use of special investigative means for criminal proceedings from those for integrity testing?

Special investigative means exist in most countries for different purposes and based on different laws. They are a standard feature of criminal investigations for collecting evidence on past crimes. They are also a standard feature of activities by intelligence agencies. The conditions for their use and the procedures applicable differ within each country, depending on the criminal procedure or other contexts.[5] The **difference** between using special investigative means in criminal investigations and in other contexts is thus a **standard feature** of most if not all legal systems in this world.

Intelligence agencies may use special investigative means for gaining intelligence on mere foreign policy issues, such as in the case of the apparent hacking of the mobile phone of the German Chancellor by U.S. intelligence agencies. Intelligence agencies often also use special investigative means in order to prevent serious security threats, such as from terrorists. Intelligence agencies can also use special investigative means to protect their internal security, for example against spies or leakers among their staff. Criminal proceedings by contrast look – from hindsight – at committed criminal offences in the past.

From an investigative-technical, special investigative means for criminal proceedings and for other purposes, including integrity testing, could be the same or at least largely overlap. However, from a

[5] See for example the regulation of special investigative means in articles 100a f. of the German Criminal Procedure Code ("Strafprozessordnung"), http://www.gesetze-im-internet.de/englisch_stpo/ (English) and in § 9 of the Law on the Domestic Intelligence Agency ("Bundesverfassungsschutzgesetz"), http://www.gesetze-im-internet.de/bverfschg/BJNR029700990.html.

legal point of view, the use of special investigative means in criminal proceedings is substantially different from the use of these means for integrity testing (as under Law 325):

- Subjects of integrity tests will not face any further **procedural consequences** a criminal suspect might face as a consequence of using special investigative means – such as pre-trial detention, blood- or DNA-tests, house-searches, etc.
- The **consequences** of criminal proceedings and integrity tests are very different: whereas a person might spend the rest of its life in prison, the only negative outcome of an integrity test is the determination that the person does not meet the ethical requirements for office as defined by law. Consequently, the person might not be able to hold office anymore. There are neither fines nor imprisonments as a consequence of integrity tests.

4. SECRET AUDIO-VISUAL RECORDS

To what extent are secret audio-visual records – made by public officials or private citizens – of corruption offences admissible as evidence in court under international standards and the ECHR?

The answer to this question depends largely on the life-context. In a first step, one can distinguish the following two categories:

- Secret audio-visual records are **legal** under domestic law
- Secret audio-visual records are **illegal** under domestic law

4.1. Legal recordings

Each time secret audio-visual records are **legal** under domestic law, they are admissible as evidence in court. The legality of secret recordings varies internationally:

For example, secret **visual** records made by citizens of public police operations are generally legal in Germany; only the distribution or publication of such pictures is forbidden, except for the use in courts. For example, the Administrative Appeals Court of the German region "Rhineland-Palatinate" has decided that "it is **admissible** to film and photograph police operations."[6] Therefore it would be legal to secretly film a police operation, such as a traffic control. As a consequence, if a police officer would abuse his/her office during this traffic control, the visual recording would be admissible as evidence during a trial against this officer.

There is similar jurisprudence from other jurisdictions, such as the United States. The U.S. Court of Appeals for the First Circuit held in 2011, that recording police activity in public is independently protected by the First Amendment, and that it is unconstitutional for the state to prosecute those recording the police in public under Massachusetts's wiretapping law; this ruling might protect secret as well as open recordings.[7]

The legality of visual records has apparently led to an increase of filming of police operations with mobile phones. Most police officers have gotten accustomed to the fact that bystanders film them during the police operations.[8] There is even applications for mobile phones, such as „Cop Recorder", which can record audio without indicating that it's doing so". It comes with a built-in uploader to OpenWatch, a platform for publishing incidents of police corruption and brutality.[9]

[6] Decision of 30 April 1997, no. 11 A 11657/96, https://www.jurion.de/Urteile/OVG-Rheinland-Pfalz/1997-04-30/11-A-11657_96 (German).
[7] http://www.dmlp.org/legal-guide/massachusetts-recording-law http://www.dmlp.org/blog/2011/victory-recording-public.
[8] http://www.ksta.de/koeln/smartphone-app-handybesitzer-filmen-polizei,15187530,16215546.html (German).
[9] http://www.theatlantic.com/technology/archive/2011/06/policing-the-police-the-apps-that-let-you-spy-on-the-cops/240916/ (English); https://www.openwatch.net/apps/.

It should be noted that it is legal in some jurisdictions to secretly record a phone conversation, if one of the participants consents;[10] in other jurisdictions it is not.[11]

4.2. Illegal recordings

4.2.1. European Court of Human Rights

Secret audio-visual recordings by private citizens can constitute a violation of Article 8 European Convention on Human Rights (ECHR). This would be the case, if a voyeuristic citizen would wiretap the private home of his/her neighbor. It is interesting to note that the European Court of Human Rights (ECtHR) does **not generally exclude** evidence from court proceedings if it had been collected in violation of Article 8 ECHR. In *Gäfgen v. Germany* it held:

> *"As to the examination of the nature of the Convention violation found, the Court reiterates that the question whether the use as evidence of information obtained in violation of Article 8 rendered a trial as a whole unfair contrary to Article 6 has to be determined with regard to all the* ***circumstances of the case****, including respect for the applicant's defence rights and the quality and importance of the evidence in question."*[12]

In another decision on illegal audio-surveillance made in a private home (*Bykov v. Russia*), the ECtHR found a violation of Article 8 (Privacy); at the same time, the Court did not find the use of this evidence in a subsequent criminal trial to constitute a violation of Article 6 (Fair trial). The Court argued similarly as in *Gäfgen v. Germany*:

> *"The question which must be answered is whether the proceedings as a whole, including the way in which the evidence was obtained, were fair. This involves an examination of the 'unlawfulness' in question and, where a violation of another Convention right is concerned, the nature of the violation found.*
>
> *In determining whether the proceedings as a whole were fair, regard must also be had to whether the rights of the defence were respected. It must be examined in particular whether the applicant was given the opportunity of* ***challenging the authenticity*** *of the evidence and of opposing its use. In addition, the quality of the evidence must be taken into consideration, including whether the circumstances in which it was obtained cast doubt on its* ***reliability*** *or* ***accuracy****. While no problem of fairness necessarily arises where the evidence obtained was unsupported by other material, it may be noted that where the evidence is very strong and there is no risk of its being unreliable, the need for supporting evidence is correspondingly weaker."*[13]

If the recordings have the necessary quality, it is likely that films, photos, or audio-tapes of criminal actions would meet the above requirements of authenticity, reliability and accuracy.

4.2.2. National Laws and Jurisprudence

In both previously quoted decisions, the ECtHR also stated that member States are primarily free to regulate the question of admissibility of evidence in their own **discretion**:

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[10] For example in the United States the law of Georgia, Ga. Code §§ 16-11-62(1), 16-11-66, http://law.justia.com/georgia/codes/16/16-11-66.html; http://www.dmlp.org/legal-guide/georgia-recording-law.

[11] For example in the United States the law of Massachusetts, Mass. Gen. Laws ch. 272, § 99, http://www.mass.gov/legis/laws/mgl/272-99.htm; http://www.dmlp.org/legal-guide/massachusetts-recording-law.

[12] Grand Chamber, Gäfgen v. Germany, Application no. 22978/05, Decision of 1 June 2010, at no. 165 (emphasis by author), http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-99015.

[13] Grand Chamber, Bykov v. Russia, Application no. 4378/02, decision of 10 March 2009, at no. 89, 90 (emphasis by author), http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-91704.

> *"While Article 6 [fair trial] guarantees the right to a fair hearing, it does not lay down any rules on the admissibility of evidence as such, which is primarily a matter for regulation under national law […]."*[14]

Consequently, there is no general practice among national laws, but rather a **diversity of approaches**. Whereas United Kingdom allows for the use of illegally obtained audio-visual recordings in civil procedures,[15] and to some extent in criminal procedures,[16] they are never admissible in Germany.[17]

It should be noted that even if evidence is not admissible in court, it may still be used for investigations and thus lead to other evidence. Again, national laws vary on the question whether such legally obtained evidence triggered by illegal evidence is admissible in court. Some countries, such as the United States, follow the so-called doctrine of the "**fruit of the poisonous tree**" – basically prohibiting any later evidence from being used in court.[18] Germany on the other hand does not follow this doctrine.[19] The ECtHR has left this question more or less up to national discretion (with the exception of evidence obtained through torture).[20]

5. INVOLVEMENT OF THIRD PERSONS IN INTEGRITY TESTS

Is it admissible to involve third persons (non-investigators) in confidential integrity tests?

One has to distinguish two constellations in this context:

- Involvement of private individuals
- Involvement of public officials (non-investigators)

The involvement of **private citizens** is admissible. The State makes use of private persons in many ways. In most if not all countries of this world, private companies or individuals assist the State in performing its functions. Examples include visa service centres assisting embassies in issuing visas; pupils regulating the traffic in front of schools, companies storing confiscated items, or informants "from the street" providing the police with intelligence and evidence on crimes. The use of informants, confidential persons, and other forms of citizen-police co-operation are generally recognised in criminal procedure law. The German "Joint Guidelines of Justice Ministers in Germany on Informants, Confidential Persons and Undercover Agents" defines a confidential person as

> *"a person, which does not belong to a law enforcement authority, and who is willing to support the authority with investigating crimes over a longer period of time and whose identity is in principle confidential."*[21]

The Grand Chamber of the German Supreme Court decided in 1996 on a case where the police engaged a private person to make the suspect repeat his **confession** to an armed robbery in the

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[14] Gäfgen, ibid, at no 162; Bykov, ibid, at 88.

[15] See Jones v University of Warwick [2003] 1 WLR 954, in which an enquiry agent tricked her way into the personal injury claimant's home by pretending to be conducting a market survey and then secretly filmed her performing physical movements that were inconsistent with her alleged injuries. The evidence was admitted.

[16] http://www.ryanlaw.co.uk/new_page_2.htm.

[17] Constitutional Court, BVerfGE 34, 238, 245, http://www.servat.unibe.ch/dfr/bv034238.html (German)

[18] Gaefgen, ibid, at 73.

[19] Supreme Court, Decision of 22 February 1978, 2 StR 334/77, https://www.jurion.de/Urteile/BGH/1978-02-22/2-StR-334_77 (German).

[20] Gaefgen, ibid, at 165.

[21] See for example the Joint Guidelines of Justice Ministers in Germany on Informants, Confidential Persons and Undercover Agents (Gemeinsame Richtlinien der Justizminister/-senatoren und der Innenminister/-senatoren der Länder über die Inanspruchnahme von Informanten sowie über den Einsatz von Vertrauenspersonen (V-Personen) und Verdeckten Ermittlern im Rahmen der Strafverfolgung, Anlage D zu den Richtlinien für das Strafverfahren und das Bußgeldverfahren (RiStBV)) of 1 January 1977, BAnz No. 208 of 8 November 2007, page 7950, www.verwaltungsvorschriften-im-internet.de/BMJ-RB3-19770101-KF02-A004.htm (German).

presence of a further (private) witness. The Supreme Court held the action legal and the evidence usable in court:

> *"The usage of contact persons and entrapping persons has always been regarded as an admissible investigation method."*[22]

Therefore, there is no reason why private individuals should not be included in integrity tests. On the contrary, it is obvious that for certain tests it is conditional to include such private individuals as otherwise the scenario would not be realistic. For example, the "Texas Alcoholic Beverage Commission", a state agency that regulates all phases of the alcoholic beverage industry, has developed "Minor Sting Operation Guidelines".[23] According to the guidelines, "minor sting operations allow the local law enforcement community to use a person not older than 18 years of age to attempt to purchase alcoholic beverages from a licensed business". The minors can be "agency employees' children, civic group volunteers, or recruits from local schools and school groups". Obviously, the private individual would need to be properly **instructed**, and have to adhere to certain **confidentiality** requirements (such as signing a confidentiality statement).

It is also obvious that private individuals could not be entrusted the full task alone, but could only **assist**. Otherwise, the State would fully delegate a law enforcement function to a private individual, which would be problematic.[24] Therefore, the selection of the targets, the general setting of the tests, the choice of technical means, and the appraisal of the evidence collected are the prerogative of public officials.

As for the involvement of (non-investigator) **public officials**, the principle of **inter-administrative assistance** applies. In Germany, this principle is even enshrined in the Constitution:

> *"All federal and Land authorities shall render legal and administrative assistance to one another."*[25]

Such assistance may be mere information and go up to the provision of staff or technique. Therefore, it is not only admissible under international standards, but rather good practice to have public officials assisting other agencies. This includes sting operations by the police: if the police can involve private citizen, it can all the more do so with public officials, who are already professionally obliged to confidentiality and objectivity. As one of the many examples available, the FBI conducted a sting operation involving in which not only police officers, but also "the NASA Office of the Inspector General ('OIG') and the Defense Contractor Investigative Service ('DCIS') participated".[26] The same is obviously true for procedures leading to less grave consequences than criminal investigations, such as preventive integrity tests.

6. INTEGRITY TESTS AND NON-TARGETED CRIMES

Is it possible to prosecute non-targeted (non-corruption) crimes that were accidently recorded during the integrity testing?

6.1. Criminal investigations

[22] Supreme Court, Grand Chamber for Criminal Matters, Decision of 13 May 1996, GSSt 1/96, http://www.servat.unibe.ch/dfr/bs042139.html.

[23] http://www.tabc.state.tx.us/publications/brochures/Minor_Sting_Guidelines.pdf.

[24] See for example Regional Upper Court of Appeals (BayObLG), Decision of 11 July 1997, 1 ObOWi 282/97, http://www.schweizer.eu/bibliothek/urteile/index.html?id=12012 (German): delegation of investigation of traffic violations to private persons on behalf of the State requires a statutory provision, Appeals Court Berlin, 23 October 1996, 2 Ss 171/96 - 3 Ws (B) 406/96, not online available.

[25] Article 35 [Administrative assistance|, http://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html#p0171 (English).

[26] United States Court Of Appeals for the Fifth Circuit, https://law.resource.org/pub/us/case/reporter/F3/188/188.F3d.579.97-41214.html.

Special investigative means are a rather intrusive measure. In the context of criminal investigations, they cannot be applied for any purpose or any offence. In 2005, the Council of Europe issued Recommendation Rec2005(10) "on 'special investigation techniques' in relation to serious crimes including acts of terrorism". The Recommendation is applicable to "techniques [...] in the context of criminal investigations" (Chapter I). No. 4 of the Recommendations states:

> *"Special investigation techniques should only be used where there is sufficient reason to believe that a **serious crime** has been committed or prepared, or is being prepared, by one or more particular persons or an as-yet-unidentified individual or group of individuals."*

As analysed in the Opinion of 8 January 2013,[27] **corruption** is counted among the serious crimes.[28] As corruption can be viewed as still systemic in the Moldovan public sector, with an average of more than a quarter of all citizens experiencing bribe-taking or -giving in public administration,[29] there is sufficient reason to believe that "as-yet-unidentified individuals" are committing the offence of corruption.

There are many cases in real life where criminal investigations using special investigative means to target a certain serious crime, uncover other crimes which the investigators did not expect to encounter. There are basically two categories of cases:

- The non-targeted crimes discovered are **serious**.
- The non-targeted crimes discovered are **non-serious**.

National laws usually allow using evidence on non-targeted crimes obtained through special investigative means, if the crimes fall into the same list of crimes qualifying for special investigative means. For example, the Germany Criminal Procedure Code sets the following restriction on using accidently obtained evidence:[30]

> *"If a measure [surveillance] pursuant to this statute is only admissible where specified criminal offences [certain serious crimes] are suspected, then any personal data obtained on the basis of such a measure may only be used without the consent of the person affected by the measure for evidential purposes in other criminal proceedings for those criminal offences, for which the measure could have been ordered pursuant to this statute [= other serious crimes]."*

Thus, if, for example, during the surveillance of an organised drug cartel accidentally produces evidence of a rape of minors emerges, such evidence can be used as both offences qualify for special surveillance.

6.2. Integrity testing

The above described principles apply to criminal investigations. This poses the question whether the same principles should apply to integrity testing. As mentioned earlier, the ECtHR is of the opinion that member States are primarily free to regulate the question of admissibility of evidence in their own **discretion**:

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[27] ECCU-BO-MD-2/2012, http://www.coe.md/images/stories/Articles/Expertises_and_reports/2013.01_eccu-bo-2_2012-moldova-th.pdf.

[28] Criminal Law Convention on Corruption (ETS 173), Preamble: "[C]orruption threatens the rule of law, democracy and human rights, undermines good governance, fairness and social justice, distorts competition, hinders economic development and endangers the stability of democratic institutions and the moral foundations of society", http://conventions.coe.int/Treaty/en/Treaties/html/173.htm.

[29] European Bank for Reconstruction and Development, "Life in Transition Survey" (2010), p. 39, www.ebrd.com/downloads/research/surveys/LiTS2e_web.pdf.

[30] Section 477 [Admissibility of the Transfer of Information] par. 2 sentence 2, http://www.gesetze-im-internet.de/englisch_stpo/ (English).

> *"While Article 6 [fair trial] guarantees the right to a fair hearing, it does not lay down any rules on the admissibility of evidence as such, which is primarily a matter for regulation under national law […]."*[31]

However, this would probably not mean that member States could use any information obtained during the integrity tests for just any purpose. The compliance of integrity testing is largely based on the fact that it serves to prevent a **serious crime**, corruption. The Opinion of 8 January 2013[32] argued in the context of proportionality:

> *"This prevalent and systemic corruption poses a serious risk to the State itself and calls – after years of anti-corruption reforms – for new measures with enhanced efficiency. Integrity testing would seem the ideal tool for breaking the vicious circle of silence, profit, and impunity*."

This would support the view that only evidence on **other serious** crimes could be used, when obtained accidently during an integrity test. This would naturally include any crime normally qualifying for special investigative means (technical surveillance), such as terrorism, organised crime, or murder.[33]

A statutory basis for using such accidentally obtained evidence in other procedures would be recommendable: special investigative means require a **legislative definition** of "the circumstances in which, and the conditions under which, the competent authorities are empowered to resort to the use of special investigation techniques" (Rec2005(10), Chapter II – a. General principles, par. 1).

7. INTEGRITY TESTS AND INDEPENDENCE OF JUDGES

Would integrity tests in principle violate the independence of judges, if they would be applied to them in the future?

7.1. International definition

Independence of judges is internationally defined as follows:

> *"In the **decision-making process**, judges should be independent and be able to act without any restriction, improper influence, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason. The law should provide for sanctions against persons seeking to influence judges in any such manner. Judges should have unfettered freedom to **decide cases impartially**, in accordance with their conscience and their interpretation of the facts, and in pursuance of the prevailing rules of the law. Judges should not be obliged to report on the merits of their cases to anyone outside the judiciary."*[34]

Thus, independence does **not** protect judges as a **person**, but only the independence of their **decision making**. Therefore, under international standards, judges can enjoy immunity related to their decision making, but not as a personal privilege against any crime they commit outside decision making; in the words of the Venice Commission:

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[31] Gäfgen, ibid, at no 162; Bykov, ibid, at 88.

[32] ECCU-BO-MD-2/2012, page 27, http://www.coe.md/images/stories/Articles/Expertises_and_reports/2013.01_eccu-bo-2_2012-moldova-th.pdf.

[33] See the list of crimes for which special investigative means are available under Article 100a German Criminal Procedure Code, http://www.gesetze-im-internet.de/englisch_stpo/englisch_stpo.html#p0483 (English).

[34] Recommendation (94)12 of the Committee of Ministers to Member States on the Independence, Efficiency and Role of Judges – Principle I.2.d), https://wcd.coe.int/ViewDoc.jsp?id=524871&, replaced by Recommendation CM/Rec(2010)12 of the Committee of Ministers to member states on judges: independence, efficiency and responsibilities, see in particular no. 22, https://wcd.coe.int/ViewDoc.jsp?id=1707137.

> *"To this end they should enjoy functional – but only functional – immunity (immunity from prosecution for acts performed in the exercise of their functions, with the exception of intentional crimes, e.g. taking bribes)."*[35]

The independence of judges serves only one purpose: providing **citizens** with a fair trial. Thus, Article 6 of the European Convention on Human Rights includes "an independent and impartial tribunal" into the key features of a fair trial. Similarly, the Council of Europe Recommendation "on judges: independence, efficiency and responsibilities" states:

> *"The external independence of judges is not a prerogative or privilege granted in judges' own interest but in the interest of the rule of law and of persons seeking and expecting impartial justice."*[36]

7.2. Integrity tests as a protection of independence

The biggest threat to independent decision-making of judges are probably **bribes**: A bribe puts the independence of corrupt judges up for sale. Corrupt judges trade their independence for money and subjugate themselves to the directions of the bribe-giver. Integrity tests aim at eliminating or substantially reducing the number of bribery incidents. They therefore **protect** the **independence** of courts and can restore a system where citizens enjoy their right to an impartial judge.

7.3. Do integrity tests infringe on independence?

Integrity tests can never make a judge to change his/her decision. Even if integrity tests would go as far as offering a bribe, this would not amount to any undue influence on the impartiality of judges. Such undercover bribe offers would always be "fake" and would not be used to actually influence the outcome of a trial. Therefore, integrity tests do not even touch on the issue of independence of judges.

Judges need certain **confidentiality** when deliberating on a concrete case as a chamber in camera. Such confidentiality would also help them to find a decision independently. However, there is no such confidentiality when judges communicate with parties. On the contrary, with regard to their impartiality and to the fairness of proceedings, such communication is exactly supposed to be **transparent**, if it is allowed at all.[37] Therefore, any recording during integrity tests performed by court parties could not touch on the independence of judges.

8. DETERMINATION OF NEGATIVE RESULTS AFTER LEAVING OFFICE

Is it possible to oblige the public official/employee to stay in office until the end of disciplinary procedures (dealing with the outcome of integrity tests)?

The relevant provision of the "Law on Professional Integrity Testing" (see appendix) is Article 16 par. 3:

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[35] European Commission for Democracy Through Law (Venice Commission) CDL-AD(2010)004, Report On The Independence Of The Judicial System, Part I: The Independence of Judges, at no. 56 f., www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2010)004-e; see also: Consultative Council of European Judges (CCJE), Opinion no 1 (2001) of the Consultative Council of European Judges (CCJE) for the attention of the Committee of Ministers of the Council of Europe on standards concerning the independence of the judiciary and the irremovability of judges, par. 11-12, https://wcd.coe.int/ViewDoc.jsp?Ref=CCJE%282001%29OP1&Sector=secDGHL&Language=lanEnglish&Ver=original&BackColorInternet=FEF2E0&BackColorIntranet=FEF2E0&BackColorLogged=c3c3c3.

[36] CM/Rec(2010)12 of the Committee of Ministers to member states of 17 November 2010, https://wcd.coe.int/ViewDoc.jsp?id=1707137.

[37] See for example Larry Campagna, "The Prohibition of Ex Parte Communications by Appeals Officers", The Practical Tax Lawyer 16 (2002).

"As of the date of receiving the notification regarding the negative result of the professional integrity test and until finalizing the disciplinary procedures, the public agent may not be dismissed based on the resignation application."

In general, civil servants – as any other employee – cannot leave office from one day to another. In Council of Europe member States, different **minimum periods of notice** apply. For example, in Canada[38] and Germany the minimum period of notice is two weeks. In Germany, the employer can extend this time limit up to three months in case the employer needs the civil servant to finish his/her tasks.[39] In the United Kingdom, a minimum period of three months applies for senior public officials, which the employer can extend up to six months.[40]

Such periods of notice are **not forced labour** according to the case law of the ECtHR.[41] The prohibition of forced labour is a constitutional principle of many if not all European constitutions and is enshrined in the ECHR:

"Article 4 (prohibition of slavery and forced labour)

1. No one shall be held in slavery or servitude.

*2. No one shall be required to perform **forced or compulsory labour**.*

3. For the purpose of this Article the term 'forced or compulsory labour' shall not include:

(a) any work required to be done in the ordinary course of detention imposed according to the provisions of Article 5 [right to liberty and security] of this Convention or during conditional release from such detention;

(b) any service of a military character or, in case of conscientious objectors in countries where they are recognised, service exacted instead of compulsory military service;

(c) any service exacted in case of an emergency or calamity threatening the life or well-being of the community;

(d) any work or service which forms part of normal civic obligations."[42]

Since the case of *Van der Mussele v. Belgium*[43], the ECtHR defined the term "forced or compulsory labour" means as "all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself **voluntarily**".[44] The ECtHR based its definition of forced labour also on Article 2 of ILO-Convention No. 29 of 1930 "concerning Forced or Compulsory Labour. The Convention is binding on nearly all the member States of the Council of Europe, including Moldova.[45] Article 2 defines forced labour as follows:

*"For the purposes of this Convention the term forced or compulsory labour shall mean all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself **voluntarily**."*[46]

By this logic, a citizen entering an employment as civil servant voluntarily cannot argue later on that a minimum period for staying in office would constitute forced labour (if that minimum period

[38] Section 20, Civil Service Act, http://web2.gov.mb.ca/laws/statutes/ccsm/c110e.php.

[39] Section 33 Federal Civil Service Law, http://www.gesetze-im-internet.de/bbg_2009/BJNR016010009.html (German).

[40] U.K. Department of Finance and Personnel, Minimum Periods of Notice for Civil Servants, www.dfpni.gov.uk/2.05_notice.pdf.

[41] On the case law in general see: ECtHR, Factsheet – Slavery, servitude and forced labour, July 2014, www.echr.coe.int/Documents/FS_Forced_labour_ENG.pdf; ECtHR, Key Case-Law Issues, Prohibition of Slavery and Forced Labour, Article 4 of the Convention, 2012, www.echr.coe.int/Documents/Guide_Art_4_ENG.pdf.

[42] www.echr.coe.int/Documents/Convention_ENG.pdf.

[43] Judgment of 23 November 1983, Application no. 8919/80, http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57591.

[44] Ibid, at no. 32.

[45] http://www.ilo.org/dyn/normlex/en/f?p=1000:11200:0::NO:11200:P11200_COUNTRY_ID:102695.

[46] http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C029.

existed already at the time of his/her engagement). However, the ECtHR has made it clear that by entering a certain profession citizens do not "voluntarily" accept to just any condition of the employment. In the case of *Van der Mussele*, the ECtHR observed in the case of a lawyer being obliged to perform free legal aid:

> *"However, he had to accept this requirement, whether he wanted to or not, in order to become an avocat and his consent was determined by the normal conditions of exercise of the profession at the relevant time. […] The applicant's, without more, does not therefore warrant the conclusion that the obligations incumbent on him in regard to legal aid did not constitute compulsory labour."*[47]

For the question of "voluntarily", the ECtHR takes into account but does not give decisive weight to the element of the applicant's prior consent to the tasks required:

> "*Rather, the Court will have regard to **all the circumstances** of the case in the light of the underlying objectives of Article 4 when deciding whether a service required to be performed falls within the prohibition of "forced or compulsory labour" [...]. The standards developed by the Court for evaluating what could be considered **normal** in respect of duties incumbent on members of a particular profession take into account whether the services rendered fall outside the ambit of the **normal professional activities** of the person concerned; whether the services are **remunerated** or not or whether the service includes another compensatory factor; whether the obligation is founded on a conception of **social solidarity**; and whether the burden imposed is **disproportionate** [...].*"[48]

In applying the above criteria to the case of a civil servant being obliged to stay in office until his/her disciplinary proceeding is finished, one could come to the following conclusions:

- The civil servant would have entered the engagement **voluntarily**.
- The services required would be **normal professional activities**.
- The services would be **remunerated** (therefore the concept of social solidarity would not apply as it is only relevant for non-remunerated obligations).

As for the question of **proportionality**, one would have to apply the **proportionality** test of the ECtHR:[49]

1. *The legislative objective must be sufficiently important to justify limiting a fundamental right.*
2. *The measures designed to meet the legislative objective must be rationally connected to that objective – they must not be arbitrary, unfair or based on irrational considerations.*
3. *The means used to impair the right or freedom must be no more than is necessary to accomplish the legitimate objective – the more severe the detrimental effects of a measure, the more important the objective must be if the measure is to be justified in a democratic society.*

Of the above test, in particular step 3 is problematic: it seems likely that there are **less detrimental** measures than obliging the public official to stay in office without any fixed time limit. This would mean that the public official would possibly have to stay in office for months, or even years merely for the purpose of completing a disciplinary procedure through all appeals procedures. Any time limit within the **normal range** of minimum periods of notice of up to 3-6 months would seem not problematic.

For any disciplinary proceeding which would take longer than this period, a less detrimental option would be available: one could establish a **separate procedure** – inside or outside disciplinary

[47] Ibid, at no. 36.

[48] Ibid, at no. 37.

[49] Lord Justice Burnton, Proportionality, presentation delivered in May 2011, www.adminlaw.org.uk/docs/sc%2012%20Lord%20Justice%20Burnton.doc.

procedures – for formally determining the negative result of the integrity test. This procedure could apply should a public official leave office – within the usual statutory time periods of notice for resignation – before the negative test result is formally confirmed. Thus, the negative result would be determined even **after** the public official **left office**. Usually, disciplinary proceedings end with the resignation of a public official from office.[50] However, there is no constitutional reason apparent why the result of an integrity test should not enter a public record even after the public official left office. The only constitutional requirement would be in this context to have a clear statutory provision,[51] as a negative test result would affect his/her possible dismissal from office or ability to hold future office.

Should disciplinary proceedings in Moldova currently apply only to public officials in office, this special procedure for integrity tests would require introducing a simple **exception**. As long as a (former) public official would be informed about the preliminary result of the test, would have the possibility to provide feedback before a final decision is made, and would enjoy the right to appeal the decision in court, there is no indication why such a procedure would not be admissible.

Another option could be a mechanism to "outplay" a smart official who tries to evade responsibility by quitting public service on **short term**. To this end, one would have to establish the following general rule for dismissals: public officials are allowed to ask for dismissal within a certain time period of notice, for example eight weeks or six months; however, the dismissal becomes only legally valid through a decision by the employer. In this context, the German regulation for resignations is of interest:[52]

> *"§ 33. Resignation*
>
> *(1) Civil servants are dismissed if they demand their dismissal in writing from the competent authority. [...]*
>
> *(2) The dismissal may be requested at anytime. It is to be pronounced for the requested time. However, it may be postponed until the civil servant has fulfilled his or her assigned duties properly, but not exceeding three months.*
>
> *§ 38 Procedure of dismissal*
>
> *Unless stipulated otherwise, the dismissal is carried out in writing by the agency that would be responsible for the appointment. The dismissal [...] enters into effect with the end of the month following the month by which the officer is served a copy of the dismissal."*

With such a procedure, the employer could always dismiss the civil servant upon the ground of a failed integrity test, before deciding on the request for dismissal. Thus the still pending request by the public official for an ordinary dismissal would become obsolete. As a consequence, the civil servant would be dismissed based on the negative test result, instead of being based on his/her application for dismissal. If he or she does not agree with the negative result of the integrity test and the dismissal, he or she would need to appeal the extraordinary dismissal in court. In other words: with such a procedure the employer could "outrun" the public official, but still grant the public official all fundamental rights of being heard and having a right to appeal.

9. DISBARMENT FROM PUBLIC SERVICE

Is a prohibition of 5 years for corruption offenders to work in public service proportionate?

[50] See for example Article 32 par. 2 No. 2 of the German Federal Disciplinary Law, http://www.gesetze-im-internet.de/bdg/__32.html (German).

[51] See for example German Constitutional Court, Decision of 2 December 1958, 1 BvL 27/55, at no. 80, http://www.servat.unibe.ch/dfr/bv008332.html (German).

[52] Federal Civil Service Law, http://www.gesetze-im-internet.de/bbg_2009/BJNR016010009.html (German; English translation by author).

Compared internationally, a prohibition of 5 years for corruption offenders to hold public office appears to be not only **proportionate**, but a rather **lenient** time frame. In the **United States**, corruption offenders are prohibited **forever** from holding any office in the future. For example:

> *California Penal code,[53] article 68*
>
> *"Every executive or ministerial officer, employee, or appointee of the State of California, a county or city therein, or a political subdivision thereof, who asks, receives, or agrees to receive, any bribe, [...] in addition thereto [fine/imprisonment], forfeits his or her office, employment, or appointment, and is **forever disqualified** from holding any office, employment, or appointment, in this state."*
>
> *Massachusetts Constitution,[54] chapter VI, article II*
>
> *"No person shall **ever** be admitted to hold a seat in the legislature, or any office of trust or importance under the government of this commonwealth, who shall, in the due course of law, have been convicted of bribery or corruption in obtaining an election or appointment."*

The Federal Bribery Statute, 18 U.S.C. § 201(b), foresees that any corruption offender

> *"may be **disqualified** [without time limit] from holding any office of honor, trust, or profit under the United States."*[55]

This Statute reflects the following provision in the United States Constitution (Article Two, Section Four):

> *"The President, Vice President and all **civil Officers** of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, **Bribery**, or other High crimes and Misdemeanors."*[56]

In **Germany**, civil servants lose their status as such and all related benefits, and – without any explicit prohibition time period – would de facto be banned for life once being convicted of (simple) bribery: a corruption conviction would regularly render candidates "unworthy" of another appointment under federal statutes.[57]

All over the world, prohibition terms seem to be mostly no less than five years. Even in India, the term is six years, and it is counted only from the time of release:

> *"A person convicted of any offence and sentenced to imprisonment for varying terms under Sections 8 (1) (2) and (3) shall be disqualified from the date of conviction and shall continue to be disqualified for a further period of six years since his release."*[58]

The **United Kingdom** applies the same time period of five years, as does Moldova. Any person convicted under the "Public Bodies Corrupt Practices Act 1889" shall

> *"be liable to be adjudged incapable of being elected or appointed to any public office for **five years** from the date of his conviction, and to forfeit any such office held by him at the time of his conviction [...]."*

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[53] http://www.leginfo.ca.gov/cgi-bin/calawquery?codesection=pen.

[54] https://malegislature.gov/laws/constitution.

[55] http://www.law.cornell.edu/uscode/text/18/201.

[56] http://www.law.cornell.edu/constitution/articleii#section4 (emphasis by author)

[57] § 41 and § 7 Federal Civil Service Law, http://www.gesetze-im-internet.de/bbg_2009/BJNR016010009.html (German).

[58] Representation of the People Act, Section 8, http://lawmin.nic.in/legislative/election/volume%201/representation%20of%20the%20people%20act,%201951.pdf

10. APPENDIX: LAW ON PROFESSIONAL INTEGRITY TESTING

The following Law has been provided by the Moldovan authorities as an informal English translation.

L A W
on professional integrity testing

no. 325 of December 23, 2013

Official Gazette no.35-41/73 of February 14, 2014

* * *

C O N T E N T S

Pursuant to Art.72 para.(3) letter r) of the Constitution of the Republic of Moldova,

The Parliament adopts this organic law.

Chapter I
GENERAL PROVISIONS

Article 1. Regulation object

This law establishes the purpose, principles, means, methods, procedures and legal effects of testing professional integrity within public entities.

Article 2. Testing purpose

Professional integrity testing is made in order to:

a) ensure professional integrity, prevent and fight against corruption within public entities;

b) verify the public agents' manner to observe work obligations and duties, and the conduct rules;

c) identify, assess and remove the vulnerabilities and risks which could determine or favor corruption acts, corruption related acts or deeds of corruptive behavior;

d) reject inappropriate influences in exercising the work obligations or duties of public agents.

Article 3. Principles

The professional integrity testing of public agents is made subject to the mandatory observance of the following principles:

a) legality;

b) observance of the fundamental human rights and freedoms, of human and professional dignity;

c) unbiased, equitable and non-discriminatory treatment of the public agents subject to testing;

d) presumption of the good faith of testing subjects;

e) non-admission of the impairment of the authority, prestige and image of public entities and public agents.

Article 4. Concepts

For the purpose hereof, the following concepts shall have the following meanings:

public agents – the employees of the public entities provided in the annex forming an integral part hereof;

professional integrity – the person's capacity to exercise their legal and professional obligations and duties honestly and impeccably, proving a high moral standard and maximum correctness, and to exercise their activity impartially and

independently, without any abuse, respecting public interest, the supremacy of the Constitution of the Republic of Moldova and of law;

professional integrity testing – the process of planning, initiating, organizing and performing professional integrity tests;

professional integrity test – the creation and application by the tester of certain virtual, simulated situations, similar to those in the work activity, materialized through dissimulated operations, conditioned on the activity and behavior of the tested public agent, in order to passively monitor and establish the reaction and conduct of the tested public agent;

professional integrity tester – person authorized hereunder and under special laws with duties and competences to test professional integrity;

inappropriate influence – illegal attempts, actions, pressures, threats, interferences or requests of third persons in order to determine public agents to perform or not, delay or accelerate the performance of, certain actions in the exercise of their functions or contrary to them;

justified risk – risk without which the socially useful purpose to objectively set the public agent's conduct within the professional integrity test cannot be reached, and the professional integrity tester who risks took measures to prevent damages of the interests protected by law.

Article 5. Subjects of professional integrity testing

(1) The subjects of professional integrity testing shall be public entities, public agents and professional integrity testers.

(2) Professional integrity tests shall apply to the public agents employed within the public entities provided in the annex.

(3) Professional integrity tests are made by the employees of the National Anti-corruption Center and of the Information and Security Service.

Article 6. Rights and obligations of public agents

(1) Public agents shall be entitled to be informed of the manners to legally challenge the disciplinary sanctions applied as a result of professional integrity testing results.

(2) Public agents shall have the following obligations:

a) not admit in their activity any corruption acts, corruption related acts and deeds of corruptive behavior;

b) immediately denounce to the competent bodies any attempt of being involved in the actions provided under letter a);

c) communicate any inappropriate influence to the leader of the public entity, in writing;

d) declare gifts according to the law in force.

Article 7. Rights and obligations of public entities

(1) Public entities shall have the following rights:

a) to be informed on the results of applying professional integrity tests to their employees, within the terms provided herein;

b) to deem the positive result of the professional integrity test as an additional reason to promote the public agent, without disclosing such reason.

(2) Public entities shall have the following obligations:

a) to inform public agents, against signature, of the possibility of being subject to the professional integrity test. The information shall be made when new employees are appointed, and in case of the public agents employed upon the coming into force hereof – within the term provided in the final and transitory provisions;

b) to record inappropriate influence cases, according to the regulation approved by the Government, and provide access to such information to the institutions performing professional integrity testing;

c) to provide access to gift registers to professional integrity testers.

Article 8. Rights and obligations of professional integrity testers

(1) Professional integrity testers shall have the following rights:

a) to determine, along with the coordinator of the professional integrity testing activity, under the conditions hereof, the public agents liable to testing and the testing frequency;

b) to be trained especially on the methods and means applied within testing;

c) to use within the professional integrity testing documents encoding the identity of persons, structures, organizations, rooms and transportation means, and the identity of the persons provided under Art.12 para.(2).

(2) Professional integrity testers shall have the following obligations:

a) to keep the professional integrity testing activity confidential;

b) to inform the leaders of public entities on the testing that were made though the coordinator of the professional integrity testing activity;

c) to perform all the measures in order to prevent the potential negative consequences or prejudices of third parties related to the application of the professional integrity test;

d) to ensure the destruction of the audio/video recordings made during the integrity test within the terms provided under Art.18 para.(1).

(3) The obligations of the professional integrity tester shall also reflect, accordingly, on the institution performing the professional integrity testing.

Article 9. Guarantees and responsibilities

(1) In case of a negative result of the professional integrity test, the tested public agents shall only be applied a disciplinary liability depending on the seriousness of the established deviations and according to the legislation regulating the activity of such public entities, observing the provisions of Art.16 para.(2).

(2) The results and materials of the professional integrity test may not be used as means of evidence in a criminal or minor offence trial against the tested public agent.

(3) The methods and means to test and set professional integrity tests shall not represent special investigation activities as provided by Law no.59 of March 29, 2012 on the special investigation activity.

(4) The use of the materials of the professional integrity test in a civil trial shall be approved as provided by the civil procedural legislation. The report on the professional integrity testing results and the materials of the professional integrity test may be used as evidence in a civil trial if they are pertinent, admissible and veridical, observing public interest, human rights and freedoms and the declassification conditions.

(5) The action of the professional integrity tester based on a justified risk, having the purpose of drawing the attention of the tested public agent shall not be a minor offence or offence if the professional integrity testing activity cannot be performed without involving this risk.

(6) If, during the performance of the professional integrity test, other illegal activities of the tested public agents or of third persons were established, the institution which made the professional integrity testing shall notify the competent body so that the measures established by the legislation in the field are taken.

Chapter II
PROFESSIONAL INTEGRITY TESTING PROCEDURE

Article 10. Professional integrity testing initiation

(1) Professional integrity testing is initiated by:

a) The National Anti-corruption Center – regarding all the public agents within the public entities provided in the annex, except for the Information and Security Service;

b) The Information and Security Service – regarding the employees of the National Anti-corruption Center;

c) the internal security subdivision of the Information and Security Service – regarding its employees.

(2) The professional integrity testing initiation and the selection of the public agents to be subject to testing shall be made depending on:

a) the risks and vulnerabilities to corruption identified in the activity of such public entities;

b) the held information and the notifications received by the institution making professional integrity testing;

c) the motivated requests of the leaders of the public entities provided in the annex.

(3) The decision on making the professional integrity testing of public agents within a public entity shall be made by the coordinator of the professional integrity testing activity without informing in advance the management of the targeted public entity. If necessary, the professional integrity testers shall collaborate with the representatives of the public entity in which the tested public agent activates under the conditions of this law and of the special normative rules regulating the cooperation in the field.

Article 11. Professional integrity testing coordination

(1) The professional integrity testing of public agents shall be coordinated by a person with a management function within the National Anti-corruption Center or the Information and Security Service.

(2) The coordinator of the professional integrity testing activity shall designate, on a confidential basis, for each professional integrity testing activity, professional integrity tester ensuring the performance of all professional integrity testing activities and in charge with drafting the professional integrity testing plan and submitting the reports with the results obtained further to testing activities.

(3) The professional integrity testing plan is a confidential document approved by the coordinator of the professional integrity testing activity and includes the following information:

a) the testing initiator and the motivated decision to initiate the testing;

b) the testing subjects;

c) the forecast dissimulated operations;

d) the place, duration, participants and the logistic assurance of the testing;

e) the simulated virtual situations, the behavior hypotheses and the action variants of the professional integrity tester and the tested public agent;

f) the actions based on a justified risk;

g) other information relevant for making the testing.

(4) The professional integrity tester may change the professional integrity testing plan *ex officio* and/or as necessary, in case of occurrence of additional information. The coordinator of the testing activity shall be informed of the occurred changes.

Article 12. Means and methods to test and set professional integrity tests

(1) Professional integrity testers shall perform their activity on a confidential basis.

(2) In exceptional cases, when making the integrity test, other persons may also participate, subject to their prior consent and to the submission of the guarantees that they shall not disclose the performed activity.

(3) For the objective assessment of the professional integrity test result, it shall be registered on a mandatory basis by the audio/video means and the communication means in the tester's possession or used by the tester.

(4) When making the professional integrity test, documents supporting a dissimulated activity or the used story, including cover documents, may be used.

(5) Within professional integrity testing activities, transportation means, audio/video recording means, communication means and other technical means to covertly obtain the information, the National Anti-corruption Center and/or the Information and Security Service is/are equipped with may be used. If necessary, when the use of the means the National Anti-corruption Center and/or the Information and Security Service is/are equipped with is ill-suited or impossible, means from other sources may also be used subject to the prior consent of their owner/holder, but avoiding to inform them of the real purpose of using such means.

(6) In order to ensure the exact evidence in the professional integrity test, in case the tested public agents claim or accept the receipt of certain goods, services, privileges or advantages, professional integrity testers may send goods, offer services, grant privileges and other advantages, which shall be indicated in advance in the professional integrity testing plan and coordinated according to Art.11.

Article 13. Report on professional integrity testing results and probative materials

(1) After having made the professional integrity test, the professional integrity tester shall draft a report on testing results which shall include the following information:

a) the testing initiator;

b) the description of the testing activities performed according to the testing plan and other relevant aspects;

c) the behavior and the actions of the public agent subject to testing during the test;

d) the findings on the vulnerabilities and risks determining or which may determine the tested public agent to perpetrate corruption acts, corruption related acts or deeds of corruptive behavior or admit inappropriate influences in exercising their work duties;

e) the conclusions and proposals regarding the positive or negative result of the test.

(2) The report drafted under the conditions of para.(1) shall be concluded so as not to allow the disclosure of the persons involved in making the professional integrity test, the forces, means, sources, methods and activity plans of the National Anti-corruption Center and of the Information and Security Service and other information of limited accessibility.

(3) The original audio/video recordings made during the performance of the integrity test shall be attached to the report on the professional integrity testing results and maintained, on a mandatory basis, along with it. If the mentioned registrations include information classified as state secret, such materials shall be maintained and managed according to the legislation on the state secret protection.

Chapter III
RESULTS AND CONSEQUENCES OF PROFESSIONAL INTEGRITY TESTING

Article 14. Positive result of the professional integrity test

(1) Shall be deemed as positive result of the professional integrity test the situation when the report on the testing results establishes that the tested public agent:

a) proved professional integrity;

b) communicated without delay to the management of the public entity the fact that a inappropriate influence was exercised upon them, that they were transferred goods, offered services, granted privileges or advantages.

.

(2) In case of a positive test result, the institution which made the professional integrity testing shall communicate such result to the management of the public entity in which the tested public agent activates, within 6 months from the testing date, ensuring confidentiality and conspiracy. The result communication shall be made through an official demarche without attaching the report on the professional integrity testing results or the copy of the audio/video recording of the made test.

(3) The leader of the public entity the tested agent is part of shall communicate the testing performance to the public agents within such entity without giving the name of the tested public agent, within 10 business days since the test result communication date.

Article 15. Negative result of the professional integrity test

(1) The situation when the report on the testing results establishes that the public agent did not prove professional integrity shall be deemed to be a negative result of the professional integrity test.

(2) In case of a negative test result, the institution which made the professional integrity testing shall send, within 10 business days since the test date, the report on the results of the professional integrity testing to the entity having functions to establish the disciplinary deviations perpetrated by such public agent, so that the disciplinary measures are applied according to the legal provisions.

(3) The institution which made the professional integrity testing shall provide access to the entity authorized to establish the disciplinary misconducts that were discovered to the audio/video recording of the made professional integrity test and to other materials confirming the negative test result. In order to ensure confidentiality and conspiracy, the image and voice of persons other than the tested public agent, the images of cars, restaurants and other backgrounds, and the sounds of the registered circumstances shall be presented so that they may not be recognized.

(4) Within 30 days from the receipt of the notification, the notified entity shall examine the materials on the negative professional integrity test and immediately inform the institution which made the test of the taken measures and the applied sanctions, providing a copy of such decision.

Article 16. Consequences of the negative result of the professional integrity test

(1) The disciplinary sanctions as a result of the negative result of the professional integrity test, including the dismissal of the tested public agent, shall apply according to the legislation regulating the activity of the public entity where he performs his activity.

(2) The application of the sanction of dismissal shall be mandatory if during the test it was established that the public agent approved the breaches provided under Art.6 para.(2) letter a).

(3) As of the date of receiving the notification regarding the negative result of the professional integrity test and until finalizing the disciplinary procedures, the public agent may not be dismissed based on the resignation application.

(4) When finalizing the disciplinary procedure, the employees of the public entity where the tested public agent activates shall be informed of the main aspects established in the testing process and of the applied sanctions.

(5) The goods received within the professional integrity testing or their equivalent shall be returned /recovered by the tested public agent who received them.

(6) The record on the professional integrity of public agents shall be kept by the National Anti-corruption Center and the Information and Security Service, which shall issue information upon request. The regulation on keeping and using such record shall be approved by the Government.

Article 17. Challenge of applied disciplinary sanctions

The disciplinary sanction applied further to the negative result of the professional integrity test may be challenged by the tested public agent in the administrative dispute court as provided by the legislation.

Article 18. Keeping the recordings made within professional integrity tests

(1) The audio/video recordings made within professional integrity testing are kept:

a) in case of a positive result – until the information of the employees hired in the public entity the public agent subject to testing is part of;

b) in case of a negative result– until the court decision remains final and irrevocable or until the expiry of the term provided for challenging the sanction, if the institution which performed the professional integrity testing holds no information on a possible challenge.

(2) After the expiry of the terms established under para.(1), the audio/video recordings made within the professional integrity test shall be destroyed.

Chapter IV
CONTROL AND FINANCING OF PROFESSIONAL INTEGRITY TESTING

Article 19. Parliamentary control on professional integrity testing activity

(1) The parliamentary control on the professional integrity testing activity is exercised by the National security, defense and public order commission and the Legal, appointment and immunity commission.

(2) The National Anti-corruption Center and the Information and Security Service submit to the each of the commissions mentioned under para.(1), on an annual basis, until January 30, one report on the professional integrity testing activities, to include:

a) the number of made professional integrity tests;

b) the results of professional integrity tests;

c) the number of challenges of applied disciplinary sanctions.

(3) The National security, defense and public order commission and the Legal, appointment and immunity commission may request, within their competence limits, any additional information on the activity of testing the professional integrity of public agents if they deem that the submitted reports are incomplete.

Article 20. Financing the measures to organize and perform professional integrity testing

The measures to organize and perform professional integrity testing and those to record, keep and systematize the information obtained within the testing are financed from the state budget within the limit of available means.

Chapter V
FINAL AND TRANSITORY PROVISIONS

Article 21. Final provisions

This law shall come into force from its publication date and be enforced as follows:

a) in case of the employees of the National Anti-corruption Center and of the competences of the Information and Security Service – from the publication date;

b) in case of the employees of other public entities – after the expiry of the 6-month term from the publication date.

Article 22. Transitory provisions

(1) Within 10 days from the publication hereof, the public entities falling under it shall inform, under signature, public agents of the possibility to apply professional integrity tests. The refusal to sign shall not exonerate public agents from their disciplinary responsibility in case of a negative result of the professional integrity test.

(2) The financial resources necessary for the application hereof are provided in the budget of the National Anti-corruption Center and of the Information and Security Service.

(3) Until the application hereof, the National Anti-corruption Center shall verify public entities regarding the information of public agents according to para.(1), and the manner of keeping gift registers and inappropriate influence denunciation registers, granting them methodological support, if necessary.

(4) The Government of the Republic of Moldova, within 3 months since the enforcement hereof:

a) shall submit to the Parliament proposals on harmonizing the legislation in force with this law;

b) shall make its normative documents compliant hereto and ensure the adoption by the subordinated institutions of the normative documents necessary for the application hereof;

c) shall ensure, from available means, the financial and technical resources necessary for the immediate application hereof.

(5) The National Anti-corruption Center and the Information and Security Service shall submit, within 12 months since the coming into force hereof, to each of the National security, defense and public order commission and the Legal, appointment and immunity commission of the Parliament, one report regarding its implementation.

THE PRESIDENT OF THE PARLIAMENT **Igor CORMAN**

Chişinău, December 23, 2013.

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Annex

PUBLIC ENTITIES
whose employees are subject to professional integrity testing

The Parliament Secretariat

The Administration of the President of the Republic of Moldova

The State Chancellery, including its territorial offices

The authorities of the central specialized public administration (ministries, other central administrative authorities subordinated to the Government and the organizational structures in their competence area)

The Superior Council of Magistracy, the colleges and bodies in its subordination

The Constitutional Court

The Courts at all levels

The Prosecution bodies at all levels

The Information and Security Service

The State Protection and Security Service

The Center for Human Rights

The Court of Accounts

The Central Electoral Commission

The National Integrity Commission

The National Financial Market Commission

The National Bank of Moldova

The National Center for the Protection of Personal Data

The Audiovisual Coordinating Council

The Competition Council

The Council for preventing and eliminating discrimination and ensuring equality

The National Agency for Energetic Regulation

The National Agency for Regulation in Electronic Communications and Information

Technology

The National Social Insurance House

The State Archive Service, including the state central archives

The National Council for Accreditation and Attestation

The Supreme Council for Science and Technological Development

The Civil Service Center

The Special Currier State Service

The local public administration authorities

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