

Fifteen Years of Investigative Judges' institute: Achievements and Prospects for the Future

Ilie CHIRTOACĂ

Ion GUZUN

Vladislav GRIBINCEA



ANALYTICAL DOCUMENT

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Authors:

Ilie CHIRTOACĂ

Ion GUZUN

Vladislav GRIBINCEA



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Abbreviations

| | |
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| CAA | Courts Administration Agency |
| CCM | Constitutional Court of the Republic of Moldova |
| Evaluation Board | Judicial Performance Review Board |
| SCM | Superior Council of Magistracy |
| SCJ | Supreme Court of Justice |
| ECHR | European Convention on Human Rights |
| ECtHR | European Court of Human Rights |
| CrPC | Criminal Procedure Code of the Republic of Moldova |
| NIJ | National Institute of Justice |
| SCM Law | Law No. 947 of 19 July 1996, “On the Superior Council of Magistracy” |
| Law No. 126 | Law No. 126/2016, “For the Amendment of Certain Legislative Acts” |
| PGO | Prosecutor General’s Office |
| RM | Republic of Moldova |
| | SCM Regulations on the procedure and manner of appointing investigative judges, approved by SCM Decision No. 668/26 of 15 September 2015 |
| JSRS | Justice Sector Reform Strategy for 2011 – 2016 |

Executive Summary

Since 2003, or over 15 years now, investigative judges carry out their activity in every district court from the country.¹ Investigative judges have special powers, being responsible for the examination of complaints against criminal investigation authorities, pre-trial detention, searches, wiretapping and other criminal investigation actions. Over the years, investigative judges have been often criticized for their pro-accusatory attitude and insufficient protection of human rights.

To some extent, this attitude may be due to the investigative judges' professional profile and to their workload, which has increased significantly in the past ten years. On 20 January 2018, the Ministry of Justice came forward with a new proposal to reform the institution of investigative judges. At a public event, the ex-justice minister declared that the institution of investigative judges would be replaced by freedom and detention judges, with different skillset and qualifications.² Those declarations, however, failed to materialize in concrete legislative or administrative actions.

Established initially as a separate category of judges, the institution of investigative judge was meant to guarantee additional protection of human rights during criminal investigation phase. Investigative judges were specialized exclusively in judicial oversight of the actions of prosecution authorities and were appointed for an unlimited tenure, based on specific criteria. Because of these requirements, most investigative judges appointed between 2003 and 2009 were former prosecutors or criminal investigation officers. Apparently, their professional background determined a strongly pro-accusatorial bias, as confirmed later by official statistics.³

Following legislative amendments of 2012⁴, investigative judges were integrated into the system of judges of general jurisdiction (common law judges). Thus, starting with 2013, the duties of investigative judges were exercised by common district judges appointed by the Superior Council of Magistracy (SCM). Apart from that, the investigative judges' work remained mostly unchanged. For example, the rate of granted motions for pre-trial arrest

¹ The Courts of Appeal and the Supreme Court of Justice do not have investigative judges.

² Ministry of Justice, „Concept Paper. Strategic Areas and Priority Actions of the Judicial Reform,” available at http://justice.gov.md/public/files/Document_de_concept.pdf.

³ LRCM, report: “Reforming the Institution of the Investigative Judge in the Republic of Moldova,” 2015, available at <https://crjm.org/wp-content/uploads/2015/01/CRJM-Raport-JI-28-01-2015.pdf>.

⁴ See Law No. 153 of July 5, 2012, “For the Amendment of Certain Legislative Acts.”

was 88% in 2018, higher even than in 2011 and 2012, when it was 81% and 80%, respectively. The rate of granted motions for wiretapping has not changed either, even though the number of granted motions increased by more than 250% in the past ten years.

The Moldovan judiciary includes between 42 and 45 main investigative judges, making up 13% of all (sitting) judges of general jurisdiction.⁵ The number of investigative judges was established based on the assumption that every court of law in the country must have at least one such judge.⁶ Although the number of investigative judges has not increased very much in the past ten years, their workload increased considerably. If in 2006, investigative judges examined approximately 20,670 cases and materials, in 2017 this figure was 56,404, evidencing a steady increase from 2006 (with the exception of 2013). In 2018, this figure decreased to 47,621 cases.

The workload of the investigative judges varies significantly across the system, as the SCM failed to take any policy measure to review the total number of investigative judges required. In 2017, every investigative judge had an average workload of 1,340 cases and materials. This number, however, is bigger for the investigative judges from Chişinău and Bălţi and smaller for those who work in district courts from the rayons. Moreover, as a result of the amendments made in 2014 to the SCM Regulations on the randomized assignment of cases, every investigative judge also deals with cases from other categories, which accounts for half of their workload.⁷ Until the end of 2018, this provision applied to all district courts, regardless of the workload of their investigative judges. This determines a further increase in investigative judges' workload in the congested courts. The workload and the complexity of the examined cases, particularly in Chişinău and other localities or districts (Bălţi, Orhei, etc.), needs for the SCM to review the total number of the positions of investigative judge allocated for each court.

According to the SCM Regulation on the establishment of single national complexity grades for civil, criminal and contravention cases, the types of cases examined by investigative judges have a complexity level of between 2 and 6, where 1 is the lowest and 10 is the highest complexity level. The qualification of the materials examined by investigative judges as of lower complexity is a matter calling for a detailed review. Considering investigative judges' workload and the real complexity of some of their cases, as opposed to the assigned complexity, it would be appropriate to thoroughly review the methodology for assigning complexity levels to the cases examined by investigative judges.

Although the primary goal of the judicial review performed by investigative judges is to ensure the protection of the rights of a person, over the past few years, the practice of overly excessive application of pre-trial arrest and easy authorization of wiretapping requests has

⁵ The list of investigative judges, updated on 10 December 2018, available at https://csm.md/files/Lista_judecatorilor/Lista_de_instructie.pdf. The percentage of judges who work as investigative judges was calculated based on the total number of sitting judges (filled positions), and this information is available at https://www.csm.md/files/Lista_judecatorilor/Locuri_vacante.pdf.

⁶ LRCM, report: "Reforming the Institution of the Investigative Judge in the Republic of Moldova," 2015, p. 47.

⁷ Ibidem, p. 47.

been instated. This worrying trend has been voiced by civil society reports,⁸ and lately even some state authorities have acknowledged it⁹. The rate of authorizing special investigation measures or arrest is indicative of the continued and unchanged investigative judges' pro-accusatorial attitude. It also means that the alternative measures provided for in the Criminal Procedure Code to the pre-trial arrest are insufficiently used.

The investigative judges' hard work is extremely important to effectively protect human rights during the criminal investigation phase. Their experience is crucial to making complex decisions on urgent matters. Therefore, the legislative amendments of 2017-2018 represented a major setback since the establishment of the investigative judges' institution in 2003, and ensuring that the judge has sufficient experience to be fully independent and at the same time, granting to the parties that the judge has adequate qualification.

We recommend restoring the status-quo, which existed before 2018, when a minimal number of years of prior judicial experience was required to become an investigative judge. To increase the "attractiveness" of the institution of investigative judge, we recommend reviewing their status. A solution to this could be assigning investigative judges the same status as that of the Courts of Appeal judges, with all resulting benefits, including the financial remuneration. This means, however, that judges filling these positions meet the necessary conditions required to qualify for the office of the Courts of Appeal judges, namely their seniority (6 years' prior work experience as a judge).

To improve the quality of the examination of the motions granting the pre-trial arrest, home arrest and motions for arrest prolongation, the defence party should request public examination of such motions more often. Another way of improving the reasoning of court decisions issued by investigative judges with regard to pre-trial arrests and home arrests, including their prolongation, would be to publish those decisions on the national courts online portal, which is currently not done.

⁸ LRCM, report: "Wiretapping in the Republic of Moldova: a progress or a regression?" 2015, available at <https://crjm.org/wp-content/uploads/2016/01/CRJM-DA-Interceptari.pdf>. CPR Moldova, "Crazed with Anger: How to Deal with Wiretapping in Moldova?" 2018, available at: <https://site.cpr.md/2018/07/03/scosi-din-fire-ce-facem-cu-interceptarile-convorbirilor-telefonice-din-moldova/>.

⁹ The speech of Justice Minister Victoria IFTODI, delivered on 23 March 2018, at the General Assembly of Judges (timing: 02:06), available at <https://www.privesc.eu/Arhiva/80525/Adunarea-Generala-a-Judecatorilor>.

Introduction

Starting with 2013, the LRCM has advocated for the reform of the institution of investigative judges and has issued monitoring reports¹⁰ and policy papers¹¹ on this subject. This document, produced in 2018, is largely based on previous findings but also provides a thorough analysis based on official information and data collected over the past 11 years. The purpose of the document is to review the present status of the investigative judges' institution in the Republic of Moldova and the prerequisites that can help both to improve their work to effectively guarantee human rights and freedoms as well as to ensure the efficient administration of the judicial system.

The authors recommend several changes that can improve the investigative judges' work to ensure effective protection of human rights and freedoms during the criminal investigation phase.

Methodology

The report is based on official information and data on the work of investigative judges. The LRCM team garnered the data from publicly available resources, while some official statistics were offered by the representatives of the Courts Administration Agency (CAA) under the Ministry of Justice. The authors reviewed the national legislation, the SCM's internal regulatory framework regarding the duties of the judges from this category, the legal requirements for being appointed in this position and the information (statistical reports, planning reports and activity reports) available on the websites of the Ministry of Justice, the SCM and the General Prosecutor's Office (GPO).

Some data came from the monitoring on the work of the SCM and the Performance Evaluation Board (Evaluation Board), the preliminary study of the agenda and the documents presented at the meetings of the SCM and the Evaluation Board, the monitoring of the meetings of the SCM, the study of the decisions of the SCM and the Evaluation Board, available on the SCM's website, the study of the decrees of the president of the country, etc. The LRCM uses this data to keep and regularly update two databases on investigative

¹⁰ See: LRCM, report: "Reforming the Institution of the Investigative Judge in the Republic of Moldova," 2015, available at <http://crjm.org/wp-content/uploads/2015/01/CRJM-Raport-II-28-01-2015-1.pdf>.

¹¹ See: LRCM, policy paper "The Re-allocation of Investigative Judges: Recommendations for Every Court," 2014, available at <https://crjm.org/wp-content/uploads/2014/09/Doc-politici-nr-2-realoc-JL.pdf>.

judges: one regarding the investigative judges re-confirmed as common law judges and one regarding the newly appointed investigative judges in every court of the country. The verified data reflects the situation existing between 31 August 2012 and 31 December 2018, and has been included in this paper.

The authors also reviewed the data from previous reports prepared by the LRCM, such as the review of the process of re-confirming investigative judges as common law judges and the appointment of investigative judges in accordance with the new rules established by the SCM Regulations on the procedure and manner of appointing investigative judges, approved by Decision No. 145/6 of 12 February 2013. The draft report was subjected to peer review by the LRCM team and was consulted at a public event on 17 December 2018, with the representatives of public authorities, investigative judges, former judges, specialists and experts. The Superior Council of Magistracy (SCM) also received a copy of the draft review for comments. By the end of December 2018, the authors have not received any comments from the SCM.

1. Who are the investigative judges?

1.1. The legal requirements and the manner of appointing investigative judges from 2003 until 2018

The institution of investigative judge exists in the Republic of Moldova since 2003. The work of investigative judges consists mainly in providing judicial oversight and assessing the reasonableness of the measures applied or ordered by prosecutors and criminal investigation officers in the criminal investigation phase. They also warrant certain provisional measures, such as the application or prolongation of arrest during the pre-trial phase, and certain special investigation measures, such as wiretapping and searches. The investigative judges' primary function is to ensure the observance of human rights during the criminal investigation phase. The legal regime for the appointment of investigative judges is established by Law No. 514 of 6 July 1995, "On the Judicial Organization."

The selection criteria for investigative judges, introduced in Law No. 544, "On the Status of the Judge," in 2003, established that only candidates with minimum five years' experience as a prosecutor, criminal investigation officer, or minimum three years of experience as a judge can be appointed as investigative judges.¹² The investigative judges were appointed by the president of the country at the proposal of the SCM, initially for a five-year term and, after the re-confirmation, for unlimited tenure. In 2003, none of the judges with at least three years of judicial experience applied for the position of investigative judge.¹³ As a result of the appointment requirements, in November 2013, 87% of investigative judges were former prosecutors or criminal investigation officers.¹⁴

In 2012, following legislative amendments¹⁵, the institution of investigative judge as a specialized category of judges appointed in line with special criteria, was abolished. Investigative judges became common law judges after a brief training and performance evaluation process. From that year, the duties of the investigative judge were exercised by common law judges appointed by the SCM.

¹² Article XXIV (4) of Law No. 206 of May 29, 2003, "For the Amendment of Certain Legislative Acts."

¹³ LRCM, report: "Execution of Judgments of the European Court of Human Rights by the Republic of Moldova. 1997 – 2012," 2012, available at <https://crjm.org/wp-content/uploads/2014/04/Executarea-hotararilor-CtEDO-de-catre-RM-1997-2012.pdf>, p. 145.

¹⁴ LRCM, report: "Reforming the Institution of the Investigative Judge in the Republic of Moldova," 2015, available at <http://crjm.org/wp-content/uploads/2015/01/CRJM-Raport-JI-28-01-2015-1.pdf>.

¹⁵ See Law No. 153 of July 5, 2012, "For the Amendment of Certain Legislative Acts."

In 2016, Law No. 126 of 9 July 2016 introduced several amendments regarding the status of the investigative judge. According to them, the SCM assigns the position of investigative judge for a fixed three-year term, without the possibility of renewal, to the candidates who have served as judges for at least three years, with their consent, at the proposal of the President of the Court. If a court does not have judges with the judicial experience of minimum three years, the powers of the investigative judge may be vested in a judge with the minimal experience of 18 months. Furthermore, the investigative judges who had been appointed before the enactment of Law No. 126, were to keep their duties until 1 January 2018. Those judges who have worked as investigative judges for more than two years, between 1 January 2013, and 31 August 2017, were no longer able to perform the duties of an investigative judge until 31 December 2020. Additionally, Law No. 126 required the SCM to appoint investigative judges in all courts until 30 September 2016, so that they could get into office on 1 January 2018. Law No. 126 was to be applied from 1 January 2017, but, at the request of the SCM, its implementation was postponed until 1 January 2018, by Law No. 266 of 9 December 2016.¹⁶

Before the implementation of Law No. 126, investigative judges were appointed under SCM Regulations No. 145/6 of 12 February 2013. According to p. 7 of this Regulation, just as with Law No. 126, the President of the court initiated the appointment procedure by a request addressed to the SCM. As for investigative judges' experience, according to p. 2 of the Regulation, they must have worked as judges for at least three years. In justified cases, however, the three-year period of experience could be reconsidered. The term in office of the investigative judge could last up to three years.

On 22 December 2017, the Law No. 315, amending once again the manner of appointment and the powers of investigative judges, was passed (Article 15¹ of the Law on the Judicial Organization). It excluded the requirement regarding the judicial incumbency of three years or, in exceptional cases, 18 months as a prerequisite for being appointed as an investigative judge.

The proposals to amend Article 15¹ of the Law on the Judicial Organization came from two Members of the Parliament, who proposed to amend the text of the draft of Law No. 361¹⁷ during the meeting of the Legal Committee for appointments and immunities held on 21 December 2017, when they discussed the approval for the second reading of a draft law that did not even refer to the investigative judges or the criminal justice system.¹⁸ The original draft law referred only to changes concerning the position of deputy head of the secretariat of Chişinău district Court, whereas the MPs' additional proposals referred to

¹⁶ Law No. 266 of 9 December 2016, "For the Amendment of Article IV of Law No. 126 of June 9, 2016, 'For the Amendment of Certain Legislative Acts.'"

¹⁷ The draft of Law No. 361 of 23 November 2017, "For the Amendment of Certain Legislative Acts" (the Law on the Judicial Organization — Article 45, the Law on the Public Office and the Status of the Civil Servant — Article 9, etc.) available at: <http://parlament.md/ProcesulLegislativ/Proiectedeactelegislativ/tabid/61/LegislativId/3983/language/ro-RO/Default.aspx>.

¹⁸ The report of the Commission for legal matters, appointments, and immunities on the draft of Law No. 361 (for the second reading), available at <http://parlament.md/LegislationDocument.aspx?Id=4e884881-273f-4090-b957-19d3614b4a70>.

the status and term in office of investigative judges, as well as to the moving of Ungheni Court from the territorial jurisdiction of Bălți Courts of Appeal into that of Chișinău Court of Appeal. These major changes were made despite the fact that the Commission's report for the first reading of 14 December 2017, stated that "the second reading will focus on the MPs' amendments, the proposals of the standing commissions, the technical-legislative objections of the General Legal Directorate of the Parliament's Secretariat."¹⁹ At the Parliament's plenary session of 22 December 2017, the rapporteurs of the Legal Committee for appointments and immunities did not mention those changes.²⁰ Thus, this introduction of important amendments regarding the office of investigative judges violated the rules on transparency in the decision-making.

The exclusion of the criterion regarding the minimal experience of three years affects the original purpose of the institution of investigative judge, namely, to ensure that there will always be judges with sufficient experience and qualification, capable to perform an effective judicial control to ensure the protection of human rights and freedoms. The argument that only experienced judges should hold the position of investigative judge is acknowledged in other legal systems, too. In France, for example, only judges with the rank of court president, senior deputy president, or deputy presidents may serve as liberty and custody judges (whose duties are similar to those of the Moldovan investigative judges), and they are appointed to this position by the court president. If they cannot examine a case, they are replaced by a judge from the same court, who has the highest seniority level.²¹ Similarly, in Ukraine, the powers of the investigative judge (a position similar to the investigative judges in Moldova) are exercised in the absence of a judge appointed only by the president of a first level court or, as the case may be, by the president of the court of appeal.²²

In the late 2018, the Parliament of the Republic of Moldova introduced, once again, amendments that affected the way of appointing investigative judges and their powers.²³ This time, it excluded two other criteria included by Law No. 126 in 2016, namely (i) the restriction on the exercise of two consecutive terms; as well as (ii) the selection of the investigative judge by drawing lots if none or more than two judges express their consent to fill in the position. The exclusion of the restriction on two consecutive terms means that the same persons could stay in the office of investigative judge for long periods, which is exactly opposite to what had been initially intended, including by the reform of this institution in 2013. The exclusion of the requirement regarding the designation by lots means more discretion will be left to the chief judge. Without the judge's consent or when

¹⁹ The report of the Commission for legal matters, appointments, and immunities on the draft of Law No. 361 (for the first reading), available at <http://parlament.md/LegislationDocument.aspx?Id=195f2ce0-bfc4-4de0-a3d4-90400047e4b7>.

²⁰ The transcript of the Parliament session of 22 December 2017, p. 41 – 42, available at <http://parlament.md/LinkClick.aspx?fileticket=VrIPMh18s4g%3d&tabid=128&mid=506&language=ro-RO>.

²¹ Article 137 – 1 of the French Criminal Procedure Code, available in English at https://www.legifrance.gouv.fr/content/download/1958/13719/.../3/.../Code_34.pdf.

²² OSCE/ODIHR, Opinion on the law of Ukraine on the judiciary and the status of judges, 2017, p. 22, available at: <https://www.osce.org/odihr/335406?download=true>.

²³ Law No. 265 of 23 November 2018, "For the Amendment of Certain Legislative Acts."

several candidates contend for this position, the court's chief judge may unilaterally decide who to appoint as an investigative judge. This discretion affects the functional independence of judges who will act as investigative judges.

The amendments of 2017 and 2018 represented a major setback since the institution of the position of investigative judge in 2003 in ensuring that the judge has sufficient experience to be independent and assuring the parties that the judge has adequate qualification. In fact, these amendments excluded the main innovations introduced by law No. 126 of 9 July 2016. The necessity of these amendments has never been officially substantiated. Moreover, frequent changes of the law cannot but negatively affect the institution of investigative judge. They create uncertainty for people who enter or will enter this profession.

Starting with 1 January 2019, all district judges from Chişinău will specialize into five categories, based on specific type of cases: (i) insolvency cases judges, (ii) civil cases judges, (iii) criminal cases judges, (iv) administrative cases and (v) investigative judges also dealing with contravention cases. Thus, the investigative judges will be assigned to a single premise, (Ciocana premises), having jurisdiction over their own cases and the contravention cases.²⁴ The SCM has reasoned the necessity for specialization by a better quality of decisions in the long run.²⁵ While it is premature to evaluate the outcome of this change, the impact on the investigative judges' work seems inefficient, since they already were specialized in certain types of cases, while the assignment of contravention cases to them, in addition to cases from their work line, can amplify the workload issues reported earlier and, consequently, worsen the quality of the reasoning of their decisions.

1.2. The investigative judges appointed from 2010 until 2012

From 2010 onwards, the SCM consistently approved 45 positions of investigative judge for the entire judiciary - one position of investigative judge for every court in the country, except from the Chişinău district courts of Botanica, Centru and Buiucani, for each of which it approved two positions of investigative judge.

From 2010 through 2012, some investigative judge positions were vacant. In 2010 there were 11 vacancies, in 2011 – 7 and in 2012 – 2 vacancies for investigative judge. This information is presented in the table below.

Table 1. *The number of judges in the courts in the period of 2010 – 2012*

| | 2010 | 2011 | 2012 |
|---|------|------|------|
| The total number of judicial positions (including investigative judges) | 456 | 456 | 472 |
| The total number of investigative judge positions | 45 | 45 | 45 |
| Effectively working investigative judges | 34 | 38 | 43 |

²⁴ SCM, Decision No. 555/25 of 27 November 2018, "On the Specialization of Chişinău Court" available at <https://www.csm.md/files/Hotaririle/2018/25/555-25.pdf>.

²⁵ Ibidem.

On 1 November 2013, most investigative judges were former prosecutors, investigative officers or criminal investigation officers. Out of the total of 40 investigative judges (four positions were vacant), 25 were former prosecutors, 10 were former investigators or criminal investigation officers and 5 were former lawyers or legal clerks at courthouses.²⁶

Law No. 153 of 5 July 2012 (in force since 31 August 2012) established that investigative judges must be appointed from among the court's judges. Under the SCM Regulations on the procedure and manner of appointing investigative judges, the investigative judges had to file applications for re-confirmation as judges of general jurisdiction until 1 March 2015.²⁷

In 2013, four investigative judges were re-confirmed for the position of common judge. In 2014, the SCM proposed the President of the Republic of Moldova to re-confirm 34 investigative judges for the position of judge. The President issued a decree to re-confirm 32 investigative judges for the common law judge and rejected two investigative judges (Anatolie GALBEN, Rîșcani Court, Chișinău, and Vasile TABAN, Șoldănești Court). One of the investigative judges (Ion GUȚU, Fălești Court) did not apply for re-confirmation as a judge, one (Gheorghe URȘAN, Telenești Court) resigned on his own initiative and other two (Vasile GHETU, Edineț Court, and Victor LANOVENCO, Vulcănești Court) failed their performance evaluation from the Evaluation Board, as a result, were disqualified from re-confirmation.²⁸

1.3. The investigative judges appointed from 2015 until 2017

Law No. 126 of 9 June 2016, established that the term in office of an investigative judge had a fixed duration of three years and could not be held for two times consecutively. In practice, after the enactment of Law No. 126, the SCM established the term of investigative judges for shorter periods than three years. For example, the SCM, by its Decision No. 932/38 of 26 December 2016,²⁹ established a term of one year for all investigative judges.

Law No. 126 of 9 June 2016, established that only judges with a seniority of more than three years could serve as investigative judges. From 2015 through 2017, the SCM appointed 21 judges (6 main incumbents and 15 alternates) to act as investigative judges, despite them having served in judicial positions for less than the minimally required three years. One of the five main judges had served as a judge for one year, and ten alternate judges had served as judges for one year at most. This information is presented in detail in the table below.

²⁶ LRCM, policy paper: "Reforming the Investigative Judge Institution: Challenges, Risks and Solutions," 2014, available at <https://crjm.org/wp-content/uploads/2014/04/2013-12-11-CRJM-doc-politici-judecat-instructie.pdf>.

²⁷ SCM Decision No. 145/6 of 12 February 2013, "On the Approval of the Regulations on the Procedure and Manner of Appointing Investigative Judges," available at <http://www.csm.md/files/Hotaririle/2013/6/145-6-%281%29.pdf>, and the Regulations on the procedure and manner of appointing investigative judges, available at http://www.csm.md/files/Acte_normative/Legislatia/Interne/145-6-Reg_proced_condit_jud_instructir.pdf.

²⁸ SCM's activity report for 2014, p. 19 – 20, available at https://www.csm.md/files/Raport_anual/RAPORT_CSM2015.pdf.

²⁹ SCM Decision No. 932/38 of 26 December 2016, available at <http://www.csm.md/files/Hotaririle/2016/38/932-38.pdf>.

Table 2. The main judges and alternate judges appointed in the period of 2015 – 2017 to act as investigative judges without having the minimal judicial incumbency of three years

| Judecători de instrucție (de bază) | | | |
|---|------------------------------|---|--|
| District court | Judge's first and last names | Experience (as of the date of SCM decision) | SCM Decision |
| Centru Court, Chișinău | Sergiu BULARU | 2 years and 10 months | No. 932/38 of 27 December 2016 |
| Bălți Court | Ghenadie EREMCIUC | 2 years and 2 months | No. 220/10 of 5 April 2016 |
| Călărași Court | Veaceslav NEGURIȚĂ | 2 years and 5 months | No. 932/38 of 27 December 2016 |
| Comrat Court | Vasile HRAPACOV | 1 year | No. 7/1 of 14 January 2014 |
| Criuleni Court | Viorica URSU | 2 years and 9 months | No. 838/33 of 29 November 2016 |
| | | 2 years and 10 months | No. 932/38 of 27 December 2016 |
| Florești Court | Sergiu CARAMAN | 2 years and 5 months | No. 236/10 of 24 March 2015 |
| Investigative judges (alternates) | | | |
| District Court | Judge's first and last names | Experience (as of the date of SCM decision) | SCM Decision |
| Buiucani Court, Chișinău | Alexandru NEGRU | 2 years and 9 months | No. 798/32 of 22 November 2016 |
| | Andrei NICULCEA | 1 year and 4 months | |
| | Vitalie BUDECI | 1 year and 3 months | |
| | Alexandru NEGRU | 2 years and 10 months | No. 932/38 of 27 December 2016 |
| | Andrei NICULCEA | 1 year and 5 months | |
| | Vitalie BUDECI | 1 year and 4 months | |
| Cimișlia Court | Sofia ARAMĂ | 7 months | No. 442/18 of 9 June 2015 |
| | | 11 months | No. 970/39 of 15 December 2015 |
| | | 1 year | No. 932/38 of 27 December 2016 |
| Comrat Court | Valeri HUDOBA | 5 months | No. 787/32 of 22 November 2016 |
| | | 5 months | No. 932/38 of 27 December 2016 |

| | | | |
|------------------|------------------|-----------------------|--|
| Florești Court | Marcela NICORICI | 6 months | No. 720/28 of 6 October 2015 |
| | | 1 year and 7 months | No. 932/38 of 27 December 2016 |
| | Alina ȚIHONSCHI | 2 years and 8 months | No. 932/38 of 27 December 2016 |
| Hîncești Court | Ion DADU | 1 year and 7 months | No. 932/38 of 27 December 2016 |
| Leova Court | Silvia GURIȚANU | 1 year and 3 months | No. 932/38 of 27 December 2016 |
| Orhei Court | Viorica SEVERIN | 1 year and 7 months | No. 932/38 of 27 December 2016 |
| | | 2 years and 7 months | No. 940/38 of 27 December 2017 |
| Rezina Court | Igor NEGREANU | 6 months | No. 932/38 of 27 December 2016 |
| | Viorica SEVERIN | 2 years and 7 months | No. 740/32 of 7 November 2017 |
| Sîngerei Court | Hristina CRAVEȚ | 6 months | No. 932/38 of 27 December 2016 |
| Șoldănești Court | Ramona MOȘNEGUȚU | 6 months | No. 932/38 of 27 December 2016 |
| Taraclia Court | Andrei Mironov | 2 years and 11 months | No. 505/20 of 30 June 2015 |
| Vulcănești Court | Sergiu BUCICOV | 5 months | No. 932/38 of 27 December 2016 |

Between 2015 and 2017, at almost every of its meetings, the SCM examined chief judges' requests for appointing judges to act as investigative judges. For example, in 2015, the SCM passed 45 decisions to appoint judges to act as investigative judges (including to examine concrete cases), in 2016 it passed 27 such decisions and in 2017 it passed 12 such decisions. The small number of SCM decisions regarding the appointment of investigative judges in 2017 is explained by SCM Decision [No. 932/38 of 27 December 2016](#), appointing main and alternate judges as investigative judges for a one-year term in all courts and court offices.

In addition to these 84 SCM decisions, from 1 January 2015, through 31 December 2017, the SCM's President issued 17 orders to appoint judges to the position of investigative judge. The SCM members approved the orders issued by the SCM's President at one of their subsequent meetings. Eleven of the SCM decisions cited as reason the fact that, at the time of issue of the President's orders, the SCM could not convene, three explained that the orders were a matter of urgency and one decision stated that the order was issued for ensuring proper judicial administration. In 7 of the 11 orders of the SCM's chairperson, the terms for the appointed investigative judges varied between one month and three years, and, in the others, they were equal to the periods during which a previously appointed investigative judge was out on vacation or could not examine a case. In most cases, the SCM decisions did not identify the appointed judges or their number, including the period for performing those duties.

All SCM decisions to approve the orders of the SCM's President invoked Article 6 letter (e) of the SCM Law, which stated that the President of the SCM can perform additional duties in line with the law. Articles 4 and 6 of the Law on the SCM do not provide for such powers of the SCM President, because this is a duty of the SCM, which passes its decisions at meetings whose schedule is published on its website.

From 2015 through 2017, the SCM passed at least eight decisions to change the judges who would act as investigative judges. For example, the SCM passed four such decisions regarding Rîșcani district court of Chișinău during the period of March 2015 – April 2016, while at Strășeni Court alternate judges were changed four times during the period of February 2015 – February 2016. This practice shows that some chief judges do not plan for the possibility of having to replace the main investigative judges or alternates and, as a result, add to the work of the SCM's secretariat and unreasonably overload the agenda of SCM meetings.

The investigative judges who were appointed before the enactment of Law No. 126 of 9 June 2016, will keep their duties until 1 January 2018. Those judges who have worked as investigative judges for more than two years, between 1 January 2013 and 31 August 2017, except for alternate judges, will no longer be able to perform the duties of an investigative judge until 31 December 2020. Finally, Law No. 126 required the SCM to appoint investigative judges in all courts, so that they could get into office on 1 January 2018.

1.4. The investigative judges appointed for the period of 2018 – 2020

In line with Law No. 126 of 9 June 2016, the SCM passed Decision No. 836/37 of 19 December 2017, to appoint judges and alternates who would act as investigative judges from 1 January 2018 until 31 December 2020.³⁰ Thus, it appointed 89 judges (43 main judges and 46 alternates) to act as investigative judges in 12 courts. As of the date of passing SCM Decision [No. 836/37 of 19 December 2017](#), 29 judges (32.5%) did not have three years of experience as judges. Of those 29 judges (main and alternate) with less than three years of experience in judicial office, four had worked as judges for less than nine months. Two of those four judges were from Chișinău Court, that had more than 150 judges, many of whom with more than three years' experience.

Of the 27 judges with less than three years of experience in judicial office, appointed to act as investigative judges from 1 January 2018 through 31 December 2020, 13 were main investigative judges and 14 were alternates. Of the 13 main investigative judges, five were former prosecutors. This information is presented in the table below.

³⁰ SCM Decision No. 836/37 of 19 December 2017, on the appointment of judges to act as investigative judge in their courts for the period of 2018 – 2020, available at <http://www.csm.md/files/Hotaririle/2017/37/836-37.pdf>.

Table 3. The main judges and alternate judges appointed to act as investigative judges for the period of 2018 – 2020

| District Court | Court location | Judge's last and first names | Status | Judicial incumbency as of the date of appointment as an IJ | Experience prior to the appointment in judicial position |
|----------------|----------------|------------------------------|--------------------|--|--|
| Chişinău | Botanica | Eugeniu BEŞELEA | Main position | 9 months | Judicial assistant at the SCJ |
| | Buiucani | Vitalie BUDECI | Main position | 2 years and 4 months | Lawyer |
| | | Andrei NICULCEA | Main position | 2 years and 5 months | Prosecutor |
| | Centru | Svetlana Tizu | Main position | 2 years and 10 months | Clerk |
| | Ciocana | Igor BAŢALAI | Alternate position | 2 years and 5 months | |
| | Rîşcani | Veniamin CHIHAI | Main position | 2 years and 1 month | Judicial assistant |
| | | Vitalie CIUMAC | Main position | 2 years and 7 months | Judicial assistant |
| | | Angela VASILENCO | Alternate position | 9 months | |
| Bălţi Court | Sîngerei Court | Iurie MALCOCI | Main position | 2 years and 10 months | Prosecutor |
| | | Hristina CRAVEŢ | Alternate position | 1 year and 5 months | |
| Cimişlia Court | Leova Court | Silvia GURIŢANU | Alternate position | 2 years and 6 months | |
| Edineţ | Edineţ | Cristina PRISĂCARI | Alternate position | 1 year 11 months | |
| | | Natalia BOBU | Alternate position | 2 years and 8 months | |
| | Briceni | Aurelia ANDRONACHE | Alternate position | 2 years and 6 months | |
| Cahul | Cahul | Leonid TURCULEŢ | Main position | 2 years and 3 months | Prosecutor's assistant |
| | Cantemir | | | | |
| | Taraclia Court | | | | |
| Străşeni | Străşeni | Silvia SLOBODZEAN | Alternate position | 1 year 11 months | |
| | Călăraşi Court | Veaceslav NEGURIŢĂ | Main position | 2 years and 5 months | Lawyer |
| | | Elena BOLOCAN | Alternate position | 1 year and 7 months | |

| | | | | | |
|----------------|-----------------|------------------|--------------------|----------------------|------------|
| Căușeni | Căușeni | Victoria RAILEAN | Alternate position | 7 months | |
| Comrat Court | Comrat Court | Valeri HUDOBA | Main position | 1 year and 6 months | Prosecutor |
| Criuleni Court | Criuleni Court | Romina ȚURCAN | Alternate position | 9 months | |
| Soroca | Florești Court | Marcela NICORICI | Main position | 2 years and 7 months | Jurist |
| Hîncești Court | Hîncești Court | Emil BULAT | Alternate position | 2 years and 6 months | |
| | | Ion DADU | Alternate position | 2 years and 7 months | |
| Orhei Court | Orhei Court | Viorica SEVERIN | Main position | 2 years and 7 months | Prosecutor |
| | Șolănești Court | Ramona MOȘNEGUȚU | Alternate position | 1 year and 6 months | |
| | Rezina Court | Igor NEGREANU | Main position | 1 year and 6 months | Prosecutor |

In the case of eight out of the 89 judges³¹ provided in the SCM Decision No. 836/37, the restriction regarding the exercise of duties of an investigative judge was not respected (the prohibition that was abolished after the SCM decision). Moreover, none of the SCM decisions explained the rationale behind the appointment of a judge with less than three years of incumbency in the office of investigative judge.

From 1 January through 31 May 2018, the SCM passed seven decisions regarding the replacement of main or alternate investigative judges. The SCM regularly publishes the updated list of investigative judges for the period of 1 January 2018 – 31 December 2020, on its web site.³²

The frequent replacement of investigative judges, regardless of the cause, highlighted the issues and inconsistencies in the practices of various courts of law. For example, on several occasions, chief judges requested retaining these powers for the examination of cases that had not reached the final phase.³³ As a result, the CAA requested the SCM and the courts to solve this issue to exclude possible conflicts related to the examination of cases assigned to the investigative judges whose term had expired or to transmit them to newly appointed investigative judges for examination.³⁴

On 20 January 2018, the Ministry of Justice came forward with a concept of strategic areas and priority actions for the judicial reform, including a proposal to reform the institution of investigative judge. At a public event, the ex-justice minister declared that the institution of investigative judge would be replaced by freedom and detention judges, having

³¹ Ion Păcăleu, Petru Vacula, Ghenadie Comerzan, Nadejda Lazareva, Igor Botezatu, Vladimir Craveț, Sergiu Godorogea and Vasile Nogai.

³² The latest version of the list is available at http://csm.md/files/Lista_judecatorilor/Lista_de_instrucție.pdf.

³³ SCM Decision No. 29/1 of 16 January 2018.

³⁴ SCM Decision No. 103/6 of 20 February 2018.

different skillsets and qualifications. Those declarations, however, failed to materialize in concrete legislative or administrative actions.³⁵

The practice of appointing investigative judges observed throughout the monitoring period proved to be inconsistent. At almost every of its meetings, the SCM had to consider chief judges' requests for appointing judges to act as investigative judges. This practice, in addition to increasing the workload of the SCM's secretariat and unreasonably overloading the agenda of the SCM's meetings, adds to the uncertainty of the judges who will act as investigative judges and limits the impact proposed by the 2016 reform of the institution of investigative judge. Moreover, the requirements regarding the appointment criteria for the investigative judges, introduced in 2016 (the appointment of the investigative judges for a fixed term of three years) were mostly ignored. A natural explanation would be the lack of judges with more than three years of experience in those courts. And yet, a look at the list of judges from those courts showed that many of those courts (especially in Chişinău) had judges who had more than three years of judicial incumbency. With the legislative amendment of 2017, this requirement was excluded.

³⁵ Justice Ministry, „Concept Paper. Strategic Areas and Priority Actions of the Judicial Reform,” available at http://justice.gov.md/public/files/Document_de_concept.pdf.

2. The work of the investigative judge

2.1. The workload

In 2018, every district court in the Republic of Moldova (with the exception of several courts from Chişinău and Orhei Court) had only one investigative judge.³⁶ Another up to three judges of the same court were designated to act as alternatives if the main judge were unable to exercise his/her duties.³⁷ On average, the total number of the main investigative judges did not exceed 43 or 45 investigative judges at the 42 existing court premises (15 courts).³⁸ The number of the investigative judges was established based on the assumption that every district court in the country must have at least one such judge.³⁹

Although the number of investigative judges has not changed in the past ten years, their workload has increased considerably. If in 2006, investigative judges examined approximately 20,670 cases and materials, in 2017 this number was 56,404, evidencing a steady increase from 2006 (with the exception of 2013). In 2018, the number of cases and materials examined by the investigative judges decreased by approximately 10,000 cases.

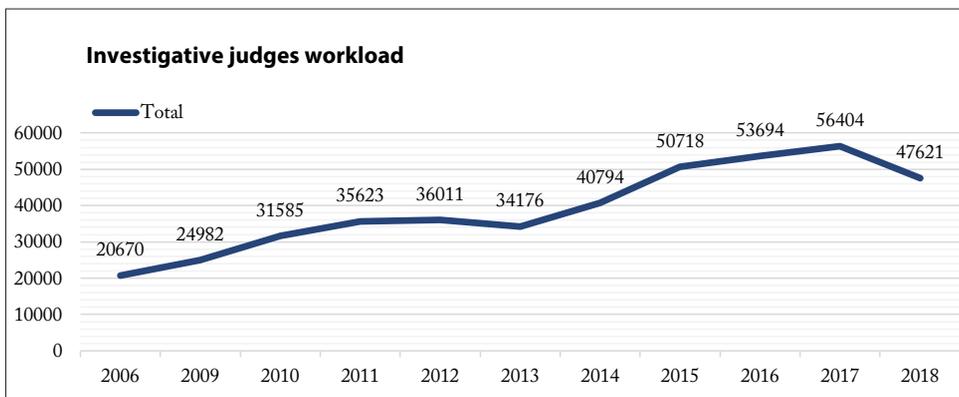
³⁶ CSM, The list of the investigative judges in the courts of the Republic of Moldova, 2018, available at http://csm.md/files/Lista_judecatorilor/Lista_de_instructie.pdf.

³⁷ CSM, The list of the investigative judges in the courts of the Republic of Moldova, 2018, available at http://csm.md/files/Lista_judecatorilor/Lista_de_instructie.pdf.

³⁸ Before 2016, the Republic of Moldova had 44 first-level courts (trial courts), of which two — the Commercial Court and the Military Court — were specialized. With the adoption of Law No. 76 of 21 April 2016, “On the Reorganization of Courts of Law,” the specialized courts were dissolved, and the other courts were merged into 15 courts, each having several offices in different locations. As of December 2018, the 15 courts had 42 offices across the country, and they will be gradually merged until 31 December 2027, as conditions for this will occur, in line with the plan approved by the Parliament at the proposal of the government. Updated list of court offices is available at http://csm.md/files/Lista_judecatorilor/Lista_de_instructie.pdf.

³⁹ LRCM, report: “Reforming the Institution of the Investigative Judge in the Republic of Moldova,” 2015, p. 47.

Graph 1. The total workload of investigative judges in 2006, and in the period of 2009 – 2018. Source: CAA



It seems that the decision regarding the number of investigative judges was not based on a careful assessment of their real workload. A simple estimation shows that currently an investigative judge must examine an average of 1,340 cases and materials in one year (according to the data of 2017). This figure, however, is bigger for the investigative judges from Chişinău and Bălţi and smaller for the district courts in the rayons. Moreover, as a result of the amendments made in 2014 to the SCM Regulations on the randomized assignment of cases, every investigative judge also receives cases from other categories, which account for half of their workload.⁴⁰

In a study published in 2015, the LRCM found that, in some courts, investigative judges' workload exceeded the average calculated for the entire judiciary very much, while in other courts it was very small.⁴¹ In 2018, this finding is still relevant. According to available data, the workload of investigative judges varies significantly across the courts, as the SCM has not taken policy measures to review the total number of investigative judges required for the system. The workload and the complexity of the examined cases, particularly in Chişinău and other localities or districts (Bălţi, Orhei, etc.), requires the SCM to review the total number of the positions of investigative judge allocated for each court.

For that end, the SCM should review the real workload of investigative judges. The obtained results will be used to increase or decrease the number of investigative judges and to make a better use of part-time investigative judges.

⁴⁰ LRCM, report: "Reforming the Institution of the Investigative Judge in the Republic of Moldova," 2015, p. 47..

⁴¹ Ibidem, p. 47.

2.2. The categories of cases examined by the investigative judge

To guarantee the observance of human rights during the criminal investigation phase, starting with 2003, investigative judges authorize certain criminal investigation actions and examine the appropriateness of constraint measures, including search, wiretapping, seizure of property and pre-trial arrest. Therefore, investigative judges play a central role in protecting human rights during the criminal investigation phase.

The table below shows the official statistics regarding all categories of cases examined by the investigative judges in 2006 and from 2009 through 2018 and their respective shares.

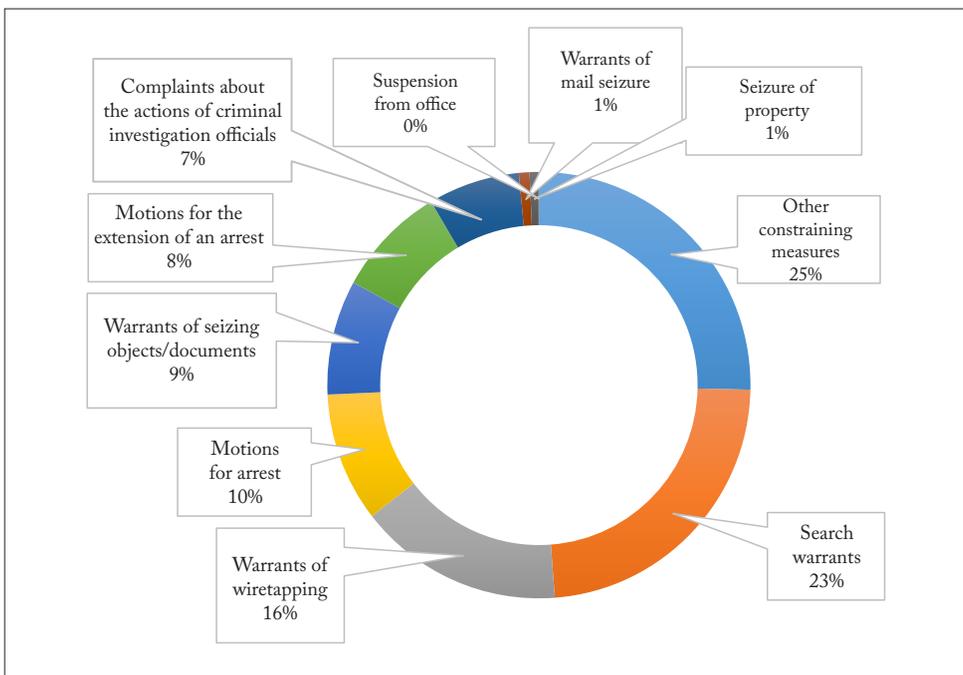
Table 4. The official statistics regarding the cases examined by the investigative judges in 2006 and from 2009 through 2018 and their respective shares in the total number of cases/materials examined by the investigative judges⁴²

| Year | Total | Search Warrants | | Warrants of seizing objects/documents | | Warrants of mail seizure | | Warrants of wiretapping | | Suspension from office | | Seizure of property | | Other constraining measures | | Motions for arrest | | Motions for the prolongation of an arrest | | Complaints about the actions of prosecution authorities | |
|---------------------------|--------------|-----------------|----------------|---------------------------------------|----------------|--------------------------|----------------|-------------------------|----------------|------------------------|----------------|---------------------|----------------|-----------------------------|----------------|--------------------|----------------|---|----------------|---|----------------|
| | | motions | % of the total | motions | % of the total | motions | % of the total | motions | % of the total | motions | % of the total | motions | % of the total | motions | % of the total | motions | % of the total | motions | % of the total | motions | % of the total |
| 2006 | 20670 | 3515 | 17.0% | 882 | 4.3% | 200 | 1.0% | 1931 | 9.3% | 43 | 0.2% | 142 | 0.7% | 4217 | 20.4% | 5083 | 24.6% | 2662 | 12.9% | 1995 | 9.7% |
| 2009 | 24982 | 5437 | 21.8% | 1890 | 7.6% | 57 | 0.2% | 3848 | 15.4% | 1 | 0.0% | 162 | 0.6% | 5780 | 23.1% | 3427 | 13.7% | 2395 | 9.6% | 1985 | 7.9% |
| 2010 | 31585 | 7453 | 23.6% | 3234 | 10.2% | 83 | 0.3% | 3890 | 12.3% | 0 | 0.0% | 147 | 0.5% | 9164 | 29.0% | 3287 | 10.4% | 2395 | 7.6% | 1932 | 6.1% |
| 2011 | 35623 | 8759 | 24.6% | 3939 | 11.1% | 199 | 0.6% | 3586 | 10.1% | 0 | 0.0% | 155 | 0.4% | 10775 | 30.2% | 3332 | 9.4% | 2688 | 7.5% | 2190 | 6.1% |
| 2012 | 36011 | 8744 | 24.3% | 4627 | 12.8% | 206 | 0.6% | 5029 | 14.0% | 0 | 0.0% | 187 | 0.5% | 8574 | 23.8% | 3342 | 9.3% | 2881 | 8.0% | 2421 | 6.7% |
| 2013 | 34176 | 9346 | 27.3% | 4813 | 14.1% | 116 | 0.3% | 2915 | 8.5% | 1 | 0.0% | 169 | 0.5% | 9071 | 26.5% | 2672 | 7.8% | 2439 | 7.1% | 2634 | 7.7% |
| 2014 | 40794 | 11535 | 28.3% | 4057 | 9.9% | 111 | 0.3% | 5952 | 14.6% | 0 | 0.0% | 285 | 0.7% | 10102 | 24.8% | 2876 | 7.1% | 2956 | 7.2% | 2920 | 7.2% |
| 2015 | 50718 | 13690 | 27.0% | 3662 | 7.2% | 123 | 0.2% | 9962 | 19.6% | 0 | 0.0% | 354 | 0.7% | 12895 | 25.4% | 3290 | 6.5% | 3541 | 7.0% | 3201 | 6.3% |
| 2016 | 53694 | 12068 | 22.5% | 3343 | 6.2% | 344 | 0.6% | 12004 | 22.4% | 1 | 0.0% | 271 | 0.5% | 14028 | 26.1% | 3954 | 7.4% | 4326 | 8.1% | 3355 | 6.2% |
| 2017 | 56404 | 13732 | 24.3% | 2842 | 5.0% | 2087 | 3.7% | 11278 | 20.0% | 4 | 0.0% | 661 | 1.2% | 13098 | 23.2% | 3666 | 6.5% | 5775 | 10.2% | 3261 | 5.8% |
| 2018 | 47621 | 8266 | 17.4% | 3465 | 7.3% | 534 | 1.1% | 12480 | 26.2% | 3 | 0.0% | 597 | 1.3% | 12421 | 26.1% | 2605 | 5.5% | 3833 | 8.0% | 3417 | 7.2% |
| Average (11 years) | | - | 23.5% | - | 8.7% | - | 0.8% | - | 15.7% | - | 0.0% | - | 0.7% | - | 25.3% | - | 9,8% | - | 8.5% | - | 7.0% |

⁴² According to the annual data reports published by the CAA, available at <http://aaj.justice.md/ro/rapoarte/rapoarte-statistic>.

According to the official statistics for the years 2006 and 2009 through 2018 on the cases examined by investigative judges, on average, almost half of the workload of investigative judges consisted in the examination of motions for constraining measures, other than pre-trial arrest (25%) and searches (23%). Another 18% were the motions for arrest and the prolongation of arrest, 16% were motions for wiretapping and 9% were motions for seizure of objects/documents. Approximately 7% of the workload were complaints about actions of criminal investigation authorities, and 1% and less were motions for seizing correspondence or property and suspension from office.

Graph 2. *The percentage distribution of cases and materials examined by investigative judges by categories in 2006 and 2009 – 2018.*



In the past years, the amount of cases and materials examined by investigative judges has increased in all categories but the motions for seizure of objects/documents and complaints about the actions of prosecution authorities.

According to the SCM Regulations on single national complexity levels for civil, criminal and contravention cases, cases and materials examined by investigative judges have a complexity level of between 2 and 6, where 1 is the lowest and 10 is the highest complexity level. The qualification of the materials examined by investigative judges as of lower complexity is a matter calling for a detailed review. Most of them are complex matters regarding the limitation of human rights, which are decided by the investigative judge. The qualification of a case category as less complex can negatively influence the time an investigative judge is willing to allocate for the examination of cases from this category. Considering the big amount of cases examined by investigative judges and the

real complexity of some of those cases, as opposed to the assigned complexity, it would be relevant to thoroughly review the methodology for assigning complexity levels to the cases examined by investigative judges.

2.3. The impact of the investigative judge's work on the observance of human rights

From 1997, when the Republic of Moldova ratified the European Convention on Human Rights (ECHR), until 31 December 2018, the European Court of Human Rights (ECtHR) issued 387 decisions in regard to Moldova, finding 549 human rights violations.⁴³ In at least 15% of them, the ECtHR acknowledged the violation of Article 5 of the ECHR, the right to liberty and security (80 violations), including due to insufficient reasoning of the arrest.⁴⁴ This is only a part of the work of investigative judges, that is most visible due to the violations found by the ECtHR, and the most intrusive in the lives of people who suffered because of the unreasoned decisions of investigative judges.

Despite this, in the past years, investigative judges have widely adopted the practice of warranting arrests excessively often and granting the prosecutors' motions for wiretapping without a second thought. This worrying trend has been reported by civil society,⁴⁵ and lately even some state authorities have acknowledged it.⁴⁶

2.3.1. The warranting of pre-trial arrests

"The rate of granting the motions for arrest and wiretapping is worrying."

The speech of Justice Minister Victoria IFTODI, delivered on 23 March 2018, at the General Assembly of Judges (timing: 02:06)⁴⁷

In at least 18 decisions against the Republic of Moldova, the ECtHR found that judges' decisions regarding arrests were insufficiently reasoned. The first decisions condemning the Republic of Moldova for insufficient reasoning of decisions regarding arrests were issued

⁴³ LRCM, report: "Summary of the Violations Found by the European Court of Human Rights with Regard to the Republic of Moldova," 2018, available at <https://crjm.org/wp-content/uploads/2018/03/Violari-20-de-ani.pdf>.

⁴⁴ Soros Foundation – Moldova, Criminal Justice Performance from a Human Rights Perspective, "Assessing the Transformation of the Criminal Justice System in Moldova," 2009, p. 19.

⁴⁵ LRCM, report: "Wiretapping in the Republic of Moldova: a progress or a regression?" 2015, available at <https://crjm.org/wp-content/uploads/2016/01/CRJM-DA-Interceptari.pdf>. CPR Moldova, "Crazed with Anger: How to Deal with Wiretapping in Moldova?" 2018, available at: <https://site.cpr.md/2018/07/03/scosi-din-fire-ce-facem-cu-interceptarile-convorbirilor-telefonice-din-moldova/>.

⁴⁶ The speech of Justice Minister Victoria IFTODI, delivered on 23 March 2018, at the General Assembly of Judges (timing: 02:06), available at <https://www.privesc.eu/Arhiva/80525/Adunarea-Generala-a-Judecatorilor>.

⁴⁷ <http://realitatealive.md/live-adunarea-general-a-judecatorilor-din-23-martie-2018---74177.html>.

in cases *Șarban* and *Becciev*, dated October 2005.⁴⁸ A study found that, in 2010, most prosecutors' motions and judges' decisions regarding arrests did not comply with the legal provisions requiring the reasoning of such measures.⁴⁹ Since 2009 until 2018, the number of motions for pre-trial arrests has not changed very much. However, the rate of granted motions increased.

Table 5. The official statistics regarding the motions for arrest, examined in 2006 and 2009 – 2018 Source: CAA

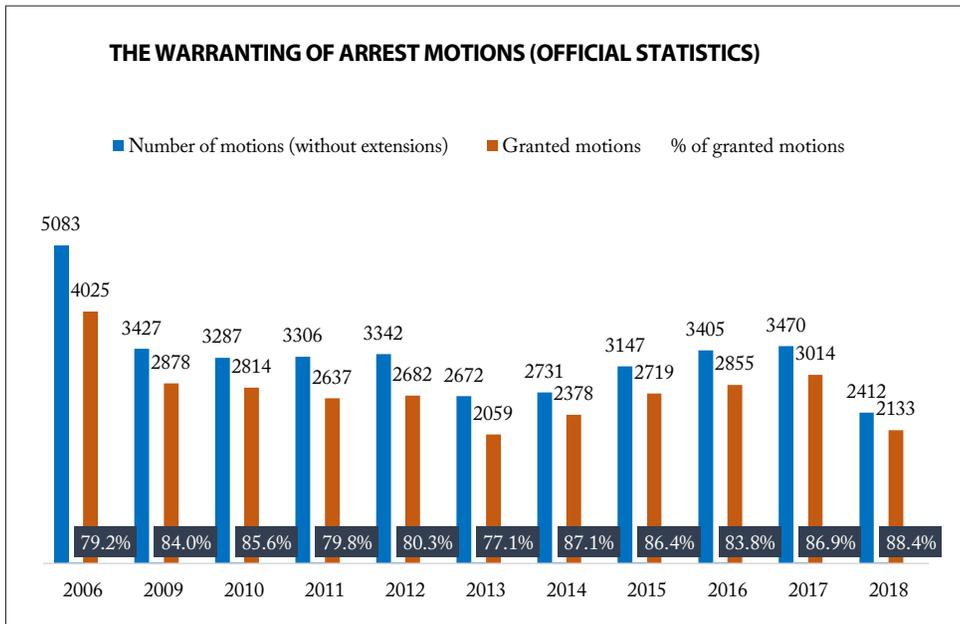
| Year | Number of criminal cases sent to court | Number of motions (without prolongations) | In relation to the number of cases sent to court | Variation in comparison with the previous year | Granted motions | Percent of granted motions |
|----------------|--|---|--|--|-----------------|----------------------------|
| 2006 | 13517 | 5083 | 37.6% | - | 4025 | 79.2% |
| 2009 | 9525 | 3427 | 36.0% | -32.5% | 2878 | 84.0% |
| 2010 | 9941 | 3287 | 33.1% | -4.0% | 2814 | 85.6% |
| 2011 | 10088 | 3306 | 32.8% | +0.5% | 2637 | 79.8% |
| 2012 | 11720 | 3342 | 28.5% | +1.0% | 2682 | 80.3% |
| 2013 | 9797 | 2672 | 27.3% | -20.0% | 2059 | 77.1% |
| 2014 | 14586 | 2731 | 18.7% | 2.2% | 2378 | 87.1% |
| 2015 | 14402 | 3147 | 21.9% | +15.2% | 2719 | 86.4% |
| 2016 | 14329 | 3405 | 23.8% | +8.2% | 2855 | 83.8% |
| 2017 | 15141 | 3470 | 22.9% | +1.9% | 3014 | 86.9% |
| 2018 | 14794 | 2412 | 16.3% | -30.4% | 2133 | 88.4% |
| Average | | | | | | 83.5% |

Although the share of criminal cases where prosecutors requested arrest has decreased steadily (from 37.6% in 2006 to 22.9% in 2017). The rate of granting the motions for arrest is really worrying. If in 2006, it was 79.2%, in 2018, it increased to more than 88.4%. According to the reviewed statistical data, the average percentage of the motions for arrest that were granted over the past ten years exceeded 83%.

⁴⁸ LRCM, report: "Execution of Judgments of the European Court of Human Rights by the Republic of Moldova: 2013 – 2014," 2015, available at <https://crjm.org/wp-content/uploads/2015/03/CRJM-Raport-CtEDO-31.03.2015.pdf>, p. 66.

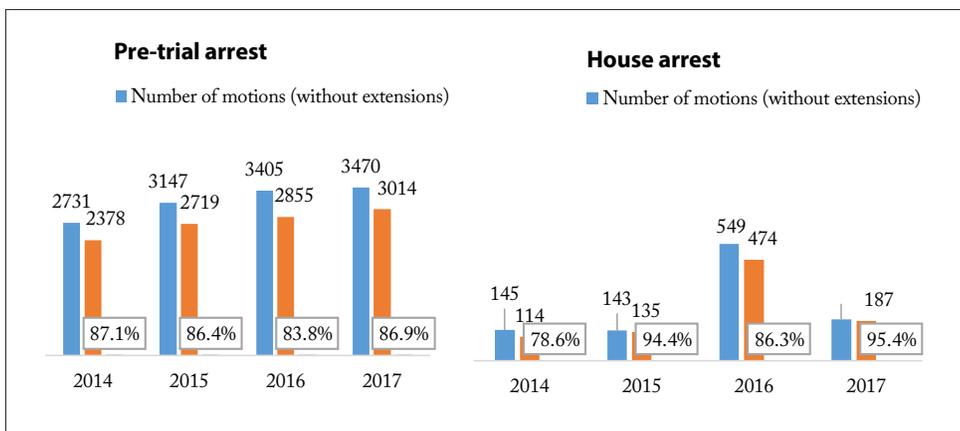
⁴⁹ Soros Foundation – Moldova, report: "Decisions on Arrest by Investigative Judges in the Republic of Moldova — an Assessment from the International Point of View," 2010, available at http://soros.md/files/publications/documents/Report_Stange_Final_0.pdf, p. 59.

Graph 3. The official statistics regarding the motions for arrest, examined in 2006 and 2009 – 2018 Source: CAA



Even if the prosecutor requests other measure than pre-trial arrest, the rate of granting these motions is still high. For example, the rate of granting the motions for home arrest is higher than 88%.

Graphs 4 and 5. The official statistics regarding the examined motions for pre-trial arrest in comparison with the examined motions for home arrest (2014 – 2017)



The lack of any significant difference between the rate of granting the motions for pre-trial arrest and the motions for home arrest can be indicative of the pro-accusatorial attitude of investigative judges. These data seem also to confirm that the granting arrest motions

usually takes place without a thorough consideration of the reasons for arrest. As a rule, motions for pre-trial arrest or house arrest repeat the accusation part against the concerned person submitted by the Prosecutor, and the sections regarding the reasonable allegations and warranting the arrest repeat the provisions of the Criminal Procedure Code.⁵⁰ Thus, the insufficient reasoning of the decisions regarding pre-trial arrest can be caused by the role of prosecutors and criminal investigation officers, who are the key persons in submitting motions for pre-trial arrest to the investigative judges.

2.3.2 Case study: the case of the judge Munteanu — a precedent that calls for improvements in the application of pre-trial arrest

On 31 January 2017, at the request of the prosecutor general, the SCM granted consent for the prosecution of the judge Dorin MUNTEANU of Chişinău Court. He was charged based on Article 307 of the Criminal Code with having deliberately passed an illegal decision. Allegedly, on December 9, 2016, he rejected a prosecutor's motion for extending the arrest of a person accused of a fraud that resulted in the expropriation of property. Later, Chişinău Court of Appeal quashed the decision of the judge Munteanu. Meanwhile, the accused person has fled the country. It should be noted that, after the judge Munteanu had rejected the motion for arrest, he wrote a letter to the Prosecutor General's Office to explain the irregularities committed by the prosecutor in question.

According to [a press-release of the Prosecutor General's Office](#), issued shortly after the meeting of the SCM, the judge's decision to reject the arrest was illegal because it was based on the declarations of a witness interrogated "without reason" and on the fact that the judge had found that the incriminated deed was not a fraud. The press-release stated that the case had been started at the prosecutors' initiative, not in response to a complaint from the victims of the crime.

The press-release of the Prosecutor General's Office stated that the criminal investigation authorities were dissatisfied that a judge had rejected the prosecutor's motion for the arrest of a person. The grounds cited by the criminal investigation authorities for starting a criminal action, the interrogation of a witness "without reason" and the finding that the incriminated deed was not a crime, are debatable. The Criminal Procedure Code obliges judges who examine prosecutors' motions for arrest to check whether the incriminated deed is a crime and to interrogate relevant witnesses summoned by the defence. If the incriminated deed is not a crime, the law obliges the judge to reject the motion for arrest. The judge must also consider the witnesses' declarations when he/she decides on the necessity of the arrest. If, during the arrest proceedings, the prosecutor was not sufficiently persuasive about the flight risk or the constitutive elements of a crime, it is the prosecutor's fault, not the judge's.

The press-release of the Prosecutor General's Office implied that the accused person had fled the country after the rejection of the prosecutor's motion for the arrest. This can hardly be viewed as the judges' fault because the prevention of the dodging of charges is

⁵⁰ LRCM, report: "Reforming the Institution of the Investigative Judge in the Republic of Moldova," 2015, available at <https://crjm.org/wp-content/uploads/2015/01/CRJM-Raport-JI-28-01-2015.pdf>, p. 27.

the responsibility of the prosecution and the police, rather than the judge. The press-release explained that the judge was suspected not of corruption, but of having deliberately ruled contrary to the law. The mere reversal of a court decision by a higher court does not offer grounds for prosecution in accordance with Article 307 of the Criminal Code. The law requires that the reversal should be caused by illegal actions and that those illegal actions be committed “deliberately.” The SCM did not clarify the reasoning behind its preliminary conclusion that the judge had violated the law and that the violation could not have been other than “deliberate.” The case of the judge Munteanu, with the charges based on Article 307 of the Criminal Code, was sent to court and is pending trial.

In this context, it is worth reminding that in December 2016, [the SCJ requested the Constitutional Court](#) (CCM) to check the constitutionality of Article 307 of the Criminal Code, invoked as the grounds for charges against the Judge Dorin MUNTEANU. According to the SCJ’s request, at least some of its judges were not sure whether judges could be prosecuted based on Article 307 of the Criminal Code without this fact representing an interference in their independence. On 12 January 2017, the CCM requested the Venice Commission an *amicus curiae* brief regarding the alignment of Article 307 of the Criminal Code with the international standards.

On 13 March 2017, the Venice Commission [issued an opinion](#)⁵¹ where it laid out three main points. First, the judges may be criminally liable for the interpretation of the law, finding of facts and considering of evidence only in cases of ill intent or gross negligence. Second, the mere reversal of a decision of a lower court by a higher court does not offer sufficient grounds for holding liable the judge who had issued it. The criminal liability can be established only if it has been proven that the judge was personally guilty and that the “mistake” came from ill intention or gross negligence. Third, a judge may be held criminally liable only based on the law that must comply with the principle of judicial independence and be interpreted restrictively.

On 28 March 2017, the CCM [rejected the application of the SCJ](#) regarding the unconstitutionality of Article 307 of the Criminal Code. The CCM, however, made some clarifications regarding the application of that article. The word “knowingly” from the description of the constitutive elements of the crime in question means that it is necessary to demonstrate the direct intention of the judge to deliver an illegal decision. The accusation must be proven beyond any reasonable doubt, and any doubt must be interpreted in the favour of the accused judge. The prosecutors must prove the accused judge’s wish for consequences that go against the law and that he/she was aware of the certainty of the consequences. Furthermore, the reversal of the decision by a higher court does not offer grounds for holding the judge criminally liable. The CCM also stated that, when warranting prosecution under Article 307, the SCM should consider the fact that criminal liability shall always be a measure which is to be applied as a last resort. The SCM should consider

⁵¹ The European Commission for Democracy through Law (Venice Commission), *amicus curiae* brief (CDL-AD(2017)002) on the criminal liability of judges, passed at the 110th plenary session (Venice, 10 – 11 March 2017), available at [http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2017\)002-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2017)002-e).

alternatives, such as disciplinary procedure against the judge.

In conclusion, the prosecution of the judge Munteanu and the referral of his criminal case based on Article 307 of the Criminal Code to court for the refusal to extend the arrest raises big questions regarding the message it sends to judges and the impact on their work related to the examination of motions for arrest and pre-trial arrest. As mentioned earlier, even before January 31, 2017, there were major questions regarding the way Moldovan judges examined criminal cases. The acquittal rate in the Republic of Moldova is much lower than the average for advanced democracies, reaching 1.65% in 2017 for the trial courts and 1.5% for courts of appeal.⁵² Moreover, the rate of granting prosecutors arrest motions has always been higher than 75%, despite the criticism from the ECtHR that arrests in the Republic of Moldova are too frequent and unreasoned, and that the rate of granting the prosecutors' motions for wiretapping is higher than 98%. The cases like that of the judge Munteanu install fear among judges who will never take decisions that go against the will of the prosecution authorities. This reduces even further the chances that the trend of excessive or unreasoned arrests will go down.

2.3.3. Wiretapping

On 14 September 2009, the ECtHR issued a decision in the case *Iordachi and others v Moldova*,⁵³ where it found that the legislation on wiretapping failed to provide sufficient guarantees and that the number of warranted wiretaps was excessively high (then approximately 3,000).⁵⁴

Despite the adoption of the decision on *Iordachi and Others v Moldova* in 2009, statistics confirm that the situation has not changed at all. In 2012, the courts examined 30% more motions than in 2009, in 2015, they examined 50% more motions than in 2012, and in 2018, they examined three times more motions than in 2009. In 2018, the total number of the granted motions reached 12,128 being the highest ever recorded.

⁵² According to the data presented in the annual activity reports of the prosecution authorities, available at <http://procuratura.md/md/d2004/>.

⁵³ ECtHR, decision *Iordachi and others v. Moldova* 10 February 2009.

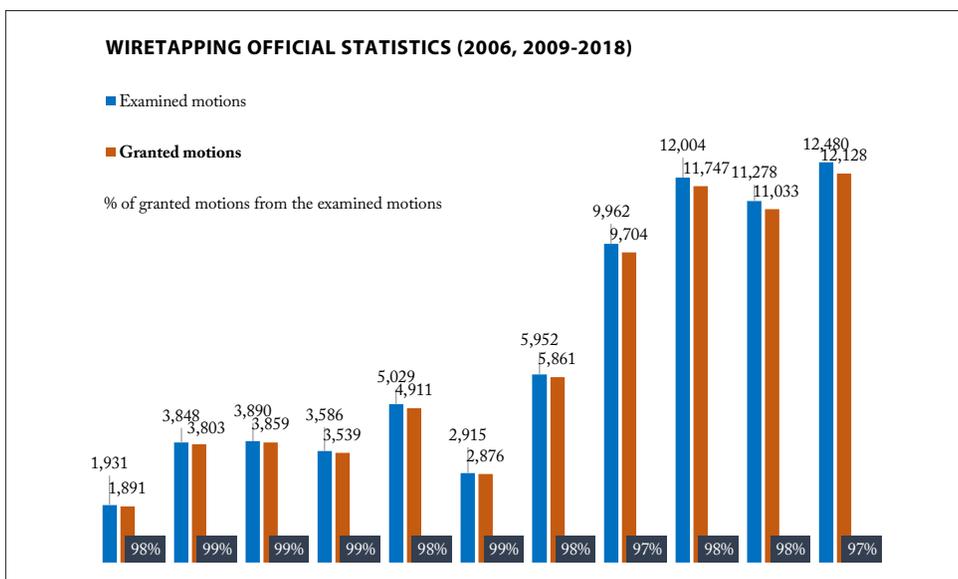
⁵⁴ LRCM, report: "Reforming the Institution of the Investigative Judge in the Republic of Moldova," 2015, available at <https://crjm.org/wp-content/uploads/2015/01/CRJM-Raport-JI-28-01-2015.pdf>, p. 7.

Table 6. The statistics regarding the motions for wiretapping examined by the investigative judges in 2006, and in 2009 – 2018. Source: CAA

| Year | Examined motions | Variation in comparison with the previous year | Granted motions | % of granted motions from the examined motions |
|----------------|------------------|--|-----------------|--|
| 2006 | 1931 | - | 1891 | 97.9% |
| 2009 | 3848 | +99.3% | 3803 | 98.8% |
| 2010 | 3890 | +1.1% | 3859 | 99.2% |
| 2011 | 3586 | -7.8% | 3539 | 98.7% |
| 2012 | 5029 | +40.2% | 4911 | 97.7% |
| 2013 | 2915 | -42.0% | 2876 | 98.7% |
| 2014 | 5952 | +104.2% | 5861 | 98.5% |
| 2015 | 9962 | 67.4% | 9704 | 97.4% |
| 2016 | 12004 | +20.5% | 11747 | 97.9% |
| 2017 | 11278 | -6.0% | 11033 | 97.8% |
| 2018 | 12480 | +10.7% | 12128 | 97.2% |
| Average | | | | 98.2% |

In 2006 and from 2009 through 2018, the investigative judges granted 98% of the wiretapping motions on average. This percentage has not changed very much after the decision on *Iordachi and Others*. This information is presented in the graph below.

Graph 6. The granting of the motions for wiretapping examined by the investigative judges in 2006, and in 2009 – 2018. Source: CAA



The excessively frequent warranting of arrests and the granting of the prosecutors' motions for wiretapping without a second thought threatens the effective protection of human rights during the criminal investigation phase. Investigative judges should consider more often provisional measures that are alternative to the pre-trial arrest and the investigation measures that are alternative to the wiretapping, provided for by the Criminal Procedure Code. For that end, competent authorities should urgently ensure conditions for the application of arrest alternatives and carry out information campaigns to promote them. Additionally, consideration should be given to the application of other special investigation measures and a stricter control over the warranting of wiretaps.

3. The examination of cases by investigative judges. Could closed hearings account for the problems of the investigative judge institution in the Republic of Moldova?

According to Article 308 of the Criminal Procedure Code, investigative judges examine the motions for pre-trial arrest, home arrest or arrest prolongation in closed hearings. The accused or the defendant may request the examination of the motion for the application or prolongation of pre-trial arrest or home arrest in public hearing. The investigative judge should consult with the prosecutor and order the examination of the motion in public hearing. Nevertheless, this is rather an exception, and most motions for pre-trial arrest, home arrest or arrest prolongation are examined in closed hearings. To increase the accountability and the quality of the examination of such motions by the investigative judge, it would be useful to significantly increase the number of requests for the examination of arrest motions in public hearings.

Considering that the main purpose of the investigative judges' work is to ensure the legality of criminal investigation actions, which are confidential, the decision that almost all such work should be carried out in closed hearings is understandable and mostly justified. Nonetheless, as "guardians" of human rights during the criminal investigation phase, the investigative judges have not proven yet that they perform this role well, even 15 years after the establishment of this institution. In this context, it would be reasonable to introduce legislative amendments and changes of the practice not only with regard to the appointment manner and the workload of investigative judges, but also with regard to the examination of the motions for pre-trial arrest and home arrest.

The pre-trial arrest is the most intrusive measure against a person facing criminal charges. As mentioned earlier, in at least 18 judgements against the Republic of Moldova, the ECtHR found that judges' decisions regarding arrests were insufficiently reasoned. The issues with the examination and warranting of pre-trial arrests by investigative judges are obvious, which should determine decision-makers to take effective actions to change this situation. The examination of the motions for pre-trial arrest in public hearings could

increase the accountability of investigative judges and determine them to treat this subject more seriously and to improve the quality of their decisions.

Another way of improving the reasoning of decisions issued by investigative judges with regard to pre-trial arrests and home arrests, including their prolongation, would be to publish those decisions with the anonymization of personal information. Currently, these decisions are not published, even if these judgments are known to the parties and are delivered in open hearings. There is no plausible explanation for the non-publication of all these judgments. Exceptionally, certain decisions shall not be published immediately to allow the arrested person or co-accused to be detained, but this should be the exception, not the rule.

Conclusions and recommendations

- Since 2003, the institution of investigative judge has changed and has faced multiple challenges. The investigative judges' complicated work is extremely important to effectively guarantee respect of human rights during the criminal investigation phase. Their experience is crucial to making complex decisions on matters of urgency. Therefore, the legislative amendments of 2017 and 2018 represented a major setback since the institution of the position of investigative judge in 2003 in ensuring that the judge has sufficient experience to be fully independent and in assuring the parties that the judge is properly qualified. In fact, these amendments excluded the main innovations introduced by law No. 126 of 9 July 2016. The legislator should reinstate the mandatory requirement of minimum three years' experience for the appointment as a judge, which it removed in 2017 in a non-transparent manner and without any justification.
- To increase the "attractiveness" of the institution of investigative judge, we recommend reviewing their status. A solution to this could be assigning investigative judges the same status as that of the Courts of Appeal judges, with all the resulting benefits, including the financial remuneration. This means, however, that judges filling these positions shall meet the necessary criteria required to qualify for the office of the Courts of Appeal judges, namely their seniority (minimum 6 years of work experience as a judge).
- The practice of appointing investigative judges observed throughout the monitoring period proved to be inconsistent. At almost every of its sittings, the SCM had to consider chief judges' requests for appointing judges to act as investigative judges. This practice, besides increasing the workload of the SCM's secretariat and unreasonably overloading the agenda of the SCM's meetings, adds to the uncertainty of the judges who will act as investigative judges and limits the impact proposed by the 2016 reform of the institution of investigative judge. Their reintegration as common law judges and appointment for a limited term, starting with 2013, has not produced tangible results in terms of the quality of their work. This can also be explained by the slowdown in the reforms of the

institution of investigative judge of 2012 and 2017.

- Although the number of investigative judges has not changed in the past ten years, their workload has increased considerably. The workload of investigative judges varies significantly across the courts, as the SCM has not taken policy measures to review the total number of investigative judges required for the system. This directly impacts the possibility of performing a qualitative examination of the materials and cases that fall within the exclusive competence of investigative judges. The workload of investigative judges should be realistic to avoid compromising the quality of their work. On the other hand, the investigative judges with insufficient workload could be involved in the examination of other cases. For that end, the SCM should review the real workload of investigative judges. The obtained results will be used to increase or decrease the number of investigative judges and to make a better use of part-time investigative judges.
- The qualification of the cases and materials examined by investigative judges as of lower complexity is a matter calling for a detailed review. Considering the high number of cases examined by investigative judges and the real complexity of some of those cases, as opposed to the assigned complexity, it would be appropriate to thoroughly review the methodology for assigning complexity levels to the cases examined by investigative judges. Thus, the SCM should review the complexity of the cases examined by investigative judges and the total number of investigative judge positions allocated for each court.
- A big workload has a very significant impact on the possibility of a qualitative examination of the materials and cases that fall within the competence of investigative judges. Although the primary goal of the judicial oversight performed by investigative judges is to guarantee protection of human rights, in the past years, investigative judges have widely adopted the practice of warranting arrests excessively often and granting the prosecutors' motions for wiretapping without a second thought. This reveals a pro-accusatorial bias of investigative judges and that they either fail or ignore the mandatory requirement to justify the warranting of a measure. It also means that the alternative measures provided in the Criminal Procedure Code to pre-trial arrest and wiretapping are used insufficiently. Competent authorities should urgently ensure conditions for the application of arrest alternatives and carry out informative campaigns to promote them. Consideration should be given to the application of other special investigation measures and a stricter control over the warranting of wiretaps motions.
- From 2006 until 2018, the workload of investigative judges increased considerably. Thus, the provisions of the SCM Regulation on the randomized assignment of cases, according to which investigative judges also receive cases from other categories, which account for half of their workload, should be revisited. This amendment is particularly necessary for Chişinău and other localities or districts where the courts have big workloads (Bălţi, Orhei, etc.).

- To improve the quality and thoroughness of the examination of the motions for pre-trial arrest, home arrest and arrest prolongation, the defence party should request public examination of such motions more often. Another way of improving the reasoning of court decisions issued by investigative judges with regard to pre-trial arrests and home arrests, including their prolongation, would be to publish those decisions on the national portal of the courts, as in the case of the other court decisions.

Legal Resources Center from Moldova (LRCM) is a nonprofit organization that contributes to strengthening democracy and the rule of law in the Republic of Moldova with emphasis on justice and human rights. Our work includes research and advocacy. We are independent and politically non-affiliated.

Centrul de Resurse Juridice din Moldova

📍 Str. A. Șciusev 33, MD-2001 Chișinău,
Republica Moldova

☎ +373 22 843601

📠 +373 22 843602

@ contact@crjm.org

🌐 www.crjm.org

📘 CRJM.org

✉ CRJMdovola

📧 CRJM

