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Amicus Curiae Position Paper

*on the complaint no 233/23 and No 77/24, pending
before the Equality Council*

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SUMMARY

This Opinion refers to cases no. 233/23 and no. 77/24, pending before the Equality Council regarding the compliance with the provisions of art. 10 para. (2) letter g) of the State Budget Law for 2024 no. 418/2023 with the standards on non-discrimination, with reference to the size of the differentiated reference value for the professional group (prosecutors and judges) who passed the assessment according to the provisions of Law no. 26/2022, in comparison with those who have not yet been subjected to external evaluation and those for whom the law does not provide for the obligation of external evaluation.

The conclusions of the Justice Expert Group (EYG) are:

- *The external evaluation carried out with a view to ensuring the integrity of judges and prosecutors and increasing society's trust in justice could be qualified as a legitimate aim.*
- *The salary gap between the professional group (prosecutors and judges) who have passed the evaluation and those who have not yet been subjected to the evaluation, in the context of the broad margin of the authorities, does not raise essential questions regarding the lack of justification and reasonableness;*
- *The salary difference between the professional group (prosecutors and judges) who passed the evaluation and those for whom the law does not provide for the obligation of external evaluation could, in principle, raise questions about the lack of a fair balance between the measures applied and the legitimate aim.*

SUBJECT OF THE COMPLAINT

(Cases No 233/23 and No 77/24)

The examination of the adequacy of the provisions of art. 10 para. (2) letter g) of the State Budget Law for 2024 no. 418/2023 with the standards on non-discrimination, in the part that refers to the size of the differentiated reference value (4300 lei/4500 lei compared to 2500 lei/2850 lei) for the professional group (prosecutors and judges) who passed the evaluation according to the provisions of Law no. 26/2022 on some measures related to the selection of candidates for the position of member in the self-administration bodies of judges and prosecutors (hereinafter – Law no. 26/2022) and were not appointed to the positions for which they applied and Law no. 252/2023 on the external evaluation of judges and prosecutors and the amendment of certain normative acts (hereinafter – Law no. 252/2023), by comparison with those who have not yet been subjected to evaluation and with those for whom the law does not provide for the obligation of external evaluation.

According to the press release of the Equality Council, the following aspects were proposed for public consultation:¹

- Whether the difference in pay between prosecutors/judges who passed the appraisal and were not appointed to the positions for which they applied and the prosecutors/judges who were not subject to the appraisal constitutes a breach of the principle of equal pay for equal work

¹ Cases No 233/23 and No 77/24, <https://egalitate.md/amicus-curiae/>



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- The differential treatment of the specialists of the professional group indicated *above* in the part related to their remuneration according to the status of "person subject to external evaluation" can be objectively and reasonably justified.
- What would be the legal purpose pursued by establishing this differentiation, including the explanation of whether the maintenance of the difference in the remuneration of these categories is proportionate to the legal purpose invoked.

RELEVANT REGULATORY FRAMEWORK

The European Social Charter (revised) at Art. 4 para. (3) provides that in order to ensure the effective exercise of the right to fair pay, the parties undertake to recognize the right of workers to equal pay for work of equal value.

Covenant no. 1966 of 16 December 1966 on economic, social and cultural rights in art. 7 para. (1)(a)(i) provides that States Parties to the present Covenant recognize the right of everyone to enjoy fair and favourable conditions of work, including equitable pay and equal remuneration for work of equal value, without distinction.

The European Convention on Human Rights by art. 14 enshrines the right not to be discriminated against in the "exercise of the rights and freedoms recognized by the Convention".

The Constitution of the Republic of Moldova by art. 16 para. (2) provides that all citizens of the Republic of Moldova are equal before the law and public authorities, without distinction of race, nationality, ethnic origin, language, religion, sex, opinion, political affiliation, wealth or social origin.

Law on ensuring equality no. 121/2012 in art. 1 para. (1) establishes that the purpose of the law is to prevent and combat discrimination, as well as to ensure the equality of all persons on the territory of the Republic of Moldova in the political, economic, social, cultural and other spheres of life, without distinction of race, color, nationality, ethnic origin, language, religion or beliefs, sex, age, disability, opinion, political affiliation or any other similar criterion; Art. 2 provides the definition of discrimination as any difference, exclusion, restriction or preference in rights and freedoms of the person or of a group of persons, as well as the support of discriminatory behavior based on the real criteria, stipulated by this law or on presumed criteria; Article 3 establishes that the subjects in the field of discrimination are natural and legal persons in the public and private domain; Art. 7 para. (1) establishes that any distinction, exclusion, restriction or preference based on the criteria established by law is prohibited, which have the effect of limiting or undermining equal opportunities or treatment at employment or dismissal, in direct activity and in professional training; Art. 7 para. (2) letter d) stipulates that the employer's action of unequal remuneration for the same type and/or workload is considered discriminatory.

The State Budget Law for 2024, no. 418 of 22.12.2023 provides in art. 10 a reference value for calculating the salary in a larger amount for judges, prosecutors who have passed the external evaluation according to Law no. 252/2023 on the external evaluation of judges and prosecutors and the amendment of some normative acts, as well as candidates for the positions indicated in art. 3 para. (1) letters a)–f) of the mentioned law, who passed the respective evaluation, but were not elected or, as the case may be, appointed, in the position for which they applied.



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Law no.26 of 10.03.2022 on some measures related to the selection of candidates for the position of member in the self-administration bodies of judges and prosecutors establishes in the preamble that it was adopted In order to increase the integrity of the future members of the Superior Council of Magistracy, of the Superior Council of Prosecutors and of their specialized bodies, as well as in order to increase the confidence of society in the activity of the self-administration bodies of the judges and prosecutors, but also, in general, in the justice system.²

Law no. 252/2023 on the external evaluation of judges and prosecutors and the amendment of certain normative acts establishes in the preamble that it was adopted in order to ensure the integrity of judges and prosecutors and to increase society's trust in justice.³

CONTEXT GENERAL

The issue of judicial independence has always been at the top of the priorities on the agenda of reforms of the Moldovan authorities in the last 10 years. During this period of time, reforms of the judicial system have been initiated and partially carried out to guarantee judicial independence and impartiality, in order to effectively apply international standards and good practices. Despite these efforts, accusations of corruption, pursuit of self-interest, ethics and lack of transparency have been continuously brought by civil society, media outlets and representatives of the international community.

Despite the implementation of the Justice Sector Reform Strategy for 2011-2016⁴, public trust in the justice system remained low. According to a national survey conducted in December 2017 for the Superior Council of Magistracy, 81% of the general population and 81% of respondents who interacted with the courts did not trust the judicial system. The same survey shows that 75% of the general population and 83% of those who have interacted with the courts believe that the justice sector is corrupt. 73% of the general population and 77% of those with experience of interaction with justice considered that the court will declare a simple person guilty of a crime, even if he is innocent, and an equally large percentage of respondents (79% and 80%, respectively) considered that the court will declare a person with a higher social status innocent, but guilty.⁵

As a result of this protracted and serious situation, the authorities announced their intention to carry out far-reaching reforms of its judiciary and prosecutor's office in order to eradicate endemic corruption by implementing the measure of external integrity assessment of judges and prosecutors. The main goal is to increase the level of public trust in these institutions. In particular, the reform aimed at the extraordinary verification of judges and prosecutors.

The need for effective reform of the judiciary has also been supported by civil society organisations following the identification of the following serious problems:

² https://www.legis.md/cautare/getResults?doc_id=145443&lang=ro

³ https://www.legis.md/cautare/getResults?doc_id=145198&lang=ro

⁴ https://justice.gov.md/public/files/file/reforma_sectorul_justitiei/srsj_pa_srsj/SRSJro.pdf

⁵ The survey, conducted for the Superior Council of Magistracy by the USAID Program for Transparent Justice and the European Union Project "Increasing Efficiency, Accountability and Transparency in the Courts of Moldova" (ATRECO), 2018, Available online: http://crjm.org/wpcontent/uploads/2018/02/Brosura_finala.compressed.pdf.



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- Enslavement of justice to political interests, including its use to capture state institutions and cover up grand corruption – the large-scale use of public resources in private interests;
- Using justice to intimidate and persecute the opposition, activists, taking over businesses, ensuring impunity for human rights abuses;
- Endemic corruption, at all levels;
- A culture of tolerance and almost total impunity towards corruption and abuse throughout the system;
- The vulnerability of the system to be recaptured;
- A very low trust in justice on the part of citizens.

GENERAL ASPECTS ABOUT EXTERNAL EVALUATION

On 10.03.2022, the Parliament adopted Law no. 26/2022 in the preamble of which it is established that this law was adopted in order to increase the integrity of the future members of the Superior Council of Magistracy, the Superior Council of Prosecutors and their specialized bodies, as well as in order to increase society's confidence in the activity of the self-administration bodies of judges and prosecutors, but also, in general, in the justice system.⁶

Next, in 2023, a new law was adopted in order to extend the verification procedure to a significant number of judges and prosecutors in office (Law No. 252/2023).⁷ The reasoning of the draft law is presented in detail in the explanatory note. The authorities refer to the "extraordinary situation" within the judicial system of the Republic of Moldova and the rampant corruption, which is illustrated by a large number of criminal cases filed against judges by the Anticorruption Prosecutor's Office and the participation of many judges in the money laundering scheme called "Russian Laundromat". According to the authorities, the existing accountability mechanisms do not work, which results in the loss of credibility of the judicial system. Moreover, the fight against corruption in the judiciary is one of the basic conditions resulting from the Association Agreement between the Republic of Moldova and the EU.

Both laws have been expertized by the Venice Commission: Law 26/2022⁸; Law 252/2023⁹.

Venice Commission's arguments on the external evaluation:

- The extremely high level of corruption can justify equally radical solutions, such as an examination of incumbent judges. Such a critical and extraordinary situation in the judicial system should be objectively demonstrated, and other methods of judicial accountability should be investigated.¹⁰

⁶ https://www.legis.md/cautare/getResults?doc_id=145443&lang=ro

⁷ https://www.legis.md/cautare/getResults?doc_id=145198&lang=ro

⁸ [https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2021\)046-E](https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2021)046-E)

⁹ https://constcourt.md/public/files/file/comisia_venetia/2023/CDL-AD2023005.pdf

¹⁰ See Opinion of October 2022, CDL-AD(2022)024, para. 44, Available online: [https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2022\)024-e](https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2022)024-e)



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- The extent of the crisis in the judicial system and the alleged (in)efficiency of the existing anti-corruption bodies and mechanisms are factual issues that require an in-depth knowledge of the national context.¹¹
- Ultimately, it is for the Moldovan authorities to decide whether the prevailing situation in the judicial system of the Republic of Moldova creates a sufficient basis to subject all judges and prosecutors [...] to extraordinary integrity assessments.¹²
- the verification of the integrity of candidates for the positions of members of the Superior Council of Magistracy, the Superior Council of Prosecutors and their specialized bodies is a filtering process and not a judicial verification process. If implemented properly, it could strike the right balance between benefits, *i.e.* increased trust in the justice system.¹³
- Regarding the extraordinary measures to vet judges and prosecutors in Albania "such measures are not only justified, but necessary for Albania to protect itself from the scourge of corruption which, if not combated, could completely destroy its own judicial system".¹⁴

RELEVANT GENERAL PRINCIPLES ON DISCRIMINATION

According to the case law of the European Court of Human Rights, not all differences in treatment – constitute discrimination, but only those that do not have "an objective and reasonable justification" (*Molla Sali v. Greece* (MC), 2018, § 135).

Lack of objective and reasonable justification

Art. 14 ECHR does not prohibit differences in treatment which are based on an objective assessment of fundamentally different factual circumstances and which, being based on the public interest, maintain a fair balance between the protection of the interests of the community and respect for the rights and freedoms guaranteed by the Convention (*Zarb Adami v. Malta*, 2006, § 73).

A difference in treatment is discriminatory 'if it has no objective and reasonable justification', *i.e.* if it does not pursue 'a legitimate aim' or if there is no reasonable relationship of proportionality between the means used and the aim pursued (*Molla Sali v. Greece* (MC), 2018, § 135).

Therefore, the so-called 'proportionality check' has two stages: the verification of the existence of the legitimate aim and the verification of the proportionality *stricto sensu* of the difference in treatment.

a) Legitimate purpose

In order for a difference in treatment to be justified, States must, in the first place, base the measure in question on a 'legitimate aim' (*Molla Sali v. Greece* (MC), 2018, § 135). In addition,

¹¹ Opinion of March 2023, CDL-AD(2023)005, para. 18, Available online:

https://constcourt.md/public/files/file/comisia_venetia/2023/CDL-AD2023005.pdf

¹² See Opinion of December 2021, CDL-AD(2021)046, para. 13, Available online:

[https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2021\)046-e](https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2021)046-e)

¹³ *Ibid.*, §§ 14, 43.

¹⁴ CDL-AD(2016)009 Albania - Final Opinion on the Revised Draft Constitutional Amendments on the Judiciary in Albania, § 52.



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they must demonstrate that there is a 'link' between the legitimate aim pursued and the difference in treatment complained of by the applicant.

The Court has identified a number of purposes that may be considered admissible for the application of Article 14 of the Convention, such as:

- the effective implementation of the policy of achieving linguistic unity (*Belgian Linguistic Cause*, 1968);
- the provision of public services that fully ensure the promotion of equal opportunities and for which employees are obliged to act in a manner that does not discriminate against others (*Eweida and Others v. the United Kingdom*, 2013, § 105);
- maintaining economic stability and debt restructuring in the context of a serious political, economic and social crisis (*Mamatras and Others v. Greece*, 2016, § 103);
- facilitating the rehabilitation of juvenile offenders (*Khamtokhu and Aksenchik v. Russia (MC)*, 2017, § 80).

However, some aims invoked by governments have not been considered legitimate by the Court, for example: references to traditions, general assumptions or social attitudes prevailing in a particular country (*Ünal Tekeli v. Turkey*, 2004, § 63; *Konstantin Markin v. Russia (MC)*, 2012, § 127).

The aims mentioned by governments to justify differences in treatment can only be considered legitimate in the case of the establishment of certain safeguards and it is for the Court to examine whether those safeguards exist at each stage of the implementation of the measures in question and whether they are effective.

b) Proportionality

Once a legitimate aim has been established, the difference in treatment must strike a fair balance between the protection of the interests of the community and respect for the rights and freedoms of the individual (*Belgian Language Case*, 1968, § 10 under 'In law'). Thus, the ECtHR requires the existence of a reasonable relationship of proportionality between the means used and the aim pursued (*Larkos v. Cyprus (MC)*, 1999, § 29).

Since the role of the Court is not to substitute its own assessment for that of the competent national authorities as regards the question of whether — and to what extent — differences in similar situations in other respects justify a difference in treatment, States enjoy a certain margin of discretion. The extent of this margin varies according to the circumstances, the subject matter and the context of the case (*Stummer v. Austria (MC)*, 2011, § 88).

On the one hand, the Court indicated some areas in which the State's margin of appreciation remains quite wide. For example, the Court has held that, because of direct knowledge of their society and its needs, national authorities are, in principle, better able than the international court to assess what is in the public interest for social or economic reasons, and the Court generally respects the policy choices of the legislator, unless they are manifestly unreasonably grounded (*Belli and Arquier-Martinez v. Switzerland*, 2018, §; *Mamatras et al. v. Greece*, 2016, § 88-89). The same applies to questions relating to general social strategy measures (*Belgian Language Case*, 1968, § 10 under 'In law') and relating to the right to property (*Chabauty v. France (MC)*, 2012, § 50).



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Moreover, the Court has also identified certain grounds of discrimination in which the margin of discretion is reduced. Indeed, the Court has repeatedly held that no difference in treatment, based solely or decisively on a person's ethnic origin, can be objectively justified, in a modern democratic society, based on the principles of pluralism and respect for different cultures (*Sejdić and Finci v. Bosnia and Herzegovina* (MC), 2009, § 43-44). Similarly, differences in treatment based on gender or sexual orientation can only be justified on very good grounds (*Konstantin Markin v. Russia* (MC), 2012, § 127).

As with the other provisions of the Convention, one of the criteria used by the Court to define the State's discretion in cases concerning discrimination is the existence and extent of a consensus among the Contracting States on the issue in question. As the Convention is, first and foremost, a system for the protection of human rights, the Court must take into account the evolution of conditions in the contracting states and react to any emerging consensus on the standards to be achieved (*Konstantin Markin v. Russia* (MC), 2012, § 126).

Discrimination based on "other situation"

The term "other situation" has generally been given a broad interpretation (*Carson and Others v. the United Kingdom* (MC), 2010, § 70) that has not been limited to personal characteristics, in the sense that they are innate or inherent (*Kiyutin v. Russia*, 2011, § 56; *Clift v. United Kingdom*, 2010, § 56).

The Court recognized the following situations as 'another situation' within the meaning of Article 14 of the Convention: age; gender identity; sexual orientation; health and disabilities; parental status and marital status; immigration status; the employment situation, etc.

At the same time, the Court examined a number of situations that do not fall within the concept of 'other situation'. It was considered that certain differences in treatment unrelated to the personal situation did not fall within the scope of the concept of 'other situation'.¹⁵

CONCLUSIONS ON THE QUESTIONS REFERRED BY THE EQUALITY COUNCIL

The Council asked the following questions:

- Does the difference in pay between prosecutors/judges who passed the appraisal and were not appointed to the posts for which they applied and the prosecutors/judges who were not subject to appraisal constitute a breach of the principle of equal pay for equal work?
- The differential treatment of the specialists of the professional group indicated above in the part related to their remuneration according to the status of "person subject to external evaluation" can be objectively and reasonably justified.
- What would be the legal purpose pursued by establishing this differentiation, including the explanation of whether the maintenance of the difference in the remuneration of these categories is proportionate to the legal purpose invoked.

Legitimate purpose

¹⁵ Guide to Art. 14 of the European Convention on Human Rights and Art. 1 of Protocol No. 12 to the Convention, Available online: https://ks.echr.coe.int/documents/d/echr-ks/guide_art_14_art_1_protocol_12_rum, §186



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Both in the section dedicated to the general context and in the one on external evaluation, we highlighted the main elements that were the basis for the organization of the extraordinary process of external evaluation of judges and prosecutors.

Because the authorities have a wide margin of appreciation of the national context, because this extraordinary exercise was developed and intended in a particular way to overcome the serious problems in the judicial system, recognized both nationally and internationally, we believe that "increasing the confidence of society in the activity of the self-administration bodies of judges and prosecutors, but also, in general, in the justice system" can be accepted as a legitimate goal, including the effects of these measures, such as the difference in salary of some representatives of the judicial system.

Reasonable proportionality between the means used and the aim pursued

From the summary provided by the Council and the questions asked, we consider that the object of the 2 notifications is to be analyzed in the light of 2 distinct situations:

- a) The salary difference between the professional group (prosecutors and judges) who passed the evaluation but were not appointed to the positions for which they applied and those who have not yet undergone the evaluation but are to be evaluated;
- b) The salary difference between the professional group (prosecutors and judges) who passed the evaluation but were not appointed to the positions for which they applied and those for which the law does not provide for the obligation of external evaluation.

First situation (a).

As mentioned above, the importance of the pre-vetting and vetting exercise has been confirmed both nationally and internationally as an exceptional mechanism needed to combat corruption in the judiciary and ensure its integrity. The verification of the integrity of the holders of the positions of judge and prosecutor aims to ensure a functional system that inspires confidence in litigants.

Since the law provides for the obligation of external evaluation, the situations of judges and prosecutors who receive a higher remuneration depend exclusively on the passing of the evaluation and the time when it occurs. However, because the moment of external evaluation for some representatives of the judicial system occurred later, most of the time for objective reasons, than for others in similar positions, it cannot be qualified as an essential and unjustified difference in treatment.

Thus, I consider that this situation does not raise questions about the existence of an objectively unjustified differential treatment, or that all persons who will be subject to external evaluation will eventually benefit from a salary increase according to the law.

2nd situation (b).

The Constitutional Court on the remuneration of the judge:

- The judge's remuneration is one of the basic components of his independence. In a genuine democracy, both the rulers and the people must recognize that the judge, who



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has been entrusted with the power to decide on human rights and freedoms, must possess material independence and a sense of security about his future.¹⁶

- An independent judiciary cannot be imagined in the absence of financial guarantees and that fundamental human rights and freedoms acquire an illusory character in the absence of an independent judiciary to ensure their respect. The guarantee of the financial independence of judges requires that financial benefits correspond to economic and social realities.¹⁷

Thus, ensuring adequate remuneration for the position for both judges and prosecutors is an important component in ensuring their independence.

According to the State Budget Law for 2024, an increased reference value is provided for judges and prosecutors who passed the evaluation in relation to others. The purpose of establishing such a difference is to ensure that those who have passed the external evaluation, who will continue to work in the system, a higher remuneration, which corresponds to the above-mentioned requirements, to guarantee the independence of judges and prosecutors.

At the same time, the situation is created in which some persons (judges and prosecutors) who have applied for positions in the self-administration bodies have been subjected to evaluation (but were not appointed to the position), receive these salary privileges, but a group of judges and prosecutors who have not passed the evaluation, **but do not have the legal possibility to do so, I cannot receive this salary increase**. In this situation, if the position occupied by these groups of professionals is similar, if the work they carry out is similar, but the salary is different, there may be unjustified differential treatment in relation to the other judges/prosecutors who are not assessed.

The salary difference between the professional group (prosecutors and judges) who passed the evaluation and those for whom the law does not provide for the obligation of external evaluation could, in principle, raise questions about the lack of a fair balance between the measures applied and the legitimate aim.

CONCLUSIONS

The importance of the pre-vetting and vetting exercise has been confirmed both nationally and internationally as an exceptional mechanism necessary to combat corruption in the judiciary and ensure its integrity. Verifying the integrity of the holders of the offices of judge and prosecutor in order to ensure a functional system that inspires confidence in litigants could be qualified as a legitimate goal.

Analyzing the general context and the applicable international standards on discrimination, taking into account the sufficiently wide margin of the state in social and justice issues, we note that in this case 2 distinct situations can be identified in the cases pending before the Equality Council:

¹⁶ Decision no. 24 of 02.10.2018 for the review of the constitutionality of some provisions of Articles 3 and 4 of Law no. 328 of 23 December 2013 on the remuneration of judges and prosecutors and of a phrase from Article 131 para. (1) of Law no. 544 of 20 July 1995 on the status of the judge, Available online: <https://constcourt.md/ccdocview.php?tip=hotariri&docid=671&l=ro>

¹⁷ Decision no. 27 of 31.10.2019 on the review of the constitutionality of Articles 37 of the Law on the Constitutional Court, 27 of the Law on the Supreme Court of Justice and 4 of the Law on the Organization and Functioning of the Court of Accounts (Financial Autonomy of Independent Authorities), Available online: <https://www.constcourt.md/ccdocview.php?l=ro&tip=hotariri&docid=715>



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- Judges and prosecutors who have not yet undergone mandatory external evaluation;
- Judges and prosecutors who did not apply, but will not be subject to the mandatory external evaluation.

On the basis of the above-mentioned arguments, the Justice Expert Group (EYG) reached the following conclusions:

- The external evaluation carried out with a view to ensuring the integrity of judges and prosecutors and increasing society's trust in justice could be qualified as a legitimate aim.
- The salary gap between the professional group (prosecutors and judges) who have passed the assessment and those who have not yet been subject to the assessment, in the context of the broad margin of the authorities, does not raise essential questions as to the alleged lack of justification and reasonableness.
- The salary difference between the professional group (prosecutors and judges) who passed the evaluation and those for whom the law does not provide for the obligation of external evaluation could, in principle, raise questions about the lack of a fair balance between the means applied and the declared legitimate aim.