



ADDITIONAL OPINION

on the draft law on several related measures for the selection of candidates for administrative positions in the self-administrative bodies of judges and prosecutors and the amendment of some normative acts (pre-vetting)

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This opinion analyses and suggests some additional recommendations for the draft law on pre-vetting. The recommendations concern several related measures for the selection of candidates for administrative positions in the self-administrative bodies of judges and prosecutors, as well as the amendment of some normative acts, [approved by the Government on the 19th of January 2022](#) and proposed to the Parliament for examination and adoption.

We note that the draft law approved by the Government, reflects most of the recommendations proposed in the [Opinion released by the Justice Expert Group \(GEJ\) within IPRE, on the 17th of December 2021](#), as well as in the public consultations organised by the Ministry of Justice. In this context, we hereby support the Government's legislative initiative and at the same time present a set of additional recommendations for consideration in the legislative procedure in the Parliament of the Republic of Moldova. The main recommendations concern:

- *Provision of essential elements concerning the organisation and functioning of the Evaluation Committee's Secretariat;*
- *Description, in the draft law, of the mechanism regarding the delegation of three international members of the Evaluation Commission from the development partners' side, including the approval of the list by the Government;*
- *Introduction of the obligation for members of the Evaluation Commission to submit a declaration of assets and interests;*
- *Provision of a clear mechanism on the establishment and resolution of conflicts of interest for members of the Evaluation Committee in relation to the evaluated candidates;*
- *Introduction of an obligation for candidates to present data regarding their external trips made during the last 5 years and the details of those trips;*
- *Other technical aspects that will give greater clarity and predictability to the law.*

CONTEXT

On the 15th of November 2021, the Ministry of Justice published a draft concept on the extraordinary evaluation of judges and prosecutors, which aims to create an ad hoc mechanism that would evaluate judges and prosecutors and remove from the system, or not admit to the system, those who do not meet the integrity and professional criteria for the position that they hold.

At the same time, according to the Constitution of the Republic of Moldova, decisions on the careers of judges and prosecutors are taken by the Superior Council of Magistracy (SCM) and the Superior Council of Prosecutors (SCP). According to the draft concept of the Ministry of Justice, the extraordinary evaluation of judges and prosecutors is to be carried out without constitutional changes or additions. As a result, the final decision following the extraordinary evaluation is to be taken by the SCM in the case of judges, and by the SCP in the case of prosecutors.

The success of the extraordinary evaluation of judges and prosecutors therefore depends largely on the SCM and the SCP. It is therefore crucial that these bodies are composed of honest and professional members. In order to achieve this first step, on the 1st of December 2021, the Ministry of Justice published a [draft law](#) establishing the measures related to the selection of candidates for administrative positions in the self-administrative bodies of judges and prosecutors.

During December 2021 and January 2022, the draft law was subject to public debate and consultation. In this regard, members of the Justice Expert Group (GEJ) at the Institute for European Policies and Reforms (IPRE), on the 17th of December 2021, [presented several recommendations](#) to improve the draft law. On the 17th of January 2022, the Government published the [final version of the draft](#), which was approved during the Government meeting on the 19th of January 2022 and presented to the Parliament.

Following the analysis of the final version of the draft law approved by the Government, we note that most of the recommendations proposed by the GEJ members have been reflected in it. The draft also includes a number of improvements compared to its initial version, mainly reflecting most of the [recommendations](#) of the Venice Commission and the Directorate General for Human Rights and the Rule of Law of the Council of Europe.

CHANGES INTRODUCED IN THE FINAL VERSION OF THE DRAFT LAW

Compared to the original version of the draft law, in the version approved at the Government meeting there were introduced a number of improvements that provide more clarity and predictability, some of the most relevant are reflected below:

- the activity period of the Evaluation Committee has been expressly established and it is foreseen that the Committee will cease its activity at the end of the evaluation of the last candidate;
- the level of remuneration of the Commission members has been reviewed;
- the dismissal procedure of the Evaluation Committee members has been clarified;
- clarification of the term "irreproachable reputation" for the members of the Commission, referring to Article 16 para. (2) of Law No 136/2017 on Government;
- the category of those who can be members of the Evaluation Committee has been broadened by adding new eligibility criteria;
- clarification of the decision-making process in the event of a tie vote in the Commission;

- the provisions on the hearing of relatives have been revised to ensure that their privacy is not affected;
- the number of rights and procedural guarantees have been extended to candidates and their relatives, which should ensure a balance between private and professional life;
- the exclusion of notions that can be interpreted equivocally, such as 'lifestyle' and 'living costs';
- introduction of an obligation for candidates to submit a declaration of assets and personal interests with updated data for the last 5 years, including the expenditures over that period. Also, the submission of a declaration with the list of relatives, within the terms of Law No 133/2016 on the declaration of wealth and personal interests;
- express provision that the results of the integrity assessment of candidates will have no effect on the candidate's career as a judge or prosecutor, with the results being used exclusively for this competition;
- reviewing the way in which the decisions of the Evaluation Commission can be appealed, confining it to procedural matters and to a single instance - the Supreme Court of Justice;

RECOMMENDATIONS FOR THE FINAL VERSION OF THE DRAFT

Although there have been introduced a great number of improvements to the draft law approved by the Government, reflecting most of the recommendations presented, including the recommendations of the Venice Commission and the Directorate General for Human Rights and the Rule of Law of the Council of Europe, in order to further increase precision and avoid misinterpretations, we propose the following recommendations for the final version to be adopted by the Parliament.

a. Additional clarifications in the information note

The development of an ad hoc mechanism for the extraordinary evaluation of judges and prosecutors, as mentioned in the Venice Commission's opinion, is based on the assumption that the justice system has extremely serious shortcomings and that there are systemic doubts about the integrity of prosecutors and judges. This need stems from the corrupt practices within these institutions, the level of trust in them, and the impact it has on the development of the Republic of Moldova. All these developments have been analysed and documented in various reports, studies and analyses. These aspects have been described in detail in the [IPRE opinion](#), and it is recommended to adjust the information note to the draft law and to present in more detail the context, as well as the reasons that made this law necessary, the level of inefficiency of the SCM and SCP, and their subordinate bodies, etc. These detailed aspects are missing from the version of the information note to the draft law approved by the Government.

Thus, we consider that additional clarifications to the information note are required on the context and necessity for this ad-hoc mechanism.

b. Institutional aspects concerning the work of the Evaluation Committee and the Secretariat

It is noted that the draft law provides the need for a full independence of the Evaluation Commission, which will then approve its own organisational and operational rules, taking into account the competencies, rights and obligations provided by law. At the same time, the draft law stipulates that the Commission will be assisted in its work by a secretariat, the Regulation of which is also to be approved by the Commission.

At the same time, the draft law and the information note lacks in details on the way this secretariat will be legally organised, leaving it entirely up to the Commission to decide on how it will be organised and operated.

Based on the nature of the draft law, the functions and duties to be performed by this secretariat, but also taking into account the provisions of Law no. 136/2017 on the Government, Law no. 98/2012 on the central public administration, and Law no. 100/2017 on normative acts, it is important to provide more precision at the level of a primary rule on how an entity (in this case - the secretariat of the Evaluation Commission) is to be organised and function.

Furthermore, it is worth noting the provision in para. (2) letter c) of Art. 20 of the Final and Transitional Provisions, which specifies that the Government shall set up within 10 days from the date of entry into force of the law, a legal entity governed by public law that will ensure the implementation of the law.

Thus, we consider it relevant to update the provisions of the law on the organization and functioning of the Secretariat, eventually regarding its legal form of organization. Or at least adding to the note clarifications that would detail these aspects, including the role of the public legal entity provided for in paragraph (2) letter c) of Art. 20.

c. Members of the Evaluation Commission proposed by the development partners

The approved draft law by the Government takes into account the recommendations of the Venice Commission regarding the term "development partners", establishing that "development partners refers to international donors (international organisations, diplomatic missions and their representations in the Republic of Moldova) that have been active in the field of justice reform and the fight against corruption in the last two years".

Also, para. (4) of Article 5 of the Law states that "Their list shall be approved by Government decision and published on the official website of the Ministry of Justice". At the same time, the Final and Transitional Provisions provide for a rather tight deadline (5 days) for the Government to contact the development partners in order to appoint members to the Evaluation Commission.

The major challenge is still however that the development partners, including those active in the area of justice reform and anti-corruption, do not have an institutionalised platform and established mechanism for identifying and appointing their representatives. This may require more time, which could affect compliance with the activity timetable set by the law in the Final and Transitional Provisions.

Another aspect that leaves room for interpretation is the wording of para. (4) of Art. 5 of the draft Law which states that "Their list shall be approved by Government decision and published on the official website of the Ministry of Justice". The current wording implies that the Government will approve a list of development partners active in the field of justice reform and fight against corruption in the last 2 years, without clearly defining how the 3 members of the Evaluation Commission from the development partners will be identified.

Therefore, we consider it appropriate to revise Article 5 of the draft law and to come up with normative clarifications on the mechanism for selecting the representatives of development partners in the Commission, as well as on the procedure for their approval by the Government.

d. Ensuring confidence in the Evaluation Commission

According to the [analysis](#) carried out by the Legal and Political Studies Group in Pristina on the mechanism of extraordinary evaluation of magistrates, in order to successfully carry out such a reform and achieve the desired results, it is necessary for the society to have confidence that what is done is fair, transparent, based on clear criteria and uniformly applied. In order to increase the confidence of candidates, judges, prosecutors and also of the society in the mechanism applied, and in the Evaluation Commission, it is necessary to take all the necessary measures for this purpose.

Therefore, one of the recommendations of the GEJ experts from IPRE to the original draft law was to introduce an obligation for the members of the Evaluation Commission to submit a declaration of assets and personal interests, just like the members of the SCM, SCP and their subordinate bodies are doing. In the draft version approved by the Government, this provision is not included. However, we consider it opportune to have this obligation included in the final version of the draft.

In addition, we recommend regulating much more strictly the situations when a conflict of interest arises for members of the Evaluation Commission. The current version of the draft law provides for an obligation for the members of the Evaluation Commission to refrain from any activity that could lead to a conflict of interest or any action incompatible with their membership in the Evaluation Commission, as well as to refrain from actions that could discredit the Evaluation Commission or cast doubt on the objectivity of its decisions.

The provisions on abstention of Commission members are welcome, however, we consider it appropriate to provide for a clearer mechanism on the determination of conflict of interest and the actions to be taken in such situations.

e. Other provisions to improve the draft law

As mentioned in the information note, the election of new members to the self-governing bodies of judges and prosecutors is currently an urgent necessity, particularly in view of the tight timelines under which new members are to be appointed to these bodies. For this reason, the law provides for very tight deadlines for the creation of the Commission, as well as for the evaluation of the candidates' files.

Thus, in order to carry out a thorough assessment in these limited terms, alongside having access to the registers, the declaration of assets and personal interests for the last 5 years, the list of relatives, we consider it appropriate to ask for additional information concerning the trips undertaken during the last 5 years and the details regarding them, which would allow an easier research of the candidates' files, including abroad.

In addition, one of the conditions of incompatibility for the members of the Evaluation Committee, laid down in para (5) of Article 5 on the draft law, is not to have held the position of member of the Parliament, member of the cabinet of ministers, secretary general, secretary of state, head of cabinet, adviser, assistant or secretary to the dignitary or public official in the public administration authorities of the Republic of Moldova in the last 3 years. Although this provision appears to be exhaustive and includes the most relevant categories of dignitaries and civil servants, at the same time some relevant

categories are omitted, such as heads of central administrative authorities, heads of autonomous authorities, etc.

We therefore recommend reviewing this provision, either by extending the list to include positions that are similar in nature to those listed, or by limiting it to certain generic categories, such as positions of public dignity and civil servants at senior management level.

Moreover, although the approved version of the draft offers more clarity and predictability than the original version, it still retained a number of phrases that offer a wide margin of discretion and may be treated erroneously by the Commission members, for example: 'intentional breach', 'serious breach', 'reasonable suspicion', 'reasonable doubt', 'serious doubt', without providing a definition for these, or clarifying how they are assessed.

Thus, we recommend, in the process of finalising the draft law, either to avoid these phrases or to adjust and elaborate on them in order to provide more clarity and predictability to the members of the Commission, but also to the candidates.

As regards the anti-corruption expertise, there is a relevant remark made by the author in the draft information note on anti-corruption expertise to the draft law, where it is mentioned that the National Anti-Corruption Centre is obliged to submit the anti-corruption expertise within the general deadline provided for by Law No 100/2017. At the same time, we consider it relevant that the National Anticorruption Centre should prepare the anti-corruption expertise for the updated version of the draft law and the Parliament should take it into consideration when preparing the final version of the draft law which would be submitted for adoption.



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IPRE is a member of the National Platform of the Civil Society Forum of the Eastern Partnership (www.eapcsf.eu), co-initiator of the Eastern Partnership Forum of the Research Centres (EaP Think-Tank Forum) launched in 2017 in Chisinau.

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