# PRESENTATION ON LESSONS FROM THE PRE-VETTING PROCESS IN THE REPUBLIC OF MOLDOVA

Conference: Vetting in the Montenegrin Judiciary, 24 September 2024

Drafted by Nadejda HRIPTIEVSCHI, lawyer, member of the Pre-Vetting Commission, the Republic of Moldova[1]

Draft as of 12 September 2024

## What does pre-vetting mean in the Republic of Moldova's context?

„Pre-vetting" refers to the extraordinary evaluation of candidates for the position of member in the self-administration bodies of judges and prosecutors:

- For Superior Council of Magistracy (SCM): acting judges and non-judges (Constitutional requirement: persons with high professional reputation and personal integrity, with experience in law or another private relevant field, that do not work in the legislative, executive or judicial bodies and are not politically affiliated) and
- For Superior Council of Prosecutors (SCP): acting prosecutors and non-prosecutors (Constitutional requirement: representatives of other authorities, public institutions or civil society),
- As well as candidates for the position of member in Boards within SCM and SCP: the Selection and Performance Evaluation Boards (separate for SCM and SCP) and Disciplinary Boards (separate within SCM and SCP).

Pre-vetting is implemented in the Republic of Moldova since May 2022 under the Law No. 26/2022 on certain measures relating to the selection of candidates for position as a member of the self-administration bodies of the judges and prosecutors (hereinafter "Law No. 26/2022").[2]

- Candidates that enlisted in contests for SCM and SCP until 1 September 2023 were evaluated by the Independent Evaluation Commission for assessing the integrity of candidates for the position of member in the self-administration bodies of judges and prosecutors ("the Pre-Vetting Commission") – information on Commission composition and activity available in Romanian and English as www.vetting.md. The Commission will end its mandate once the last appeal to its decisions is examined by the Supreme Court of Justice.
- Candidates that enlisted in contests for SCM and SCP after 1 September 2023, as well as for the Boards within SCM and SCP, are evaluated by Judges Vetting Commission (SCM and SCM Boards), information available at www.vettingmd.eu, and Prosecutors Vetting Commission (SCP and SCP Boards), information available at www.vettingmd.org.

[1] Since 1 February 2023 also a member of the Prosecutor Vetting Commission.
[2] Law No. 26/2022 is available in Romanian, including all amendments, at https://www.legis.md/cautare/getResults?doc_id=140451&lang=ro; and unofficial translation to English at https://vettingmd.org/wp-content/uploads/2024/02/Law_26_2022_9.2.2024_ENG.pdf (amendments as of 24.22.2023).

Vetting of judges and prosecutors in key positions is implemented as follows:

- vetting of judges and candidates for the Supreme Court of Justice, based on Law No. 65/2023 on external evaluation of judges and candidates for the position of judges in the Supreme Court of Justice,[3] since July 2023 and vetting of judges in key positions, based on Law No. 252/2023 on the external evaluation of judges and prosecutors and amendments of some regulatory acts,[4] since May 2024 – by Judges Vetting Commission, and
- vetting of prosecutors in key positions, based on Law No. 252/2023, since June 2024 – by Prosecutors Vetting Commission.

Both the pre-vetting and the vetting processes were contemplated as extraordinary, one-time processes, not to be carried out periodically.

## What were the main reasons for initiating the pre-vetting (and vetting) process?

- State capture 2016 – 2019 that eroded rule of law, independence of judiciary and destabilized the functioning of democratic institutions:
  - In 2017 four local Moldovan NGOs issued a report on state capture in Moldova, concluding that all three branches of power were captured by the Democratic Party of Moldova led by the oligarch Vladimir Plahotniuc.[5]
  - Resolution of the European Parliament of 5 July 2018 (after the arbitrary invalidation through judicial decisions of the mayoral elections in Chisinau): "the decision of the courts, which have already been cited many times as politically influenced and driven, is an example of state capture and reveals a very deep crisis of the institutions in Moldova".[6] In its resolution of 14 November 2018 (regarding the implementation of the Association Agreement) the European Parliament stated that the democratic values where being undermined by "the ruling political leaders colluding with business interests and unopposed by much of the political class and the judiciary, resulting in the Republic of Moldova being a state captured by oligarchic interests with a concentration of economic and political power in the hands of a small group of people exerting their influence on parliament, the government, political parties, the state administration, the police, the judiciary and the media".[7]
  - Declaration of 25 members of the Parliamentary Assembly of the Council of Europe of 11 October 2018, expressing their concerns regarding "*the deterioration of the basic democratic standards in the Republic of Moldova:*

[3] Law No. 65/2023 available in Romanian at https://www.legis.md/cautare/getResults?doc_id=140455&lang=ro; unofficial translation to English at https://cdn.prod.website-files.com/65dc9c889b671cd4987c7b51/661506cbc924b7e1514b21fc_Law%20no.65.2023_ENG.pdf.
[4] Law No. 252/2023 available in Romanian at https://www.legis.md/cautare/getResults?doc_id=140481&lang=ro ; unofficial translation to English at https://vettingmd.org/wp-content/uploads/2024/02/Law_252_2023_9.2.2024_ENG.pdf.
[5] State Capture: the case of the Republic of Moldova, Transparency International – Moldova, ADEPT, Legal Resources Centre from Moldova, IDIS Viitorul, 2017, available at http://www.transparency.md/wp-content/uploads/2017/06/TI_Moldova_State_Capture.pdf.
[6] Available at: http://www.europarl.europa.eu/doceo/document/TA-8-2018-0303_EN.html.
[7] Available at: http://www.europarl.europa.eu/doceo/document/TA-8-2018-0458_EN.html.

*rule of law, democratic institutions, independence of judiciary, media freedom, harassment of opposition*".[8]

- The Republic of Moldova Parliament's declaration from 8 June 2019: "the public and rule of law institutions and have been captured" and that "the oligarchic regime led by the leader of the Democratic Party of Moldova, Vladimir Plahotniuc, is responsible for the control […] of Prosecutor General's Office, justice system, National Anticorruption Center, National Integrity Authority, Central Electoral Commission, Security and Intelligence Service, National Bank of Moldova".[9]

- Captured judiciary / dysfunctional architecture of self-governing judicial bodies:
  - The International Commission of Jurists (ICJ) report on judiciary in the Republic of Moldova "Only and empty shell: The Undelivered Promise of an Independent Judiciary in Moldova", [10] published on 13 March 2019, after a mission to the Republic of Moldova from 19 to 23 November 2018:
    - "ICJ delegation was presented with witness statements and stories of judges living often in a condition of fear: fear to express their opinions on the situation of the judiciary; fear of criminal prosecution for issuing a decision contrary to the desiderata of the prosecutor's office or the people in power; fear of dismissal proceedings or ruining their career for expressing their views in disagreement with the judicial nomenklatura and the hierarchy that exists in practice, even if abolished in law".
    - "the SCM [Superior Council of Magistracy], instead of playing its crucial role of defending the independence of the judiciary and of the individual judges it governs, has become an instrument of pressure on individual judges and a threat to their individual independence. The ICJ was told that in the last elections of the judges of the SCM the candidates were presented in a single list and judges were "encouraged" to vote for them and not to stand against them in the election".
    - "the focus of many criminal investigations seems to be directed more at stifling dissent or preventing dissonant voices in the judiciary that at really eradicating the phenomenon of corruption".
    - "The ICJ delegation asked for a meeting with the leadership of the Association of Judges from Moldova, but the request was declined. During its mission, the ICJ delegation heard testimony from a wide variety of stakeholders that the Association of Judges, though sufficiently vocal on issue of judges' salaries and pensions, is ineffective and inactive when there is a need to protect a judge's individual independence. The ICJ is concerned at the inaction of the Association of Judges of Moldova before threats to the independence of individual judges. The concern is enhanced by the impression that it is quicker to

[8] Available at: http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=25115&lang=en.
[9] Available in Romanian at: http://www.parliament.md/ProcesulLegislativ/Proiectedeactelegislative/tabid/61/LegislativId/4567/language/en-US/Default.aspx.
[10] Available at: https://www.icj.org/wp-content/uploads/2019/03/Moldova-Only-an-empty-shell-Publications-Reports-Mission-reports-2019-ENG.pdf.

react when narrow personal and institutional interests are touched upon by legal reforms, such as salaries and pensions or housing for judges. The ICJ considers that, in Moldova where the perception of corruption in the judiciary is extremely high, it is important that the Association of Judges is not seen as a corporatist instrument but as a body that acts openly and consistently for the defence of the independence of all judges. The ICJ is further concerned that the current governance of the Association, where its President is also President of the Supreme Court of Justice and member of the SCM, may represent an obstacle to the development of healthy debate and free engagement within the judiciary on its role and independence, due to the still strong culture of hierarchy and obedience to the superior present in the Moldovan judiciary."

- "Some criminal investigation of judges, including for corruption, have been undertaken since 2013, but still with few final results. For example, in 2014-2015, the National Anticorruption Centre investigated 17 judges. Of these, only eight were remanded to trial, some of them for the controversial offence of rendering an unlawful judicial act (see below). Of these, one judge was found guilty for passive corruption and sentenced to seven years of imprisonment (although she fled the country before the judgment was pronounced) and one judge was found guilty of passive corruption by a first instance court but acquitted by the Supreme Court in 2017. The ICJ delegation was informed that the SCM has not taken adequate steps to ensure that judges against whom there was evidence of corruption or other abuse are not admitted to the judicial system or at least promoted. On the contrary, the delegation was informed that, during 2013-2016, several cases were noted in which judges with integrity issues were appointed or promoted by the SCM, including after the President's refusal to appoint some of them, providing no reasoning that would exclude the doubts regarding candidates' integrity."
- "A mentality of excessive hierarchy in the judiciary and of the judge as having a merely notary role to the work of the prosecution office (called by some experts met a "Soviet mentality") is still prevalent among judges, even despite the fact that the majority of judges are young and have been appointed after 2011. The mission heard from several stakeholders that, these changes of personnel notwithstanding, this orientation and attitude persists, transmitted from generation to generation of judges. The ICJ mission saw first-hand that a system of deference to the Superior Council of Magistrates and the Supreme Court of Justice still exists in the Moldovan judiciary."

- Widespread corruption and the role of judiciary – show case "Russian Laundromat case".
  - "During 2010-2014, around 20 billion USD have been laundered from Russia to various European states via Moldova, including due to "legalization" of these operations by Moldovan courts via a simplified procedures (procedure in

ordinance[11]).[12] Although the Superior Council of Magistracy was aware since 2012 about the involvement of judges in these cases,[13] they did not take action until the autumn of 2016. Several judges involved in such cases were either evaluated very positive (Iurie Hîrbu[14]) or promoted to administrative positions (Serghei Popovici) or to Courts of Appeal (Ştefan Niţa[15] and Serghei Gubenco[16]) during 2014-2016."[17]

- According to a local think tank IDIS Viitorul, the role of the courts in the Russian Laundromat was significant because they issued the court orders for transfer of funds. The majority of judges that issued court orders came from the Rîşcani District Court. The then president of this court was until recently the President of the SCM. IDIS Viitorul concluded that judges were aware of the illicit nature of transactions and the entire criminal structure of the actors involved in these activities. The reason for which those 15 judges have adopted decisions in favor of criminal networks is that they have been assured that they will have all the necessary support from higher political and judicial factors.[18]
- "In September 2016, sixteen judges and four bailiffs have been accused by Moldovan anti-corruption prosecutors of involvement in the "Laundromat" case. The authorities reacted only three years after the last rulings were issued. The judges and bailiffs were apprehended for 30 days. The PG requested the SCM to suspend the magistrates on charges of complicity in money laundering and later they were accused of deliberate pronouncement of an unlawful decision. In September 2020, the anti-corruption prosecutors ceased criminal investigation in respect of thirteen former and current judges involved in the

[11] The ordinance procedure, provided by the Civil procedure code, is a simplified procedure through which the judge, unipersonal, issues a court order (ordinance) that allows collecting / cashing in of an amount of money or reclaiming goods from the debtor, based on the written materials provided by the creditor).

[12] For more details on the money-laundering scheme and the arrest of judges in 2016, see one of the investigating journalistic source of 2014: https://www.rise.md/articol/operatiunea-ruseasca-the-laundromat/.; Press conference of the head of the Anticorruption Prosecution Office and the head of the criminal investigation of the National Anticorruption Center of 21 September 2016 (http://www.realitatea.md/live--viorel-morari-si-bogdan-zumbreanu--conferinta-de-presa-privind-bilantul-operatiunii-de-retinere-a-celor-15-magistrati-si-3-executori-judecatoresti-pentru-fapte-de-coruptie_45501.html). Also see a more recent investigation at https://www.theguardian.com/world/2017/mar/20/british-banks-handled-vast-sums-of-laundered-russian-money.

[13] The SCM knew about the "Russian Laundromat" back in 2012 when the Security and Intelligence Service (SIS) was notified of the actions of Judge Iurie HÎRBU at Telenești Court. At that time, the SCM took note of the information provided by the Judicial Inspection that the judge certified the debt of USD 30 million on the basis of unauthenticated copies of documents. The SCM also noted the intention of a member of the SCM to initiate disciplinary proceedings against that judge and forwarded the materials to the General Prosecutor's Office. See for detalils the SCM decision no. 812/38 of 8 December 2012 in Romanian, http://csm.md/files/Hotaririle/2012/38/812-38.pdf. In 2014, the SCJ analyzed the court practice on this issue and found several misconduct by judges. The findings were brought to the attention of prosecutors, NAC and SCM. In May 2014, SCM took note of this information but did not order any further investigation or disciplinary proceedings. See for detalils the SCM decision no. 470/16 of 27 May 2014 in Romanian, http://csm.md/files/Hotaririle/2014/16/470-16.pdf.

[14] Between 2012-2014, Judge Iurie Hîrbu was not sanctioned in disciplinary procedure and in February 2015 he was evaluated "very good". See more details: Performance Evaluation Board, decision no. 18/2 of 13 February 2015, http://csm.md/files/Hotaririle%20CEvaluare/2015/02/18-2.pdf.

[15] Superior Council of Magistracy, decision no. 769/30 of 20 October 2015, http://csm.md/files/Hotaririle/2015/30/769-30.pdf.

[16] Superior Council of Magistracy, decision no. 8/2 of 26 January 2016, http://csm.md/files/Hotaririle/2016/02/8-2.pdf.

[17] State Capture: the case of the Republic of Moldova, Transparency International – Moldova, ADEPT, Legal Resources Centre from Moldova, IDIS Viitorul, 2017, available at http://www.transparency.md/wp-content/uploads/2017/06/TI_Moldova_State_Capture.pdf.

[18] IDIS Viitorul, Operaţiunea Laundromat: Analiza actorilor şi acţiunilor întreprinse (Laundromat Operation: Analysis of the actors and actions taken), Chişinău, 2017, pages 15-16, http://www.viitorul.org/files/library/Puterea%20hibrida_site.pdf.

"Laundromat" because the deed did not have the requisite elements of the crime. In one of these motions, the prosecutor justified her decision in respect of a judge by the fact that his ruling "became final because it was not challenged, therefore, so far there is no confirmation of the fact that the court ruling is against the law". Similar arguments are found in the motions issued by other prosecutors. Five judges asked the SCM to be reinstated to their previous positions. The judges had been suspended during the criminal investigation procedures. With the end of the criminal investigation, there were no other grounds to keep them suspended. Thus, after a four-year break, five judges, all investigated in the Russian Laundromat, have been returned to their positions. At least three of the five have asked to be paid pecuniary damages, moral damages and salary for the period they had been suspended."[19]

- Dysfunctional disciplinary mechanisms:
  - "the view that the SCM did not react to reported misconduct of judges in a sufficiently determined manner. Numerous cases are reported in the media and are allegedly not acted upon by the SCM. Decisions are reportedly not well explained, available sanctions are not used to their full extent and the GET [GRECO Evaluation Team] was given examples of judges being allowed to resign at their own request instead of being dismissed, in order to be entitled to legal allowances and social benefits. This sends out unfortunate messages that misconduct and lack of diligence are tolerated with no effective deterrents."[20]
  - "some grounds for disciplinary liability were found to be vague […]. Overall application of disciplinary and dismissal procedures is not perceived as impartial by non-governmental stakeholders and routine application of proportionate and dissuasive sanctions is lacking".[21] Regarding "criminal investigations of judges" the International Commission of Jurists observed in 2019 that "some criminal investigations of judges, including for corruption, have been undertaken since 2013, but still with few final results".[22] Concerns about the lack of accountability arise as early as when judges start their career: In 2016, GRECO was "deeply concerned by indications that candidates presenting integrity risks are appointed as judges".[23]

- The Strategy of Ensuring the Independence and Integrity of the Judiciary for 2022 - 2025, approved by the Law No. 211/2021, acknowledged the public perception of lack of integrity of the actors of the judiciary (Objective 1.1) and stated that ensuring the integrity of actors in the judiciary has been declared as a national objective through various international commitments and national documents (Objective 1.2). The

[19] Independent Anti-Corruption Advisory Committee, *Disrupting dysfunctionality: resetting Republic of Moldova's Anti-Corruption Institutions*, November 2022, available at https://ccia.md/en/reports/disrupting-dysfunctionality/.
[20] The Group of States against Corruption (GRECO)'s Fourth Evaluation Report, Republic of Moldova, 1 July 2016, para. 135.
[21] OECD, Pilot 5th Round of Monitoring Under the Istanbul Anti-Corruption Action Plan, Moldova, 2022, p. 51
[22] International Commission of Jurists, The Undelivered Promise of an Independent Judiciary in Moldova, 2019, p. 35.
[23] GRECO's Fourth Evaluation Report, Republic of Moldova, 1 July 2016, para. 101.

Strategy further stated that, "(i)n the current conditions of the Republic of Moldova, in order to achieve this objective, it is necessary to ensure an effective verification of judges and prosecutors in terms of integrity, interests, but also professionalism, which will be carried out through an extraordinary (external) evaluation mechanism, similar to the practices of other states in Europe that started this exercise following the approval of the mechanism by the international competent forums" (same Objective 1.2).

The Informative Note accompanying the draft Law No. 26/2022 stated that, "The current legal framework that regulates the procedure for verifying candidates for membership positions in the Superior Council of Magistracy and the Superior Council of Prosecutors and in their specialized bodies is insufficient, because currently the persons who are candidates for the respective positions are not subject to verification from the point of view of integrity. […] The identified problems may be resolved by instituting an integrity filter."

## Relevant Venice Commission opinions

- Interim Joint Opinion No. 966/2019 of the Venice Commission and the Directorate of Human Rights (DHR) of the Directorate General of Human Rights and Rule of Law (DGI) of the Council of Europe on the draft law on the reform of the Supreme Court of Justice and the Prosecutor's Office, 14 October 2019
- Joint opinion No. 1069/2021 of the Venice Commission and the Directorate General of Human Rights and Rule of Law (DGI) of the Council of Europe on some measures related to the selection of candidates for administrative positions in bodies of self-administration of judges and prosecutors and the amendment of some normative acts, 13 December 2021
- Joint Opinion No. 1100 / 2022 of the Venice Commission and the Directorate General of Human Rights and Rule of Law (DGI) of the Council of Europe on the draft law on the Supreme Court of Justice, 21 October 2022
- Joint Opinion of the Venice Commission and the Directorate General of Human Rights and Rule of Law (DGI) of the Council of Europe on the draft law on the external assessment of judges and prosecutors, 14 March 2023
- Joint Follow-up Opinion of the Venice Commission and the Directorate General of Human Rights and Rule of Law (DGI) of the Council of Europe to the Joint Opinion on the draft law on the external assessment of judges and prosecutors, 13 June 2023
- Joint Follow-up Opinion of the Venice Commission and the Directorate General of Human Rights and Rule of Law (DGI) of the Council of Europe to the Joint Opinion on the draft law on the external assessment of judges and prosecutors, 9 October 2023

## What are the main differences between the pre-vetting and vetting processes?

- **Evaluation criteria:**

The evaluation criteria for pre-vetting are the following:
A candidate is deemed to meet the criterion of *ethical integrity* if (art. 8 para. (2) Law No. 26/2022):

a) he/she has not seriously violated the rules of ethics and professional conduct of judges, prosecutors, or, where applicable, other professions, and has not committed,

in his/her activity, any wrongful actions or inactions, which would be inexplicable from the point of view of a legal professional and an impartial observer;

b) there are no reasonable suspicions that the candidate has committed corruption acts, acts related to corruption, or corruptible acts, within the meaning of the Law on Integrity No. 82/2017;

c) has not violated the legal regime of declaring personal assets and interests, conflicts of interest, incompatibilities, restrictions, and/or limitations.

A candidate shall be deemed to meet the criterion of *financial integrity* if (art. 8 para. (2) Law No. 26/2022):

a) the candidate's assets have been declared in the manner established by law;

b) the Evaluation Commission finds that his/her wealth acquired in the last 15 years corresponds to the declared revenues.

The law further provides that in order to assess the applicant's financial integrity, the Commission is required to verify the following (art. 8 para. (5) Law No. 26/2022):

a) compliance by the candidate with the tax regime in the part related to the payment of taxes when using the means and income derived from the property held, as well as taxable income and the payment of import duty and export duty;

b) compliance by the candidate with the regime of declaring assets and personal interests;

c) the method of acquiring the property owned or possessed by the candidate or persons referred to in art. 2 para. (2) as well as the expenses associated with the maintenance of such assets;

d) the sources of income of the candidate and, where appropriate, of the persons referred to in art. 2 para. (2);

e) existence or not of loan, credit, leasing, insurance, or other contracts capable of providing financial benefits, in which the candidate, the person defined in art. 2 para. (2) thereof, or the legal entity in which they are beneficial owners, is a contracting party;

f) whether or not donations exist, in which the candidate or the person established in art. 2 para. (2) has the status of donor or recipient of donation;

g) other relevant aspects to clarify the origin and justification of the candidate's wealth.

The evaluation criteria for vetting are:

*Ethical criterion* (art. 11 para. (2) of Law No. 252/2023) - the subject is deemed not to meet the requirements of ethical integrity if the Commission has established that:

a) over the last 5 years, the subject has seriously violated the rules of ethics and professional conduct of judges or, as the case may be, of prosecutors, as well as if the subject acted arbitrarily or issued arbitrary acts, over the last 10 years, contrary to the imperative rules of law, and the European Court of Human Rights has established, before the adoption of the act, that a similar decision was contrary to the European Convention for Human Rights.

b) over the last 10 years, the subject had admitted in their activity incompatibilities and conflicts of interest that affected the position held.

*Financial criterion* (art. 11 para. (3) of Law No. 252/2023) - the subject of the evaluation shall be deemed not to meet the criterion of financial integrity if the Commission has serious doubts determined by the fact that:

a) the difference between wealth, expenses and income, for the last 12 years, exceeds 20 average salaries per economy, in the amount as set by the Government for the year 2023 (234,000 MDL /est. 12,200 EUR);
b) over the last 10 years, the subject admitted tax irregularities as a result of which the amount of unpaid tax exceeded, in total, 5 average salaries per economy, in the amount as set by the Government for the year 2023 (58,500 MDL / est. 3,050 EUR).

The law further provides (art. 11 para. (4) of Law No. 252/2023) that in evaluating financial integrity, the commission may verify:

a) compliance by the subject of the evaluation with the tax regime in respect of the payment of taxes on the use of wealth and income derived from the property held, taxable income and the payment of import and export duties.
b) compliance by the subject of the evaluation with the legal regime for the declaration of wealth and personal interests.
c) the method of acquisition of the property owned or possessed by the subject of the evaluation or by the persons referred to in para. (5), and the expenses relating to the maintenance of the property.
d) the sources of income of the subject of the evaluation and, where applicable, of the persons referred to in para. (5).
e) whether or not there are any loan, credit, leasing, insurance or other contracts which may provide financial benefits, to which the subject of the evaluation, the person referred to in para. (5) or the legal person, in which they are the beneficial owners, is a contracting party.
f) whether or not there are donations in which the subject of the valuation or the person referred to in para. (5) has the status of donee or donor.
g) other issues relevant to the verification of the criteria referred to in para. (2) and (3).

The evaluation criteria for pre-vetting and vetting differ substantially, with the vetting criteria being less strict due to the consequences of the process (see below):

- ethical criteria are limited to five / ten years for vetting;
- financial criteria are limited to 12 years (inexplicable wealth) and 10 years (tax irregularities). In addition, there is a threshold for both inexplicable wealth (est. 12,200 EUR) and tax irregularities (3,050 EUR) under which the failure of the subject of evaluation is not possible.

In terms of **who is verified within the extraordinary evaluation** (common for pre-vetting and for vetting), art. 2 para. (2) of Law No. 26/2022 provides that the evaluation of candidates includes a verification of the assets of persons close to candidates, as defined in Law No. 133/2016 on the declaration of assets and personal interests, as well as of the persons referred to in art. 33 para. (4) and (5) of Law No. 132/2016 on the National Integrity Authority.
"Close persons", as defined in Law No. 133/2016 on declaration of assets and personal interests, are: "husband/wife, child, cohabitant of the subject of the declaration, the person

supported by the subject of the declaration, as well as any person related through blood or adoption to the subject of the declaration (parent, brother/sister, grandparent, nephew/niece, uncle/aunt) and any person related by affinity with the subject of the declaration (brother-in-law/sister-in-law, father-in-law/mother-in-law, son-in-law/daughter-in-law).
Art. 33 para. (4) of Law No. 132/2016 on the National Integrity Authority provides that control of assets and personal interests extends to family members, parents/in-laws, and adult children of the person under control. If the person subject to control is cohabiting with another person, the check will also extend to this person's assets.
Art. 33 para. (5) of Law No. 132/2016 on the National Integrity Authority provides that if it appears that the assets of the person subject to control have been registered in the name of other persons, the control will also extend to these assets and persons. If the subject of the declaration indicated income and goods obtained from donations or holds goods in trust, the control will also extend to the donor and the trust. They may be asked for clarifications regarding the origin of the income used for the purchase and maintenance of those goods. To clarify these aspects, the integrity inspector may request relevant information from any natural person or legal entity.

- **Decision-making authority and process:**

The Evaluating Commission that conducts the pre-vetting evaluation takes a decision on the candidate's compliance with the ethical and financial integrity criteria and thus passing or failure of the evaluation. This decision is further appealed to the Supreme Court of Justice. The law (art. 14 of Law No. 26/2022) provides for special deadlines for examining this appeal by a special panel created within the Supreme Court of Justice for appeals on pre-vetting decisions. According to the initial provisions, the Supreme Court of Justice had only two options: a) rejects the appeal and maintains the decision of the Evaluation Commission or b) admits the appeal and orders the Evaluation Commission to re-evaluate the candidate, "if it finds that within the evaluation procedure, the Evaluation Commission made some serious procedural errors that affected the fairness of the evaluation procedure, and that there were circumstances that could have led to the candidate's passing the evaluation". Hence, for ordering a re-evaluation of the candidate, the Supreme Court of Justice must establish both that serious procedural errors affected the fairness of the evaluation procedure and that there were circumstances that could have led to the candidate's passing the evaluation. As of 13 September 2024, there is a pending draft law before the Parliament that provides for limiting the Supreme Court of Justice's possibility for sending a candidate for a re-evaluation to one time. This amendment is aimed at preventing unlimited circles of evaluation.

In vetting procedures, the Evaluation Commissions issue reports on the subject of evaluation's compliance with the integrity evaluation criteria, which is submitted to the respective self-governing body – Superior Council of Magistracy or Superior Council of Prosecutors – which are mandated by law with judges/prosecutors' careers. The self-governing body takes a decision on whether the subject of evaluation passes or fails the vetting. That decision is subject to appeal before the Supreme Court of Justice (a special panel composed of three judges that passed the vetting) by the subject of evaluation or the Evaluation/Vetting Commission. The Supreme Court of Justice can a) reject the appeal or b) admits the appeal and send the subject of evaluation only once for a re-evaluation, the second time it takes the final decision. The Supreme Court of Justice can admit the appeal only if during the evaluation/vetting procedure

there were serious procedural errors admitted that affected the fairness of the evaluation procedure or if there are factual circumstances that could have led to the candidate's passing or failure of the evaluation.

- **Consequences:**

The decision of the Evaluation Commission that carries out the pre-vetting evaluation has no impact on the evaluated candidate's career. This is expressly provided in the law (aart. 13 para. (6)), which makes clear that the results of the assessment by the Commission, set forth in the evaluation decision, constitute legal grounds for not admitting the respective candidate to the elections or competition. The Constitutional Court has confirmed that the law provides no other legal consequences of the evaluation decision; the negative decision of the Evaluation Commission does not affect in any way the judge or prosecutor's career, but only prevents him or her from running for office as a member of the Council.[24] The practice of the Superior Council of Magistracy has confirmed this approach by recently confirming the appointment for life of a judge that has failed the pre-vetting exercise in the context of his application for membership in the Superior Council of Magistracy.

The report of the Evaluation/Vetting Commission that carries out vetting is submitted to the self-governing body. In case of failing the vetting, the judge/prosecutor is dismissed from his/her position. In addition, this person: a) does not have the right to hold the position of judge/prosecutor during 5-7 years after the vetting decision remains final; b) loses the right to a special dismissal allowance provided by law for judges and prosecutors and c) loses the right for a special pension/retirement allowance for judges, maintaining the general pension/retirement allowance provided on general terms based on age.

### Statistics and main issues examined by the Pre-Vetting Commission:

The Pre-Vetting Commission was set up in April 2022. It is composed of six members: three national and three international, appointed by Parliament.[25] The quorum for adoption of decision is four members.

The evaluation was initiated in July 2022, with an initial group of 28 judicial candidates for the position of member in the Superior Council of Magistracy. From June 2022 until December 2023, the Pre-Vetting Commission evaluated 68 candidates for membership of the SCM and the SCP, among them - 27 judges, 21 non-judges (for CSM), 18 prosecutors and 2 non-prosecutors (for CSP). Out of 68 candidates, 45 failed the pre-vetting and 23 candidates promoted. Out of 45 candidates that failed the initial evaluation, 28 appealed the decision of the Pre-Vetting Commission to the Supreme Court of Justice (among them, 18 are judges, 5 - civil society representatives and 5 prosecutors).

[24] Section 115 of the Constitutional Court Decision Concerning Exceptions of Unconstitutionality of some provisions of Law No. 26 on measures related to the selection of candidates for the positions of members in the self-administration bodies of judges and prosecutors, Decision No. 42/2023, 6 April 2023; see also Venice Commission Opinion No. 1069/2021 on draft Law No. 26/2022, para. 15 and 39.

[25] One national member resigned in October 2023 and another national member resigned in May 2024.

A special panel of three judges that examined the appeals issued 21 one decisions on 1 August 2023, after several months examination although the law provided 10 days for examining the appeals, and resigned shortly aftewards. Later, the Supreme Court of Justice special panel (a new composition) admitted one more appeal sending for re-evaluation and rejected six other appeals (three judges, one civil society representative and two prosecutors). In total, the Supreme Court of Justice admitted the appeals of 22 candidates out of 28 that appealed the Commission's decisions on initial evaluation and sent them for re-evaluation.

The Pre-Vetting Commission started the re-evaluation of 21 candidates on 8 September 2023. An additional notification was sent to a candidate on 9 February 2024, after the Supreme Court of Justice issued the last decision on Commission's inital evaluation. In total, the Supreme Court of Justice ordered the re-evaluation by the Pre-Vetting Commission of 22 candidates for the positions of members in the Superior Council of Magistracy and Superior Council of Prosecutors.

Out of the 22 decisions ordered for re-evaluation, in one case the Pre-Vetting Commission took a decision on passing the candidate and three candidates withdrew from resumed evaluation (two at the outset of the re-evaluation process and one towards the end), which equals with failure of evaluation according to the law. As of 12 September 2024, the Pre-Vetting Commission issued 15 re-evaluation decisions (failure) and three are pending. The Supreme Court of Justice upheld seven re-evaluation decisions of the Pre-Vetting Commission, sent one for a second re-evaluation and there are seven pending appeals (15 in total).

Examples of issues for which candidates were failed:

- Inexplicable wealth: difference between expenses and income over four years of more than 150,000 EUR;
- Lack of funds/inability to explain the sources of funds for a close relative that allegedly bought an apartment in the capital where a candidate declared only habitation rights;
- Lack of funds/inability to explain the sources of funds for a close relative that allegedly donated a candidate a residential house in the capital;
- Failure to pay capital increase taxes for sale of real estate, including as a result of misreporting the price of the real estate in the sales-purchase contract and to the tax authorities;
- Failure to pay income taxes (for professional activity);
- Failure to explain the source of funds for several bank transfers;
- Receiving benefits contrary to eligibility requirements: apartments at preferential prices provided to judges/prosecutors based on agreements between local public authorities and private companies;
- Receiving land plots for building houses contrary to legal provisions that only allowed for service accommodation;
- Privatization of service accommodation contrary to legal provisions that prohibited such privatizations.

The Pre-Vetting Commission relied on extensive sources of information for evaluating the candidates, such as the National Integrity Authority, State Fiscal Service, General Inspectorate of Border Police, financial institutions (banks), public institutions and related databases

(cadaster, vehicles, identity acts etc.), open sources such as social media and investigative journalism reports and reports from members of civil society.

### What are the main lessons so far?

- Vetting and pre-vetting as an evaluation process are very similar, the difference lies with the consequences. The scope of the process must be very clearly provided by law. It must also be clearly communicated to the legal profession and the society.
- A qualitative process requires time and human resources. It is demanding on candidates, but also requires time from public and private institutions (e.g. banks) that provide information that is crucial for the evaluation process. Shared understanding of the needs and cooperation of public and private institutions is crucial. Setting up strict deadlines for finalizing the vetting process in the legislation is not helpful.
- The set up of mixed Evaluation Commissions is very important for the quality of the process, although it significantly prolongs the process due to translation. However, the quality benefits outweigh any efficiency benefits in this context. The international members presence in Commissions as decisive members along the nationals, not as consultative members, is crucial for various reasons:
  - quality (wider / difference views and experience);
  - independence and objectivity perception (generally lack conflicts of interests; distanced from the individual candidates and the local interest groups and political forces).
- The appointment of members with integrity, good reputation and competent is crucial for the success of the process. Resilience and strength are equally important due to pressures that are not foreign to such processes, including via public discourse and manipulation / disinformation regarding the members (including personal attacks) and the content of decisions.
- Public hearings of candidates and publication of decisions (with due regard to data protection limitations) is very important for credibility of the process, as well as protection against manipulation and misinterpretation of Commission's work. The law regulating the pre-vetting exercise in Moldova took the approach of not publishing the decisions without the candidate's consent as a guarantee against potential consequences for the candidate's career, particularly relevant for failure cases (see in this respect also the Venice Commission opinion of 2021). Although this approach is well reasoned, it might be worth reconsidering it in view of the risk of manipulation and distortion of Commission's work (without a published decision the Commission cannot comment on any challenges made in the public sphere, including when such are misinterpreting the Commission's decisions).
- The criteria for evaluation are a crucial element of the evaluation process. There needs to be a full understanding and sharing of the criteria set in the law, to be developed through inclusive and participatory means. These also need to be well explained to the legal profession and the society.
  - The stricter the criteria are the higher is the risk that very few candidates will pass the evaluation. There is nothing wrong with strict criteria, but it is important that these are clear, understood and also risks avoiding strategies are developed, for example for situations when the passing rate is very small and there are no candidates to fill in the positions.
  - One needs to be very clear that the outcomes of the vetting process is directly dependent on the criteria for evaluation. If the criteria are limited to ethical and financial criteria, not including the professionalism and fitness for the job, one cannot expect that the

vetting process will filter "weak" candidates. There is very possible that candidates/professionals with weak performance also fit all integrity criteria. And it is well possible that very courageous and highly performing candidates have integrity issues if for example the criteria focus on formalities.

- The secretarial support is crucial for the process. In Moldova the developing partners (donors), included in a list developed by the Ministry of Justice, financially contribute for hiring and maintaining the Secretariats of all three Evaluation Commissions. The roles of the Secretariat, expectations and integrity of their members is crucial. The choice in Moldova was that the National Anticorruption Center does background checks of the candidates for Secretariat. This proved to be an important safeguard for choosing not only competent, but also people that do not have issues of integrity. The example in Moldova shows that hiring of Secretariat staff is a lengthy process, mostly due to lack of capable human resources, usual for both the public and private sphere, due in particular to high emigration/ brain drain issues. When setting up Commissions and planning process, such factors are very important to be taken into account.
- The appeal mechanism over the Evaluation Commission's decisions is very important. If the judiciary is resistant and populated with judges that are evidently against any integrity mechanisms, one needs very carefully to choose the extent and the body competent to review/approve/confirm the vetting decisions.
- The importance of effective communication prior to initiating any vetting process, as well as throughout its implementation cannot be overstated. Government authorities and civil society should communicate about the goals/scope of the process, explaining how it is, but avoiding setting unrealistic expectations (vetting is an important reform, but not a panacea to all issues; it requires time and results are not seen in a short-term; for it to have impact – the accountability mechanisms and functioning of other institutions, including integrity, anticorruption and fiscal authorities, as well as internal judiciary and prosecution service mechanisms, are crucial). The Evaluation Commissions should also ensure a very good communication both with the society and the candidates about the process, the stages, and the outcomes. The clearer the rules, the more transparent the processes are, the less chances for misinterpretations.