

### The extraordinary evaluation of the actors in the justice sector: How and under what conditions can it be implemented?

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On July 16, 2020, the Parliament of the Republic of Moldova excluded from the agenda the draft Decision of the Parliament on the appointment of Ms. Viorica Puica as a judge at the Supreme Court of Justice, and subsequently on July 20, 2020 did not include this topic on the agenda. The SCM presented the candidacy of Ms. Puica on June 9, 2020.

At the same time, on July 28, 2020, the SCM promoted for appointment two controversial judges - Vladislav Clima to the position of chairman of the Chisinau Court of Appeal, which was part of the panel that upheld the decision to annul the results of the new elections in Chisinau in the summer 2018 and Tamara Chișca-Doneva to the position of vice-chairwoman of the Supreme Court of Justice, which was part of the panel that issued the decision on the case of Gemenii SA, which was later considered arbitrary by the ECtHR.

The above are additional arguments to support the implementation of the extraordinary evaluation of actors in the justice sector. Although the Ministry of Justice launched initiatives with similar content in [2019](#) and [2020](#), the subject of the extraordinary evaluation of justice actors, remains for the time being a desideratum without continuity.



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### Why extraordinary evaluation?

Because the verification of the integrity, wealth, lifestyle, professionalism and ethics of the actors in the justice sector have failed. Although since 2002 there is a legislative framework that establishes wealth declaration requirements, emblematic cases of election cancellation, wealth declared with luxury cars at "symbolic" prices, income from family events of 100 thousand euros, but also other unjustified wealth was in the sights of society without a prompt and effective response.

### Who is evaluated?

The actors in the justice sector, mainly judges, prosecutors, but also actors from other authorities - SCM, SCP, NAC, NIA, NIJ will be evaluated in terms of integrity and professional abilities, in three distinct stages

### How?

Through an International Monitoring Mission (IMM), an Evaluation Commission (EC) and a Special Board of Appeal (CBA), with the involvement of the SCM and the SCP on the career of judges and prosecutors. The members of IMM, EC and CBA are to be selected in a transparent and rigorous process, and each of them must have access to data from various sources to substantiate the taken decisions, while respecting the right to a fair trial. IMM, EC and CSA will have separate secretariats.

### When?

It is a procedure that can only be applied once. That is why there is a need for broad support in society, political will and an large agreement among political actors, sufficient human, financial and temporal resources, as well as decisive support from development partners.

## Previous interventions

### 1.1. Control over income and property starting with 2002

The evaluation of actors in the justice sector has been a topic of discussion for at least two decades in the Republic of Moldova.

Some provisions have been approved to ensure the verification of the quality of actors in the justice sector, but they have not generated the desired result.

Thus, in 2002, the Parliament adopted [Law no. 1264/2002](#) on the declaration and control of incomes and property of persons with positions of public dignity, judges, prosecutors, civil servants and of persons with management positions, and in 2008 - [Law no. 16/2008](#) on the conflict of interests.

The regulatory framework was complemented with [Law no. 158/2008](#) on the civil service and the status of the civil servant, [Law no. 199/2010](#) on the status of persons with positions of public dignity and [Law no. 80/2010](#) on the status of staff in the cabinet of persons with positions of public dignity.

These additions considerably broadened the spectrum of people who were to file their income, property, and conflicts of interest declarations.

The institutional framework, however, did not provide the necessary results, and the NAC (then CCECC) acted selectively in verifying the income and property of the declarants.

In 2011, the Parliament adopted [Law no. 180/2011](#) on the National Integrity Commission (NIC), which took over the function of verifying income and property declarations, previously provided by the Central Control Commission and the departmental control commissions, as it was provided by Law no. 1264/2002.

### 1.2. Creation of NIA and approval of a new legislative framework on declaration of wealth and interests

In 2016, the Parliament decided to reorganise the NIC into the National Integrity Authority (ANI) by adopting [Law no. 132/2016](#) and [Law no. 133/2016](#) on the declaration of assets and interests, as well as the amendment of the Code on Administrative Misdemeanours to provide sanctioning powers for NIA. Following the adoption of these two laws, NIA took over the function of verifying the declarations of assets and interests, with a staff of 46 integrity inspectors, and the activity of ANI to be verified by the Integrity Council, composed of representatives of several administrative authorities, but also associative structures and representatives of civil society.

The selection process of the NIA leadership (director and vice director) was a difficult one, it being appointed in early 2018. So far, not all positions of integrity inspectors have been filled, while in recent three years, NIA organised competitions to fill the positions of integrity inspector at least twice a year. According to the [latest available data](#), 17 of the 46 positions of integrity inspectors have been filled.

During 2019 and 2020, NIA intensified the verification of the declarations of assets and interests of the actors in the justice sector. Nine judges and eight prosecutors were targeted, in 2019, for cases of violation of the rules of declaration of assets and interests, all of which are of a misdemeanour nature.

At the same time, on criminal cases related to wealth - especially in the field of illicit enrichment, although last year the Anticorruption Prosecutor's Office initiated several cases on the name of judges with administrative functions in the judiciary, they were either closed, or the criminal investigation activity slowed down significantly, especially after the change of the leadership of the Anticorruption Prosecutor's Office at the end of 2019.

Thus, the progress made in verifying the wealth and interests of justice actors is modest. Wealth declaration and verification procedures

have been set up, some processes - such as access to databases - have been digitised, but without ensuring their interoperability and search automation, and the NIA institution has set its priorities and established the work plan. However, ANI is loaded with many files, the number of subjects of the declaration exceeds 60 thousand people, which significantly dilutes the impact of NIA's activity for the justice sector.

### **1.3. Strengthening the position of the self-management bodies in the justice sector**

Starting with 2012, the Parliament approved specific legislation related to the career and disciplinary liability of judges and prosecutors, including [Law no. 154/2012](#) on the selection, performance evaluation and career of judges, [Law no. 178/2014](#) on the disciplinary liability of judges, [Law no. 3/2016](#) on the prosecutors' offices. Both the SCM and the SCP have strengthened their specialised boards and have taken action to increase the efficiency of the judicial inspection and the inspection of prosecutors.

### **1.4. Results after 20 years of verification of assets and interests?**

The effects of the legislation related to the verification of assets and interests in the judicial system and that of the prosecutor's office, but also on the public sector in general, are still much waited to show themselves. Sanctioning for illicit enrichment or violation of the legislation on wealth and interests, including exclusion from the profession, did not take place. On the contrary, in the years following the approval of the mentioned legislative framework (2016-2020), compromised persons were promoted through the Parliament and the SCM in the leading positions within the courts, and the prosecution bodies - especially the specialised prosecutors' offices - have been frequently exposed to suspicions of political control, selective initiation of criminal cases and violation of

fundamental rights in the conduct of criminal proceedings.

The general public has witnessed numerous cases of mismatch of wealth and expenses among the actors in the justice sector, which denotes a luxurious lifestyle compared to the legal available income. Thus, the cases of purchasing luxury cars at declared prices of 10,500 lei or declaring income obtained from family events, which reach 100 thousand euros, are truly emblematic. These cases, supplemented by recent journalistic investigations which show that, for example, electric cars - relatively new products on the world market - are declared to be purchased for 14 thousand euros, prove once again that the system of verification and control of wealth and lifestyle when comparing them with available legal income does not work. This state of affairs is also explained by the scattered competences between the actors in the justice sector in the field of declaration and verification of assets and interests, as well as by the sanctioning mechanism, including dismissal and prosecution with unjustified confiscation of assets.

Moreover, the vicious circle of corruption and political control, in which the justice sector in general has entered, does not allow us to see that the current institutional instruments are able to ensure the exclusion of compromised actors with serious integrity problems.

The results are constantly materialising on the public arena, through resounding cases of cancellation of the new general elections in Chisinau in 2018; Decisions of the ECtHR in which the violation by the Republic of Moldova of the provisions of the ECHR is found, including one of the last important Decisions, in the case of "Gemenii" SA; controversial decisions annulling SCM decisions; exceeding the powers of the judges by examining other aspects than those mentioned in the file; but also unjustified decisions on less resounding causes that continue to constantly reduce citizens' trust in justice.

## The mechanism of extraordinary evaluation of the actors in the justice sector

The extraordinary evaluation involves a mechanism different from those currently in place, prescribed by the above-mentioned normative acts, which assess the integrity, ethics and professionalism of actors in the justice sector. Such an assessment will require evaluation criteria and procedures separate from the existing ones, an integration in the process of the competent authorities in the field, mainly SCM and SCP, to ensure compliance with the requirements of the Constitution, but also close cooperation and access to information relevant for the evaluation of the targeted persons.

### 2.1. The need of the intervention

The current institutional framework does not provide us with the necessary capacity to apply strict criteria and rules to all actors in the justice sector. The Anti-Corruption Prosecutor's Office, which manages corruption cases, including on cases of illicit enrichment and / or with the involvement of justice actors (judges, prosecutors), is itself suspected of lack of integrity. In addition, NIA rulings on breaches of the provisions on the declaration of assets and interests are subject to scrutiny by the judiciary, which also suffers from a lack of trust and integrity.

Under these conditions, an external intervention that seeks to verify the integrity of actors in the justice system is the only reliable solution to overcome the slippage in the sector and give integrity and professional actors the place they deserve in the justice system of the Republic of Moldova.

Similar practices in other states have shown different progress and this has been influenced, above all, by the institutional framework created to ensure the extraordinary

evaluation, but also compliance with constitutional requirements and compliance with the recommendations of the Venice Commission, as well as practical assurance of institutional independence of the actors involved in the evaluation, as well as ensuring a fair trial for the subjects of extraordinary evaluation. Thus, given the views expressed by the Venice Commission in the context of the evaluation promoted in Serbia, it is clear that the practice in this country should not be taken over. At the same time, the examples from Georgia and Ukraine offer some components that deserve attention, in particular, in terms of detailing the evaluation criteria, and the example of Albania is currently considered the most complex and with results generally recognised as positive. The [IPRE policy paper](#) from October 2019 details these aspects.

### 2.2. Preconditions to initiate and conduct the extraordinary evaluation

For this complex evaluation exercise to be successfully implemented, three essential preconditions are needed: (1) broad consensus in society and in Parliament to initiate such an extraordinary evaluation; (2) the availability of development partners to support and engage in the extraordinary evaluation process; and (3) the availability of sufficient human and financial resources.

### 2.3. Proposed institutional framework for the extraordinary evaluation of the actors in the justice sector

Following the example of Albania, with the adjustment to the constitutional context of the Republic of Moldova, the mechanism for extraordinary evaluation of actors in the justice sector would consist of:

- a) International Monitoring Mission (IMM);
- b) the Evaluation Commission (EC), composed of four Evaluation Boards (EBs);
- c) Special Board of Appeal (SBA);

The self-administration bodies in the sector - the Superior Council of Magistracy and the

Superior Council of Prosecutors, are to be involved in the process of extraordinary evaluation of the actors in the justice sector, in order to guarantee the observance of the Constitutional provisions (art. 123 paragraph (1), and art. 1251 para. (3) respectively).

The Parliament, the Government, development partners and civil society will also be involved in the formation of the IMM, the EC, the EBs and the SBA.

### ***The International Monitoring Mission***

The IMM is the structure that we propose to be composed of seven members, which will be approved by the Government, based on the proposals from development partners and civil society. This list is to be approved in its entirety by Parliament by the vote of at least 3/5 of the elected MPs.

Once the composition of the IMM is approved, it will select the EC members, including the EBs, but also the SBA, to launch the evaluation process.

In order to ensure that there is no abuse by the EC, the IMM will also have the power to challenge EC decisions which will target the persons subject to the evaluation.

### ***The Evaluation Commission and the Evaluation Boards***

The Evaluation Commission is the authority that will ensure the formation of the initial file of the evaluated person and will verify the data available from other sources, including the automated information systems currently available in the Republic of Moldova. The EC will also have the right to request additional information from other authorities to substantiate its decision.

EC procedures will also include the necessary elements of a fair trial for the persons assessed, with the right to submit additional information within a reasonable time, but also to challenge the documents issued by the EC to the SBA.

The EC would be composed of people with an impeccable and honest reputation, with experience in the fields of justice, prosecution, corruption prevention, integrity promotion, taxation and financial-banking services.

The selection of the EC members will be ensured by the IMM, and, once the composition has been agreed, it will be proposed to the Parliament to be approved in its entirety by the vote of at least 3/5 of the number of elected MPs.

### ***The Special Board of Appeal***

The SBA is to be composed of non-judge professionals, who will be proposed to the President by the SCM and will work at the level of the Chisinau Court of Appeal, but totally independent from an institutional and functional point of view.

The competence of the SBA will be to judge appeals against EC decisions, without adjudication functions on other cases.

Given that judges in the judiciary are nominated by the SCM and SCM members are among the subjects of the extraordinary evaluation, the formation of the SBA will be possible only after the SCM members are themselves evaluated and the right of appeal will be ensured once the SCM submits candidates for the position of judge to the SBA, based on IMM proposals.

### ***The secretariats of IMM, EC and SBA***

The IMM, EC and SBA will each have a separate secretariat, consisting of people with experience in the fields of law, integrity promotion, financial-banking services and asset tracking to ensure the efficient functioning of three evaluation structures.

## **2.4. The persons to be exposed to extraordinary evaluation**

To ensure an efficient evaluation process, as well as to ensure that the justice authorities do not become dysfunctional, it is proposed that the extraordinary evaluation takes place in three stages.

In the first stage, the members of the SCM and the SCP are to be evaluated, except for the ex-officio members of the SCM and the CSP; the chairman, vice-chairmen and judges of the Supreme Court of Justice, the Prosecutor General, the Deputy Prosecutor General, the chief prosecutors of the General Prosecutor's Office, chief, deputies and prosecutors of the Anticorruption Prosecutor's Office, the Prosecutor's Office for Combating Organised Crime and Special Cases, the director and deputy directors of the National Anticorruption Centre, members of the Integrity Council, the director and deputy director of the National Integrity Authority, and of the director, the deputy director and the members of the Council of the National Institute of Justice.

In the second stage, the chairmen and vice-chairmen of the courts of appeal and district courts, members of the boards of the Superior Council of Magistracy and of the Superior Council of Prosecutors, inspectors from the Inspectorate of Judges and of the Inspectorate of Prosecutors, prosecutors from the General Prosecutor's Office, chief prosecutors and deputies of the territorial prosecutor's offices, judges from the courts of appeal, integrity inspectors from the National Integrity Authority.

In the third stage, the judges and prosecutors who were not evaluated in the first two stages and the employees from the National Anticorruption Centre who are civil servants with special status will be evaluated.

## 2.5. Evaluation criteria

The extraordinary evaluation of the actors in the justice sector would be based on the criteria of integrity and professional skills, with the necessary detailing in the law.

Among the criteria related to integrity are: verification of lifestyle, compliance with the obligations to declare wealth and correctness of presented information, verification of compliance with the requirements of impartiality and independence, respect for

professional conduct and ethics, respect of legislation on personal interests and observance of dignity of the position while in office.

Professional skills are verified in terms of professional skills and abilities to motivate, justify and solve complex issues; efficiency and level of performance; the capacity to review and verify judgments / acts of lower courts.

## 2.6. Procedural rules

To be able to comply with the requirements of the Constitution, the rules of procedure will be adjusted to ensure the involvement of SCM members, respectively of SCP members in the case of judges / prosecutors. Thus, in the case of these evaluated persons, the additional quasi-judicial level of verification from the SCM/SCP will be ensured, which can later be challenged in the SBA. In the case of SCM and SCP members, this stage will not be included, and judicial control will be provided directly by the SBA, once it is formed.

## Opportunities and risks associated to the implementation of the mechanism of extraordinary evaluation

### 3.1. Opportunities

This mechanism could be the solution to overcome the current severe situation in the justice sector. Through the proposed mechanisms of verification of the integrity and professionalism, we ensure that the actors in the sector are thoroughly verified, and after the verification they return into the system with an advance of trust and support from society.

The application of verification mechanisms by the IMM, EC and SBA will **provide us with an important practice** of verifying wealth and interests, establishing minimum standards of integrity and professionalism, which can be taken over by current structures involved in preventing and combating corruption - NIA, Anticorruption Prosecutor's Office and NAC.

The authorities that will go through the extraordinary evaluation process - applied, first of all, to the people with management positions in these authorities - will ensure a higher level of trust, but also new tools at hand to effectively investigate acts of corruption, illicit enrichment or defective declaration of held assets.

### 3.2. Risks

The extraordinary evaluation must be analysed very carefully and **developed in detail before it starts**. Otherwise, it may fail. Careful planning with realistic terms and cost assessment, along with the involvement of the Government and development partners, are absolutely necessary. Initiating the evaluation without taking these factors into account will discredit the process, and the results will be minimal or, even worse, the mechanism will be used to exclude integer actors and agents of change. Such a mechanism applies only once, which is also confirmed by numerous opinions of the Venice Commission.

The extraordinary evaluation process will inevitably contribute to **increasing the number of cases** pending before both prosecutors and

judges. The first to pass the assessment will be exposed to an additional workload, and it must be distributed according to priorities, so as not to affect the main processes in the country.

The political support, but also the support of development partners is essential throughout the extraordinary evaluation. The interference of political actors, in particular, when narrow group' interests will be at stake, should be avoided both through legal instruments and through public monitoring and reporting. Otherwise, the extraordinary assessment mechanism will be used to **influence actors in the judiciary** and, through them, **to constrain political competitors and secure illegal revenue streams**.

### The timeframe of the intervention

Once the minimum conditions to start the extraordinary evaluation process are met, it can take between five and seven years. Albania's practice, considered the best reference example, demonstrates that it takes at least one year to structure the intervention framework and another five years to initiate and complete the extraordinary evaluation process.



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