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Ministry of Justice of the Republic of Moldova

NORLAM COMMENTS ON THE DRAFT LAW ON PROFESSIONAL INTEGRITY TESTING

We refer to our participation at the "Public Debates regarding measures to prevent and fight corruption introduced in the legislative package for implementation of the Justice Sector Reform Strategy and the Plan of Actions", which was held on December 6th 2012 in Chisinau. Furthermore we refer to the existing draft law on "Professional Integrity testing" which was presented at the conference and formed the basis for the debate. We were informed that any comments to the subjects raised in the named conference were welcome, and that the time limit for such comments is December 15th 2012.

We base our comments on our Norwegian background and our understanding of the situation of the challenges facing the Moldovan judiciary today, all in light of the regulations in ECHR – as we understand them.

General comments:

Norlam fully appreciates and support the need for, and strong focus on, strategies and efforts to prevent and combat corruption in the Republic of Moldova in all its aspects. We also support the efforts in improving and strengthening the legal framework in this domain, which undoubtedly must be regarded as vital in order to improve the functioning and the trust of the public sector in general, and the judicial sector in particular.

We still find it important to stress that the need for a more active approach to corruption, and any strengthening of the legal framework in this respect, should not be implemented without due consideration to legal security for persons involved, and it is of course vital that the legislation and the practice are within the frames of international conventions by which Moldova are bound.

As for the conditions for authorizing, initiating - and for the methods that can be used during the Professional Integrity testing, there are elements which cause some concern – especially their relation to the conditions set out in ECHR Art. 6 and Art. 8 - which are elaborated in case law from ECtHR.

We are of course aware that the consequences of a negative test "only" will be loss of position as a public official (for a period up to 7 years), and that the test result cannot be used as evidence in a criminal case, cf. article 7 § 2.

Nevertheless, it is of great significance, that the procedure for the use of such testing facilitates the necessary guarantees for legal security and foreseeability for the persons who are subject to testing. Furthermore, we find it necessary to mention that the methods used during testing, should be clearly regulated with regards to accessibility, as well as ensuring that they are adequate and proportionate in relation to the seriousness of the possible infringement in question.

The competence and conditions for initiating the use of Professional Integrity testing

According to the draft law Article 8 § 1, the integrity testing can be initiated by three public entities: The National Anti-Corruption Center, the Security and Information Service (SIS) and the subdivision Internal Security of SIS on SIS employees. The listing is exhaustive.

In § 3 in the same article it is stipulated that "the decision to conduct an integrity test is taken independently by the subject authorized to perform the testing…".

The conditions/basis for the initiation of the testing are regulated in § 2 –which stipulates three alternative conditions:

(a) Risks and vulnerabilities to corruption identified in the activities of public entities;
(b) Information available/gathered and complaints received;
(c) Explicit motivated requests made by the leadership of public entities

First of all we want to emphasize that in our opinion the competence of such measures should not – alone – be placed on the named institutions. Such a solution will in our opinion imply a risk for lack of legal control and contradiction in the most essential part of the process; deciding if the conditions for using the test are fulfilled. Even if this is not regarded as criminal proceedings, the methods used are quite similar to rather advanced investigation (see below), and where the competence of using such methods often are exclusively given to the courts, in order to have the decision made by an independent and neutral institution. We also think it is important to stress that the possible consequence of a negative test is rather serious and dramatic for the public official in question. The legal safeguards in the regulations that might give such a result should reflect this.

On this background we suggest that testing only can be initiated after a decision from the Court, upon request from the mentioned public bodies. Even if this may appear to be a less expedient process, we think it is necessary.

In this respect we also want to refer to the case Ramanauskas v. Lithuania – application no 74421/01 where it is stated in § 53:

> "The right to the fair administration of justice holds so prominent a place in a democratic society that it cannot be sacrificed for the sake of expedience (see Delcourt v. Belgium, judgment of 17 January 1970, Series A no. 11, pp. 13-15, § 25)."

Furthermore, we find the basis for the initiation of the testing to be too general. We think that such testing only should be based on concrete suspicion of a criminal offence – and only if there is reasonable suspicion that the public official has committed such an offence. In this regard we would also like to refer to the comments given by Christopher Pater and Glen Comesanas from ICE on November 29th 2012, underlining the practice and conditions for such testing in the US, which primarily takes place within the context of a criminal case – as one of many other investigation tools.

I addition, we find reason to ask whether the solutions in the draft law regarding the conditions to initiate such test, are in compliance with the ECHR. In the informatory note to the draft law, there are several references to judgments from ECtHR. As far as we can see, these have all ended in convictions for violations of Art. 6. In some of the decisions the Court states that – to be in accordance with the Convention – such regulations and practice, namely the conditions for initiating the concrete measures, and the use of these methods, must be within "clear limits". This follows also from the case Ramanauskas v. Lithuania – application no 74421/01 § 51:

> That being so, the use of special investigative methods – in particular, undercover techniques – cannot in itself infringe the right to a fair trial. However, on account of the risk of police incitement entailed by such techniques, their use must be kept within clear limits (see paragraph 55 below).

As mentioned, the conditions in Article 8 §2 a)-c) are alternative. This implies that regardless of any concrete suspicion, Professional Integrity testing can be decided if the public official has a position where he/she is in risk or vulnerable to corruption when this is identified in the activities of public entities. We think it is fair to say that this condition will be fulfilled for the vast majority of all public officials in the Republic of Moldova. This taken into account, the condition of "clear and foreseeable" regulations, as stipulated in the jurisprudence from ECtHR, seems not to be satisfied.

It is also important to point out the fact that the draft – at least according to the comments – seems to have been assessed only in the light of Article 6 in the Convention. We agree that case law related to Article 6 – which only, at least directly, regulates the criminal procedure - can give guidelines also for regulations outside criminal cases. Particularly if the methods used have a clear parallel to investigation measures, which is the case in the draft law. Nevertheless, we miss a thorough assessment related to Article 8 in the Convention, which regulates interventions from the state towards the citizens with regards to their private life. As far as we can see, this approach has not been taken in the comments, and there is no referral to Article 8 at all.

In our opinion – as for the scope and range of Article 8, we refer to the case Uzun v. Germany – application number 35623/05:

> 46. Thus, the Court has considered that the systematic collection and storing of data by security services on particular individuals, even without the use of covert surveillance methods, constituted an interference with these persons' private lives (see Rotaru v. Romania [GC], no. 28341/95, §§ 43-44, ECHR 2000-V; P.G. and J.H. v. the United Kingdom, cited above, § 57; Peck, cited above, § 59; and Perry, cited above, § 38; compare also Amann v. Switzerland [GC], no. 27798/95, §§ 65-67, ECHR 2000-II, where the storing of information about the applicant on a card in a file was found to be an interference with private life, even though it contained no sensitive information and had probably never been consulted). The Court has also referred in this context to the Council of Europe's Convention of 28 January 1981 for the protection of individuals with regard to automatic processing of personal data, which came into force – inter alia for Germany – on 1 October 1985 and whose purpose is "to secure in the territory of each Party for every individual ... respect for his rights and fundamental freedoms, and in particular his right to privacy, with regard to automatic processing of personal data relating to him"

(Article 1), such data being defined as “any information relating to an identified or identifiable individual” (Article 2) (see P.G. and J.H. v. the United Kingdom, cited above, § 57).

The demand for clear definitions in the legislation – in relation to Article 8, we refer to Iordachi and others v. Moldova – application number 25198/02:

> 44. Still, the nature of the offences which may give rise to the issue of an interception warrant is not, in the Court's opinion, sufficiently clearly defined in the impugned legislation. In particular, the Court notes that more than one half of the offences provided for in the Criminal Code fall within the category of offences eligible for interception warrants (see paragraph 14 above). Moreover, the Court is concerned by the fact that the impugned legislation does not appear to define sufficiently clearly the categories of persons liable to have their telephones tapped. It notes that Article 156 § 1 of the Criminal Code uses very general language when referring to such persons and states that the measure of interception may be used in respect of a suspect, defendant or other person involved in a criminal offence. No explanation has been given as to who exactly falls within the category of “other person involved in a criminal offence”.
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> 45. The Court further notes that the legislation in question does not provide for a clear limitation in time of a measure authorizing interception of telephone communications. While the Criminal Code imposes a limitation of six months (see paragraph 17 above), there are no provisions under the impugned legislation which would prevent the prosecution authorities from seeking and obtaining a new interception warrant after the expiry of the statutory six months' period.
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> 46. Moreover, it is unclear under the impugned legislation who – and under what circumstances – risks having the measure applied to him or her in the interests of, for instance, protection of health or morals or in the interests of others. While enumerating in section 6 and in Article 156 § 1 the circumstances in which tapping is susceptible of being applied, the Law on Operational Investigative Activities and the Code of Criminal Procedure fails, nevertheless, to define “national security”, “public order”, “protection of health”, “protection of morals”, “protection of the rights and interests of others”, “interests of ... the economic situation of the country” or “maintenance of legal order” for the purposes of interception of telephone communications. Nor does the legislation specify the circumstances in which an individual may be at risk of having his telephone communications intercepted on any of those grounds.

Means and methods of integrity testing

As mentioned, the draft gives a wide range of measures that can be used by the agents carrying out the integrity tests. In Article 10 in the draft, the following measures are directly stipulated:

(4) “…some documents which support the simulated situation or cover may be utilized, including cover-related documents

(5) During the course of professional integrity testing, some transport means, audio-video, communications, and other technical equipment aimed at obtaining covert information available with the National Anti-Corruption Center and/or the Security and Information Service may be used as well. If necessary, when the use of the National Anti-Corruption Center and/or the Security and Information Service equipment is undesirable or impossible, some other sources means may also be used with the prior consent of their owner/keeper, but without disclosing their respective real use information.

(6) In order to ensure the accuracy of professional integrity testing, the testers can transmit/promise to transmit money, other goods, services, privileges and advantages in small amounts, and the possibility of passing these values and their costs are to be indicated in advance in the testing Plan.

As we understand this, a full range of measures will be available for the testers, including surveillance of communication to obtain covert information, and also measures of a provocative character. As we understand the draft, it is left to the discretion of the testers to decide which concrete measure(s) out of those listed that should be applied in each test. We also note that apparently there are no regulations or guidelines addressing issues on how and when the various methods should be applied, *inter alia* in light of the need to assess the principle of proportionality. This appears to be an unfortunate solution, which can give way to exceeding powers, lack of control, and random use of methods.

Some of the measures stipulated have the character of being Special Investigative Measures, which in our opinion should be specially regulated as for competence and with clear conditions for initiating them. This should imply that using the same methods – even if it is outside of criminal investigation – should have the same legal safeguards in this respect

Summing up:

We find several elements in the draft that give reason for concern – both regarding the necessity of applying such tools and methods in non-criminal proceedings, as well as with regards to the lack of legal security that the draft law provides.

In Norlam's opinion – if Personal Integrity testing at all should be implemented – it should follow the model of the US, where it is used as a part of a criminal investigation, and within the already established frames of the Criminal Procedure Code.

Furthermore it is important to have an independent body, i.e. the Courts, to assess whether the conditions are satisfied for each method being used, and to decide if the measures can be applied.

Furthermore it is necessary to make the conditions for initiation of Personal Integrity testing more specific, clear and foreseeable. The solutions chosen in the draft seem not to satisfy requirements established by the ECtHR – in particular with regards to Articles 6 and 8.

We specifically suggest that a basic condition for initiating such tests, should be that there is reasonable suspicion that a criminal offence – clearly stipulated and of a certain seriousness - has been committed.

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