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Council of Europe Access Info Group (AIG)

Comments submitted by the Republic of Moldova on the AIG's Baseline Evaluation Report on the implementation of the Council of Europe Convention on Access to Official Documents (CETS No.205) in respect of the Republic of Moldova

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Regarding the Baseline Evaluation Report on the implementation of the Council of Europe Convention on Access to Official Documents (CETS No. 205) – Republic of Moldova (AIG(2024)09 of 11 June 2024), the Ministry of Justice of the Republic of Moldova submits the following comments.

1. At §§ 11 and 48 of the report, the AIG notes that it has not been provided with information about the content of the regulation on access to environmental information and cannot draw conclusions whether it is in compliance with Article 1(2)(b) of the Convention.

As stated previously, the Regulation on Public Access to Environmental Information, approved by Government Decision no. 1467/2016¹, transposes into national legislation Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information and repealing Council Directive 90/313/EEC². Therefore, the definition of ‘environmental information’ is identical to that provided in Article 2(1) of the aforementioned directive:

1. ‘Environmental information’ shall mean any information in written, visual, aural, electronic or any other material form on:
 - (a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;
 - (b) actors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in (a);
 - (c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in (a) and (b) as well as measures or activities designed to protect those elements;
 - (d) reports on the implementation of environmental legislation;
 - (e) cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in (c); and
 - (f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of the elements of the environment referred to in (a) or, through those elements, by any of the matters referred to in (b) and (c).

We emphasize that if some information is not covered by the scope of the Regulation on Public Access to Environmental Information, it would still be under the scope of the Law on Access to Information of Public Interest.

Therefore, no information is left out from the scope of access to information legislation, which is in full accordance with Article 1(2)(b) of the Convention.

¹ https://www.legis.md/cautare/getResults?doc_id=114423&lang=ro

² <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32003L0004>

2. At § 52 of the report, it is stated that '[t]o the extent that a decision of the Government regulating access to environmental information provides for restrictions of the right of access to official documents containing such information, the requirement of Article 3, paragraph 1, of the Convention that limitations must be set down precisely in law is not met.'

We underline that expressions such as 'set down in law', 'provided by law', 'prescribed by law', 'laid down in law', 'established by law', 'determined by law', 'according to national law', are found not only in Tromsø Convention but in virtually all international treaties of the Council of Europe.

Of particular importance is the fact that such expressions are found in the cornerstone treaty of the Council of Europe – European Convention on Human Rights (e.g. Articles 5-12 of the ECHR).

We bring to the attention of the AIG that, regarding the meaning of these expressions, the European Court of Human Rights summed up its jurisprudence on this matter in *Sanoma Uitgevers B.V. v. the Netherlands*, 2010, as follows:

83. Further, as regards the words "in accordance with the law" and "prescribed by law" which appear in Articles 8 to 11 of the Convention, the Court observes that it has always understood the term "law" in its "substantive" sense, not its "formal" one; it has included both "written law", encompassing enactments of lower ranking statutes and regulatory measures taken by professional regulatory bodies under independent rule-making powers delegated to them by Parliament, and unwritten law. "Law" must be understood to include both statutory law and judge-made "law". In sum, the "law" is the provision in force as the competent courts have interpreted it (*Leyla Şahin v. Turkey* [GC], no. 44774/98, § 88, ECHR 2005-XI, with further references).³

In the light of the settled case-law of the European Court, it is clear that the abovementioned considerations are applicable in relation to all international treaties of the Council of Europe, including the Tromsø Convention.

Therefore, the Regulation on Public Access to Environmental Information, being approved by Government Decision no. 1467/2016, is in full compliance with Article 3(1) of the Tromsø Convention.

Having regard to the foregoing considerations, we submit to the AIG for § 52 to be excluded from the report, in order to ensure a uniform interpretation of all the international treaties of the Council of Europe by all of its various bodies, especially considering the interplay of the Tromsø Convention with Article 10 of the ECHR, in the context of the *Magyar Helsinki Bizottság v. Hungary* case.⁴

3. At §§ 18 and 51 of the report, the AIG encourages the Republic of Moldova to make the harm test and the public interest test contained in Article 9(1) applicable to the special laws and to ensure that the use of absolute exceptions is kept to a minimum in accordance with the Convention.

We emphasize that Article 8(2) of the Law on Access to Information of Public Interest transposes the considerations provided at § 38 of the Explanatory Report of the Convention, according to which 'the "harm test" and the "balancing of interests" may be carried out for each individual case **or by the legislature through the way in which the limitations are formulated.**'

³ <https://hudoc.echr.coe.int/eng#%7B%22appno%22:%5B%2238224/03%22%5D%2C%22itemid%22:%5B%22001-100448%22%5D%7D>

⁴ <https://hudoc.echr.coe.int/eng#%7B%22appno%22:%5B%2218030/11%22%5D%2C%22itemid%22:%5B%22001-167828%22%5D%7D>

We reiterate that, in accordance with § 38 of the Explanatory Report, once the legislature introduces a limitation in a special law regarding access to a special category of information, this limitation has prevalence by virtue of one of the most fundamental legal principles – *lex specialis derogat legi generali*.

Thus, we underline that the application of Article 9(1) in relation to the special laws would make the Law on Access to Information of Public Interest hierarchically superior to other laws, which is contrary to the legal principle of *lex specialis derogat legi generali*, as well as contrary to the settled case-law of the Constitutional Court of the Republic of Moldova, which established the following:

In the hierarchy of normative acts, organic laws are on the same level. They must not contain contradictory legal provisions.

Therefore, no organic law [...] can be placed in conditions of superiority over other organic laws adopted by the Parliament.⁵

Nonetheless, what is of paramount importance is the fact that Article 54(2) and (4) of the Constitution of the Republic of Moldova provide the following:

(2) The exercise of rights and freedoms cannot be subject to other restrictions than those provided by law, which correspond to the unanimously recognized norms of international law and are necessary in the interests of national security, territorial integrity, the economic well-being of the country, public order, in order to prevent mass disturbances and crimes, protecting the rights, freedoms, and dignity of other people, preventing the disclosure of confidential information or guaranteeing the authority and impartiality of justice.

[...]

(4) The restriction must be proportional to the situation that determined it and cannot affect the existence of the right or freedom.

Therefore, the legislature is obliged to ensure that (i) any limitation of access to information of public interest corresponds with the norms of international law, (ii) the particular limitation is necessary for safeguarding one of the legitimate interests provided in Article 54(2) of the Constitution, and (iii) the limitation is fully proportionate with the constitutional right of access to information of public interest enshrined in Article 34 of the Constitution.

If the legislature would introduce a limitation that will not comply with these conditions, it would be unconstitutional. In this case, any person will have the right to raise an exemption of unconstitutionality before the Constitutional Court of the Republic of Moldova, in the context of judicial proceedings relating to an eventual refusal based on the limitation in question.

Having regard to the foregoing considerations, Article 8(2) of the Law on Access to Information of Public Interest is in compliance with Article 3(2) of the Convention.

4. At §§ 37 and 54 of the report, the AIG states that in the absence of information regarding the costs of court proceedings, it reserves its position on the compliance of the law with Article 8(2) of the Convention.

On 18 April 2024 entered into force Law no. 73/2024 on amending Law no. 213/2023 on State

⁵ Judgement of the Constitutional Court no. 9/1999: https://www.legis.md/cautare/getResults?doc_id=5012&lang=ro

Tax⁶, which, *inter alia*, repealed the requirement for paying a fee for the introduction of an administrative litigation action against public authorities.

Therefore, initiation of judicial proceedings against public authorities is free of charge and is in compliance with Article 8(2) of the Convention.

⁶ https://www.legis.md/cautare/getResults?doc_id=142814&lang=ro