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Action against Corruption in the Republic of Moldova

TECHNICAL PAPER

MECHANISMS FOR INTEGRITY CHECKING OF JUDGES DURING APPOINTMENT AND PROMOTION IN THE JUDICIARY IN THE REPUBLIC OF MOLDOVA

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The project "Action against corruption in the Republic of Moldova" aims to address key priorities and needs in the Republic of Moldova which are closely interlinked with the reform processes initiated by the government and their obligations towards implementing international standards against corruption and the related monitoring recommendations. More specifically the Action is designed to deliver assistance in the legislative, policy and institutional reforms by addressing pending recommendations from the Fourth Evaluation Round of the Council of Europe's Group of States against Corruption (GRECO).

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The views and opinions presented herein are those of the main author and should not be taken as to reflect the official position of the Council of Europe and/or the US Department of State.



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ABBREVIATIONS

CCJE	Consultative Council of European Judges
EU	European Union
ECHR	European Court of Human Rights
ECJ	European Court of Justice
ENCJ	European Network of Councils for the Judiciary
GRECO	Group of States against Corruption
ICJ	International Commission of Jurists
IFES	International Foundation for Electoral Systems
LRCM	Legal Resources Centre from Moldova
MPs	Members of Parliament
NIJ	National Institute of Justice of the Republic of Moldova
OSCE	Organization for Security and Co-operation in Europe
ODIHR	OSCE Office for Democratic Institutions and Human Rights
SIS	Security and Intelligence Service of the Republic of Moldova
SCM	Superior Council of Magistracy
SCJ	Supreme Court of Justice
UNODC	United Nations Office on Drugs and Crime
VC	Venice Commission (European Commission for Democracy through Law)



1. EXECUTIVE SUMMARY

The goal of this report is to contribute to corruption prevention in respect of judges and prosecutors in the Republic of Moldova, more specifically through the assessment of the mechanisms for integrity testing of candidates for appointment and promotion in the judiciary (GRECO IV round evaluation – R9).

It is the result of a desk review of reports and legislation and a round of online consultative meetings (15 December 2020 - 16 January 2021) with different justice sector institutions, civil society organisations and investigative journalists.

Based on the interviews and on the data available, the following observations can be made:

The integrity checking mechanisms in appointment and promotion of judges in the Republic of Moldova have been under attention of the Moldovan authorities and international organisations such as the Council of Europe or European Union for several years. Following recommendations of those organisations, some institutional and procedural changes have been introduced, progressively improving the system.

However, public perception of corruption in the Judiciary in the Republic of Moldova is still high and integrity issues in the appointment and promotion of judges are frequently pointed out as one of the key factors contributing to that perception.

As GRECO noted in the Evaluation Report and in the Compliance Reports regarding the Republic of Moldova, the legal and institutional framework of integrity checking of judges still faces challenges that must be addressed, in order to bring the system closer to international standards, and thus promote the independence of - and public trust in - the Judiciary.

After the analysis made, this report concludes that the system of integrity checking in the procedures of appointment and promotion of judges in the Republic of Moldova would benefit from the adoption of these recommendations:

I. **A complete restructuring of the system of appointment of judges should be considered**, fostering transparency, a more efficient management of human and financial resources and a clear separation of integrity and professional skills assessment, following this proposal (or any other based on the same model):
   a. the competition to enter the National Institute of Justice (NIJ), the number of vacancies (including the minimum quota to be filled by candidates with and without professional experience) and the deadline for submitting applications would be publicly announced;
   b. candidates (either with or without professional experience) would have to apply, submitting all the documents currently demanded for the appointment procedure before the Superior Council of Magistracy (SCM);
   c. the Selection Board of the SCM would assess the candidates' integrity (with the participation of the other entities, such as National Integrity Authority (NIA) and National Anti-Corruption Centre (NAC)), rejecting those who present integrity problems;
   d. the candidates who are admitted would then have to undergo exams to enter NIJ, which would be different for candidates with and without previous professional experience (e.g., just a written exam and a public discussion of the CV for the former, written and oral exams for the latter), and also a psychological assessment;
   e. written exams should be corrected anonymously and the final mark of admission would be given after an oral examination in front of a panel whose composition should be as diverse as possible and with members appointed not only by the SCM, but also by other bodies;

f. candidates approved in the exams would be listed according to the final classification and the vacancies announced would be filled by order of classification;
g. the training in NIJ would be theoretical and practical (a difference in the length of the training could exist for candidates with previous professional experience);
h. candidates admitted to NIJ would be subject to the same ethical and disciplinary rules of judges and to the disciplinary power of the SCM;
i. after successful completion of the training, candidates would be formally appointed by the SCM (or by the President of the Republic), and placed in different courts, their placement being made according to personal choice of the candidates, respecting the order of the final classification obtained in NIJ, and without possibility of rejection by the SCM (or the President, if the formal act of appointment would be of his/her competence).

II. **If a complete restructuring of the system of appointment is not undertaken, improvements must be made to the existing system**, and the final decision on the selection, appointment and promotion of judges should be given to the Selection and Career Board of the SCM, without further intervention of the SCM – except in the case of refusal of appointment by the President of the Republic, in which case it would belong to the SCM the competence to decide to reappoint or not the candidate, under reasoned decision.

III. The changes to the Constitution of the Republic of Moldova eliminating the 5-year probation period for judges should be quickly adopted.

IV. A new requirement should be added, establishing that candidate judges should not have been members of a political party for a determined period prior to the application.

V. A new criterion for initial appointment and promotion of judges should be added to the existing: not having expressed or engaged in hate speech, indecent or blunt behaviour, impolite treatment, or expressing partiality or intolerance;

VI. Candidate judges and sitting judges should have to disclose the social media they use and its public (not private) content should be analysed in the selection and promotion procedures, in order to verify if there's been any kind of hate speech, impolite treatment or expression of partiality or intolerance that could hamper the integrity (or public perception of it) of the candidate to appointment or promotion.

VII. The criterion in promotion procedures of considering violations of the European Convention on Human Rights established by the ECtHR should be eliminated.

VIII. The Republic of Moldova should as quickly as possible solve NIA's problem of lack of strategy and understaffing.

IX. The value of assets declared by judges should be either mandatorily assessed by independent accountants, appointed by the *Association of Professional Accountants and Auditors of the Republic of Moldova* (the first declaration and, afterwards, only in the case of declaration of new assets or alleged increase/reduction of the value of those previously declared) or a principle of assessing assets based on their market value should be introduced by law and guidelines to achieve this in practice prepared by NIA.

X. The obligation for candidate judges for initial appointment to present a declaration of assets should be avoided, keeping only the obligation to present a declaration of personal interests.

XI. Polygraph testing should be eliminated from the appointment and promotion procedures.

XII. A psychological council or department should be established in the SCM.

XIII. Professional psychological personnel should have intervention in the admission procedure, to assess the psychological profile of candidates.



XIV. In the promotion of judges, the psychological profile revealed during the exercise of functions should be analysed and taken into consideration.

XV. NIJ's role in integrity checking of candidates for a position of a judge should be reinforced in two ways:

a. By giving NIJ a broader mandate in performing the integrity checks that would entail not only checking the candidate's criminal record and obtaining a certificate of professional integrity records, but also checking other conditions related to integrity of the candidates as stipulated in Article 6 of the Law on the status of judge (i.e. conditions of having an impeccable reputation). A gradual approach should be taken when performing different integrity checks, initially merely consulting different public databases or requesting certificates stating facts contained in particular registers, databases etc. which requires minimum efforts and public resources and at a later stage taking measures which require more efforts and public resources (i.e. polygraph testing, in case authorities decide not to eliminate this tool).;

b. By performing integrity checks at an earlier stage of handling applications of the candidates in order to avoid any unnecessary spending of public resources (in forms of time, money, staff) on activities related to the admission contest and the initial training courses with regard to the candidates who failed to prove their integrity.

XVI. Professional integrity testing should be applied in practice, with sufficient safeguards in place to avoid any unlawful use of testing that would impinge on the judicial independence.

XVII. It is recommended that NIA prepare a strategy, explaining which tasks (i.e. verification of declarations of assets and personal interests) and which categories of public officials (i.e. judges) will be the focus of NIA as a matter of priority. The strategy should be made public in order to ensure transparency with regard to NIA's work and prevent any criticism of its work, especially from the politicians. NIA needs to be ensured with sufficient resources for its functioning.

XVIII. When responding to requests from SCM to issue integrity certificates with regard to candidate judges, it is recommended that NIA perform a more detailed integrity check of the candidates by initiating procedures for checking their compliance with rules on declaration of assets and personal interests, conflicts of interest, restrictions and limitations, incompatibilities.

XIX. In case Security and Intelligence Service of the Republic of Moldova (SIS) is again given competence for carrying out verification of candidate judges and sitting judges in the selection and promotion procedures, certain safeguards should be put in place (i.e. background checks should be performed on the basis of criteria that can be objectively assessed, a right to have access to information granted, a right to access the results of such control and a right to appeal to an independent body in case being rejected due to the results of the control granted).

XX. Annexes to the regulations on the criteria for selection, performance evaluation and transfer of judges should be updated in order to list all integrity verification tools applied in practice.

XXI. Making information on notifications with regard to suspected disciplinary offences or misconduct of a judge which were not admitted by the Disciplinary Board or did not result in any disciplinary sanctioning available to the Selection and Performance Evaluation Boards for the purpose of integrity check, together with information on how these notifications were processed.

XXII. A mechanism should be put in place, allowing the reconsideration of the promotion if a disciplinary conviction that has not yet become final at the moment of promotion is confirmed.

XXIII. The Judge's Ethics Committee should be given additional competence, namely:

a. receiving and handling reports made by judges on misconduct by other judges;

b. examining non-serious violations, i.e. violations that normally would not be dealt with by the disciplinary bodies (would not be admitted by the Admissibility Board), however, need to be addressed.

XXIV. SCM should explore ways on how to improve the existing channels available to SCM and its boards for making additional inquiries in respect of previous professional work and reputation of the candidates coming from outside the judiciary, and based on its findings, improve either the existing legal framework or develop practical measures.

XXV. SCM should develop a strict policy of responding to any direct notification on suspected misconduct of a judge or other way of obtaining such information.

XXVI. Media reports (including those resulting from journalistic investigations) on integrity risks pertaining to judges (and the judiciary at large) should be appropriately identified and reviewed by the judiciary in order to make appropriate use of them. This should be done under the control of SCM. A strategy for handling such media reports would be useful to be prepared, guaranteeing the media reports are reviewed in practice, and be included in the existing public communication strategy.

XXVII. It should be prescribed by law that reasons for non-selection of a particular candidate are presented in a decision on non-selection of the candidate.

XXVIII. In order to establish new or improve the existing communication channels between SCM and the media as well as within the judiciary, the existing Communication strategy of the Superior Council of Magistracy of the Republic of Moldova should be re-examined, appropriately updated and used in practice – for this purpose the Guide on Communication with the media and the public for courts and prosecution authorities, prepared by CEPEJ could be of good use.

XXIX. SCM should, together with NIJ: 1) develop trainings to ensure appropriate and uniform understanding and application of criteria for selection and performance evaluation as well as of procedural provisions for selection and performance evaluation; and 2) ensure that all those involved in selection and performance evaluation procedures are appropriately trained.

XXX. To ensure that its members work with integrity to achieve the SCM's mandate and improve the public trust in the judiciary SCM should perform a corruption risk assessment to identify corruption risks pertaining to SCM's activities and develop efficient, cost-effective strategies to mitigate risks identified, making the strategies also visible to the public.

It must be stressed that the success of the reforms depends mostly on the practical application of the laws. Besides the adoption of the above-mentioned recommendations, additional efforts must be put in practice by the SCM and the Moldovan authorities involved to ensure a real promotion of integrity in the selection and promotion of judges. That can only be achieved through loyal institutional cooperation and responsible exercise of the constitutional competences of each of those bodies.

In that regard, future missions to assess the effective implementation on the ground of the changes proposed in case of their adoption are essential.



2. INTRODUCTION

Scope of the report and methodology

The Action against Corruption in the Republic of Moldova is a country specific intervention funded by the Bureau of International Narcotics and Law Enforcement Affairs (INL) of the US Department of State and implemented by the Council of Europe, and is designed to deliver assistance in the legislative, policy and institutional reforms by addressing pending recommendations from the Fourth Evaluation Round of the Council of Europe's Group of States against Corruption (GRECO).

Its purpose is to enhance capacities of the institutions to implement GRECO recommendations. The project actions provide direct support to the authorities to address the shortcomings identified in the GRECO 4th round evaluation, thus aligning the measures of the Moldovan authorities with the international standards and good practices for prevention and fight against corruption.

This report focuses on the *"Intermediate Outcome 1: Corruption prevention in respect of judges and prosecutors improved"*, more specifically in its point 1.2 – *"Introduced mechanisms for integrity testing of candidates for appointment and promotion in the judiciary (GRECO IV round evaluation – R9)"*.

The report is the result of a desk review of the legislative and regulatory framework of the Republic of Moldova (referred to in the following chapters) and of consultative meetings with justice sector institutions[1], civil society organisations and investigative journalists.

[1] Scoping meetings were held during 15 December 2020 – 26 January 2021 with representatives of the following justice sector institutions: Ministry of Justice, Superior Council of Magistracy (SCM), National Integrity Authority, National Institute of Justice, National Anticorruption Centre, SCM Board on Selection and Career of Judges; SCM Board on Performance Evaluation; and civil society organizations and journalists.

3. ANALYSIS

3.1 Overview of the Regulatory Framework and State of Play

Selection and promotion of judges in the Republic of Moldova is regulated in the following laws and bylaws:

- Constitution of the Republic of Moldova (adopted on 27th July 1994);
- Law on the organisation of the judiciary (Law No. 514 of July 1995);
- Law on the status of judge (Law No. 544 of 20th July 1995);
- Law on the selection, performance evaluation and career of judges (Law No. 154 of 5th July 201);
- Law on the Superior Council of Magistracy (Law No. 947-XIII of 19th July 1996);
- Law on the National Institute of Justice (Law No. 152 of 8th June 2006);
- Several regulations adopted by the Superior Council of Magistracy with subsequent amendments, namely Regulation on the criteria for the selection, promotion and transfer of judges (Decision No. 211/8 on 5th March 2013), Regulation on the criteria, indicators and the procedure for evaluating the performance of judges (Decision No. 212/8 on 5th March 2013), Regulation on the organisation and conduct of the competition for the filling of the functions of judge, vice-president and president of the court of justice (Decision No. 612/29 on 20th December 2018); and
- Several regulations adopted by the National Institute of Justice, namely Regulation for organising and conducting the admission contest for the initial training of the candidates for the positions of judge and prosecutor (NIJ Council Decision No. 5/2 of 26th May 2017, amended by Decision no. 8/1 of 30th August 2017, Decision No. 7/1 of 8th June 2018 and Decision No. 5/2 of 21st June 2019), Regulation on initial training and graduation of the candidates for the positions of judge and prosecutor (NIJ Council Decision No. 2/4 of 25th February 2021) and Regulation on the organisation and conduct of the examination for candidates applying for the position of judge or prosecutor on the basis of seniority in employment (NIJ Council Decision No. 2/5 of 25th February 2021).

Additional laws and bylaws that regulate some measures relevant for checking of judicial integrity in the selection and promotion procedures are:

- Law on integrity (Law No. 82 of 25th May 2017) which regulates professional integrity testing and issuing of integrity records by the National Anticorruption Centre, the control of assets and personal interests, control of conflicts of interests, incompatibilities, restrictions and limitation as well as issuing of integrity certificates by the National Integrity Authority;
- Law on institutional integrity assessment (Law No. 325 of 23rd December 2013) which regulates random professional integrity testing as part of an institutional integrity assessment;
- Law on the National Integrity Authority (Law No. 132 of 17th June 2016) which in detail regulates the procedure for the control of assets and personal interests, control of conflicts of interests, incompatibilities, restrictions and limitation as well as issuing of integrity certificates;
- Law on the declaration of assets and personal interests (Law No. 133 of 17th June 2016,) which stipulates persons obliged to submit declarations of assets and personal interests, prescribes the content of the declaration and the supervision of the compliance with obligations pertaining to the declaration regime;
- Law on verification of holders of and candidates for public offices (Law No. 271-XVI of 18th December 2008);
- Law on polygraph testing (Law No. 269 of 12th December 2008) which prescribes polygraph testing as mandatory for candidates who participate in a competition for appointment to a position of a judge);

- Regulation on keeping and use of the certificate of professional integrity record of the public servants (Regulation No. 767 of 19th September 2014);
- Regulation on the issuing of integrity certificates (Regulation No. 90/653/07 of 9th October 2018).

There are several state authorities involved in integrity checking of judges during selection and promotion procedures, namely the Superior Council of Magistracy (hereinafter: SCM) with its professional boards, the National Anticorruption Centre (hereinafter: NAC), the National Integrity Authority (hereinafter: NIA) and the National Institute of Justice (hereinafter: NIJ).

3.1.1 Appointment of judges and basic requirements for appointment

Judges are appointed by the President of the Republic of Moldova upon proposal of SCM and following an open competition organized by the Board on selection and career of judges. Judges are first appointed for a period of five years. After expiry of this first period, they are reappointed by the SCM for life tenure until the retirement age (Article 116, Constitution) and only if the judge carried out his/her activity properly during the probation period. The President of the Republic may reject once the candidate proposed by SCM, but only if irrefutable evidence is found confirming the candidate's incompatibility with this position or him/her violating the legislation or procedure for his/her selection or promotion. The refusal has to be reasoned and presented within 30 days of the proposal, a period that can be extended by 15 days in case additional investigation is necessary. Upon a repeated proposal of SCM, the President of the Republic has to appoint the person proposed (Article 11, Law on the status of judge). **Court presidents** are appointed by the President of the Republic, upon proposal by SCM, for a term of four years and can hold two consecutive mandates at most (Article 16, para. 3, Law on the organisation of the judiciary). **Judges of the Supreme Court of Justice (SCJ)** are appointed by the Parliament on the proposal of SCM (Article 11, para. 2, Law on the status of judge). The Parliament can also reject once the candidate proposed by SCM for similar reasons as the President of the Republic regarding other judges.[2]

Basic requirements for appointment at a first instance court include Moldovan citizenship, domicile in the country, command of the language, legal capacity, an impeccable reputation, a clean criminal record, fulfilling the medical requirements for the function, holding a bachelor's degree and a master's degree in law or its equivalent, having a minimum of five years of service in a legal profession or having graduated at the National Institute of Justice after completing an initial training of candidates for the position of judge and passing a polygraph test (Article 6, Law on the status of judge).

A candidate fails to have an impeccable reputation and thus cannot apply for a position of a judge when s/he: 1) has a criminal record, including extinguished, or has been absolved of criminal liability by an act of amnesty or pardon; 2) has been dismissed from law enforcement for compromising reasons or has been released, for the same reasons, from functions in a legal profession; 3) behaves or carries out an activity incompatible with the rules of the Code of Ethics for Judges; 4) was disciplinarily sanctioned for non-compliance with the provisions of Article 7, para. 2 of Law No. 325 of 23rd December 2013 on institutional integrity assessment; or 5) is prohibited from holding a public office or function, based on the decision of the National Integrity Authority (Article 6, para. 4, Law on the status of judge).

Depending on the length of work experience in legal professions, candidates have to either undergo initial training courses and take the graduation exam or merely take an exam before the Commission for graduation examination of NIJ.

[2] Amendments to the Constitution of the Republic of Moldova (Article 116 para (2)) were submitted to the Parliament providing for the abolishing the 5-year ban period. If adopted by the Parliament, judges of courts of law shall be appointed, according to the law, until the age limit has been reached, by the President of the Republic of Moldova, at the proposal of the Superior Council of Magistracy. The President of the Republic of Moldova will be able to reject only once the nomination proposed by the Superior Council of Magistracy.

Candidates who have two years of work experience in a legal profession have to undergo and successfully complete initial training courses with a duration of 18 months organised by NIJ in order to participate in competitions for filling of vacant positions of a judge. Candidates are admitted to the initial training courses after successfully taking part in admission contest. Conditions for entering the admission contest are laid down in Regulation for organising and conducting the admission contest for the initial training of the candidates for the positions of judge and prosecutor – eligible are only those candidates that meet the conditions for a position of a judge laid down in Article 6 of the Law on the status of judge (among others: having no criminal record, enjoying an impeccable reputation, not having any negative results of professional integrity tests registered in the professional integrity record in the last five years). Annexed to the application to enter the admission contest the candidate has to submit also a certificate of detailed criminal record and a reference from work or studies. If the candidate has submitted all relevant documents in his/her application, s/he enters the admission contest which is held before the Commission on admission exams and consists of a written and an oral part. The results of the admission contest are sent to the Council of NIJ for approval. NAC is then requested by NIJ to issue certificates of professional integrity records with regard to candidates in order to verify whether any negative results of professional integrity tests as per the Law on institutional integrity assessment have been entered in the personal integrity records of the candidates in the last 5 years (Article 72). In case so, the candidate is excluded from the list of candidates for the initial training courses approved by the Council of NIJ (Article 74). After completion of the initial training courses, the candidate that has passed a graduation exam before the Commission for graduation examination of NIJ is issued a certificate and is registered in the Register of participants in the competition for filling judicial vacancies. The graduate is then obliged for 5 years to participate in competitions for filling the vacant positions of a judge (Articles 13 - 15, 26 - 27, Law No. 152 on the National Institute of Justice, and Articles 5 - 7 and 72 - 74 of the Regulation of NIJ on admission contest).

Candidates with a minimum of five years of service in a legal profession have to take an examination before NIJ's Commission for graduation examination in order to participate in competitions organised by SCM for filling of vacant positions of a judge. Only those candidates that meet the conditions for a position of a judge laid down in the Law on the status of judge (Article 6) are eligible for admission to the exam. The candidates have to submit their application with a copy of their employment record book. The Commission for graduation examination verifies whether the candidates meet the condition of having more than five years of service in a legal profession and then approves a list of candidates admitted to the exam. After successfully taking the exam, the candidate is issued a certificate, which is valid for a period of 5 years (Articles 6, para. 3 of the Law on status of judge in relation to Article 4, para. 1d) of the Law on the National Institute of Justice).

Additional conditions of working experience are required for appointment to higher positions within the judiciary, according to Law on the status of judge (Article 6, para. 5) and Regulation on the criteria for the selection, promotion and transfer of judges (Article 11), namely six years of experience as a judge for the position of a court of appeal judge or 10 years of experience as a judge for the position to the Supreme Court of Justice.

Recruitment to any position of judge/court president occurs on the basis of a competition organised by SCM according to the Regulation on the organisation and conduct of the competition for the fulfilment of the position of judge, vice-president and president of the court of justice. Candidates for appointment to a position of a judge must fulfil the requirements laid down in Article 6 of the Law on the status of judge, have passed the examination before the Commission for graduation examination of NIJ, have passed the selection procedure before the Selection Board of SCM and have been registered in the Register of participants in the competitions for filling judicial vacancies prior to the competition being announced. The register is maintained by the secretariat of SCM (Article 6^2, Law on the status of judge). Candidates that are registered as participants in the competition have to notify the secretariat of SCM about their participation or



refusal to participate in the competition and must submit their application with updated curriculum vitae, a personal motivation letter and documents attesting fulfilment of the criteria, including their declaration of assets and personal interests to prove lack of any conflict of interest of the candidate, their criminal record and a reference from work or studies (Article 2.1, Regulation on the organisation and conduct of the competition for the filling of the functions of judge, vice-president and president of the court of justice). The candidate must also present his/her written consent to undergo a polygraph testing (Article 9, Law on the status of judge).

After the deadline for submitting application expires, the competition takes place during the SCM's Plenary session at which a rapporteur member of SCM presents information on verification of a candidate's impeccable reputation. The verification is made by obtaining data from the competent authorities on the candidate's compliance with the law. **SCM is entitled to use all legal means for verifying the reputation of the candidate** (Articles 3.14 and 3.16 of the Regulation on the organisation and conduct of the competition for the filling of the functions of judge, vice-president and president of the court of justice). The candidate attends the SCM's Plenary session to present his/her personal motivation; failure to do so is a ground for exclusion from the competition (Articles 3.17 and 3.18). SCM assesses the candidate's personal motivation as well as his/her suitability for the position of a judge: reasons which led the candidate to participate in the competition; the determination of the position s/he has applied for; the firmness in the interview and the reputation of the candidate in the context of the law. In assessing the candidate his/her merits, professional, personal and social competences will be taken into account (Articles 3.19 and 3.20).

A candidate in the competition for filling a position of a judge for the first time may be awarded a maximum score of 100 points, with not less than 50% of score obtained in the examination at the NIJ, not more than 30% of the score awarded by the Selection Board in the selection procedure and not more than 20% of the score awarded by SCM. In the competition for filling a position of a higher court judge a score of not less than 50% is awarded on the basis of the performance evaluation (Articles 3.19, 3.20 and 3.32).

SCM selects a candidate for appointment as a judge based on the decision of the Selection Board. In the case of a competition for filling a position of a higher court judge, the Selection Board takes into account a decision of the Judges' Performance Evaluation Board on performance evaluation of a candidate. The SCM's decision on the selection must be reasoned (Article 19, Law on the Superior Council of Magistracy). SCM may refuse to make the proposal for the appointment of a candidate if it finds that s/he does not comply with the conditions laid down in the law; the refusal must be reasoned.

The judges are then appointed from among the selected candidates by the President of the Republic of Moldova or the Parliament upon the proposal of SCM.

3.1.2 Selection procedure

Candidates are selected by the Judges' Selection and Career Board (hereinafter the Selection Board) of SCM. The Selection Board is composed of seven members, among whom four are judges from all levels of courts (two judges from the Supreme Court, one from a court of appeal and one from a first instance court) elected by the General Assembly of Judges and three are representatives of civil society, selected by SCM following a public competition. The term of office of the members of the Selection Board is four years and members cannot be elected or appointed for two consecutive terms (Articles 3 and 4, Law on the selection, performance evaluation and career of judges).

Upon receiving the applications with the required documents, the Selection Board requests NIA to issue integrity certificates and the National Anticorruption Centre to issue certificates of professional integrity record (Article 9, para. 8, Law on the status of judge and Article 8, Regulation on the criteria for the selection, promotion and transfer of judges).

The Selection Board assesses and ranks the candidates on the basis of the written materials submitted in the application, the results of the exam taken before the Commission for graduation examination of NIJ (for beginning of career posts) or the results of judges' performance evaluations (for higher posts within the judiciary) and an interview. Candidates to be selected for appointment to a position of a judge for the first time can be awarded a maximum score of 85 points while candidates for promotion, appointment to the position of a court president or vice-president or for transfer to a court of the same level or a lower court can be awarded a maximum of 80 points.

The selection of candidates for the position of a judge/promotion to a position of a higher court judge is carried out on the basis of objective criteria, taking into account professional training, integrity, ability and efficiency of the candidates (Article 10 of the Law on the status of judge). The selection criteria include the level of knowledge and professional skills, the ability to apply knowledge into practice, the length of experience as a judge or in other functions, qualitative and quantitative indicators of work undertaken as a judge or in other legal professions, ethical standards and teaching and scientific activity (Article 2 of the Law on the selection, performance evaluation and career of judges in relation to Article 3 of the Regulation on the criteria for the selection, promotion and transfer of judges).

Based on Regulation on the criteria for the selection, promotion and transfer of judges compliance with mandatory conditions laid down in the Law on the status of judge (Article 6[3]) is assessed according to the following criteria: 1) seniority in legal specialist functions; 2) type of the activity in the legal specialised functions; 3) teaching and scientific activity, scientific degree, research, thematic analyses; 4) personality characteristics and skills appropriate to the function of a judge (integrity, fairness, ability to manage stressful situations, analytical capacity, etc.); and 5) other extrajudicial activities. Criterion under 4) is assessed on the basis of references from work or studies, from well-known personalities in the country or abroad and via an interview held with the candidate (Article 10, para. 1, indent d)). The candidate can be awarded with a maximum of 2 points for fulfilling this criterion.

To be promoted, seniority of a judge, lack of disciplinary sanctions and evaluation of judge's performance by the Evaluation Board is to be taken into account. Criteria applicable for promotion of a candidate are the following: 1) seniority as a judge; 2) ability to perform required duties; 3) judge's quality, efficiency and integrity; 4) teaching and scientific activity, scientific degree, research, thematic analyses, participation in the elaboration of draft normative acts, comments on normative acts, participation in national or international working groups as an expert or consultant; and 5) other extrajudicial activities. The criterion under 3) is assessed by the Evaluation Board in the evaluation procedure (Articles 11 and 12).

Meetings of the Selection Board are public and audio recorded, and decisions are taken by open majority vote. Decisions are motivated, with the possibility for members of the Selection Board to issue dissenting opinions. Decisions are submitted to the SCM Plenum for examination. The decisions with reasoning are published on the SCM's website within five days of their adoption and are subject to appeal before the SCM Plenum within ten days of their adoption.

3.1.3 Performance evaluation and promotion procedure

Judges are subject to performance evaluation every three years, as well as extraordinary evaluation in certain cases, such as an insufficient performance, transfer or promotion. The evaluation is carried out by the Judges' Performance Evaluation Board (hereinafter the Evaluation Board) of SCM. The Evaluation Board is composed of seven members, among whom five are judges from all levels of courts (two judges from the Supreme Court, two judges from courts of

[3] Moldovan citizenship, domicile in the country, command of the language, legal capacity, an impeccable reputation, a clean criminal record, fulfilling the medical requirements for the function, holding a bachelor's degree and a master's degree in law or its equivalent, having a minimum of five years of service in a legal profession or having graduated at the National Institute of Justice after completing an initial training of candidates for the position of judge.

appeal and one judge from a first instance court) elected by the General Assembly of Judges and two are representatives of civil society selected by SCM following a public competition. The term of office of the members of the Evaluation Board is four years and members cannot be elected or appointed for two consecutive terms (Articles 15 and 16, Law on the selection, performance evaluation and career of judges).

Detailed evaluation criteria are stipulated in the Regulation on the criteria, indicators and the procedure for evaluating the performance of judges and evaluate the efficiency of the judge's activity (criteria: case resolution rate, compliance with reasonable time limits in the process of justice, compliance with the time limit for drafting the decision, compliance with other duties as per the law, knowledge and use of information technologies), the quality of the judge's activity (criteria: percentage of decisions/termination retained from the contested ones, number and percentage of cassation decisions from the examined ones as well as the confirmed ones, clarity and quality of reasoning of the decision, way of organising professional activity, professional training) and the professional integrity of the judge (criteria: respect for professional ethics, professional reputation, cases of disciplinary misconduct, violations of the European Convention on Human Rights established by the ECtHR).

The results of the evaluation are used for promotion – making up 40 % of a candidate's final grade –, professional training, administration of courts and for granting judges' qualification degrees. In case a judge's performance is assessed as 'insufficient', an extraordinary evaluation is conducted. A judge's performance being assessed as 'insufficient' during two consecutive extraordinary evaluation constitutes a ground for initiation of dismissal proceedings by SCM.

3.1.4 Role of the National Integrity Authority

The Law on National Integrity Authority stipulates that NIA is an independent public authority competent for exercising control of assets and personal interests of public officials, monitoring compliance of public officials with rules on conflicts of interest, incompatibilities, restrictions and limitations as well as for sanctioning any violation of obligations with regard to provisions on assets and personal interest, conflicts of interest, incompatibilities and restrictions. As public officials, judges fall under the competence of NIA in this respect.

3.1.4.1 Declarations of assets and personal interests

In respect of declarations of assets and private interests, NIA collects, stores and publishes them on its website, controls their timely submission and completeness of data, verifies declarations in order to identify any substantial and unjustified divergences between income earned during the performance of official duties and property acquired in that period, establishes violations of rules on assets and personal interests and maintains an electronic Register of subjects of declarations of assets and personal interests (Article 7, para. 1, Law on National Integrity Authority). In case that the public official failed or refused to submit the declaration of assets and personal interests upon the NIA's request, NIA is obliged to request the management of a public entity or an authority responsible for appointment of a public official to hold the public official accountable for a disciplinary violation or, if case be, to order termination of his/her mandate, employment or service (Article 27, para. 8, Law on National Integrity Authority).

NIA also monitors compliance of public officials with rules on conflicts of interest, incompatibilities, restrictions and limitations, i.e. establishes violations of the provisions, requests the management of a public entity to impose a disciplinary sanction on the public official for violating the rules or to terminate his/her mandate, employment or service, requests the management of a public entity to suspend the public official while the NIA's decision which provides ground for termination of a mandate, employment or service is reviewed by court, imposes sanctions for violations under its jurisdiction and maintains the State Register of persons prohibited to hold public office or function (Article 7, para. 2, Law on National Integrity Authority). As per Regulation on the issue of integrity certificate this is a register of natural persons in respect of which a three-year prohibition of holding a public office or function has been



applied based on NIA's final findings confirming the existence of unjustified wealth, incompatibility or conflict of interest.

Based on Law on integrity NIA performs the following integrity control measures in the public sector: control of declarations of assets and personal interests and control of compliance with rules on conflicts of interest, incompatibilities, restrictions and limitations (Article 25, para. 4). To facilitate NIA's performance of integrity control measures, a head of a public entity is obliged to ensure transmission of declarations of assets and personal interests to NIA of public officials from the public entity s/he leads, to inform NIA about the public officials who failed to submit the declarations (Article 13, para. 2, indent d)), to notify NIA about a public official who failed to solve incompatibility situation within one month upon taking up his/her mandate, labour or duty relations or who failed to observe publicity limitations in the performed professional activity (Article 12, para. 3, indent d) and e)). When a breach of rules on incompatibilities, restrictions in hierarchy and limitations of publicity has been established in relation to a particular public official, the head of the public entity is obliged to initiate the disciplinary procedure against him/her and, upon NIA's request, terminate his/her mandate, labour or duty relations (Article 12, para. 3, indent f)).

Candidates for vacant positions of judges are also obliged to submit their declarations of assets and personal interests as part of the application for the competition (Article 9(6), Law on the status of judge).

Failure to comply with provisions of the Law on the status of judge on incompatibilities with the judicial office (Article 8, para. 1), on avoidance of conflicts of interest when in the process of decision-making, on obligation to submit declaration of assets and personal interests (Article 15, para. 1) or when a final decision on confiscation of unjustified assets by a court is issued constitutes ground for dismissal of the judge from office (see provisions of Article 25, para. 1)g^1, para. 1)g^2, para. 1)g^3, para. 1)g^4, para. 1)i).

3.1.4.2 Issuing of integrity certificates

NIA is competent for issuing integrity certificates with regard to persons who are candidates in recruitment procedures in the public sector. These certificates are issued upon requests of heads of public entities where recruitment procedures are carried out or natural persons who are applying for holding of eligible public position. The integrity certificate includes information on findings with regard to established unjustified assets, violations of obligations as regards conflicts of interest, restrictions, limitations and incompatibilities as well as prohibitions to hold public office or a position of public dignity, based on final decisions adopted with regard to a particular person in the last three years by NIA or by courts (Article 7, para. 3)i, Law on National integrity authority in relation to Article 31^1, Law on integrity).

In the selection and promotion procedures of judges NIA is requested to issue integrity certificates by the SCM's Selection Board for all candidates for vacant positions of a judge (Article 9, para. 8, Law on the status of judge).

3.1.5 Role of the National Anticorruption Centre

3.1.5.1 Professional integrity testing and issuing certificates of professional integrity records

Based on the Law on integrity, NAC is competent for verifying the efficiency of building the institutional and professional integrity climate in the public sector (Article 25, para. 1 and 3), including the justice sector. In that respect NAC is competent to apply integrity control measures which are also relevant for integrity checking of judges during selection and promotion procedures, namely professional integrity testing which is part of the institutional integrity assessment and issuing certificates of professional integrity records of the public officials (Article 25, para. 3b)).

The Law on institutional integrity assessment further details professional integrity testing and professional integrity records. Professional integrity testing is a practical method used as part of

the process of institutional integrity assessment of the public entity with the objective to identify corruption risks within the public entity and thus determine the level in which the institutional integrity climate is affected. The professional integrity testing is initiated based on a reasoned decision of the director of NAC which indicates reasons for initiating professional integrity testing within the public entity, corruption risks identified within the public entity, the objectives of the professional integrity testing of public officials within the entity, categories of public officials within the public entity selected for testing, the sample of public officials which shall be tested, the possibility to use different means for obtaining information in a concealed way and other relevant information. The decision is to be authorised by the competent court. The decision and authorisation are confidential until NAC submits its institutional integrity assessment report to the public entity in question. Based on the reasoned decision authorised by the court a professional integrity testing plan is prepared which details how the professional integrity testing will be carried out, without specifying identity of any particular public official that will be tested. The deadline for conducting professional integrity testing is six months, with a possibility to extend it for another six months based on the court's decision.

At first an initial desk review is done to identify potential corruption risks at the institutional level, followed by the professional integrity testing to identify whether any potential risks have actually materialised. For the purpose of professional integrity testing public officials that will be tested are selected randomly, depending on the identified corruption risks within the public entity. The latter are identified on the basis of integrity incidents committed by the public officials, media reports, complaints of the citizens etc. (Article 29, Law on integrity).

The results of the professional integrity test may be either positive, negative or inconclusive. The negative result means that the public official has not observed the obligations laid down in Article 7, para. 2 of the Law on institutional integrity assessment, namely the obligation to not to accept corruption manifestation, to immediately denounce any attempt to be involved in corruption, to immediately denounce undue influences, declare gifts and conflicts of interest, to be familiar with and observe duties stipulated in the national and sector anticorruption policies, to observe the specific professional integrity requirements for the activity of public officials within public entities, which they were informed about and to perform measures set forth in the integrity plan of the public entity (Article 17). In case of the negative result, the public official may be subject only to disciplinary liability, depending on the severity of established deviations (Articles 11 and 21). The negative result of the professional integrity test as well as disciplinary sanctions applied on its basis are subject to judicial review (Article 22). In case that a disciplinary sanction is applied to a judge based on the negative result of the professional integrity test, it may be challenged as per provisions of the Law on Judges' Disciplinary Liability (Article 22, para. 3, Law on institutional integrity assessment).

The results and materials of professional integrity testing may be used only in civil proceedings as per provisions of civil procedure law. However, they are not to be used as evidence in criminal or misdemeanour proceedings initiated against the tested public official unless unlawful activities of the tested public official or a third person are detected without being generated by the application of professional integrity testing (Article 11, Law on institutional integrity assessment).

On the basis of verification of the results of the professional integrity test by the court these are entered in professional integrity records of public officials. The records are necessary for employment process within the public sector. The results are kept in the record either for five years (in case of violation of obligation to not to admit corruption manifestation) or for one year (in case of violation of obligation to immediately denounce any attempt to be involved in corruption, to immediately denounce undue influences, declare gifts and conflicts of interest) (Article 21).

NAC keeps these records and provides certificates of professional integrity records upon request to employers based on Government Regulation on keeping and use of the certificate of



professional integrity record of the public servants[4]. These certificates merely confirm whether a public official has been subject to professional integrity testing in the past or not and provide information on whether the result of the test was positive or negative.

The full report on institutional integrity assessment, including information on the results of professional integrity testing is then prepared and sent to the head of the public entity (in case of courts the results would be sent to the president of the court as the head of the court and in case of negative result of professional integrity testing to the Superior Council of Magistracy). The depersonalised version of the report is made publicly available on the NAC's website (Article 18).

After the report is reviewed by the public entity and if the report determines corruption risks within that public entity, an integrity plan needs to be adopted by the public entity within 30 days from the submission of the report to the public entity and is to be carried out within 60 days after its adoption (Article 19). In case of the negative result of the professional integrity testing the public entity has to inform NAC about the undertaken measures and applied sanctions. In case the integrity plan is not implemented, NAC may propose the head of the public entity (i.e. the president of the court) to be dismissed.

On the basis of information obtained from NAC no institutional integrity assessments with personal integrity testing have been conducted with regard to courts and judges so far although such assessments were introduced in 2014. However, at that time the Law on professional integrity testing which was adopted in 2013 envisaged not only random professional integrity testing but also targeted professional integrity testing of public officials as well as professional integrity testing initiated at a request of a manager of a public entity. The application of this law to ordinary and constitutional court judges was challenged before the Constitutional Court in June 2014, as it was alleged that it would undermine judicial independence since the control and evaluation of the integrity of judges was attributed to two bodies that were controlled by the executive branch of power. An amicus curiae brief[5] issued by the Venice Commission in December 2014 confirmed these concerns. On 16 April 2015, the Constitutional Court[6] found some provisions of this law unconstitutional and consequently they were not applied to judges. In 2016, Law on institutional integrity assessment was adopted by which the first two types of integrity testing were abandoned, regulating only the random professional integrity testing. The new system of institutional assessments based on the law from 2016 has been put in place in May 2018. Per year, two institutional integrity assessments with professional integrity testing are performed by NAC. Though NAC did not perform any institutional integrity assessments in regard to courts/judges the institution communicated plans to use this mechanism in the near future.

The Law on the status of judge stipulates that a person who has been disciplinary sanctioned for not complying with the obligations laid down in Article 7, para. 2 of the Law on institutional integrity assessment is considered as lacking an impeccable reputation and thus cannot apply for a position of a judge. Thus, in the selection and promotion procedures of judges, NAC is requested by the SCM's Selection Board to issue certificates of professional integrity records for all candidates for vacant positions of judges (Article 9, para. 8 of Law on the status of judge). 203 such certificates were issued in 2019 with regard to judges and other court staff. Since no professional integrity testing with regard to judges and court members was conducted in the past all these certificates merely confirmed the fact that no testing was conducted in relation to respective person.

As per Article 25, para. 1)g[5], Law on the status of judge the negative result of the professional integrity test is a ground for a judge's dismissal from office pursuant to the decision of the Disciplinary Board of SCM.

[4] Republic of Moldova, Regulation on keeping and use of the certificate of professional integrity record of the public servants, approved by Government Decision No 767 as of 19.09.2014
[5] Accessible on the following website: https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2014)039-e
[6] Republic of Moldova, Constitutional Court Decision No 7 as of 16.04.2015 on the constitutional control of several provisions of the Law on Professional integrity testing No 325 as of 23.12.2013

3.1.5.2 Polygraph testing

Another competence of NAC with regard to integrity checking of judges during selection and promotion procedures is stipulated in Law on polygraph testing. NAC performs polygraph testing in regard to all persons participating in the competition for appointment as judges, upon request of SCM. For this purpose, the Cooperation Agreement between NAC and SCM has been signed. Taking the polygraph test is mandatory for persons participating in the competition for appointment as judges and candidates need to present their written consent on taking the polygraph test upon submitting their application for the competition (Article 9, para. 7, Law on the status of judge).

3.1.6. Role of the Security and Information Service and the Law on Verification of Public Office Holders and Candidates

The integrity of candidates to judicial positions used to be checked by the Security and Information Service (hereinafter: SIS) according to the Law on Verification of Public Office Holders and Candidates[7] until 2017. The aim of the verification was to prevent, identify and exclude certain risk factors, such as conflicts of interest. The verification was conducted with the written consent of the candidate and it entailed completion by the candidate of a written questionnaire and the gathering by SIS of relevant information held by other public authorities or private entities, such as previous employers and banks. In case SIS concluded that a candidate's appointment had been incompatible with the interests of the public office, s/he could not be appointed. This candidate could have filed a complaint before the court if s/he thought that SIS had exceeded its duties and his/her rights were violated. In 2017 the Constitutional Court declared[8] these provisions in regard to judges and candidate judges to be unconstitutional as they infringed upon, among other, independence and irremovability of judges. The Constitutional Court noted that although the SIS's director was appointed and dismissed by Parliament, which meant that SIS was under the control of another branch of power, the opinion of SIS with regard to the verified person was nevertheless a *sine qua non* condition for accessing the judicial office, for being appointed until reaching the age limit as well as for judge's career (maintaining the position, being promoted or transferred). Furthermore, the Constitutional Court pointed out that the Law on Verification of Public Office Holders and Candidates did not grant any discretionary decision-making power to SCM in case SIS identified a risk factor in relation to the verified person. In such case, SCM was bound by facts established by SIS and had to conclude either that the verified person could not be appointed due to incompatibility reasons or had to release the verified person from office for these reasons. The role of SCM as a guarantor of the independence of the judiciary was therefore diminished. Amendments to the Law on Verification of Public Office Holders and Candidates from 19.07.2018 explicitly excluded candidates for the office of judge and sitting judges from among verified persons (see Article 5). In 2017, the Law on integrity has been adopted regulating verification of holders and candidates to public positions as part of integrity control carried out by SIS. For the purpose of the verification of public office holders and candidates, the Law on integrity refers to the provisions of the Law on Verification of Public Office Holders and Candidates.

3.2 International good practices and standards in regard to integrity checking of judges and candidate judges

The need to ensure and reinforce integrity among judges is universally accepted and mentioned in almost all basic international global documents regarding the Judiciary.

[7] Republic of Moldova, Law on verification of public office holders and candidates, No 271 as of 18.12.2008
[8] Republic of Moldova, Constitutional Court Decision concerning the exception of unconstitutionality of certain provisions of Law No. 271-XVI of 18 December 2008 on the verification of holders of and candidates for public offices (verification of judges by the Security and Information service), referral no. 115g/2017, dated 5th December 2017.

The *Basic Principles on the Independence of the Judiciary*[9] state that *"persons selected for judicial office shall be individuals of integrity and ability with appropriate training or qualifications in law. Any method of judicial selection shall safeguard against judicial appointments for improper motives. In the selection of judges, there shall be no discrimination against a person on the grounds of race, colour, sex, religion, political or other opinion, national or social origin, property, birth or status, except that a requirement, that a candidate for judicial office must be a national of the country concerned, shall not be considered discriminatory"*[10]. As for promotion, the document establishes that it must *"be based on objective factors, in particular ability, integrity and experience"*[11].

In 1987, the United Nations Special Rapporteur on the Study on the Independence of the Judiciary, L. V. Singhvi, elaborated *The Draft Universal Declaration on the Independence of Justice* (Singhvi Declaration)[12], where it is stated that candidates selected must be *"individuals of integrity and ability"*[13]. Also, for promotion, the Singhvi Declaration establishes that it must be based, *inter alia*, on an objective assessment of the judge's integrity[14].

Value 3 of the *Bangalore Principles of Judicial Conduct* of 2002[15], clearly affirms that *"integrity is essential to the proper discharge of the judicial office"*. The *United Nations Office on Drugs and Crime* (UNODC), in the *Commentary on the Bangalore Principles of Judicial Conduct*[16], develops the notion of integrity, saying it is *"the attribute of rectitude and righteousness. The components of integrity are honesty and judicial morality. A judge should always, not only in the discharge of official duties, act honourably and in a manner befitting the judicial office; be free from fraud, deceit and falsehood; and be good and virtuous in behaviour and in character. There are no degrees of integrity. Integrity is absolute. In the judiciary, integrity is more than a virtue, it is a necessity"*[17].

The *United Nations Convention against Corruption*[18] establishes as one of its purposes *"to promote integrity, accountability and proper management of public affairs and public property"* (Article 1, § c)) and States are called *"to facilitate the reporting by public officials of acts of corruption"* (Article 8 § 4) and to take *"disciplinary or other measures against public officials who violate the codes or standards"* (Article 8, § 6). Ensuring integrity in the Judiciary is clearly stated in Article 11, § 1 of the Convention as a global goal: *"bearing in mind the independence of the judiciary and its crucial role in combating corruption, each State Party shall, in accordance with the fundamental principles of its legal system and without prejudice to judicial independence, take measures to strengthen integrity and to prevent opportunities for corruption among members of the judiciary. Such measures may include rules with respect to the conduct of members of the judiciary"*.

As the UNODC noticed, Article 11 does not place integrity checking and independence of the Judiciary as conflicting values: on the contrary, increased integrity strengthens the independence and authority of the Judiciary, so *"while (...) States parties may be required to strike a balance between the two key principles of independence and integrity that underpin this provision of the*

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[9] Adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders in September 1985 in Milan, Italy, and endorsed by the General Assembly in its resolution 40/32 of 29 November 1985. By resolution 40/146 of 13 December 1985, the General Assembly welcomed the Principles and invited Governments *"to respect them and to take them into account within the framework of their national legislation and practice"*. Available at https://www.un.org/ruleoflaw/blog/document/basic-principles-on-the-independence-of-the-judiciary/ .

[10] *Id.*, par. 10.

[11] *Id.*, par. 13.

[12] Available at http://digitallibrary.un.org/record/139884/files/E_CN.4_Sub.2_1985_18_Add.5_Rev.1-EN.pdf .

[13] *Id.*, par. 9.

[14] *Id.*, par. 14.

[15] Endorsed by the *Economic and Social Council* in Resolution 2006/23, adopted at the Forty-first plenary meeting, 27 July 2006, available at https://www.unodc.org/documents/commissions/CCPCJ/Crime_Resolutions/2000-2009/2006/ECOSOC/Resolution_2006-23.pdf .

[16] Available at https://www.unodc.org/res/ji/import/international_standards/commentary_on_the_bangalore_principles_of_judicial_conduct/bangalore_principles_english.pdf .

[17] *Id.*, par. 101.

[18] Adopted by General Assembly resolution 58/4, of 31 October 2003 – available at https://www.unodc.org/res/ji/import/international_standards/united_nations_convention_against_corruption/united_nations_convention_against_corruption.pdf .

Convention, measures adopted with the aim of supporting either of these core values are, more often than not, mutually reinforcing"[19].

3.2.1 Scope of the analysis

The notion of "integrity" in the Judiciary involves various aspects inter-related, namely:

- conflicts of interest/incompatibilities;
- unofficial payments/gifts;
- establishment of Codes of Conduct/assessment of unethical behaviour;
- asset/interest declarations.

The scope of this report is to analyse the integrity checking of judges and candidate judges, so we will focus more on the standards applicable to the procedure of integrity checking in appointment and promotion and not on the rules regarding each of the above-mentioned aspects as tools to ensure integrity – only where they are interconnected with the procedure of integrity checking in appointment and promotion. In order to ensure a thorough assessment of the integrity of candidate judges and judges who are to be promoted, not only there must be a valid procedure, but also rules regarding the body(ies) responsible for that assessment. To that extent, we will analyse these aspects on which the effectiveness and transparency of integrity checking systems depend: the nature of the body(ies) responsible for the assessment (in the case of selection and promotion) and the procedure (criteria, methods/instruments, intervention of other authorities).

3.2.2 Body responsible for selection and promotion

We may identify three main systems of selection/appointment of judges in the international practice[20]:

- The "professional recruitment", where judges are chosen from among practising lawyers or experienced jurists;
- The "bureaucratic recruitment", where judges are chosen mainly from among young law graduates without previous professional experience;
- The electoral recruitment, where judges are directly elected by the citizens.

Set aside the electoral process (chosen by a small majority of countries), either in the professional or in the bureaucratic model, a final decision on appointment of judges has to be taken by an organ or individual, be it from the Judiciary or from the Executive or Legislature. The same occurs for the promotion of judges, that inevitably has to be decided by some sort of body or organ.

Those international documents that accept that judicial appointments or promotions may be made by the legislature and the executive (considering that this, *per se*, does not influence a court's impartiality and independence), establish nevertheless some restrictions and conditions to that possibility:

- the appointed judges must be free from influence or pressure when carrying out their adjudicatory role[21];
- the appointments must be made in consultation with members of the Judiciary and the legal profession or by a body in which members of the Judiciary and the legal profession participate effectively[22];

[19] *The United Nations Convention against Corruption Implementation guide and evaluative framework for Article 11*, New York, 2015, p. 5 – available at https://www.unodc.org/res/ji/import/international_standards/Article_11/Article_11_english.pdf .
[20] *Resource Guide on Strengthening Judicial Integrity and Capacity*, United Nations Office on Drugs and Crime, New York, 2011, p. 7 – available at https://www.unodc.org/res/ji/import/guide/resource_guide/resource_guide_english.pdf .
[21] ECHR decisions: Campbell and Fell v. the United Kingdom, 28/06/1984, par. 79; *Flux (No. 2) v. Republic of Moldova*, 03/07/2007, par. 27.
[22] *Singhvi Declaration*, *cit.* (note 12).

- an independent and competent authority drawn in substantial part from the judiciary should be authorised to make recommendations or express opinions which the relevant appointing authority follows in practice[23].

The majority of the international documents focusing on this aspect, however, recommend the attribution of the competence to appoint or promote judges to a body independent from the executive or legislative powers:

- the 2018 *Report* of the *UN Special Rapporteur on the independence of judges and lawyers,* Diego García-Sayán[24], recommends the establishment of an independent body in charge of protecting and promoting the independence of the judiciary, endowed with the widest powers in the field of selection, promotion, training, professional evaluation and discipline of judges;
- the 1998 *European Charter On The Statute For Judges*[25], paragraph 1.3. states that *"in respect of every decision affecting the selection, recruitment, appointment, career progress or termination of office of a judge, the statute envisages the intervention of an authority independent of the executive and legislative powers within which at least one half of those who sit are judges elected by their peers following methods guaranteeing the widest representation of the judiciary"*;
- several CCJE documents also reaffirm this position:
    - in par. 42 and 48 of Opinion no. 10 (2007) on *"Councils for the Judiciary in the service of society"*[26], it is recommended that the Council for the Judiciary ensures that the selection and promotion of judges is carried out in an independent manner (by the Council itself or in cooperation with other bodies);
    - in par. 25 of Opinion no. 21 (2018) on *"Preventing Corruption Among Judges"*[27], once again it is recommended that the selection, appointment and promotion of judges should be in the hands of essentially non-political bodies, with at least a majority of persons drawn from the judiciary;
    - par. 5 and 13 of the *Magna Carta of Judges*[28] reaffirm that the decisions on selection, nomination and career should be taken by the body in charge of guaranteeing independence, being this a Council for the Judiciary or another specific body, itself independent from legislative and executive powers, composed either of judges exclusively or of a substantial majority of judges elected by their peers;
- in the *Report on the Independence of the Judicial System Part I: The Independence of Judges* (CDL-AD(2010)004)[29], the Venice Commission reaffirms that *"it is an appropriate method for guaranteeing for the independence of the judiciary that an independent judicial council have decisive influence on decisions on the appointment and career of judges"*;

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[23] Par. 47 of the *Recommendation CM/Rec(2010)12 of the Committee of Ministers to member states on judges: independence, efficiency and responsibilities*, adopted by the Committee of Ministers of the *Council of Europe*, on 17 November 2010, at the 1098th meeting of the Ministers' Deputies, available at https://rm.coe.int/16807096c1

[24] Presented to the Human Rights Council, to be taken into consideration at its Thirty-eighth session of 18 June–6 July 2018 – available at https://digitallibrary.un.org/record/1637422/files/A_HRC_38_38-EN.pdf.

[25] Approved at the multilateral meeting on the statute for judges in Europe, organized by the Council of Europe, between 8-10 July 1998 – available at https://rm.coe.int/090000168068510f .

[26] Available at https://rm.coe.int/168074779b .

[27] Adopted during the 19th CCJE plenary meeting, in Zagreb, on 9 November 2018 - available at https://rm.coe.int/ccje-2018-3e-avis-21-ccje-2018-prevent-corruption-amongst-judges/native/16808fd8dd.

[28] Adopted during the 10th CCJE plenary meeting, from 17 to 19 November 2010- available at https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000168063e431.

[29] Adopted by the Venice Commission at its 82nd Plenary Session (Venice, 12-13 March 2010), available at https://rm.coe.int/1680700a63 .

- the European Network of Councils for the Judiciary (ENCJ), in par. 3.4. of the *Councils for the Judiciary Report 2010-2011*[30] (par. 3.4.) also affirms that *"the Council for the Judiciary should be the decision-making body in matters affecting the status of each judge from the moment of the commencement of the application for entry to the judicial profession, until retirement"*;
- the OSCE's *Kyiv Recommendations on Judicial Independence in Eastern Europe, South Caucasus and Central Asia*[31] recommend in par. 3 and 4 that judicial selection should be made by Judicial Councils or separate expert commissions, independent from the executive;
- one of the *Seven International Best Practices for Judicial Councils* defined in *"Global Best Practices: Judicial Councils - Lessons Learned from Europe and Latin America"*[32], of the International Foundation for Electoral Systems (IFES) is that Judicial Councils should be responsible for the judicial selection process and contribute to the promotion of judges.

3.2.3 Procedure

If the need for the promotion of integrity is commonly accepted and reaffirmed in several international documents, rarely do they objectively define the process to be followed in the assessment of integrity during the selection and promotion of judges. It may be due to the fact that *"while the ideal of integrity is easy to state in general terms, it is much more difficult and perhaps even unwise to do so in more specific terms. The effect of conduct on the perception of the community depends considerably on community standards that may vary according to place and time"*[33] or even due to the specificities of the Judiciary, which lead some international documents to expressly exclude its application to that field[34].

This means that, although universally accepted as a need, it is not easy to lay down objective criteria and mechanisms for the checking of integrity, and *"the integrity of a person who applies to become a judge is difficult to assess other than by making inferences from references or previous convictions"*[35].

As USAID recognizes, *"there is little consensus about how to test for the qualities relevant to being a fair and impartial judge. Most entrance examinations at best test only intelligence and knowledge of the law. There have been many efforts to develop tests for other traits, such as professional integrity, willingness to work hard, and deliberative decision-making, but no agreement on their success"*[36].

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[30] Available at https://pgwrk-websitemedia.s3.eu-west-1.amazonaws.com/production/pwk-web-encj2017-p/Reports/Report_Project_Team_Councils_for_the_Judiciary_2010_2011.pdf .

[31] Approved by the *OSCE*'s *Office for Democratic Institutions and Human Rights* (ODIHR), together with the *Max Planck Institute for Comparative Public Law and International Law* (MPI), after an expert meeting on Judicial Independence held in Kyiv, Ukraine, on 23-25 July 2010 - available at https://www.osce.org/files/f/documents/a/3/73487.pdf . The *Kyiv Recommendations* are currently being updated and reviewed: *"The Kyiv Recommendations will be updated as part of the project "Strengthening Inclusive and Accountable Democratic Institutions in the OSCE Region", implemented with funds from several participating States, including Germany, Ireland, Norway and the United States"* - https://www.osce.org/odihr/439394.

[32] Available at https://www.csm.org.pt/wp-content/uploads/2017/12/authemaandelena2004judicialcouncilslessonslearnedeuropelatinamerica.pdf.

[33] UNODC, *Commentary on the Bangalore Principles…*, *cit.* (note 16), par. 102.

[34] As it is the case of the *Model Code of Conduct for Public Officials*, approved by *Recommendation no. R (2000)10, of the Committee of Ministers to Member States on codes of conduct for public officials*, adopted at the 106th session, on 11 May 2000 (available at https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016806cc1ec), that expressly excludes its application to holders of judicial office (Article 1, § 4).

[35] Anne Sanders / Ralf Treibmann, *Expert Report on the outcomes of the Working Group's meeting on: Selection, Evaluation and Promotion of Judges*, Council of Europe, 2016, p. 15 – available at https://rm.coe.int/1680700f39 .

[36] *Guidance for Promoting Judicial Independence and Impartiality*, Revised Edition (PN-ACM-007), U.S. Agency for International Development, Office of Democracy and Governance Bureau for Democracy, Conflict, and Humanitarian Assistance, January 2002, p. 18 – available at https://www.unodc.org/res/ji/import/guide/usaid_guidance/usaid_guidance.pdf.

3.2.3.1 Criteria

Recommendation CM/Rec(2010)12 establishes that decisions concerning the selection and career of judges should be based on objective criteria pre-established by law or by the competent authorities[37]. Also GRECO concluded in the overview of the results of the 4th Evaluation Round that there was the need for judicial appointments to be made as transparently as possible, based on formal and objective criteria and that, along with evaluation procedures, these must be applied with due regard to the independence, integrity and impartiality of judicial appointees[38].

In OSCE's *"Best Practices in Combating Corruption"*, the example of the Lithuanian model is given as a good practice for establishing integrity criteria for candidate judges – only individuals with "impeccable reputation" may accede to the position of judge, therefore excluding persons that:

- have been convicted of an intentional crime, notwithstanding the expiration of the conviction;
- have been convicted of a negligent crime and the conviction has not expired;
- have been dismissed from office on the basis of the decision of the Court of Honour of Judges;
- maintain conduct or activities which are not in line with rules of judges' professional ethics[39].

The *British Institute of International and Comparative Law* admits the verification of the inexistence of history of criminal offences or disciplinary misconduct that would make the applicant unsuitable for appointment as a judge[40].

The *Lilongwe Principles and Guidelines on the Selection and Appointment of Judicial Officers*[41] establish in its principle vii) that *"objective criteria for the selection of judicial officers should be pre-set by the selection and appointment authority, publicly advertised, and should not be altered during that process"*. The guideline for those criteria point out the following[42]:

- hold a recognised law degree;
- hold an appropriate level of post-qualification experience;
- be a fit and proper person;
- be competent to perform the functions of a judicial officer;
- possess good written and communication skills;
- be able to diligently render a reasoned decision;
- not have any criminal convictions, other than for minor offences;
- not have any ongoing political affiliation after appointment.

Developing the *"be a fit and proper person"* criterion, the guidelines explain that it consists in *"the ability to uphold the provisions of the applicable Constitution and Judicial Code of Ethics. It is guided by the requirements in the Bangalore Principles of Judicial Conduct. Immediately following appointment, candidates shall divest themselves of all interests which may affect their ability to carry out their judicial duties. At a minimum, appointees shall not hold political office or have any*

[37] *Cit.* (note 23), par. 44.
[38] *Corruption Prevention - Members of Parliament, Judges and Prosecutors - Conclusions and Trends*, Council of Europe, 2017, p. 18 – available at https://rm.coe.int/corruption-prevention-members-of-parliament-judges-and-prosecutors-con/16807638e7.
[39] *Office of the Co-ordinator for Economic and Environmental Activities*, Vienna, 2006, p. 143 – available at https://www.osce.org/files/f/documents/9/a/13738.pdf.
[40] *The Appointment, Tenure and Removal of Judges under Commonwealth Principles - A Compendium and Analysis of Best Practice*, Commonwealth Secretariat, 2015, p. 46.
[41] Adopted at the Southern African Chief Justices' Forum Conference and Annual General Meeting, Lilongwe, 30 October 2018 – available at https://www.unodc.org/res/ji/import/regional_standard/sacjf_final/sacjf_final.pdf.
[42] Id., p. 7.

active political affiliations or membership. Subject to domestic laws, candidates should not have any previous criminal convictions besides minor offences"[43]. In the application process, a *curriculum vitae* should be presented by the candidates, with sufficient information, *inter alia*, on employment history, business interests, previous political involvement including membership of political parties, potential conflicts of interest and disclosure of anything which if discovered after appointment may cause the judiciary embarrassment or bring the judiciary into disrepute[44].

In Opinion No. 528/2009 (CDL-AD(2009)023)[45], the Venice Commission analysed the criteria established by Serbian Law to be initially appointed as judge: honesty, conscientiousness, equity, dignity, persistence and the setting of good example (the latter including refraining from any indecent act, refraining from any action causing suspicion, raising doubts, weakening confidence, or in any other way undermining confidence in the court, refraining from hate speech, indecent or blunt behaviour, impolite treatment, expressing partiality or intolerance, using vulgar expressions, wearing indecent clothing and other improper behaviour). These factors were to be evaluated on the basis of the results of interviews, tests and other psychosocial techniques, and also by getting the opinions of persons the candidates have worked with, such as judges or members of the bar. The Venice Commission did not address any negative comment to the criteria but noted that they may be very difficult to evaluate in practice[46].

3.2.3.2 Rules/Methods

3.2.3.2.1 Declaration of financial interests/assets

A method increasingly used for the assessment of possible integrity problems within the Judiciary is the establishment of mandatory declarations of financial interests or assets.

UNODC sees this method as a way of addressing both conflicts of interest and potential cases of embezzlement or illicit enrichment, saying that in order for it to be efficient, it must go beyond mere financial interests and also include information related to outside affiliations and interests of judges, such as pre-tenure activities, affiliations with businesses (board memberships), connections with non-governmental or lobbying organizations and any unpaid or volunteer activities[47]. Declarations should include the assets of judges, their parents, spouse, children and other close family members, should be regularly updated, inspected after appointment and monitored from time to time by an independent and respected official[48].

In the Explanatory Memorandum of Recommendation CM/Rec(2010)12, it is suggested that Member States consider creating registers of interests in order to make public information on additional activities of judges, as a way of avoiding actual or perceived conflicts of interest[49].

In the overview of the results of the 4th Evaluation Round, GRECO stressed that where declarations of assets are required, monitoring and follow up by the appropriate authorities must be reliable and robust and it should be clear whether the rules extend to all judicial posts, also remembering that providing false information constitutes a criminal offence[50].

The Organization of American States published a *Draft Legislative Guideline: Basic Elements on the Registration of Income, Assets, and Liabilities* with the basic elements that should be included in a legal framework related to the registration of income, assets and liabilities of persons who perform public functions in certain posts as specified by law (including judges) and, where

[43] Ibid., p. 8.
[44] Ibid., p. 10.
[45] *Opinion on the Draft Criteria and Standards for the Election of Judges and Court Presidents of Serbia*, 15 June 2009 – available at https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2009)023-e.
[46] Pars. 30 and 31.
[47] *The United Nations Convention against Corruption Implementation guide..., Cit.* (note 19), pars. 44 and 45.
[48] Petter Langseth, *Judicial Integrity and its Capacity to Enhance the Public Interest*, UNODC, Vienna, October 2002, p. 13 – available at https://www.unodc.org/res/ji/import/academic_articles_and_books/judicial_integrity_and_its_capacity_to_enhance_the_public_interest/judicial_integrity_and_its_capacity_to_enhance_the_public_interest.pdf.
[49] *Cit.* (note 23), par. 29.
[50] *Corruption Prevention..., cit.* (note 19), p. 21.

appropriate, for making such registrations public[51]. The guidelines suggest declarations should be made:

- before starting up public functions;
- when there is a significant change in net worth;
- periodically over an established timeframe (on an annual basis);
- when a competent authority requests it;
- when performance of the public function is terminated and after leaving office, within a given period.

As for the detail of the declaration, the guidelines suggest:

- listing and amount or value of income, assets, investments, liabilities, credit holdings;
- disclosure of status as a partner in any kind of enterprise or partnership;
- disclosure of individual interests, employment, professional activities or economic activities;
- listing and amount of the accounts or deposits in financial institutions located domestically or abroad.

Also rules regarding access to information and in what conditions the information provided may be used as evidence must be established, according to these guidelines.

A *Model Law on the Declaration of Interests, Income, Assets and Liabilities of Persons Performing Public Functions* has also been approved by the Organisation of American States, developing the above-mentioned guidelines[52].

USAID also recommends disclosure of judges' assets and liabilities when they are appointed and annually thereafter, deeming it *"an effective means of discouraging corruption, conflicts of interest, and misuse of public funds"*[53]. Judges should disclose their assets and the assets of close family members prior to taking office, periodically throughout their tenure and upon departing from office, and such declarations should be verified and monitored on a regular basis by an independent official[54].

The CCJE, in Opinion no. 21 (2018) on *"Preventing Corruption Among Judges"*, considers that a robust system for declaring assets can contribute to the identification and subsequent avoidance of conflicts of interests if relevant steps are taken, and thereby leading towards more transparency and judicial integrity. It warns, however, to the need of proportionality, in order to guarantee the judge's right to privacy and the right to privacy of his/her family members, and to the fact that *"in the many member States where corruption has not been an issue"*, the implementation of an obligation of systematic asset declaration may have as consequence that *"suitable candidates for a judge's post might refrain from applying because they see such a far-reaching obligation as an unjustified intrusion into their private lives"*. The CCJE also recommends that disclosure to stakeholders outside the judiciary should only be done on demand, and only if a legitimate interest is credibly shown and confidential information should never be divulged, and that the privacy of third parties, such as family members, should be protected even more strongly than that of the judges[55].

[51] Available at https://www.unodc.org/res/ji/import/regional_standard/oas_draft_legislation_asset/oas_draft_legislation_asset.pdf.
[52] Available at http://www.oas.org/en/sla/dlc/mesicic/docs/model_law_declaration.pdf.
[53] *Guidance for Promoting Judicial Independence…*, *cit.* (note 36), p. 36.
[54] Mary Noel Pepys, *Corruption and the Justice Sector*, USAID / Management Systems International, January 2003, p. 14 – available at https://www.unodc.org/res/ji/import/academic_articles_and_books/corruption_and_the_justice_sector/corruption_and_the_justice_sector.pdf.
[55] *Cit.*, pars. 38 to 40.

The need to protect not only privacy of judges and their families, but especially to protect their safety is also stressed by the *United States General Accounting Office*, that issued guidelines to prevent the disclosure of unsecured locations of judges and members of their families and information that bears a clear nexus with specific security threats[56].

One should note, however, that the Venice Commission has already advised that declarations of assets are useful only for judges already admitted and not as a criterion or pre-condition for the appointment of judges, *"since only an increase of property during the mandate of the judge should trigger further investigation into possible corruptions"*. If candidate judges are required to declare property and that declaration is taken into consideration for the appointment decision, it may lead to discrimination on the basis of the social/property status[57].

3.2.3.2.2 Integrity Testing

The *Technical Guide to the United Nations Convention against Corruption*[58] refers to integrity testing as an extremely effective and efficient deterrent to corruption, enhancing both the prevention and prosecution of corruption. However, it warns to the fact that such testing cannot be used on an indiscriminate basis, but must be based on some level of intelligence to suggest suspicions of corruption, and consideration should be given to restrictions intended to prevent "entrapment" (undercover agents should be allowed to create opportunities for a suspect to commit an offence, but not to offer any actual encouragement to do so).

The OECD's *"Managing Conflict of Interest in the Public Sector - a toolkit"*, after defining integrity testing as *"a tool by which public officials are deliberately placed in potentially compromising positions without their knowledge, and tested, so that their resulting actions can be scrutinised and evaluated by their employer or an investigating authority"* and deeming it as *"a powerful specialised corruption detection tool"*, also alerts to the need of some caution when applying it: the need for special legislation (either in cases where tests would involve offering a "bribe" to an official who is under suspicion, or to allow the use of any evidence obtained, in a prosecution), for special training and the risk of alienating non-corrupt staff by creating fear of accidentally being targeted[59].

In OSCE's *"Best Practices in Combating Corruption"*, integrity testing is presented as a powerful tool to prevent and deter corruption, but also in this document caution is advised so that *"the temptation placed in the way of an official is not so great as to tempt even an honest person to succumb. The object is to test the integrity of the official, not to render an honest official corrupt through a process of entrapment"*[60].

The World Bank's *Preventing Corruption in Prosecution Offices: Understanding and Managing for Integrity* (although addressed to Prosecutors, in terms directly applicable also to Judges), considers integrity testing a *"powerful corruption detection tool"*, although to be used *"only with great caution and in exceptional cases"*[61].

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[56] *Federal Judiciary - Assessing and Formally Documenting Financial Disclosure Procedures Could Help Ensure Balance between Judges' Safety and Timely Public Access*, June 2004 – available at https://www.unodc.org/res/ji/import/law_on_administration_of_justice/gao_asset_declaration_reduction/gao_asset_declaration_reduction.pdf.

[57] *Joint Opinion of the Venice Commission and the Directorate of Human Rights (DHR) of the Directorate General of Human Rights and Rule of Law (DGI) of the Council of Europe on the Draft Law on Amendments to the Organic Law on General Courts of Georgia*, Opinion no. 773 / 2014, CDL-AD(2014)031, 14 October 2014, par. 51 – available at https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2014)031-e.

[58] *United Nations Office on Drugs and Crime* and *United Nations Interregional Crime and Justice Research Institute*, New York, 2009, p. 186 – available at https://www.unodc.org/documents/treaties/UNCAC/Publications/TechnicalGuide/09-84395_Ebook.pdf.

[59] *Organisation for Economic Co-operation and Development*, 2005, p. 68 – available at https://www.oecd.org/gov/ethics/49107986.pdf.

[60] *Cit.*, p. 195.

[61] *Preventing Corruption in Prosecution Offices: Understanding and Managing for Integrity*, Justice and development working paper series, no. 15, World Bank, Washington, DC, 2001, p. 11 – available at https://openknowledge.worldbank.org/bitstream/handle/10986/18320/655100WP0J0D0150110Box361565B00PUBLIC0.pdf?sequence=1&isAllowed=y .

Analysing the Moldovan reality, the Venice Commission in Opinion no. 789/2014 (CDL-AD(2014)039)[62] also said that integrity testing must be done in a proportionate manner:

- respecting the private life of judges and not creating the risk of its use as an instrument to discipline judges[63];
- only if there are reasonable grounds of suspicion of the existence of corruption and subject to formal authorisation[64];
- if using undercover agents, with sufficient safeguards to prevent their use as *agents provocateurs*[65].

3.2.3.2.3 Complaint whistleblowing processes

The Council of Europe's Civil Law Convention on Corruption (which entered into force in the Republic of Moldova on 1 July 2004) establishes in its Article 9 that *"each Party shall provide in its internal law for appropriate protection against any unjustified sanction for employees who have reasonable grounds to suspect corruption and who report in good faith their suspicion to responsible persons or authorities"*. This Article is in line with Article 33 of the United Nations Convention against Corruption – *"each State Party shall consider incorporating into its domestic legal system appropriate measures to provide protection against any unjustified treatment for any person who reports in good faith and on reasonable grounds to the competent authorities any facts concerning offences established in accordance with this Convention"*.

In the *Handbook on Combating Corruption*[66], OSCE states the importance of developing anti-corruption strategies that promote integrity, not only based *"on measures to catch and punish corrupt individuals"* but having *"the broader aim of creating an environment that entrenches integrity as the standard of public office"*. Chapter 15 of the *Handbook* is entirely dedicated to the Judiciary and addresses, *inter alia*, the selection and appointment of judges, as well as their advancement and promotion. Ensuring oversight of the judiciary is pointed out as essential to prevent and punish corruption, on order to safeguard the judiciary's independence. Apart from establishing codes of conduct, the *Handbook* recommends the establishment of a complaint process whereby anyone can report a suspected violation of the code, accompanied by a disciplinary process to address serious and/or repeated violations.

In the September 2011 *Project Report* of the *Eastern Partnership - Enhancing Judicial Reform in the Eastern Partnership Countries*[67], the *Working Group on Independent Judicial Systems*, while analysing Article 76, § 3 of the Ukrainian Law *"On the Judicial System and Status of Judges"*[68], concluded that petitions received from different sources (citizens, public organizations, enterprises, institutions, and/or central and local government bodies) could be of use when assessing the integrity of a judge and that well-founded complaints that have been carefully evaluated should be capable of having any impact upon the judicial career of any judge.

Also the World Bank[69], referring to prosecutors, notes that *"it is often only fellow prosecutors and staff members within a prosecutorial agency who have opportunities to observe or otherwise detect corrupt behaviour in their colleagues or supervisors"*, which leads to the need of establishing rules

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[62] *Amicus Curiae Brief for the Constitutional Court of Moldova on Certain Provisions of the Law on Professional Integrity Testing* – available at venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2014)039-e.
[63] Par. 94.
[64] Par. 96.
[65] Pars. 95 and 97.
[66] *Office of the Co-ordinator of OSCE Economic and Environmental Activities*, Vienna, 2016 – available at https://www.osce.org/files/f/documents/0/3/232761.pdf .
[67] *Directorate General of Human Rights and Rule of Law* of the *Council of Europe*, available at https://www.refworld.org/pdfid/4ee9bec12.pdf .
[68] *"The High Qualifications Commission of Judges of Ukraine shall measure the compliance of the candidate for a lifetime judicial position against the requirements of article 127 of the Constitution of Ukraine, articles 53, 64 of the present Law, and consider any petitions received from citizens, public organizations, enterprises, institutions, and/or central and local government bodies regarding his or her judicial performance"*.
[69] *Preventing Corruption in Prosecution Offices…*, *cit.* (note 61), par. 15.4.

protecting whistle-blowers against recriminations or payback by, or on behalf of, those they denounce, pointing out good examples of those laws in countries such as the United States, Australia, South Africa, the United Kingdom and South Korea.

The *Lilongwe Principles*[70] admits anonymous comments to be taken into account on candidates', *"where the comments have some foundation taking into account the gravity of the complaint, the credibility of the source, and the reasons for confidentiality"*. The negative comments must be known to candidates and they must have the opportunity to respond.

UNODC recommends the establishment of an *"independent, credible and responsive complaint mechanism"*, where the complaints are analysed by an entity (where appropriate, included in a body having a more general responsibility for judicial appointments, education and action or recommendation for removal from office) composed of serving and past judges, with the mandate to receive, investigate and determine complaints of corruption allegedly involving judicial officers and court staff[71].

Also, in Opinion no. 21 (2018) on *"Preventing Corruption Among Judges"* the CCJE clearly states that judges have an obligation to report offences they discover in the performance of their duties, in particular, acts of corruption committed by colleagues[72].

3.2.3.3 Intervention of other authorities or institutions/background checks

Although admitting background checks, the *Kyiv Recommendations* advises they should be *"handled with utmost care and strictly on the basis of the rule of law"* and even if a standard check for a criminal record and any other disqualifying grounds from the police may be requested, its results should be made available to the applicant, who should be entitled to appeal them in court. In this document it is clearly affirmed that no other background checks should be performed by any security services[73].

In Opinion no. 21 (2018) on *"Preventing Corruption Among Judges"*, the CCJE strongly advises against background checks *"that go beyond the generally accepted checks of a candidate's criminal record and financial situation"*. In those countries that carry out very thorough background integrity checks which include the personal, family and social background of the candidate (usually carried out by the security services), the CCJE recommends that they should be made according to criteria that can be objectively assessed and that candidates should have the right to have access to any information obtained and those rejected on the basis of such a control must have the right to appeal to an independent body and, to this end, have access to the results of such control. The CCJE also warns that a distinction must be made between candidate judges and serving judges, because in no circumstances should the fight against corruption of judges lead to the interference by secret services in the administration of justice[74].

The Venice Commission already analysed systems of investigation of candidate judges and considered that:

- investigation on a wide range of aspects, including the financial status of the candidates, goes beyond the search for information on professional skills of the candidates and risks violating the right to privacy of the candidates;
- there seems to be no justification for unlimited access or any access at all to banking and other financial institutions;
- for dealing with highly confidential information, special requirements for the members of the body responsible for the investigation must be laid down in the legislation and

[70] Cit. (note 41), p. 11.
[71] *Judicial Integrity…*, *cit.* (note 48), p. 14.
[72] *Cit.*, par. 46.
[73] *Cit.*, par. 22.
[74] *Cit.*, pars. 26 and 27.

also the conditions for their appointment/selection by the High Council and their responsibilities must be made clear;

- investigation must depend on previous consent of the candidate, which must have the possibility to refuse;
- the information on the candidates acquired as a result of information search shall be confidential and the candidate must have the right to access it in an effective manner – if not, it may constitute a breach to the right to respect for private life (access to personal data);
- information should not be stored after the selection procedure has been terminated or, at least, a maximum period for data retention, lower than five years, should be introduced[75].

Specifically in the case of Moldova, the Venice Commission has already recalled in Opinion no. 789/2014 (CDL-AD(2014)039) that other authorities/bodies participating in integrity checking procedures should have a degree of autonomy from the other powers of the State, in order not to raise doubts about possible interference in the independence of the Judiciary[76].

The *British Institute of International and Comparative Law*, although admitting the existence of background checks, says that an independent commission's oversight is essential in those cases (reaffirming the concerns expressed in the *Kyiv Recommendations*) and that applicants should be informed of any potentially disqualifying findings and be given a fair opportunity to challenge them[77].

Not specifically referring to selection of promotion processes, USAID notes that transparency in the judiciary may be boosted by the intervention of external actors, and *"court monitoring by NGOs, academics, and the media can expose and deter abuses"*[78].

Also the UN Special Rapporteur on the independence of judges and lawyers, Leandro Despouy, in his 2009 report, advised that, as a complement to a selection and nomination process that uses objective criteria to select judges, other procedures may be implemented to enhance the public certainty on the nominee's integrity, such as *"the holding of public hearings where citizens, non-governmental organizations or other interested parties, are able to express their concern or support for particular candidates"*[79].

The *Lilongwe Principles*[80] establish that financial interests, criminal records, wealth declarations and reference checks shall be carried out to ensure veracity of disclosure, and also stakeholder comments from core groups (including the bar, academia, the judiciary and civil society) shall be actively encouraged in the appointment process, as long as the negative comments are known to candidates and they have the opportunity to respond.

3.3 Measures to consolidate the integrity checking mechanisms in regard to judges during selection and promotion procedures in the Republic of Moldova

3.3.1 Complexity of the process

In the Evaluation Report of the Fourth Evaluation Round, GRECO considered that *"the selection process of judges by the Selection Board appears reasonably transparent and based on objective criteria"*, stressing, however, that *"the selection criteria could be further refined"*.

[75] CDL-AD(2014)031, *cit.* (note 57), pars. 54-59.
[76] *Cit.*, pars. 89 and 90.
[77] *The Appointment…*, *cit.* (note 40), p. 46.
[78] *Guidance for Promoting Judicial Independence…*, *cit.* (note 36), p. 2.
[79] *Report of the Special Rapporteur on the independence of judges and lawyers*, Leandro Despouy, to the General Assembly, 24 March 2009, par. 31 – available at https://www.unodc.org/res/ji/import/international_standards/special_rapporteur/report_2009_en.pdf.
[80] Cit. (note 41), p. 11.

The main concern of GRECO was not the selection by the Selection Board, but the following stages, which *"raise more pressing concerns"*[81], **namely the insufficient justification of the SCM's decisions, especially in recruitment, career and disciplinary matters**. According to the report, the SCM, not being bound by the decisions of the Selection Board on the respective merits of candidates to positions of judges, gives no reasoning when it chooses to deviate from them, citing only the number of votes obtained by each candidate. In the view of GRECO, *"this practice erodes judges' and the public's confidence in the SCM's decisions and in the fairness and objectivity of the selection process. While there may sometimes be reasons for which the SCM does not follow the recommendation of the Selection Board, such exceptions must be justified in a clear, complete and conclusive manner. Moreover, the GET has misgivings regarding the lack of full judicial review of SCM's decisions"*[82].

GRECO also identified shortcomings in:

- the fact that judges are appointed for an initial probation period of five years (leading young judges to *"feel pressured to decide cases in a particular way or to deal with the real or assumed expectations of those who can make or break their career"*); and
- the procedure of appointment, noting that candidates rejected by the President of the Republic are usually reappointed by the SCM (and there isn't the possibility for the President to reject a second time), thus leading to the appointment of persons with integrity risks.

In accordance with these findings, GRECO recommended that:

i. decisions of the Superior Council of Magistrates be adequately reasoned and be subject to judicial review, both on the merits of the case and on procedural grounds (recommendation viii.);

ii. appropriate measures be taken, with due regard to judicial independence, in order to avoid the appointment and promotion to judicial positions of candidates presenting integrity risks (recommendation ix. (i)); and

iii. the five-year probation period for judges be abolished (recommendation ix. (ii)).

In the second compliance report of September 2020, GRECO considered these recommendations only still partly implemented:

- the appeals of the SCM decisions may now be based on procedure and also merits[83];
- although new requirements of motivation of the decisions are foreseen, there isn't sufficient information that the SCM has started to motivate thoroughly its decisions, especially when deviating from the Selection Board decision[84];
- the end of the 5-year probationary period is foreseen in the amendments to the Constitution pending in Parliament[85];
- although measures have been taken to review the regulatory framework concerning competition for judicial positions and transfer and promotion of judges, *"the testing of integrity of candidate judges during the selection process does not appear to be adequately regulated, GRECO underlines that there should be clear, predictable and comprehensive rules on how the integrity of candidate-judges is to be checked by the*

[81] *Evaluation Report*, par. 100.
[82] *Ibid.*, par. 93.
[83] *Second Compliance Report - Republic of Moldova*, par. 57.
[84] *Ibid.*.
[85] *Id.*, par. 65.

judiciary, before they are appointed and/or promoted. Obviously, such rules need to be consistently applied in practice"[86].

The concerns expressed by GRECO address one point that has also come to light during the preparation of this report: the excessive complexity of the process of appointment of judges in the Republic of Moldova. As seen in the previous chapter, there are four main institutions involved: the National Institute of Justice, the Selection and Career Board of the SCM, the Superior Council of Magistracy, the Parliament (in case of judges at the SCJ) and the President of the Republic. Besides these main actors, others have some kind of role in the procedure, mainly the National Integrity Authority and the National Anticorruption Centre.

The coordination among these main actors is complex, with the final decision belonging to the SCM or to the Parliament in case of SCJ judges (either before indication to the President of the Republic or after a rejection decision by the latter) but with little public knowledge of its concrete motives, due to insufficient reasoning of its decisions, as GRECO noticed.

Public perception of integrity depends greatly on transparency – the more transparent and easy to understand for any citizen the process of appointment of judges is, the easier it will be for civil society (journalists, other actors of the judiciary, common citizens) to eventually check the cleanness of the process or for ordinary citizens to trust that the choice has not been made based on unclear or dubious criteria. Integrity checking, as stressed by many international institutions (mentioned in the international standards chapter of this report), is difficult to assess on objective grounds, so it is even more essential that the procedure is transparent, as it is often the only way of guaranteeing the trust of society in the choice made.

The current design of the procedure of appointment or promotion of judges in the Republic of Moldova, however, leaves room for "grey areas", where undisclosed motivations could enter the decision. As GRECO noted, in many occasions the SCM decides to appoint candidates which received a lower classification in the Selection Board, without any valid explanation of that decision. We may find concrete examples of this reality in the study conducted by *Legal Resources Centre of Moldova* for the period of June 2017 – December 2018, where it was concluded that *"27 (60%) out of the 45 candidates selected in contests with more than one candidate had a lower score from the Selection Board, and the SCM did not explain why it disregarded the score"*[87].

3.3.1.1 A possible restructuring of the system

Seen the considerations above, a more comprehensive restructuring of the system of appointment of judges could be foreseen, increasing the transparency of the procedure, while ensuring a more efficient management of (human and financial) resources in the judiciary.

The current Moldovan system tries to balance what above were identified as the *"bureaucratic"* and *"professional"* recruitment models – two different procedures are applicable to candidates with and without previous professional experience. After undergoing a course or exam at the National Institute of Justice (NIJ), both types of candidates are then subject to the selection procedure before the Selection Board of the SCM, after which they are enrolled in the Register of Participants in competitions to be held afterwards by the SCM.

In the meeting held with the National Integrity Authority (NIA) and the National Institute of Justice (NIJ), concerns were voiced about the fact that candidate judges are evaluated by the SCM prior to their appointment and the verification of their integrity by NIA takes place after the graduation from the NIJ, moment when financial resources allocated from the state budget for the initial training of judges were already spent.

These concerns appear to be reasonable and well founded. At a first look, it doesn't seem very logical to give initial training to persons who might never be appointed as judges. On the other

[86] *Ibid.*.
[87] Ilie CHIRTOACĂ/Victoria VIRSCHI, *The Selection and Promotion of Judges in the Republic of Moldova June 2017 – December 2018*, Legal Resources Centre from Moldova, December 2019, p. 23.

hand, the fact that a person has professional experience in a legal profession doesn't necessarily mean that he/she has the skills and training needed to perform the demanding functions of a judge. Some training should also be provided for the candidates who have professional experience.

Furthermore, the entry to NIJ should be seen by candidates as the starting point of their career as members of the judiciary, subject to a status of special duties and responsibilities, situation which the current system doesn't ensure, as candidates that have already passed the training/exam at NIJ remain in a sort of limbo until the final appointment by the SCM/President of the Republic.

Finally, a new system could clearly distinguish the assessment of integrity/conflict of interest issues (to be carried out by the Selection Board of the SCM) from the assessment of knowledge and professional skills (to be carried out by NIJ).

A possible way to restructure the system in order to meet these objectives would be to anticipate the selection to a moment prior to the admission to NIJ[88]:

- the competition to enter NIJ, the number of vacancies (including the minimum quota to be filled by candidates with and without professional experience) and the deadline for submitting applications would be publicly announced;
- candidates (either with or without professional experience) would have to apply, submitting all the documents currently demanded for the appointment procedure before the SCM;
- the Selection Board would assess the candidates' integrity (with the participation of the other entities, such as NIA and NAC), rejecting those who present problems;
- the candidates who are admitted would then have to undergo exams to enter NIJ, which would be different for candidates with and without previous professional experience (e.g., just a written exam and a public discussion of the CV for the former, written and oral exams for the latter), and also a psychological assessment;
- candidates approved in the exams would be listed according to the final classification and the vacancies announced would be filled by order of classification;
- the training in NIJ would be theoretical and practical (a difference in the length of the training could exist for candidates with previous professional experience);
- candidates admitted to NIJ would be subject to the same ethical and disciplinary rules of judges and to the disciplinary power of the SCM;
- after successful completion of the training, candidates would be formally appointed by the SCM (or by the President of the Republic), and placed in different courts, their placement being made according to personal choice of the candidates, respecting the order of the final classification obtained in NIJ, and without possibility of rejection by the SCM (or the President, if the formal act of appointment would be of his/her competence).

In order to ensure that no interference would take place in the admission contest, the written exams to enter NIJ would be corrected anonymously and the final mark of admission would be given after an oral examination in front of a panel whose composition should be as diverse as possible and with members appointed not only by the SCM, but also by other bodies: a university professor, a lawyer appointed by the Bar Association, a Prosecutor, etc.

As above said, this system would allow a more transparent way of appointing judges, a more efficient management of human and financial resources and a clear separation of

[88] The system proposed is in many points similar to the one in force for many years in Portugal, to be admitted to the *Centro de Estudos Judiciários* (CEJ) – more information at http://www.cej.mj.pt/cej/eng/training_admission_to_initial_training.php.



integrity/professional skills assessment, which in our view would contribute to public trust in the independence of the judiciary.

3.3.1.2 The unnecessary second intervention of the SCM

The suggestion made would be a complete restructuring of the system, which in the view of the experts is desirable.

However, if that is not the option chosen by the Moldovan authorities, it is fundamental to bring some improvements to the existing system, even without changing its main aspects.

The vast majority of the international standards point out to the essentiality of giving competence to appoint judges to a body independent from the executive or legislative, and even those who admit the participation of an organ from outside the judiciary stress the need to have the participation of a body from the judiciary, with a decisive role that the other player must follow in practice.

In the Republic of Moldova, the Selection Board is a body functioning within the Superior Council of Magistracy (Article 7 of Law No. 947-XIII, of 19/07/1996) and it is composed of seven members: four judges elected by the General Assembly of Judges and three representatives of the civil society, selected by the SCM following a public competition.

The procedure followed by the Selection Board is described in the previous chapter and – as noted by GRECO – *"appears reasonably transparent and based on objective criteria"*.

Despite the need to ensure that either the election of judge members by the General Assembly or the appointment of civil society representatives by the SCM is transparent, this board already fulfils the international requirement of having the competence for selection and promotion attributed to an independent body. It seems therefore unnecessary to have a further intervention of the SCM in the appointment and promotion procedure. As GRECO noticed, the second intervention of the SCM is only bringing more complexity to the process and casting doubts on the reasons why the evaluation made by the Selection Board is often not followed.

We do not see as negative that separate bodies exist to select and manage the career and to evaluate the work of judges – the existence of a single board with both competences[89] could eventually lead to an unwanted confusion of roles of evaluation of the work of judges and of selection and promotion – but the intervention of the plenum of the SCM in the appointment and promotion process seems unnecessary and counterproductive. The procedure would benefit in terms of transparency and simplicity to have the selection and promotion decided in first hand only by the Selection Board.

This does not in any way diminish the role of the SCM, seen the fact that the SCM has also extended competences in the field of initial and continuous training of judges and in the organisation and functioning of the National Institute of Justice (Article 4, § 2 of Law No. 947-XIII, of 19/07/1996).

It would therefore be a positive change to give the final word on the selection and appointment to the Selection Board, without further intervention of the SCM – except in the case of refusal of appointment by the President of the Republic, in which case it would belong to the SCM the competence to decide to reappoint or not the candidate (always under reasoned decision).

3.3.1.3 The 5-year probation period

As for the five-year probation period, although the draft amendments to the Constitution of Moldova would eliminate it (the proposed wording of Article 116, par. (2) would be that "judges of courts of law shall be appointed, according to the law, until age limit has been reached"), the current version of the Constitution still establishes that period and recent cases have come to light where the SCM decided not to appoint judges after the probation period with public doubts

[89] As proposed by Victoria Sanduta in *Judicial Integrity as Key Issue of the Moldovan Justice System Reform*, Friedrich Ebert Stiftung, December 2020, p. 4.

on the real motives of those decisions and accusations of inappropriate connections between the members of the SCM involved in the interviews and other persons who would have interest in the non-appointment of the judge[90]. It is essential that the changes to the Constitution of the Republic of Moldova are quickly approved and the 5-year probation period is eliminated.

3.3.2 Review of existing criteria to assess the integrity of judges and suggestions for new criteria

As analysed in the previous chapter, the integrity criterion for appointment of judges in the Republic of Moldova ("having an impeccable reputation"), is translated into the following requisites:

- not having a criminal record, including extinguished, or having been absolved of criminal liability by an act of amnesty or pardon;
- not having been dismissed from law enforcement for compromising reasons or having been released, for the same reasons, from functions in a legal profession;
- not having behaved or carried out an activity incompatible with the rules of the Code of Ethics for Judges;
- not having been disciplinarily sanctioned for non-compliance with the provisions of Article 7, para. 2 of Law No. 325 of 23rd December 2013 on institutional integrity assessment; or
- not being prohibited from holding a public office or function, based on the decision of the National Integrity Authority (Article 6, para. 4, Law on the status of judge).

As for promotion, these integrity criteria are also taken into account:

- respect for professional ethics;
- professional reputation;
- cases of disciplinary misconduct;
- violations of the European Convention on Human Rights established by the ECtHR).

In order to assess the fulfilment of these criteria:

- candidates must present a declaration of assets and personal interests to prove lack of any conflict of interest;
- candidates must pass a polygraph test;
- the reputation of the candidate in the context of the law is taken into account, namely assessing the candidate's professional, personal and social competences;
- the National Integrity Authority issues integrity certificates and the National Anticorruption Centre issue certificates of professional integrity record;
- the personality characteristics and skills appropriate to the function of a judge (integrity, fairness, ability to manage stressful situations) are taken into account.

When confronting the criteria established by Moldovan law with the international standards previously analysed, the conclusion of GRECO in the IV Evaluation Round is accurate: the criteria established appear to be in line with the international best practices. Some refinements may nevertheless be introduced.

The prohibition to be a member of a political party or to carry out any activity of a political nature, including during the period of secondment of office is established in Article 8, par. 3^2, b) of the

[90] See the cases of Judge Mihai Murguleț (decision of SCM of 09 April 2020 – more info can be found at https://newsmaker.md/ro/mihai-murgulet-nu-mai-poate-fi-judecator-csm-a-respins-cererea-sa/) and Judge Nicolae Pasecinic (decision of SCM of 19 January 2021 – more info may be found at http://www.voxjust.md/feed/50).

Law on the Status of Judges only for sitting judges. Article 6 does not mention any criterion related to that membership (current or previous) in relation to candidate judges. This could lead to the situation where an active member (even of an executive body) of a political party could pass directly from that position to become a judge, as long as it ceases its political affiliation in the moment of appointment. This would obviously contribute to the weakening of the perception of independence of the judiciary. A new requirement could be added, establishing that candidate judges should not have been members of a political party for a determined period prior to the application.

Another aspect that could be considered is one of the criteria established by Serbian Law, that was analysed by the Venice Commission in its Opinion No. 528/2009 (CDL-AD(2009)023) - refraining from hate speech, indecent or blunt behaviour, impolite treatment, expressing partiality or intolerance. Social interaction of judges and candidate judges and the personal attitude revealed should be taken into consideration in selection and promotion procedures.

Related to the previous topic, the use of social media by judges or candidate judges is also a new reality that must be considered when assessing integrity. Nowadays, it is more and more frequent to see public demonstrations of hate speech or intolerance, mainly in internet and social media, and some aspects of the real personality of an individual are often more transparently revealed in those interactions. This reality includes all kinds of persons, be they candidate judges or sitting judges. As the UNODC noted in the *Non-Binding Guidelines on the Use of Social Media by Judges*, *"the way an individual judge uses social media may have an impact on the public perception of all judges and confidence in judicial systems generally"*[91]. And although the use of social media by judges may have the positive effect of contributing to enlarge the expertise of judges and help citizens to be better informed about the judiciary, it may also have very negative situations in which *"judges have been perceived to be biased or subject to inappropriate outside influences"*[92]. The assessment of the integrity of a person applying to be a judge or of a sitting judge that wants to be promoted must take into consideration this new reality. Therefore, candidate judges and sitting judges should have to disclose the social media they use and its public (not private) content should be analysed in the selection and promotion procedures, in order to verify if there's been any kind of hate speech, impolite treatment or expression of partiality or intolerance that could hamper the integrity (or public perception of it) of the candidate to appointment or promotion.

Another aspect that raises some concerns is the inclusion as a criterion of integrity checking in promotion procedures of violations of the European Convention on Human Rights established by the ECtHR. The fact that the ECtHR may consider that a judicial decision has been rendered in breach of the ECHR does not imply the existence of an integrity breach by the judge. With the exception of cases where a judge has deliberately infringed the ECHR during the procedure – cases that must be assessed in the framework of disciplinary liability – convictions by the ECtHR in judicial proceedings are based either on flaws of the laws of procedure or on the interpretation of the Convention by the ECtHR and its application to the concrete case, and not based on integrity issues related to the judge. The inclusion of such a criterion, especially when correlated with provisions of the law on disciplinary liability of judges - mentioning that judges bear material responsibility, in proportion to the established degree of guilt, in the recourse action of the state towards them asking for the restitution of the amounts paid by the state in cases where the ECtHR found, by final decision, a violation of a person's fundamental rights or freedoms and ordered the payment of financial compensations – may have an undesirable chilling effect on judges. To hold a judge responsible for a decision is a clear threat to his/her independence, that must at all cost be avoided. Therefore, the criterion in promotion procedures of considering violations of the European Convention on Human Rights established by the ECtHR should be eliminated.

[91] Pag. 2 - available at https://www.unodc.org/res/ji/import/international_standards/social_media_guidelines/social_media_guidelines_final.pdf .
[92] *Ibid.*

3.3.3 Possible mechanisms to consolidate the integrity checking in regard to judges

As described in the previous chapter the excessive complexity is characteristic of the process of appointment of judges in Moldova. This is to some extent due to involvement of several state institutions in the appointment process where coordination between these institutions is complex however not producing sufficient information necessary for assessing integrity of candidates for position of a judge to the extent necessary. This has been observed by GRECO which expressed deep concerns regarding *"indications that candidates presenting integrity risks are appointed as judges"*.

Several state institutions, from within the judiciary or outside, perform integrity checks. At first glance, numerous mechanisms for integrity checking that are available to the judiciary seem to enable it making an informed decision on selection/promotion of judges.

However, after closer examination it becomes visible that competences of some state institutions as to integrity checks performed have been limited in practice, there is a lack of efficiency of the controls performed due to insufficient resources, and some mechanisms available do not provide reliable information and are as such questionable.

On the other hand, the excessive complexity of the judicial appointment process conceals (to some extent successfully) a lack of willingness on the side of judicial bodies involved in the selection and promotion procedures, to use the results of integrity checks when making decisions as well as a lack of transparency of the decisions made.

3.3.3.1 National Institute of Justice (verification of conditions for a position of a judge prior to entering the admission contest or taking the exam)

In the process of selection of judges in the Republic Moldova NIJ conducts initial training courses as well as organises and conducts examination for the candidates. NIJ is also the first of several state bodies to be involved in integrity checking of candidates for a position of a judge. Significant resources, both human and financial, are allocated for these activities.

NIJ is given a mandate to verify whether the candidates for a position of a judge meet the conditions laid down in Article 6 of the Law on the status of judge since Law on the National Institute of Justice stipulates that meeting (some of) the conditions laid down in Article 6 of the Law on the status of judge results in eligibility to enter the admission contest prior to the initial training courses (para 1. of Article 15, Law on the National Institute of Justice) or to take part in the exam before the Commission for graduation examination (para. 3 of Article 28, Law on the National Institute of Justice).

However, NIJ is vested with limited powers to check integrity of the candidates. Regarding the candidates who have two years of work experience in a legal profession NIJ checks only one condition related to integrity of candidates for a position of a judge, namely lack of criminal record (para. 3 in relation to para. 2 of Article 15, Law on the National Institute of Justice) since the mere submission of all required documents attached to the application to enter the admission contest, including of the criminal record results in acceptance to the admission contest. Regarding the candidates with more than five years of work experience in a legal profession (candidates for the position of judge based on the seniority in employment) NIJ does not check any of the conditions related to integrity of the candidates; NIJ verifies only whether a condition of having more than five years of work experience is met (para. 3 of Article 28, Law on the National Institute of Justice) since meeting this condition makes the candidate eligible to be admitted to the exam.

After the results of the admission contest are approved by the NIJ's Council and prior to their admittance to the initial training courses NIJ checks the candidates' integrity by requesting the National Anticorruption Centre to issue certificates of professional integrity records – valid only for persons who until the submission of documents to the admission contest have worked in public entities that fall under the incidence of institutional integrity assessment. In case a negative result of professional integrity tests has been recorded in the candidate's personal integrity



record in the last 5 years s/he is excluded from the list of candidates to participate in initial training courses.[93]

Other conditions related to integrity of candidates for a position of a judge laid down in Article 6 of the Law on the status of judge such as having an impeccable reputation or passing the polygraph testing are checked only at a later stage in the selection procedure of judges and by other state bodies, namely SCM and the SCM's Selection Board. Moreover, some of these integrity checks are carried out again. For example, in the selection procedure the Selection Board also requests the National Anticorruption Centre to issue certificates of professional integrity record and the National Integrity Authority to issue integrity certificates[94] while in the recruitment procedure SCM verifies the candidates' impeccable reputation by obtaining data from the competent authorities on the candidates' compliance with the law.

Checking integrity by requesting the certificates of professional integrity records is performed several times in the whole process, first by NIJ and later by the Selection Board.

NIJ's role in integrity checking of candidates for a position of a judge should be reinforced in two ways:

- By giving NIJ a broader mandate in performing the integrity checks that would entail not only checking the candidate's criminal record and obtaining a certificate of professional integrity records, but also checking other conditions related to integrity of the candidates as stipulated in Article 6 of the Law on the status of judge (i.e. conditions of having an impeccable reputation and passing the polygraph testing). A gradual approach should be taken when performing different integrity checks, initially merely consulting different public databases or requesting certificates stating facts contained in particular registers, databases etc. which requires minimum efforts and public resources and at a later stage taking measures which require more efforts and public resources (i.e. polygraph testing);
- By performing integrity checks at an earlier stage of handling applications of the candidates in order to avoid any unnecessary spending of public resources (in forms of time, money, staff) on activities related to the admission contest and the initial training courses with regard to the candidates who failed to prove their integrity.

3.3.3.2 National Anticorruption Centre (certificates of professional integrity records; institutional integrity assessment)

As described above, upon request of NIJ, NAC issues certificates of professional integrity records with regard to candidates who have two years of experience and who have been admitted to the initial training courses at NIJ, following the admission contest.

One inefficiency of this process already noted above, is related to the fact that a certificate of professional integrity record is requested only after the candidate has undergone the application review at NIJ which means that considerable public resource have been allocated to this activity by NIJ prior to making the request to NAC for issuing the certificate. Furthermore, in case of a negative result of the candidate's professional integrity testing which is dully recorded in his/her professional integrity record, the public resources spent are never compensated for. A measure to improve efficiency of the procedure in this regard has been recommended above.

Another striking issue with regard to NAC's competences is the fact that in practice no institutional integrity assessments of courts, part of which is professional integrity testing of judges, have been carried out so far. During the interviews with interlocutors it has been established that this has been the case since 2018 when the integrity assessment system has been

[93] Regulation for organizing and conducting the admission contest for the initial training of the candidates for the position of judge and prosecutor (approved by NIJ Council Decision No 5/2 of 25.05.2017 and further amendments), point 72.
[94] Regulation on the criteria for selection, promotion and transfer of judges (approved by the Decision of the Superior Council of Magistracy No 613/29 of 20.12.2018), point 8 as well as Law on the status of judge No 544 of 20.07.1995, Article 9 para (8)

redrafted as a response to the Constitutional Court ruling[95]. A professional integrity record, as explained above, contains information on results of professional integrity testing, being positive or negative. Since no professional integrity testing of courts/judges has been performed to date, a certificate of professional integrity record in relation to any sitting judge who is a candidate in selection process therefore always attests to the nonexistence of any professional integrity testing (unless the candidate judge previously held a public office position and was as such subject to integrity testing). In 2019, 203[96] such certificates have been issued by NAC upon the SCM's request. As such, this mechanism is currently ineffective in terms of providing any relevant information for the selection process and only represents a task performed by NAC that does not serve any purpose.

However, this mechanism may be useful in order to identify a candidate with integrity risks prior to his/her appointment to a judicial position. It should, however, be used properly and taking into account all relevant procedural safeguards in order to avoid any unlawful use (for example, use of undercover agents, also as agents provocateurs[97] with regard to the simulation exercise which is the essential element of the professional integrity testing) that would impinge on the judicial independence. As GRECO recommended *"that appropriate measures be taken, with due regard to judicial independence* (underlined by the authors), *in order to avoid the appointment and promotion to judicial positions of candidates presenting integrity risks"*. It is therefore recommended that this tool is applied in practice, with sufficient safeguards in place.

One safeguard that is currently in place is that a court authorisation of a reasoned decision of the NAC's director is needed to initiate professional integrity testing in regard to a specific public institution. Another safeguard could be ensuring that information obtained in the professional integrity testing which raises doubts as to integrity of a particular candidate should not represent the sole and decisive basis for excluding the candidate from the selection procedure – it should be thoroughly analysed, also in terms of due process of obtaining such information, and its content verified using other means as well.

3.3.3.3 National Integrity Authority (integrity certificates, asset declarations, etc.)

In the selection and promotion procedure the SCM's Selection Board requests NIA to issue integrity certificates for all candidates for vacant positions of a judge. The integrity certificate includes information on the findings from final decisions of NIA or courts issued in the last 3 years with regard to established unjustified assets, conflicts of interest, violations of restrictions, unresolved incompatibilities, limitations and prohibitions to hold public office or a position of public dignity (Article 31^1, Law on integrity).

Furthermore, candidates who are registered in the Register of participants in the competition for filling judicial vacancies have to submit their declaration of assets and personal interests as part of their application for the competition organised by SCM. Declarations are verified in order to identify any violation of various legal regimes, namely assets and personal interests, conflicts of interest, incompatibilities, restrictions and limitations.

Several issues have been raised by various interlocutors with regard to NIA's role and tasks in integrity checking of judges:

- NIA lacks sufficient resources (human, financial) while at the same time is competent for control over a large number of public officials (approx. 60.000) and is thus hampered in performing its activities effectively;

[95] Constitutional Court ruling No 7 of 16.04.2015 on constitutional control of several provisions of the Law No 325 of 23.12.2013 on professional integrity testing
[96] Information given by NAC in the meeting held with authors.
[97] See Venice Commission, *Amicus curiae* brief for the Constitutional Court of Moldova on certain provisions of the Law on professional integrity testing, Opinion No. 789/2014, available at https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2014)039-e

- information provided by NIA in integrity certificates is mostly formalistic since NIA does not initiate any procedures with regard to a candidate's compliance with the rules on declarations of assets and personal interests, conflicts of interest, restrictions, limitations and incompatibilities but merely provides information on its findings from past integrity checks performed with regard to the candidate, if any;
- information only with regard to sitting judges is provided since they are subject to declarations – no information is available with regard to wealth, conflicts of interest etc. of other candidates (unless holding a public position and thus subject to NIA's control);
- existing legal framework does not allow NIA to check whether value of assets declared in the declarations actually corresponds to the real market value since assets may be declared according to their contractual value which is often abused so that assets are declared at a much lower value;

In the IV Evaluation Round Report of Moldova, GRECO pointed out the need for:

- ensuring a significantly more independent and effective control, by the National Integrity Commission, of compliance by members of Parliament, judges and prosecutors with the rules on conflicts of interest, incompatibilities, statements of personal interests and statements of income and property (recommendation iv.);
- ensuring that the mechanism by which administrative sanctions are imposed for violations of the rules on conflicts of interest, incompatibilities, statements of personal interests and statements of income and property works effectively in practice, notably:
    - (i) by providing the National Integrity Commission with the authority to impose administrative sanctions and
    - (ii) by increasing the limitation period applicable to the violations foreseen in the Contravention Code and clarifying its scope of application;

      (recommendation v.).

In the first compliance report (December 2018), recommendation v. was considered implemented in a satisfactory way, seen the approval in 2016 of the new Law on National Integrity Authority, that gave NIA extended powers to impose administrative sanctions, and the extension to one year of the limitation period.

As for recommendation iv., either in the first and in the second compliance reports, it has been considered only partly implemented. Although NIA has an institutional design ensuring more independence and has been operational, GRECO noticed a lack of strategy and understaffing that still needs to be addressed, in order to make it more effective and efficient.

According to Article 4, § 1 of Law No. 133 of 17 June 2016, on the declaration of assets and personal interests, these are the following aspects to be subject to declaration:

- income gained by the subject of the declaration together with their family members or cohabitant in the previous fiscal year;
- movable and immovable goods, including any incomplete ones, owned with right of usufruct, of use, habitation, superficies by the subject of the declaration, including as beneficial owner or by his/her family members or by his/her cohabitant or in their possession based on mandate, commission or trust agreements, as well as based on translative agreements of possession and of use;
- the goods transferred by the subject of the declaration whether for a consideration or free of charge, personally or by his/her family members or his/her cohabitant to any natural person or legal entity during the declaration period, if the value of each assets exceeds the value of 10 average national salaries;



- the financial assets of the subject of the declaration, namely the monetary amount in the national currency or a foreign currency which exceeds the value of 15 average national salaries and which does not represent the object of a deposit in a financial institution. Bank accounts, creation units in investment funds, equivalent forms of investments and savings, investments, bonds, checks, bills of exchange, loan certificates, other documents that include personal patrimonial rights of the subject of the declaration, of his/her family members or of his/her cohabitant, direct investments in the national currency or in a foreign currency, made by him/her or by his/her family members or his/her cohabitant, as well as other financial assets, if their combined value exceeds 15 average national salaries;
- the personal debts of the subject of the declaration, his/her family members or his/her cohabitant in the form of any debt, pledge, mortgage, guarantee issued for the benefit of a third party, loan and/or credit, if the value of the same exceeds the value of 10 average national salaries;
- goods in the form of precious metals and/or stones, art and cult objects, objects that are part of the national or universal cultural patrimony, whose unit value exceeds the value of 15 average national salaries, held by the subject of the declaration in person or by his/her family members or his/her cohabitant;
- collections of works of art, coins, stamps, weapons or other goods whose value exceeds 20 average national salaries, held by the subject of the declaration or by his/her family members or cohabitant;
- a share/shares in the share capital of a company owned by the subject of the declaration either personally or by his/her family members or his/her cohabitant;
- patrimonial rights, held by the subject of the declaration either personally or by his/her family members or cohabitant, deriving from copyrights, patents or intellectual property rights;
- being a member of the management, administration, review or inspection bodies of non-commercial organisations or trade companies, held by the subject of the declaration or by his/her family members or his/her cohabitant;
- being an associate, shareholder or member of an economic agent, a non-commercial organization or international organization held by the subject of the declaration or by his/her family members or his/her cohabitant;
- agreements, including legal support, consultancy and civil agreements drawn up by the subject of the declaration, his/her family members or his/her cohabitant, or in development during the appointment/mandate being exercised, financed by the state or local budget and from external funds or contracted with trade companies owned by the state;

All assets and personal interests of the declaration and his/her family members or cohabitant, in the country or abroad should be included (§ 2), excluding presents, services and/or advantages received by the subject of the declaration free of charge from his/her family members, parents, siblings or children, whose individual value does not exceed 10 average national salaries (§ 3).

The declaration must be submitted (Article 6):

- within 30 days from the date of beginning of functions (§ 1);
- every year, by 31st of March (§ 1);
- within 30 days of the termination of mandate (§ 4).

The declarations are published in NIA's website and remain available for 15 years, with the exception of the following information, which is of limited access (Article 9, § 2):

- identification number assigned to the subject of the declaration;
- his/her permanent address and phone number;



- last name, first name, the years of birth, addresses and identification numbers of his/her family members and of his/her cohabitant;
- addresses and cadastral numbers of immovable assets;
- the registration numbers of movable assets;
- the cash in national currency or foreign currency that does not represent the object of financial submissions;
- the bank account numbers;
- any assets in the form of precious metals or stones, works of art and cult objects, objects that are part of the national or universal patrimony, collections of works of art, of coins, stamps, weapons;
- the signature of the subject of declaration.

The control and inspection of assets and personal interests is performed by NIA, according to Article 10 of Law No. 133 of 17 June 2016, and to Article 7, § 1, c) of Law no. 132 of 17 June 2016, on the National Integrity Authority.

The inspection consists in controlling the asset and personal interest declarations, the data and information on the existing assets, as well as the patrimonial changes occurred during the exercise of the mandate (Article 26 of Law no. 132), and it may be started *ex officio* or following a notification submitted by an individual or legal entity (Article 28, § 1). Inspections may be carried out during the exercise of functions and up to three years after termination (Article 32, § 1). The inspection extends to assets of family members and cohabitants of the inspected person and the inspector may request information from any source and ask for an expert evaluation of the value of assets (Article 32, §§ 2 to 5 and 7). The inspected must be heard about any inconsistencies found and has the right to perform his own expertise (Article 32, §§ 6 and 8) and has the right to be informed, present information, be assisted by a lawyer and challenge the documents issued by the inspector (Article 33).

When confronted the legal framework just described with the international standards previously analysed, it appears that the system currently in force in Moldova is compatible with those standards: the law establishes the obligation of declaration of assets and interests and details the mechanisms of control and inspection of the data declared, while ensuring a degree of privacy in what concerns sensitive personal information of judges.

The main problems that arose in the analysis made (in line with what GRECO had already noticed in the Evaluation Report) were not linked with the legal framework, but with the concrete execution of the control of the declarations presented by judges.

Contributing to this reality is certainly the fact that NIA has competence over the declarations of assets of around 60 thousand people, thus being impossible to effectively control all of them[98]. Reasons for above listed problems can be attributed to some extent to the fact that NIA has only been operational since 2018. This was also recognised by GRECO in the Compliance Report (adopted in December 2018) where GRECO noted improvements with regard to NIA's expanded competences (as opposed to the competence of NIA's predecessor, National Integrity Commission) but concluded that since NIA only started to operate its overall effectiveness in practice would have to be reassessed once it would be operational for some time. In the Second Compliance Report (adopted in September 2020) GRECO again concluded recommendation[99] to be partly implemented, pointing to the lack of a strategy, understaffing and insufficient level of

[98] Ibid..
[99] Recommendation iv: GRECO recommended ensuring a significantly more independent and effective control, by the National Integrity Commission, of compliance by members of Parliament, judges and prosecutors with the rules on conflicts of interest, incompatibilities, statements of personal interests and statements of income and property.

professional capacities and called for more resolute measures to make NIA more effective and efficient.

The issue pointed out in GRECO's Second Compliance Report is, therefore, of crucial importance – Moldova should as quickly as possible solve NIA's problem of lack of strategy and understaffing.

As for the control of the value of the declared assets, not diminishing the importance of checking the declarations of assets of all public officials, special attention must be given to declarations of judges, seen the important role they play in society, as holders of one of the three powers of the State. Therefore, seen the current limitation of means of NIA, other solutions must be thought in order to guarantee effective control of the value of assets declared.

In the *Memorandum of Understanding between the European Union and the Republic of Moldova*, of July 2020, it was established that to improve the efficiency of NIA, the Parliament of the Republic of Moldova should adopt amendments to the legal framework related to assets and conflict of interest declarations, in order, *inter alia*, to *"extend the competences of integrity inspectors by allowing* them *to request the evaluation of assets during control procedures from independent evaluators"*, and to *"oblige the subjects of declaration of assets and conflicts of interest to declare assets at their real market value"*[100].

In line with this obligation imposed by the agreement, a possible solution would be to establish that the value of assets declared by judges would mandatorily be assessed by independent accountants, appointed by the *Association of Professional Accountants and Auditors of the Republic of Moldova* (to assess if there is incompatibility between the value of the asset and the income of the judge). This assessment would not be necessary every year, but only in the first declaration and, afterwards, in the case of declaration of new assets (not included in the previous declaration) or alleged increase/reduction of the value of those previously declared. This solution would not only contribute to overcome the obstacles posed by the lack of means of NIA, but also to increase public trust, as it would involve an assessment made by independent and certified experts. Even if there may be no unlawful conduct in declaring the contractual value of an asset, if an independent assessment would find out that the market value is much higher, it could imply:

- possible tax evasion in the contract declared, that should be investigated by tax authorities;
- explanations that the judge would have to give to NIA or the SCM on that divergence;
- explanation of the judge on how was he/she able to buy that asset for such a low price.

Nevertheless, the following steps need to be made to improve current deficiencies:

- With regard to lack of sufficient resources and the fact that NIA is competent for control of compliance of a large number of public officials: For the purpose of the prioritisation, a strategy would be useful to be prepared, explaining which tasks (i.e. verification of declarations of assets and personal interests) and which categories of public officials (i.e. judges) NIA will be focus on as a matter of priority. The strategy should be made public in order to ensure transparency with regard to NIA's work and prevent any criticism of its work, especially from the politicians. NIA should also call upon the authorities to ensure sufficient resources for its functioning. With regard to criticism that the information provided in integrity certificates is merely formalistic: When responding to requests from SCM to issue integrity certificates with regard to candidate judges, it would be useful that NIA perform additional check of the candidates by initiating procedures for verifying declarations of assets and personal interests and for controlling their compliance with rules on conflicts of interest, incompatibilities, restrictions and limitations.

[100] Annex I – *"Structural Reform Criteria"*, par. 3 - available at https://ec.europa.eu/info/sites/info/files/economy-finance/moldova_mou_signed.pdf.

- The initiative of NIA seen over the last year, to prioritize checks on judges as well, is welcomed, since NIA plays an important role in the overall system of integrity checking of judges. This checking was assessed by GRECO as ineffective and thus allowing judges presenting integrity risks being appointed or promoted.
- With regard to the value of assets declared, in addition to the recommendation already formulated above (assessment by independent auditors), the legal framework should be changed in order to eliminate this deficiency - guidelines for assessing a market value of different assets could be prepared by NIA.

Another matter that was raised during the meetings with interlocutors were amendments to Law on National Integrity Authority in December 2020 which brought several changes to the competences of NIA with regard to applying effective control measures. These amendments were challenged before the Constitutional Court, pending examination at the moment. Time allocated to checking assets and personal interests after termination of the official's mandate has been reduced from three to one year which might affect NIA's capability to initiate investigations in due time with regard to officials that have terminated their office in 2020. Furthermore, the amendment could allow accumulation of unjustified assets after one year has passed. NIA's decisions may be challenged in court within one year after adoption and not within 15 days anymore. Disciplinary liability may be applied only after a fact-finding document has become final which could in practice lead to non-application of disciplinary liability due to expiry of statute of limitations. Disciplinary procedure may be initiated within one year and since the disciplinary sanction applied is termination of a mandate, employment or service, it might be impossible to apply this sanction due to long investigation procedures. Changes apply also to the NIA's ongoing investigation procedures.

Some of these amendments might have an impact also on integrity cases related to judges in selection and promotion procedures. For example, the fact that NIA's decisions may be challenged in court within one year after being adopted and not within 15 days anymore will affect comprehensiveness of information provided in integrity certificates where NIA's final decisions on compliance with rules on declaring assets and personal interests, conflict of interest, incompatibilities etc. are recorded. It might be that because the case is still pending in court NIA's decision on violation of rules will not be recorded in the integrity certificate at the time of selection or promotion procedure.

3.3.3.4 SIS checks

According to the Law on integrity, SIS may carry out verification of holders and candidates to public positions as part of integrity control. For the purpose of the verification of public office holders and candidates, the provisions of the Law on Verification of Public Office Holders and Candidates apply. Prior to adoption of amendments to this law SIS carried out verifications also in respect of judges – however, amendments to the Law on Verification of Public Office Holders and Candidates explicitly excluded candidates for the office of judge and sitting judges from among verified persons. This has been done due to the Constitutional Court decision that pointed out that the law did not grant any discretionary decision-making power to SCM in case SIS identified a risk factor in relation to the verified person.[101] In such a case, SCM was bound by facts established by SIS and had to conclude that the verified person could not be appointed due to incompatibility reasons. Its role as a guarantor of the independence of the judiciary was therefore diminished.

International standards[102] in regard to integrity checking of judges and candidate judges during selection and promotion procedures do not prohibit any background checks to be performed, even by security services; however, they limit them to checks of a criminal record and of other

[101] Constitutional Court, Decision No 32 of 05.12.2017 concerning the exception of unconstitutionality of certain provisions of Law No 271 of 18.12.2008 on the verification of holders and candidates for public offices
[102] See Kyiv Recommendations and CCJE Opinion No. 21 (2018),

disqualifying grounds obtained from the police as well as to checks of financial situation. They also affirm that when background checks are performed certain safeguards should be in place and respected, namely background checks should be performed on the basis of criteria that can be objectively assessed, a right to have access to information obtained, a right to access the results of such control and a right to appeal to an independent body in case being rejected due to the results of the control.[103]

It is recommended that the above listed safeguards are put in place in case SIS is again given competences for carrying out verification of candidate judges and sitting judges in the selection procedures.

3.3.3.5 Polygraph testing of judges

National Anticorruption Centre is also competent to perform polygraph testing in relation to all persons participating in the competition for appointment as judges, upon request of SCM. This anti-corruption mechanism for assessing integrity of a candidate has already been addressed by the International Commission of Jurists in its Mission Report[104] which pointed out the fact that polygraph tests *"are inherently unreliable and have been rejected for use as evidence in courts in many jurisdictions."* Leonard Saxe and Gershon Ben-Shakhar who found that *"the present analysis demonstrates that although the validity of polygraph test results has been examined across many studies, none of them satisfies the necessary criteria, and therefore, accuracy rates of polygraph test results are unavailable"* have made the same conclusion[105].

It is recommended that the mechanism of polygraph test is abolished.

3.3.4 Strengthening SCM's role in seeking and assessing relevant information with regard to a particular candidate

The general mission of any Council for the Judiciary is to safeguard the independence of the judicial system and the independence of individual judges. Judicial integrity is closely interlinked with the concept of judicial independence: the latter enables integrity and integrity reinforces independence. CCJE recognised that the most important safeguard to prevent corruption among judges is the development and fostering of a true culture of judicial integrity. This should be done when performing different tasks assigned to the Council for the Judiciary, i.e. selection and appointment of judges, evaluation of judges, disciplining etc.[106]

In the Moldovan legal and institutional framework for selecting and promoting judges there are several gaps and deficiencies that contribute to the low level of public confidence and trust in the judiciary. Given the fact that international standards emphasise the Council for the Judiciary's role of being in service of accountability and transparency of the judiciary, this role has been largely disregarded by SCM.

In the GRECO Evaluation Report (4th Evaluation Round) several deficiencies were identified with regard to the SCM's role in guaranteeing the independence of the judiciary and in organising and managing the judicial system, namely insufficient transparency and objectivity of the SCM's decisions in matters of recruitment, promotion and disciplining of judges and lack of determined and effective response of SCM to misconduct of judges. Throughout the report, GRECO highlighted

[103] CCJE Opinion No. 21 (2018), Preventing Corruption among Judges, available at https://rm.coe.int/ccje-2018-3e-avis-21-ccje-2018-prevent-corruption-amongst-judges/16808fd8dd

[104] See page 33, the report available at https://www.icj.org/wp-content/uploads/2019/03/Moldova-Only-an-empty-shell-Publications-Reports-Mission-reports-2019-ENG.pdf

[105] See Admissibility of Polygraph Tests: The Application of Scientific Standards Post-Daubert, page 2, available at https://www.researchgate.net/publication/232572993_Admissibility_of_Polygraph_Tests_The_Application_of_Scientific_Standards_Post-Daubert

[106] CCJE Opinion No. 21 (2018), Preventing Corruption among Judges, paras. 2, 22, available at https://rm.coe.int/ccje-2018-3e-avis-21-ccje-2018-prevent-corruption-amongst-judges/16808fd8dd and CCJE Opinion No. 10 (2007), Chapter II, available at https://rm.coe.int/168074779b

a deeply negative public image of the Moldovan judiciary. Perception of judicial bias and self-reporting by many of paying bribes to the judiciary were mentioned.[107]

Subchapters below try to address some of these issues relevant for performing integrity checks of candidates in selection and promotion procedures within the judiciary.

3.3.4.1 Updating the existing regulation on criteria for selection, performance evaluation and transfer of judges

Mandatory conditions, criteria and procedures for selection, performance evaluation and transfer of judges prescribed in the applicable laws are further elaborated in the SCM's regulations, namely Regulation on the criteria for the selection, promotion and transfer of judges (Decision No. 211/8 on 5th Mach 2013), Regulation on the criteria, indicators and the procedure for evaluating the performance of judges (Decision No. 212/8 on 5th March 2013), Regulation on the organisation and conduct of the competition for the filling of the functions of judge, vice-president and president of the court of justice (Decision No. 612/29 on 20th December 2018). As such, they should provide clear guidance to all those involved in recruitment and promotion (and transfer) procedures, leaving no doubt as to which criteria is assessed and what verification tools are used to verify whether candidates meet the criteria.

However, it has been noticed in the course of preparation of this technical paper that not all verifications tools that are applied in practice are listed in annexes to the regulations. For the sake of transparency of the process, regulations and its annexes should be updated.

3.3.4.2 Analytical notes/reports provided by the Judicial Inspection and the Disciplinary Board

As mentioned above (see Chapter 2.1 on international standards), according to some international best practices verification of inexistence of history of disciplinary misconduct may play a role in appointment procedures.

Lack of disciplinary sanctions is one of the selection criteria for promoting judges in Moldova, either to a higher hierarchical court or to a position of a (vice-)president of a court (para. b) of Article 11, Regulation on the criteria for the selection, promotion and transfer of judges). Disciplinary Board of SCM provides information on this. However, this criterion can only be applied in cases of sitting judges being candidates for promotion and it only certifies lack of disciplinary sanctions issued. Moreover, as it was explained during a meeting with the Selection Board representatives, the information provided only relates to disciplinary matters in which a decision of the Selection Board has become final (either because in it was upheld by a court in an appeal procedure or because it was not appealed at all).

On the other hand, for the purpose of integrity checking of candidate judges information on notifications made with regard to suspected disciplinary offences or misconduct of a judge which were not admitted by the Disciplinary Board or did not result in any disciplinary sanction being imposed would also be valuable. As per the law, notifications may be submitted by any interested person, SCM, the Performance Evaluation Board or the Judicial Inspection on its own initiative. After the Judicial Inspection verifies facts of the case, the Admissibility Board either rejects the case or admits it and sends it to the Disciplinary Board which decides on the substance of the case and imposes sanctions, if necessary. The Judicial Inspection keeps (electronic) statistical record of all complaints and results of the verification procedure.

Taking into account the legal possibility to use all legal means for verifying the reputation of the candidate awarded to SCM (Article 3.16, Regulation on the organisation and conduct of the competition for the filling of the functions of judge, vice-president and president of the court of justice) it is therefore advised that the current mechanism of checking integrity of candidate judges in promotion procedures is improved so that it would include also a requirement for SCM

[107] GRECO 4th Evaluation Report, paras. 4, 100, 132

to obtain information from its disciplinary bodies on possible notifications of suspected disciplinary offences or misconduct made as well as their content and how these cases were handled. In respect of cases pending before the Judicial Inspection regarding a particular candidate, such information should be recorded in the promotion procedure, however, at the same time it should be noted that until the disciplinary procedure is finalised information should not be taken into account. A possibility to reconsider a decision on promotion in case the candidate is later held disciplinary liable should be envisaged by law.

Such improvement of the practical implementation of the current legal framework bringing more insight into how the Judicial Inspection and the Disciplinary Board deal with cases of judges' misconduct would also have effect on the way they exercise their disciplinary competence. As it was noted by GRECO, *"the capacity of the Judicial Inspection and the Disciplinary Board to deal with misconduct of judges in a determined and effective manner is crucial, especially against the perception of judicial bias and self-reporting by many of paying bribes to the judiciary."*[108]

Also, regarding decisions issued in disciplinary matters that have not become final yet there should be a mechanism allowing to reconsider a decision on promotion in case the decision becomes final. The facts of the case might present a serious "red flag" in relation to a candidate's integrity. However, although in these cases the whole procedure of establishing one's disciplinary liability has taken place, the fact that the decision is not yet final does not allow that they are taken into consideration. While in principle it would go against the objective of a concrete disciplinary procedure to promote a judge awaiting his/her disciplinary sanction for a serious misconduct to become final, the whole procedure should not be blocked and the individual judge – who may still be in time to exercise his right to appeal – must not see this fundamental right affected. Therefore, also in these cases a mechanism should be put in place, allowing the reconsideration of the promotion when the disciplinary decision becomes final.

3.3.4.3 Analytical notes provided by the Ethics Commission (information on confidential counselling as well)

A dedicated confidential service developed within the judiciary is deemed an important professional tool to help judges to be proactive in resolving problems early, appropriately and authoritatively.[109] GRECO often highlighted in its reports in the Fourth Evaluation Round dedicated to corruption prevention in respect of judges that *"such mechanisms are undoubtedly valuable for better advising judges in case of integrity-related dilemmas, but also for bringing coherence to integrity policies and developing best practices across the profession."*[110]

GRECO recommended setting up such mechanism also in respect of Moldova. The recommendation was issued based on GRECO's findings that the accountability mechanism in place for judges had not been as efficient as it should have been (see above) and that a change in mind set and approach was needed in order to focus more on the preventive angle of the notion of conflicts of interest and not merely on the repressive side. It noted that there had been no body or mechanism providing confidential advice to judges on the concrete implementation of the rules of conduct and possible ethical dilemmas.[111]

The Judge's Ethics and Professional Conduct Committee (hereinafter: Committee) has been established within SCM in 2018, with competence to issue 1) consultative opinions interpreting the Code of Ethics and Professional Conduct of Judges' provisions and 2) recommendations on specific cases of judge's misconduct or misbehaviour. The Committee is, *inter alia*, a counselling

[108] GRECO Evaluation Report on the Republic of Moldova, para. 132.

[109] GRECO report on Conclusions and trends, pg. 20, available at https://rm.coe.int/corruption-prevention-members-of-parliament-judges-and-prosecutors-con/16807638e7

[110] GRECO Evaluation Report, para. 115.

[111] GRECO Evaluation Report, para. 115

body to individual judges. A judge may seek an opinion or a recommendation from the Committee or its individual members who are obliged to protect the confidentiality of the judge in question.

One element of integrity of a candidate judge that is checked in the selection and promotion procedure is whether s/he enjoys an impeccable reputation, which includes also behaving or carrying out an activity that is compatible with the rules of the Code of Ethics for Judges. As mentioned above, interpreting provisions of the Code of Ethics for Judges by issuing consultative opinions falls within the competence of the Committee.

As per Regulation on the organisation and conduct of the competition for the filling of the functions of judge, vice-president and president of the court of justice, SCM is entitled to use all legal means for verifying the reputation of the candidate (Article 3.16). However, during the meeting held with the Selection Board it was stated that the Committee is not consulted during the selection and promotion procedure with regard to any case of a candidate judge's past misconduct or misbehaviour explaining that this was because the Selection Board's competences were rather limited in terms of what the Selection Board could check.

Turning to the Committee for additional information on integrity of a particular candidate judge, especially whether the Committee has issued any recommendation on specific case in relation to the candidate judge's misconduct or misbehaviour would be beneficial for the outcome of the selection and promotion process in order to have a more comprehensive overview of a candidate judge's integrity. Making use of such information would also mean using the existing institutional setup better and to a greater extent possible which could eventually lead to a recognition of its work within the judiciary and in the public as well as its better positioning within the judiciary.

Furthermore, with regard to any doubt expressed in the selection or promotion procedure as to whether a particular behaviour or activity of a candidate is incompatible with the Code of Ethics for Judges thus rendering the candidate's reputation as flawed the Committee could provide opinion interpreting the provisions of the Code of Ethics for Judges.

The Committee could be given additional competences relevant also for performing integrity checks of candidate judges:

- competence of receiving and handling reports made by judges on misconduct by other judges (Committee as a recipient of whistle-blower's reports): such reports could then be handled by the Committee itself or referred to the competent body (i.e. the Judicial Inspection);
- examining non-serious violations, i.e. violations that normally would not be dealt with by the disciplinary bodies (would not be admitted by the Admissibility Board), however, need to be addressed.

3.3.4.4 Active role of SCM in requesting information from other institutions (including in the case of candidates coming from other professions)

The current legal framework on selection and promotion procedures envisages limited sources of verification, both from within the judiciary as well as from outside, where enquiries can be made with regard to integrity of candidates. Information may be sought from:

- In respect of all candidates:
    1. NAC: polygraph test
- In respect of candidates who are public officials:
    1. NAC: certificates of professional integrity records and polygraph test
    2. NIA: integrity certificate, declaration of assets and personal interests, Register of persons prohibited from holding public position for 3 years
- In respect only of candidates who are sitting judges:



1. NAC: certificates of professional integrity records and polygraph test
2. NIA: integrity certificate, declaration of assets and personal interests, Register of persons prohibited from holding public position for 3 years
3. Disciplinary Board of SCM: information on final decisions in disciplinary matters

- In respect of candidates from within the judiciary (judicial assistants, clerks):

1. Courts: previous professional activity (i.e. any disciplinary sanctions applied)

With regard to candidates for a position of a judge who are public officials (i.e. law professors from public education institutions, prosecutors) some information may be obtained from NIA and NAC (if they are subject of the declaration or have been the subject of a professional integrity testing). Nevertheless, no information on past professional activity (i.e. professional reputation, disciplinary sanctions issued) can be sought. Regarding candidates who are not public officials when applying for a position of a judge (i.e. lawyers) no channels for information exist. The Selection Board representatives confirmed this to be a deficiency because the law does not provide for a possibility for the Selection Board to make such inquiries (i.e. to request for information on professional reputation and integrity from the prosecution service). As a result, many integrity issues are revealed only after the person has already been appointed.

One source of information attesting to a candidate's personality characteristics and skills, including integrity, are reference letters from renown persons submitted by the candidates. However, due to absence of any obligation or at least guidance on what characteristics and skills of a candidate should be presented and assessed in the reference letter it has been confirmed by the Selection Board representatives that sometimes reference letters do not provide the Selection Board with relevant information on the candidate.

Furthermore, the Selection Board representatives explained that information provided in the integrity certificates is formalistic, providing merely information on finding acts issued by NIA with regard to a candidate (a judge or other public official bound by rules on declaration of assets and personal interests, conflicts of interest, incompatibilities). Information provided by the Disciplinary Board is only with regard to decisions in disciplinary matters that have already become final.

Information on disciplinary sanctions issued to public officials could also be very important with regard to establishing one's integrity (i.e. information on negligently performing work).

As already mentioned above, SCM is entitled to use all legal means for verifying the reputation of the candidate (Article 3.16, Regulation on the organisation and conduct of the competition for the filling of the functions of judge, vice-president and president of the court of justice). However, it seems that in practice this provision enables a very limited possibility for obtaining information on integrity of candidates who do not come from within the judiciary. Reasons for this should be explored and measures taken in order to either provide SCM and its boards with sufficient legal basis for making additional inquiries in respect of previous professional work and reputation or to introduce practical measures to put the existing provision to practice.

3.3.4.5 Controls initiated by SCM ex-officio in case of suspicions or information about the ethics/integrity of judge

One of the SCM's competences with regard to discipline and ethics of judges is to examine citizens' petitions on issues related to judicial ethics (indent a), para. 3, Article 4, Law on SCM). Furthermore, the Judicial Inspection which is a SCM's body is also competent to examine citizens' petitions on issues related to judicial ethics, addressed to SCM, demanding compulsory written explanation from the judge concerned as well as to verify referrals on acts that may constitute disciplinary offences (indents b) and b^1) of para. 6, Article 7^1, Law on SCM). According to Law on Disciplinary Liability of Judges notifications regarding suspected disciplinary offences or misconduct may be submitted by any interested person, SCM, the Performance Evaluation Board

or the Judicial Inspection on its own initiative. Facts of the case are then verified by the Judicial Inspection, after which the Admissibility Board decides on the admissibility and the Disciplinary Board decides on the substance of the case and imposes sanctions if necessary.

In its Evaluation Report GRECO noted *that "…several of the GET's interlocutors expressed the view that SCM did not react to reported misconduct of judges in a sufficiently determined manner. Numerous cases are reported in the media and are allegedly not acted upon by the SCM"*[112].

This practice of selective justice with regard to misconduct of particular judges has also been confirmed by some interlocutors. Political ties seem to play a big role with regard to whether investigations against judges will be initiated by different monitoring bodies (i.e. NIA) or law enforcement agencies.

It seems that the legal framework in place enables SCM to start *ex-officio* investigation of cases of alleged misconduct. However, in practice this competence seems to be exercised only occasionally, allowing that the perception of the selective justice is reinforced. It is thus recommended that SCM develops a strict policy of responding to any direct notification on suspected misconduct of a judge or other way of obtaining such information.

3.3.4.6 Responding to mass-media reports on integrity risks within the judiciary/journalistic investigations

Media reporting on integrity risks pertaining to judges and the judiciary can have a negative effect on the public perception of the judiciary, especially when not properly addressed by the judiciary.

In order to rebuild public trust, the judiciary should take determined action, also finding ways to respond to the negative media reporting. More on this matter is described in the next chapter.

In cases of media reporting on integrity risks within the judiciary communication between the judiciary and the media must not be one-sided, where only the media benefits from information provided by the judiciary and courts. Good journalism can also produce information that the judiciary and the courts can use for their purposes as well. Ignoring such information contributes to a greater negative public perception since it seems that misconduct is tolerated when not acted upon or even rewarded in cases of promotion.

This negative perception with regard to the lack of appropriate response of the judiciary to the media reports has already been noted by GRECO, stating that there were cases of reported misconduct to which SCM did not react *"in a sufficiently determined manner"* and which *"are allegedly not acted upon by SCM"*. Furthermore, lack of appropriate attention was confirmed by interlocutors from the media which stated there were many journalist investigations that brought to light serious misconduct of judges that could amount to corruption criminal offences.

It is therefore recommended that media reports (including those resulting from journalistic investigations) on integrity risks pertaining to judges (and the judiciary at large) are appropriately identified and reviewed by the judiciary in order to make appropriate use of them. This should be done under the control of SCM, involving different judicial bodies depending on their mandate and the content of such reports (i.e. Judicial Inspection in case a report reveals any suspected misconduct, Selection Board in case a report relates to a particular judge in selection/promotion procedure). A strategy for handling such media reports should be prepared, guaranteeing the media reports are reviewed in practice and be included in the existing public communication strategy (see below).

3.3.4.7 Active communication with mass-media and legal reasoning of SCM decisions and Board decisions

Transparency of the judiciary, including its recruitment, career and disciplinary procedures is an essential factor for contributing to strengthening the integrity of the judiciary.

[112] GRECO Evaluation Report, para. 135.

As seen in the Evaluation Report, GRECO expressed several concerns[113] with regard to the lack of transparency of the functioning of the Moldovan judiciary, especially of the actions taken by SCM in recruitment, career and disciplinary matters. Insufficient justifications of the SCM's decisions, especially when deviating from Selection Board's decisions on the respective merits of candidates were mentioned, as well as with lack of providing reasons in the decisions. As a result, candidates presenting integrity risks are being appointed as judges and judges who should be dismissed for misconduct are allowed to resign at their own request instead, in order to be entitled to legal allowances and social benefits.

The fact that this lack of transparency is coupled with numerous media reports on such cases definitely contributes to lack of public confidence in the SCM's decisions and in the recruitment, career and disciplining of judges.

This above-mentioned practice of SCM has also been confirmed by the representatives of the civil society which analysed the practice of organisation of selection and promotion competitions during 2013 and 2018[114].

Level of judges' confidence in the SCM's decisions and in the fairness and objectivity of the selection process is also worth mentioning. The Legal Resources Centre from Moldova commissions surveys on judges' perception with regard to the functioning of the judiciary. In a survey conducted in October-December 2015 in which 273 judges (out of 407 in total at the time[115]) responded, 62% of the respondents perceived the mechanism for initial appointment of judges as fair and based on merits, while only 54% of the respondents thought the same about the promotion system.[116] A survey on the perception of judges, prosecutors and lawyers on justice reform and fight against corruption was conducted in October-December 2020. 149 judges responded (37% in total). With regard to self-administration of justice, 60% of judges (71% of judges in 2015) responded that the SCM's activity is transparent while only 46% of judges (68% of judges in 2015) considered the SCM's decisions as well-reasoned. About the appointment procedures, 68% of judges stated they based on merits, while only 48% of judges agreed that promotion procedures were based on merits.

Insufficient response to media attention in such excessive cases has been mentioned also by interlocutors with whom meetings were held for the purpose of drafting this report. Protests in front of SCM headquarters or courts during selection procedures were mentioned as well. It seems that numerous signals on integrity issues have been communicated to SCM which makes this practice of silence even more noticeable and causing discomfort of the public and the media with the Moldovan judiciary.

International standards for judiciary emphasise the importance of ensuring transparency of the judicial system as a corruption prevention tool. *"There is clear evidence that a judicial system with a (traditionally) high degree of transparency and integrity presents the best safeguard against corruption."*[117] CCJE also notes that *"…several mechanisms exist to enhance the prerequisite legitimacy and transparency of the judiciary, and thereby public confidence and trust in the judiciary. They all can be summarised by the necessity of a proactive information policy, such as providing general information about the functioning of the judicial system…"*[118]. The CCJE also stresses that the general public should have a general insight into the selection and appointment procedure.[119]

[113] See para. 93, 101, 105 and 135 of the GRECO Evaluation Report on the Republic of Moldova, available at https://rm.coe.int/fourth-evaluation-round-corruption-prevention-in-respect-of-members-of/168075bb45
[114] Ilie Chirtoaca, "Resetting the system of selection and promotion for judges – Lessons learned and (new) challenges", May 2020, Legal Resources Centre from Moldova, pg. 2.
[115] Ibid., para. 87.
[116] Ibid., f.n. 13.
[117] CCJE Opinion No. 21 (2018), Preventing Corruption Among Judges, para. 13, available at https://www.coe.int/en/web/ccje/ccje-opinions-and-magna-carta
[118] Ibid., para. 58.
[119] Ibid., para. 25.

A central role of the Council of the Judiciary as to ensuring transparency in the administration of the judiciary is recognised by international standards. *"Given the prospect of considerable involvement of the Council of the Judiciary in the administration of the judiciary, transparency in the actions undertaken by this Council must be guaranteed. Transparency is an essential factor in the trust that citizens have in the functioning of the judicial system and is a guarantee against the danger of political influence or the perception of self-interest, self-protection and cronyism within the judiciary. All decisions by the Council for the Judiciary on appointment, promotion, evaluation, discipline and any other decisions regarding judges' careers must be reasoned."* and *"Indeed, the independence of the Council for the Judiciary does not mean that it is outside the law and exempt from judicial supervision"*[120]. The importance of demonstrating the highest degree of transparency by Council for the judiciary towards judges and society by developing pre-established procedures and reasoned decisions is affirmed in the Appendix to Recommendation CM/Rec(2010)12 on judges: independence, efficiency and responsibilities.[121]

Accountability of the judiciary for the public service it provides is exercised through providing explanations for its actions and assuming responsibility for them. Relations of the judiciary with the public at large and the media are thus encouraged. CCJE notes that a dialogue with the public, directly or through the media, is of crucial importance in improving the knowledge of citizens about the law and increasing their confidence in the judiciary.[122] In its Opinion No. 7 (2005) on "Justice and society", CCJE recommended that the judiciary should actively reach out to the media and the public directly. *"The justice system should accept the role of the media which, as outside observers, can highlight shortcomings and make a constructive contribution to improving courts' methods and the quality of the services they offer to users".*[123]

In several reports GRECO identified that *"at a time when awareness of the value of rule of law is increasing and the judiciary is under pressure to be accountable... judges need support in handling communications with the media and relevant civil society organisations"*[124]. GRECO has often pointed out that providing appropriate specific training to those in the judiciary in charge of contacts with the public is instrumental in improving the image of the judiciary in the public.

Transparency of SCM's activities is ensured by SCM's competences to collaborate with civil society and media in order to inform the public about the activity of SCM and the courts and by providing access to the society and the media regarding the information on the SCM's activities (point d[1]), paragraph 4 of Article 4 and paragraph 1 of Article 8[1]). Decisions and annual reports of SCM as well as decisions of the SCM's boards are reasoned and published on its website (para. 7 of Article 8[1], para. 2 of Article 19 and para. 2 of Article 19, Law on SCM; para. 3 of Article 10, Law on the selection, performance evaluation and career of judges).

Despite the sufficient legal requirement to give legal reasoning for decisions made in recruitment, career and disciplinary matters of judges, the SCM's practice deviates from it. Furthermore, the need to strengthen the capacity of the judiciary and the SCM to ensure collaboration with civil society and the media is noticed.

SCM is responsible for upholding and strengthening trust in the judiciary. As such, it is recommended that SCM should be proactive in establishing communication channels with the media, the civil society organisations and the public in general since activities of SCM and its boards in recruitment, career and disciplinary matters s are being closely scrutinised by them. Establishing good communication channels that run both ways will be beneficial for SCM and the

[120] CCJE Opinion No. 10(2007) on the Council fort he Judiciary at the service of society, para. 39, 91 and 92, available at https://rm.coe.int/168074779b
[121] See para. 28, available at https://rm.coe.int/cmrec-2010-12-on-independence-efficiency-responsibilites-of-judges/16809f007d
[122] CCJE Opinion No. 7 (2005),
[123] CCJE Opinion No. 7 (2005) on »Justice and society«, para. 33, available at https://rm.coe.int/1680747698
[124] Corruption prevention, Members of Parliament, Judges and Prosecutors: Conclusions and Trends, pg. 22, available at https://rm.coe.int/corruption-prevention-members-of-parliament-judges-and-prosecutors-con/16807638e7

judiciary at large as it could obtain an outside view on the (perception of) quality of its activities, useful for making improvements of the system in the future.

Communication channels should also be established for communicating information within the judiciary itself. Like with the public and the media, a negative perception is created with judges who are not familiar with the reasons behind the important decisions made by SCM which is even more worrying as they should defend and protect the integrity of the judiciary.

It is therefore recommended that:

- law prescribes that reasons for non-selection of a particular candidate are presented in a decision on non-selection of the candidate;
- In order to establish new or improve the existing communication channels between SCM and the media as well as within the judiciary, the existing Communication strategy of the Superior Council of Magistracy of the Republic of Moldova is re-examined, appropriately updated and used in practice – for this purpose the Guide on Communication with the media and the public for courts and prosecution authorities[125], prepared by CEPEJ could be of good use.

3.3.4.8 Training of members of SCM Plenum and its Selection Board and Performance Evaluation Board on integrity criteria

In order to understand and apply notions such as "integrity" in selection and performance evaluation procedures in a correct and uniform manner, a common understanding of these notions should be ensured. This may be done through specific trainings. These trainings would specifically focus on how selection and performance evaluation procedures are carried out, both in relation to the merits of the case and procedural provisions of the law. In order to develop appropriate training's curriculum an analysis of the application of existing criteria related to integrity checking in practice should be made. To this extent, results of corruption risk assessment mentioned below should be made of use as well.

All members of the SCM Plenum and of its boards involved in selection and performance evaluation would need to undergo these trainings. This is especially important in order to ensure uniformity as well as continuity of practice in applying the law on selection and performance evaluation since all the members enjoy a limited term of office and cannot be appointed for two consecutive terms. Furthermore, some of their members come from outside the judiciary (are either representatives of civil society – in case of both boards – or law professors – in case of the SCM Plenum). Especially with regard to these members, it is important to raise their awareness on proper application of selection and performance evaluation criteria.

SCM has already been given an important role in designing trainings since it approves a strategy on initial and continuous training of judges at NIJ, adopts opinions on training programs as well as on training's curricula of NIJ and delegates judges to participate at training courses (see para. 2, Article 4, Law on the Superior Council of Magistracy). SCM should therefore, together with NIJ, 1) develop trainings to ensure appropriate and uniform understanding and application of criteria for selection and performance evaluation as well as of procedural provisions for selection and performance evaluation; and 2) ensure that all those involved in selection and performance evaluation procedures are appropriately trained.

3.3.4.9 Corruption risks assessment of SCM's activities

It is apparent from the description of the SCM's role concerning recruitment, career and disciplinary matters that integrity and prevention of corruption do not occupy a very prominent place in the current supervisory arrangements, even though some integrity elements are assessed

[125] Available at https://rm.coe.int/cepej-2018-15-en-communication-manual-with-media/16809025fe

by SCM and its boards. This was highlighted by GRECO which summarised its findings by saying *"the monitoring and enforcement regime for integrity and conflict of interest prevention, which is common to all three categories under review* (including judges – comment by the authors)*, needs to be strengthened significantly."* Concretely, GRECO noted that *"…several of the GET's interlocutors expressed the view that SCM did not react to reported misconduct of judges in a sufficiently determined manner. Numerous cases are reported in the media and are allegedly not acted upon by the SCM. Decisions are reportedly not well explained, available sanctions are not used to their full extent and the GET was given examples of judges being allowed to resign at their own request instead of being dismissed, in order to be entitled to legal allowances and social benefits. This sends out unfortunate messages that misconduct and lack of diligence are tolerated with no effective deterrents."*

In the meetings with interlocutors it was often emphasised that integrity risks affecting judges were insufficiently identified, prevented and managed, due to lack of operational as well as legal framework. It is mostly due to lack of appropriate tools provided for in the legal framework, activities pertaining to integrity checking lacking sufficient focus thus rendering integrity checks to be mostly formalistic, not bringing comprehensive assessment of one's integrity. This assessment system is then also coupled with unwillingness to react and manage integrity risks, both in the recruitment and career process, even when they have already materialised.

The United Nations Convention against Corruption requires States parties to have *"effective and efficient systems of risk management and internal control"* as a means for promoting *"transparency and accountability in the management of public finances"* (Article 9, para. 2(d)). *"The goal of any risk assessment is to identify a realistic set of potential areas or scenarios that may be vulnerable to corruption, determine which should be prioritized, and develop and implement mitigation measures"*[126].

This lack of focus on integrity and the prevention of corruption could be one of the factors explaining the negative image of the judiciary. SCM having the main responsibility regarding the supervision of judges, also in connection with integrity and conduct should make its present, but also future endeavours in this respect more systematic. Performing a corruption risk assessment to identify corruption risks pertaining to SCM's activities and, on the basis of the assessment, developing efficient, cost-effective strategies to mitigate risks identified, making the strategies also visible to the public, would help SCM to ensure that its members work with integrity to achieve the SCM's mandate and improve the public trust in the judiciary.

3.3.5 Mechanisms to verify asset declarations and integrity of candidate judges during their appointment at the National Institute of Justice

According to Article 9, par. (6), line h), of the Law on the Status of Judges, candidates for vacant positions of judges must present a declaration of assets and personal interests.

If the requisite of presenting a declaration of interests is in line with international standards and constitutes an important element to check the integrity of candidate judges, the mandatory presentation of a declaration of assets for persons applying for initial appointment as judge raise more doubts. As mentioned before, the Venice Commission has already considered that declarations of assets are useful only for judges already admitted and not as a criterion or pre-condition for the appointment of judges, *"since only an increase of property during the mandate of the judge should trigger further investigation into possible corruptions"*. If candidate judges are required to declare property and that declaration is taken into consideration for the appointment decision, it may lead to discrimination on the basis of the social/property status[127].

[126] "State of integrity: A guide on conducting corruption risk assessments in public organisations", UNODC, Vienna 2020, available at https://www.unodc.org/documents/corruption/Publications/2020/State_of_Integrity_EN.pdf

[127] *Joint Opinion of the Venice Commission and the Directorate of Human Rights (DHR) of the Directorate General of Human Rights and Rule of Law (DGI) of the Council of Europe on the Draft Law on Amendments to the Organic Law on General Courts of Georgia*, Opinion

While it may be understandable that a declaration of assets could be an indicator of social links and, in that way, possible conflicts of interest that could be important in the assessment of the integrity of candidates, there is also the risk of discrimination on the basis of social status in the admission procedure. As the Venice Commission stressed, the analysis of the assets of a judge is important to assess if he/she has obtained any unexplained/unjustified patrimony during his mandate and not as a requisite/criterion for admission, so only changes in those assets during the mandate and not the assets *per se* are important. The elimination of that requisite should therefore be considered.

A more important criterion to be considered must be the psychological profile of candidates. As the *International Commission of Jurists* has already noticed, mere psychological written tests could also lead to eventual abuses[128]. In that sense, the intervention of professional psychological personnel in the admission procedure should be considered, to assess the psychological profile of candidates.

As for sitting judges, the psychological profile revealed during the exercise of functions should also be analysed and valued in the promotion procedure. The establishment of a Psychological Council or department in the SCM should be considered[129].

4. REVIEW OF THE PROPOSED MEASURES IN LIGHT OF HUMAN RIGHTS AND JUDICIAL INDEPENDENCE

Chapter 4 is dedicated to developing concrete measures in order to consolidate the integrity checking mechanisms with regard to judges during selection and promotion procedure. In the following chapter, a review of the measures is undertaken in order to establish their compatibility with human rights.

Since the Republic of Moldova ratified the European Convention on Human Rights (ECHR), the rights and freedoms enshrined in this Convention function as the main rule for the review. The case law of the European Court of Human Rights (ECtHR) is an important source for the interpretation and application of the Convention and is therefore recognized in the review. Furthermore, the Republic of Moldova ratified the International Covenant on Civil and Political Rights (ICCPR), which includes another set of human rights. As the European Convention on Human Rights, the ICCPR protects predominantly civil and political rights. Consequently, in many respects the substantive guarantee of both human rights treaties correspond to each other.

4.1 Integrity checking as an element of safeguarding the independence of the judiciary

Article 6 of the European Convention on Human Rights (ECHR) constitutes a significant manifestation of the principle of Rule of Law. Judicial independence is guaranteed by Article 6 para. 1 ECHR that reads as follows:

"In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time ***by an independent and impartial tribunal*** *established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice."*

The concept of an *"independent"* tribunal relates to the separation of powers, which is fundamental to the Rule of Law principle and concerns the tribunal as a whole. It additionally refers to each single member and in general encompasses independence of the executive and of

no. 773 / 2014, CDL-AD(2014)031, 14 October 2014, par. 51 – available at https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2014)031-e.

[128] *Only an Empty Shell – The Undelivered Promise of an Independent Judiciary in Moldova – A Mission Report*, International Commission of Jurists, 2019, p. 33 - available at https://www.icj.org/wp-content/uploads/2019/03/Moldova-Only-an-empty-shell-Publications-Reports-Mission-reports-2019-ENG.pdf .

[129] As suggested by Victoria Sanduta in *Judicial Integrity…, cit.*, p. 4.

the parties to the case.[130] Therefore, independence and impartiality are closely related and sometimes difficult to dissociate. Thus, both requirements are often collectively used and analysed by the ECtHR.[131] Nevertheless, independence constitutes a prerequisite for impartiality.

Independence of the judiciary includes a number of aspects such as the appointment of the members of a tribunal, their term of office, the removability of the members of a tribunal and the carrying out of their office free from instruction. The laws and bylaws of a state must observe those criteria in order to fully safeguard the independence of the judiciary.

Impartiality means the *"absence of prejudice or bias"* and is particularly important, because a person needs to be able to trust in the impartiality of a tribunal determining of the question of right and wrong.[132] Thus, a court must not be biased when deciding, it must act without being influenced by information gathered outside the courtroom, and it is not allowed to go by popular feeling, or any other pressure. A judge's opinion has to exclusively rest on objective arguments put forward at a trial without being led by personal emotions or attitudes. Again, the ECtHR looks at whether there are specific constitutional and legal rules providing for the impartiality of the judiciary.[133]

All recommendations developed in chapter 3 aim at improving the integrity checking of judges during selection and promotion. Integrity of judges is one element of their independence and impartiality. The notion of "integrity" means that a judge exercises its office strictly according to the law without being biased by any interests outside the law. Again, it means, that judges resist against any possible influence be it by public officials, politicians or private persons. Besides any organisational and regulatory preconditions deriving from the state's obligation to establish independent tribunals, integrity focuses on each judge and his/her commitment to the office. Especially with view to the concept of impartiality integrity is the personal and individual attitude of any judge, which is necessary to exclude undue influence on the decisions of judges. Therefore, integrity is an indispensable criterion for the safeguard of independence and impartiality of the judiciary as provided for by Article 6 ECHR.

Fostering and improving integrity checking of judges is an important element of safeguarding the independence and impartiality of the tribunals.

In order to make the best use of the integrity checking with view to the safeguarding of the independence and impartiality of the judiciary,

- the checking should be provided for in laws or bylaws,
- the criteria relevant to assess "integrity" should be defined as clearly as possible,
- and the procedure for the checking should be clear, transparent and revisable.

The elements presented above should be applied with regard to the integrity checking when selecting and promoting judges. They guarantee a transparent and fair procedure and prevent arbitrary decisions on the integrity of candidate judges when pursuing the integrity test.

- The recommendations developed under 1.3.1 (relating to the restructure of the system and concentration of the procedure with the Selection Board) aim at reducing the complexity of the existing process of the integrity checking. They therefore contribute to a more clear and simple procedure for the checking and, by this, to a better implementation of the integrity check. Accordingly, these recommendations are fully in line with the requirements of Article 6 para. 1 ECHR.

[130] See, e.g., ECtHR, 18.10.2018, *Thiam v FRA*, No. 80018/12, §§ 71 et seq.
[131] ECtHR, 25.2.1997, *Findlay v UK,* § 73; ECtHR, 9.10.2008, *Moiseyev v RUS*, No. 62936/00, § 175; ECtHR, 6.10.2011, *Agrokompleks v UKR*, No. 23465/05, § 128.
[132] ECtHR, 24.2.1993, *Fey v AUT*, No. 14396/88, §§ 27 et seq.; ECtHR, 21.12.2000, *Wettstein v SUI*, No. 33958/96, § 42; ECtHR (GC), 15.10.2009, *Micallef v MLT*, No. 17056/06, § 95.
[133] ECtHR (GC), 15.10.2009, *Micallef v MLT,* §§ 99-100.

- The recommendations developed under 1.3.2 (relating to the criteria relevant to assess "integrity") aim at shaping the criteria for the integrity checking even more thoroughly and exactly. By this, they contribute to an even more clear-cut definition of the notion of "integrity" and improve the integrity checking. This again will have a positive effect on the independence and impartiality of the judiciary and is fully in line with the requirements of Article 6 para. 1 ECHR.
- Moreover, the recommendations presented under 1.3.3 (relating to possible mechanisms to consolidate the integrity checking) aim at reducing the complexity of the existing process of integrity checking. By concentrating several elements of the integrity checking procedure to NIJ (1.3.3.1) and by promoting already existing tools of the NAC (1.3.3.2) the recommendations once more contribute to a more clear and simple procedure for the integrity checking of judges. The recommendation explained under 1.3.3.3 (solving NIA's problem of lack of strategy and understaffing) again adds an element to strengthen the institutions, which are competent to apply the integrity checking of judges. Thus, the recommendation will improve the effectiveness of the integrity checking procedure. Accordingly, these recommendations are fully in line with the requirements of Article 6 para. 1 ECHR.
- The same is true for the recommendations developed under 1.3.4 (strengthening SCM's role). The respective recommendations serve the integrity checking procedure to be clearer (by updating the regulations, see 1.3.4.1) and more effective (by giving the SCM additional competences, see 1.3.4.3). Accordingly, these recommendations are fully in line with the requirements of Article 6 para. 1 ECHR.
- The recommendation under 1.3.1 suggests the elimination of the 5-year probation period for judges. Article 6 para. 1 ECHR requires that the term of office of judges does not need to be for a lifetime, but generally for a period of time to guarantee a certain stability. One can discuss, if a probation period of 5-years would be in line with the requirements of Article 6 para. 1 ECHR and the respective case law of the ECtHR. However, it is an important step to improve the independence of (young) judges when eliminating the 5-year probation period. The recommendation under 1.3.1 (elimination of the 5-year probation period) is therefore fully in line with the requirements of Article 6 para. 1 ECHR. It contributes significantly to foster the independence of the respective judges.

4.2 Integrity checking and the right to respect for private life

Article 8 para. 1 ECHR provides for the right to respect for private life. As the integrity checking for judges (on the occasion of their selection and promotion) is based on specific information disclosed by the candidate judge or collected and proceeded by public institutions or bodies, it may rise concerns with view to the right to respect for private life.

According to the case law of the ECtHR the notion of "private life" is broad. It encompasses the personal autonomy; everyone can freely pursue the development and fulfilment of his or her personality and establish and develop relationship with others.[134] One part of "private life" in the meaning of Article 8 ECHR is the collection of data and information on an individual. The collection, the storage, the usage and the release of data and information relating to an individuals' private life is governed by Article 8 ECHR. The right to private life protects individuals against disclosure of information concerning them that is in the possession of public authorities.[135]

[134] ECtHR, 16.12.1992, *Niemietz v GER*, No. 13710/88, § 29; ECtHR (GC), 16.2.2000, *Barbulescu v Romania*, No. 61496/08, § 70; ECtHR (GC), 25.9.2018, *Denisov v UKR*, No. 76639/11, § 95 et seq.
[135] ECtHR, 26.3.1987, *Leander v SWE*, No. 9248/81, § 48; ECtHR (GC), 16.2.2000, *Amann v SUI*, No. 27798/95, §§ 69, 80; ECtHR (GC), 4.5.2000, *Rotaru v ROM*, No. 28341/95, § 46.

The definition of the right to respect for private life as given in para. 1 of Article 8 ECHR is complemented by a second paragraph that restricts the scope of the right. Interferences with the right to respect for private life are justified if they are prescribed by law, pursue a legitimate aim as mentioned in para. 2 of Article 8 ECHR and fulfil the proportionality test ("necessary in a democratic society"). In order to assess if the collection and usage of personal data by the state is in accordance with Article 8 ECHR a fair balance between the right to respect for private life and the public interest at stake has to be stroked. For the collection, storage and usage of data the Court established that Article 8 ECHR requires a proper legislative framework for the collection and protection of information and data of a personal nature. The Court deemed it important to have minimum safeguards concerning, inter alia, duration, storage, usage, access of third parties, procedures for preserving the integrity and confidentiality of data and procedures for their destruction, thus providing sufficient guarantees against the risk of abuse and arbitrariness.[136]

The scope of this report does not include a comprehensive examination of any detail of the integrity checking of judges according to the law in the Republic of Moldova with view to the right to respect for private life, or more concretely the right to data protection. Nevertheless, it should be highlighted that the recommendations developed in chapter 3 of this report contribute to a better protection of the right to respect for private life.

- The application of a polygraph test in order to get information for assessing the integrity of (candidate) judges raises concerns with regard to the right to respect for private life. This is due to the fact, that polygraph tests are evaluated as being unreliable and not leading to accurate information or data. Against this background, the interference with the right to respect for private life enjoyed by the (candidate) judges when performing a polygraph test cannot be justified in the meaning of Article 8 para. 2 ECHR. As the information received through the polygraph test is not reliable, it cannot serve for any public interest, including the interest of safeguarding the integrity and independence of the judiciary. Recommendation 1.3.3.5 (abolishment of the mechanism of the polygraph test) is fully in line with Article 8 ECHR. Even more, Article 8 ECHR argues for the abolishment of the polygraph test.
- When applying the integrity checking of judges, any institution or body involved has to rely on information and data concerning the (candidate) judge. This leads to an interference with the right to respect for private life in the area of data protection. This interference will generally be justified with view to the public interest of safeguarding the integrity and therefore the independence and impartiality of the judges and the judiciary. However, according to the case law of the ECtHR a proper legislative framework for the collection, storage and usage of data should be established in order to avoid misuse and arbitrariness. In this regard, it is important that the integrity checking process is accompanied by procedural safeguards and provides for sufficient safeguards against the risk of abuse and arbitrariness. The recommendation under 1.3.3.2 (application of the already existing mechanism by NAC **with sufficient safeguards in place)** and the recommendation under 1.3.3.4 (SIS checks) explicitly mention the necessity of safeguards when applying any part of integrity checking. They further explain, which safeguards should put in place in the specific phases of the integrity checking. Accordingly, the recommendations contribute to an improvement of the procedural safeguards when applying the integrity checking. They are fully compatible with the requirements stemming from Article 8 ECHR.
- In addition, including professional psychological personnel in the admission procedure (recommendation I, point d), and recommendation XII)) constitutes another element of safeguarding the right to private life of the judges concerned as the assessment will be based on scientific and professional experience. This

[136] ECtHR, 13.11.2012, *M.M. v UK*, No. 24029/07, § 95.

recommendation contributes to an integrity check respecting the private life of the persons concerned.

4.3 Integrity checking and the right to freedom of expression

The right to freedom of expression is guaranteed in Article 10 para. 1 ECHR. According to the established case law of the ECtHR the freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individuals self-fulfilment.[137] The right to freedom of expression could be touched by the integrity checking of judges as it is provided for that candidate judges and sitting judges should refrain from hate speech and expressing partiality or intolerance (see 1.3.2).

In general, Article 10 para. 1 ECHR protects any form of expression, irrespective of its content. However, it is discussed in academia if expressions disseminating hate speech fall within the scope of Article 10 ECHR. The case law of the ECtHR is not coherent in this respect. In any case, as with Article 8 ECHR Article 10 para. 1 ECHR is also complemented by a second paragraph that restricts the scope of the right. Interferences with the right to respect for private life are justified if they are prescribed by law, pursue a legitimate aim as mentioned in para. 2 of Article 10 ECHR and fulfil the proportionality test ("necessary in a democratic society"). If one agrees to include the expression of hate speech in the scope of Article 10 ECHR, restrictions on disseminating hate speech are justified when applying the restriction clause of Article 10 para. 2 ECHR.

Furthermore, the freedom to expression when exercised by judges can be subject to stronger restrictions. According to the case law of the ECtHR, judges may underlie certain specific restrictions of their freedom to expression in order to safeguard the people's trust in the independence of the judiciary and therefore the principle of the Rule of Law.[138]

- The recommendation under 1.3.2 proposed a criterion of the integrity requirement that judges should refrain from hate speech and from expressing partiality or intolerance. This requirement may lead to a restriction of the right to free expression enjoyed by judges. However, hate speech is not protected by the human right to free expression. The restriction of the expression of partiality or intolerance by judges is justified with view to the legitimate public interest to safeguard the independence and impartiality of the judiciary. Therefore, the recommendations does not violate the right to free expression according to Article 10 ECHR.

4.3 Integrity checking and the right to freedom of association

Article 11 ECHR guarantees the right to freedom of association, which is *inter alia* closely connected to right to freedom of expression. The exercise of the right to freedom of association will generally involve the defending of specific opinions or ideas. With view to the integrity checking of judges, the application of some of the integrity criteria may touch the right to freedom of association. This is the case for the requirement that candidate judges should not have been members of a political party for a determined period prior to the application (see 1.3.2).

The right to freedom of association includes the right to found an association, to become member of an association and to actively participate in an association. Political parties constitute a kind of association and fall within the ambit of Article 11 para. 1 ECHR. They possess a special place within the guarantee of freedom of association because of their central role in the functioning of democratic government.[139] The right to freedom of association underlies a restriction clause according to Article 11 para. 2 ECHR as it is the case with the right to respect for private life (Article 8 ECHR) and the right to freedom of expression (Article 11 ECHR). Accordingly, interferences with the right to freedom of association can be justified if they follow a public interest and are proportionate. Safeguarding the independence of the judiciary and the

[137] ECtHR (GC), 12.9.2011, *Palomo Sanchez ao v ESP*, No. 28955/06, § 53.
[138] ECtHR, 12.2.2008, *Guja v MDA*, No. 14277/04, §§ 72 et seq.; ECtHR, 9.6.2013, *Di Giovanni v ITA*, No. 51160/06, §§ 51 et seq.
[139] ECtHR, 30.1.1998, *United Communist Party of Turkey v TUR*, No. 19392/92, §§ 25 et seq.

impartiality of any judge amounts to a legitimate public interest, which can call for restrictions of the right to freedom of association.

- The recommendation under 1.3.2 (candidate judges should not have been members to a political party for determined period prior to their application) aims at safeguarding the independence and impartiality of the prospective judges. As the membership of a political party may raise concerns regarding the impartiality of a judge, it is appropriate to exclude the membership not only for judges but also for candidate judges. The idea of establishing a "cooling down phase" before taking office as a judge with regard to the membership of a political party improves the impartiality of the prospective judges. While it is true, that this restriction caused a limitation of the right to freedom of association enjoyed by the candidate judges, this limitation is justified with view to the public interest of safeguarding the independence and impartiality of the judiciary. In order to keep the restriction adequate, the period prior to the application, during which the candidate judge should not be member of a political party, should not be too long. The appropriate length has to be determined with view to the preparation time for becoming a judge. Taking into account a reasonable period, the recommendation under 1.3.2 is in accordance with the right to freedom of association.



5. CONCLUSIONS AND FOLLOW-UP

From all the analysis made, we may conclude that despite the positive changes that have been introduced in recent years, the legislative and regulatory framework of integrity checking of judges in appointment and promotion procedures in Moldova still presents flaws and must overcome challenges, in order to meet the international standards regulating that matter.

The system would benefit from the adjustments and modifications summarized in the conclusions that will be formulated in the next section.

One must also notice that much of the success of the reforms depends more of the practical application of the laws than of the laws themselves, so additional efforts must be put in practice by the SCM and the Moldovan authorities involved to ensure a real promotion of integrity in the selection and promotion of judges. That can only be achieved through loyal institutional cooperation and responsible exercise of the constitutional competences of each of those bodies, together with a robust ethical commitment by their members.

In view of the experts, an essential follow-up would be the development of missions on the ground to assess the effective implementation of the changes proposed.

The conclusions of this report will be further discussed in the planned roundtable meeting that will follow and the experts remains fully available for any further discussion and contribution that may be of interest.



6. RECOMMENDATIONS

I. **A complete restructuring of the system of appointment of judges should be considered**, fostering transparency, a more efficient management of human and financial resources and a clear separation of integrity/professional skills assessment, following this proposal (or any other based on the same model):

a. the competition to enter NIJ, the number of vacancies (including the minimum quota to be filled by candidates with and without professional experience) and the deadline for submitting applications would be publicly announced;
b. candidates (either with or without professional experience) would have to apply, submitting all the documents currently demanded for the appointment procedure before the SCM;
c. the Selection Board would assess the candidates' integrity (with the participation of the other entities, such as NIA and NAC), rejecting those who present problems;
d. the candidates who are admitted would then have to undergo exams to enter NIJ, which would be different for candidates with and without previous professional experience (e.g., just a written exam and a public discussion of the CV for the former, written and oral exams for the latter), and also a psychological assessment;
e. written exams should be corrected anonymously and the final mark of admission would be given after an oral examination in front of a panel whose composition should be as diverse as possible and with members appointed not only by the SCM, but also by other bodies;
f. candidates approved in the exams would be listed according to the final classification and the vacancies announced would be filled by order of classification;
g. the training in NIJ would be theoretical and practical (a difference in the length of the training could exist for candidates with previous professional experience);
h. candidates admitted to NIJ would be subject to the same ethical and disciplinary rules of judges and to the disciplinary power of the SCM;
i. after successful completion of the training, candidates would be formally appointed by the SCM (or by the President of the Republic), and placed in different courts, their placement being made according to personal choice of the candidates, respecting the order of the final classification obtained in NIJ, and without possibility of rejection by the SCM (or the President, if the formal act of appointment would be of his/her competence).

II. If a complete restructuring of the system of appointment is not undertaken, improvements must be made to the existing system, and the final decision on the selection, appointment and promotion of judges should be given to the Selection and Career Board of the SCM, without further intervention of the SCM – except in the case of refusal of appointment by the President of the Republic, in which case it would belong to the SCM the competence to decide to reappoint or not the candidate, under reasoned decision.

III. The changes to the Constitution of Moldova eliminating the 5-year probation period for judges should be quickly adopted.

IV. A new requirement should be added, establishing that candidate judges should not have been members of a political party for a determined period prior to the application.



V. A new criterion for initial appointment and promotion of judges should be added to the existing: not having expressed or engaged in hate speech, indecent or blunt behaviour, impolite treatment, or expressing partiality or intolerance;

VI. Candidate judges and sitting judges should have to disclose the social media they use and its public (not private) content should be analysed in the selection and promotion procedures, in order to verify if there's been any kind of hate speech, impolite treatment or expression of partiality or intolerance that could hamper the integrity (or public perception of it) of the candidate to appointment or promotion.

VII. The criterion in promotion procedures of considering violations of the European Convention on Human Rights established by the ECtHR should be eliminated.

VIII. Moldova should as quickly as possible solve NIA's problem of lack of strategy and understaffing.

IX. The value of assets declared by judges should be either mandatorily assessed by independent accountants, appointed by the *Association of Professional Accountants and Auditors of the Republic of Moldova* (the first declaration and, afterwards, only in the case of declaration of new assets or alleged increase/reduction of the value of those previously declared) or a principle of assessing assets based on their market value should be introduced by law and guidelines to achieve this in practice prepared by NIA.

X. The obligation for candidate judges for initial appointment to present a declaration of assets should be avoided, keeping only the obligation to present a declaration of personal interests.

XI. Polygraph testing should be eliminated from the appointment and promotion procedures.

XII. A psychological council or department should be established in the SCM.

XIII. Professional psychological personnel should have intervention in the admission procedure, to assess the psychological profile of candidates.

XIV. In the promotion of judges, the psychological profile revealed during the exercise of functions should be analysed and taken into consideration.

XV. NIJ's role in integrity checking of candidates for a position of a judge should be reinforced in two ways:

1. By giving NIJ a broader mandate in performing the integrity checks that would entail not only checking the candidate's criminal record and obtaining a certificate of professional integrity records, but also checking other conditions related to integrity of the candidates as stipulated in Article 6 of the Law on the status of judge (i.e. conditions of having an impeccable reputation). A gradual approach should be taken when performing different integrity checks, initially merely consulting different public databases or requesting certificates stating facts contained in particular registers, databases etc. which requires minimum efforts and public resources and at a later stage taking measures which require more efforts and public resources (i.e. polygraph testing in case authorities decide not to eliminate this tool).;
2. By performing integrity checks at an earlier stage of handling applications of the candidates in order to avoid any unnecessary spending of public resources (in forms of time, money, staff) on activities related to the admission contest and the initial training courses with regard to the candidates who failed to prove their integrity.



XVI. Professional integrity testing should be applied in practice, with sufficient safeguards in place to avoid any unlawful use of testing that would impinge on the judicial independence.

XVII. It is recommended that NIA prepare a strategy, explaining which tasks (i.e. verification of declarations of assets and personal interests) and which categories of public officials (i.e. judges) will be the focus of NIA as a matter of priority. The strategy should be made public in order to ensure transparency with regard to NIA's work and prevent any criticism of its work, especially from the politicians. NIA needs to be ensured with sufficient resources for its functioning.

XVIII. When responding to requests from SCM to issue integrity certificates with regard to candidate judges, it is recommended that NIA perform a more detailed integrity check of the candidates by initiating procedures for checking their compliance with rules on declaration of assets and personal interests, conflicts of interest, restrictions and limitations, incompatibilities.

XIX. In case SIS is again given competence for carrying out verification of candidate judges and sitting judges in the selection and promotion procedures, certain safeguards should be put in place (i.e. background checks should be performed on the basis of criteria that can be objectively assessed, a right to have access to information granted, a right to access the results of such control and a right to appeal to an independent body in case being rejected due to the results of the control granted).

XX. Annexes to the regulations on the criteria for selection, performance evaluation and transfer of judges should be updated in order to list all integrity verification tools applied in practice.

XXI. Making information on notifications with regard to suspected disciplinary offences or misconduct of a judge which were not admitted by the Disciplinary Board or did not result in any disciplinary sanctioning available to the Selection and Performance Evaluation Boards for the purpose of integrity check, together with information on how these notifications were processed.

XXII. A mechanism should be put in place, allowing the reconsideration of the promotion if a disciplinary conviction that has not yet become final at the moment of promotion is confirmed.

XXIII. The Judge's Ethics and Professional Conduct Committee should be given additional competence, namely:

a. receiving and handling reports made by judges on misconduct by other judges;

b. examining non-serious violations, i.e. violations that normally would not be dealt with by the disciplinary bodies (would not be admitted by the Admissibility Board), however, need to be addressed.

XXIV. It is recommended to explore ways on how to improve the existing channels available to SCM and its boards for making additional inquiries in respect of previous professional work and reputation of the candidates coming from outside the judiciary, and based on its findings, improve either the existing legal framework or develop practical measures.

XXV. SCM should develop a strict policy of responding to any direct notification on suspected misconduct of a judge or other way of obtaining such information.

XXVI. Media reports (including those resulting from journalistic investigations) on integrity risks pertaining to judges (and the judiciary at large) should be appropriately identified and reviewed by the judiciary in order to make appropriate use of them. This should be done under the control of SCM. A strategy for handling



such media reports would be useful to be prepared, guaranteeing the media reports are reviewed in practice, and be included in the existing public communication strategy.

XXVII. It should be prescribed by law that reasons for non-selection of a particular candidate are presented in a decision on non-selection of the candidate.

XXVIII. In order to establish new or improve the existing communication channels between SCM and the media as well as within the judiciary, the existing Communication strategy of the Superior Council of Magistracy of the Republic of Moldova should be re-examined, appropriately updated and used in practice – for this purpose the Guide on Communication with the media and the public for courts and prosecution authorities[140], prepared by CEPEJ could be of good use.

XXIX. It is recommended that SCM together with NIJ: 1) develop trainings to ensure appropriate and uniform understanding and application of criteria for selection and performance evaluation as well as of procedural provisions for selection and performance evaluation; and 2) ensure that all those involved in selection and performance evaluation procedures are appropriately trained.

XXX. To improve the public trust in the judiciary, it would be useful for SCM to perform a corruption risk assessment to identify corruption risks pertaining to SCM's activities and develop efficient, cost-effective strategies to mitigate risks identified, making the strategies also visible to the public.

[140] Available at https://rm.coe.int/cepej-2018-15-en-communication-manual-with-media/16809025fe