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Newsletter

GOOD GOVERNANCE AND JUSTICE REFORM

After more than one year of debates, the package of laws on integrity has been adopted

The three important laws (also called the package of laws on integrity) were published on 30.07.2016: Law no. 132 of 17.06.2016 on the National Integrity Authority (NIA), Law no. 133 of 17.06.2016 on declaring assets and personal interests and Law no. 134 of 17.06.2016 on amending and supplementing certain legislative acts (which amends the related legislation). The foregoing laws entered into force on 01.08.2016, except the provisions related to submission of electronic declarations of assets and personal interests, which will enter into force on 01.01.2018.

The package of laws on integrity instituted a new system of declaration and control of assets and private interests in the public service, which should be more effective than the current one, provided that the new laws are implemented in a proper and diligent manner. The main innovations brought by the package of laws refer to expanding the list of subjects and object of declaration, the reorganization of the National Integrity Commission (NIC) into the National Integrity Agency (NIA), with a more efficient structure and much broader powers, as well as increased liability for breach of norms related to the declaration of assets, personal interests and resolving conflicts of interest. NIA will be led by a president and vice-president selected following a competition by the National Integrity Council and appointed by the President of the country. The National Integrity Council, the governing collegial body of NIA, is composed of 7 members appointed by various entities, including two civil society representatives selected through a competition by the Ministry of Justice. Direct verifications will be carried out by the integrity inspectors, selected by NIA through a contest organized in full compliance with the regulations approved by the National Integrity Council. Among the new competencies of the integrity inspectors are finding substantial differences in assets of the declaration subject incurred while in office/public function and request the court the confiscation of the unjustified assets value found during the carried out verification. Substantial difference means any amount exceeding 20 average monthly salaries in economy between the acquired assets and income obtained by the subject of declaration together with his/her family members, cohabiting partners (concubine) during his/her mandate/public function. Additionally, the integrity inspectors will determine whether or not a contravention (misdemeanor) was committed, examine the cases and apply contravention sanctions. Another important innovation relates to the provision that administrative acts issued/adopted or legal documents concluded personally or through a third person in a situation of

> **The package of laws on integrity establishes a new effective system of declaration and control of assets and private interests in the public service, if it implemented correctly and diligently**

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real conflict of interest are null and void, unless the cancellation thereof would damage the public interest.

The package of laws has some flaws or inaccuracies that could cause confusion in practice. For instance, it is unclear why of the 7 members of the National Integrity Council remained only two civil society representatives and express reference to journalists has been removed. Also, although the list of subjects of declaration has been extended and this is welcomed, it is not clear why for a number of positions the obligation to indicate family members (i.e., membership of the management, administration, revision or control bodies within non-profit organizations or commercial companies and other circumstances stipulated in art. 4 para. (2) j), k), l) and m) of Law no. 133) is not included. These provisions and possibly others could be modified during the implementation of the three laws.

Reorganization of judicial map – reducing courts from 44 to 15

Law no. 76 of 21.04.2016 on the reorganization of the judicial map came into force on 01.07.2016, except for the provisions related to the liquidation of existing specialized courts (military and district commercial courts), which will come into force on 01.04.2017. The law provides for merging several courts (of first instance), so as from 01.01.2017 there will be only 15 first instance courts (currently there are 44 first instance courts). Under the law, de facto unification of courts premises/buildings will be done gradually until 31.12.2027, upon creation of appropriate conditions to this end, according to the plan approved by the Parliament on the Government's proposal. This reform, if implemented properly, will create conditions for improving the quality of justice and efficient administration of public funds allocated to the judiciary.

Reorganization of the judicial map, if properly implemented, will create conditions for improving the quality of justice and efficient administration of public funds allocated to the judiciary

Law no. 76 is a necessity and priority of the Justice Sector Reform Strategy (JSRS), which had to be adopted back in 2013. The adoption of the law is an important achievement. However, it unjustifiably stipulated the termination of mandates of all court presidents and vice-presidents as of 01.01.2017 (art. 4 para. (1) of the Law) and organization by then of contests by the SCM for the vacant positions of presidents and vice-presidents. This provision is not justified and may further increase judges' resistance to reform. By terminating only the mandates of the presidents and vice-presidents of courts that merge or are liquidated would be possible to ensure greater continuity and gradual implementation of the reform. At the same time, the law allows the court presidents whose mandate ended following this law, to run two more times for the office of president or vice-president in the courts led by them before the reorganization (art. 4 para. (2)). This provision could mean keeping in office the presidents/vice-presidents who are "loyal". These concerns can be mitigated only if the SCM conducts fair contests and appoints court presidents and vice-presidents strictly in accordance with the criteria provided by law, based on the candidates' merits. Moreover, merging those five courts in Chișinău raises some questions about the appropriateness and manner of achieving it, which seems to raise resistance from many judges in Chișinău to the respective reform. Discussions on this subject and leaving the merger of Chișinău courts' premises for the last period dedicated to the implementation of the law could reduce the tension and resistance to reform.

Last but not least, the reform is ambitious and requires a comprehensive approach for proper implementation. Resistance to reforming the judicial map is large enough both within the judiciary, including among members of the SCM, which is a key institution for the proper implementation of the law, as well as within other public authorities. The specifics of optimization of the judicial map require continuous efforts made by authorities to promote and explain the benefits of this reform to judges and court users, to prevent misunderstanding of the reform and manipulation of public opinion. Otherwise, there is a risk for the reform to remain only on paper or to be distorted.

Transitional and final provisions of the draft law provide for the development by the Government, within 2 months after the entry into force of the law, of a Plan for the construction of new buildings and/or renovation of existing buildings. The Agency for Courts Administration has already developed a draft plan.

After long hesitations, the sixth judge to the Constitutional Court has been appointed

On 30.10.2014, a position of judge to the Constitutional Court (of the two who are appointed by the Government, other two being appointed by the Parliament and remaining two by the SCM) became vacant. On 27.11.2015, following a transparent contest, the Commission for the selection of the candidate for judge to the Constitutional Court proposed the candidacy of Mr. Veaceslav ZAPOROJAN to the Government. On 29.03.2016, several civil society organizations expressed their concern over the reluctance of the Government in appointing him to this position. On 07.06.2016, the Commission members addressed the

Government a request of either to appoint the selected candidate or to reject him, providing reasons for the rejection and organize a new contest. On 06.07.2016, the Government appointed Mr. Zaporojan to the position of judge to the Constitutional Court for a 6-year term. On 15.07.2016, he took the oath in the Parliament. Such a procedure of selecting a Constitutional Court judge was carried out for the first time in the history of the Republic of Moldova. Previously, candidates were appointed in the Government sittings without establishing any selection criteria and without a transparent selection procedure.

FUNCTIONING OF JUSTICE

SCM: judges of the Supreme Court of Justice who withhold the decision in „Basconslux" case cannot be held disciplinary liable because the decision is in force

On 22.04.2016 the Disciplinary Board sanctioned with a reprimand the SCJ judges Iulia SÂRCU, Galina STRATULAT, Iuliana OPREA, Ion DRUȚĂ for breaching of imperative legal norms and for a reasoning obviously contrary to legal reasoning. Sanctioned judges upheld the judgment of first instance (judge Garri BIVOL), who allowed the claims of the construction company "Basconslux" against the state budget, amounting to over MDL 14 million, for the demolition of the Republican Stadium. Judge Bivol was not sanctioned due to expiry of the term for holding him disciplinary liable.

According to the decision of the Disciplinary Board, public authorities selected "Basconslux" company without following a public procurement procedure (public tender), no written contractor agreement was concluded and, respectively, no agreement was registered with the State Treasury. The law in force stipulated unequivocally that failure to register a procurement contract leads to its nullity. Thus, the Disciplinary Board considered that the validation of the contract for demolishing the Republican Stadium, without compliance with these conditions, constituted a violation of imperative legal norms. Moreover, the Ministry of Finance (the author of the disciplinary notification) put forward other violations that were allegedly committed in examining the "Basconslux" claims, in particular, acceptance of the civil claim by judges in spite of expiry of the time limitation period (the demolition works were finished in 2007, and the civil claim was filed in 2013), admission of MDL 6 million penalty without explaining how and since when that amount was calculated etc.

The judge who issued the first-instance judgment in the „Basconslux" case could not explain why he had accepted a civil claim beyond the time limitation period and how the MDL 6 million penalty had been calculated. The Supreme Court of Justice upheld that judgment

Within the sitting of the Disciplinary Board, first instance court judge, Garri BIVOL, could not explain why he had accepted a request filed late or how he had calculated the penalty. He added that if he were assigned again such a file, he would have done the same and that demolition works were executed and someone had to pay. In the Disciplinary Board sitting, it was also found that the validity of the contract was ascertained by the judge on the basis of an undated and unstamped receipt of works act from the beneficiary authorities. Meanwhile, no document in the file reflects what happened to the goods obtained by "Basconslux" following the demolition of the stadium, which could have had a considerable value and belonged to the State.

The Decision of the Disciplinary Board of 22.04.2016 was challenged in the SCM by three sanctioned judges, Mr. Bivol, the Ministry of Finance and the Judicial Inspection. The Judicial Inspection also defended the sanctioned judges. The Inspection sought the recusal of the SCM member, Mrs. Tatiana RĂDUCANU, who previously has made a statement regarding the "Basconslux" case. The SCM accepted the recusal and removed her from examining the case. On 05.07.2016, the SCM upheld the complaints of the four judges and of the Judicial Inspection and quashed the decision of the Disciplinary Board. Essentially, the SCM argued that no other body outside courts can make a conclusion on the merits of a judgment, even if it is about violation of imperative legal norms and that judges cannot be held accountable for the opinions expressed in their judgments, except in cases when the judge's criminal abuse was found in a final criminal sentence. There is no public information if a criminal investigation has been initiated regarding the judgment issued in "Basconslux" case. The company "Basnconslux" builds apartments that are sold on advantageous terms to judges and their families, including judge Iuliana OPREA, who was on the panel that delivered the judgment in BASCONSLUX case.

One of the concerns related to the SCM conclusion in the "Basconslux" case is that de facto disciplinary liability of the SCJ judges for violation of imperative legal norms becomes impossible, while judges in lower courts are held liable for similar violations. This interpretation leads to the appearance of a feeling of impunity of the SCJ judges and encourages deficient judicial practices in the highest court.

The interim measure which favoured the embezzlement of MDL 20 million resulted in the dismissal of a judge

On 17.05.2016, SCM proposed the dismissal of Adela ANDRONIC, judge of Centru Court. The disciplinary sanction was applied for the disciplinary offense of breaching the imperative legal norms, issuing an illegal court order that favoured embezzling of over MDL 20 million from the account of the National Bureau of Auto Insurers (NBAI) and questioned the status of the Republic of Moldova in the international system of insurance "Green Card".

Basically, in a dispute between "Victoria Asigurări" and NBAI and other insurance companies, judge Andronic issued a court order for suspending the enforcement of the NBAI General Assembly's decisions from 13.01.2015 and prohibited the NBAI Administration Council and Executive Director to undertake actions or take decisions. This measure was later annulled by the Chișinău Court of Appeals on the grounds that it was issued in the absence of an order on initiation of a civil case signed by the judge. The judges of the Court of Appeals and subsequently the Disciplinary Board and the SCM qualified these circumstances as an implementation of the interim measure without initiating a proceeding, which is contrary to civil procedural legislation. When applying the sanction, the SCM also argued that the interim measure is not proportionate to the alleged purpose and that interim measures "*cannot be extensive, cannot lead to blocking the activity of legal entities (...) and cannot cause damages, severe consequences*".

The SCM proposed the dismissal of the judge who issued an interim measure that favoured embezzling over MDL 20 million from NBAI account and questioned the status of the Republic of Moldova in the international insurance system „Green Card"

Prior to the SCM decision, on 22.01.2016, the Disciplinary Board applied a warning to judge Andronic for the same case. The Disciplinary Board members thought the judge deserved a softer penalty because Mrs. Andronic had not been previously sanctioned and had not had a big backlog in examining cases. The SCM amended the sanction imposed by the Disciplinary Board, considering this argument insufficient. The SCM stated that in this case, the consequences of the interim measure were crucial, namely that the prohibitions imposed, for example, by foreclosing the Executive Director's access to the NBAI bank accounts, led to misappropriation of funds of over MDL 20 million from the NBAI accounts, which led, in turn, to the impossibility to issue an external financial guarantee in favour of the Council of Bureaux. This prompted the Council of Bureaux to recommend the Member States of the international system of insurance "Green Card" the suspension of the Republic of Moldova from the insurance system "Green Card". The same argument can be found in the separate opinion of Mrs. Domnica MANOLE to the decision of the Disciplinary Board of 22.01.2016, who supported a harsher sanction for Mrs. Andronic.

Judge left without immunity for interpretation of legal norms

On 14.04.2016, at the request of an initiative group for organization of a referendum to amend the Constitution, Domnica MANOLE, a judge at Chișinău Court of Appeals, quashed the decision of the Central Election Commission (CEC) of 30.03.2016 on the refusal to organize the constitutional referendum. The judge ordered CEC to adopt a decision on the initiation of the referendum to revise the Constitution. The judge noted that the initiative group collected the required number of signatures provided by art. 141 of the Constitution (200,000 signatures, including 20,000 from at least half of the administrative units existing in the year 2000. This constitutional provision was introduced in the year 2000. Back then, the Republic of Moldova was divided into 12 territorial units of second level).

The decision of the Court of Appeals was challenged by the CEC in the Supreme Court of Justice (SCJ). On 22.04.2016, the Supreme Court found that CEC's decision is lawful, quashed the decision of Chișinău Court of Appeals and dismissed the request of the initiative group. The SCJ concluded that the decision of 14.04.2016 was adopted with "incorrect interpretation of legal norms, applying a law that was not to be applied given its abrogation, exceeding limits of powers by the court by interpreting the Constitution and compelling the appellant to adopt a certain act, invoked by the appellant for the quashing of the impugned decision". The SCJ noted in particular that only the Constitutional Court may interpret the Constitution and that it is inadmissible to calculate the number of administrative-territorial units of the second level from the number of units existing back in 2000, as the law on administrative-territorial division in force from 2000 was abrogated in 2002.

On 23.05.2016, the CEC submitted a complaint to the General Prosecutor's Office on the commission of the offense by judge Manole provided by art. 307 of the Criminal Code (deliberate pronouncement of a judgment contrary to the law). The next day, on 24.05.2016, the Interim General Prosecutor requested the Superior Council of Magistracy's consent to initiate criminal proceedings against judge Domnica MANOLE, based on art. 307 par. (1) of the Criminal Code. It reproduced the arguments invoked by the SCJ on 22.04.2016.

By SCM decision no. 369/17 of 31.05.2016, the SCM accepted the request of the Interim General Prosecutor and issued its

consent to initiate criminal investigation. Three SCM members voted against. The remaining members voted for, including the Minister of Justice and the SCJ President. The SCM decision does not contain any reasoning for the decision taken. The SCJ judge, member of the SCM, Tatiana RĂDUCANU, in a separate opinion declared her disagreement with the SCM decision, arguing that it should have rejected the request of the Interim General Prosecutor. In support of her position, she mentioned that the notification actually refers to the interpretation of the law, containing only the arguments raised by the recourse court. The consent to initiate criminal investigation in this case sets a dangerous precedent for the independence of judiciary. The SCM sitting, in which the consent for criminal investigation was issued, was held behind closed doors, although judge Manole and her lawyer requested examination of the case in public court hearing. According to the SCM decision no. 368/17 of 31.05.2016, the sitting was declared closed under the provisions of p. 9.5 of the Regulation on the organization and functioning of the SCM, approved by the SCM Decision no.668/26 of 15.09.2015 (which provides that the Council will, in closed sittings, examine the notification of the General Prosecutor, only regarding the observance of the conditions or the circumstances of the Criminal Procedure Code for initiating criminal investigation, apprehension, arrest or search of the judge, without assessing the quality and authenticity of the presented materials). Law no. 947 of 19.07.1996 on the SCM does not contain such provisions.

Several judges and civil society representatives have qualified the request of the Interim General Prosecutor for lifting judge's immunity as an attempt to judicial independence

On 13.06.2016, judge Manole challenged in the SCJ the SCM's consent for initiating criminal investigation, requesting, also the suspension of the criminal investigation until the SCJ decision. The judge invoked, mainly, lack of grounds of the Interim General Prosecutor request for the consent to initiate criminal investigation and its grounding exclusively on the SCJ decision, which involves the criminal investigation of a judge for the interpretation of legal norms. Although the SCJ had to examine the request on applying the interim measure the same day or maximum within 5 days from receiving the request, the SCJ examined the request and took a decision on refusal of the suspension of the criminal investigation only on 23.06.2016. At the same time, on 22.06.2016, prosecutors from Anti-Corruption Prosecution Office seized the work computers of the judge and her assistant. Until 31.08.2016, computers were not returned. The SCJ should have examined the appeal of judge Manole on 07.07.2016, but the hearing was postponed to 18.08.2016. At this time, the participants in the proceedings were informed that the panel had changed. A decision has not been taken on that day either and the hearing was postponed to 15.09.2016. The judge challenged the motion to initiate criminal investigation (in another proceeding). The request was examined by Rîșcani Court in hearings of 22.08.2016 and 25.08.2016. The judgment was to be issued on 09.09.2016.

The case of judge Manole caused strong reactions in the society. On 30.06.2016, a group of civil society organizations in Moldova issued a public appeal expressing concern towards the request of the Interim General Prosecutor. The signatories asked him to explain the accusations brought against the judge Domnica MANOLE and requested the SCM to examine in public sittings the notification and issue a convincing reasoning for the taken decision. The signatories considered the notification of the Interim General Prosecutor as biased and dangerous for the whole judiciary. The appeal also emphasizes that the prosecution request does not refer at all to the adoption of the decision by judge Manole, knowing that it is illegal, an element without which criminal investigation cannot be initiated under art. 307 of the Criminal Code, the request exclusively relying on the SCJ decision, which in its turn is a court decision where legal norms are analysed and interpreted, including constitutional ones. The signatory organizations considered the prosecution request as an attempt to intimidate the judge.

For the first time for the justice system of the Republic of Moldova, on 31.05.2016, a group of judges from the Chișinău Court of Appeals publicly sympathised with judge Manole, considering the request of the Interim General Prosecutor as an "attempt without precedent to the independence of justice, contrary to the international justice standards, contrary to the objectives of the European integration promoted by the judiciary". On 31.05.2016, the Association "Forum of Judges of Romania" supported above appeals, pointing out that judges are to be able to decide cases independently and impartially, without fear or anticipating favour from any source or being under any improper influence.

On 02.06.2016, the European Union issued a written statement through the Department of coordination of the EU foreign policy (EEAS), asking the Republic of Moldova to implement the 2010 recommendations of the European Council on "independence, efficiency and accountability of judges", especially those which require that "the interpretation of the law, assessment of facts or weighing of evidence carried out by judges to determine cases should not give rise to civil or disciplinary liability, except in cases of malice and gross negligence." The US Embassy in Chișinău supported the European Union's message, posting the following message on Facebook: "Ensuring independence and impartiality in the justice sector is of utmost importance to any democracy… for real reform to take root, Moldovan authorities must take great care to ensure that the rule of law is respected and that there is not even the appearance of political interference, unfairness or intimidation in the conduct of legal matters".

On 03.06.2016, the SCM reacted to statements of the EU Ambassador and US Ambassador to Moldova through a press release. It states that "the Council has expressed a desire to bring clarity as quickly as possible in this case. The only mechanism that can verify and prove

the absence or existence of bad ill – is proving innocence or guilt of the accused person in an investigation and legal proceedings, transparent, fair and uninfluenced by anyone. Therefore, I wish to assure you that the Superior Council of Magistracy will undertake and ensure that this process is as transparent and fair as possible. The judiciary is equally interested in such a development of things. Moreover, where there will be evidence or signs that this process is conducted in bad faith, the Superior Council of Magistracy, will use absolutely all available legal tools to prevent and combat such practice". The respective press release raises several question marks, especially in terms of observing the presumption of innocence (the only mechanism to verify the existence of intent cannot be proof of innocence, the accused person should not be called upon to prove his/her innocence) and regarding the independency of prosecution and judiciary.

On 31.08.2016 the case against judge Manole was not finalised.

Data about the carrier of judges – state secret?

On 14.05.2015, the Centre for Investigative Journalism requested the Presidential Office of the Republic of Moldova to provide information on all documents sent to the SCM by which candidates to the position of judge or judges, who sought promotion during 2001 – 2015, were rejected. The Presidency refused to present the requested information, invoking protection of personal data and the undetermined character of the requested information, its non-concrete status that does not refer to subjects. The presidency's refusal was challenged in court.

On 29.06.2016, the SCJ rejected the appeal of the Centre for Investigative Journalism against the refusal of the country's President. The SCJ reasoned, *inter alia*, that the acts by which the President refused the appointment of candidates contain information which being disclosed, would constitute interference in private life, would be protected by the Law on the protection of personal data and the Law on state secret. The SCJ did not give reasons why the public interest in knowing this information is less important than the protection of the private life of judges, while the Law on freedom of expression requires such an analysis.

Selective approach of the Parliament in appointing judges to the Supreme Court of Justice

In 2016, the Parliament appointed several judges to the SCJ. By Decision no. 7/2 of 26 January 2016, the SCM proposed the Moldovan Parliament to appoint Mrs. Mariana PITIC as a SCJ judge. The SCM failed to explain why it selected particularly her. Mrs. Pitic did not obtain the highest score at the Board for Selection and Career of Judges and had the shortest experience as judge of all candidates.

On 01.04.2016, the Legal Committee for Appointments and Immunities of the Parliament examined in its sitting the SCM proposal to appoint Mrs. Pitic as SCJ judge. The examination of this issue by the Legal Committee was not announced in advance and is missing from the agenda of the sitting. On 27.04.2016, the Parliament appointed Mrs. Pitic, though the media had published several materials about the possession of a property, which was not declared, and later NIC reacted and ordered to initiate an investigation in this regard.

On the other hand, judges Nicolae CRAIU and Anatolie ŢURCAN were appointed by the Parliament at an interval of almost one year after the SCM issued the decision proposing their promotion to the SCJ. The latter were proposed by the SCM to be appointed as judges to the SCJ on 23.06.2015 and the Parliament appointed them only on 27.04.2016.

Transparency and objectivity of the SCM is deficient

On 23.05.2016, LRCM presented for public discussion the report "Transparency and efficiency of the Superior Council of Magistracy of the Republic of Moldova" for the period January 2015 - March 2016. The SCM was invited to comment on its findings and recommendations.

The report states that one of the most important activities of the SCM, which has not registered any progress, is related to the career of judges. In several cases, the SCM proposed the President of the country or the Parliament candidates with a lower score without reasoning its decision. In most cases related to the career of judges, the SCM invoked as reason the fact that the vote for one candidate or another is an exclusive right of a SCM member without reasoning why a candidate with a lower score was promoted and candidates with higher scores were not. During the monitored period, there were several cases in which the President of the country refused the appointment to the position of judge or appointment of judges to administrative positions. Among the quoted reasons were discrediting justice, lack of objectivity, possession of unjustified wealth, existence of integrity issues etc. In at least three cases, the SCM repeatedly proposed the same person, without giving reasons for its decision, particularly with reference to the grounds invoked in the President's refusal.

The report criticizes the organization of the SCM sittings and decisions. Art. 24 para. (2) of the Law on the SCM provides that voting procedure is carried out without the person whose case is being examined and in the absence of other persons

who were invited. In practice, important part of debates and the voting on decisions by the SCM members takes place in almost all cases in closed sittings at which only members of the SCM participate (in "deliberation"). The SCM usually adopts decisions in "deliberations" even in matters that do not involve discussion of confidential topics or personal data, such as commenting on draft laws. The SCM does not have a consistent practice on indicating the distribution of votes in its decisions, as well as in cases of repeated proposals to the President of the country for appointment or promotion of a judge, for which the law requires the vote of two thirds of the SCM members. Failure to indicate the exact number of votes raises suspicions about meeting the required number of votes in all decisions, especially in sensitive cases.

The Constitutional Court v. Venice Commission - under what conditions does the judge repair the damage caused to the state?

On 13.06.2016, the Venice Commission issued its opinion where it explained under what conditions the judges may be required to compensate the state for the damages ordered by the European Court of Human Rights (ECtHR). The opinion was drawn up at the request of the Constitutional Court of the Republic of Moldova. The latter was considering a request where seven judges of the SCJ claimed that the provisions of art. 27 of Law no. 151 of 30.07.2015 on the Governmental Agent, based on which in 2016 the Ministry of Justice filed regress actions against them, contravene the Constitution.

The Venice Commission explained that the ECtHR judgment or decision by itself should not automatically constitute grounds for satisfying the regress action. Judges may be obliged to compensate the damages ordered by the ECtHR only if the violation is due to intent or gross negligence. This should be considered in each case. A similar interpretation results from art. 1404 para. (1) of the Civil Code.

The Commission also explained that the material liability of a judge should not be applied in case of lack of established jurisprudence or change of the ECtHR jurisprudence, as well as in case of reasonable explanation done by a judge as to why the case under consideration is essentially different from the cases on which the ECtHR jurisprudence has been based. Also, cases where damages have been paid under a friendly settlement or unilateral declaration of the Government are to be analysed by the judge who examines the regress action with due diligence, to establish whether the alleged infringement really existed.

On 25.07.2016, the Constitutional Court recognized as constitutional the provisions of the Law on the Governmental Agent as to the regress action, but only in case of criminal conviction of a judge. Such a rigid interpretation cannot be inferred neither from the opinion of the Venice Commission nor from the text of the Constitution. When it arrived to this interpretation, the Court relied on art. 19 para. (3) of the Law on the Status of Judge and art. 1415 para. (2) of the Civil Code, which expressly provide that limitation. The Constitutional Court's interpretation makes virtually inapplicable the regress action provided by the Law on the Governmental Agent, as not any violation of the ECHR is a crime. On the other hand, the ECtHR judgments are usually taken over more than 5 years from the national judgments, when the potential criminal offense (under art. 307 Criminal Code) is usually prescribed (time limits expired). Moreover, art. 307 of the Criminal Code provides that a judge may be convicted for issuing an illegal judgment only if committed intentionally, which is extremely difficult to prove. Implicitly, the Constitutional Court ruled out the possibility of admitting the regress action against the judge in the case of gross negligence, although the Venice Commission concluded that obliging a judge to compensate the damage caused through gross negligence is not contrary to the Council of Europe standards.

[Implicitly, the Constitutional Court excluded the possibility of admitting the regress action against the judge in case of gross negligence, although the Venice Commission concluded that it is not contrary to the Council of Europe standards]

NOTORIOUS CASES

Mayor suspended from office – exceeding official prerogatives or political pressure? Unprecedented reaction of the Association of Judges

On 04.04.2016, Cahul Court of Appeal decided to suspend from office the mayor of Taraclia town Serghei FILIPOV. Mr. Filipov is accused of organizing illegal cutting of 31 trees in the courtyard of Taraclia town hall, without having the agreement

of the Ecological Inspection in this regard. In the examination of this case, the mayor of Taraclia said that he did not have an active role in organizing and cutting the trees, this is a matter for specialized services within the municipality. The mayor publicly stated that the criminal case is actually a political order, as a result of his refusal to join and represent the Democratic Party in local elections in 2015.

EU Ambassador to Moldova: the decision of Cahul Court of Appeals suggests a political motivation to remove the mayor from the public office

Mr. Filipov was obliged by the court to pay the damage caused to the state, estimated at MDL 164,000, and a fine of MDL 8,000. Additionally, the court imposed mandatory additional penalty established for such offense - deprivation of the right to hold public office for a period of two years. This implicitly means that Mr. Filipov would be unable to exercise further his mandate as mayor. The decision of the Court of Appeals comes after the first instance court issued an acquittal in this case. Mr. Filipov's recourse was examined by the Supreme Court in August 2016. The SCJ quashed the decision of the Court of Appeals and sent the case to retrial.

Shortly after the decision of the Cahul Court of Appeals, the Congress of Local Authorities from Moldova (CLAM) adopted a statement in support of Serghei Filipov requesting reinstalling him in his position. The EU Ambassador to the Republic of Moldova and the US Embassy expressed concern and disappointment regarding the Cahul Court of Appeals decision on mayor Filipov. They stated that judicial decisions should never be or appear to be politically motivated.

In response, the Association of Judges issued an open letter addressed to the EU Ambassador requesting more caution in commenting on cases that are pending in courts, particularly those to be subject to judicial review by higher courts. According to the above-mentioned letter, such actions constitute an interference with justice meant to adversely affect the examination of the case. Also, the Association of Judges suggested Mr. Tapiola to address the Judicial Inspection of the SCM, in case he has evidence on political influence on that judgment.

The open letter generated a wave of indignation from both several judges and representatives of the civil society who declared their support for Ambassador Pirkka TAPIOLA and EU efforts to support justice reform in Moldova. On 12.04.2016, a group of judges issued a statement declaring that the open letter signed by Mr. DRUŢĂ was not consulted with the members of the Executive Council of the Association of Judges and, respectively, it does not represent the opinion of the entire judicial body.

The decision of Cahul Court of Appeals in respect of Mr. Filipov raises several questions. In a democratic society it is acceptable and useful to discuss and critically analyse the court decisons, especially if they are not reasoned enough and raise questions about the impartiality of judges. Unfortunately, the reaction of the Association of Judges shows a lack of understanding of the essential difference between criticizing court decisions and interference in delivery of justice. An independent and professional judiciary involves making unpopular decisions, which can be criticized, judges having the task of reasoning them clearly and sufficiently as to dispel any suspicions about their independence and impartiality.

In a democratic society it is acceptable and useful that judgments are discussed and critically analysed

Examination behind closed doors of Filat case – dangerous precedent for the Moldovan justice

On 27.06.2016, ex-Prime Minister Vlad FILAT was convicted by Buiucani court of Chişinău municipality to 9 years of imprisonment for passive corruption and traffic of influence. It seems that the judges found that Mr. Filat took bribes from Mr. Ilan SHOR to facilitate the latter's business and to undertake control over Banca de Economii. The judges concluded that Mr. Filat has benefited from the alleged actions in the amount of MDL 796 million. Of these, 4.6 million MDL is the cost of some cars bought by Mr. Shor and made available to Mr. Filat. The remaining amount represents the cost of charter airline tickets paid by Mr. Shor's companies, expensive gifts, cash and bank cards offered as bribe and loans offered by Banca de Economii to companies controlled by Mr. Filat. In order to recover damages, the judges confiscated the cars received by Mr. Filat from Mr. Shor and Mr. Filat's property worth up to MDL 791 million. The conviction is not final.

The criminal case against Mr. Filat was sent to court in December 2015 and on 05.01.2016 the judges decided to examine it behind closed doors. Examination of the case in closed hearing was requested by the prosecutor, who argued that the prosecution is investigating a related case e and the examination of the case of Mr. Filat in open hearings could make it difficult to collect evidence and harm the secrecy of investigation in the second case. Mr. Filat asked to examine the case in open hearing. Judges accepted the prosecutor's arguments, finding that the reasons brought by the prosecutor justified the prohibition of participation of press and public in the hearings. On 24.03.2016 and 24.06.2016, more than 20 non-governmental organizations have called judges who examine the case to reassess the arguments related to the examination of the case in closed sessions and, eventually, to review the decision. Despite these calls, the case continued to be examined behind closed doors.

In 2008, the SCM adopted a Regulation stipulating that sentences in criminal cases shall be published on the website of the court. On 21.06.2016, six days before issuing the sentence in Mr. Filat case, the SCM abrogated the Regulation of 2008 and adopted a new Regulation, according to which decisions on the cases examined behind closed doors are not to be published on its website. The sentence in Filat case was not published on the website immediately after delivery. However, in early August 2016 the Buiucani District Court placed a part of the reasoned judgment on its website, which contains only arguments of the parties and witness statements.

Detention and release of Ilan SHOR in the context of the „theft" of the billion

On 22.06.2016, the National Anti-Corruption Centre (NAC) arrested Ilan SHOR, the mayor of Orhei, for 72 hours. He is being investigated as an accused in a case of large-scale fraud and money laundering committed during his term as the Chairman of the Banca de Economii Board in 2014, which led to plundering the bank. Prosecutor leading the criminal investigation in this case stated that this case is different from Filat case. On 24.06.2016 the Buiucani District Court issued an arrest warrant on SHOR's name for 30 days. On 04.07.2016, the Anti-corruption Prosecutor's Office asked Orhei Town Council to suspend the mayor Ilan SHOR from his position. On 05.07.2016, Orhei Town Council rejected the request for suspension. The General Prosecutor's Office informed that, according to art. 200 of the Criminal Procedure Code, the prosecutor cannot challenge the decision by which the prosecutor's motion was rejected regarding temporary suspension from office of the accused. The prosecution noted in a press release that only the accused can benefit of this right, when it comes to the decision on his suspension from office. However, according to the press release, given the lack of clear regulations on the procedure for temporary suspension from office in case of a mayor, the Anti-corruption Prosecutor's Office will examine the possibility to appeal in court the decision of Orhei Town Council in accordance with art. 33 of Law no.436 of 28.12.2006 on Local Public Administration. Although art. 200 of the Criminal Procedure Code is not sufficiently clear about the prosecutor's right to appeal the non-suspension from office decision, we consider that the prosecution should anyway challenge the decision or at least take steps to remove the respective inaccuracy in the law.

After 1.5 months of pre-trial detention, Chișinău Court of Appeal decided to change pre-trial detention with in house arrest of Ilan SHOR, one of the main suspects of the „theft" of the billion

On 21.07.2016, the arrest warrant on Ilan SHOR's name was extended by another 30 days. On 05.08.2016, examining the appeal of Mr. Shor's lawyers, the Chișinău Court of Appeals decided on Ilan SHOR's placement under house arrest for a period of 30 days. That decision generated criticism in the society. The court applied to Ilan Shor the prohibition to leave the country. On 18.08.2016, Buiucani district court prolonged by 30 days the house arrest of Ilan SHOR. Ilan SHOR's bodyguards impeded the media to enter the courtroom, and the police who were in the hall of Buiucani Court did not intervene. The police's inaction indicates both a lack of professionalism and bias towards the accused from police officers present in court. Or, the accused's bodyguards are private persons, who do not exercise state authority, respectively, do not have the power to admit or hider the access of the media in a public institution like the court is.

Court orders on placing under house arrest of one of the main accused of the "theft" of the billion and lack of complaints from the Anti-corruption prosecution (or at least lack of public information on the subject) also raises questions, especially given the decisions of the courts in Filat case, who seem to be only tangentially related to the theft of the billion, or measures applied to four participants in the protest of 24.04.2016 (see below).

HUMAN RIGHTS

Ingenious and less ingenious forms of restriction of freedom of assembly in the Republic of Moldova

Lately there were still several incidents that restricted or affected the right of assembly. On 24.04.2016, some anti-government protests attended by thousands of people took place. At a certain stage, a group of protesters went to one of the premises of the Vice-President of the Democratic Party of Moldova (DPM), Vladimir PLAHOTNIUC, where some people threw stones at law enforcement representatives. Following these protests, four people were detained and arrested for

mass disorders. Several NGOs found that, in fact, there were no mass disorders during protests, but some individual incidents of hooliganism. The organizations also criticized the way in which people were detained and the authorities' disregard towards preventive measures alternative to arrest.

Lately, the right of assembly is more often violated, indicating governing politicians' intolerance to criticism

On the other hand, in July 2016, the Government ordered the allocation of MDL 6.7678 million from the reserve fund of the Government for awarding employees of the Ministry of Internal Affairs and Ministry of Justice which ensured public order at demonstrations of 24.04.2016.

Talking about other incidents, in January 2016, the Ombudsman, Mihail COTOROBAI found that on 13.01.2016, some people were brought by force by the Democratic Party to the protest in support of Mr. Vladimir PLAHOTNIUC to the position of Prime-Minister. Also, according to Mr. Cotorobai, public authorities restricted the activity of several national routes of minibuses, which prevented the supporters of the Civic Platform "Dignity and Truth" in the regions to participate in the protest against the candidacy of Mr. Plahotniuc held on the same day.

Another incident took place on 06.09.2015, the day in which anti-government demonstrations took place in Chişinău. "Unite", a state-owned company and managed by a person appointed by the Democratic Party, announced that it will organize a big concert on September 6. Besides the fact that this concert did not have a clear purpose and raised questions about how the money was spent by a state enterprise, the concert was planned to start at 11 o'clock in the morning and coincided with the time of the protest. The day before the protest, "Unite" changed the starting time of the concert for 14:00. Several guest artists at the concert refused to attend the concert organized by "Unite" on the grounds that its purpose was to compromise the protests.

Public hearings in the Parliament regarding special investigation activity

On 20.04.2016, the Parliamentary Committee on national security, defence and public order held hearings on the enforcement of Law no. 59 of 29.03.2012 on special investigative activity. At hearings participated representatives of authorities conducting special investigations activity, the Ministry of Justice and LRCM representatives.

The number of wiretappings has alarmingly increased: from 2.915 in 2013 to 9.962 in 2015

At the beginning of the hearings, LRCM representatives presented the conclusions of the analytical document "Wiretapping in the Republic of Moldova: progress or regress?". According to the report, the number of prosecutors' motions authorizing wiretaps, has increased alarmingly in recent years, reaching 9.962 in 2015 compared to 2.915 in 2013. Meanwhile, the rate of authorisations granted by investigative judges remained as high – about 98%. Representatives of the LRCM also indicated about gaps in legislation, such as lack of duty of the judge to inform the person that his conversations were wiretapped when the illegality of tapping is found, and the secret nature of the annual report presented by the Prosecutor General to Parliament on carrying out special investigation measures, although much of the information in the report is of general interest.

Hearings continued in closed session. According to the press release of the Parliament, representatives of the above authorities presented reports on the implementation of the law on special investigation activity. The press release indicates that, following the hearings, the Committee on national security, defence and public order will take a decision on some recommendations to solve the existing problems in the implementation of the law on special investigation activity. This decision was not published. Such hearings are held the second consecutive year.

The Metropolitan of the Orthodox Church and SPRM want to abrogate the law on ensuring equality

On 27.04.2016, the Metropolitan of the Orthodox Church of Moldova Vladimir delivered a speech before Parliament representatives. In his speech, the cleric asked the elected officials to abrogate Law no. 121 of 25.05.2012 on ensuring equality. The Metropolitan argued that the law would protect the rights of sexual minorities, which would lead to destabilization and collapse of Christian values in the society. The Metropolitan's speech was followed by applause from several MPs. Following the speech, the faction of the Socialist Party in the Parliament registered a legislative initiative that proposed to abrogate the law on ensuring equality. Several civil society organizations condemned Metropolitan's statements and the MPs who applauded the discriminatory speech. Through a public appeal, the signatories asked the MPs and the Metropolitan to refrain from promoting discriminatory messages, including in the Plenum of the Parliament.

Information campaign „Law for ensuring equality is for all!"

In June 2016, the Council for the prevention and elimination of discrimination and ensuring equality in partnership with several representatives of the civil society launched an information campaign for promoting the idea of equality. The campaign 'Good people' raises awareness on the Law on ensuring equality to inform the population about defense mechanisms against discrimination and explain the importance of the law to protect the rights of all inhabitants of the Republic of Moldova.

Join the campaign #oamenibuni #legea121epentrutoti!

So far, the Council for the prevention and elimination of discrimination and ensuring equality recorded about 400 applications, every third application is found to be a discrimination case. The most common cases of discrimination are based on the criteria of disability, gender, language and ethnicity. For more information, please see the Council's website: www.egalitate.md.

CIVIL SOCIETY

What should the Government and the Parliament do to enhance transparency in the decision-making process?

On 27.04.2016, representatives of the Parliament, Government and civil society held a trilateral meeting in which they decided to create a working group composed of representatives of civil society to propose new mechanisms to re-launch cooperation between the Parliament, Government and civil society. Following the joint meeting, LRCM in partnership with 22 civil society organizations drafted a legal opinion in which it indicated what actions would have to be taken by the authorities to provide greater opportunities for the participation of civil society in decision-making. Signatories identified the necessary legislative acts that should be amended to improve the process of consultation and involvement of the civil society in decision-making. The common opinion was presented at the annual conference "Cooperation between the parliament and civil society" of 4-5 July 2016. For the decision of the Parliament and the Government on this subject, read the next newsletter.

Civil society participation in the decision-making process - subject of regional interest

In May 2016, the Council of Europe published a study on civic participation in decision-making process in the six Eastern Partnership countries (Armenia, Azerbaijan, Belarus, Georgia, Moldova and Ukraine). The study analyzes the challenges and opportunities of participatory policy in Eastern Partnership countries, how they differ and what legislative and procedural shortcomings were found in the six countries. The document will be translated into the official languages of the member states. By the end of 2016, the Council of Europe will publish a second study that will address the practical implementation of the respective legislation.

BRIEFLY

Prosecution reform continues, but not fast and coherent enough

- in March 2016 the new Law on Prosecution was published, which entered into force on 1 August 2016. For the purpose of implementing the law, other two draft laws were developed. Law no. 152 of 01.07.2016 for amending and supplementing certain legislative acts came into force on 01.08.2016, except for the provisions pertaining to the prosecution staff (the provision "the total staff of 720 prosecutors and 700 units of personnel, including technical staff shall be approved" will come into force on 01.01.2017). Law no. 159 of 08.07.2016 on the specialized prosecution offices (draft no. 271) came into force on 01.08.2016.

The head of the Anti-corruption Prosecutor's Office has been selected

– on 22.04.2016, following a contest, the Superior Council of Prosecutors (SCP) selected Viorel MORARI as the Chief prosecutor of Anti-corruption Prosecutor's Office. Mr. Morari accumulated the highest score of the five candidates after the assessment of

the Qualification Board. Unfortunately, the SCP did not ensure the publication of the candidates' CVs before the interview.

Proposals to amend the Constitution regarding the Ombudsman

– on 18.04.2016, the Constitutional Court issued its Opinion No. 3 (positive) to the draft law for the amendment of the Constitution of the Republic of Moldova - Art. 59/1. The draft law proposes to have a constitutional provision on the manner of appointing the Ombudsman. S/he will be appointed by the Parliament, based on a transparent selection procedure for a 7 years term, which may not be renewed.

Proposal to annul the MPs immunity

– on 18.04.2016, the Constitutional Court issued its Opinion No. 4 (positive) on the initiative to revise art. 70 of the Constitution. The draft law proposes cancellation of parliamentary immunity institution guaranteed by the Constitution.

Proposal to amend the Constitution regarding the prosecutor's office

– on 19.04.2016, the Constitutional Court issued its Opinion no. 5 (positive) to the draft law for amending and completing the Constitution. These amendments are harmonised to the concept on which the new law on prosecution relies.

Proposal to amend the Constitution regarding the judiciary

– on 19.04.2016, the Constitutional Court issued its Opinion no.6 (positive) to the draft law for amending and completing the Constitution (judiciary). The draft includes important provisions for the independence, accountability and professionalization of judges and the SCM.

Enforcement of ECtHR judgments

– regional priority – between 11-12 April, LRCM participated in the meeting organised by the European Implementation Network (EIN) in Istanbul, Turkey. At the meeting, it was discussed the creation of a network of European NGOs to strengthen their capacities in promoting the enforcement of judgments of the European Court of Human Rights.

Europe Day in the Republic of Moldova

– following a multi-year tradition, on 14.05.2016 the Delegation of the European Union to the Republic of Moldova organized the Europe Day. The events dedicated to the most important European celebration were held in the traditional "European Village", installed in the central park in the capital. LRCM, along with other NGOs, was among the "residents of the European Village" and offered all interested persons the possibility to get acquainted with its vision, mission and scope of work, as well as the projects it implements. During the day, LRCM distributed more than 300 publications in the field of non-discrimination and ensuring equality, thus promoting a culture of human rights observance, similar to the one existing in the European area.

A member of the Board for Performance Evaluation of Judges incompatible for a year

- on 23.06.2015, following a public contest, Mr. Alexandr CAUIA was elected to the position of member of the Board for Performance Evaluation of Judges (BPEJ) of the SCM. Mr. Cauia worked as member of the Board between 23.06.2015 and 06.04.2016, when the SCM admitted his resignation request. Mr. Cauia resigned after information on his incompatibility, namely his involvement in political activity as party member, appeared in mass-media. It is not clear if the SCM verified the information from Mr. Cauia's CV and why it was not vigilant to exclude any political involvement in the activity of its boards. The SCM decision on appointment of Mr. Cauia contains no reference to the incompatibility of the Board's member, although there was sufficient evidence in this respect.

Judge promoted to the SCJ continues to also hold the position of SCM member

- by decision of the General Assembly of Judges on 18.10.2013 Mr. Anatolie ȚURCAN was elected member of the SCM among judges of courts of appeal. On 23.06.2016, the Parliament appointed him judge at the SCJ. After appointment as Supreme Court judge, Mr. Țurcan continues to act as a member of the SCM. Thus, the current membership of the SCM consists of three judges from the SCJ, although according to art. 3 para. (4) of the Law on the SCM and the consistent practice of the SCM, two judges from each court level are selected in the SCM.

Projection of important Romanian and national cinema films

– during May – June 2016, LRCM and Expert-Forum (EFOR) Romania organised the projection of four cinema films - „De ce eu?", „Aferim!", „După dealuri" and „Ce lume minunată" – in Chișinău, Bălți, Cahul and București. The event was aimed at promoting human rights and raising awareness of citizens about the values of a democratic state.

Roadmap monitored by the civil society

– the priority reform action roadmap was developed by national authorities in response to the Conclusions of the European Union Council of 15 February 2016. The roadmap comprises the actions that the government has committed to undertake (Government, Parliament and a number of other public institutions) in a period of just 5 months (1 March to 31 July 2016) to overcome the socio-economic and political crisis in Moldova. The progress in implementing the Roadmap can be viewed online in an interactive

application available here: http://www.expert-grup.org/media/k2/attachments/FP-ENG3-02.08.swf in Romanian, English and Russian).

The 2% Law has been voted, but the implementation mechanism is still to be adopted

– on 21.07.2016, the draft amendment to the law that allows individuals to direct a part of their annual income tax to non-profit organizations and churches in the country, conventionally named the "2% Law", was voted in second reading.

ABOUT LRCM

The Legal Resources Centre from Moldova is a not-for profit non-governmental organization based in Chişinău, Republic of Moldova. LRCM strives to ensure a qualitative, prompt and transparent delivery of justice and effective observance of civil and political rights in Moldova. In achieving these aims, LRCM combines policy research and advocacy in an independent and non-partisan manner.

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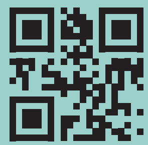

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