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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

DRAFT
AMICUS CURIAE BRIEF
FOR THE CONSTITUTIONAL COURT OF MOLDOVA
ON CERTAIN PROVISIONS OF
THE LAW ON PROFESSIONAL INTEGRITY TESTING

on the basis of comments by

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I. INTRODUCTION

1. By letter of 18 September 2014, the President of the Constitutional Court of Moldova, Mr Alexandru Tănase, requested an *Amicus curiae* brief from the Venice Commission on a number of provisions of Law no. 325 of 23 December 2013 on Professional Integrity Testing and on Appendix 1 to this Law (CDL-REF(2014)041).

2. The scope of the Law, set out in Article 2, is to ensure the professional integrity; prevent and combat corruption in public entities; verify the observance of obligations, duties and conduct of public officials; identify, assess and eliminate vulnerabilities and risks that could cause or encourage acts of corruption and corruption related acts or acts of corrupt behaviour.

3. Those subject to the professional integrity test are: public entities, public agencies and the professional integrity testers themselves. Appendix 1 to the Law provides a list of these public entities and agencies. The public agents of the entities and agencies concerned include ordinary court and constitutional court judges. The professional integrity testers are employees of the National Anti-corruption Center and of the Security and Information Service of Moldova.

4. The Court seeks *amicus curiae* advice "*based on international practices and tools for combatting corruption and taking into account the principles governing the rule of law*" on the following: (1) whether the control and evaluation of the integrity of ordinary court and constitutional court judges attributed to a body that is controlled by the executive (effectively removing the Superior Council of Magistracy and the Plenum of the Constitutional Court's direct powers to deal with this issue) is in line with the principles of the separation of powers and the rule of law; and (2) whether an integrity test applied to judges by a body of the executive is in line with the right to respect for private and family life (Article 8 ECHR).

5. The Venice Commission invited Mr Kang, Mr Vardzelashvili, Mr Vermeulen and Mr Hornung (expert with GRECO), to act as rapporteurs for this *Amicus curiae* brief.

6. This Amicus curiae brief was adopted by the Venice Commission at its … Plenary Session (Venice,…).

II. GENERAL REMARKS

7. Moldova has addressed the issue of combating corruption over a decade ago with the establishment of the Center for Combating Economic Crimes and Corruption under Law no. 1104-XV of 6 June 2002. Thereafter, a new law converted this Center into the "National Anti-Corruption Center" (hereinafter, the "NAC") on 1 October 2012.[1] Law no. 325 on Professional Integrity Testing (hereinafter, "Law no. 325") was adopted on 23 December 2013 and gives the NAC and the Information and Security Service (hereinafter, the "ISS") the power to organise and administer the professional integrity test to entities listed in Appendix 1 to this Law.

8. Moldova has taken a cohesive and thorough approach in tackling corruption for over twelve years. It seems, however, that this country is facing serious challenges in fighting and preventing corruption as well as widespread corruption phenomena in almost all public sectors.[2]

[1] Official website of the National Anti-Corruption Center: http://cna.md/en/history.

[2] According to a recent Moldovan report for the United Nations High Commissioner for Human Rights (http://www.ohchr.org/EN/HRBodies/HRC/AdvisoryCommittee/Pages/RepliesCorruption.aspx), the Moldovan National Anti-Corruption Center has reported, for the first nine months of 2013 alone, an impressive number of

9. As corruption undermines the rule of law and good governance, poses significant risks to the protection of human rights, hinders economic development, endangers the stability of democratic institutions and the moral foundation of society[3], any efforts made by Moldova to fight this is to be encouraged and welcomed. However, it is also important that these efforts do not jeopardise the stability of democratic institutions nor weaken the independence and impartiality of the judiciary.

10. The Third Evaluation Round Report of 2011 by the Group of States Against Corruption (GRECO)[4], encourages the amendment of the offences of bribery and traffic of influence, *"given the seriousness of the problem of corruption in Moldova"*, in order to close loopholes in the legal framework and expand its applicability, aligning national legislation with the standards of the Criminal Law Convention on Corruption and its Additional Protocol.[5] While such a call provides serious grounds for action, this does not mean that any legislative action in response will be in conformity with the principle of judicial independence.[6]

11. In addition, while the principles of independence, impartiality and integrity of public officials form an integral part of the principle of good governance, these requirements are of special significance for the judiciary (both the Constitutional Court and courts of ordinary jurisdiction).

12. As provided in Opinion no. 1 (2001) of the Consultative Council of European judges (CCJE) on Standards Concerning the Independence of the Judiciary and the Irremovability of Judges, *"Judicial independence is a pre-requisite to the rule of law and a fundamental guarantee of a fair trial. Judges are "charged with the ultimate decision over life, freedoms, rights, duties and property of citizens" (recital to UN basic principles, echoed in Beijing declaration; and Articles 5 and 6 of the European Convention on Human Rights). Their independence is not a prerogative or privilege in their own interests, but in the interests of the rule of law and of those seeking and expecting justice."*

13. Therefore, laws regulating the assessment or evaluation of the professional duties of judges must be worded and applied with great care and the role of the executive or legislative branches of government in this process should be limited to the extent absolutely necessary.

14. This Opinion deals with the specific position of the judiciary with respect to Law no. 325, however where this Law also covers other public officials, the Opinion should be seen as also applying to them.

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241 established "acts of corruption" which were detailed as follows: local public administration: 60 cases; law enforcement agencies: 52 cases; enterprises in private sector: 29 cases; justice sector: 27 cases; public health service: 20 cases; education sector: 20 cases; municipal and state enterprises: 16 cases; customs service: 10 cases; state fiscal inspection: 7 cases. This is huge indeed for a country with barely 3.2 million inhabitants. This number includes the 500 000 inhabitants of the Autonomous Republic of Transnistria. Therefore, within only nine months, there was nearly one detected act of corruption (involving at least two persons) per 10 000 inhabitants.

[3] See Preamble, Criminal Law Convention on Corruption, ETS 173, 27.01.1999.

[4] http://www.coe.int/t/dghl/monitoring/greco/evaluations/round3/GrecoEval3(2010)8_Moldova_Two_EN.pdf

[5] *Amicus curiae* brief on the immunity of judges for the Constitutional Court of Moldova adopted, 8-9 March 2013 refers to Greco Eval III Rep (2010) 8E, Theme I, p. 25., paragraph 37.

[6] Ibid., paragraph 38.

III. LAW NO. 325 WITH RESPECT TO THE JUDICIARY AND THE SEPARATION OF POWERS AND THE RULE OF LAW

A. Judicial independence and the separation of powers

15. Article 116.1 of the Constitution of Moldova provides that "*Judges sitting in the courts of law shall be independent, impartial and irremovable under the law*". Article 116.4 sets out that "*Judges shall be promoted and transferred only at their own consent*". And according to Article 116.5, "*Sanctioning of the judges shall be carried out pursuant to the rule of law*".

16. As regards the concretisation of the professional status of judges, Article 123.1 states that "*The Superior Council of Magistracy shall ensure the appointment, transfer, removal from office, upgrading of, and imposing of the disciplinary sentences against judges*" - the majority of the Superior Council of Magistracy (hereinafter, the "SCM") is composed of judges elected by their peers (see Article 122 of the Constitution and Article 3 of the Organic Law no. 947-XIII of the Republic of Moldova on the SCM of 19 July 1996).

17. While the subject of this *Amicus curiae* brief is not on newly-adopted Law no. 178 of 25 July 2014 on Disciplinary Liability of Judges (hereinafter, "Law no. 178"), it is noteworthy that this Law regulates the details concerning disciplinary offences, sanctions, competencies and proceedings:[7] Article 4 defines 16 concrete disciplinary offences, Article 6.1 sets out warnings, reprimands, reduction in salary and removal from office as potential disciplinary sanctions and Articles 8 to 17 set up a Disciplinary Board with five judges elected by their peers and four selected persons of civil society as a first instance disciplinary jurisdiction. Articles 18 to 29 govern the examination procedure of disciplinary cases before the main hearing by the Disciplinary Board. It is mainly in the hands of the so-called Judicial Inspection, i.e. five independent investigator-judges who fulfil specific professional requirements and who have been selected by the SCM through a transparent procedure.[8]

18. Pursuant to Articles 23 to 26, the assigned inspector-judge verifies the allegations which were notified and then drafts a *"report"* for the Disciplinary Board in which the evidence gathered during the verification phase is presented. The judge subject to disciplinary proceedings is entitled to know the charges, to present written and oral explanations, to present evidence showing or denying certain facts related to the charges and to be assisted by a lawyer (Article 25.1).

19. The Disciplinary Board, after having admitted the *"notification"* in accordance with a specific procedure, then generally hears the case in a public meeting (Article 34.1). According to Article 34.4, the Disciplinary Board may – at its own initiative or on request by the judge concerned – hear witnesses and study further documents. Pursuant to Articles 39 and 40, the Disciplinary Board's decisions – which are to be motivated in writing – may be appealed to the SCM, and the latter's decision may then be appealed (in law) to the Moldovan Supreme Court of Justice.

20. These constitutional and legal rules concerning the disciplinary liability of judges – from which Law no. 325 derogates significantly – seem to be, for the most part, in line with European and international standards, notably those on the principles of judicial

[7] When the regulations in Law no. 178 are compared with the basic constitutional principles (Articles 116, 122 and 123) and with Organic Law no. 947-XIII on the SCM, doubts subsist with respect to the constitutionality of Law no. 178 – especially as concerns the somewhat unclear concrete legal relationship between the SCM and the Disciplinary Board, the SCM is the constitutionally designated body for disciplinary proceedings against judges. It is, however, not the task of this Opinion to further elaborate on this issue.

[8] For details see Article 6 of the Law on the SCM as amended by Law no. 185 of 26 July 2007. Cf. also the Monitoring Report "Transparency and Efficiency of the Superior Council of Magistracy of the Republic of Moldova 2010 – 2012", Legal Resources Center of Moldova (2013), pp. 51 *et seq*.

independence and the separation of powers: the Disciplinary Board with a majority of judges elected by their peers and a minority of representatives of civil society is an "*independent and impartial tribunal (established by law)*" within the meaning of Article 6 ECHR and Article 10 UDHR.[9] The entitlement to a "*public hearing*" as laid down in both Articles is also respected. Other universally acknowledged fair trial guarantees such as the presumption of innocence (even if not mentioned explicitly in Law no. 178) and the right to an effective and efficient defence (Article 25.1 of Law no. 178) have been followed.

21. Finally, the composition of the Judicial Inspection composed of five independent investigator-judges, who are selected in a transparent manner, as well as the detailed rules for the "*verification proceedings*" during the examination phase, are strong safeguards against any undue or illegitimate influence by the executive branch on disciplinary proceedings. It is therefore clear that Law no. 178 is inspired by the concept of judicial self-administration (self-governance).

22. These positive findings, however, should be seen together with the less positive opinions by international organisations on two prior Moldovan draft laws on the disciplinary liability of judges, namely by the OSCE/ODIHR's Opinion no. JUD-MOL/217/2012 [LH] of 14 December 2012 and by the OSCE/ODIHR's and the Venice Commission's Joint Opinion of 24 March 2014[10]. Nevertheless, even if most of the recommendations made are unfortunately not reflected in Law no. 178[11] – this concerns a number of technical aspects as well as substantial recommendations, for example the respect for the principle of proportionality and the strengthening of the role of inspector-judges – Law no. 178 seems to be in line with European standards on judicial independence and the separation of powers in general, as well as with the minimum requirements for disciplinary proceedings concerning the protection of the aggrieved judge.

23. However, there are several fundamentally diverging specific regulations found in Law no. 325. This is due to the particular legal status of the NAC as a major integrity testing authority, which seems to make it part of the executive (law enforcement) branch (see below), but also in view of its – apparently largely uncontrolled and unaccountable – special investigative competencies within the testing procedure, which seem to create an institutionalised risk to impartiality.

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[9] For an in-depth appraisal, notably on the applicability of Article 6.1 ECHR – only "under its civil' head", however (*Albert and Le Compte v. Belgium*, 7496/76) – on disciplinary proceedings against judges (in Moldova), and on the applicability of other international rules granting minimum standards in criminal proceedings on disciplinary proceedings against judges, see paragraphs 26 and 27 of Opinion JUD-MOL/217/2012 [HL] by OSCE/ODIHR. For a compilation of other international sources (principles, recommendations, judgments, charters, opinions) on judicial independence (including impartiality) in disciplinary proceedings can be found in paragraph 9 (see also footnotes 1 to 8) of the aforementioned Opinion. See also the European Court of Human Rights' recent "Guide on Article 6 – Right to Fair Trial (criminal limb)" from 2014, especially paragraph 13: In a case of "*professional disciplinary proceedings […] resulting in the compulsory retirement of a civil servant*", i.e. a removal from office, the European Court of Human Rights (*Moullet v. France*, dec.) had held that the criminal limb of Article 6 ECHR would not be applicable "*inasmuch as the domestic authorities managed to keep their decision within a purely administrative sphere*". However, there does not seem to be any European Court of Human Rights case law on the applicability of the specific criminal limb (i.e. Article 6.2 and 6.3 ECHR) on professional disciplinary proceedings against judges. In *Albert and Le Compte v. Belgium*, there was no need to decide the question (paragraph 30), as the dispute was about the standards guaranteed in Article 6.1 ECHR both for civil and criminal proceedings. It is questionable whether *Moullet v. France* can be taken as a reference, as disciplinary proceedings against judges can never be kept "*within a purely administrative sphere*". They necessarily have a judicial implication. So for the purpose of these comments, Law no. 325 will also be scrutinised in view of its compatibility with Article 6 ECHR's specific criminal limb's standards. The concept seems to be all the more valid as other international standards and best practices concerning the fair trial principle are not exclusively reserved to criminal proceedings.

[10] CDL-AD(2014)006.

[11] None of the recommendations made in the Joint Opinion no. 755/2014 seem to have been taken into account in the final, adopted version.

24. While the need for creating an independent anti-corruption agency should not be questioned, the reason for establishing an agency responsible for the evaluation of "*professional integrity*" and "*manner to observe work obligations*" of judges in addition to the Disciplinary Board is not clear and seems to be unjustified.

B. National Anti-Corruption Agency's legal status and its effect on judicial independence

1. Background

25. Moldova established the Center for Combating Economic Crimes and Corruption a decade ago, under Law no. 1104-XV of 6 June 2002 (see Item II. General remarks, above). This Center was created as a result of a fusion of the Department of Financial Control and Inspection of the Ministry of Finance, the Anti-Corruption Department for Combating Organised Crime and Corruption and the Financial-Economic Police Department of the General Police Inspection under the Ministry of Internal Affairs and the Financial Guard subordinate to the Principal State Tax Service.[12]

26. This Center seems therefore to have been under the control of the executive and the issue of its independence was raised in reports by international and European institutions and then addressed by a new law which converted the Center for Combating Economic Crimes and Corruption into the "National Anti-Corruption Center" (NAC) on 1 October 2012. The NAC's director is appointed (or dismissed) by Parliament. But due to the fact that the NAC's neutrality was questioned after a political crisis in 2013, Parliament transferred the control over the NAC to the Government. The NAC's director is now appointed (or dismissed) on recommendation of the Prime Minister.[13]

27. The NAC is therefore not a public authority the institutional independence of which could be assimilated to the concept of judicial independence.

28. Consequently, the NAC still seems to be in essence a national law enforcement agency in a very specific field of action. The scope of its "independence" seems to be (merely) that neither the Government nor Parliament is entitled to give it instructions in individual cases – which is, of course, to be welcomed. Although it seems that the Prime Minister has a say in the appointment and dismissal of the director (see above). Therefore, "autonomy" rather than "independence" would perhaps be a better description of NAC's status since 2012-13.

29. The specific law enforcement structure of the NAC requires close scrutiny of the extent of its special investigative/examination competencies, as well as of the existence and the efficiency of control mechanisms. This is all the more important where concrete investigation measures infringe upon the aggrieved person's human rights. The more a concrete action is connected – with respect to technicalities and objectives – to criminal (or disciplinary) proceedings (for example the use of undercover agents, see below), the more it seems important to have, at least, a post event control by an independent judicial body. However, Law no. 325 has regulations which raise concern in this respect.

2. National Anti-Corruption Agency's powers

30. Law no. 325 gives the NAC the power to organise and administer the professional integrity test. Article 2 of this Law defines the purpose of professional testing as follows: *"a) ensure professional integrity, prevent and fight against corruption within public entities; b) verify the public agents' manner to observe work obligations (…); c) identify, assess and*

[12] Official website of the National Anti-Corruption Center: http://cna.md/en/history
[13] https://freedomhouse.org/report/nations-transit/2014/moldova#.VF3AvzSsWFV

remove the vulnerabilities and risks which could determine (…) corruptive behaviour; d) reject inappropriate influences in exercising the work obligations or duties of public agents."

31. Appendix 1 to this Law lists public entities, the employees of which could be subject to integrity testing. These include judges of the Constitutional Court and of ordinary courts.

32. The ordinary pre-hearing examination authority in "normal" disciplinary proceedings against judges under Law no. 178 is the Judicial Inspection composed of five independent investigator-judges. However, under Article 10.1.a of Law Article no. 325 combined with Appendix 1 to this Law, the NAC is the key body that carries out professional integrity testing of, amongst others, all categories of Moldovan judges.

33. It is important to point out that the overall objective of the specific professional integrity testing procedure under Law no. 325 is essentially – and explicitly – a disciplinary one (see Articles 6.1 and 15 to 17) and that disciplinary proceedings which can trigger massive sanctions that can lead to a judge's removal from office are widely assimilated to criminal proceedings as far as institutional protective guarantees for the aggrieved party are concerned. In reality, in corruption scenarios, the criminal and the disciplinary aspects necessarily overlap. The results of criminal investigations – led by a prosecution service under the supervision of an independent investigative judge whenever a measure necessitates major infringements on the aggrieved person's human rights (or even entirely led by an independent examining judge) – are *de facto* binding on the findings in the disciplinary proceedings.[14]

34. A public agent's acceptance of a bribe (or comparable corruptive behaviour) constitutes a disciplinary offence. Under Law no. 178 regarding the ordinary disciplinary procedure, such an offence committed by a judge would be covered either by Article 4.1.e ("*illegal interventions or use of a judge's position in relation with other authorities, institutions or officials […] to obtain unfair advantages"*) or by Article 4.1.m ("*committing an act with elements of a crime or a minor offence, that was detrimental to the prestige of justice*"). Therefore, in principle, a judge's (alleged) corruptibility would trigger the proceedings under Law no.178, which have more or less satisfactory procedural safeguards which respect European and international standards.

35. However, all conceivable acts of corruption of a public agent – and also a public agent's contributions to third party's corruptive acts – seem to be covered by Article 6.2.a of Law no. 325 ("*not admit in their activity any corruption acts, corruption-related acts and deeds of corruptive behaviour"*)[15]. Therefore, when the relationship between laws no. 178 and no. 325 is considered with respect to a judge's corruptive behaviour, it seems that Law no. 325 is likely to take priority in accordance with the principle of *lex specialis derogat legi generali*.

36. But, the decisive problem is that the rationale of the regulations in Law no. 325 is entirely at odds with standard disciplinary proceedings. When compared to the regular protective standards of ordinary pieces of legislation on disciplinary liability (i.e. Law no. 178 for judges), Law no. 325 has "quasi-outsourced" and "quasi-immunized" the entire testing procedure of the professional integrity of public agents. This was done despite the fact that the main objective of the testing procedure is explicitly a disciplinary one and that the very core element of the testing procedure relies on the vast employment of undercover agents

[14] In the State of Baden-Wurttemberg, Germany, the prosecutor general's offices (one for Baden, one for Wurttemberg) in charge of investigating disciplinary cases against judges (or prosecutors) systematically suspend the proceedings until a pending criminal case has at least been decided at first instance. It is only then that the disciplinary charges are communicated to an independent judges' disciplinary court.

[15] These rather broad, generic and hybrid (indeed overlapping) terms – which might, however, in part be the result of a problem with the translation – also pose a problem with respect to the principles of foreseeability and narrow interpretation of statutory offences.

called "*professional integrity testers*".[16] This gives the impression that "innocent" terminology has been used to circumvent the standard protective guarantees in this area.

37. Another striking point is that Article 9.2 sets out that "*[t]he results and materials of the professional integrity test may not be used as means of evidence in a criminal or minor offence trial against the tested public agent*". At first, this seems to be a protective regulation for the aggrieved public agent. But, taken in the context of Law no. 325, the rationale of Article 9.2 is quite different: it seems to serve as a means for digressing from common protective standards in sanction-oriented proceedings related to the use of undercover agents.

38. Only the understanding of disciplinary liability as a complete "*aliud"* when compared to criminal liability could, if at all, justify a complete deviation from the ordinary rules. However, it has already been shown that this is not the position taken by the European Court of Human Rights or of any other relevant European or international organisation and that criminal and disciplinary proceedings often overlap.

39. While the use of publicly available information by professional integrity testers, including monitoring of public proceedings, review of decisions, interviews with the parties of proceedings, etc. does not raise any concerns in terms of intrusiveness into the professional work of judges, the use of such means as covert video and audio recordings (Article 12.5) without any warrant from an independent body, is questionable and raises concern with respect to the right to private life of a judge as well as with respect to the independence of the judiciary in general.

40. It is important to clearly state that all "tricks" or "artifices" used should not allow for a lack of control of the authorities who instigate and carry out integrity testing procedures. This seems, however, to be the case here, since Law no. 325 apparently does not provide for any – and be it *ex post facto* – judicial review of the legality of examination steps taken by the professional integrity testers under the authority of the NAC.

41. Indeed, Article 19 of Law no. 325 on the "*Control (…) of Professional Integrity Testing*"[17] merely installs loose parliamentary control consisting, in essence, of a general annual report by the NAC (and the ISS) with exclusively statistical information. That means that there seems to be complete immunity of the main actors as to their way of handling the individual case.

42. In addition, the deferral of the case to the ordinary disciplinary bodies applying the ordinary protective rules comes into operation at too late a stage. Pursuant to Article 15.2, the aggrieved judge is no longer in the position to effectively challenge the examination procedure and its findings. This is all the more true as several regulations of Law no. 325 on "*confidentiality", "conspiracy*" (both terms are used in Article 15.3 and on a "*report […] concluded so as to not to allow the disclosure*" (see Article 13.2)[18] make it virtually impossible for the suspected judge to effectively question and scrutinise the gathered means of evidence (professional integrity testers are excluded as witnesses; videotapes and photos are tampered with for the purpose of dissimulation).

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[16] See Article 4 as to the concept as such: "*the creation and application by the tester of certain virtual, simulated situations, similar to those in the work activity, materialised through dissimulated operations*"; Article 8 as to the testers' rights and obligations; and Article 12 in depth on the quality of the testing as dissimulated activity with the use of cover-up elements).

[17] One could easily provide in-depth comments on the merging of controlling the testing procedure and of financing it in one and the same Chapter of Law no. 325.

[18] The English terminology here (based on an unofficial translation) is not always very clear and coherent. However, the overriding principle of confidentiality can be easily detected throughout Law no. 325.

43. When all these structural elements are taken together, there can be no doubt that the set of regulations in Law no. 325 implements – for the sake of professional integrity testing with severe disciplinary sanctions as a systematic follow-up – a genuinely imbalanced system with an institutionalised superiority of the NAC (and ISS) in its quality as autonomous law enforcement authority, on the one hand, and a notoriously inferior – unaided – judge, on the other.

44. Aside from the question of the "trustworthiness" of each individual professional integrity tester, it must be positively acknowledged that Law no. 325 makes reference to the need for an authorisation under "*special laws with duties and competences*" (Article 4) and for the need for the training of the professional integrity testers (Article 8.1.b). Nevertheless, the entire system conveys the impression of structural partiality with a general bias against judges.

45. Article 4 of Law no. 325 defines professional integrity as "*the person's capacity to exercise their legal and professional obligations and duties honestly and impeccably, proving a high moral standard and maximum correctness, and to exercise their activity impartially and independently, without any abuse, respecting public interest, the supremacy of the Constitution of the Republic of Moldova and of law".* It is not completely clear on the basis of which criteria the Law proposes to examine "professional integrity" of judges. Determining the criteria against which the exercise of a judge's "*professional obligations*" will be assessed need to be clearly and precisely defined.

46. According to Opinion no. 3 of CCJE on the Principles and Rules Governing Judges' Professional Conduct, in particular Ethics, Incompatible Behaviour and Impartiality, *"the statute or fundamental charter applicable to judges should define, as far as possible in specific terms, the failings that may give rise to disciplinary sanctions as well as the procedures to be followed."* Opinion no. 3 goes on to say that, *"Professional standards (…) represent best practice, which all judges should aim to develop and towards which all judges should aspire. It would discourage the future development of such standards and misunderstand their purpose to equate them with misconduct justifying disciplinary proceedings. In order to justify disciplinary proceedings, misconduct must be serious and flagrant, in a way which cannot be posited simply because there has been a failure to observe professional standards …"*

47. According to Article 8.1 of Law no. 325, the professional integrity testers have the right to *"determine, along with the coordinator of the professional integrity testing activity, under the conditions hereof, the public agents liable to testing and the testing frequency".* Apart from this provision, the Law does not set out how and on what grounds the integrity testers determine which public entity they will be testing. It is also not clear if the NAC (and ISS) itself or any other body (Parliament, Government) will define and adopt such criteria, or if it should be assumed that public entities will be selected randomly. The absence of any clear regulation in this respect may result in arbitrary decisions or may create the impression that such legal instruments are used unfairly to discipline certain courts or individual judges.

48. In addition, there is a series of individual concerns about the Law which do not meet the specific requirements of internationally accepted rule of law and fair trial standards.

49. These concerns often originate in an institutionalised imbalance between the important rights taken together with relatively few obligations of the examination body (the NAC in this case), on the one hand, and the scarce rights and important obligations of the judge under disciplinary scrutiny, on the other.

50. In general, one of the essential prerequisites and components for an effective anti-corruption authority is to provide a proper and stable legal framework that regulates the

functions of this body. There are several aspects to independence which include political independence, functional, operational as well as financial independence. The freedom of decision-making and the freedom to take appropriate actions are of the utmost importance, especially to investigate allegations effectively and efficiently and without undue influence or undue reporting obligations.[19]

C. Rule of law and fair trial principles

51. Law no. 325 is problematic in respect of a number of important rule of law and fair trial principles. These include the presumption of innocence;[20] the right to an effective and efficient defence, including the right to full disclosure of, and full access to, the evidence, the examination of witnesses included; the legal requirements for the use of undercover agents, including the consequential non-admittance of evidence gathered by *agents provocateurs* who are themselves committing an offence; the principles of foreseeability and of narrow interpretation of statutory offences; the principle of proportionality between offence and sanction and finally, the possibility of an effective and efficient appeal to an independent court of law.

1. Presumption of innocence

52. The presumption of innocence, amongst others, laid down in Article 6.2 ECHR, is supposed to apply during the entire criminal (or disciplinary) procedure. However, the presumption of innocence is circumvented factually, as is the case with Law no. 325, if the real protection of the aggrieved judge begins only *after* s/he has received a disciplinary sanction at first instance (see Article 6.1).

53. In addition, the uncommon and highly questionable concept of "*justified risk*" seems to cast a general doubt on the integrity of every judge in Moldova. The key concept of Law no. 325, as it emerges from Articles 4 and 10.2, is that the initial step of each professional integrity test is for a professional integrity tester to contact a judge using a fake identity with a *"simulated situation […] materialised through dissimulated operations"* (Article 4), and this on the basis of a pre-established confidential "*professional integrity testing plan"* (Article 11.3). What is meant by this seems to be clear: the tester – the apparent briber – exposes the judge to a fictitious corruptive setting, in other words, the tester takes the initiative.

54. Furthermore, according to Law no. 325, in order to instigate the testing procedure there is no need for the habitual reasonable-grounds test based on objective criteria or a similar concept allowing the assumption that a specific judge might be prone to corruptive behaviour.

55. Under Article 10.2, the initiation of the testing procedure and the selection of the public agents to be subject to testing merely depend on the fact that a given public entity has shown general *"risks and vulnerabilities to corruption"* in the past (lit. a), or – even less specific – on the NAC holding "*information*" and receiving "*notifications*" (lit b). The third (alternative) ground for initiation (lit. c) – a public entity's leader's "*motivated request*" – is the most specific. However, even this seems to allow the initiation of a testing procedure against a judge who is not personally mentioned in the request. Therefore, the very generic terms in Article 10.2.a - c concerning grounds for the initiation of the testing procedure cannot, in any way, be assimilated to a reasonable grounds test.

[19] Anti-Corruption Authority (ACA) Standards, European Partners Against Corruption/ European contact-point network against corruption

[20] Which is entwined with the impartiality principle, but which has additional connotations.

56. The legislator has obviously seen the dangerous position of a professional integrity tester instigating a corruption setting against an *a priori* innocent judge. To protect the NAC testers, Article 4 of Law no. 325 defines a "*justified risk*", the rationale of which is in essence that the tester is allowed to enter into potentially criminal behaviour, because s/he does so for the greater good of society and because less interfering measures would not allow the test to reach its goal. Consequently, Article 9.5 contains the legal fiction ("shall not be") that any tester's action against a judge under scrutiny, which is covered by the principle of a "*justified risk*", does not constitute a criminal offence (even though it does as a matter of fact).

57. However, this seems to be overtly circular legal reasoning, because proper reasoning would hold that, if at all, the tester's first contact with a judge based on a simulated corruptive setting could be justified only if there were prior reasonable objective grounds for suspecting that a particular judge is prone to corruption. Or, alternatively, if a judge's impeccable professional behaviour has never raised any suspicion as to his or her potential corruptibility, there is no societal need to cast a general shadow of suspicion on this particular judge just because the public entity as such for which s/he works or other colleagues who carry out a similar job might have shown leniency towards corruption.

2. Effective defence

58. There is no occurrence of the terms "defence" or "legal assistance to the aggrieved public agent" or the like in the text of Law no. 325. The Law is too sparse as to the rights of the aggrieved public agent. As a matter of fact, the only explicitly mentioned right of a public agent who has failed a professional integrity test is *"to be informed of the manners to legally challenge the disciplinary sanctions applied as a result of professional integrity testing results"* (Article 6.1 of the Law).

59. From the perspective of Law no. 325, the rights of the public agent under suspicion only seem to become effective at a very late point i.e. when the disciplinary sanction has already been *imposed* at first instance (by the Disciplinary Board insofar as judges are concerned). And, as has been shown already in a different context, even the point of time when the specific professional integrity testing proceedings effectively change over to the ordinary disciplinary proceedings (i.e. Law no. 178 for judges) is a very late one, see Article 15.2 of Law no. 325.

60. However, Article 6.3 ECHR which sets out the most important rights of the defence, including important principles of participatory rights concerning the gathering of evidence in criminal proceedings – as these rules are potentially applicable to disciplinary proceedings against judges – foresees in its lit. b that *"adequate time and the facilities to prepare [the] defence"* are essential procedural guarantees. These requirements seem to be seriously impaired by the regulations in Articles 6.2 and 15.2 of Law no. 325.

61. Furthermore, whereas once the specific professional integrity testing procedure has finally changed over to the ordinary proceedings pursuant to Article 15.2 of Law no. 325, an aggrieved judge is entitled to choose a defence lawyer and to present his or her own evidence according to Article 25.1 of Law no. 178, the judge seems nevertheless – and independently of the late deferral to the ordinary proceedings as such – to be substantially deprived of his or her rights to *"adequate facilities to prepare his [her] defence"* under Article 6.3 lit. b ECHR, and to "*examine or have examined witnesses against him*" under Article 6.3 lit. d ECHR[21].

[21] For an in-depth overview of the European Court of Human Rights' case law concerning the named defence rights see the European Court of Human Rights' "Guide on Article 6 – Right to Fair Trial (criminal limb)" of 2014, paragraphs 266 – 334.

62. The aggrieved judge himself or herself as well as his or her legal counsel are *de facto* widely hindered from an effective assessment of the evidence – for example from examining the professional tester as a key witness, as well as from assessing material proof such as written documents and videotapes – since all these major means of evidence in the professional integrity testing procedure are classified as *"confidential*" under Articles 13.2 and 15.3 of Law no. 325.

3. Narrow interpretation and foreseeability of statutory offences

63. Due to the closeness of disciplinary proceedings against judges with criminal proceedings, the criminal procedure principles of foreseeability of statutory offences and of their narrow interpretation, also apply *mutatis mutandis* to disciplinary proceedings. Thus, in OSCE/ODIHR's aforementioned Opinion JUD-MOL/217/2012 [LH] of 14 December 2012, it is rightfully held, in paragraph 10, that one of the basic European and international requirements as to domestic laws governing the disciplinary liability of judges is, *"that there be a clear definition of the acts or omissions which constitute disciplinary offences"*.

64. As concerns Law no. 178 governing the ordinary disciplinary liability procedure for judges, there are 16 different disciplinary offences defined in Article 4. Even though none of OSCE/ODIHR's and the Venice Commission's joint recommendations in Opinion no. 755/2014 of 24 March 2014 for the further improvement towards clear-cut foreseeable and easily interpretable definitions seem to have been followed, it can nevertheless be said that the foreseeability requirement has more or less been fulfilled in the final adopted version.

65. It is therefore regrettable that Law no. 325 is of a significantly weaker quality when it comes to the definition of the targeted disciplinary offences. The terms in Article 6.2.a that public agents should "*not admit in their activity any corruption acts, corruption-related acts and deeds of corruptive behaviour"*, are generic, hybrid, vague and overlap. The terminology of the Moldovan Penal Code's "*criminal offences committed by officials*" in Articles 324 (Passive Corruption) *et seq*. is quite different from the wording of Article 6.2.a. It is indeed much more concrete and thus allows an unequivocal understanding of prohibited behaviour.

66. This difference might be tolerated if Article 6.2.a of Law no. 325 could be understood as simply referring to the corruption offences in the Moldovan Penal Code. This is, however, not the case. First, the concept of a judge not admitting corruption in his or her activity is not entirely clear.[22] "Admission" is indeed not one of the forms of participation foreseen in Articles 41 to 49 of the Moldovan Penal Code. The same is valid for the ambiguous concept of *"corruption-related acts".*

67. Another dubious concept in that respect can be found in Article 16.2 of Law no. 325: dismissal - i.e. the removal from office - is the mandatory disciplinary sanction if during the test it was established that the judge approved the breaches provided under Article 6.2.a. "Approval" of a criminal offence is also not listed in Articles 41 to 49 of the Moldovan Penal Code. Indeed, both "admitting" and "approving" criminal offences (in our case corruptive behaviour) are dangerously vague terms which bear heavy risks as to the foreseeability of what would be – and what would not be – a disciplinary offence within the framework of a professional integrity test.

68. But Article 16.2 of Law no. 325 is not only problematic as to the foreseeability and narrow interpretation principles, but also in view of its automaticity, i.e. the "mandatory" removal from office as consequence of a "breach". Here, the principle of proportionality between offence and sanction comes into play. This, of course, also applies to all judges.

[22] This could be due to the translation.

69. According to Opinion no. 1 (2001) of the CCJE on Standards Concerning the Independence of the Judiciary and the Irremovability of Judges, *"It is a fundamental tenet of judicial independence that tenure is guaranteed until a mandatory retirement age or the expiry of a fixed term of office: see the UN basic principles, paragraph 12; (…)"*[23] .

70. Furthermore, the same Opinion provides that, "*the existence of exceptions to irremovability, particularly those deriving from disciplinary sanctions, leads immediately to consideration of the body and method by* which*, and basis upon which, judges may be disciplined. …".*

71. In light of the above, while the grounds listed in Article 6.2 may be of such gravity in certain cases so as to render the sanction of the removal of a judge from office proportionate/appropriate, such a mandatory provision might – nevertheless – be deemed an improper intervention into the competences of the Disciplinary Board.

4. Principle of Proportionality between an offence and a sanction

72. It is a universally acknowledged principle that interfering actions of the public administration must always follow the principle of proportionality. As concerns criminal and disciplinary sanctions, the principle asks for a reasonable relationship between the seriousness of the offence, on the one hand, and the quality and the amount of the sanction, on the other.

73. Law no. 178 provides in its Article 7.2 that *"[d]isciplinary sanctions shall be applied proportionally to the seriousness of the disciplinary offence committed by the judge and his/her personal circumstances".* Even if it is to be regretted that the Moldovan legislator has not deemed it necessary to follow the OSCE/ODIHR and the Venice Commission's joint recommendation to explicitly reserve the removal from office (dismissal) to the most serious disciplinary offences[24], Article 7.2 of Law no. 178 seems to guarantee a minimum protection against excessive disciplinary sanctions.

74. At first glance, Law no. 325 also contains such a guarantee, since Article 9.1 states that *"the tested public agents shall only be applied a disciplinary liability [sanction?] depending on the seriousness of the established deviations and according to the legislation regulating the activity of such public entities [i.e. here the judiciary], observing the provisions of Article 16 (2)".* But, the reservation in the last sentence is decisive, as Article 16.2 provides for "*mandatory*" removal from office whenever the judge just *"approved the breaches provided under Article 6 (2)"*. And Article 6.2 makes the circular concept complete by giving a very broad and generic definition of what the anti-corruption obligations of judges are (*"not admit in their activity any corruption acts, corruption-related acts and deeds of corruptive behaviour*").

75. The factual consequence of the combination of Articles 6.2, 9.1 and 16.2 seems to be evident: whenever a judge "*admits*" / "*approves*" any kind of "*corruption-related act*" in his or her professional vicinity, his or her "*mandatory*" thus automatic removal from office is imposed. However, this leaves the door wide open for potentially arbitrary decisions.[25] The rule under European and international standards is that a judge's minor infringement with anti-corruption laws could, in principle, also be subject to disciplinary sanctions with a less

[23] See also Recommendation CM/Rec(2010)12 on judges: independence, efficiency and responsibilities.

[24] Joint Opinion on the draft Law on disciplinary liability of judges of the Republic of Moldova (CDL-AD(2014)006), p. 4, Key Recommendation A.

[25] That does of course not mean that the NAC would abuse this rather arbitrary power in practice. However, the vagueness of the whole concept seems to be - as such - an intrinsic violation of the proportionality principle.

serious outcome than an automatic dismissal, for example, with a temporary reduction of salaries pursuant to Article 6.1.c of Law no. 178.[26]

5. An efficient and effective appeal to a court of law

76. Law no. 178 implements the ordinary rules for disciplinary proceedings against judges and satisfies this principle, as a first appeal against the Disciplinary Board's decision to the SCM and then a second appeal (in law) to the Supreme Court of Justice of Moldova is possible[27].

77. Law no. 325 foresees a different – and more restrictive – appeals procedure for disciplinary sanctions in the follow-up to a failed professional integrity test. Article 17 allows only one appeal to the administrative dispute court. Therefore, judges suspected of a disciplinary offence in the particularly serious field of corruptive behaviour – which is in principle always criminal as well – seem to be "robbed" of one appellate instance as compared to those who are subject to minor disciplinary cases who have access to two appeals. There is therefore a discrepancy between laws no. 178 and no. 325.

78. In addition – and independently of whether the aggrieved judge should dispose of one or two appeals – the system of regulations in Law no. 325 seems to make an – at least potentially – successful appeal virtually impossible. This is due to the fact that, first, the judge under suspicion of a disciplinary offence in relation to the professional integrity testing does not have effective access to the key evidence (see above), and second, Law no. 325 does not leave any discretion to the disciplinary jurisdictions since the removal from office is imperative, whenever the concerned judge has "admitted" or "approved" a breach of his or her anti-corruption obligations.

79. In view of these findings, the fact that at least a disciplinary sanction cannot be enforced before the definite decision in the proceedings (Article 16.3) is only scant consolation.

IV. LAW NO. 325 WITH RESPECT TO A POSSIBLE INTERFERENCE WITH JUDGES' PRIVATE LIVES

80. The question of whether the regulations set out in Law no. 325 constitute an infringement on a judge's right to private life under Article 8 ECHR (Article 28 of the Moldovan Constitution would be the applicable domestic rule) also applies to all categories of public agents within the scope of this Law.

81. As corruption phenomena are logically bound to happen in the professional surroundings of a judge, a violation of the right to private life does not seem obvious at first. However, the situation is different when undercover agents are employed. Here, criteria as to the potential violation of the fair trial principle pursuant to Article 6.1 ECHR go hand in hand with the criteria on the infringement of the right to private life under Article 8 ECHR.

82. It is noteworthy that Article 9.3 of Law no. 325 expressly provides that *"The methods and means to test and set professional integrity tests shall not represent special investigation activities as provided by Law no.59 of March 29, 2012 on the special*

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26 Under German law, for example, automatic removal of a civil servant or a judge from public office is only foreseen when s/he has definitely been sentenced to at least one year of imprisonment (with or without probation) for a criminal offence with intent. As the criminal offence of "Accepting a Bribe" shall be punished, pursuant to sec. 332 of the German Penal Code, with imprisonment from six months to five years – and with a criminal fine or imprisonment up to three years in "less serious" cases – it is perfectly conceivable, also in practice, that a public agent who has engaged in some minor form of corruptive behaviour is not removed from office, but disciplinarily sanctioned in a more clement, less interfering way.

27 See Article 40.1 of Law no. 178.

investigation activity". But it is not clear how the covert means used by the testers would differ from special investigation activities. It should also be mentioned that the Law lacks clear and precise regulations as to when and how the professional integrity tester may use more intrusive means for testing.

83. The collection of information or recording by a state official of an individual without his or her consent, as a rule, falls within the scope of private life as defined under Article 8 ECHR. Already in the case of Klass v. Germany (1978), the European Court of Human Rights held that even a "*mere existence of secret measures or of legislation permitting secret measures, without having to allege that such measures were in fact applied to him"* an individual may claim to be victim of a violation. Therefore, the State must have adequate safeguards in place to guarantee the necessary protection and to avoid abuse of power. In order to satisfy Article 8 ECHR's requirement, the law should be formulated with sufficient precision *"to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail*".[28]

84. In the case of Vetter v. France (2005) the European Court of Human Rights found a violation of Article 8 ECHR[29] because the law that applied to the interception of telephone lines (telephone tapping) did not indicate with reasonable clarity the scope and manner of exercise of the authorities' discretion in allowing the monitoring of private conversations and the applicant therefore did not enjoy the minimum degree of protection.

85. Article 9.3 of Law no. 325 creates the impression that no judicial oversight is requested for the application of covert measures and consequently the intrusion into the private life of a public agent or a judge. Unless the relevant provisions of the Law are clarified, "*covert measures"* defined with the necessary precision and judicial oversight is introduced, the Law would clearly be in violation of the ECHR.

86. There is plenty of case law by the European Court of Human Rights on the involvement of undercover agents and more specifically on their use as *agents provocateurs* in (criminal) investigative proceedings. Due to the important human rights infringements which the use of undercover agents cause to the person at whom their actions are aimed, their use is scrutinised by the European Court of Human Rights not only from the aspect of a potential violation of the fair trial principle under Article 6.1 ECHR, but also from the aspect of a potential violation of the right to private life under Article 8 ECHR.

87. The guiding principles which can be derived from the European Court of Human Rights' case law can be summarised as follows[30]:

- an undercover agent's involvement necessitates prior reasonable grounds to suspect that the targeted person is involved in a similar criminal activity or has committed a similar criminal act beforehand;[31]

[28] Margareta and Roger Andersson v. Sweden, Judgment (application no. 12963/87), 25 February 1992, paragraph 75.
[29] Vetter v. France, Judgment (application no. 59842/00), 31 August 2005, paragraph 27.
[30] See notably Furcht v. Germany, application no.54648/09, 23 October 2014, paragraphs 47-53; Bannikova v. Russia, application no.18757/06, 4 November 2010, paragraphs 36-50; Ramanauskas v. Lithuania, application no. 74420/01, 5 February 2008 paragraphs 50-61; Khudobin v. Russia, application no.59696/00, 26 October 2006, paragraph 128; Texeira de Castro v. Portugal, application no. 25829/94, 9 June 1998, paragraph 36.
[31] The prerequisite of "reasonable grounds" is necessarily also valid for the use of undercover agents in professional disciplinary cases – if it should be permitted at all – as an argument *a majore ad minus* shows: the infringement on the human rights of the targeted persons being identical in both criminal and disciplinary settings, it is all the more important in a (mere) disciplinary setting that a serious objective suspicion as to the involvement in a major disciplinary offence (for example one such as corruption which is at the same time a criminal offence) is cast upon the targeted public agent. See also the summary of the European Court of Human Rights' case law concerning the reasonable grounds test as necessary prerequisite of the employment of an undercover agent in

- the authorisation of an undercover agent's activity must be formally legal, an administrative decision not containing full information on purposes and reasons of applying such a method is not sufficient;[32]
- as to the scope of the undercover agent's involvement, s/he is (only) allowed to join an ongoing criminal act, whereas s/he must abstain from instigating the targeted person to commit a criminal act (*agent provocateur*), for example by intensively offering a sum of money for the commitment of a criminal offence.[33]

88. However, all these principles seem to be violated by the professional integrity procedure set out in Law no. 325: Articles 4 and 10.2 are not sufficient for a reasonable grounds test or a comparable concept concerning the initiation of an individual integrity testing procedure. It is also highly questionable whether the (confidential) "*professional integrity testing plan*" established by the NAC (or ISS) under Article 11.3 of Law no. 325 satisfies the minimum requirements for the formal authorisation of an undercover agent's activity.

89. Finally, Law no. 325's rather circular and artificial argumentation for a "*justified risk*" (Article 4) leading towards the legal fiction of the professional integrity tester not committing a criminal offence (Article 9.5), cannot negate that – factually – the tester with a fake identity who approaches a judge for the first time with an apparent corruptive offer – and be it with a mental reservation as to the seriousness of the offer – commits a criminal offence, and thus has to be qualified as a forbidden *agent provocateur*.[34]

V. CONCLUSIONS

90. Corruption undermines, among others, the rule of law, poses significant risks to the protection of human rights and endangers the stability of democratic institutions and the moral foundation of society. Although efforts made by States to fight this are to be welcomed, these efforts should not in turn jeopardise the stability of democratic institutions nor weaken the independence and impartiality of the judiciary.

91. The question raised by the Constitutional Court of Moldova can be answered as follows:

As regards Law no. 325 and possible interference with the principles of judicial independence, the separation of powers and the rule of law:

92. The primary objective of Law no. 325 on Professional Integrity Testing is to fight corruption in the public sector. However, when analysed more closely, its scope appears to be much broader than that, covering the general assessment of the performance of professional duties by public employees – including those of constitutional court and ordinary judges.

93. There are a number of European and international standards, guarantees and best practices concerning (ethical behaviour related) disciplinary proceedings against public agents and more specifically with respect to judges that Law no. 325 does not comply with. It

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L. Stariene, "The Limits of the Use of Undercover Agents and the Right to a Fair Trial under Article 6 (1) of the European Convention on Human Rights", Mykolas Romeris University Vilnius / Lithuania, JURISPRUDENCIJA / JURISPRUDENCE 2009, 3 (117), pp. 268 et seq.

[32] See Furcht v. Germany, paragraph 53; Bannikova v. Russia, paragraph 48.

[33] See Furcht v. Germany, paragraph 52; Bannikova v. Russia, paragraph 47.

[34] Where the activity of undercover agents appears to have instigated the offence and there is nothing to suggest that it would have been committed without their intervention, it goes beyond that of an undercover agent and may be described as incitement. Such intervention and its use in criminal proceedings may result in the fairness of the trial being irremediably undermined (see Vanyan v. Russia, Judgment, application (no. 53203/99), 15 December 2005 paragraph 47).

is a highly disputable instrument, the suitability of which for the fight of wide-spread corruption phenomena in the public sector is questionable.

94. Setting up a truly independent anti-corruption agency is generally encouraged for the purpose of effectively fighting corruption. However, whether the National Anti-Corruption Center (NAC) and the Information and Security Service (ISS) fulfil this definition is doubtful and the NAC's status raises some concern with respect to its independence.

95. Unless the transparency, accountability and independence of the NAC (and ISS) are guaranteed in law and practice, anti-corruption activities of this body are likely to threaten the principle of the rule of law. Also, a law that establishes a body with such a broad mandate in relation to judges of the Constitutional Court and those of ordinary courts - which lacks clarity and is ambiguous along with the absence of criteria for evaluating the performance of professional duties of judges - raises serious concern with respect to judicial independence (and the intrusion into the private lives of judges).

96. The NAC's specific law enforcement structure necessitates a very close look at the extent of NAC's special investigative/examination competencies, as well as at the existence and the efficiency of control mechanisms. This is important because investigative measures necessarily infringe upon the aggrieved person's human rights. The more a concrete action is connected to criminal (or disciplinary) proceedings, the more important and necessary it is to have a post-event control system in place by an independent judicial body. Law no. 325 does not provide for such a safeguard.

97. It seems to be unjustified and dangerous to establish a body responsible for the evaluation of the professional conduct of judges (including judges of the Constitutional Court) and thus duplicating the function of the Disciplinary Board (or other similar bodies). Although Law no. 325 defers to the relevant disciplinary authority the application of disciplinary measures on the basis of test results, it is - however – mandatory for certain types of violations to dismiss the judge. Mandatory dismissal which is based solely on negative test results could amount to an unjustified interference with the competences of the Disciplinary Board.

98. Therefore, the Venice Commission is of the opinion that Law no. 325 does indeed have the potential of negatively interfering with the principle of judicial independence, the separation of powers and the rule of law.

As regards "integrity testers" constituting a possible interference with a judge's private life (Article 8 ECHR):

99. Protection against the disproportionate application of surveillance measures is guaranteed by Article 8 ECHR. Law no. 325 expressly provides that testers may use covert means for testing and that audio/video record testing is mandatory. This could indeed constitute an intrusion into the private life of a public agent or a judge. The use of such means by the NAC (or ISS) without any counterbalancing checks could pose a real threat to judicial independence and may be wrongly used as an instrument to discipline judges. The State must provide the necessary safeguards in order to avoid abuse of such measures.

100. The use of undercover agents and more specifically when used as *agents provocateurs*, is scrutinised by the European Court of Human Rights not only from the aspect of a potential violation of the fair trial principle under Article 6.1 ECHR, but also from the aspect of a potential violation of the right to private life under Article 8 ECHR. This is due to the potential important human rights infringements which the use of undercover agents may cause to the person at whom their actions are aimed.

101. Law no. 325 does not follow the guiding principles that can be derived from the European Court of Human Rights' case law on this issue (e.g. prior reasonable grounds to suspect that the targeted person is involved in a similar criminal activity or has committed a similar criminal act beforehand; authorisation of an undercover agent's activity must be formally legal etc.). Articles 4 and 10.2 of Law no. 325 are not sufficient to be considered a reasonable grounds test or a comparable concept concerning the initiation of an individual integrity testing procedure. It is also highly questionable whether the (confidential) "*professional integrity testing plan*" established by the NAC (or ISS) under Article 11.3 of Law no. 325 satisfies the minimum requirements for the formal authorisation of an undercover agent's activity.

102. In addition, the artificial "*justified risk"* argument under Article 9.5 of Law no. 325 used to create a legal fiction so that the professional integrity tester is not considered to be committing a crime turns the tester into a (forbidden) *agent provocateur*, and this is not in line with European standards.

103. The Venice Commission is therefore of the opinion that under Law no. 325, integrity testers have the potential of disproportionately interfering with a judge's private life.