

DEMOCRACY AND HUMAN RIGHTS

EVALUATING THE JUDICIAL INTEGRITY: WITHOUT RIGHT TO APPEAL?

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The perception of judicial corruption has been worsening due to the lack of reaction of the judges targeted by journalistic investigations, the lack of attitude by the SCM when the reputation of the judiciary is damaged, and the lack of public communications on integrity issues by the judges' professional associations.



Currently, the integrity of judges in the SCM does not constitute an eligibility criterion. This explains why people with perceived integrity problems end up being appointed to these bodies and why these bodies do not care about the judicial integrity.



When evaluating the integrity of judges, the following should be taken into account: the appropriate lifestyle; lack of evidence of corruption/ acceptance of gifts that are not expressly rejected by the judge; not accepting improper influences/ prohibited communication; non-prosecution for crimes against justice; non-prosecution for corruption offences.

Table of contents

	INTRODUCTION	2
1.	EXPECTED INTEGRITY	3
	1.1 Appropriate lifestyle of judges vs. unexplained wealth	3
	1.1.1 Dilemma 1: Income obtained from family members' businesses, ceremonies and help provided by relatives	4
	1.1.2 Dilemma 2: Liability for undervaluation of real estate and cars	4
	1.1.3 Dilemma 3: The uneven practice of the NIA and the prosecutor's office in finding irregularities	5
	1.2 Correct decisions vs. controversial decisions on sensitive issues	5
	1.3 Honesty vs. Bribery	6
	1.4 Independence vs. accepting inappropriate influences	8
	1.5 Lack of convictions of judging magistrates	9
2.	REGULATED INTEGRITY	10
	2.1 What is integrity?	10
	2.1.1 Impeccable reputation/ professional reputation/ reputation	10
	2.1.2 Professional integrity/ integrity in the position of judge	11
	2.1.3 Professional ethics	11
	2.1.4 The honour, probity and prestige of justice. Confidence in justice	12
	2.2 Who evaluates and when?	13
	2.2.1 Promotion of candidates for the position of judge	13
	2.2.2 Evaluation of judges	13
	2.2.3 Promotion, transfer and appointment to administrative positions of judges	14
	2.3 How is integrity evaluated?	15
3.	REAL INTEGRITY	16
	3.1 Public perception of justice	16
	3.2 The reaction of the anti-corruption authorities	17
	3.3 SCM's constant indifference	17
4.	PROMISED INTEGRITY	18
	4.1 The extraordinary evaluation of judges	18
	4.1.1 Evaluation of the Group of States against Corruption (GRECO) of the Council of Europe	18
	4.1.2 The concept of extraordinary evaluation of judges	19
	4.1.3 Constitutional aspects of the extraordinary evaluation	20
	4.2 Evaluation of candidates for the positions of members of SCM and SCP	21
	4.2.1 Opinion of the Venice Commission	21
	4.2.2 The draft law on the evaluation of candidates for the position of members of the SCM and SCP	22
	4.2.3 Analysis of integrity criteria and of their assessment mechanism	23
5.	CONCLUSIONS	25

INTRODUCTION

Justice and corruption have been the leitmotifs of the political agenda for more than a decade. The transformation of the judicial sector is no longer perceived as a transitional process, but as a continuous, chronic, almost endless process. The general attitude of the majority of society is that all our evils come from corrupt magistrates, and all magistrates are corrupt. More recently, the given perception is fuelled by the argument that prosecutors and judges have not found and punished the ‘thieves of the billions’ because, most likely, they are accomplices. Therefore, for now, they are part of the problems facing society, and not part of the solutions to those problems.

Expectations to reform justice and fight corruption have toppled governments and changed the political class. The intended outcome of all the reforms in the justice sector was to finally have professional and honest judges whose work will stimulate foreign investment and develop the economy. Justice reform seems to be the panacea for all society’s problems. Part of the previous reforms – the training of future magistrates was improved, the codes were revolutionized, the judicial map was changed, an ethics commission was created, the immunity of judges for acts of corruption was removed, the principles of formation of the Superior Council of Magistrates (SCM) were also changed, -they renovated and optimized the courts, specialized the judges, increased their salaries, thoroughly regulated their selection, evaluation and discipline, and rejuvenated the judiciary. These and many other changes were made, and the miracle did not happen. The vehement and virulent criticism of the judges’ work has continued. Interest in judges and prosecutors naturally fore-

shadows media interest in their fortunes, judgments, and generally their “sins.”

Since 2019, the new political leaders, whose position has been strengthened in the following years, have identified the extraordinary evaluation of judges and prosecutors as a solution for the justice reform and, implicitly, for fighting corruption. This evaluation aims to purge the judicial and prosecution systems of corrupt magistrates, starting from the evaluation of their integrity. Although it was initially announced that the first judges to be subjected to this evaluation would be those from the Supreme Court of Justice (SCJ), recently this position was revised, announcing that those who will be subjected to an integrity evaluation are the candidates for the position of member of the Superior Council of Magistrates (CSM) and the Superior Council of Prosecutors (CSP). Although it does not provide a definition of integrity, the justice ministry explained that the integrity will be evaluated from the perspective of matching assets with legal declared income, lifestyle and conflicts of interest. It remains unclear how the evaluation commission established for this purpose will differ from the National Integrity Authority (ANI).

This study tries to identify the problems with which society associates the lack of integrity of judges, making a review of social expectations in this regard (Chapter 1), analyse the regulations applicable at the moment in the field of evaluating the integrity of judges (Chapter 2), comparing them with the realities in which the anti-corruption authorities and the SCM assess the integrity of judges (Chapter 3), as well as with the political offer to change the state of affairs (Chapter 4).

1

EXPECTED INTEGRITY

In a society decimated by poverty and financial shortages, where the government has been primarily concerned with solving corruption in the judiciary for more than 10 years, the citizens, regardless of whether they have their own experience of being a litigant or not, follow with particular preference mediatized topics that directly or indirectly confirm the much-discussed corruption among judges.

Arising from the subjects perceived in society as indicators of the lack of integrity, we can deduce the expectations towards the integrity of the magistrates: appropriate lifestyle vs. unexplained wealth (1.1), correct judgments vs. unpopular decisions on sensitive issues of public interest (1.2), honesty vs. bribing judges (1.3), independence vs. acceptance of inappropriate influences (1.4) and lack of criminal history vs. conviction for acts of corruption (1.5). This chapter will explore how these expectations can be converted into evaluation criteria of judicial integrity and their important aspects.

1.1 Appropriate lifestyle of judges vs. unexplained wealth

A first societal expectation of the integrity of judges is related to assets and lifestyle, which must be appropriate to the legal income they obtain.

Most frequently, judicial corruption becomes known to public opinion through the prism of wealth. While earlier it was more difficult for journalists to detect the assets of magistrates, today, in conditions of transparency of declarations of assets and personal interests, their content is often reflected by journalists. Moreover, the press, already traditionally, publishes articles about the wealth of judges who examine high-profile cases, as well as about judges promoted to higher courts and in administrative positions of presidents and vice-presidents of courts. Thus, simultaneously with the attention on the examined files, the society monitors the assets and interests of the judges through the media. Incorrect or incomplete information, undervalued movable and immovable assets have a high chance of being detected by citizens and journalists, as well as requiring control and sanctioning by the National Integrity Authority (ANI). In the same way, the findings of ANI regarding judges are widely publicized.

On the other hand, judges practically never comment on these articles, do not offer public reactions and do not take actions to defend their honour and dignity, regardless of whether the published information is true or not. Even if the judges has plausible explanations that exonerate them, most of the time they will hesitate to communicate publicly and initiated legal actions towards journalists in order not to generate an even greater wave of media criticism against them.

Another reason is that, being jurists, judges mistakenly believe that the presumption of innocence operates in the public space, as long as they have not been convicted. In reality, the public accusations which are left unanswered compromise both the image of the specific judge and the judiciary in general. For example, on 29.06.2018, the Ziarul de Gardă published the article *“How the judiciary made the judges who annulled the elections millionaires”* in which eight judges were targeted¹. No one rebutted. There are hundreds of examples of this kind of articles, the overwhelming majority of which are left without reactions by the targeted protagonists.

The lack of any reaction from the SCM also does not encourage judges, at least those who have arguments, to publicly support their innocence, thus assuming an active role in maintaining the prestige of justice. A positive example of reaction is that of a magistrate, who came with a firm public reaction in the context of her investigation for illicit enrichment:

CASE STUDY 1: The reaction of the magistrate Tatiana Avasiloaie, investigated for illicit enrichment. “I am an honest judge”

Magistrate Tatiana Avasiloaie makes the first statements in connection with her investigation in a criminal case for illicit enrichment. She assures that she did not commit the illegalities she is accused of.

“I am an honest judge. I have no illicit assets and no dubious personal interests,” the judge told the TV8.

¹ <https://www.zdg.md/editia-print/cum-i-a-fa%CC%86cut-justit%CC%A6ia-milionari-pe-judeca%CC%86torii-care-au-anulat-alegerile/>

Moreover, Tatiana Avasiloaie claims that she contested the referral act of the National Integrity Authority, which she considers unfounded and illegal.

"Regarding the search, I can only say that I am convinced that it will help to prove my innocence. I know for sure that there is no one who could claim that I stained the honour of the judge's mantle when passing judgments. I am ready to be evaluated by any judgement ever made", added the magistrate².

Even if there is no definitive solution to the given case that removes any doubt about the integrity of the judge, the public assumption of a clear position of honesty is important both for the litigants and for society, in the event that the judge's words are confirmed at a later stage. In general, the public defence position, in addition to the procedural one, are equally important for maintaining the image and prestige of justice.

If we are to analyse the judges who have a good image in society, they are usually those who have assumed a public discourse: either about the problems in the system (Gheorghe Balan, Tatiana Răducan), or about the pressures made on them with regard to the cases submitted to them (Domnica Manole) or that they had under examination (Ludmila Ous).

Therefore, society's first legitimate expectation of judges' integrity is related to their lifestyle, which must be commensurate with their legal income. At the same time, judges who have adequate assets in relation to their incomes are not of media interest, the press does not write about them. Thus, in the conditions where a lot is written only about the judges whose wealth arouses suspicion, and they, as a rule, do not offer public defence reactions, the public opinion assimilates them to all the judges in the system, considering them corrupt.

At the same time, the assessment of magistrates' assets as a criterion for evaluating integrity raises several dilemmas related to the declaration of income/help provided by the family (1.1.1), the authorities' responsibility for the undervaluation of real estate and cars (1.1.2), the uneven practice of detecting irregularities by ANI and prosecution bodies (1.1.3).

1.1.1 Dilemma 1: Income obtained from family members' businesses, ceremonies and help provided by relatives

Very often, judges who declare more or less impressive assets indicate that they were acquired by their family involved in legal affairs. Young judges often indicate help/donations from their parents, including when they work for many years abroad, and from the bank transfers to them they built a house or bought a car. Judges who are reported by the press to have relatives with prosperous businesses or who help them financially, even when they have sufficient legal income to provide this help – do not enjoy a flawless image anyway, being treated with distrust in public space. Amounts of non-

ey that are claimed to have been gained at weddings and anniversaries alike are treated with suspicion. Thus, it is possible that behind such statements there are both honest judges and judges who accumulate illicit wealth by taking bribes.

1.1.2 Dilemma 2: Liability for undervaluation of real estate and cars

There is also the problem of undervaluation by judges of the assets they own, which does not necessarily denote a problem of the judge's integrity, given that the legislation in the field of declaration of assets and interests until recently required the indication of the price in the contract. Based on these provisions, judges, as well as other categories of public agents (including the NIA inspectors) indicated in their declarations cars or real estate at ridiculous prices compared to the market value of a similar asset, this in itself raising suspicions about their integrity. At the same time, both the journalists and the public opinion formed by them ignore the fact that the state created the conditions, tolerated or even encouraged the specific declaration of such values of goods, not taking measures to include in the databases the real value of these goods subject to registration.

By way of example, there are standardized contracts, completed compulsorily when registering the means of transport, based on which the state provides assistance in carrying out the transaction, collects the tariff for the services provided and recognizes the price of the transaction. The usual amount included in these contracts is 10,000 lei, included in the sample contracts of the state authorities. After imposing the obligation to complete the contract in the given form, recognising the price and collecting an official fee by a state authority, another state authority questions this information, sanctions the public agent for the way another authority led him to act, but without raising the issue of the responsibility of the subdivisions of the Public Services Agency (PSA).

In the case of the real estate not declared at market value, we are in a similar situation, since the State Fiscal Service accepts and calculates the amount of taxes charged specifically based on the contract value, indicated until now, according to the law, in the asset declarations and interests. Although it has the prerogative to apply the indirect method to estimate the taxable base, the tax authorities accept the reduced values from the contracts in relation to the market value of the real estate, accumulating accordingly much lower taxes. Under these conditions, it is not clear why public agents, including judges, should be considered compromised if they indicated, according to legal requirements, the contract value of the real estate and not the real value, while the tax authorities are not held responsible for specifically encouraging this behaviour on the part of the taxpayers. Or, the problem with not indicating the real value of the value of the real estate in the contract is rather a problem of a fiscal nature and not of not correctly declaring assets, since the legislation regulating the activity of NIA requires the indication of the contractual value.

Thus, the state authorities (responsible subdivisions of the PSA and fiscal bodies) directly contributed to the adoption

² <https://tv8.md/2021/11/11/reactia-magistratei-tatiana-avasiloaie-cercetata-pentru-imbogatire-ilicita-sunt-un-judecator-onest/>

of a certain behaviour by citizens, including the subjects of the declaration of assets and personal interests through the promoted institutional policies, because essentially the state did not impose clear and similar rules for the way in which the information is kept in the official registers.

1.1.3 Dilemma 3: The uneven practice of the NIA and the prosecutor's office in finding irregularities

Some of the judges whose assets generate distrust have examined high-profile cases, others have not, some of them have issued controversial judgments, and others have not. Moreover, some judges were subject to NIA control, while others were not. Regarding some judges in the case of whom NIA found no irregularities, the prosecutor's office initiated criminal cases for illicit enrichment and/or false statements, and regarding others, in whose assets NIA had no objections to, the prosecution office initiated criminal proceedings for illicit enrichment. In certain cases, the unfavourable solutions of the NIA were cancelled by the courts. In some cases, the criminal prosecution for illicit enrichment was terminated due to non-confirmation of the alleged facts. At the same time, the checks and solutions of the competent bodies that do not confirm the version of illicit enrichment or false declarations often do not diminish the public distrust in the integrity of the judges concerned, because much less evidence is required to establish public guilt than to establish procedural guilt.

In the 2020-21 Monitoring Report on the Selectivity of Criminal Justice, released by Freedom House, it was found that information was leaked from the criminal case on illicit enrichment of a prosecutor aimed at worsening his public image, during the period when the prosecutor's office was preparing to classify that case due to the non-confirmation of the charges submitted.³ Previously, NIA had checked the prosecutor's assets and had found no irregularities. In this case, how can the integrity of the magistrate be appreciated, given that the public image remains affected, despite the favourable solutions of both the NIA and the prosecutor's office?

Considering the impressive amount of data in the public space regarding the wealth of magistrates, the uneven practice of self-reporting by relevant bodies, as well as their different solutions, the use of the wealth criterion to assess the integrity of judges should be based on a clear methodology, because the lack of it will inevitably lead to a different practice of assessing the integrity of judges, in identical factual and legal circumstances, depending on how they are perceived by public opinion and media.

1.2 Correct decisions vs. controversial decisions on sensitive issues

Another social expectation from honest judges is to adopt legal solutions to the cases they examine.

The share of the population that go to court annually and thus can form their own opinion based on direct contact with judges accounts for 3-7 percent⁴. However, a negative perception about the work of judges and the quality of the judicial act is widespread. This perception is formed by the media coverage of the solutions given in cases of increased social resonance, such as electoral ones, or criminal cases in which imposing sums appear.

CASE STUDY 2: Invalidation of local election results in the municipality of Chisinau from 3 June 2018

Probably the most "famous" court decision so far is that of Rodica Berdilo, invalidating the results of the elections in the municipality of Chisinau in 2019.

Given the major political interest in electoral disputes, court decisions on them will always generate speculations of political influence on the court.

However, not every judicial solution in the electoral disputes has provoked as strong reactions of disagreement as in the case of the local elections in the municipality of Chisinau.

This is also one of the few cases in which both the judge and the court in which the judge works came up with a public reaction. However, given the almost singular character in which the court came up with a press release, the public opinion seems to have overlooked it.

CASE STUDY 3: Rodica Berdilo, the magistrate who decided to invalidate the local elections, came up with a first reaction after the series of attacks on her, while the court where she works released a statement.

In a Facebook post, Berdilo claims she had the courage to issue a ruling that pleased some and angered others.

"I followed strictly and without exception the provisions of the law, in this case the Electoral Code, which stipulates that on the day of the elections and the day before the elections electoral agitation of any kind is not allowed, the key word being "of any kind", wrote Rodica Berdilo.

The institution where Rodica Berdilo works issued a press release, stating that the invalidation decision was correct and must be applied without exception.

The central district of the Chisinau Court also notes that the judges regret the denigrating messages towards the judiciary and the media attack on Rodica Berdilo.

³ Monitoring the selectivity of criminal justice, Report 2020-21, Freedom House, authors Mariana Rata and Cristina Tarna, page 32: https://freedomhouse.org/sites/default/files/2021-10/fh-Moldova_Report-Selective-Justice-2021_Rom.pdf

⁴ Study of impact assessment of the National Integrity and Anti-corruption Strategy – Moldova 2019, UNDP Moldova, page: 52, data on the population's contact with the courts in 2017 and 2019: https://www.md.undp.org/content/moldova/ro/home/library/effective_governance/studiu-de-evaluare-a-impactului-strategiei-naionale-de-integrita0.html

The law must be applied in order not to endanger democracy, and ignoring it is a wilfulness, the statement also states.

The magistrates also cited the example of the presidential elections in Austria two years ago, which were cancelled after the court found numerous irregularities⁵.

Other rulings that upset public opinion in the past were those issued by the Causeni Court, through which it is considered that imposing sums of money were laundered within the *Russian Laundromat*. In reality, there were several courts that issued such rulings.

CASE STUDY 4: Involvement of Judges in the Russian Laundromat

15 magistrates were accused of being part of a criminal scheme that allowed the laundering, through the banking system of the Republic of Moldova, of about 20 billion dollars, originating from the Russian Federation.

The “Moldovan scheme” to legalize the billions of dollars coming from Russia worked in the following way: at the requests of some off-shore companies from Great Britain, Belize, the USA, South Africa, New Zealand or Scotland, the Moldovan magistrates obliged Russian companies, but also Moldovan citizens, to return their debts of hundreds of millions or even billions of dollars.

Creditors – companies and/or foreign individuals – requested through the court the restitution of fictitious debts from citizens of the Republic of Moldova, as debtors or guarantors of those debts. These citizens accepted their participation in the scheme against symbolic sums, they did not know and did not understand the scheme they were participating in. In fact, the need to involve Moldovan citizens was necessary only for the establishment of the competent court on the territory of the Republic of Moldova. At the same time, the judicial procedure was simplified, it being sufficient to verify the documents that confirm the existence and maturity of the debt. As a result, the judges issued orders for debt collection. The specifics of the trials consisted in the non-attraction of the alleged debtors to the trial, the non-request by the court to present the original civil contracts that proved the existence of the debts and the high speed of issuance by the court of ordinances (1 day – several weeks), so that, despite the impressive sums of the money involved, the courts were satisfied with some unauthenticated copies and did not summon the debtors in court, before issuing the court orders, which had the value of an executory title. Later, on behalf of those persons, the sums ordered for execution by court orders were transferred to the foreign jurisdictions, from which the alleged creditors originated. Thus, the complicity of the judges in the laundering scheme of more than 20 billion dollars consisted in knowingly pronouncing decisions contrary to the law, resulting in serious consequences, a crime provided for by art. 307 of the Criminal Code.

In general, starting from the idea of the legality control of judicial decisions by hierarchically superior courts, it is debatable the extent to which the issuance of controversial solutions can be considered as a criterion for assessing judicial integrity. For example, if a controversial decision is upheld by hierarchically higher courts, will the entire chain of solutions issued later be considered controversial, with the result that the integrity of all the judges involved in that chain will be called into question, or only those of the lower court?

If we return to the two cases regarding the court orders issued in connection with the alleged money laundering, no objections were filed, they became executory, while in the case of the solution issued by Rodica Berdilo regarding the invalidation of the local elections’ results in the municipality of Chisinau, the solution was upheld by the superior court. At the same time, there has been recently a situation of exclusion of an electoral contestant with the best intermediate score before the second round of local elections in the municipality of Balti, which also caused controversial public reactions.

Therefore, the issuance of controversial court decisions as a criterion for judging the integrity of judges could be retained, possibly, if: the judge is held accountable/convicted for committing crimes against justice, stipulated in Chapter XIV of the Criminal Code or corruption crimes stipulated in Chapter XV of the Criminal Code, in relation to the controversial decision that was issued.

1.3 Honesty vs. Bribery

Citizens expect honest behaviour from judges, not to take bribes. Evidence of the bribery by judges does not appear in the public space very often. But when this happens, it can seriously affect the image of judges.

CASE STUDY 5. Publication of images of alleged bribing of Judge Liliana Andriaş from the Chisinau Economic Court (15.05.2009)

A video was sent to the editorial office of JURNAL TV. The images were filmed with a hidden camera, on April 10. Because the images sent were not accompanied by any explanation, we can only make the following deductions: the person who took the video is a man who entered the judge’s office for a discussion. The judge is Liliana Andriaş from the Chisinau Economic Court. After the discussion that lasted about 40 minutes, the man takes out several dollar bills, which he puts under the phone on Judge Andriaş’s desk. She does not oppose or condemn the gesture of her interlocutor. Moreover, later, Liliana Andriaş hid the money under some documents that were on her desk⁶.

The recording sparked strong reactions of public displeasure. At the time, the Superior Council of Magistracy (SCM) and the prosecutor’s office defended the judge, citing the fact that the recording was not authorized and therefore has no evidentiary value. At the same time, the authenticity of the recording, as well as the fact that the money was passed in connection with the examination of a file by the judge, were never publicly denied by the concerned judge.

Similar reactions were offered on different occasions by other categories of public agents, when their images appeared in the public space, being taken either by the citizens passing the bribe or by nearby surveillance cameras. The lack of authorization of the recording does not fundamentally change

⁵ https://www.publika.md/judecatoarea-rodica-berdilo-m-am-condus-strict-si-fara-exceptii-de-prevederile-legii_3010896.html

⁶ <https://www.youtube.com/watch?v=82aZ7fp3enY>

the fact that citizens perceive the person recorded as taking bribe as corrupt. It is obvious that the judge cannot be convicted on the basis of this evidence, but such evidence certainly does not support the integrity and good reputation of the magistrate.

An interesting fact is that a few years later, the judge referred to in the above case study was detained together with 14 other magistrates for involvement in the money laundering, the so-called Laundromat. In 2014 the judge left the system⁷.

Another situation assimilated to bribery is when the judge is caught on video receiving goods from participants in the trial. However, under the terms of the Integrity Law, public officials are prohibited to accept inadmissible gifts, i.e. goods, services, favours, invitations or any other advantage, which are intended for them personally or their family, if their offering or granting is directly or indirectly related to carrying out their professional activity, while requesting or accepting inadmissible gifts constitute acts of corruption as per criminal legislation⁸.

CASE STUDY 6. Shor's lawyer, meeting with judge Berdila, at a car wash in Cahul. He hands him out a black bag with wine and chocolates.

One of the lawyers defending Ilan Shor's interests in court has met recently with a magistrate from the Cahul Court of Appeal, where the case of the leader of the Shor Political Party is currently pending. From the images captured by a surveillance camera, it appears that it could be magistrate Tudor Berdila and lawyer Nicolae Bojenco. Moreover, the images show how the latter hands out the judge a black bag.

The images were allegedly recorded on 30 April 2021, in front of a car wash. A gray BMW X3 model car appears in the video. Such a car also appears in the asset declaration for 2020, submitted to NIA by magistrate Tudor Berdila.

The lawyer Nicolae Bojenco confirmed that this meeting took place, but mentioned that it was an unplanned one.

"There was no private meeting. We met at a car wash. We have known each other since 2003. Before Easter I met him by chance. I also came to the car wash to wash my car. I didn't give him anything. It was a white wine and a chocolate, which was not intended for him, but since I met him, I congratulated him on the occasion of the holidays", Nicolae Bojenco told us.

Later, Berdila stated that the meeting was accidental, and the bag contained a small present on the occasion of his birthday⁹.

Just 2 months before the incident, the fact that magistrate Berdila was the new judge-rapporteur of Ilan Shor's case examined at the Cahul Court of Appeal was publicized¹⁰.

Asked by journalists for a reaction, the court communicated that it regrets the existence of the fact recorded on video, in which the judge of the Cahul Court of Appeal is targeted, noting that the judge has already provided comments for the media. The court also communicated that it is beyond the powers and duties of a court to assess events involving a magistrate¹¹.

If 12 years ago the SCM took a defense position in relation to the judge Liliana Andriaș who appeared taking money in secretly filmed images, in the second case, with the involvement of the magistrate Tudor Berdila, in which he was caught accepting a bag in which there were supposed to be goods, the Judicial Inspection announced that it had reacted, after a vehement public reaction of the EU Ambassador in Chisinau on this case.

CASE STUDY 7. The reaction of the EU Ambassador in Chisinau to the case of magistrate Berdila, caught accepting a black bag from Shor's lawyer

The EU ambassador in Chisinau, Peter Michalko, said during Jurnal TV's "Hour of Expertise" show that: "The scene you talked about is unimaginable in the modern justice system in any country. I don't understand how this can simply be tolerated. This is also against the law regarding the conduct of judges and parties in a case. It is obvious that this is about the need for deep changes in the judicial system, of not only how it works, but also how it thinks"¹².

Another "famous" case in which a public agent declared that he received a gift is that of ex-prime minister Filat. During the criminal investigation, the ex-prime minister claimed that the transfers of money to his card from Ilan Shor were simple gifts, so they cannot be categorized as bribes and that he, Filat, should only be sanctioned disciplinarily, for not declaring the gifts, not criminally, for acts of corruption.

Following this logic, any act of corruption involving transfer of financial means or other assets can be declared as a gift, to avoid criminal liability. The delimitation of the gift from a bribe lies in the existence of a correlation between the goods transferred to the public agent and his consider-

⁷ <https://www.zdg.md/stiri/stiri-justitie/ultima-ora-judecatorii-anchetati-pentru-complicitate-la-spalare-de-bani-in-dosarul-laundromat-scosi-de-sub-urmarire-penala-de-procuratura-anticoruptie-cer-csm-ului-restabilirea-in/>

⁸ Art.16, paragraph (1) of the Integrity Law, no.82 from 25.05.2017: https://www.legis.md/cautare/getResults?doc_id=120706&lang=ro

⁹ <https://deschide.md/ro/stiri/social/85351/Inspec%C8%9Bia-judiciar%C4%83-de-la-CSM-s-a-autosesizat-%C3%AEn-cazul-judec%C4%83torului-care-ar-fi-primit-o-pung%C4%83-de-la-avocatul-lui-%C8%98or.htm>

¹⁰ <https://www.zdg.md/stiri/stiri-justitie/judecatorul-raportor-din-dosarul-lui-or-a-fost-schimb%t-noul-magistrat-a-vrut-sa-demisioneze-de-la-ca-cahul-dar-s-a-razgandit-la-cateva-zile/>

¹¹ <https://agora.md/stiri/87789/regretam-existenta-faptului-inregistrat-video-curtea-de-apel-cahul-despre-intalnirea-dintre-avocatul-lui-Sor-si-judecatorul-raportor-in-dosar-doc>

¹² <https://deschide.md/ro/stiri/social/85351/Inspec%C8%9Bia-judiciar%C4%83-de-la-CSM-s-a-autosesizat-%C3%AEn-cazul-judec%C4%83torului-care-ar-fi-primit-o-pung%C4%83-de-la-avocatul-lui-%C8%98or.htm>

ation through the manner in which he exercises his duties. Money is not considered a gift¹³.

Regardless of whether it is money or other assets, being given by the lawyer to a judge, under the pretext of the Easter holidays or a birthday, does not transform the alleged assets into courtesy gifts, considering that during that period the judge was examining a case with the participation of the lawyer given, and that the “gift” could buy his goodwill. Moreover, judge Berdila accepted the “gift” while examining a case of resonance in which the defendant had previously publicly admitted that he had given bribes and that he had been constantly offering “gifts” to the prime minister, which were later qualified as acts of corruption. The nature of the goods in the bag cannot be established exactly, it is not known if there were also money in addition to the bottle of wine and candies in the bag. It is certain though that no one from the involved parties denied transmitting and accepting of some goods in that bag. Moreover, the subsequent failure to declare to the SCM the admissible or inadmissible gifts given by the lawyer, make the judge liable to at least disciplinary liability.

These two cases offer the possibility to determine a new criterion for assessing the integrity of magistrates: the absence of audio/video recordings, made public, regardless of their authorization, from the content of which results transmitting of money or assets in connection with the exercise of official duties – with a direct impact on the final solution (bribe) or with an indirect impact on it (to obtain a benevolent attitude) – directly by the participants in the trial or through other persons, as long as the authenticity of the recording is not denied by the judge or if the latter confirms it.

1.4 Independence vs. accepting inappropriate influences

Another expectation of society towards judges, in order to perceive them of integrity, is for them to be independent in making decisions and not fall prey to outside influences, especially those coming from the political environment.

In this sense, when there is evidence of improper influences on judges, society can no longer perceive them as persons of integrity. The examples made public confirm the hypothesis of exercising influence over judges by court presidents, influenced, in turn, by politicians and interest groups.

Two relevant examples in this regard involve the former president of the Supreme Court of Justice (SCJ), investigated for interference in the administration of justice, according to article 303 of the Criminal Code, and the example of a judge investigated for alleged acts of corruption, who believed that

the investigations were as a result of the fact that he had opposed the instructions of the court president to adopt a certain solution in the case in which the ex-prime minister Filat was the defendant, although at that time he did not declare those influences.

CASE STUDY 8. Prosecutors obtained the SCM’s agreement to prosecute Judge Ion Druta, dismissed from the position of president of the SCJ. The magistrate is suspected of „interference in the act of justice”

The TV8.md came into possession of some documents, which would have been found during the searches in Ion Druta’s office and from which the prosecutors’ investigation would have started. The documents contain brief descriptions of several cases pending at the Supreme Court of Justice, with the names of the judges who would have dealt with those cases and with suggestions for them as to what decisions to adopt.

Analysing the database of the Supreme Court of Justice, several cases mentioned in those documents were identified. Every time, the decisions pronounced by the magistrates corresponded to the solutions indicated in the documents found with Ion Druta¹⁴.

The public recognition of improper influences exerted on a judge, if the influences were neither rejected nor dealt with in the manner provided by law, by declaring them to the SCM, are a clear sign of a lack of integrity.

CASE STUDY 9. A former judge says she was intimidated by the president of the Chisinau Court of Appeal: “Do you want to be handcuffed and sit next to Filat?”

The former judge at the Chisinau Court of Appeal, Ludmila Ous, says that before she was excluded from the judicial system, she had been intimidated by the president of the Chisinau Court of Appeal, Ion Plesca. The intimidation took place during the period when she was examining high-profile cases such as the one involving the former liberal democratic Prime Minister Vlad Filat and the former Democratic Party deputy Constantin Tutu. The disclosures were made in the TV show “Politics with Natalia Morari” on the TV8.

The former judge said that it all started in 2016, when several magistrates of the Court of Appeal signed an appeal to support the independence of the judiciary after Judge Domnica Manole had been excluded from the system. Ludmila Ous said that then she was asked by the president of the Court of Appeal (Ion Plesca) to withdraw her signature from that statement.

Ludmila Ous was one of the judges who examined the case against former Prime Minister Vlad Filat. “In the Filat case, initially, I was asked by Plesca to attend a closed, urgent meeting, so that the case could be examined until the presidential elections in 2016. We have been hinted and the agenda was checked.

When the examination of the case began and they saw that I did not agree with some issues, I was no longer invited to the meetings. Later, I was called and intimidated: “Do you want to be handcuffed and sit next to Filat?”

If the source of improper influence comes from within the court where the judge works, this also affects the public per-

¹³ Article 16, paragraph (2) of the Integrity Law no 82 from 25.05.2017: https://www.legis.md/cautare/getResults?doc_id=120706&lang=ro

¹⁴ <https://tv8.md/2019/10/24/doc-exclusiv-dosarele-in-care-ar-fi-dat-indicatii-ion-druta-pentru-asta-s-a-ales-cu-un-nou-dosar-penal/>

ception of the integrity of the judges in question, which can be removed by public denial and the criminal investigation of the presence of the constituent elements of the crime of interfering with the act of justice (article 303 of the Criminal Code).

1.5 Lack of convictions of judging magistrates

An obvious expectation of society in relation to a judge of integrity is that he/she was not involved in, investigated, and convicted for acts of corruption. Regardless of whether a conviction for an act of corruption was challenged or not, the public opinion can no longer perceive that judge of holding integrity.

CASE STUDY 10. Oleg Melniciuc, the first judge sent to court for illicit enrichment and falsification of public documents, sentenced to seven years in prison with execution

Oleg Melniciuc, the first judge sent to court for illicit enrichment, sentenced to seven years in prison with execution, in a closed penitentiary. The decision was taken at the Anenii Noi Court, Varnita headquarters, by magistrate Aurelia Plesca.

Melniciuc's case was sent to court in 2018. After collecting and studying hundreds of documents and questioning several witnesses, the prosecutors determined that, in the years 2013-2017, when he held the position

of judge and interim president of the Rascani Court, the municipality of Chisinau, Oleg Melniciuc presented erroneous data in the asset declarations. He would also have committed the crime of illicit enrichment, through the possession, personally or through third parties, of goods, the value of which substantially exceeds the means acquired.

The anti-corruption prosecutors calculated that in 2014-2016 the magistrate's family obtained income of MDL 1,444,958 and had expenses of MDL 2,085,101. This fact indicates a substantial difference between the acquired wealth and earned income. In the „income” category, the prosecutors also included the more than MDL 600,000 declared as a donation. Prosecutors called them „suspicious donations.”

Some of these donations come from the magistrate's mother and father-in-law. The mother allegedly donated him MDL 150 in 2014 and 2015, as shown in the asset declarations. Oleg Melniciuc explained them that the money was obtained legally from the rental of premises that his mother owns in the municipality of Chisinau. As for another 3 thousand euros donated by his father-in-law, the judge said that he had worked abroad for a long time and could afford to make such a donation to his daughter.

Currently, several assets of the family are under seizure: a Mercedes car, which belonged to the magistrate's wife, and several amounts of money, raised during the searches made by the prosecutors in the judge's office and home in July 2017.

Both at the hearings at the Anticorruption Prosecutor's Office and in the press statements made when he was detained, Oleg Melniciuc did not admit his guilt¹⁵.

¹⁵ <https://tv8.md/2021/09/03/video-oleg-melniciuc-primul-judecator-trimis-in-instanta-pentru-imbogatire-ilicita-si-fals-in-acte-publice-condamnat-la-sapte-ani-de-inchisoare-cu-executare/>

2

REGULATED INTEGRITY

Integrity is the ability to be incorruptible, honest. It is the intrinsic concept for public agents and public authorities, being a basic landmark to give appreciation to their activity, both by the legal bodies and by the whole society. Gradually, the demands on the people who were going to be assigned to a position of public agent, has increased. Digitization has increased the possibilities of evaluating the results of the activity of public agents and public entities, as well as their relationships, way of life, interests, visions, political preferences, interactions with various interest groups, etc. These new circumstances prefigured new conditions for assessing the activity of public agents through the lens of their integrity. In other words, the professionalism and probity of the holder of public office are not sufficient for assessing the correspondence of the subject with the position held or claimed.

As mentioned, in the last decade, the judiciary has been given special attention by the other two powers, as well as by civil society and especially the media. The intensity with which the issue of integrity of the judges is debated is justified, because the decisions of the courts have an impact on the relations in society.

Although it is of major importance, the judicial integrity is treated by the normative framework in an imprecise and even confusing manner sometimes. Next, in order to understand the regulation of judicial integrity we will analyse how integrity is understood in their case (2.1), who and when evaluates it (2.2), as well as the way in which this is done (2.3).

2.1 What is integrity?

The basic normative act that regulates the field of integrity in the public sector at the national level is the Integrity Law 82/2017¹⁶, which primarily aims to regulate mandatory measures to ensure and strengthen institutional and professional integrity.

Naturally, with the entry into force of this Law, in order to cultivate and maintain a climate of integrity in the judicial sys-

tem, it was necessary to adjust the normative framework that regulates the selection/ appointment/ training/ promotion/ evaluation/ sanctioning process of judges, but even a brief analysis of the legislation on the activity of judges reveals the lamentable failure of the authorities to adjust the legal framework to the new criteria for analysis and assessment of the conduct of judges or persons aspiring to the position of judge.

It should be specified that the framework legislation regarding the activity of judges does not expressly operate with the term of integrity and does not stipulate integrity as an imperative condition to correspond to the status of a judge and ensure/maintain the prestige of justice. This conclusion is substantiated by the lack, in the normative framework that regulates the activity of judges, of the definition of "integrity", but especially by the lack of a procedure for evaluating the judicial integrity, this being determined by the qualifications included in a disorganized way in the legislation on the activity of judges, including: impeccable reputation, professional reputation or, simply, reputation (2.1.1), professional integrity/ integrity as a judge (2.1.2), professional ethics (2.1.3) and honour, probity and prestige of justice; confidence in justice (2.1.4). In the following, they will be analysed separately.

2.1.1 Impeccable reputation/ professional reputation/ reputation

The framework legislation regarding the activity of judges, the Law regarding the status of the judge no. 544-XIII of 20.07.1995, expressly provides in art. 6 paragraph (1) the impeccable reputation as a condition for persons who apply for the position of judge.

The definition of the notion of irreproachable reputation is not regulated by this Law, only the situations indicating the lack of irreproachable reputation are indicated, namely, paragraph (4) art.6 provides that "*it is considered that the person does not have an irreproachable reputation and cannot run for office of judge, who:*

- a) has a criminal record, including extinguished criminal cases, or was absolved of criminal liability through an act of amnesty or pardoning;
- b) was dismissed from the legal bodies for compromising rea-

¹⁶ Integrity Law no. 82 from 25.05.2017

sons or was released, for the same reasons, from the functions specified in paragraph (2);

c) has a behaviour incompatible with the norms of the Judges' Code of Ethics or carries out activity incompatible with the norms of this Code;

d) was applied disciplinary sanctions for not complying with the provisions of art. 7 paragraph (2) of Law no. 325 of December 23, 2013 regarding the evaluation of institutional integrity;

e) is prohibited from occupying a public position or public dignity, which derives from a finding by the National Integrity Authority."

The DEX definition of "reputation" is "public opinion of someone or how someone is known/regarded". The term "irreproachable" means something or someone beyond reproach, flawless, faultless.

Therefore, when we talk about the basic condition for access to the position of judge, but also for the exercise of the given position, it should be noted that the legislator emphasizes the person's reputation, the general perception of the person's conduct prevailing over integrity, which is a much broader notion than the "reputation", which includes also the notion of "reputation". While for access to some positions as a member of the specialized bodies subordinated to the SCM¹⁷ the condition of having an irreproachable reputation is expressly indicated, for the access as a member of the SCM this condition is not expressly provided by the Law, being only necessary to meet the condition of seniority as a judge of at least 2-year experience and the lack of disciplinary sanctions.

It should also be noted that both the provisions of the Regulation on the organisation of the activity of the College for selection and career of judges¹⁸, as well as the provisions of the Regulation on the organization of the activity of the Judges' Performance Evaluation College¹⁹ impose the condition of irreproachable reputation only for members who are elected from among civil society.

Thus, although the authority and prestige of the judiciary are directly dependent on the conduct of the persons constitutionally invested with justice administration duties, the eligibility of judges in the judicial self-administration body, as well as in its specialized bodies, is not currently dependent on their integrity.

¹⁷ The specialized bodies subordinated to the SCM are: the college for the selection and career of judges; the college for judges' performance and evaluation; the disciplinary college; judicial inspection.

¹⁸ Approved by SCM Decision no. 60/3 of 22.01.2013.

¹⁹ Approved by SCM Decision no. 59/3 of 22.01.2013.

2.1. 2 Professional integrity/ integrity in the position of judge

In the sense of the Integrity Law 82/2017, the "professional integrity" is "the ability of the public agent to carry out his/her professional activity ethically, free from undue influence and manifestations of corruption, respecting the public interest, the supremacy of the Constitution and the law".

If related to the provisions of Law 544/1995 regarding the status of the judge²⁰, the professional integrity refers to the record of professional integrity issued by the National Anti-corruption Centre, as a necessary document to be attached to the files of candidates for the vacant positions of judge, vice president and president of the court, entered in the Registry.

This act is issued under the terms of Law 325/2013 on the assessment of institutional integrity²¹ and includes the result of the integrity test which consists in the creation and application by the tester of some virtual, simulated situations, similar to those in the service activity, materialized through covert operations, conditioned by the activity and behaviour of the tested public agent, in order to passively track and establish the reaction and of his/her conduct, thus determining the degree of damage to the climate of institutional integrity and the risks of corruption within the public entity in the process of evaluating the institutional integrity.

At the same time, a distinct approach to the concept of professional integrity of the judge is noted in the provisions of the Regulation regarding the criteria, indicators and procedure for evaluating the performance of judges²². Here the professional integrity of the judge is already assessed strictly from the perspective of respecting professional ethics, professional reputation and the absence of disciplinary violations, not from the perspective of the absence/ existence of risk factors.

2.1. 3 Professional ethics

One of the basic obligations of judges is to comply with the provisions of the Judge's Code of Ethics, an express fact established in art. 15 paragraph (1) letter e) of the Law 544/1995 regarding the status of judges.

The Judge's Code of Ethics and professional conduct was approved by the Decision of the General Assembly of Judges no. 8 of September 11, 2015. This document enshrines a set of principles and rules of conduct for judges, which they must respect during the exercise of their duties and outside of them. This document establishes the *principle of integrity* as one of the principles of ethics and professional conduct for judges. Moreover, this document describes in detail the essence of the principle of the integrity of the judge, namely:

²⁰ Law on the status of the judge, no. 544-XIII of 20.07.1995.

²¹ Law on the assessment of institutional integrity no. 325 of 23.12.2013.

²² Approved by SCM Decision no. 212/8 of 05.03.2013.

(1) The judge will respect the highest standards of integrity and responsibility, to ensure society's trust in the courts. The judge is aware of the risks of corruption and will not admit or create the appearance of corrupt behaviour in his/ her activity; will not ask for, accept or receive gifts, favours or benefits for fulfilling or not fulfilling functional duties or by virtue of the position held.

(2) The judge shall not request or accept, directly or indirectly, payments, gifts, services or other benefits, on his/ her behalf, of his/ her family members or friends, as consideration for exercising or refraining from fulfilling his/ her obligations in relation to a case which is to be examined by him/ her.

(3) The judge shall refrain from any financial and business transactions likely to affect his/ her impartiality, influence the exercise of his/ her duties, exploit his/ her position or involve him/ her in agreements with lawyers or other persons who are participants in the trials in the court where he/ she works.

(4) The judge may own and manage investments, including real estate, engage in other profit-generating activities, but will not be entitled to be an official, director, administrator or employee of any bank, credit institution, insurance companies, public enterprises or other companies with a public participation quota or state structures.

(5) The judge shall conclude transactions regarding personal property in a manner that does not cause doubt, or does not affect his/ her independence and impartiality or cause conflicts of interest.

(6) The judge shall not use the information obtained in his/ her official capacity in his/ her own interest, in the interest of family members or other persons when carrying out various financial transactions or for purposes not related to the exercise of his/ her office.

(7) The judge will avoid discussions with the participants in the trial or with third parties about other cases pending in the court, except for the cases provided by law.

(8) The judge shall not use his/ her status as a judge to obtain access to information about other cases pending before the court, except for the cases provided by law.

(9) The judge will give advice/consultations only to parents, spouse, children, grandchildren as well as to persons under tutorship or guardianship.

(10) The judge shall organise all his/ her extrajudicial activities in such a way as to maintain the authority and dignity of his/ her position, as well as the prestige of the judicial system.

(11) The judge can engage in any social activities to the extent that they do not prejudice the authority of the ju-

diciary, the prestige of the profession or the execution of professional obligations.

(12) The extrajudicial activities of the judge shall not cause doubts regarding his/ her impartiality, objectivity or integrity.

(13) The judge shall not use the judge's symbols, the judge's official documents for purposes other than official ones.

(14) The judge will not use social networks, in a way that could affect the image and status of a judge, the image and prestige of the judicial system as a whole.

In the sense of the provisions of the Regulation regarding the criteria, indicators and procedure for evaluating the performance of judges, the professional integrity of the judge is evaluated based on the indicators regarding the observance of professional ethics, the judge's observance of the provisions of the Judge's Code of Ethics being evaluated, to the extent that this does not constitute disciplinary misconduct.

2.1.4 The honour, probity and prestige of justice. Confidence in justice

Another obligation imposed on judges through the provisions of art. 15 paragraph (1) letter d) of the Law 544/1995 on the status of the judge, is to refrain from acts that harm the interests of the service and the prestige of justice, that compromise honour and dignity as a judge, causes doubts about their objectivity.

Acts that affect the honour or professional probity or the prestige of the judiciary to such an extent that trust in the judiciary is affected, committed in the exercise of official duties or outside of them, which, according to their gravity, cannot be qualified only as violations of the Code of Ethics and professional conduct of judges, constitute disciplinary violations according to the provisions of art. 4 letter p) of Law 178/2014 on the disciplinary liability of judges²³.

We must admit that there is no mechanism or tool that allows the definite determination of the indicators of probity or the prestige of justice, these being assumed, as a rule, as a result of the appreciation of society's perception towards the process of administration of justice, towards the body of magistrates, against court decisions. In a rule of law, a free and independent press has an essential role in determining society's perception and, respectively, in assessing trust in the act of justice.

²³ Law on the disciplinary liability of judges, no. 178 of 25.07.2014.

2.2 Who evaluates and when?

The integrity of judges is evaluated, as a rule, by the CSM and the specialized bodies subordinate to the CSM on various occasions: when promoting candidates for the position of judges (2.2.1), when evaluating judges (2.2.2) and when promoting, transferring and appointing to administrative functions (2.2.3), which is explained next.

2.2.1 Promotion of candidates for the position of judge

There is no doubt the professional and personal qualities that a judge must possess must imperatively be found in the candidates for the position of judge and it is natural that in the process of selecting the candidates for the position of judge, in the process of appointment of them in the position of judge, the same evaluation rigors should be applied.

The conditions for participation in the competition and the procedure for organizing and conducting the competition for the position of judge are provided in the Regulation on the organization and conduct of the competition for the position of judge, vice-president and president of the court (approved by CSM Decision no. 612/29 of 20.12.2018). For the position of judge can apply the person who meets the conditions provided in art. 6 of the Law on the status of the judge, passed the capacity exam before the Graduation Commission of the National Institute of Justice (hereinafter NIJ) or is a graduate of the NIJ, passed the selection procedures before the College for the selection and career of judges and is registered in the Register of participants in the contest to fill the vacant position of judge, president or vice president of the court.

A candidate for the position of judge is the person who meets the conditions of art. 6 of the Law on the status of the judge no. 544-XIII of 20.07.1995, was admitted, as a result of the selection procedure by the College for the selection and career of judges to apply for the quested position, is entered in the Register of participants in the contest to fill the vacant position of judge, president or vice president of the court.

The contest itself is held in the Plenary meeting of the Council with the presentation by the reporting member of detailed information about the candidate and his/her activity. During the SCM meeting, the reporting member presents the information regarding the verification of the candidate's impeccable reputation in accordance with the provisions of the Law no. 544 on the status of the judge. The information regarding the person's reputation shall be accumulated based on the data presented by the competent bodies regarding compliance with the legislation by the person concerned. CSM is entitled to use all legal means to verify the reputation of the participant in the competition.

Thus, it is necessary to conclude that the Regulation mentioned above, although it does not accurately describe a procedure in which the Superior Council of Magistracy can assess the integrity of the candidate for the position of judge,

assigns the Superior Council of the Magistracy an active role in the process of selecting candidates for the appointment to the position of judge, which essentially obliges the judicial self-administration body, in order to avoid discrediting the judicial system and damaging the prestige of the judiciary, to retain or at least give appreciation to the information about the participants in the contests, which is provided by the press and civil society.

2.2.2 Evaluation of judges

The regulation regarding the organization and conduct of the competition for the positions of judge, vice-president and president of the court stipulates that all judges are evaluated for their activity as a judge according to the following criteria: the efficiency of the activity, the quality of the activity, and the professional integrity.

The presidents and vice-presidents of all courts, courts of appeal and the Supreme Court of Justice are evaluated both in terms of their activity as a judge and their activity as president or vice-president, according to the following criteria: leadership, control, and communication capacity. The evaluation of the judge's performance can take place periodically or extraordinarily. The periodic evaluation takes place once every three years, according to the schedule established by the Evaluation Board. The evaluation of the activity of the president or vice-president of the court takes place simultaneously with the periodic evaluation of his/ her activity as a judge. The extraordinary assessment takes place in the case of: a) appointment to the position until reaching the age limit; b) requesting promotion to a higher court; c) applying for the position of president or vice-president of the court; d) transfer to a court of the same level or to a lower court; e) insufficient qualification in the evaluation.

The activity as a judge is evaluated by the College based on the criteria, indices, verification sources and the score indicated in Annex no. 1 to the Regulation. The evaluation criteria aim at the efficiency of the activity, the quality of the activity, and the professional integrity. The maximum score that can be awarded is 100 for judges of the lower courts and courts of appeal and 90 for judges of the Supreme Court of Justice.

The professional integrity criterion focuses on the following indicators:

- a. Compliance with professional ethics – for which the sources of information are: The Judicial Inspection's informative note regarding the checks carried out and the complaints received; attending the judge's court hearings or listening to the audio recording of at least 5 randomly chosen court hearings;
- b. Professional reputation for which the sources of information are: the opinion of the president of the court; the holding by the judge of functions in the administrative bodies or promoting the interests of the judges; assessments by civil society; other sources;

- c. The presence of disciplinary violations for which the sources of information are: the information received from the Disciplinary Board, in the absence of disciplinary violations it is not provided;
- d. The finding of violations of the ECHR found by the ECtHR regarding the court decisions adopted in the last 6 years – sources: information received from the Government Agent or obtained from other sources. In case of lack of violations or conviction at the ECHR, no points are given, 1 point will be deducted for each conviction.

It is important to state that, in order to exercise its powers, the College has the right to examine any materials. The requests of the President of the College or members of the College in connection with the evaluation of judges are binding for the presidents of courts and other judges, the Ministry of Justice and other public authorities. They are obliged to submit to the College, within the term established by it, the requested documents and information.

Once again, this speaks of the active role of the specialized body attached to the SCM, which has more than enough leverage to identify deficiencies when it comes to the integrity.

2.2.3 Promotion, transfer and appointment to administrative positions of judges

According to the Regulation on the criteria for the selection, promotion and transfer of judges²⁴, the selection of candidates for the position of judge, the promotion to the position of judge at a hierarchically higher court, the appointment to the position of president or vice-president of the court, as well as the transfer of the judge to a court of the same level or to a lower court are carried out by the College for the selection and career of judges. In the processes of selection of candidates for the position of judge, promotion to the position of judge of a hierarchically higher court, appointment to the position of president or vice-president of the court and transfer of the judge to a court of the same level or lower court, the following basic criteria shall be taken into account:

- a) the level of knowledge and professional skills;
- b) the ability to apply knowledge in practice;
- c) length of service in the position of judge or in other specialized legal positions;
- d) the qualitative and quantitative indicators of the activity carried out as a judge or, as the case may be, in other specialized legal positions;
- e) compliance with ethical standards;

f) the didactic

and scientific activity and the optional criterion;

- a) extrajudicial activity, confirmed by certificates, diplomas, judgments, decisions, orders, etc.

Judges can be promoted to a hierarchically higher court taking into account:

- a) length of service as a judge, correspondingly: minimum 6 years for the position of judge at the Court of Appeal and 10 years for the position of judge at the Supreme Court of Justice;
- b) lack of unextinguished disciplinary sanctions;
- c) supporting the performance evaluation, confirmed by the decision of the Judges' Performance Evaluation Board.

Each judge who applies for promotion to a hierarchically higher court is evaluated in terms of meeting the conditions mentioned at point 11 and the criteria below, with scoring as follows:

- a) length of service in the position of judge, confirmed by the entries in the work book and other relevant documents. For each year of work experience that exceeds the minimum threshold imposed by law, 1 point will be given, but the total value cannot exceed the ceiling of 10 points.
- b) the skills of the judge to occupy the position. The selection board, during the meeting, will check the candidate's skills based on his/her opinion presented on judicial practice. The maximum score awarded will not exceed 5 points.
- c) quality, efficiency and integrity in the position of judge. It is evaluated according to the qualification granted by the decision of the Evaluation Board. The qualification "excellent" gives candidates 60 points, the qualification "very good" – 55 points, the qualification "good" – 50 points.
- d) didactic and scientific activity, scientific degree, research, thematic analyses, participation in the drafting of normative acts, comments on normative acts, as an expert or consultant in national or international working groups, reflected in the personal file and confirmed by diplomas, work books, certificates, manuals, brochures, articles in magazines, are valued with 2 points.
- e) other extrajudicial activities, confirmed by certificates, diplomas, judgments, decisions, orders are awarded up to 3 points.

Judges can be promoted to the position of president or

²⁴ Approved by the SCM Decision no.613/29 of 20.12.2018.

vice-president of the court taking into account: supporting the performance evaluation, confirmed by the decision of the Judges' Performance Evaluation Board and the absence of unextinguished sanctions, confirmed by the certificate issued by the Disciplinary Board.

The candidates for the position of president or vice president of the court are to be assessed according to the following criteria, including in terms of managerial capabilities:

- a) quality, efficiency and integrity in the position of judge.
It is evaluated according to the qualification granted by the decision of the Evaluation Board. The qualification "excellent" gives the candidates 60 points, the qualification "very good" – 55 points, the qualification "good" – 50 points;
- b) the skills of the judge to occupy the requested position.
During the meeting, the Selection Board will verify the candidate's skills based on his/ her opinion on judicial practice. The maximum score awarded by the College shall not exceed 5 points.
- c) the didactical and scientific activity, scientific degree, research, thematic analyses, participation in the drafting of normative acts, comments on normative acts, as an expert or consultant in national or international working groups reflected in the personal file and confirmed by diplomas, notebooks of work, certificates, manuals, brochures, articles in magazines are valued with 2 points.
- d) the (previous) activity in administrative functions (including the exercise of the interim in an administrative position) shall be appreciated with up to 3 points.
- e) participation in activities related to the administration of the courts (committees, decision-making activities, contests, collective performance evaluation committees, work group for procurement, work groups within the court, etc.) shall be valued with up to 5 points.
- f) the candidate's development of a plan or establishment of a court activity strategy for the next 4 years (annex no. 2), shall be valued with up to 5 points.

2.3 How is integrity evaluated?

According to the provisions of art. 2 paragraph (1) of Law 154/2012 on the selection, performance, evaluation and career of judges²⁵, the selection of candidates for the position of judge, the promotion to the position of judge to a higher court, the appointment to the position of president or vice-president of a court, as well as the transfer of the judge to a court of the same level or lower court are carried out by the collegium for the selection and career of judges (hereinafter – the selection college), based on clear, transparent, objective and merit-based criteria.

In the sense of the Law mentioned above, integrity is not a basic criterion for the selection procedure of candidates for the position of judge or for the career of judges, because the Legislator expressly provided in paragraph (2) of the same Law the basic criteria, as follows:

- a) the level of knowledge and professional skills;
- b) the ability to apply knowledge in practice;
- c) length of work in the position of judge or in other specialized legal positions;
- d) the qualitative and quantitative indicators of the activity carried out as a judge or, as the case may be, in other specialized legal positions;
- e) compliance with ethical standards;
- f) didactic and scientific activity.

At the same time, according to the provisions of art. 12 of Law 154/2012 on the selection, performance evaluation and career of judges, the performance of judges are evaluated by the judges' performance evaluation board (hereinafter – the evaluation board), the purpose of which is to establish the level of knowledge and professional skills of judges, as well as the ability to apply the theoretical knowledge and skills necessary in the practice of the profession of judge, establishing the weak aspects and strong aspects of the activity of judges, stimulating the tendency to improve professional skills and increasing the efficiency of the activity of judges at the individual level and at the level of courts.

²⁵ Law on the selection, performance evaluation and career of judges, no. 154 of 05.07.2012.

3

REAL INTEGRITY

Comparing society's expectations related to judges to the possibilities offered in this regard by the regulations in force, we find that the SCM and the specialized bodies that are subordinate to it could have delivered a much higher level of judicial integrity than has actually been delivered so far. In such conditions, the reality of judicial integrity gradually deteriorates, a fact confirmed by the worsening of the public perception of judicial corruption (3.1). The reaction of the anti-corruption authorities (3.2) and the chronic indifference of the SCM to the issues of judicial integrity (3.3) are not likely to change things for the better.

3.1 Public perception of justice

The need to improve the situation in terms of judicial integrity can be analysed from the perspective of the evolution of social perception.

According to the data of the Public Opinion Barometer, the June 2021 edition, only 16% of those surveyed stated that they trust the judiciary. For comparison, the level of trust in the government and political parties is at a comparable level of 17%, while trust in Parliament is only 13%²⁶.

Perceptions of justice in the Republic of Moldova should also be analysed from an international perspective, through the lens of international indicators, such as the Global Index of Economic Freedom of the Heritage Foundation and the Rule of Law Indicator, calculated by the World Justice Project, whose methodology involves the calculation of scores and factors related to justice and the degree of its corruption.

Thus, the "Efficiency of Justice" Score, calculated by the Heritage Foundation to determine the Global Index of Economic Freedom, established a level of 29.9% for the Republic of Moldova in 2021²⁷, being in decline compared to 2020. Previously, during the years of 2016-2020, this index had been increasing, from 23.9% to 31.7%. In the description it is stated that the justice sector is undergoing

reform due to political pressures, while the corruption and organized crime remain concerns at all levels of government²⁸.

The "Absence of corruption" factor within the Rule of Law Indicator calculated by the World Justice Project for the Republic of Moldova for 2021 is 0.36²⁹. Although this score has steadily improved since 2015, when it was at the level of 0.28, its current value remains considerably below the regional average (0.44) and the global average (0.52)³⁰. The World Justice Project's Rule of Law Indicator annually estimates two other factors: civil justice and criminal justice, as well as the extent to which it is free from corruption and political influence. For the year 2021, the level of freedom from corruption of civil justice in the Republic of Moldova was calculated at the value of 0.34, remaining below the regional average (0.45) and the global average (0.57)³¹. The level of freedom from corruption of criminal justice was calculated at the value of 0.36, being below the regional average (0.46) and the global average (0.55). A calculation of freedom from undue influence by government is also provided for justice. In the case of our country, the government non-interference in civil justice was estimated at a level of 0.37, a better situation compared to the regional average (0.34), but worse compared to the global average (0.52). In the case of criminal justice, the government non-interference was rated at 0.27, also between the regional average (0.23) and the global average (0.48)³².

The low level of citizens' trust in the judiciary in the Republic of Moldova is also an indirect consequence of the public communication handicap of judges, professional associations of judges and the judicial self-administration body, which denotes the absolute reluctance to expose themselves on the sidelines of

²⁶ Slide 19 of the survey presentation: <https://ipp.md/wp-content/uploads/2021/07/1-Prezentarea-rezultatelor-BOP-2021-iunie-1.pdf>

²⁷ The Heritage Foundation's "Efficiency of Justice" score in the Global Index of Economic Freedom is calculated on a scale of 0-100%, with 0 being the worst and 100 being the best.

²⁸ <https://www.heritage.org/index/country/moldova#rule-of-law>

²⁹ The World Justice Project's "Absence of Corruption" factor in the Rule of Law Indicator is calculated on a scale from 0 to 1, where 0 is the worst result and 1 is the best.

³⁰ <https://worldjusticeproject.org/rule-of-law-index/country/2021/Moldova/Absence%20of%20Corruption/>

³¹ <https://worldjusticeproject.org/rule-of-law-index/country/2021/Moldova/Civil%20Justice/>

³² <https://worldjusticeproject.org/rule-of-law-index/country/2021/Moldova/Criminal%20Justice/>

media scandals, whose negative protagonists are the judges.

The legal reserve obligation imposed on judges has been treated by the vast majority of judges as a rule without exceptions, which leaves no room for involvement in any dispute beyond the interaction with the SCM and its specialized bodies. The public forms and exposes its opinions on justice based on the arguments, versions, and criticism widely publicized by the mass media, and in the absence of any reactions from the concerned judges and the SCM, it is considered that if the judges are silent it means that they accept the criticism and have nothing to say.

3.2 The reaction of the anti-corruption authorities

The Anticorruption Prosecutor's Office and the National Integrity Authority (NIA), as a rule, do not show reluctance in self-reporting against magistrates, especially judges, in cases where journalists expose alleged acts of corruption and illicit enrichment. In particular, recently, after an interruption of several years, the actions of active investigation of judges' assets have been resumed. It is not clear whether the reason lies in obtaining the conviction of the first judge for illicit enrichment (Oleg Melniciuc) or the replacement of the leadership of the General Prosecutor's Office. It is certain though that, recently, the prosecutors have paid more attention to the verification of suspicions related to the assets of judges (Tatiana Avasiloaie, Alexandru Gheorghies, Dorel Musteata).

Likewise, the NIA management does not limit itself to publishing on the official page of the institution of the finding documents regarding the magistrates, taking on an active role in mediating the grievances of the institution towards certain judges in whose case finding acts were issued by NIA (Tatiana Avasiloaie).

Some of the judges in question declare themselves victims of the SCM's revenge for the active role they had during the attempt to disembark the composition of the SCM in the fall of 2019, when the Extraordinary Assembly of Judges was convened (Alexandru Gheorghies)³³, while other judges accuse the NIA leadership of personal reasons for revenge for previously adopted judicial solutions, directly uncomfortable for the head of the NIA³⁴.

In the circumstances presented, the determined reaction of the anti-corruption authorities towards judges in the last period certainly aggravates the perception of corruption among magistrates.

3.3 SCM's constant indifference

While the anti-corruption authorities react in the case of judges, the SCM adopts a passive attitude towards the alleged integrity

problems of judges. The only role that the SCM seems to adopt is to lift the immunity of judges at the request of the Attorney General.

In this sense, the SCM seems not to realize the important role entrusted to it by the effect of the Integrity Law 82/2017 of cultivating integrity in the public sector and preventing the appearance of manifestations of corruption within the judicial system, the direct responsibility for cultivating and strengthening the institutional integrity climate, as well as for the sanctioning of the lack of professional integrity, and zero tolerance for corruption within public entities and the inevitability of the legal sanctioning of the lack of integrity in the public sector³⁵.

In this sense, the SCM omits to provide reactions to journalistic investigations in which judges, including members of the SCM, are targeted, leaving the impression of complicity through non-involvement. The SCM, as a recognized leader through Law 82/2017, is to ensure the cultivation of the elements of integrity climate of the judicial system, the most important being:

- employment based on merit and professional integrity;
- compliance with the legal regime of the declaration of assets and personal interests of judges;
- compliance with the legal regime of incompatibilities in exercising the function of a judge;
- compliance with the legal regime of restrictions, limitations and prohibitions in exercising the function of a judge;
- not admitting, reporting and dealing with improper influence and *ex-parte* communication;
- compliance with the legal regime of conflicts of interest;
- non-admission of favouritism;
- compliance with the legal regime of gifts;
- non-admission, denunciation of manifestations of corruption and protection of integrity whistle-blowers;
- intolerance of integrity incidents;
- compliance with the rules of ethics and deontology of judges.

In reality, the SCM does not react either to the mediatized cases of receiving gifts, contrary to the provisions of the law and the Code of Conduct for judges, nor to cases of undue influence exercised over judges, nor to cases of *ex-parte* communication, nor to cases of public disclosure by judges of problems in the system, nor in cases of bribery.

Although the Integrity Law 82/2017 and the Law 178/2014 on the disciplinary liability of judges offer the legal possibility of framing all the deviations admitted in the activity of judges, the SCM has a passive attitude in this regard, exhibiting a great tolerance towards the integrity incidents of the judges. Under these conditions, the entire system is perceived as corrupt and uncaring of the integrity of the magistrates.

³³ <https://nordnews.md/video-retinerea-judecatorului-din-balti-de-la-birou-pana-la-spital/>

³⁴ <https://tv8.md/2021/12/14/judecatoarea-avasiloaie-cercetata-pentru-imbogatire-ilicita-ii-da-replica-sefei-ani-care-a-acuzat-o-de-lipsa-de-impartialitate-o-razbunare/>

³⁵ Art. 4 letters b), d) and e) of the Integrity Law no. 82 of 25.05.2017

4

PROMISED INTEGRITY

After the change of government in 2019, a good part of the judges in the system convened, for the first time in the history of the Republic of Moldova, two Extraordinary Assemblies, through which they pursued the disembarkation, before the deadline, of the judges appointed to the SCM for perceived integrity issues and participation in the capture of state institutions, as also declared by Parliament³⁶. Against the backdrop of strong political distrust, the Extraordinary Assemblies failed. The government defended the SCM, even if previously they brought vehement criticism to its members, accusing them of political servility towards the previous political regime.

The solution offered by the new political class of the Action and Solidarity Party (PAS) was the so-called “vetting” or the performance of an external evaluation, later renamed – extraordinary, of all judges and prosecutors in the system, following the model implemented by Albania. This idea was abandoned by the socialist government that succeeded after 2019, a fact welcomed in the report of the Group of States against Corruption of the Council of Europe³⁷. After the return of PAS to government in the summer of 2021, the idea of *vetting* judges and prosecutors came back. In the fall of 2021 an announcement and summary concept were published on the website of the Ministry of Justice³⁸, a working group being established to develop the corresponding draft laws.

In 2020 and 2021, the government prohibited the convening of the ordinary General Assembly of judges, citing restrictions related to the pandemic. Given that in 2021 the General Assembly was to appoint new members of the SCM to replace those whose mandates have expired, the government has announced that the moment is favourable to implement a “*pre-vetting*”, i.e. an evaluation of the integrity of the candidates for the positions

of members within SCM and SCP, as well as in the specialized bodies subordinate to them. A draft law was developed, which provides for the establishment of an evaluation commission formed by the Parliament and the development partners, which will verify the integrity of the candidates in the respective bodies, based on criteria focused mainly on the verification of the assets and the lifestyle of the candidates (a number of 38 at that time)³⁹, within a period of just one month. The draft was not presented for public consultations, being sent directly to the Venice Commission, which presented its opinion on it during the plenary of 10-11 December 2021.

In the following, we will analyse the ways of ensuring judicial integrity, in the context of the political offer to solve the problem of judicial integrity by implementing the extraordinary evaluation of judges (4.1) and the evaluation of candidates for the positions of members of the SCM and SCP (4.2).

4.1 The extraordinary evaluation of judges

The implementation of any measure to ensure judicial integrity must be compatible with the guarantees of judicial independence. An important source of international standards in this regard are the instruments of the Council of Europe, relevant being both the assessment of the Group of States against Corruption (GRECO) of the Council of Europe and the opinions of the Venice Commission of the Council of Europe.

4.1.1 Evaluation of the Group of States against Corruption (GRECO) of the Council of Europe

In the framework of the fourth evaluation round by GRECO of the Council of Europe, held in 2016 in the field of integrity of parliamentarians, judges and prosecutors, the Republic of Moldova was recommended to take the necessary measures to ensure judicial independence, in order to avoid the appointment and promotion of judges who present integrity risks. GRECO emphasized the importance of checking the integrity risks of candidates for the position of judges by the judicial system, in

³⁶ Decision of the Parliament for the adoption of the Declaration regarding the recognition of the captive nature of the state of the Republic of Moldova, No. 39 of 08.06.2019: https://www.legis.md/cautare/getResults?doc_id=114796&lang=ro

³⁷ The Second Compliance Report of the Republic of Moldova to the recommendations of the Fourth Evaluation Round: Prevention of corruption among parliamentarians, judges and prosecutors, adopted on 25.09.2020 at the 85th plenary meeting of GRECO, paragraph 65, page. 14 of the English version: <https://rm.coe.int/fourth-evaluation-round-corruption-prevention-in-respect-of-members-of/16809fec2b>

³⁸ <http://justice.gov.md/libview.php?l=ro&idc=184&id=5387>

³⁹ 24 candidates to SCM: <https://www.zdg.md/stiri/stiri-justitie/candidatii-la-functia-de-membru-al-csm-avere-dosare-si-integritate/> and 14 candidates to SCP: <https://www.zdg.md/importante/activitatea-averea-si-justificarile-celor-14-candidati-la-functia-de-membru-al-csp/>

order to guarantee the independence of the judiciary⁴⁰.

On 25.09.2020, during the 85th plenary meeting of GRECO, the second Compliance Report of the Republic of Moldova with the recommendations of the Fourth Evaluation Round was adopted: Prevention of corruption among parliamentarians, judges and prosecutors (Report of GRECO compliance). According to this Compliance Report, GRECO welcomed the abandonment of the previous initiative to conduct a general *vetting* of judges, as such large-scale evaluations are neither compatible nor proportionate with the requirement to check the integrity of judges before appointment/promotion, without generating enormous risks regarding the independence of the judiciary. It was noted that the requirements for the integrity of judges and the verification of their compliance have not been regulated yet. GRECO mentioned that more measures should be taken to increase, in a practical way, the transparency in the activity of judges, judgments and decisions, including those adopted by the SCM and to strengthen the objectivity of procedures and disciplinary measures towards judges⁴¹.

GRECO concretized that a large-scale evaluation of judges can only be examined as an exceptional measure, which can only be admitted under exceptional conditions and which is neither compatible nor proportionate with the recommendations formulated by GRECO, while underlining the need to introduce clear, predictable and comprehensive rules regarding the method of verification of integrity by the judicial system, before the appointment and/or promotion of judges, and these rules are to be put into practice consistently⁴².

For comparison with the situation of judges, GRECO noted the lack of any progress regarding the recommendation on parliamentary integrity by eliminating the practice of adopting laws without proper consultations and in emergency procedures. GRECO also noted the lack of progress in adopting a Code of Conduct for deputies, which would include dealing with conflict of interest situations in parliamentary activity, as well as the lack of clear and objective criteria for lifting parliamentary immunity⁴³.

4.1.2 The concept of extraordinary evaluation of judges

Despite the opinion expressed by GRECO in September 2020 regarding the risks to the independence of the judicial system in the event of the implementation of an extensive vetting procedure of all judges in the system, especially if this procedure is not

directly administered by the judicial system, in the fall of 2021, the Ministry of Justice published the draft of a Concept on the extraordinary evaluation of judges and prosecutors (Concept)⁴⁴, with a content contrary to the concerns expressed by GRECO.

The concept of extraordinary evaluation has in the foreground the integrity of the subject of the evaluation. It is proposed that failure to pass the integrity evaluation will lead to dismissal. During the integrity evaluation, the person shall be verified regarding his/ her assets and expenses in relation to the legal available and declared income of the evaluated subject and his/ her family members. If inconsistencies are detected, it will be considered that the subject has not passed the integrity check. The concept also proposes checking cases when judges and prosecutors have not resolved the state of conflict of interest in their work, as well as how they have implemented specific cases, including if they have issued clearly abusive/illegal decisions.

According to the Concept, it was proposed to carry out the extraordinary evaluation with the involvement of three bodies: the International Monitoring Mission, the Evaluation Commission (consisting of 4 Evaluation Panels) and the Special Appeal Panel.

It was proposed to establish the International Monitoring Mission of 7 members, of which 5 nominated by the international partners and 2 members – by civil society, with this composition to be approved by the Government and, subsequently, approved with a qualified parliamentary majority of 3/5. The Parliament will have the option to express itself in its entirety on the composition of the International Monitoring Mission: either to approve or reject the submitted list in full. It is proposed that the members of the International Monitoring Mission have access to the information resources managed by the authorities and public institutions in the country. The International Monitoring Mission is to select the members of the Evaluation Commission and the Special Appeal Board.

Regarding the Evaluation Commission, it was proposed that it be composed of 12 members (including former judges and prosecutors), divided into 4 Evaluation Colleges of 3 members each. The extraordinary evaluation is to be carried out by the Evaluation Boards, based on the reasoned reports, and the Evaluation Commission is to adopt decisions regarding the approval or rejection of the evaluation reports. In the case of the evaluation of judges and prosecutors, the evaluation reports are to be approved by the decisions of the SCM/SCP. The Evaluation Commission is also proposed to have access to the information resources managed by the authorities and public institutions in the country.

The Special Board of Appeal is to be established as a separate board within the Chisinau Court of Appeal, with a secretariat and a separate administrative body, which are not related to the management of the Chisinau Court of Appeal. The college is to be composed of 7 judges and 2 substitute judges, selected

⁴⁰ The Second Compliance Report of the Republic of Moldova with the recommendations of the Fourth Evaluation Round: Prevention of corruption among parliamentarians, judges and prosecutors, adopted on 25.09.2020 at the 85th plenary session of GRECO, paragraphs 59 and 65, pages 13 and 14 of the English version: <https://rm.coe.int/fourth-evaluation-round-corruption-prevention-in-respect-of-members-of/16809fec2b>

⁴¹ *Ibidem*, page 19

⁴² *Ibidem*, paragraph 110, page 19

⁴³ *Ibidem*, paragraphe 109, page 19

⁴⁴ http://justice.gov.md/public/files/Concept_EEJP_15_11_2021_1.pdf

by the International Monitoring Mission, proposed by the SCM and appointed by presidential decree. Judges must have at least 10-year-experience in the legal sector, meet integrity requirements and not be from existing judges. The special board of appeal is to examine the actions of summons to court against the decision of the Evaluation Commission and the decisions of the SCM and SCP. The Special Board of Appeal will also have access to the information resources managed by the authorities and public institutions in the country, under the same conditions as the international Monitoring Mission and the Evaluation Commission.

The existence of three stages of the extraordinary evaluation is foreseen, of which only two are clear from the proposed Concept: the evaluation in the first stage of the judges of the Supreme Court of Justice, of the Courts of Appeal, the General Prosecutor's Office, the specialized prosecutor's offices (anti-corruption and against organized crime), after which in two other (undefined) stages, the other courts and lower prosecutor's offices are to be evaluated.

4.1.3 Constitutional aspects of the extraordinary evaluation

The authors of the Concept announced that they do not anticipate constitutional problems, considering that it will not be necessary to amend the Constitution in advance, since the inclusion of the SCM and SCP as actors who decide on the career of judges and prosecutors, as well as the appointment of judges by the SCM was foreseen in the Special Appeal Board, after a selection of them by the International Monitoring Mission. At the same time, it is not clear why, avoiding an amendment to the Constitution, which requires a qualified quorum that the current parliamentary majority does not meet, it is proposed that all laws related to the evaluation be voted by 3/5 of the number of deputies elected in the Parliament.

However, the Concept does not take into account a number of other serious constitutional issues related to its implementation, such as:

- violating the fundamental principle of separation of powers in the state from Article 6 of the Constitution, which provides that the legislative, executive and judicial powers are separate and collaborate in the exercise of their prerogatives, according to the provisions of the Constitution, while the Concept of Extraordinary Evaluation narrows the powers of the judiciary by the other two powers, in a way contrary to the Constitution;
- violation of the right of the injured party by a public authority, through an administrative act, to obtain the recognition of the claimed right and the annulment of the act, combined with the violation of the right to effective satisfaction from the competent courts against acts that violate his/her rights, freedoms and legitimate interests, provided by articles 53 and 20 of the Constitution – because the establishment of the Special Board of Appeal intervenes in the right guaranteed by the Constitution to control the legality of administrative acts issued by the Evaluation Commission by a competent court;
- restricting the right to free access to justice and effective satisfaction from the competent courts against acts that violate the rights, freedoms and legitimate interests of the person, provided for by Article 20 of the Constitution which, according to Article 54 paragraph (3) of the Constitution cannot be restricted;
- the restriction of the right to the non-retroactivity of the law, provided by article 22 of the Constitution which, according to article 54 paragraph (3) of the Constitution, cannot be restricted, in the part related to the exercise of the verification of the expenses of the evaluated subjects, if the evaluation period will refer to the period before the amendment in October 2021 of the legislation regulating the NIA controls, because previously the expenses did not constitute grounds for sanctions;
- the restriction of the right to family, intimate and private life provided by Article 28 of the Constitution, by granting extended access to the members of the International Monitoring Mission, the Evaluation Commission and the Special Board of Appeal, which involves derogations from the guarantees of special legislation in the field of personal data protection;
- the creation of extraordinary courts, prohibited by Article 115 paragraph (3) of the Constitution, by establishing the Special Board of Appeal;
- violation of the principle of independence of judges, provided by art. 116 paragraph (1) of the Constitution;
- violation of the principle of guaranteeing the independence of the prosecutor's office by the SCP, provided by art. 1251 of the Constitution;
- excluding the possibility of exercising appeals against the decisions of the Special Board of Appeal, in accordance with the law, contrary to Article 119 of the Constitution;
- violation of the constitutional powers of the SCM to ensure the appointment, transfer, promotion and application of disciplinary measures to judges, contrary to Article 223 paragraph (1) of the Constitution, since these powers of the SCM are limited by the International Monitoring Mission, which selects the judges in the Special Board of Appeal, which the SCM is to propose to the President of the Republic of Moldova for appointment. A similar procedure, by which the powers of the SCP to conduct the competition for the selection of the Prosecutor General were narrowed by a prior selection carried out by a Competition Commission established by the Ministry of Justice, was previously declared unconstitutional (Decision of the Constitutional Court no. 13 of 26.05.2020)⁴⁵; etc.

⁴⁵ <https://www.constcourt.md/ccdocview.php?l=ro&tip=hotariri&docid=734>

4.2 Evaluation of candidates for the positions of members of SCM and SCP

The additional actions set out in the Concept of Extraordinary Evaluation of Judges proposed by the Ministry of Justice include the evaluation of the integrity of candidates for the positions of members of the SCM and SCP, as well as of their colleges, to be carried out before the convening of the General Assembly of Judges and the General Assembly of Prosecutors, following the verification of the compliance of candidates for elective positions within the SCM, SCP and their specialized colleges to the requirements of integrity and justification of the assets held and expenses – part of their lifestyle.

The draft Law on some measures related to the selection of candidates for administrative positions in the self-administration bodies of judges and prosecutors and the modification of some normative acts⁴⁶ was placed on the official web page of the Ministry of Justice for public consultations between 16.12.2021 and 21.12.2021, i.e. for only 3 working days, contrary to the legal requirements that require a period of at least 15 working days in such cases⁴⁷. Apparently, before the draft was published, it was submitted to the Venice Commission for an opinion.

4.2.1 Opinion of the Venice Commission

The Venice Commission was concerned about the lack of consultation of the draft law with interested parties⁴⁸, indicating that the establishment of the *ad-hoc* integrity evaluation commissions implies, in itself, a double risk. On the one hand, it assumes that the system is generally impaired, which can be extraordinarily unfair to many of its competent and upright elements, who are consequently tainted with general suspicion. On the other hand, such a method may prove ineffective in terms of judges and prosecutors to remove and eliminate the fatal doubt that the model itself creates or may generate⁴⁹.

The Venice Commission also specified that the integrity checks aimed at candidates for the position of members in the SCM and SCP and their specialized organizations represent a filtering process and not a judicial verification process⁵⁰. The commission also noted that, in addition, the fact that the integrity checks will be carried out not by the self-governing bodies of the judicial system and the prosecutor's office, but by an external body to be constituted by the "development partners" of the Republic

of Moldova and by the parliamentary majority, the greatest attention must be paid to respecting the constitutional principles of separation of powers and checks and balances⁵¹.

The Venice Commission also noted that the draft does not clearly state who the "development partners" are, their selection procedure and criteria within the Evaluation Commission⁵². The Commission considered as unjustified the requirement for the members of the Evaluation Commission not to have held the position of judge or prosecutor in the Republic of Moldova, since the international standards in this regard are very clear: the judicial members of the judicial councils should be elected by their colleagues. At the same time, considering that integrity checks are a *de facto* consistent part of the selection process of the members of the SCM and SCP and their specialized bodies, the Commission considers that the proposed requirement implying that the judges themselves cannot be trusted is arbitrary and should be rejected. In this context, the Commission recalled the content of its previous opinion from 2019 on the draft law on the reform of the SCJ and the Prosecutor's Office, it recommended (paragraph 55) that the number of members of the evaluation commission (specialized commission tasked with evaluating the integrity, lifestyle and professionalism of the SCJ judges in practice) with judicial experience to be increased to the extent that a substantial number of members (at least half) have judicial experience⁵³.

The Venice Commission stated that it is not clear whether the evaluation is a checklist of previous compliance of declarations, tax status, etc. or an evaluation of the candidate's reputation. Likewise, it is not clear how large the discrepancies between income and expenses should be to establish a mismatch, and in the absence of clear criteria in this regard, the decision regarding the candidates will not be motivated⁵⁴. The commission also noted the lack of clarity of the criteria related to the candidates' compliance with the provisions of the judge's code of ethics, as they involve complex evaluations⁵⁵.

As for contesting the evaluation result, the Venice Commission mentioned that it is not clear whether the appeal has the effect of stopping the competition or not⁵⁶.

Given that the draft law on which the Venice Commission expressed its opinion was published on the website of the Ministry of Justice after the adoption of the opinion by the Venice Commission, it is not clear whether the published draft took into account the observations of the Venice Commission or not,

⁴⁶ <http://justice.gov.md/pageview.php?l=ro&idc=192>

⁴⁷ Law on transparency in the decision-making process, no. 239 of 13.11.2008, article 9 paragraph (1).

⁴⁸ The joint opinion of the Venice Commission and the General Directorate for Human Rights and the Rule of Law of the Council of Europe regarding some measures related to the selection of candidates for administrative positions within the self-administration bodies of judges and prosecutors to amend some normative acts, adopted at The Venice Commission during the 129th plenary session, 10-11 December 2021, based on the observations made by Mr. Alexander Baramidze and Mr. Richard Barret, Opinion no. 1069/2021 of 13.12.2021 paragraph 9, page 5

⁴⁹ *Ibidem*, paragraph 12, page 5

⁵⁰ *Ibidem*, paragraph 14, page 6

⁵¹ *Ibidem*, paragraph 16, page 6

⁵² *Ibidem*, paragraphs 19-21, page 7

⁵³ *Ibidem*, paragraph 22, pag.7.

⁵⁴ *Ibidem*, paragraph 26, pag.8.

⁵⁵ *Ibidem*, paragraph 28, pag.8.

⁵⁶ *Ibidem*, paragraph 37, pag.9.

because the Venice Commission seems to refer to some aspects not included in the published draft or refers to some aspects that differ from those published in the draft.

4.2.2 The draft law on the evaluation of candidates for the position of members of the SCM and SCP

The draft law published on the website of the Ministry of Justice provides for the establishment of an Evaluation Commission, set up for the period of the evaluation of all candidates for the vacant administrative positions within the SCM, SCP and their subordinate specialized bodies⁵⁷.

The evaluation commission is to be composed of 6 members, of which 3 national members appointed by the Ministry of Justice at the proposal of the parliamentary fractions according to the principle of proportionality, and 1 substitute member for them, proposed in the same order; and 3 members and 2 substitutes appointed by the development partners and approved by the vote of 3/5 of the elected deputies.

The requirements that must be met by the members of the Evaluation Commission are the following:

- a. higher education;
- b. impeccable reputation;
- c. at least 10 years of experience in one of the following fields: legal, economic, investigating corruption crimes and fields related to corruption or integrity;
- d. not to be a member of the Parliament, councillor or civil servant in the public administration authority of the Republic of Moldova;
- e. not to have been part of a political party in the last 5 years;
- f. not to have held the position of judge or prosecutor in the Republic of Moldova in the last 3 years⁵⁸.

The evaluation powers of the Commission include:

- a. the evaluation of the candidates' integrity based on previous declarations of income, personal interest or asset and personal interests, as well as on the basis of checks carried out against the candidate by the National Integrity Authority, the Information and Security Service, the State Fiscal Service and other public authorities that hold information about the candidate;
- b. verification of data and information regarding the property, income, expenses of the candidates and their close relatives, in compliance with the Law no. 133/2016 regarding

the declaration of assets and personal interests;

- c. hearing the candidate, the people close to him/her and other people who have relevant information about the integrity of the candidate, including regarding the lifestyle and costs of living;
- d. requesting information from physical or legal persons;
- e. adopting decisions regarding the results of the evaluation of the candidates' integrity, including regarding their lifestyle and living costs⁵⁹.

The draft law also provides that the evaluation of the integrity of the candidates for the prescribed positions consists in checking the following aspects:

- a. the candidate's compliance with the principles established in the Code of ethics and professional conduct of judges or, as the case may be, of prosecutors;
- b. the non-existence of a final court decision issued regarding the candidate, related to acts of corruption, acts related to acts of corruption or corruptible facts, as prescribed by the Integrity Law no. 82/2017;
- c. the non-existence of a final court decision issued regarding the candidate for committing crimes other than those provided for in letter b);
- d. lack of disciplinary sanctions applied to the candidate in the last 5 years;
- e. the candidate committing acts that harm the honour or professional probity or the prestige of the judiciary to such an extent that trust in the judiciary is affected⁶⁰.

The draft law also provides for the verification of the assets, including the lifestyle and living costs of the candidates during the last 10 years, by verifying the correspondence of their standard of living with the level of income obtained and the expenses made independently or jointly with close people (family members, parents/in-laws and adult children of the person subject to verification, and if they are cohabiting with another person, the verification will also extend to this person's assets). In order to verify the candidates' lifestyle and living costs, the Evaluation Commission verifies their compliance with the fiscal regime with regard to the payment of taxes on the use of means and income from the owned property, as well as taxable income and the payment of customs duties, and the regime of asset declaration and personal interests⁶¹.

⁵⁷ Articolul 3 din proiect.

⁵⁸ Article 5 of the draft law

⁵⁹ Article 6 of the draft law

⁶⁰ Article 8 of the draft law

⁶¹ Articolul 9 din proiect.

The evaluation procedure provided for by the draft law stipulates that the accumulation and verification of information by the Evaluation Commission is done within 30 days at most from the date of transmission of the request for verification of candidates by the competent institution for organizing contests for the selection of members in judicial and prosecution self-administration bodies. The evaluation commission and its secretariat have access to any information they consider necessary for the performance of their tasks, except for information that falls under the provisions of the Law no. 245/2008 regarding state secrets. Public authorities, physical and legal persons, including financial institutions, are obliged to make available to the Evaluation Commission, free of charge, any information requested within 10 days at most. By derogation from the provisions of Law no. 133/2011 regarding the protection of personal data, the processing of personal data of candidates and close persons, within the meaning of Law no. 133/2016 regarding the declaration of assets and personal interests, is admitted during the exercise of functions by the Evaluation Commission and its secretariat⁶².

The draft law stipulates that the Decision of the Evaluation Commission regarding the aspects related to the evaluation procedure can be challenged within 5 days, and the action is submitted to the Chisinau Court of Appeal. The appeal against the decisions of the Chisinau Court of Appeal as a substantive court is submitted within 3 days from the date of the decision of the Chisinau Court of Appeal⁶³.

4.2.3 Analysis of integrity criteria and of their assessment mechanism

The draft law, as published on the website of the Ministry of Justice, requires the creation of an Evaluation Commission by applying criteria that are unclear (members appointed by development partners), politicized (members appointed by parliamentary factions), which raise valid concerns about violation of the principle of separation of powers in the state. The exclusion of magistrates from the administration of judges' integrity processes is viewed critically by both GRECO and the Venice Commission. The judicial members of the SCM are appointed directly by the judicial body, through the General Assembly of Judges. Given that the law lacks integrity criteria for appointing members for the SCM, it is not clear why such criteria cannot be regulated in the procedure for appointing them by the General Assembly of Judges, why procedures cannot be established through which the General Assembly of Judges can constitute a commission to verify if the candidates who registered to be appointed as members of the SCM meet the criteria. Such a commission can be created from among judges and possibly include people from academia and/or civil society. Judges could carry out procedures for appointing members to the committee to verify if the candidates for the position of SCM member meet the integrity criteria.

Such a mechanism would be compatible both with GRECO's observations and those formulated by the Venice Commission.

As for the integrity criteria proposed by the draft law, only those related to the non-existence of final court decisions issued on the candidate regarding acts of corruption, related and corruptible acts, regarding any other crimes and the lack of disciplinary sanctions applied in the last 5 years are clear (although, it is not clear the legal basis for cancelling the guarantee regarding the extinguishment of disciplinary sanctions by checking the extinguished disciplinary sanctions for 3-4 years⁶⁴).⁶⁵ At the same time, two other criteria are confused: the candidate's compliance with the principles established in the Code of Ethics and Professional Conduct and the candidate's committing acts that harm professional honour or probity or the prestige of the judiciary to such an extent that confidence in the judiciary is affected.

As mentioned by the Venice Commission, assessing ethical violations involves complex evaluations. Considering that the Code of Ethics and Conduct includes general principles of conduct for judges, it would be very easy for a politicized Evaluation Commission to speculate on either the violation or the non-violation of the provisions of this Code. At the same time, it is difficult to imagine the moral right of the persons designated by parliamentary factions to evaluate ethical dilemmas of judges when the Parliament itself does not have a code of ethics for deputies, and its adoption has been sabotaged for many years. Last time, the draft of a Code of Ethics for MPs was developed with the assistance of the Global Organization of Parliamentarians Against Corruption (GOPAC). On the occasion of the assessment of the integrity of parliamentarians, judges and prosecutors, GRECO formulated recommendations in this regard in 2016, and four years later, in the autumn of 2020, GRECO noted the lack of any progress in terms of recommendations related to parliamentary integrity, the lack of progress in the adoption of a Code of Conduct for deputies, which would include dealing with conflict of interest situations in parliamentary activity, as well as the lack of clear and objective criteria for lifting parliamentary immunity.⁶⁶

Appraisals of the respect of professional ethics by judges can only be given by a special committee of judges' ethics.

With regard to the criterion of the candidate committing acts that harm the honour or professional probity or the prestige of the judiciary to such an extent that confidence in the judiciary is affected, these acts, if according to their gravity cannot be qualified only as violations of the Code of Ethics and Professional Conduct of judges, constitute disciplinary violations according

⁶² Articolul 11 alin.(1)-(4) din proiect.

⁶³ Articolul 15 din proiect.

⁶⁴ Article 6 paragraph (3) and (4), article 7 para.(5) of the Law on the disciplinary liability of judges, no. 178 of 25.07.2014

⁶⁵ Article 8 paragraph (1) letters b)-d) of the draft law

⁶⁶ *Ibidem*, paragraph 109, pag.19

to the provisions of art. 4 letter p) of Law 178/2014 regarding the disciplinary liability of judges.⁶⁷

Therefore, the two criteria mentioned above – the candidate's compliance with the principles established in the Code of Ethics and Professional Conduct, and the candidate's committing acts that harm professional honour or probity or the prestige of the judiciary to such an extent that confidence in the judiciary is affected – can be classified as violations of an ethical and disciplinary nature. Assessment of disciplinary violations are limited by statute of limitations (2 years and, as the case may be, 5 years).⁶⁸ It is not clear during which period the Evaluation Commission will carry out the control regarding the existence of violations of ethical norms and whether this term will exceed the established statute of limitations. At the same time, the evaluations given by the Evaluation Commission regarding ethical and disciplinary violations will replace the disciplinary sanctions mechanism, which is the exclusive prerogative of the SCM, in accordance with the provisions of the Constitution (art. 223 paragraph (1)) and those of the legislation that regulates the SCM activity.

It is also not clear whether the verification of the assets, including the lifestyle and cost of living of the candidates during the last 10 years, regulated in art. 9 of the draft law, is a criterion for evaluating the integrity of the candidates or not, because they seem to be regulated in article 8, which does not expressly include the verification of this aspect.

According to the draft law, in order to verify the lifestyle and living costs of the candidates, the Evaluation Commission verifies their compliance with the fiscal regime with regard to the payment of taxes on the use of means and income from owned property, as well as taxable income and payment of customs duties, and the regime of the asset and personal interests declarations.⁶⁹ Given that the Law regulating the asset regime has been existing for 5 years,⁷⁰ and the obligation to verify expenses/living costs were introduced a few months ago, in October 2021,⁷¹ the application of the draft provision for the verification of candidates for a period of 10 years implies the retroactivity of the law, expressly prohibited by article 22 of the Constitution, the restriction of the application of which is prohibited by article 54 paragraph (3) of the Constitution.

It is not clear what assessment will be given in the framework of the previous verification of some candidates by NIA and the Anticorruption Prosecutor's Office, how the unanimous solutions of both bodies will be assessed, for example, regarding the non-violation of the regime of the asset and personal inter-

ests declarations, the non-starting/ classification/ renunciation solutions to the accusation of illicit enrichment or the acquittal solutions of the courts – will these be retained as evidence confirming verification of this aspect or not? Above all, this must be clarified in the context in which these bodies certainly did not extend their checks for a period of 10 years, as well as with regard to expenses. If, however, the results of the checks of these bodies are retained, it could be a question of unequal treatment of the candidates, contrary to Article 16 of the Constitution, since some candidates could consider that they were checked directly by the Evaluation Commission, and others – that they have been checked with reference to the results of the verifications based on other methodological and legislative benchmarks by the NIA, the prosecutor's office and the courts.

The draft law provides for the verification of the correspondence of their standard of living with the level of income obtained and expenses incurred independently or jointly with close persons (family members, parents/in-law and adult children of the person subject to control, and if they are cohabiting with another person, the check will also extend to that person's assets). It is not clear what elements the notion of "living standards" includes and what should be the level of discrepancy found between it and the level of income and expenditure. Also, the derogation from the provisions of the legislation on the personal data protection regarding the candidates for membership positions of SCM/SCP, especially for people from the political environment, can lead to a serious impairment of the independence of the judges in question, either as members of the CSM/CSP or as judges, if they do not become members of those bodies, contrary to Article 116 paragraph (1) of the Constitution. At the same time, by granting extended access to the members of the Evaluation Commission, which involves derogations from the guarantees of the special legislation in the field of personal data protection, it will inevitably lead to the restriction of the right to family, intimate and private life provided by Article 28 of the Constitution.

The law does not specify whether the verification of candidates requires that the latter must meet all the established criteria or only a part is sufficient for a positive evaluation. If there are minor, non-essential aspects that allow a relative framing of the meeting of one or another criterion, will the person be considered to have successfully passed the integrity check or not? And if so, what is the boundary between a positive or negative assessment of the candidate's integrity? And if the delimitation of the situation consists in the number of votes of the members of the Evaluation Commission, what happens in case of parity of votes? And are there possible situations when similar cases will meet a different number of votes, so that the fate of the candidates will be different in the end?

Finally, given the scale of the checks, as well as the number of candidates and their family members to be checked, the 30-day deadline set by the draft law does not seem realistic. In this case, the draft should provide what happens in case of exceeding the legally fixed verification period of 30 days and if this exceedance leads to the automatic qualification as meeting the integrity criteria by the candidates subject to the verification.

⁶⁷ Law on the disciplinary liability of judges, no. 178 of 25.07.2014

⁶⁸ Article 5 of the Law on the disciplinary liability of judges, no. 178 of 25.07.2014

⁶⁹ Article 9 of the draft law

⁷⁰ Law on declaration of assets and personal interests, No. 133 of 17.06.2016

⁷¹ Law for the amendment of some normative acts, No. 130 of 07.10.2021, published on 29.10.2021.

5

CONCLUSIONS

Public perception of judicial corruption is worsening for various reasons. The simplest explanation is that, indeed, there is corruption in the judicial system, but this phenomenon, according to surveys, is not widespread. International assessments cite the exercise of governmental and political influences as the main source of corruption (although, surprisingly, the indicators of the Republic of Moldova are better compared to the regional average in this regard). The aggravation of the public perception of judicial corruption is also constantly fuelled by the political class. The Venice Commission mentioned that the introduction of an extraordinary evaluation mechanism is a problem in itself for the image of the judicial system, a problem that might not be solved as a result of the implementation of this evaluation.

However, regardless of whether mass media reports about the judicial corruption or the latter is accused by politicians, the image of justice suffers the most due to the lack of public communication. Judges targeted by journalistic investigations do not offer public reactions. The SCM/SCP and the specialized bodies subordinate to them do not take a public stance towards the media information about judges that damage the image of the judiciary. The professional associations of judges likewise do not communicate publicly on issues of judicial integrity. In the absence of public communication from the judicial system about the accusations brought against it, the society's suspicions of judicial corruption increase (even though only 3-7 percent of the population annually have their own experience of going to court). To improve the image of the judicial system, the development of public communication is very important.

The integrity of judges is an intensely discussed topic. Despite this fact, defining the criteria for assessing the integrity of judges is a difficult exercise. Analysing society's expectations and starting from numerous case studies in which the integrity of judges was questioned by society, the authors of the study deduced five criteria according to which they believe that a realistic assessment of the integrity of judges can be given: (1) the appropriate lifestyle; (2) lack of evidence of corruption/acceptance of gifts that are not expressly rejected by the judge; (3) not accepting inappropriate influences/prohibited communication; (4) failure to prosecute for crimes against justice; (5) non-prosecution for corruption offences.

These criteria are preliminary, they can be supplemented and adapted. After defining the evaluation criteria of judicial integrity in the appointment/evaluation/selection/promotion etc. procedures, it is necessary to develop a detailed methodology that defines each criterion and the factors that allow the exact determination of whether the criterion is met. Also, a mathematical weight shall be assigned to each criterion. The methodology should establish the values from which a candidate is considered to meet the integrity requirements or not. The criteria, factors and their weighting, as well as the procedure for applying the methodology in question is to be discussed at length by the magistrates so that its introduction is embraced by the judiciary.

The current legal regulations do not provide for the eligibility of candidates for the position of member within the SCM/ SCP and their subordinate bodies depending on their integrity. Currently, the integrity of judges does not constitute an eligibility criterion for the judicial self-administration body, as well as its specialized bodies. This explains, on the one hand, why people with perceived integrity problems end up being appointed to these bodies, and on the other hand, why these bodies do not care about the integrity of the judges in the system. At the same time, in the absence of regulations, judges were not previously given the opportunity to apply integrity requirements to their selection.

The political offer to solve the problem of the integrity of judges is the extraordinary evaluation of judges, also called vetting, as well as the evaluation of the integrity of candidates for the position of member of the judicial self-administration bodies and specialized bodies or pre-vetting. According to the concept, it is proposed that these processes be carried out without the involvement of judges, by means of ad-hoc established bodies, composed of representatives of the parliamentary factions and the development partners. Previously, GRECO has made it clear that the judicial integrity processes should be managed directly by judges. The Venice Commission also presented its opinion on the draft, expressing concerns with regard to the separation of powers and the risks posed to the independence of the judiciary, underlining that the universally recognized international standards attribute the processes of appointing members in the judicial councils, of which the application of integrity filters is a part, to the judicial body. The Commission was also concerned about the drafting process, which did not

involve stakeholders such as judges and their self-governing bodies at all.

It is at least strange that the problem of corruption perceived in international assessments as having its origins in government interference should be solved by mechanisms involving similar risks.

The concept of extraordinary evaluation of judges and the provisions of the draft pre-vetting of candidates for the positions of members of SCM/SCP, presented by the Ministry of Justice, raise many question marks regarding constitutionality, which were presented in detail in the study. These should necessarily be discussed at length by the judiciary and prosecutors. To this

end, public consultations on the draft decisions can be initiated by any of the interested parties, in compliance with the legislation on transparency in the decision-making process.

The authors of the study believe that the introduction of integrity criteria for the election of candidates for the position of member of the judicial self-administration body and its specialized bodies is welcome. However, these criteria should be discussed extensively with the representatives of the judicial authority and a clear methodology for evaluating the integrity of the candidates should be established, while the evaluation process should be entrusted to the supreme governing body: the General Assembly of Judges and the General Assembly of Prosecutors.

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EVALUATING THE JUDICIAL INTEGRITY: WITHOUT RIGHT TO APPEAL?



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