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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

REPUBLIC OF MOLDOVA

**REVISED DRAFT LAW ON THE AMENDMENT OF LAW No. 26/2022 ON
SOME MEASURES RELATED TO THE SELECTION OF CANDIDATES
FOR MEMBERSHIP IN THE SELF-ADMINISTRATIVE BODIES OF
JUDGES AND PROSECUTORS AND INFORMATION NOTE**

GOVERNMENT OF THE REPUBLIC OF MOLDOVA

DECISION No. _____
of _____ 2022

**on the approval of the draft Law on the amendment of Law no.
26/2022 on some measures related to the selection of candidates for
membership in the self-administrative bodies of judges and
prosecutors**

Government DECIDES:

It is approved and submitted to the Parliament for examination the draft Law on the amendment of the Law No. 26/2022 on some measures related to the selection of candidates for membership in the self-administrative bodies of judges and prosecutors.

PRIME MINISTER

Countersigns:
Minister of Justice

Draft

PARLIAMENT OF THE REPUBLIC OF MOLDOVA

LAW

on the amendment of the Law no. 26/2022 on some measures related to the selection of candidates for membership in the self-administrative bodies of judges and prosecutors

In order to strengthen the integrity and professionalism of the Supreme Court of Justice judges, to adjust the normative framework to the amendments to the Constitution operated by Law no. 120/2021 to amend the Constitution of the Republic of Moldova, to strengthen the role of the Supreme Court of Justice and to carry out an unique exercise to evaluate the ethical and financial integrity of the judges of the Supreme Court of Justice,

The Parliament adopts this organic law.

Art. . - Law no. 26/2022 on some measures related to the selection of candidates for membership in the self-administrative bodies of judges and prosecutors (Official Monitor of the Republic of Moldova, 2022, No 72, art. 103), is amended as follows:

1. The name of the law shall read as follows: "on measures related to the selection and evaluation of holders and candidates for certain positions in the justice system";

2. In Article 1:

the words "as well as" are excluded;

after the words " specialized of them," shall be supplemented with the words "of judges and candidates for the position of judge of the Supreme Court of Justice,".

3. Article 2:

shall be supplemented by paragraph (1¹) with the following content:

"(1¹) The provisions of this Law shall apply:

a) to the judges of the Supreme Court of Justice, in office, including those suspended;

b) to the candidates for the vacant positions of judge of the Supreme Court of Justice."

in paragraph (2) the text "in para. (1)" is replaced by "in para. (1) and (1¹)".

4. In Article 3:

the title shall read as follows: "Independent Evaluation Commission on the integrity of holders and candidates for certain positions in the justice system";

in paragraph (1), the words "candidates for membership of the self-administrative bodies of judges and prosecutors" shall be replaced by the words "holders and candidates for certain positions in the justice system".

5. The title of Chapter II shall read as follows: "EVALUATION OF CANDIDATES FOR MEMBERSHIP IN THE SELF-ADMINISTRATIVE BODIES OF JUDGES AND PROSECUTORS";

6. In Article 6 letter b), after the words "adopt decisions", shall be supplemented with the words ", or, where appropriate, reports";

7. It is supplemented with Chapter II¹ with the following content:

"CHAPTER II¹

EVALUATION OF JUDGES OF THE SUPREME COURT OF JUSTICE

Article 14¹. Subject of evaluation

(1) The subjects referred to in art. 2 para. (1¹) shall be evaluated in accordance with the procedure provided for in this Chapter.

(2) Judges of the Supreme Court of Justice, who within 20 days from the entry into force of this Law submit a dismissal application, shall not be evaluated. The dismissal application may be withdrawn only within the 20-day period. From the date of submission of the dismissal application, the respective judge of the Supreme Court of Justice shall not participate in the adoption of judicial acts of disposition.

(3) The Superior Council of Magistracy shall examine the dismissal application and decide on it within 10 days of the expiry of the period referred to in paragraph (2). The judges who have

dismissed in this way may not become judges again for 7 years.

Article 14². Results of the evaluation of Supreme Court of Justice judges

(1) Following the evaluation, the Evaluation Commission shall issue a reasoned report containing the proposal on the passing or non-passing of the integrity evaluation. The non-passing of the evaluation shall result in the automatic dismissal of the judge until the decision of the Superior Council of Magistracy on the evaluation is issued. The provisions of art. 13 para. (2) - (5) shall also apply correspondingly to the report of the Evaluation Commission.

(2) The report of the Evaluation Commission shall be submitted within 3 days to the Superior Council of Magistracy with a copy of the evaluation file.

Article 14³. Examination by the Superior Council of Magistracy of the results of the evaluation¹) The Superior Council of Magistracy shall examine the results of the judge's evaluation in a public meeting within 30 days of receiving the report of the Evaluation Commission. The representative of the Evaluation Commission and the evaluated judge in person shall be entitled to present their position.

(2) The Superior Council of Magistracy shall, by reasoned decision:

a) accept the report of the Evaluation Commission and decide on the passing or non-passing of the evaluation;

b) reject the report of the Evaluation Commission and orders once the evaluation procedure to be resumed, if it finds circumstances that could lead to the passing or non-passing of the evaluation;

c) upon receipt of the report of the Evaluation Commission, following the resumption of the evaluation procedure provided for in letter b), accept the report in accordance with letter a) or reject it and find that the evaluation was passed or not passed.

(53) The decision of the Superior Council of Magistracy on the non-passing of the evaluation shall result in the dismissal of the judge, in accordance with art. 25 para. (1) letter n) of the Law No. 544/1995 on the status of the judge and its consequences.

(64) The judge dismissed from office under para. (54) shall not have the right to exercise the position of judge for 7 years, to be admitted and to exercise the ~~positions and~~ professions of: prosecutor, lawyer, notary, authorized administrator, bailiff as well as positions of public dignity for 5 years from the date of the final decision of the Superior Council of Magistracy.

Article 14⁴. The appeal against the decision of the Superior Council of Magistracy

(1) Notwithstanding the provisions of the Administrative Code, the Decisions of the Superior Council of Magistracy provided for in art.14³ para. (3)(4) may be appealed to the Supreme Court of Justice within 5 days of receiving the reasoned decision of the SCM. The appeal shall be submitted to the Superior Council of Magistracy, which within 3 days shall be delivered to the Supreme Court of Justice.

(2) The appeal shall be examined by a panel consisting of 3 judges of the Supreme Court of Justice who have passed the evaluation and have not worked in the Supreme Court of Justice until December 31, 2022.

(3) The Supreme Court of Justice shall admit the appeal only if it finds the existence of circumstances that could have led to the passing of the evaluation and, in this case, shall order the evaluation procedure to be resumed.

Article 14⁵. Evaluation of candidates for the position of Judge of the Supreme Court of Justice

(1) Candidates for the position of judge of the Supreme Court of Justice shall be evaluated in accordance with this Law. Only candidates who have passed the evaluation shall be admitted

to the contest.

(2) The consequences of failure to pass the evaluation shall apply accordingly to candidates for the position of judge of the Supreme Court of Justice."

8. In Article 9 para. (2), the words "Upon initiation of the evaluation procedure" shall be ~~repealed~~ replaced by the words "On the basis of the information received pursuant to para. (1)".

9. In Article 10:

paragraph (1) is ~~excluded~~ repealed;

paragraph (5) shall be supplemented at the end by the sentence "The candidate is obliged to keep confidential the personal data in the evaluation material submitted by the Evaluation Commission."

paragraph (8) is ~~excluded~~ repealed;

paragraph (10) shall read as follows:

"(10) If the Evaluation Commission finds that the information provided by candidates or by other natural or legal persons in accordance with paragraph (3) does not correspond to the reality, it shall refer the matter to the competent bodies ~~with-in order~~

~~a-view~~ to ~~verify the documentation~~ establishing and sanctioning the alleged illegal facts."

10. Article 12:

shall be supplemented with paragraph (2¹) with the following content:

"(2¹) The video recording of the public part of the hearing shall be placed on the Evaluation Commission's official website.";

paragraph 4 letter d) after the words "its integrity" shall be supplemented with the words ", if he/she was previously unable to present them".

11. In Article 13:

in paragraph (5), the word "serious" shall be replaced by the word "reasonable";

paragraph (7) shall read as follows:

"(7) The decision of the Evaluation Commission drafted in Romanian language shall be delivered to the candidate at his/her e-mail address and to the institution responsible for the organization of the elections or, as the case may be, of the contest. On the same day, the Evaluation Commission shall publish on its official website the information whether the candidate has passed or failed the evaluation."

12. In Article 14 paragraph (8) letter b) ~~after the word shall read as follows:~~

~~"b) admitting the application for „appeal“; shall be supplemented with the words „if it finds that there are circumstances that could have led to the evaluation passing and ordering the Evaluation Commission to resume the evaluation procedure of the candidate.“~~

13. In Article 15 paragraph (1) the words "December 31, 2022" shall be replaced by "June 30, 2023".

Art. II ~~—~~ Final and transitional provisions

(1) This Law shall enter into force on the date of its publication in the Official Monitor of the Republic of Moldova.

(2) The Superior Council of Magistracy:

a) ~~within 15 days from the date of entry into force of this Law shall notify a contest for the filling of 6 positions of judges of the Supreme Court of Justice, in order to select candidates from among lawyers, prosecutors and university professors in the field of law. The candidates' files shall be submitted to the Superior Council of Magistracy within one month from the date of announcement of the contest;~~

b) shall notify a contest for the filling of the other vacant positions of judge of the Supreme

~~Court of Justice within 5 working days from the date of occurrence of the vacancy;~~

~~e)~~ shall submit to the Evaluation Commission within 5 working days of receipt the files of the candidates for the position of judge of the Supreme Court of Justice;

~~eb)~~ within a maximum of two weeks after the evaluation of at least 3 candidates has been passed, shall conduct the contest for the position of judge of the Supreme Court of Justice;

~~ce)~~ ~~within 15 days of the entry into force of the law, shall adopt the regulations on the selection of judges of the Supreme Court of Justice;~~

f) within 1 month from the date of entry into force of this Law, shall bring its normative acts in line with this Law.

(3) Evaluation Commission:

a) one month after the entry into force of this Law, shall start the evaluation procedure of the judges of the Supreme Court of Justice who have not submitted an application for resignation in accordance with art. 14¹ para. (2) of Law No. 26/2022;

b) within 5 working days from the receipt of the file of the candidate for the position of judge of the Supreme Court of Justice, shall start the evaluation procedure of the candidate;

c) within 6 months from the entry into force of this Law, shall evaluate all candidates for the position of judge of the Supreme Court of Justice.

~~(4) Supreme Court of Justice:~~

~~a) within 8 months of the entry into force of this Law, shall propose to the Superior Council of Magistracy the candidates for the position of President and Vice-President of the Supreme Court of Justice, respectively;~~

~~b) within 11 months of the entry into force of this law, shall approve the Regulations of the Supreme Court of Justice, the new organization chart of the Court and the staffing status and shall appoint the Jurisconsult and the Secretary General of the Court.~~

(54) The judges of the Supreme Court of Justice in office on the day of the entry into force of this Law, who have passed the evaluation, shall continue their activity within the Court.

PRESIDENT OF THE PARLIAMENT

INFORMATIVE NOTE

to the draft Law on the amendment of the Law no. 26/2022 on some measures related to the selection of candidates for membership in self-administrative bodies of judges and prosecutors

1. Name of the author and, where appropriate, of the participants in the development of the draft

The draft law on the amendment of the Law no. 26/2022 on some measures related to the selection of candidates for membership in the self-administration bodies of judges and prosecutors was drafted by the Ministry of Justice.

To the elaboration of the draft law, *the Working Group for the elaboration of the Concept for the reform of the Supreme Court of Justice and the draft law on the Supreme Court of Justice* has contributed, established by the Order of the Minister of Justice No. 190 of July 25, 2022. The Working Group includes representatives of the Supreme Court of Justice, the Superior Council of Magistracy, the courts of appeal, the Chisinau Court, the Superior Council of Prosecutors, the Union of Lawyers of Moldova, the Legal, the Legal Commission on Appointments and Immunities, the Parliament, the P.A. "Centre of Legal Resources of Moldova", etc. The Working Group met several times and formulated, including in writing, proposals for improving the Concept of Reform and the draft normative act.

2. The conditions that led to the development of the draft normative act and the aims pursued.

This draft law has been developed in the context of the reform of the Supreme Court of Justice (hereinafter - SCJ), which stems from the commitment made by the current Government following the vote of confidence given by the citizens in the July 11, 2021 elections regarding the reset of the judicial system, the implementation of the *Strategy on ensuring the independence and integrity of the justice sector for the years 2022-2025 and the Action Plan for its implementation*¹, as well as in the context of candidate status in the EU accession process, through the fulfilment of conditionality in the justice sector.

It should be noted that initially this draft law was an integral part of the draft law on the Supreme Court of Justice, forming part of the transitional provisions of that law. Following the recommendations received in the process of public consultation, the initial draft was divided into 2 separate draft laws, according to their subject matter:

1) the draft Law on the SCJ;

2) the draft Law on the amendment of the Law no. 26/2022 on some measures related to the selection of candidates for membership in self-administrative bodies of judges and prosecutors.

The reorganization of the SCJ represents an obligation assumed by the Republic of Moldova at the national and international level. This reform is one of the basic conditionalities resulting from the RM-EU Association Agreement. Considering the aspirations to join the European Union, this reform cannot in any case be postponed for a long time, otherwise it will irremediably jeopardize the reform of the legal system and the cleaning of the judiciary.

We remark the fact that in the process of elaboration of the regulations' elaboration on the assessment of the integrity of SCJ judges, the recommendations from the Venice Commission from 2019, 2021, 2022 were taken into consideration and solutions to the critical aspects were identified.

As opposed to the 2019 situation, the vast majority of the SCJ judges are the same, and there has not been a qualitative improvement of their activity, on the contrary, it has worsened, and other internal mechanisms of the auto-administration organ have not worked.

¹ https://www.legis.md/cautare/getResults?doc_id=129241&lang=ro, adopted by the Parliament of the Republic of Moldova, Law No. 211 of 06.12.2021

That being said, we present the information from the Report "[Disrupting Dysfunctionality: Resetting Republic of Moldova's Anti-Corruption Institutions](#)"² regarding the critical situation in the judicial system:

„Several unfortunate examples of cases of judicial corruption were brought to the public's attention in 2016, revealing that allegedly 16 judges were complicit in money laundering activities of about USD 70 billion in the Russian Laundromat scheme³. The role of the courts in this conspiracy was significant given the fact that it is the courts that have issued the orders for obviously suspicious transfers of funds. The cases against the judges are still pending. Although the SCM has been aware of the involvement of judges in these cases from 2012, they reportedly did not take action until 2016, long after the damage to the Moldovan banking system had been done.

Several judges involved in such cases were either evaluated "very good" in their performance reviews by the relevant SCM bodies, promoted to administrative positions in district courts or Courts of Appeal during 2014-2016.⁴ The Anticorruption Prosecutor's Office did not disclose that it had discontinued the criminal investigation in respect of these judges.⁵ On October 27, 2020, the SCM accepted the request of five of these judges investigated in the "Russian Laundromat" case to have their suspensions from office quashed and to return to work. Subsequently, two other judges were found guilty of knowingly issuing a court decision contrary to law but exempted from criminal liability due to the prescription of criminal liability; another was acquitted. Eleven cases are pending in court and multiple recusal requests in respect of judges who are examining the cases are being put forward by lawyers, which leads to postponements.⁶

As to other allegations of corruption in respect of judges, although criminal investigations have been initiated, only one judge was found guilty of taking bribes ("passive corruption") and sentenced to seven years of imprisonment. Another judge was found guilty of the same offence in the first instance court but acquitted subsequently by the Supreme Court of Justice.⁷

The Article 307 of the Criminal Code of the Republic of Moldova on "wilfully rendering a judgment, sentence, decision or ruling in breach of the law" is seen as a mechanism which endangers judicial independence⁸. Several judges have been subjected to criminal investigation under this provision, the constitutionality of which was confirmed by the Constitutional Court in 2018. That decision stated that a judge can be prosecuted "only on the basis of indisputable evidence that would prove the intention of the judge in issuing a judicial act in breach of the law"⁹.

² The Report is available in Romanian and English, at the link: <https://ccia.md/reports/ruperea-cercului-vicios/>

³ The information from the Press Conference of the Anti-Corruption Prosecutor's Office and the National Anti-Corruption Center on September 21, 2016 can be found at the link: <https://anticoruptie.md/ro/dosare-de-coruptie/doc-cum-a-functionat-spalatoria-ruseasca-scheme-prezentate-de-procuratura-anticoruptie>

⁴ «Only an empty shell» - The undelivered promise of an independent judiciary in Moldova, The International Commission of Jurists, 2019, <https://www.icj.org/wp-content/uploads/2019/03/Moldova-Only-an-empty-shell-Publications-Reports-Mission-reports-2019-ENG.pdf>.

⁵ Report on Monitoring the Selectivity of Criminal Justice, Freedom House Moldova, 2021, https://freedomhouse.org/sites/default/files/2021-11/fh-Moldova_Report-Selective-Justice-2021_v2-Eng.pdf.

⁶ "Laundromat" judges' files. Some have called for the recusal of the judges, others are demanding compensation from the state, Ziarul de Garda, 27 June 2021, www.zdg.md/stiri/stiri-justitie/dosarele-judecatorilor-din-laundromat-unii-aucerut-recuzarea-judecatorilor-altii-cer-despagubiri-de-la-stat/.

⁷ Three convicted judges for corruption for the last two years, Anticoruptie.md, 2016, <https://anticoruptie.md/ro/stiri/trei-judecatori-condamnati-pentru-acte-de-coruptie-in-ultimii-doi-ani>

⁸ «Only an empty shell» - The undelivered promise of an independent judiciary in Moldova, International Commission of Jurists, 2019, www.icj.org/wp-content/uploads/2019/03/Moldova-Only-an-empty-shell-Publications-Reports-Mission-reports-2019-ENG.pdf

⁹ Constitutional Court Decision no. 12 of 28 March 2017, available at <https://constcourt.md/ccdocview.php?tip=hotariri&docid=612&l=ro?tip=hotariri&docid=612&l=ro>. The press release in English available at <https://constcourt.md/libview.php?l=en&idc=7&id=985&t=/Media/News/Criminal-Liability-of-Judges-Arising-from-a-Wilful-Rendering-of-an-Illegal-Decision-Constitutional?l=en&idc=7&id=985&t=/Media/News/Criminal-Liability-of-Judges-Arising-from-a-Wilful-Rendering-of-an-Illegal-Decision-Constitutional>.

A 2019 Freedom House Report monitoring the selectivity of criminal justice in the Republic of Moldova¹⁰ highlighted uneven treatment across similar criminal cases which, according to prosecutors are related to the Bank Fraud case. Now fugitive politician and entrepreneur Ilan Shor received preferential treatment from the relevant investigative and court bodies. Delays in court proceedings were also a symptom of selective justice in the Shor case: out of the 98 court hearings monitored, 68 were postponed¹¹. The assessment indicated that selective justice resulted from undue cooperation between politicians and judges, and the selectivity of justice has two main manifestations: favorable or unfavorable to subjects with political affiliation, depending on how close the subjects are to the political forces that control justice

A subsequent 2021 Freedom House Report on the same topic was conducted in 2021¹². It revealed several criminal cases with similar characteristics but with different procedural approaches, notably differing and inconsistent assessments of NIA's fact-finding documents when starting criminal prosecution for illicit enrichment; different judicial outcomes in similar cases with identical criminal typologies, etc. Fiftysix percent of all monitored court hearings were postponed, leading to delays. The monitoring also confirmed clear favouritism: in one high profile example of a complex set of criminal allegations with respect to defendants in the Platon group cases likely to have had a positive outcome¹³ were carried out quickly, despite the multitude of participants in the case and the change of judges.

A recent LCRM report on the application of criminal sanctions in the Republic of Moldova¹⁴ found that courts in Moldova appear to be conscious of the importance of the specific circumstances of the defendant in the sentencing but apply a formalistic approach with respect to the criteria for individualisation. Although courts do pay attention to the issue of proportionality in sentencing, the mechanisms provided for in the legislation to ensure the balance between the impact of the deed and the perpetrator, on the one hand, and the liability and punishment merited, on the other, do not seem to have the desired effect¹⁵. This tendency is observed in the reasoning of decisions in general, and also in the reasoning of the criteria for individualisation, especially in regard to proportionality, and mitigating or aggravating circumstances. The SCJ and first instance courts outside Chisinau seem to be the most problematic in this regard.

On the matter of sanctions applied in corruption cases of over 400¹⁶ analysed judgments issued by the SCJ between January 2017 and December 2020, a 2022 LRCM

¹⁰ Report on Monitoring the Selectivity of Criminal Justice, Freedom House Moldova, 2019 https://freedomhouse.org/sites/default/files/2020-02/Judicial_Integrity_Selective-Criminal_Justice_ENGLISH_FINAL.pdf.

¹¹ In cases involving opposition subjects that seemed likely to be convicted, court proceedings moved with remarkable alacrity, while those with a chance of being acquitted were subject to extensive delays. This phenomenon was reversed in cases involving subjects close to the ruling party.

¹² Report on Monitoring the Selectivity of Criminal Justice, Freedom House Moldova, 2021, https://freedomhouse.org/sites/default/files/2021-11/fh-Moldova_Report-Selective-Justice-2021_v2-Eng.pdf.

¹³ Veaceslav Platon, who gained ownership in various Moldovan banks and insurance companies in the post-Soviet economy and maintained strong ties to Russian bankers involved in money laundering <https://ccia.md/wp-content/uploads/2022/07/CCIARaport-ENG.pdf>.

¹⁴ Report on the application of criminal sanctions in the Republic of Moldova, Legal Resources Centre from Moldova, 2022, <https://crjm.org/wp-content/uploads/2022/05/Report-on-application-of-criminal-sanctions-in-RM.pdf>.

¹⁵ In the paper "From Judgments to Justice—How Can We Achieve Better Judicial Reasoning in Moldova?" drafted by the Legal Resources Centre from Moldova, the authors identified the main causes of adopting poorly reasoned judgments, and analysed the legal shortcomings and practical constraints that weaken the efforts of the Moldovan judiciary to ensure proper quality of reasoning. These deficiencies stem from inconsistent judicial practice and the limited impact of the efforts to standardize judicial practice; judges' workload and its uneven distribution; flawed, superficial reasoning in court judgments; pre-established deficient behaviour of current judges inculcated in new judges; shortage of personnel that assists judges; and compliance with statutory time limitations, often to the detriment of other requirements, including those concerning the reasoning of judgments. The paper is available at https://crjm.org/wp-content/uploads/2021/11/2021-22-10-De-la-hotarari-judecatoresti-la-justitie_2021-RO_FINAL.pdf.

¹⁶ Represented 95% of the total number of judgements publicly available on the website of the SCJ at that time.

report¹⁷ established that in over 90% of corruption cases the subjects were engaged in or the acts themselves were of petty corruption. Seven percent of the cases relate to subjects or cases of grand corruption. Justice in corruption cases has been served within an average of 3.5 years. Every second examined case was re-examined at least once.

From the total sanctions imposed by judges, eight out of ten cases the convicted did not spend a day in jail. Fifty-five percent of district court judgements are quashed. The solutions of the Court of Appeal's judges are different in 48% of cases (the rate of acquittals in corruption cases is at least four times higher than in other criminal cases).

The publication of court decisions provides insight on how a judge applies the law. In 2020¹⁸, based on analysis of 1,340 judicial decisions adopted from 1 January 2018 to 31 March 2019, LCRM found that the anonymization of court decisions in the Republic of Moldova is inconsistent. Such inconsistencies were found across 55% of corruption cases. In 149 decisions related to corruption cases (28% of the total of 530 decisions analysed), the judges (with the exception of the SCJ) abused the practice in such areas as naming the perpetrators or instigators of a crime. In 118 decisions (22%), the name of the judge, prosecutor, police officer, mediator, bailiff, notary or lawyer were undisclosed. There are several cases in which the amount of the bribe was kept secret in court decisions in high profile cases. These examples show the excessive and improper anonymization from public view of key elements of such court decisions, which reduces the impact of corruption prevention through well-reasoned court judgments, deterrence and transparency to civil society.

There have been cases in which courts of first instance and at the appeal level, including in high profile criminal cases, have examined cases completely hidden from public view. For example, the case of former Prime-Minister Vladimir Filat, who was convicted of passive corruption and traffic of influence, was entirely examined in closed hearings, despite the defendant's request for an open trial. Two other cases related to the Bank Fraud, were reportedly examined entirely behind closed doors. Although courts can exclude the public from all or part of a trial, this is to be done only under exceptional circumstances, strictly justified on a case-by-case basis and be subject to ongoing judicial supervision and review. The International Commission of Jurists has expressed concern at the use of closed hearings particularly in criminal cases in which there is a public interest.¹⁹

We are mentioning that in the 2019 Opinion (p. 18-19, 37-40, 84) as well as the 2021 one, the Venice Commission has already found the extraordinary situation in which the Republic of Moldova finds itself, in regard to the severe state of justice. From 2019, the state has aggravated, and a whole blockage in the justice system was created. Moreover, it has been reiterated that in the principle the state authorities decide that in extraordinary cases, when internal mechanisms fail, urgent and radical mechanism can be applied, e.g: the evaluation mechanism from Ukraine, Albania and the pre-vetting in Moldova.

Moldova has taken from the lessons learned from the experience of other states and has staged -the evaluation exercise and resetting of the judiciary system, starting with the pre-vetting mechanism for the SCM and SCP member evaluation. However, this mechanism is not enough. Thus, with the implication of the auto-administration- body, the judges of the highest and most problematic court from the Republic of Moldova, are to be assessed extraordinarily.

¹⁷ Judgments and sanctions applied in corruption cases – how uniform is the legal practice?, Legal Resources Centre from Moldova, 2022, https://old.crim.org/wp-content/uploads/2022/01/2022-01-25-studiu-sanctiuni-coruptie-versiunea_pre-machetata-site.pdf.

¹⁸ Transparency of the Judiciary versus Data Protection. An Analysis on the Publication of Court Decisions in the Republic of Moldova, Legal Resource Centre from Moldova, 2020, <https://crim.org/en/transparency-of-the-judiciary-versus-data-protection-an-analysis-on-the-publication-of-court-decisions-in-the-republic-of-moldova/>

¹⁹ «Only an empty shell» - The undelivered promise of an independent judiciary in Moldova, International Commission of Jurists, 2019, <https://www.icj.org/wp-content/uploads/2019/03/Moldova-Only-an-empty-shell-Publications-Reports-Mission-reports-2019-ENG.pdf>.

In this context, we will reiterate the rationale for carrying out the reform of the SCJ ~~and drafting a new law on the SCJ~~, which are equally applicable to ~~this draft law~~ the evaluation of SCJ judges:

~~• The lack of effective methods of standardising judicial practice has led to non-uniform judicial practice and many unpredictable rulings on the application of the law to the resolution of similar disputes. Independent studies and surveys among specialists confirm that the practice of the SCJ is not uniform, even though, by law, ensuring uniform application of the law has been the main task of the SCJ for over 25 years.~~

~~— The SCJ has given numerous solutions that are difficult to understand. Invalidating the 2018 elections in Chisinau, criminal convictions in sensitive cases for politicians, which it itself later reviewed, or upholding manifestly abusive decisions, including those issued against inconvenient judges, are just some examples. On the other hand, some judges of the SCJ are currently suspected by prosecutors of committing offences and the SCM has agreed to prosecute them.~~

~~• The blockage over the last 3 years of the activity of the Plenum of the SCJ and its inability to effectively exercise its powers relating to the unification of judicial practice. At present, judicial practice in the Republic of Moldova is known to be non-uniform, with the adoption of various divergent decisions in similar circumstances, pronounced even by the panels of the SCJ. Such unpredictable practice is explained by specialists by the large number of judges in the SCJ and by the widespread phenomenon of corruption, up to the highest level of the courts. Access to justice is an illusory right in such a system, and one of the main reasons for the reorganisation of the SCJ is to ensure effective access to justice for all litigants.~~

~~• The existence of many categories of cases in which the SCJ examines not only the legal aspects but also the factual aspects, sometimes intervening arbitrarily (a fact confirmed by the convictions of the Republic of Moldova at the ECtHR, including for violation of the principle of security of legal relations).~~

• The increased risk of influencing judges of the SCJ due to lack of integrity, confirmed by the promotions and appointments to the SCJ of persons with integrity problems, a fact known to the general public, including through several journalistic investigations carried out in this regard. In the last 10 years there have been strong suspicions about the promotion of judges to the SCJ for reasons other than professionalism and independence. Out of the 19 judges of the SCJ appointed from 2013 to 2020, 5 were selected through contests in which there were no counter-candidates. It is believed that in those 5 contests other candidates were not allowed to participate. Another 6 judges were promoted to the SCJ for unclear reasons, although they did not have the highest score in the contest.

• The inefficiency of the current regulatory framework regulating the mechanism for evaluating the integrity of judges of the SCJ, yet at the moment, the streamlining of integrity verification procedures is part of the Reform Strategy for Justice and the areas of support offered by development partners.

• The impossibility of access to the SCJ for judges with less than 10 years of service and for representatives of other legal professions (lawyers, prosecutors, university professors). The reform of the SCJ is also necessary in the context of the constitutional amendments that entered into force on April 1, 2022, which excluded the requirement for judges of the SCJ to

be career judges. The new SCJ will be composed of both career judges and former prosecutors, lawyers and university professors in the field of law, a model that is the most common in European countries.

- The lack of security for citizens to be protected from possible abuses and infringements of their rights and the low level of confidence of society in the integrity of SCJ judges, in the legality and fairness of their decisions and in the justice system in general. In 2021, public confidence in the justice system was very low at just over 19%²⁰.

- The inefficiency of the evaluation procedure of the judges is already determined, as over the last couple of years, they were automatically rated the qualification "very good", without them being subjected to real and credible verification.

- The inefficiency of the disciplinary procedure, which was started "on command", only against judges who were not loyal to the SCM, or who criticized the faulty management of the judicial system.

- The SCJ reform is necessary in the context of the strategy for assessing the integrity of the actors in justice, including the SCJ judges, who later will have the mandate to verify the legality of the decisions regarding the results of the extraordinary evaluation, including internal of the judges and prosecutors.

Based on the above, the Government is proposing a profound reform of both the judicial system in general and the SCJ in particular.

The draft of the new law on the SCJ, [which will be promoted simultaneously with this draft-law](#), aims at reorganising the SCJ, which will allow it to become a court of cassation. In this context, the finalities pursued by the promotion of this draft law are to:

- 1) to increase the quality of the act of justice;
- 2) to create a mechanism for the evaluation of the integrity of the current judges of the SCJ and of the candidates for the position of judge of the SCJ;
- 3) to ensure the appointment of impartial judges of integrity to the SCJ.

The call for the exercise of extraordinary evaluation of the judicial system in a phased manner (at the moment in the Republic of Moldova, members of the SCM and the SCP are being evaluated extraordinarily, and the judges of the SCJ are to be evaluated as well) is justified by the fact that internal mechanisms have failed many times, and systemic corruption and lack of integrity have chronically affected the justice system.

It is important to specify that the evaluation exercise proposed by this draft law will be an unrepeatable one. This fact is expressly provided for in the preamble of the draft law: "In order to strengthen the integrity and professionalism of the Supreme Court of Justice judges, to adjust the normative framework to the amendments to the Constitution operated by Law no. 120/2021 to amend the Constitution of the Republic of Moldova, to strengthen the role of the Supreme Court of Justice and to carry out an unique exercise to evaluate the ethical and financial integrity of the judges of the Supreme Court of Justice, the Parliament adopts this organic law".

~~At the same time, repeated calls for this exercise without the support and endorsement of~~ An additional argument in support of this thesis is that without the support and positive approval from the Venice Commission and the support from development partners it will not be possible to call for a similar exercise to evaluate the SCJ judges, and it is assured that a similar exercise cannot be repeated.

We underline that the evaluation of the integrity of the judges of the SCJ is a first step in the evaluation of the judicial system. Thus, the role of the SCJ in its new composition will be to verify the legality of decisions on the results of the evaluation of judges and prosecutors.

²⁰ "White Book of Justice: Recommendations for an independent and integer justice", page 11, link: http://ipre.md/wp-content/uploads/2021/08/Cartea-Alba-a-Justitiei_FINAL_20_09_2021_RO_web_final.pdf

With reference to relevant policy documents, we note:

- action 3.4.1. "Reform of the Supreme Court of Justice, reduction of the number of judges, revision of competences and transformation of the Supreme Court of Justice into a court of cassation that would ensure uniform judicial practice" of the Government Action Plan for 2021-2022, approved by Government Decision No. 235/2021;
- objective 1.2.2, action "a) Elaboration of the normative framework on the extraordinary (external) evaluation of judges and prosecutors in accordance with the recommendations of the Venice Commission" of the Action Plan for the implementation of the Strategy on ensuring the independence and integrity of the justice sector for the years 2022-2025, approved by Law No. 211/2021;
- objective 2.2.2. "Improvement and development of mechanisms for ensuring uniform judicial practice" of the Action Plan for the implementation of the Strategy on ensuring the independence and integrity of the justice sector for the years 2022-2025, approved by Law No. 211/2021.

3. Main provisions of the draft and highlighting new elements

Evaluation of SCJ judges and candidates for vacancies of SCJ judges

The draft regulates the evaluation procedure for current judges of the SCJ, as well as for candidates for non-judges. This will consist of the evaluation of ethical and financial integrity and will be carried out by the Independent Commission for the evaluation of integrity of candidates for membership in the self-administrative bodies of judges and prosecutors, established on the basis of the *Law no. 26/2021* (hereinafter referred to as the Evaluation Commission), which will operate according to the procedure regulated by the said law.

The Evaluation Commission will collect and analyse information on the ethical and financial integrity of both the current judges of the SCJ and the candidates for vacant positions in the SCJ.

As a result, it was proposed to supplement the *Law No. 26/2022* with a separate chapter dedicated to the manner and consequences of the evaluation of judges of the SCJ and candidates for the positions of judges of the SCJ. Consequently, [the expansion of the circle of subjects subject to the evaluation according to the mechanism regulated by the cited law determined it became necessary](#) to change the name of the law concerned to "Law on measures related to the selection and evaluation of candidates for certain positions in the justice system".

Following the evaluation, the Evaluation Commission will draw up a report on the promotion or non-promotion of the evaluation of ethical and financial integrity, which will be sent to the SCM, together with a copy of the evaluation file. The failure of the evaluation will result in the automatic suspension of the evaluated judge, which will last no longer than ~~45~~30 days, during which time the SCM will take a decision based on the following options:

- accepts the report of the Evaluation Commission and decides to promote or not to promote the evaluation;
- rejects the report of the Evaluation Commission and orders a one-off reopening of the evaluation procedure, if it finds circumstances that could have led to the promotion or non-promotion of the evaluation.

After the evaluation has been repeated, the Evaluation Commission shall send the report again to the SCJ, which shall either accept the report or reject it and find that the evaluation was promoted or not.

[We emphasize that the project regulates the right of both the evaluation Commission representative and the evaluated person to present their position/opinion before the- SCM.](#)

The decision of the SCM on the non-promotion of the evaluation will result in the dismissal of the judge.

To this end, art 25 para. (1) of *Law No. 544/1995 on the status of judges* should be supplemented with a new ground for dismissal - "n) failure to promote the evaluation of ethical and financial integrity, provided for in Law No. 26/2022". Currently, art. 25 para. (1) of *the Law on the Status of Judges* already contains 15 grounds for dismissal from office, of which only

1 concerns the commission of disciplinary offences, the others being grounds for dismissal from office.

It should be noted that the amendment of *the Law on the Status of Judges* will be carried out through a draft law amending the related regulatory framework. This will create the legal prerequisites for the SCM to adopt a decision on the dismissal from office of SCJ judges who will not promote the integrity evaluation without going through a disciplinary procedure. [This regulation is in accordance with p. 50 of Opinion CDL-AD\(2022\)024 of the Venice Commission, which emphasized that "The evaluation/vetting process described in the drafts may by no means be equalled with the disciplinary proceedings. As the Venice Commission has noted previously, "\[e\]valuation and disciplinary liability are \(or should be\) two very different things." Disciplinary liability requires a disciplinary offence. A negative performance, which leads to a negative overall result of an evaluation, can also originate from other factors than a disciplinary offence. Therefore, a proposal that negative overall evaluation results should lead to the instigation of disciplinary proceedings raises problems.](#)

Dismissal from office on the grounds of failure to promote the integrity assessment will have the effect of deprivation of the right to exercise the office of judge for 7 years, to be admitted and to exercise the functions and professions of: prosecutor, lawyer, notary, authorized administrator, bailiff as well as public dignity for 5 years from the date of the final decision of the Superior Council of Magistracy.

We admit that it is possible that several of the current judges of the SCJ will pass the integrity evaluation. In this case, the situation will arise where the number of SCJ judges who have promoted the evaluation will be higher than the number of positions for career judges.

In order to respect the principle of irremovability of judges, it is proposed that all current judges of the SCJ who will promote the integrity evaluation will continue their activity within the SCJ, without the need to be reconfirmed in office, until they reach the age limit, or until the occurrence of one of the grounds for their dismissal. In this context, we note that the reduction of the number of judges in the SCJ from 33 to 20 positions will take place gradually ([in this regard, see the final provisions of the draft Law on the Supreme Court of Justice and the arguments included in the related information note](#)).

Procedure for appeals

As regards the appeal procedure, the person who did not promote the integrity evaluation will be able to appeal the decision of the SCM to promote / not promote the integrity evaluation to the SCJ.

For this purpose, a panel of 3 judges who have promoted the evaluation and have not served in the SCJ until December 31, 2022 will be formed within the SCJ. This approach was generated by the need to avoid corporatism and subjectivism of the judges who are to examine the appeals submitted by their colleagues.

The panel will be of a temporary nature and once the evaluation process is completed, the judges in the panel will continue their activity within the SCJ.

For the proper functioning of the panel, including in the context of possible recusals, it is proposed that the SCM, within 15 days from the date of entry into force of the draft law, will announce the contest for the replacement of ~~six~~⁹ judges of the Supreme Court of Justice, with a view to selecting candidates from among lawyers, prosecutors and university professors in the field of law.

Guarantees for judges of the SCJ

We would like to point out that the term of office of the current judges will not automatically end once the new law on the Supreme Court of Justice enters into force. The terms of office of the current judges of the SCJ may be terminated on their own initiative, if they submit a resignation application to that effect ([art. 14¹ para.\(2\) from the draft](#)); or in circumstances beyond the judge's control, if there is compelling evidence of a lack of integrity following a negative result in the integrity evaluation ([art. 14³ para.\(2\) from the draft](#)).

We emphasise that judges of the SCJ who pass the assessment will continue their work [in SCJ](#).

[We point out that the grounds for dismissal are listed in art. 25 of the Law no.544/1995](#)

~~on the status of the judge and are not only related to disciplinary liability.~~

~~The Constitution of the Republic of Moldova, in its current wording, does not contain any express requirements regarding the dismissal of judges. We emphasize that even in the previous drafts, the Constitution did not contain express provisions on the body or procedure for dismissal of judges²⁴~~

~~The basic guarantee for judges not to be arbitrarily removed from office lies in the principle of irremovability, which is regulated in art. 116 para. (1) of the Constitution of the Republic of Moldova: "The judges of the courts shall be independent, impartial and irremovable, according to the law."~~

~~As a result, the details of the judge's irremovability, including the grounds and conditions for the judge's dismissal, are regulated in Law No. 544/1995 on the Status of Judges and Law No. 947/1996 on the Superior Council of Magistracy. We emphasise that these laws are organic laws, which develop the fields expressly set out in art. 72 para. (3) of the Constitution. As a result, the Constitution itself, in letter e) of the aforementioned article, establishes the legal basis for regulating by law several aspects of the judicial system, including those related to the dismissal of judges.~~

~~As mentioned above, the strongest guarantee of the independence of judges is their irremovability. This consists in the fact that they cannot be moved by transfer, delegation, secondment or promotion without their free consent and that they can only be suspended or released from office under the conditions laid down by the law governing their status. Non-removability should not be regarded as a privilege for judges, but rather as a guarantee for the judiciary. The Council of Europe, in point 3.4 of the 1998 European Charter of the Statute for Judges, provides for three exceptions to the application of the principle of irremovability, when:~~

- ~~1. it is permissible to move a judge without his or her consent as a disciplinary sanction;~~
- ~~2. if it has been pronounced in the case of a legal amendment of the judicial organisation; and~~

~~3. in the case of temporary assignment to assist a neighbouring court, in which case the maximum duration of such assignment is strictly limited by statute.~~

~~Regarding the dissolution or restructuring of a court, in order not to be a reason for dismissal of judges, p. 29 of the Beijing Declaration provides that all current members of the court must be reinstated in their original position or appointed to another court of equivalent status and duration. Court members for whom no alternative position can be found must be fully indemnified.~~

~~According to the recent amendments to the Law of the SCM (amendments in force from July 29, 2022), the dismissal of judges is made by a decision of the SCM, which confirms the basis for dismissal provided by law in each case.~~

~~If this competence of the SCM is to be related to the constitutional provisions, then we note that the powers of the SCM, neither previously nor currently, are limited to the provisions of art. 123 para. (1) of the Constitution. Other categories of powers are also set out in Law No. 947/1996 on the Superior Council of Magistracy.~~

AWe reiterate that, according to the proposed draft, the final decision on the result of the evaluation of judges (or candidates for judges) will be taken by the SCM.

Thus, through the proposed mechanism, the SCM will be able to fully intervene in order to ensure the avoidance of possible shortcomings or abuses that could affect the independence of judges, which will be in line with the rigours of the relevant constitutional provisions.

With reference to the guarantees for judges covered by the draft law proposed for examination, we mention:

- the draft expressly regulates the decisive role of the SCM in relation to the decision of the Evaluation Commission: it can confirm or annul it, returning the file for re-examination;
- the draft also provides for adding a new ground to the list of legal grounds for dismissal "failure to promote the evaluation of ethical and financial integrity, provided for in Law

No. 26/2022"; it is difficult to imagine how a judge who has not promoted the evaluation of financial and ethical integrity can continue to work in the judicial system. This will inevitably affect the image and credibility of the entire judicial system and, directly, the decisions taken in private.

- access to justice for the negatively evaluated judge is ensured by regulating the procedure for challenging the SCM's decision in court;
- judges who promote the evaluation, but exceed the number of places available for career judges, will continue their activity in the SCJ.

In addition, we point out that the Constitutional Court, through its jurisprudence, has found that "judges of the courts are independent, impartial and irremovable, according to the law", and has enshrined the independence of the judge to ensure the exclusion of any influence from other authorities. However, this guarantee cannot be interpreted as meaning that the judge is not responsible. The fundamental law, according to art. 116 para. (1), does not only confer prerogatives, which are the basis of the concept of "independence", but also sets certain limits, which are circumscribed by the phrase "according to law" (Decision of the Constitutional Court No. 22/2013, §68).

As a result, the mechanism for terminating the mandate of judges who fail to promote the evaluation would not be in conflict with the provisions of the Constitution.

We are aware that there is a risk that some of the current SCJ judges will not promote the integrity evaluation. Keeping them in the SCJ after the results of the evaluation become public will denigrate the image of the judicial system, will reduce citizens' trust in the judicial system and will reduce to zero all the efforts made to unblock the system and clean it from corruptible elements. In the context, another consequence of not promoting the integrity assessment is the prohibition by law to exercise the function of judge for 7 years and to be admitted/to exercise the professions of prosecutor, lawyer, notary, authorized administrator, bailiff, as well as positions of public dignity for 5 years from the date when the -SCM's decision becomes definitive.

As a result, we strongly support the idea of termination of mandate only for judges who will not promote integrity evaluation.

Other amendments to Law No. 26/2022

Besides the necessary amendments for the evaluation of the integrity of judges and candidates for the positions of judges of the SCJ, the draft includes several changes concerning the work of the Evaluation Commission.

Thus, it is proposed to extend the mandate of the Evaluation Commission for another 6 months (amendment of art. 15). This extension is necessary in order to finalise the evaluation procedure of the subjects of the evaluation established in *art. 2 para. (1) of the Law no. 26/2022* and for the evaluation of the judges of the SCJ.

Other amendments concern the working process of the Evaluation Commission. The need to make them derives from the current practice of the Commission, as well as from the fact that at the time of adoption of *Law No. 26/2022* it was practically impossible to prevent all the difficulties detected in practice. These amendments concern articles 9, 10, 12, 13 and 14 of the law- and concerns aspects related to the procedural deadlines established for the Evaluation Commission, the -manner of working with personal data, as well as the manner of publishing the Commission's decisions and the video recordings of the public part of the hearings. Amendment of art. 9 is necessary to exclude the inconsistency between para. (1) and para. (2), in fact the first paragraph referring to the initiation of the evaluation procedure. Exclusion of the 30-day verification period with a maximum extension of 15 days, provided by art. 10 para. (1) and (8) is necessary to allow the Evaluation Commission to verify the information received beyond the respective time limits.

Current experience has shown that that term is far too narrow and does not allow for a complex evaluation of the information subsequently presented. The introduction of the obligation to keep personal data for candidates who are given the opportunity to familiarize themselves with the assessment materials is important to prevent the disclosure of data to third parties.

4. Economic and financial regulatory
<p>In the part concerning the evaluation of the integrity of the judges of the SCJ, additional expenses from the state budget will be necessary for the remuneration of the national members of the Evaluation Commission for the period of their extended mandate, i.e. for a period of 6 months.</p> <p>Currently, the monthly allowance of a national member of the Evaluation Commission amounts to 63,910 lei. The amount required to pay the respective allowance for 3 national members for a period of 6 months will be:</p> <p>(63 910 lei * 3 members) * 6 months = 1 150 380 lei.</p> <p>The necessary expenses for the payment of the mentioned allowances will be covered from the financial means provided in the budget proposals for the year 2023 for the process of extraordinary evaluation of judges, presented by the Ministry of Justice to the Ministry of Finance.</p> <p>As regards the expenses that may occur in connection with the change in the number of judges of the SCJ and the composition of the court, we reiterate what was explained in the Information Note of the Draft of the new law on the SCJ:</p> <p>"Regarding the financial impact of the project, we emphasize that the draft budget of the SCJ for the year 2023 has been prepared on the basis of the number of 33 judges and 220 staff units for the Secretariat of the SCJ.</p> <p>We stress that the number of positions of judges of the SCJ proposed by this draft does not exceed the current number of judges of the SCJ. Also, even if all judges of the SCJ currently in office promote the integrity evaluation, the number will not exceed 33.</p> <p>As a result, the implementation of the draft does not involve any additional expenses from the state budget.</p> <p>The implementation of the proposed reform will take place as a result of the gradual reduction of the number of judges in the SCJ. Thus, additional expenses from the state budget could occur in the part related to the dismissal of judges of the SCJ, who will not want to be subject to the evaluation by the payment of the dismissal indemnity."</p>
5. Method of incorporating the draft into the system of normative acts in force
<p>For the proper implementation of the evaluation process of SCJ judges, it is necessary to amend art. 25 para. (1) of the <i>Law no. 544/1995 on the Status of Judges</i>. It should be noted that these amendments have already been included in the draft law on amending the normative framework related to the law on the SCJ.</p>
6. Approval and public consultation of the draft
<p>Following from the fact that this draft law was originally an integral part of the draft law on the Supreme Court of Justice, the information on the compliance with the stages of preparation of the draft law on the Supreme Court of Justice (included in the similar section of the informative note of that draft) is equally applicable to this draft law.</p>
7. Findings of the anti-corruption expertise
<p>In order to comply with the provisions of art. 34 para. (1) of the <i>Law no. 100/2017 on normative acts</i> (hereinafter - <i>Law no. 100/2017</i>), the State Chancellery, by letter no. 18-23-8152 of August 18, 2022, concurrently with the public consultations, submitted the draft normative act to the National Anti-Corruption Centre for expertise.</p>

State Secretary

/Electronically signed/

Veronica MIHAILOV-MORARU