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PRELIMINARY OPINION on the draft Justice Sector Independence and Integrity Strategy 2020-2023

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This opinion is presented in the context of the public consultations launched by the Ministry of Justice on 3 January 2020 on the draft Justice Sector Independence and Integrity Strategy for 2020-2023 (hereinafter the Strategy) and the Action Plan for its implementation (hereinafter "the Plan").

In the first part, the authors present certain general aspects related to the process of development and approval of the Strategy. The second part includes recommendations on specific issues concerning (a) the goals, (b) the strategic objectives, (c) specific objectives and activities mentioned in the draft Strategy and Action Plan.

Our preliminary conclusion is that the draft Strategy and Action Plan is a good start, but need additional adjustments and review. We express our openness to contribute to their improvement. More detailed recommendations will be presented within the working groups formed for the drafting of the Strategy, as well as throughout the process of fine-tuning and approval of these strategic documents.

General aspects

We consider absolutely necessary to have a strategic document that sets out the priorities for the coming years for the development and strengthening of the justice sector. Such a document facilitates the further implementation of reforms and provides predictability to the justice sector in terms of the reform measures to be taken. This document also facilitates the support from the development partners to reform the judiciary.

Such a strategic document, as a rule, is adopted for 4 years, i.e. it exceeds the period of a Government or a Parliamentary legislature. On the other hand, the introduction of measures that do not have consistent political support, coupled with the reluctance of the justice system to reform, risks creating major difficulties at the stage of implementation of the strategy. Therefore, the new justice reform strategy must be adopted with a broad political consensus. This can be best achieved through a transparent drafting of the document and its consultation with all relevant actors, in particular the judiciary, the parliamentary opposition and civil society. The draft Strategy and Action Plan was published on 3 January 2020. The Ministry of Justice began its drafting in 2017. We hope that the draft Strategy and Action Plan will follow the necessary steps in the context of transparency in decision-making process and public consultations, avoiding changes without prior

consultation at the stage of approval by the Government and Parliament. The implementation of the Strategy is even more relevant after the end of the public consultation and adoption procedure.

Based on the above, it is important that:

1. The strategic document includes a risk assessment of potential crises (epidemiological, economic or financial) that could affect the possible implementation of the Strategy.
2. The strategic document responds to the real problems identified. We noticed that some activities do not answer to the identified problems, but were rather introduced at the proposal of the actors of the justice sector. Other proposed measures are aimed at redressing problems that do not actually exist (e.g. increasing the number of staff assisting judges. CEPEJ data confirm that there is no shortage in this regard, the real problem is staff turnover, number of vacancies and inefficient management of available positions. We did not find measures to address these shortcomings in the Strategy);
3. The proposed measures for the identified problems are sufficient. We have noticed that sometimes the reviewed documents do not contain sufficiently firm measures. For example, although the Strategy mentions the lack of integrity in the judiciary as a serious problem, the measures proposed to remedy this problem are modest;
4. The proposed measures are clear. The formulation of the actions / measures in the action plan does not offer a clear direction of the efforts as well as the end result is directed (for example, activity 1.2.5.c)). Thus, it is not clear in what sense the fees of bailiffs will be modified, in the sense of reduction or their increase;
5. The proposed measures are result-oriented. Activities such as “drafting a law”, entrusted exclusively to the Ministry of Justice, should be avoided (see Action Plan, activity 1.1.2 d)). The drafting of a law cannot be an end in itself, unlike the adoption of a law;
6. The strategic document is concise. The strategy must contain only the absolutely necessary aspects. We recommend avoiding mentioning in the Strategy the activities carried out by the authorities on a regular basis. We noticed that the action plan contains sufficient such activities (see, for example, the activities related to the National Institute of Justice mentioned at point 1.3.2);
7. The strategy should contain measurable implementation indicators. The published Strategy mentions in general terms that certain phenomena will be improved or eradicated, but does not offer measurable indicators (e.g. increasing confidence in justice by 20%). This shortcoming will inevitably lead to discussions on whether the implementation was good and whether the expected results were achieved;
8. The strategy should have a sufficiently influential coordination and monitoring mechanism to ensure a genuine implementation. One of the lessons learned from the implementation of the previous Strategy is that monitoring of the implementation must be carried out by a sufficiently influential body from a political point of view. The monitoring by the commissions set up at the level of the Ministry of Justice did not ensure the desired impact for the previous Strategy. Moreover, the Ministry of Justice does not have sufficient leverage to ensure the implementation of the Strategy by the Judiciary, Government or Parliament. The coordinating and monitoring body could be set up under the Government, Parliament or the Presidency. It is true that the Strategy provides for annual Parliamentary monitoring, but this is insufficient, as Parliamentary monitoring, in the proposed form, will take place once a year in the standing committee, which risks turning the monitoring exercise into a pronounced process with political implications. Discussions in the relevant Parliamentary committee must exist, but they cannot be the only means of monitoring the implementation of the Strategy;
9. The composition of the coordination and monitoring body for the implementation of the Strategy

to ensure its independence and representativeness. The draft provides for the establishment of a forum for justice decision-makers, but this forum is composed exclusively of the heads of the institutions to be reformed. Usually, the leaders of the institutions are reluctant to admit the serious problems in their own institutions and have a busy schedule. Moreover, such a format does not allow the discussion of issues in detail. We recommend that this body is composed of representatives of institutions of a lower level, but with sufficient influence, such as secretaries of state, deputy directors of institutions, etc. We also believe that the presence of members of civil society and of the media in this body will increase the efficiency of the discussions. At the same time, the share of the latter and of the representatives of the liberal professions should be sufficient to have a decisive influence on the decisions of this body.

10. Coordination and monitoring should not turn into a technical, routinised process. The monthly meetings in the context of the previous Strategy proved to be ineffective. Half-yearly sessions seem to be a better solution because they ensure sufficient time for the preparation for the meetings and allows a more objective assessment of progress. Certainly extraordinary circumstances may arise, and extraordinary meetings may take place to resolve them;
11. Sufficient financial resources are provided to ensure a successful implementation. Neither the draft Strategy nor the Action Plan provide realistic estimates in this regard. It is clear that some activities will not require additional budget expenditures. However, many activities require expenditures, especially on infrastructure, equipment, surveys and independent studies. We recommend that a preliminary assessment is made on the expenditures and that this expenditure is explicitly mentioned in the Action Plan. The assessment must be realistic. In case of uncertainty on the exact costs, we recommend budgeting costs slightly higher than the estimated minimum costs. This will ensure that no future budgetary adjustments are needed, which are difficult to manage. Last but not least, the content of the planned budgets need to be coordinated with the Medium Term Budget Framework (MTBF), updated every year by the Government. In this context, it is necessary to quantify the financial costs, including for the implementation of Law no. 76/2016 on the reorganization of the courts of 21 April 2016 and the digitalisation of the courts (in particular by sending online procedural documents, wider application of electronic signatures, extension of the electronic file to all courts, prosecutors and attorneys, regulation and application of teleconferences for detainees, minors and authorised persons).
12. The Strategy and the Action Plan is coordinated at content level with the provisions of National Integrity and Anticorruption Strategy for 2017-2020 (NIAS) and National Human Rights Action Plan for 2018-2022 (NHRAP III). Both NIAS and NHRAP III contain provisions relevant to the integrity and protection and promotion of fundamental rights. Pillar III is especially relevant in the case of NIAS and domain no. 2 – The national justice system – in the case of NHRAP III.
13. The Strategy and the Action Plan provide a separate component for the development of the quality of teaching at law schools and the steering of the education process towards the needs of the justice system, as the former are the main sources of new staff in the justice system.

Specific aspects

Although the strategy is inevitably a general document that provides a strategic planning framework for the justice sector reform, it must be clear enough to avoid unnecessary discussions at the implementation stage. General formulations should be avoided. It is also necessary to exclude the apparent contradictions between the text of the Strategy and of the Action Plan, which, at first glance, are rather numerous.

The list of actions to be completed in the strategic document is not exhaustive. In this context, we reiterate our readiness to return with additional comments and suggestions on the draft Strategy

and Action Plan in the process of their development and fine-tuning.

Below is a set of specific recommendations.

a. Strategic priorities

The draft Strategy envisages three strategic directions:

1. Independence, administration, responsibility and integrity of actors in the justice sector;
2. Access to justice, quality and transparency of justice;
3. Efficient and modern justice.

The strategic goals generally address the three main issues affecting the judiciary in the Republic of Moldova: (i) insufficient independence, (ii) corruption and (iii) the low quality of justice. As an additional effect, the system is affected by the reluctance of legal actors to apply the law uniformly and equally, as well as to ensure respect for and observance of human rights.

However, we note the need to redefine the three proposed goals. Thus, the administration of justice is part of the efficiency of justice, and the efficiency of justice cannot take place without quality. At the same time, ensuring modern justice can be too general a strategic goal for a policy document. It is rather a means of ensuring the efficiency or accessibility of justice. On the other hand, the related aspects of respect for human rights, given the seriousness of the issue, would deserve to become a strategic direction. This will create the preconditions for deeper human rights reforms. However, it is important to ensure the complementarity of actions relevant to human rights with the actions provided for by NHRAP III.

To ensure better clarity and subsequent coordination, we propose that the strategic goals in the Draft Strategy are reformulated as follows:

1. **Independence, accountability and integrity of justice actors**: This must also include the transparency of justice, as an element of accountability. The self-government of the liberal professions could also be found in this goal;
2. **Accessibility, efficiency and quality of justice**: All activities related to access to justice, the efficiency of justice actors and the quality of documents issued by them should be included here. The draft Strategy now contains such objectives in all three announced strategic goals (e.g. Objectives 1.3, 2.2, 2.3, 3.1 and 3.2);
3. **Respect for human rights in the justice sector**: Solutions for systemic deficiencies such as the lack of a fair trial or the abusive use of insurance measures in the criminal process may find their place here.

b. Proposed strategic objectives

The reformulation of the strategic goals implies the relocation of the 10 strategic objectives. On the other hand, we are not sure that some strategic objectives are in fact objectives. In our opinion, at least two objectives are rather indicators or activities, namely:

1. 2.4 Increasing the level of trust in the justice system;
2. 3.3 Modernisation of the justice sector by provision of equipment and its interconnection.

It is also recommended to define distinct strategic objectives for the above proposed third goal –

Respect for human rights in the justice sector. These may include:

1. Increasing the respect for human rights at the stage of criminal prosecution;
2. Improving the level of respect for the right to freedom;
3. Improving the level of respect for privacy in the civil, criminal and misdemeanour procedures;
4. Improving the enforcement of court decisions;
5. Reducing the phenomenon of ill-treatment and detention in inhuman / degrading conditions.

c. Specific objectives and activities

In our opinion, (i) some specific objectives and proposed activities are not necessary, (ii) others need to be repositioned. We also consider that (iii) additional measures (activities) are needed.

(i) Among those which we consider not necessary are the following:

1. Activity 1.1.4.a) which refers to the judicial reserve. The institution of judicial reserve is extremely difficult to manage. It has not been implemented for over 20 years, although it is provided in general terms by law. Filling the vacancies in the judiciary is an easier and more sustainable solution;
2. Activity 1.1.4.b) which refers to the gradual increase in the number of legal assistants in courts and courts of appeal. CEPEJ data confirms that the number of actual staff assisting judges and prosecutors is close to or even above the European average. Efforts should be directed towards filling existing vacancies;
3. Activity 1.1.5.a), which refers to the standardisation of the access in the positions of judge and prosecutor based on employment seniority. This method was adjusted only a few years ago and has not yet been implemented. Changing these provisions now does not seem appropriate;
4. Activity 1.1.6.c), which refers to the delimitation of competencies between the CSP and the General Prosecutor. The law on the prosecutors' offices is clear in this regard. Unfortunately, the CSP does not make full of these legal provisions. Eventually some clarifications may be introduced in the law, but these are not so important as to be provided for in the new Strategy;
5. Specific objective 1.3.2 has no place in the Action Plan, as it reproduces the activities that are in any case implemented by the NIJ and are not decisive for the proposed reform measures;
6. Activity 2.1.1.a) is required but is voluntary and cannot be imposed on attorneys. The pro-bono activity of attorneys depends on their goodwill and availability. The mandatory nature of this system, in the absence of traditions to ensure the quality of attorneys' work, will not produce any beneficial effects for the population, but on the contrary may affect the quality of provided services. In fact, the pro-bono activity of attorneys is rather determined by their sufficient income;
7. Activity 2.3.1, which proposes the introduction in law of the criteria of quality and clarity of court decisions. This cannot be achieved in practice. The Civil Procedure Code (CPC) and the Criminal Procedure Code (CrPC) already contain requirements for judgments (civil) and, respectively, sentences (criminal) – they must be legal, justified and motivated (art. 239 CPC and art. 384 para. (3) CrPC). The quality criteria cannot be listed exhaustively and they change from time to time. They are the emanation of practitioners, not the legislator. Such criteria must be developed by the SCJ, which has such powers within the meaning of Articles 2 letter. c) and 16 let. c) of Law no. 789/1996. Moreover, such criteria are not necessary in the case of standardising judicial practice and streamlining the activity of the SCJ. The quashing of poorly prepared decisions is the best remedy which will increase the quality of court decisions;
8. Activity 2.3.2.d), which refers to the preparation of a written report on the appeal by the reporting

judge. This measure is ineffective and will only increase the workload of judges. A simpler solution would be to drop the ruling part of the judgments and to issue instead fully reasoned judgments;

9. Activity 3.2.2.b) could be obsolete in case of the decision within activity 3.2.2.a) to waive the mandatory judicial mediation delivered by judges. We recommend its exclusion.

(ii) Among the measures which require a difference placement are the following:

1. For activity 2.1.2.g) a better place is within the specific objective 2.1.6.;
2. Specific objectives 2.1.6. and 2.1.7 are better placed under the strategic goal dedicated to the observance of human rights.

(iii) Among the measures, which are absolutely necessary and which are not in the Strategy or Action Plan are the following:

1. At specific objective 1.4 insert activities that will ensure in practice the application of the rules of ex-parte communication of judges and prosecutors, as well as the thorough verification of the assets of all judges and prosecutors. Also, to this end, measures should be introduced to ensure the observance in practice of the electronic random distribution of cases in courts;
2. At specific objective 1.4 it is necessary to include related actions to review the competences of the Anti-Corruption Prosecutor's Office, which must investigate cases of major corruption, ensure the transparency of the Superior Council of Prosecutors and strengthen the National Integrity Authority;
3. At the specific objective 1.3. (Strengthening legal training, education and specialisation) should also include an analysis of the work of the NIJ and its procedures to increase the quality of training at the NIJ. The NIJ was a key institution included in the previous Strategy and was the recipient of assistance from various partners. However, it is not clear how the NIJ has reformed itself to be able to respond adequately to current requirements;
4. At the specific objective 2.1.5 an activity on the possibility of outsourcing translation services should be inserted. This will solve many of the existing problems in this area;
5. Insert in the specific objective 2.2.3 of an activity to provide for the implementation of the random distribution of cases in the prosecutors' offices;
6. Insert at objective 2.3.2 an activity that refers to the revision of the role of the SCJ, so that it becomes a genuine cassation court and whose main task is to harmonise judicial practice, reduce the competences and the number of judges;
7. Insert at objective 2.3.2 an activity that would require the SCJ to develop guidelines on the individualization of criminal sanctions in different categories of cases, a widespread practice in advanced democracies and which considerably reduces the risk of arbitrariness;
8. Insert at objective 2.4.1 an activity related to the implementation of the E-File system and the introduction of an efficient mechanism for the public to receive and submit documents to courts in electronic format;
9. Insert at objective 2.4.1 an activity related to the observance of the rules of publication of anonymised court decisions on the courts' portal. There are significant shortcomings in this regard. Some decisions are excessively anonymised and other decisions that need to be anonymised are published without the exclusion of sensitive data;
10. Insert at objective 3.3.1 letter f) an activity that provides for the exclusion starting with January 1, 2021 of keeping of judicial statistics in handwritten registers, a practice that undermines the accuracy of the data from the Integrated File Management Program (IFMP);
11. The strategy does not provide for actions on criminal measures to combat corruption in the

judiciary. These should be found in the Strategy or Action plan, including in terms of assessing existing practices, strengthening mechanisms for investigating corruption in the judiciary and enforcing sufficient sanctions, coordinated with the content of the NIAS for 2017-2020 and with the Action Plans for the implementation of the NIAS, in particular the one relevant for Pillar III – Justice and Anticorruption Authorities;

12. Neither the Strategy nor the Action plan provide for measures aimed at ensuring the functional autonomy of the Judicial Inspection within the SCM. This measure must be introduced to ensure a functioning Judicial Inspection;
13. Neither the Strategy nor the Action plan provides for measures to improve the functioning of the Constitutional Court, although such measures were proposed in the previous Strategy and have not been implemented;
14. The endorsed documents do not address the issue of excessive workload at the courts of appeal and large discrepancies among their workload. This could be solved by including activities that involve: 1. Reviewing the constituencies of courts of appeal and some district courts and, 2. Ensuring minimum annual budget expenditures for the planning and construction of new courthouses in accordance with Parliament Decision no. 21 of March 3, 2017. The workload at the courts of appeal could also be reduced by adjusting the appeal system in civil and criminal cases (waiving the submission of unmotivated appeals and separate reinstatement within the appeal period).
15. There are no measures for the efficient management of human resources in the justice system, including of resources that have left the system. To reduce the negative impact on the justice system due to frequent vacancies in the system and staff turnover, we recommend creating a register of employees of the justice system, to ensure subsequent contact with former employees in the event of vacancies;
16. Although the Action Plan refers to the involvement of judges in the election of chairmen and vice-chairmen of courts (p.1.1.2), there are no measures to exclude the conflict of jurisdiction between the president of the court and the mechanisms established by law to exclude influence on how the random distribution of files takes place;
17. Include a separate component according to point 1.3. dedicated to the development of the quality of teaching at law schools and the steering of educational process towards the needs of the justice system. These may include evaluating curricula and encouraging courses to improve the quality of critical thinking, legal writing and motivation, as well as learning about the administration of the justice system.

Finally, we reiterate on the opportunity to reflect in the new strategic document the outstanding policy measures in the field of justice and integrity in the justice sector previously formulated in the **White Book on Good Governance[1]**presented by IPRE, CRJM and Expert-Grup on July 19, 2019.

Download the document in English **here**.

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[1] IPRE, CRJM, Expert-Grup, White Book on Good Governance, 19.07.2019 available in English at: http://ipre.md/2019/07/19/cartea-alba-a-bunei-guvernari-propuneri-privind-prioritatile-de-politici-pentru-urmatoarele-12-luni-pentru-guvernul-republicii-moldova/?lang=en

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