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**EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW**  
**(VENICE COMMISSION)**

**REPUBLIC OF MOLDOVA**

**JOINT OPINION  
OF THE VENICE COMMISSION  
AND THE DIRECTORATE GENERAL  
OF HUMAN RIGHTS AND RULE OF LAW (DGI)  
OF THE COUNCIL OF EUROPE**

**ON THE DRAFT LAW  
ON THE ANTI-CORRUPTION JUDICIAL SYSTEM  
AND ON AMENDING SOME NORMATIVE ACTS**

**Adopted by the Venice Commission  
at its 136<sup>th</sup> Plenary Session  
(Venice, 6-7 October 2023)**

**on the basis of comments by**

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## **I. Introduction**

1. By letter of 2 August 2023, the President of the Republic of Moldova, Ms Maia Sandu, submitted a request for an opinion of the Venice Commission on the draft “Law on the anti-corruption judicial system and on amending some normative acts” (hereinafter: “the draft law”) ([CDL-REF\(2023\)030](#)).

2. This Opinion was prepared jointly with the Directorate General of Human Rights and Rule of Law (DGI). Mr Philip Dimitrov, Ms Angelika Nussberger, Mr Tuomas Ojanen, and Ms Hanna Suchocka acted as rapporteurs on behalf of the Venice Commission. Mr Filipe Marques was appointed as expert for DGI and provided comments on its behalf.

3. On 6-8 September 2023 a delegation composed of Ms Hanna Suchocka and Mr Philip Dimitrov, accompanied by Mr Nikolaos Sitaropoulos from the Secretariat of the Venice Commission, visited Chişinău, and had meetings with the President of the Republic of Moldova and representatives of the following authorities: Ministry of Internal Affairs; the Minister of Justice and representatives of the Ministry of Justice; Legal Committee on Appointments and Immunities of Parliament; National Anticorruption Centre; National Integrity Authority; General Prosecution Office; Anticorruption Prosecution Office; Superior Council of Magistracy. They also held meetings with representatives of the: EU Delegation to the Republic of Moldova; Association of Judges from the Republic of Moldova; Legal Resources Centre from Moldova; Transparency International Moldova; and Centre for Analysis and Prevention of Corruption. This joint opinion takes into account the information obtained during the above-mentioned visit. The Venice Commission and DGI are grateful to the authorities of the Republic of Moldova and to the Council of Europe Office in Chişinău for the excellent organisation of this visit.

4. This opinion was prepared in reliance on the English translation of the draft law and its explanatory note which were provided by the authorities. The translation may not accurately reflect the original version on all points.

5. This opinion was drafted on the basis of comments by the rapporteurs and the results of the above-mentioned meetings held in Chişinău on 6-8 September 2023. On 29 September 2023 President Sandu transmitted to the Venice Commission the Presidential Administration’s remarks which are taken into consideration in the present text. The draft opinion was examined at the meeting of the Sub-Commissions on the Judiciary and on the Rule of Law on 5 October 2023. Following an exchange of views with Mr Eduard Serbenco, Secretary of State of the Ministry of Justice, it was adopted by the Venice Commission at its 136<sup>th</sup> Plenary Session (Venice, 6-7 October 2023).

## **II. Background of the draft law**

6. The President of the Republic of Moldova in her aforementioned letter of 2 August 2023 noted that the draft law was prepared by the Presidency of the Republic of Moldova “in cooperation with other stakeholders and in accordance with its authority to propose legislation. The primary objective of this draft Law is to establish a specialised first-instance anti-corruption court and to create a dedicated anti-corruption chamber at the Chişinău court of appeal, aiming to efficiently handle complex corruption cases”.

7. President Sandu also noted in her letter that “the draft has been submitted to the Parliament for consideration and approval. The Parliament is expected to organise public consultations on its platform, including meetings with various stakeholders. The President’s office will remain actively involved, providing further explanations and informational support to the Parliament. Additionally, the draft and the explanatory note have been made available on both the

Parliament's and President's websites". President Sandu underlined the significance of the draft law "as one of the State's top priorities in the justice reform agenda".

8. According to the explanatory note to the draft law, "[t]he phenomenon of corruption is considered by the society of the Republic of Moldova to be one of the main factors that prevent economic development and further aggravate inequality, poverty, and social division. This perception is supported by a number of studies of the state of judiciary and prosecutorial systems. Corruption attacks the foundation of democratic institutions by distorting electoral processes and distorting the rule of law."

9. During the mission, the Venice Commission delegation was informed by the authorities that Parliament was about to initiate public consultations and that the Ministry of Justice was in the process of receiving and consolidating comments from various competent authorities. On the basis of these comments the Minister of Justice, on behalf of the Government, planned to submit to Parliament, in the course of September, a "General Opinion" on the draft law. By the remarks transmitted on 29 September 2023, the authorities informed that the draft law was expected to go through a first reading by Parliament in October, while its final reading was planned to take place by the end of 2023, which would allow more time for consultations and consideration of the draft law by the stakeholders.

#### *Major aims of the draft law*

10. The explanatory note highlights that the draft law's two major aims are the following.

11. First, *the creation of a system of specialized courts offering "an increased degree of independence to judges"*. Despite the reform of the justice system, including the external evaluation (ongoing vetting) of judges, "the judicial system still does not have the courage to act contrary to the perception established in the system, i.e. to protect the interests of judges despite the public interest. Thus, the high profile cases continue to be procrastinated, the corruption files against judges are mostly finalized in favour of the judges, the files regarding the appeals against the decisions on the external evaluation of the judges remain unresolved for long periods, despite the limited deadlines provided by the law".

12. Secondly, *the acceleration of corruption-related proceedings*. The explanatory note refers to a study by the Legal Resources Center from Moldova indicating that "the average rate of examination of a corruption case is approximately 3.5 years. The procedures for adjudicating a corruption case from the time it is referred to the court to the adoption of an irrevocable decision last from 138 days to 10 years, in one case the term of 12.6 years was also recorded...[T]he speed of examination of corruption cases by the courts analysed in the study was four times slower than the national average and 2.4 times slower than the Council of Europe median." The explanatory note adds that "according to the statistical activity report of the trial courts regarding the trial of criminal cases, during 2022, a total of 738 files on corruption offenses in the public and private spheres were examined, of which 474 outstanding files from previous years and 264 registered in 2022. During 2022, judgments were issued by the court of first instance in 229 cases, which represents approximately 30% of the total number of cases examined during the reference period. Comparatively, the rate of completion of criminal cases pending at the trial court for the year 2022 is 50%... A similar situation is attested in the appeal courts when examining cases in order of appeal. During 2022, 306 cases were examined in the appeal procedure (of which 182 were outstanding from the previous year). In total, 105 criminal cases were completed, which represents 35% of the total number of criminal cases under review at the appeal courts."

*Ineffectiveness of earlier measures*

13. According to the explanatory note, earlier “procedural management measures taken to ensure the speed of criminal trials, especially on complex cases”, did not yield results. Also the establishment in 2020 of “specialized panels on corruption cases” did not prove effective in practice either and are not operational. Thus, having noted that some other Council of Europe member states have established specialized anticorruption courts, the authorities prepared the draft law to establish similar instances in the Republic of Moldova.

**III. Analysis and recommendations**

**A. Rationale and advisability of creating specialised anticorruption instances**

14. The determination and efforts made by the President of the Republic and other authorities to fight and eliminate corruption are welcome. Evidently, it is up to the national authorities to decide on the creation of specialised anticorruption instances. Nonetheless, a survey carried out in July 2023 indicated that legal professionals are divided as regards the initiative to create anticorruption instances in the Republic of Moldova.<sup>1</sup>

15. During the Venice Commission delegation’s mission to Chişinău a large number of interlocutors seriously questioned the advisability of proceeding to the adoption of this draft law, at least at this juncture. The major reasons for these concerns are summarized below.

16. Firstly, the general situation of the judiciary is a decisive factor before embarking upon the creation of a new system of specialized courts. It makes a difference if it is before, in the middle of or after vetting procedures concerning the judiciary of a country. Concerns were raised during the mission as to the advisability of creating a new specialized court system at this particular juncture, and to its prospects of effectiveness, given that the vetting process of judges and prosecutors has not as yet been finalized, and the Supreme Court of Justice (SCJ) lacks judges while it is planned by the draft law to be part of the envisaged anticorruption judicial system, as a court of third instance (see below). By the remarks of 29 September 2023 the authorities noted that the ongoing vetting process focuses on the judges of the SCJ and on judges holding or who have held managerial positions. Lower court judges are expected to undergo vetting in the course of 2024 and potentially in 2025. The district court judges (except for those who have held or are expected to hold managerial posts) adjudicating on corruption cases are not covered by the current vetting process.

17. Secondly, it is noted that the Republic of Moldova is a relatively small country where it might not be called for to have a judicial system with many different branches. Thus, even if the introduction of specialized courts may be considered to be successful in some countries, it is still necessary to assess the specific situation in the Republic of Moldova. The Venice Commission has already noted that a number of anti-corruption bodies and mechanisms exist in the Republic of Moldova which appear to not have functioned efficiently to date<sup>2</sup>, while reportedly amendments of the Code of Criminal Procedure were made earlier this year in order to accelerate notably the adjudication of corruption cases. Thus the creation of full-fledged anti-corruption instances raises the question why new and ongoing efforts to enhance the efficiency and effectiveness of the already existing anti-corruption bodies and mechanisms are not given time to produce tangible results. In their remarks of 29 September 2023 the authorities confirmed that the amendments of the Code of Criminal Procedure have yet to demonstrate their effectiveness, but they focus only

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<sup>1</sup> Legal Resources Centre Moldova, Perception of Judges, Prosecutors and Lawyers on Justice and Corruption, Survey, July 2023: “36% of judges were in favour of this reform and 37% did not support it. 35% of prosecutors and 42% of lawyers support this reform, while 34% of prosecutors and 40% of lawyers don’t.”

<sup>2</sup> CDL-AD(2023)005, §§17-18.

on procedural aspects and do not tackle the underlying institutional challenges linked to lack of integrity within the current judicial system.

18. Thirdly, as regards the need to eliminate excessively lengthy corruption-related criminal proceedings, although the explanatory note data indeed indicate out of ordinary delays, it does not provide any analysis by national authorities explaining the *root causes* of these reported delays, using for example the CEPEJ time management checklist or the CEPEJ backlog reduction tool.<sup>3</sup> The fact that these cases are handled especially slow may be partly due to lack of case-law uniformity, already noted by the Venice Commission in another Opinion on the Republic of Moldova in 2022.<sup>4</sup>

19. Also importantly, during the mission interlocutors underlined that almost all of the corruption-related cases were concentrated in the Buiucani court of Chişinău, which at the same time reportedly was understaffed, operating only with 27 (instead of 45) judges. The question thus arose whether a reinforcement of the resources of, or the creation of a specialized chamber in, this particular (de facto and partly specialised) court would be a better and more (cost and time) efficient option, compared to establishing a brand new set of specialised courts. The authorities in their remarks of 29 September 2023 submitted that recent decisions by the above court have cast doubts on the commitment of many judges to deliver justice. They added that the creation of specialized panels or chambers does not provide the opportunity to recruit new judges, offer competitive salaries to motivate them, or enhance their working processes, which could be realized under the umbrella of a new specialised court.

20. Last but not least, the establishment of new courts pose serious logistical and organisational challenges that will necessitate significant time and financial resources. As the Venice Commission has already stated with respect to the Republic of Moldova, “establishing new *ad hoc* bodies distracts resources and political support from the ordinary institutions of the State which were created with the specific aim of combatting judicial corruption”.<sup>5</sup> The Commission has also opined that “while specialisation may be very useful in certain circumstances, it creates a risk of complicating the system and is not always cost-efficient, especially in small countries”.<sup>6</sup> During the Venice Commission delegation’s mission, interlocutors underlined that the draft law had not yet been accompanied by a budget impact assessment, despite the significant financial resources needed for the creation and staffing of the envisaged anticorruption instances.

21. In view of the above, the Venice Commission and DGI recommend that the authorities, before proceeding further, carry out an impact assessment of the draft law.<sup>7</sup> This assessment could usefully analyse and examine with particular scrutiny notably the *root causes* of the problems that the draft law aims to resolve, as well the existence of other possible alternative measures which would attach more emphasis, as also noted by many interlocutors during the mission, to the finalisation of the judges’ vetting process, the allocation of corruption-related cases to vetted judges, reinforcement of prosecuting services and of the Buiucani court in Chişinău which is reported to handle currently the vast majority of corruption cases, and better enforcement of the existing legislation (including against judges who reportedly delay the adjudication of corruption cases).

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<sup>3</sup> Available at: <https://www.coe.int/en/web/cepej/home>. The authorities in their remarks of 29 September 2023 indicated that a number of root causes of ineffective criminal proceedings, such as courts’ excessive caseload and insufficient court staff, have been identified by certain independent research papers.

<sup>4</sup> CDL-AD(2022)024, Republic of Moldova - Joint opinion of the Venice Commission and the Directorate General of Human Rights and Rule of Law (DGI) of the Council of Europe on the draft law on the Supreme Court of Justice, §22.

<sup>5</sup> Ibid. §17.

<sup>6</sup> CDL-AD(2017)019, Opinion on the Draft Judicial Code of Armenia, §§44-47. See also CCJE, Opinion (2012) No. 15 on the Specialisation of Judges, §65.

<sup>7</sup> The authorities in their comments of 29 September 2023 noted that a comprehensive impact assessment of the draft law was planned.

22. In addition, the Commission and DGI note that the explanatory note does not elaborate on the relation of the draft law to the European standards laid down notably in the ECHR and the European Court's case-law. The Commission and DGI therefore recall the Council of Europe Committee of Ministers Recommendation (2004)5 on the verification of the compatibility of draft laws, existing laws and administrative practice with the standards laid down in the ECHR,<sup>8</sup> and propose that the authorities carry out systematically an ECHR-compatibility verification before the adoption of each draft law, including the present one, and make public the relevant verification.

### **B. The principle of the unity of the judiciary - Status of the anticorruption judges**

23. The independence and separation of the "anti-corruption judicial system" from the rest of the national judicial system is one of the explicit goals of the draft organic law, according to the explanatory note. The Venice Commission and DGI recall that there is no "hard law" which would set forth and define the principles of unity of the judiciary and uniform status of judges. However, according to the CCJE Opinion (2012) No. 15 on the Specialisation of Judges, judges and courts "should always remain a part of a single judicial body as a whole" and "in principle, generalist and specialist judges should be of equal status". Deviations from the general rules should be limited to what is necessary for anti-corruption courts to work effectively, and care must be taken to avoid the possible impression that anti-corruption judges are a different or privileged class of judges.<sup>9</sup>

24. The starting point thus is that while some deviations from the general rules on courts and judges may be acceptable, such deviations should be limited to what is necessary for the anti-corruption courts to work effectively. Hence, the criteria for selection and selection procedure of anti-corruption judges, as well as such arrangements as remuneration, liability and systems of supervision and security of judges, cannot deviate more than necessary from general rules.

25. During the Venice Commission delegation's mission many interlocutors confirmed that the provisions of the draft law deviate to a considerable degree from general rules pertaining to Moldovan courts and judges. In fact, the draft law with its explanatory note gives the impression that anticorruption judges would be a qualitatively different or even privileged class of judges (and courts). As any such doubts should be dispelled, the principles of "the unity of the judiciary"<sup>10</sup> and of "the uniform status of judges" warrant closer attention in further preparation of the draft law.

26. In this context it is noted that the draft law is titled "on the anti-corruption judicial system and on amending some normative acts", while the explanatory note mentions that "Through the draft law in question, it is proposed to establish a judicial system specialized in corruption and related cases.". In order to avoid the impression that the draft law, which is an organic law, aims to fragment the national corpus of the judiciary and to create a different status of judges dealing with corruption cases, fear expressed notably by judges met during the mission, the Venice Commission and DGI recommend that the title be amended and that all references in the specific provisions to an "anticorruption judicial system" be removed.

27. As regards the provision of additional security guarantees to anti-corruption judges under draft Article 20, it is to be welcomed and appears necessary, given that those judges will have

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<sup>8</sup> See also Guideline 5 of 2022 Guidelines of the Committee of Ministers on the prevention and remedying of violations of the Convention for the protection of human rights and fundamental freedoms.

<sup>9</sup> See CDL-AD(2017)020, Ukraine - Opinion on the Draft Law on Anticorruption Courts and on the Draft Law on Amendments to the Law on the Judicial System and the Status of Judges (concerning the introduction of mandatory specialisation of judges on the consideration of corruption and corruption-related offences), §34.

<sup>10</sup> Under Article 2 of the Law on the status of judges, titled "Unity of the status of judge", "Judges in all courts have a unique status and are distinguished from each other only by their powers and competence.

to decide also on high-profile corruption cases. While it is not up to the Venice Commission and DGI to decide which of the specific measures foreseen are necessary, advanced security measures can in principle not be seen as an unjustified special regime.

28. Also, draft Article VIII (read in conjunction with the explanatory note) provides that annual salaries of the ACC and the ACCCA judges and staff will be by 60% higher than those of ordinary judges and court staff. It is clear that those judges should be entitled to higher salaries than generalist judges, and it should also be taken into account that they work on important corruption cases and may come under significant external pressure. The CCJE Opinion (2012) No. 15 recognises the possibility of special remuneration “where specific grounds can be identified which permit the conclusion that either the specifics of the profession of the specialist judge or the burden of his/her responsibilities (including a personal burden that may come with an assignment in a specialist function) demand such compensation”.

29. During the mission the authorities did not provide information about the method of calculation of the above top up of the anticorruption judges’ salaries. It was indicated though by the Minister of Justice that after the end of the vetting process a general increase of vetted judges’ salaries is planned to take place which is expected to mitigate the effects of the foreseen difference between generalist and anticorruption judges’ salaries. The Commission and DGI invite the authorities to carefully examine these issues in light of the Council of Europe standards avoiding an excessive deviation from the general rules applicable to the area of judges and court staff remuneration.<sup>11</sup> The authorities are also invited to consider including in the draft law a provision so that after the expiry of an anticorruption judge’s term of office this judge’s salary is not excessively reduced. This might be possible by providing, for example, that such judges would be placed not in a court of the same level, but in a higher court, and may act as an incentive attracting and keeping qualified judges, given that, as the authorities stressed during the mission, there is a serious scarcity of experienced judges qualified to work in anticorruption courts.

30. As regards in particular the foreseen increased salaries of anticorruption court staff, the Venice Commission and DGI are of the opinion that the authorities need to distinguish between court clerks and specialised experts (e.g. IT, accounting, financial, etc.), the latter being even more fundamental for the specialised courts’ effectiveness and, therefore, having to be better paid. For this reason, the selection and recruitment procedures as well as the status of specialised court staff should be regulated by legislation. As regards the calculation of such staff salary increase, this is a decision that will have to be taken by the authorities in light of the average salary scale and the available financial resources of the state.

31. Lastly, the Venice Commission and DGI note that the draft law contains no provision concerning disciplinary liability of the anti-corruption judges, although in principle they should be subject to the same rules as generalist judges.<sup>12</sup> According to the CCJE Opinion (2012) No. 15 on the Specialisation of Judges, “rules of ethics and of criminal, civil and disciplinary liability of judges must not differ between generalist and specialised judges. Standards of judicial conduct as set out in CCJE Opinion No. 3 (2002) must apply equally to specialist and non-specialist judges”. Thus, the Commission and DGI recommend clarifying in the law that anti-corruption judges are subject to the same disciplinary regime as ordinary judges.

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<sup>11</sup> See CDL-AD(2017)020, Ukraine - Opinion on the Draft Law on Anticorruption Courts and on the Draft Law on Amendments to the Law on the Judicial System and the Status of Judges (concerning the introduction of mandatory specialisation of judges on the consideration of corruption and corruption-related offences), §54.

<sup>12</sup> This was provided for by the anticorruption courts draft law in Ukraine, *ibid.* §55.

### C. Specific provisions of the draft law

32. **Article 5 (Jurisdiction of the Anticorruption Court (AC)):** Under this provision the AC has three different competences: a) adjudicating in the first instance procedure “all criminal cases assigned to it by the Code of Criminal Procedure”; b) the investigating judge of the Anticorruption Court is competent for carrying out the “judicial control over the procedural actions performed by prosecutors in cases falling within the competence of the Anticorruption Court”; and c) the examination of “the legality of the declaratory acts issued by the National Integrity Authority establishing substantial differences between the revenues obtained and the expenses incurred, on the one hand, and the acquired wealth, on the other hand, as well as the requests of the National Integrity Authority regarding the confiscation of unjustified assets”.

33. The Venice Commission and DGI recalls that under its Rule of Law Checklist, a legal provision has to be, *inter alia*, clear and predictable<sup>13</sup> (or “foreseeable as to its effects” in the words of the European Court of Human Rights).<sup>14</sup> The Venice Commission and DGI note that Article 5 provides for a potentially very broad scope of jurisdiction, which is very generally formulated, lacking the precision which would make it foreseeable.

34. As regards a), the Venice Commission and DGI recommend that the provision mention the specific provision(s) of the Code of Criminal Procedure (CCP) which are applicable. Article IV§3 of the draft law contains in fact a new Article 36 to be added to the CCP which is titled Jurisdiction of the AC. Clear reference to this provision may usefully be inserted in the main text of the draft law.

35. As regards b) the provision needs to be further elaborated in order to make clear what is meant by “judicial control” of the investigating judge. The provision is also blurred by draft Article IV§5 which adds a new paragraph 2 to Article 41 CCP reading: “The investigating judge of the Anticorruption Court shall ensure judicial control during criminal proceedings on criminal cases falling within the competence of the Anticorruption Prosecutor's Office”. In order to ensure clarity of law, the Venice Commission and DGI recommend that the draft law make a cross-reference to Chapter VIII of the Criminal Procedure which, as noted by the authorities in their written comments, regulates in detail “judicial control of pretrial proceedings”.

36. As regards c) a cross-reference to the Administrative Code may be made in the draft law thus clarifying that it regulates, as the authorities noted in their written remarks, the conditions of the examination of legality of the declaratory acts issued by the National Integrity Authority.

37. **Article 6 (Competence of the Anticorruption Chamber of the Chişinău Court of Appeal):** Under this draft provision, “Within the Chisinau Court of Appeal, the Anticorruption Chamber is established, which hears appeals and cassation appeals against decisions issued in the first instance by the Anticorruption Court, as well as other cases given according to the law within its competence”.

38. **Article 7 (Jurisdiction of the Supreme Court of Justice):** Under this draft provision “[t]he Supreme Court of Justice hears appeals against judgments handed down by the Anticorruption Chamber of the Chişinău Court of Appeal, as well as other cases given according to the law within its jurisdiction”.

39. The Venice Commission and DGI note that, despite the creation of special first instance and appeal courts specialising in anticorruption cases, the draft law does not provide for the creation of a specialised chamber within the Supreme Court of Justice (SCJ) acting as a third instance. In order to achieve the aim of establishing a “system of specialised courts”, with judges having in-

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<sup>13</sup> CDL-AD(2016)007, Rule of Law Checklist, §36.

<sup>14</sup> See e.g. ECtHR (GC) *Sanchez v. France*, judgment of 15/05/2023 §124.

depth knowledge in the field of anticorruption, since there is no specialisation foreseen for the SCJ, and also in light of the aforementioned general lack of case-law uniformity in the country and the reported high rate of third instance appeals,<sup>15</sup> the Commission and DGI are of the opinion that consideration should be given to the creation of a specialised anticorruption panel or chamber also (as is the case with the ACCCA) in the SCJ, which, according to the authorities' remarks of 29 September 2023, may be possible by decision of the SCM itself.

**40. Articles 8-9 (Composition and organisation of the AC and the ACCCA):** These draft provisions provide that the AC will have 15 judges and the ACCCA six judges. The explanatory note indicates that in 2022 “a total of 738 files on corruption offenses... were examined of which 474 outstanding files from previous years”. However, no data analysis has been provided as to the adequacy of the above numbers of judges in order for them to be able to adjudicate in practice corruption-related cases in a reasonable time, as required notably by Article 6 ECHR.

41. During the mission to Chişinău a number of interlocutors, including the Minister of Justice, indicated that in their opinion six judges in the ACCCA may not suffice in practice to deal with corruption-related cases. The Minister of Justice also indicated that her Ministry plans to collect relevant statistical data in order to evaluate the adequacy of the number of judges provided for by the draft law. The Venice Commission and DGI consider it necessary that the authorities carry out a detailed data analysis in order to ensure that the above envisaged numbers of judges will be adequate in practice in order to adjudicate on corruption-related cases in a reasonable time, in line with Article 6 ECHR and the case-law of the European Court of Human Rights. Also, given that the new anticorruption instances may be composed of persons without judicial experience (see selection criteria below), in order to enhance the effectiveness of the newly created instances it is advisable that the law provide that these instances are composed of at least one person with previous judicial experience.<sup>16</sup>

**42. Article 10 (Criteria for selection of judges of the AC and of the ACCCA):** Draft Article 10 provides for three specific “professional qualities and skills” required to hold the position of a judge of the AC and in the ACCCA. These are: a) the ability to understand and analyse legal situations falling within the competence of the courts of the anticorruption judicial system; b) clarity of written and verbal expression; c) experience relevant to the position.

43. These provisions appear to be in line with the Council of Europe Committee of Ministers Recommendation CM/Rec(2010)12 on judges: independence, efficiency and responsibilities according to which “[d]ecisions concerning the selection and career of judges should be based on objective criteria pre-established by law or by the competent authorities. Such decisions should be based on merit, having regard to the qualifications, skills and capacity required to adjudicate cases by applying the law while respecting human dignity”. It is noted that the European Court of Human Rights' case-law has clarified that judges appointed on the basis of merit means “judges who fulfil the requirements of technical competence and moral integrity to perform the judicial functions required of it in a State governed by the rule of law”.<sup>17</sup>

44. Draft Article 10 also provides for certain “conditions” concerning professional experience and personality criteria necessary for one to be a candidate judge in the AC and in the ACCCA. These provisions also appear to be in line with the CCJE Opinion (2012) No. 15 on the Specialisation of Judges according to which (§44) specialised judges may have a variety of professional experience before their appointment: “Professional judges may become specialist judges by several means. It may be by means of experience gained either as a

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<sup>15</sup> UNDP, Effective sanctions for corruption offences – Specialized anti-corruption courts/panels – International experiences and proposal for Moldova, 2021, p.90.

<sup>16</sup> Such a provision is contained in Article 31§12 of the Ukrainian Code of Criminal Procedure concerning the composition of anticorruption instances.

<sup>17</sup> ECtHR (GC), *Guðmundur Andri Ástráðsson v. Iceland*, judgment of 01/12/2020, §220.

specialist lawyer before appointment as a judge or as a result of experience in specialist work following the appointment as a judge. Alternatively, the specialist judge may have received specific training in a specialist area of the law or in a non-legal area and then been appointed to a specialist court or deal with specialist cases in a general court.”

45. However, the Venice Commission and DGI note that the draft law, unlike Article 6 of the Law on the status of judges, which is also an organic law, makes no reference to major basic conditions for a judge’s candidature including the Moldovan nationality, knowledge of the Romanian language, clean criminal record, legal capacity and graduation from the National Institute of Justice. The authorities are invited to clarify the reasons for this deviation and/or consider amending the Law on the status of judges.

46. In addition, the condition of “an irreproachable reputation, since there are no reasonable suspicions about him/her committing acts of corruption...as well as meets the criteria of financial and ethical integrity” lacks clarity. The Venice Commission and DGI propose that the authorities consider the modification of the relevant provision and the replacement of the above unclear condition by an objectively verifiable one, such as clean criminal, or asset assessment (by NIA), records (cf. Article 6 of Law on the status of judges).

47. Also other additional “conditions” are “the professional qualities and skills necessary to exercise the function of a judge” of the AC or ACCCA. This also lacks clarity and may be considered superfluous, hence it may be erased, since “specific qualities and skills” are already provided for in draft Article 10.

48. Lastly, the draft provisions containing the “conditions” state “with the exceptions provided for by this Law”. However the only candidature exception cited is the one of para 4 of draft Article 10 (employment as prosecutor in the last seven years in the Anticorruption Prosecutor’s Office), in order, according to the explanatory note, to avoid recusals of prosecutors engaged in investigating cases which may later be brought to courts. It is advisable to clarify in Article 10 if any other exceptions are also covered by this provision and, if this is the case, clarify the relevant provisions of the draft (or other relevant) law containing these exceptions. It is also advisable to clarify if the criteria for selection of anticorruption judges would apply in addition to the general criteria concerning ordinary judges (provided for by the Law on the status of judges).

**49. Article 11 (Selection process for the position of judges at the AC and the ACCCA):** The pre- and selection process appears to be guided by the principles of transparency and openness, in accordance with Council of Europe standards<sup>18</sup> and Article 116§5 of the Constitution<sup>19</sup> which is welcomed. Specifically, under draft Article 11§1 the judges “shall be selected through a public selection, which shall include the following stages: a) pre-selection of candidates by a pre-selection commission established ad hoc by the Superior Council of Magistracy; b) selection of candidates by the Superior Council of Magistracy from among eligible candidates. Under draft Article 11§2, “Information on the initiation of the competition and pre-selection shall be published on the official website of the Superior Council of Magistracy at least 20 days before the deadline for submission of applications”.

50. It is recalled that under the CCJE Opinion (2012) No 15 on the Specialisation of Judges (§53) “The guiding principle should be to treat specialist judges, with respect to their status, in no way differently from generalist judges. Laws and rules governing appointment, tenure, promotion, irremovability and discipline should therefore be the same for specialist as for generalist judges.” Also, the Commission has opined that “care should be taken to ensure that the procedure for

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<sup>18</sup> See also CDL-AD(2014)008, Opinion on the draft Law on the High Judicial and Prosecutorial Council of Bosnia and Herzegovina, §76; CCJE Opinion No. 10 (2007) on the Council for the Judiciary at the service of society, §50.

<sup>19</sup> “Decisions on the appointment of judges and their careers must be taken on the basis of objective criteria based on merit and a transparent procedure, in accordance with the law...”.

the appointment of anti-corruption judges does not deviate more than necessary from the general appointment procedure (e.g. when it comes to the qualifications evaluation of candidates)".<sup>20</sup>

51. In view of the above, a number of ambiguities and questions arise from draft Article 11 which are addressed below.

52. According to draft Article 11§4 the pre-selection commission would consist of three international experts and three representatives of CSOs. Although draft Article 11§7 provides that the SCM will "decide on the winners of the selection and propose to the President of the Republic of Moldova the appointment or...the transfer of the nominated candidates", the SCM is excluded from the very important, substantive pre-selection procedure, its role being limited to the designation only of the three CSOs representatives. In this context it is recalled that under Article 121 of the Constitution the SCM is "the safeguard for the independence of the judicial authority", while under Article 123§1 of the Constitution the SCM "shall ensure [inter alia] the appointment, transfer, secondment" of judges.

53. During the mission to Chişinău the Venice Commission delegation was informed that the SCM vetting procedure had been finalized and that the SCM was operational. The authorities, by their remarks of 29 September 2023, submitted that the Judicial Selection and Evaluation Board of the SCM is not yet operational. The Commission and DGI welcome the authorities' submission that once the Board becomes operational the duties of the pre-selection commission will be assumed by the Board.

54. Article 11§4 concerning membership of the pre-selection commission raises questions of clarity. It provides that membership "may be held by persons who are qualified in the field of law... and enjoy an irreproachable reputation". The authorities noted in their written remarks that the notion of "irreproachable reputation" is mirrored from (pre-vetting) Law no 26/2022. The authorities may consider adding certain objective criteria to the above notion in order to ensure legal clarity and foreseeability.

55. The question of the involvement of internationals needs to be addressed. Foreign involvement in anti-corruption matters is not unusual in international comparison. It is at times considered that only international involvement may ensure citizens' trust in the impartiality of the process. The Venice Commission has previously supported it, as an exceptional measure, including in the Republic of Moldova. In particular, the selection of the candidates to the position of member of the SCM was carried out by an Evaluation Committee, which has a mixed composition comprising three members proposed by the "development partners" of the Republic of Moldova.

56. The Venice Commission and DGI consider the involvement of "international experts delegated by the development partners" in the pre-selection procedure to be an exceptional measure and should therefore naturally be limited in time.<sup>21</sup> The authorities in their written remarks noted that the membership of development partners follows the practice under the Law on pre-vetting. The authorities indicated in their written remarks that the SCM may add selection clarification criteria through a regulation. In the view of the Venice Commission and DGI, development partners should invite applications from suitable candidates to be nominated by them and should conduct a competitive process to find the most suitable nominees according to criteria to be specified in advance. It is essential to ensure high transparency at all stages of the appointment procedure, while political involvement in this

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<sup>20</sup> CDL-AD(2017)020, Ukraine - Opinion on the Draft Law on Anticorruption Courts and on the Draft Law on Amendments to the Law on the Judicial System and the Status of Judges (concerning the introduction of mandatory specialisation of judges on the consideration of corruption and corruption-related offences), §51.

<sup>21</sup> CDL-AD(2017)020, Ukraine - Opinion on the Draft Law on Anticorruption Courts and on the Draft Law on Amendments to the Law on the Judicial System and the Status of Judges (concerning the introduction of mandatory specialisation of judges on the consideration of corruption and corruption-related offences), §51.

procedure should be avoided.<sup>22</sup> This applies, *mutatis mutandis*, also to the CSO representatives who, according to the draft law, would be appointed by the SCM.

57. Draft Article 11§5 provides that the first stage pre-selection decision would be adopted “by a majority vote of the members present”. The Commission and DGI are of the opinion that, in order to safeguard the legitimacy and authority of the pre-selection commission, the regulations to be adopted by the SCM should clearly provide for a minimum number of members who should take part and vote in the above procedure as well as the necessary quorum.

58. Also, it is noted that, unlike draft Article 12, draft Article 11 contains no deadlines for the selection and relevant decision-making procedure. The Commission and DGI note with satisfaction the authorities’ remarks of 29 September 2023 according to which the SCM may set a general deadline and intermediary deadlines for the stages of preselection to steer the process of selection of candidates and ensure that it takes place as fast as possible.

59. It is also noted that it is not clear if these appointment decisions may be subject to review. It is recalled that under the Council of Europe Committee of Ministers Recommendation CM/Rec(2010)12 (§48), “an unsuccessful candidate [judge] should have the right to challenge the decision, or at least the procedure under which the decision was made”. The same position has been taken by CCJE in its Opinion No. 21(2018) Preventing Corruption among Judges (§25), noting that the right to challenge appointment decisions aims to “ensure objectivity and transparency in the process”. Thus, the Commission and DGI recommend that the draft law contain a cross-reference to the applicable legislation (Administrative Code) which, according to the authorities’ written remarks, provides for review of the SCM decisions.

**60. Article 12 (Appointment of judges of the AC and of the ACCCA):** Under this provision the decisions of the SCM appear to be binding on the President of the Republic who will issue in 30 days upon receipt of the proposals the appointment decrees.<sup>23</sup> However draft Article 12§1 provides that “if further examination of the candidate’s file or information held by a public authority about the candidate is necessary, this deadline may be extended by 15 days.” The Commission and DGI consider this sentence unclear and would recommend a cross-reference by the draft law to Law no 544/1995 on judicial organisation which, according to the authorities’ remarks of 29 September 2023, provides relevant procedural details.

**61. Articles 12-13 (duration of terms of office of AC and ACCCA judges and investigating judges):** The office terms for judges are foreseen to be of six years and of the investigating judges (appointed from among the AC judges) of three years. The explanatory note considers the six-year duration of judges as necessary to ensure rotation and prevent “unethical practices”. The three-year duration of the office terms of investigating judges is based on Article 15 of Law no 514/1995 on judicial organisation. The Venice Commission and DGI recommend that the authorities amend the draft law providing for a staggering procedure of rotation thus avoiding that all judges change at the same time, a situation that would seriously disrupt the efficiency and effectiveness of justice, a concern voiced also by a number of interlocutors during the mission to Chişinău.

**62. Article 13 (Investigating judges of the AC and their jurisdiction):** The competence of those judges seems to be confined to the judicial control over the procedural actions performed by prosecutors in cases falling within the competence of the Anticorruption Court (see draft Article 5§2) and judicial control of the activity of the Anticorruption Prosecutor’s Office (see draft Article IV§5). The draft law provides that the investigating judges shall be appointed from among the judges of the AC for a term of three years. The authorities, by their

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<sup>22</sup> CDL-AD(2017)020 idem.

<sup>23</sup> It is noted that under Article 116§2 of the Constitution, the President of the Republic may reject only once a judicial candidacy proposed by the SCM.

remarks of 29 September 2023, clarified that the SCM is competent to decide on the number of investigating judges having a flexibility to increase or decrease them according to the actual needs. .

**63. Article 14 (President and Vice-President of the AC):** Under this provision “the President and Vice-President of the Anticorruption Court are selected from among the appointed or transferred judges in the established manner and with the duties provided for in the Law on judicial organization”. Under Article 16§3 of the Law on judicial organisation “presidents and vice-presidents of the courts are appointed by the Superior Council of Magistracy for a term of 4 years... They may be reappointed to these positions, but not more than 2 successive terms.” The Commission and DGI recommend that the draft law contain a cross-reference to Article 16 of Law no. 514/1995 regulating the (judicial and/or administrative) tasks of court presidents and vice-presidents, which would be applicable also to the AC.

64. As regards the procedure of these appointments, it is noted that the Commission has welcomed a system of election of court presidents by the judges of the same court by secret ballot which is in line with the requirements of the principle of internal independence of the judiciary.<sup>24</sup> The Commission and DGI recommend that the authorities consider and apply this system of election.

**65. Article 19 (Monitoring the integrity of judges of the AC and of the ACCCA):** This draft provision provides for two major measures: a) “full annual verification of all declarations of assets and personal interests...submitted in accordance with the law, publication of results on the official website of the National Integrity Authority and information of the Superior Council of Magistracy”; b) “monitoring the lifestyle of judges...including their family members, in accordance with the legal procedure, by the Superior Council of Magistracy *ex officio*, based on information received from individuals and legal entities, media and other open sources of information, indicating the lack of correspondence between the lifestyle of judges with the income declared by them. For monitoring purposes, the Superior Council of Magistracy may request from natural and legal persons of public or private law, including financial institutions, documents and information necessary to carry out the assessment”.

66. As regards a), during its mission the Venice Commission delegation was informed by NIA that the latter should carry out the assets and personal interests verification. The authorities in their remarks of 29 September 2023 clarified that the consequences of a possible finding of an illegal/irregular act are regulated by Law no 133/2016 on the declaration of assets and personal interests.

67. As regards the provision of the draft law providing for publication of this information on the website of the NIA, it is recalled that under the CCJE Opinion (2018) No. 21 on Preventing Corruption among judges “in countries where a system of asset declaration exists, due attention should always be given to the proportionality of the details of the respective regulation. Disclosure to stakeholders outside the judiciary should only be done on demand, and only if a legitimate interest is credibly shown. Confidential information should never be divulged and the privacy of third parties such as family member should be protected even more strongly than that of the judges”.

68. The Venice Commission and DGI also recall that under the European Court of Human Rights case-law when a system of dissemination of data of tax-payers is established, the competent domestic authorities (including Parliament when it examines the relevant legislation) should perform a proper balancing exercise between the competing interests and,

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<sup>24</sup> CDL-AD(2014)031, Joint Opinion of the Venice Commission and the Directorate of Human Rights (DHR) of the Directorate of Human Rights and the Rule of Law (DGI) of the Council of Europe, on the draft Law on Amendments to the Organic Law on General Courts of Georgia, §84.

at least in substance, have due regard not only to (i) the public interest in dissemination of the information in question but also to (ii) the nature of the disclosed information; (iii) the repercussions on and risk of harm to the enjoyment of private life of the persons concerned; (iv) the potential reach of the medium used for the dissemination of the information, in particular, that of the Internet; and also to (v) basic data protection principles including those on purpose limitation, storage limitation, data minimisation and data accuracy. In addition, the existence of procedural safeguards may also play an important role for safeguarding one's right to respect for private and family life under Article 8 ECHR.<sup>25</sup>

69. The Commission and DGI note that the authorities in their remarks of 29 September 2023 submit that the publication of information on the website of the NIA is regulated by Law no. 133/2016 aiming to ensure compliance with Council of Europe standards and the case-law of the European Court.

70. As regards b), the Commission and DGI underline that such an interference with the right to respect for judges' private or family life will be in breach of Article 8 of the ECHR unless it can be justified under paragraph 2 of Article 8 as being "in accordance with the law", pursuing one or more of the legitimate aims listed therein, and being "necessary in a democratic society" in order to achieve the aim or aims concerned.<sup>26</sup> Under the European Court's case-law in these cases "domestic law must be sufficiently foreseeable in its terms to give individuals an adequate indication as to the circumstances in which and the conditions on which the authorities are entitled to resort to measures affecting their rights under the Convention... The law must, moreover, afford a degree of legal protection against arbitrary interference by the authorities. The existence of specific procedural safeguards is material in this context. What is required by way of safeguard will depend, to some extent at least, on the nature and extent of the interference in question".<sup>27</sup>

71. The Venice Commission and DGI are of the opinion that the monitoring of "the lifestyle of judges" is not necessary and should be removed from the draft law, given that the verification of assets and personal interests is in itself an adequate and sufficient means for monitoring judges' integrity.

72. Also, the Commission and DGI are of the opinion that draft Article 19 b) raises a number of additional, serious concerns that need to be addressed by the authorities.

73. First, it is noted that under Article 123§1 of the Constitution, "The Superior Council of Magistrates shall ensure the appointment, transfer, secondment, promotion and imposing of the disciplinary sentences against judges." Monitoring of the lifestyle of judges is not a competence of the SCM provided for by the Constitution. Thus, the addition of this competence appears to necessitate a constitutional amendment. In addition, the draft law should clarify the monitoring procedure to be followed by the SCM and the consequences that such monitoring may have on judges. Even though procedural details may be regulated by secondary legislation (regulation) some basic elements of such a monitoring procedure and especially its consequences should better be included in the law.

74. Secondly, the draft law contains vague terms which should be avoided in order to prevent possible arbitrary and abusive practices. For example, it is not clear what is meant by "information received from other open sources of information", and it is not clear how (on the basis of which criteria and under which procedure) the SCM may judge that there is "lack of correspondence between the lifestyle of judges with the income declared by them". In this context, the Commission and DGI stress as well that procedural safeguards should be included in the draft

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<sup>25</sup> ECtHR (GC), *L.B. v. Hungary*, judgment of 09/03/2023 esp. §§122 and 128.

<sup>26</sup> See e.g. ECtHR *Ovcharenko and Kolos v. Ukraine*, judgment of 12/01/2023, §91ff.

<sup>27</sup> *Ibid.* §94.

law in order for it to be compliant with ECHR and the above-mentioned case-law of the European Court.<sup>28</sup>

75. Lastly, the Commission and DGI note that draft Article 19 c) is open-ended, providing for the adoption of “other measures to control and monitoring the integrity of judges”. The Commission and DGI are of the view that this provision should be removed because it clearly lacks the clarity (foreseeability), required notably by ECHR and the European Court’s case-law.

**76. Article 23 concerning transfer of pending cases to the AC:** The draft law provides that, one month after the entry into force of the law, pending cases may be transmitted to the AC from a generalist court, if the latter has not “started examining the merits of the case” or “has not completed the examination of the case on [its] merits”. During the mission to Chişinău the authorities indicated that what is meant by the above is that such cases will be transmitted to the AC if a hearing has not taken place. It is recommended that this objective criterion be introduced in the law for the sake of clarity.

#### IV. Conclusion

77. By letter of 2 August 2023, the President of the Republic of Moldova, Ms Maia Sandu, submitted a request for an opinion of the Venice Commission on the draft “Law on the anti-corruption judicial system and on amending some normative acts” (hereinafter: “the draft law”).

78. The draft law’s two major aims are the creation of a system of specialized courts offering “an increased degree of independence to judges” and the acceleration of corruption-related proceedings.

79. The determination and efforts made by the President of the Republic and other authorities to fight and eliminate corruption are welcome. Evidently, it is up to the national authorities to decide on the creation of specialised anticorruption instances.

80. While it falls ultimately within the competence of the Moldovan authorities themselves to decide whether the prevailing situation in the country’s judicial system creates sufficient basis justifying the creation of specialised anti-corruption instances, the Venice Commission and DGI are of the view that the objections raised by several stakeholders in the Republic of Moldova warrant a thorough impact assessment of the draft law including an analysis of the root causes of the problems which this reform aims to address as well as of its advantages and disadvantages and impact, including in the light of the current vetting process, noting also the authorities’ plan to carry out such an assessment.

81. In this context it is recommended that the authorities continue and enhance their efforts aiming at the finalisation of the judges’ vetting process, who may then be allocated corruption-related cases, and at reinforcing the efficiency of anticorruption bodies and mechanisms well as of the courts dealing with corruption cases.

82. As regards the draft law, should the authorities decide to proceed with it, the Venice Commission and DGI make the following key recommendations:

- In order to respect the principle of the unity of the judiciary, an amendment of the title of the draft law as well as all the removal of references in the specific provisions to an “anticorruption judicial system” are recommended.

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<sup>28</sup> See also CDL-AD(2016)009, Final Opinion on the revised draft constitutional amendments on the Judiciary (15 January 2016) of Albania, §51.

- In light of the purported aim of establishing a “system of specialised courts” with judges having in-depth knowledge in the field of anticorruption, consideration should be given to the creation, by decision of the SCM, of a specialised anticorruption chamber also in the SCJ (as is now foreseen for the Chişinău Court of Appeal).
- A detailed data analysis should be carried out in order to ensure that the envisaged numbers of judges, especially at the ACCCA, will be adequate in practice in order to adjudicate on corruption-related cases in a reasonable time, in line with Article 6 ECHR and the case-law of the European Court of Human Rights.
- It is recommended that the SCM, once its Selection and Evaluation Board is operational, be entrusted with the selection procedure, without introducing a preselection procedure to be carried out by an additional body.
- The regulations to be adopted by the SCM should provide for a minimum number of members who should take part and vote in the selection, the necessary quorum, as well as general and intermediary deadlines in the pre- and selection procedures in order to ensure legal clarity (foreseeability) and efficiency. Also, it is recommended that a cross-reference be made in the draft law to the applicable legislation (Administrative Code) which provides for judicial review of appointment decisions.
- Monitoring of “the lifestyle of judges” by the SCM is not necessary and should be removed from the draft law since the asset and personal interests verification is in itself an adequate and sufficient means for monitoring judges’ integrity.

83. The present Opinion contains also other recommendations addressed to the authorities.

84. The Venice Commission and DGI remain at the disposal of the Moldovan authorities for further assistance in this matter.