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Activity 1.3: "Integrity Testing" (April 2016)

Legislative Toolkit on Integrity Testing

Prepared by:

Tilman Hoppe, Council of Europe Expert

with inputs and reviews from:
Phil Collins, Council of Europe Expert
Manuela Popescu, Council of Europe Expert
Jelena Jolić, Council of Europe Secretariat

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Economic Crime Co-operation Unit *Action against Crime Department* *Directorate General Human Rights and Rule of Law* *Council of Europe* *67075 Strasbourg CEDEX France*	*Tel: +33 (0)3 90 21 48 52* *Fax: + 33 3 88 41 27 05* *Email: Jelena.JOLIC@coe.int*

Content

1. INTRODUCTION TO "INTEGRITY TESTING"

For many years, integrity testing has been a tool applied in Common Law countries such as Australia, the United Kingdom, or the United States. Handbooks by international organisations also recommend the tool as highly effective.[1] Nonetheless, the concept of integrity testing seems yet to be barely familiar to a large circle of practitioners. In addition, there is a scarcity of literature on this tool. Therefore, this introduction provides background information in order to put the regulatory guidelines (Chapter 2) into the right perspective.

1.1. What it is – and what not

The term "integrity testing" is used in different contexts. Therefore, this section clarifies the term and concept of this tool.

1.1.1. Forms

Integrity tests are realistic scenarios such as a car with a malfunctioning light driven by an undercover officer at night, in order to test the reactions by the police once stopped. There are two types of tests:

- **Targeted** tests aim at specific officials, whenever intelligence exists indicating that the officials could be corrupt or have committed other ethical violations. Such intelligence could be previous allegations by citizens, criminals or colleagues, or inexplicable wealth of the official.
- **Random** tests aim at a random sample of officers in areas of heightened corruption risk. All officials are aware that integrity tests exist, but are not told about their frequency or occurrence. As a result, no official can know whether or not a bribe offer made to him/her might not be an integrity test. For example, in a case before the European Court of Human Rights (ECtHR),[2] undercover testers drove around in a car violating the speed limit and were stopped by a police officer who happened to notice their traffic violation. His subsequent bribe-taking was secretly recorded on video.

However, the distinction between both forms is somewhat artificial; as a committee of the Australian Parliament noted in 2011,

> "*the distinction between random and targeted testing is not clear cut. For example, an integrity testing regime that targets particular sections of an organisation on the basis of higher corruption risk, but in the absence of any intelligence about corrupt behaviour, could be considered either random or targeted depending on the definition used. The terms 'random' and 'targeted' are at either end of a spectrum of integrity testing methodologies.*"[3]

The term "integrity testing" is sometimes used for **pre-employment screening** of candidates for public office. In this context it refers to mechanisms that shall reveal whether the candidates would bring sufficient ethics into their future job.[4] The Council of Europe Model Code of Conduct for Public Officials uses the term "integrity checks" for this screening exercise.[5] However, in the context of hiring practices, "integrity testing" refers to a diverse range of tools such as

[1] See below at chapter 2.

[2] ECtHR, Rotaru v. Roumanie [available only in French], Application no. 27797/10, *Decision of 15 April 2014*, available at http://hudoc.echr.coe.int, accessed 24 April 2016 (for further details on the case see below Section 2, Commentaries on Article 1).

[3] Parliamentary Joint Committee on the Australian Commission for Law Enforcement Integrity (November 2011), Inquiry into Integrity Testing, *Report*, Chapter 2, no. 2.10/p.5, available at www.aph.gov.au, accessed 24 April 2016.

[4] Lickiss S. (September 2014), *Pre-Employment Integrity Testing with Law Enforcement and Security Applicants: A Closer Look at the Law Enforcement Applicant Inventory (LEAI)*, available at http://pqdtopen.proquest.com.

[5] Article 24 para. 1: "The public official who has responsibilities for recruitment, promotion or posting should ensure that appropriate checks on the integrity of the candidate are carried out as lawfully required", Recommendation No. R (2000) 10 of the Committee of Ministers to Member states on codes of conduct for public officials. Appendix, *Model code of conduct* for public officials, available at www.coe.int, accessed 24 April 2016.

questionnaires, leaderless group discussions, mock trials, role-playing, interviews, home visits, checking personal finances, or polygraph tests.[6] A more appropriate word would therefore be "integrity screening of candidates". In any case, the term "integrity testing" used in the context of this toolkit does not apply to pre-employment screening of candidates.

1.1.2. Objectives

Systemic corruption can often seem like an unbreakable pattern. For example a driver will be stopped for a traffic violation. With a corrupt policeman, he will pay only a fraction of the legally foreseen fine. The policeman will pocket the "fine" (bribe) and his/her superiors often partially profit from the money collected during the day. Similarly, a lawyer might bribe a judge to win the case. The problem in such constellations is that everybody involved in the corruption-scheme profits. Hence, there is very little, if any, willingness to report, and equally very little risk of detection.

Integrity testing breaks this cycle. Once such tests are introduced, all officials are aware that they exist, but they are not told about the frequency or occurrence. As a consequence, no police officer, for example, can now know whether or not a bribery offer made to him/her is real, or is an integrity test that may eventually draw disciplinary or criminal consequences.

Hence, the objectives of integrity testing are to:[7]

- Encourage officials to follow their obligation to report bribery (as any offer could be an integrity test);
- Increase the perceived risk of detection and thus prevent corruption;
- Identify public officials or agencies prone to corrupt practices;
- Collect evidence for disciplinary procedures;
- Identify public officials who are honest and trustworthy;
- Identify the training needs of public officials, i.e. patterns of misconduct which could go back on a lack of awareness for ethical challenges.

Integrity tests are not limited to corruption, but can be applied to any performance, including the service mentality of public officials. Ukraine opted for limiting the tests to corruption-related cases (Article 11 subsection 1).

Integrity tests primarily aims at "petty corruption", which could also be called "everyday corruption", i.e. corruption at the interface of the state and its citizens, i.e. where the state provides essential services to the public. While the amounts of money involved may be comparatively small, tackling this type of corruption makes a crucial difference to citizens. It is this type of corruption they encounter in meeting their daily needs that counts to the public: health care, education, civil registry, etc. Nonetheless, integrity tests are also possible in considerably bigger settings, i.e. where cases of so called "grand corruption" occur. This includes business licensing; public procurement; the issuance of building permits; privatisation; etc.

1.1.3. Testing and criminal or disciplinary proceedings

The integrity testing in and of itself is not a criminal/disciplinary proceeding or part of it. One has to distinguish the following two steps:

- The integrity test itself, for example an undercover tester applying for a passport to see to what extent public officials will comply with provisions when performing their services.

[6] Center for the Study of Democracy – CSD (2013), *Countering Corruption in the Police: European Perspectives*, p.37, available at www.csd.bg; Converus webpage on "*integrity test*", available at http://converus.com, accessed 24 April 2016.

[7] See United Nations (2004), *Handbook on Practical Anti-Corruption Measures for Prosecutors and Investigators*, pages 91-97, available at www.unodc.org, accessed 24 April 2016.

- A criminal or disciplinary proceeding initiated because, for example, the tested public official asked for a bribe.

Integrity testing does not have to result in a procedure in which individual guilt, whether disciplinary or criminal, would be assessed. One can also use integrity tests to generate meta-data on corruption rates in certain public institutions, for assessing abstract corruption risks, or for using the results not only for disciplinary proceedings, but also for training purposes. For example, in Australia, "integrity testing in the New South Wales Police is now an accepted practice. The Covert Investigation Unit is heavily involved in the education phase with new students entering the New South Wales Police. Case studies are presented to a broad range of the New South Wales Police which highlights the role of the Covert Investigation Unit and corruption issues that have been identified."[8] Therefore, in principle, integrity testing and disciplinary or criminal proceedings are all independent from each other. Integrity tests are conducted primarily with the aim of checking employee/institutional integrity, as opposed to undercover operations which are aimed at gathering evidence to prove criminal behaviour. Only where evidence from integrity testing is admissible in disciplinary or criminal proceedings, such proceedings can follow-up on an integrity test.

1.2. International anti-corruption standards

1.2.1. Conventions and other standards

None of the Council of Europe or other international conventions makes explicit reference to "integrity testing". Only the United Nations Convention against Corruption (UNCAC) in Article 8 subsection 4 calls on Member states "to facilitate the reporting by public officials of acts of corruption" and to take "disciplinary or other measures against public officials who violate the codes or standards". That said, all major international organisations have at various points recommended introduction of integrity testing as an anti-corruption tool.

For example, in the chapter on Article 50 of the UNCAC, the UNODC's "Technical Guide to the UNCAC" lists (targeted) integrity testing as one of the tools available and describes it as

> *"a method that enhances both the prevention and prosecution of corruption and has proved to be an extremely effective and efficient deterrent to corruption."*[9]

Similar language exists in other sources. Accordingly, the OECD, "Managing Conflict of Interest in the Public Sector" manual states that *"[T]he Integrity Test can be a powerful specialised corruption detection tool".*[10] OSCE "Best practices in combating corruption" note that:

> *"Integrity testing has now emerged as a particularly useful tool for cleaning up corrupt police forces – and for keeping them clean."*[11]

Talking about the value of integrity testing the UN "Handbook on Practical Anti-Corruption Measures for Prosecutors and Investigators" states:

> *"It is now clear that it is not enough to 'clean up' an area of corruption when problems show. Rather, systems must be developed which ensure that there will be no repetitions and no slide back into systemic corruption. It is in the essential field of follow-up and monitoring that integrity testing really comes into its own."*[12]

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[8] *History of New South Wales Police Integrity Testing Program* (2011), available at www.aph.gov.au, accessed 24 April 2016.

[9] United Nations Office on Drugs and Crime – UNODC (2009), *Technical Guide to the UNCAC* (English and Russian), Article 50 II.4.5., p.186, available at www.unodc.org, accessed 24 April 2016.

[10] Organisation for Economic Co-operation and Development – OECD (2005), *Managing Conflict of Interest in the Public Sector*, p.68 ("Integrity Testing Policy"), available at www.oecd.org, accessed 24 April 2016.

[11] OSCE (2004), *Best practices in combating corruption*, (English and Russian), Chapter 12, p.141 ("Integrity testing"), available at www.osce.org, accessed 24 April 2016.

[12] United Nations (2004), *Handbook on Practical Anti-Corruption Measures for Prosecutors and Investigators*, p.89, available at www.unodc.org, accessed 24 April 2016.

According to the he UNODC's "Anti-Corruption Tool Kit":

> *"It is one of the most effective tools for eradicating corrupt practices in Government services in an extremely short time. In particular, in cases of rampant corruption and low trust levels by the public, it is one of the few tools that can promise immediate results and help restore trust in public administration."*[13]

The World Bank "Preventing Corruption in Prosecution Offices: Understanding and Managing for Integrity" guidance refers to the testing as "*a powerful corruption detection tool*"[14]

Transparency International has also been promoting the idea of integrity testing as "a particular useful tool" for fighting corruption.[15]

1.2.2. Effective implementation

In order to work properly, a few conditions are essential:

- Scenarios have to be realistic in order to work. Since it will be "well publicised that the Department regularly conducts integrity tests, an unrealistic scenario could alert the officer that a test is being conducted."[16] Therefore, a specialised well-trained and well-equipped testing unit is required.[17]
- The testing unit has to be of highest integrity and confidentiality, as information of the targets and timings would be "commodities" for which corrupt officials could be willing to pay a good price. Subjecting the testing units themselves to testing by another unit could be seen as an important step of ensuring this integrity.
- The introduction of (random) integrity testing needs accompanying promotion, pointing out the benefits of such a system for most public officials in order to gain acceptance, and to avoid undermining a relationship of trust.[18]

1.3. Foreign Experiences

Targeted integrity tests are a common investigation tool in more or less all countries. Little comparative research is available at the moment on the extent of use of integrity tests worldwide. Therefore, this chapter cannot provide a full picture of foreign experiences. The scarcity of information can partly be attributed to the fact that it is often believed that secrecy about its scope and methods add to its deterrent effect.[19] However, information is available for some countries that apply random integrity tests. Some have been conducted in the criminal sphere (Georgia); some are conducted in both the criminal and disciplinary sphere (United States, United Kingdom,

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[13] UNODC (2004) *Anti-Corruption Tool Kit*, Version 3, p.396, available at www.pogar.org, accessed 24 April 2016.

[14] Gramckow H. (2011), *Preventing Corruption in Prosecution Offices: Understanding and Managing for Integrity*, Justice&Development Working Paper Series, No. 15/2011, p.11, available at www-wds.worldbank.org, accessed 24 April 2016.

[15] TI Source Book (2000), *Confronting Corruption: The Elements of a National Integrity System*, chapter 20, p.190, available at http://archive.transparency.org, accessed 24 April 2016.

[16] New York City Commission to Combat Police Corruption (March 2000), *The Performance Study: the Internal Affairs Bureau's Integrity Testing Program*, available at www.nyc.gov, accessed 24 April 2016.

[17] Rothlein S. (April 2010), *Conducting Integrity Tests on Law Enforcement Officers, Issues and Recommendations*: "Specialized training using role-playing scenarios is essential in building the skills of a proactive investigative unit capable of successfully assembling these types of cases. The investigators handling reactive cases are a good back-up resource; however, ideally, a proactive unit should be established that is exclusively focused on development of cases involving criminal misconduct committed by officers that requires a covert investigative approach. This type of unit is able to develop a higher level of expertise in this area and devote all of their energy to the proactive process.", available at www.patc.com, accessed 24 April 2016.

[18] OECD (2005), *Managing Conflict of Interest in the Public Sector*, p.68 ("Integrity Testing Policy"): "It risks alienating non-corrupt staff by creating fear of accidentally being targeted.", available at www.oecd.org, accessed 24 April 2016; Klockars/Haberfeld (2007), Enhancing Police Integrity, p.7.

[19] New York Times (24 September 1999), *Police Used in Stings to Weed out Violent Officers*: "Police officials said they were reluctant to discuss the program in detail because they believe secrecy about its scope and methods has added to its deterrent effect."; available at www.nytimes.com, accessed 24 April 2016.

Australia, Romania); some are conducted only in the disciplinary sphere (Moldova). While the United Kingdom has shifted its testing programme to a targeted approach, it is still listed below as it initially conducted checks that were not targeted at specific individuals. It should also be noted that some countries are currently considering introducing integrity testing, or have just done so, such as Serbia in 2016, with the scope of the programme not yet being clear.[20]

Country	Introduced	Coverage	Consequences
Australia	1996	Police	Disciplinary and/or criminal
Czech Republic	2009	Security forces	Disciplinary and/or criminal
Georgia	2003	Public administration	Disciplinary and/or criminal
Hungary	2012	Public administration	Disciplinary and/or criminal
Kenya	2006	Public administration	Disciplinary and/or criminal
Moldova	2013	Public administration	Disciplinary
Romania	2009	Ministry of Interior	Disciplinary and/or criminal
United Kingdom	1999	Mainly police	Disciplinary and/or criminal
United States	1994	Police	Disciplinary and/or criminal

1.3.1. Australia

Integrity testing in the New South Wales Police Force commenced in 1996, as a result of the recommendation of the Wood Royal Commission to the New South Wales Police. The Commission's mandate was to investigate the existence and extent of corruption in the police service.[21] The Commission emphasised that targeted integrity testing is only one strategy to detect corruption and it should not be used in cases where strong suspicion exists, as police officers are then often already aware of the risk of an investigation.[22] The New South Wales **Police Act** 1990 contains one section on integrity tests (see Annex II). The subjects of the tests are **not informed** they have been tested unless they fail the test. Officers will not be told they have "passed" to protect the viability of the test: otherwise the officer would feel "safe", because he/she would not be tested unless a new reason for a test would come up.[23]

1.3.2. Czech Republic

The Czech Republic began in 2009 with conducting integrity tests called in Czech language the equivalent of "reliability tests".[24] The Police Inspection conducted the tests within the police based on § 107 of Act no. 273/2008 "On the Police of the Czech Republic",[25] as in force until 31 December 2011. In 2012, the testing programme shifted to the newly created **General Inspection of Security Forces** (GIBS), which is part of the Office of the Prime Minister. The GIBS oversees in particular the police, customs, and the prison service and is responsible for investigating allegations of misconduct. Currently, the GIBS comprises approximately of 250

[20] Pointpulse Magazin/ Mandić, S. (2016), *Dilemmas about Police Integrity Testing*, accessed 24 April 2016, available at http://pointpulse.net, accessed 24 April 2016: "[...] [N]o one ever explained which form of the test will be applied in Serbia: the one targeting police officers under suspicion, or the random form, which would apply to all."

[21] Police Integrity Commission webpage, *Royal Commission into the New South Wales Police Service*, available at www.pic.nsw.gov.au, accessed 24 April 2016.

[22] *History of New South Wales Police Integrity Testing Program* (2011), available at www.aph.gov.au, accessed 24 April 2016.

[23] Ibid.

[24] GIBS (12 May 2015), Press release, *Preventivní Působení Zkoušek Spolehlivosti* [Preventive action through reliability tests], available at www.gibs.cz, accessed 24 April 2016.

[25] Hrudka J., Bohman M. (2008), *Zkouška spolehlivosti – nové oprávnění Inspekce?!* [The reliability test – a new power of the Inspection?!], available at www.ceses.cuni.cz/CESES-76-version1-Bohman.pdf, accessed 24 April 2016.

employees with police powers who can conduct an integrity test with approval by the prosecutor's office.[26]

The tests aim at preventing unlawful conduct by staff of the security forces, who know that the tests may occur at any time. Tests primarily aim at **corruption**, leaking of information, excessive violence, and other misconduct. From 2009 until 2015, a total of 226 tests were carried out, of which 26 found evidence of relevant misconduct.

Tests are based on § 41 of Act no. 341/2011 "On the General Inspection of Security Forces" (GIBS).[27] Paragraph 1 empowers "a member of the inspection to conduct reliability tests to prevent and detect infringements committed by a member or employee [of the security forces] ('test subjects')." The "reliability test involves inducing situations, which the test subject is asked to solve" (paragraph 2). Tests thus refer to artificial situations which the tested person is **routinely exposed** to in the course of their work, in order to determine whether he/she performs his/her duties properly and in compliance with applicable laws and regulations.[28] This is not considered provocation, as it targets everyday situations, such as simulation of a traffic offense. Eventually, such everyday situations may result in a policeman's asking for a bribe.[29] The tests "are documented by video and audio recording, and the material is preserved as official record" (paragraph 6). Testers may commit misdemeanour offences if this is necessary for performing the test and if this does not violate human rights (paragraph 8). In this regard, testers are inter alia prohibited from evoking a previously not existing criminal intent (provocation).[30]

Third parties, such as journalists, **citizens**, or other public institutions may initiate tests (paragraph 4). If approved by the GIBS, it carries out the test while possibly involving the third parties under its supervision.

All tests are followed by an assessment carried out by a department separate from the unit executing the tests. If the tested subject has not committed any offence, the testing file is archived. Otherwise, **disciplinary**, misdemeanour or **criminal** proceedings are initiated, depending on the severity of the offence. Tested subject who failed the tests have the right to review the recordings (paragraph 7). According to case law by the **Supreme Court** in 2014, the recordings can be introduced into criminal proceedings as evidence if testers did not provoke the offender.[31] This decision put an end to a reluctance of courts in earlier years to admit the test results as evidence.[32]

The introduction of integrity tests in the Czech Republic followed a **discussion** over many years on the justification and right scope of the programme, and some failed attempts to introduce legislation on this issue.[33] A legislative attempt in 2009 by some members of parliament to legalise provocation to some extent in the context of corruption offences failed.[34]

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[26] Belgrade Centre for Security Policy/Mandić, S., Djordjević, S. (2016), *Testing the Integrity of Police Officers*, p.18. available at http://pointpulse.net, accessed 24 April 2016.

[27] *Zákona č. 341/2011 Sb., o Generální inspekci bezpečnostních sborů*, available at http://aplikace.mvcr.cz, accessed 24 April 2016.

[28] GIBS (2016), *Vyhodnocení zkoušek spolehlivosti – analýza pro případné rozšíření zkoušek na další osoby působící v orgánech veřejné moci* [Evaluation of reliability tests, Analysis of tests for possible extension to other persons working in the public service], p.2, available at www.komora.cz, accessed 29 June 2016.

[29] Janoušková N., (17 February 2016), *Prostředky boje proti úplatkářství de lege ferenda II. – Agent provokatér a zkouška spolehlivosti* [Means of combating bribery *de lege ferenda* II. – Agent provocateur and reliability tests], available at www.pravniprostor.cz, accessed 24 April 2016.

[30] GIBS (2016), p.3.

[31] Supreme Court, *decision of 25 September 2014*, file 301/2014, available at http://codexisuno.cz, accessed 24 April 2016.

[32] GIBS (2016), ibid, p.62.

[33] Hrudka J. (2014), *Zkouška spolehlivosti – prostředek prevence protiprávního jednání* [Integrity test – means of illegal acting prevention], pages 13-35, available at https://sis.polac.cz, accessed 24 April 2016.

[34] Janoušková N. (ibid).

The current programme is subject to an evaluation. To this end, the GIBS compiled an **evaluation report** in June 2016.[35] The main question will be, whether the programme should be extended to other public sectors as well. In this context, the GIBS has underlined the constitutional aspect of equal treatment[36] and recommended various options of extending the programme to other sectors.[37] Furthermore, the GIBS strongly recommended maintaining the testing programme as a tool focused primarily on administrative and civil consequences. Thus, it should not be integrated into the criminal procedure code as a criminal investigative tool.[38]

1.3.3. Georgia

In a recent study, the World Bank has examined key factors in Georgia's success in fighting corruption. **Random** integrity tests were part of the success of eradicating petty corruption in the traffic police within a very short time frame:

> *"Undercover officers were assigned to make sure the police followed the rules. An ordinary officer might be partnered with a covert officer and never know it – unless he or she broke a rule. Spot checks were carried out to make sure police were following protocol. An undercover agent filed a complaint of domestic violence at a police station to see if complaints were followed up on. A driver cruised around at night with a headlight out. When stopped, he would say he was on his way to fix the light and offer GEL 20. Police officers caught taking bribes were fired. Such practices sent a strong message to new recruits that the ministry was serious about its code of conduct and the ethical practices of its police."*[39]

Georgia achieved this impact without passing any special law for these integrity tests, but based them on general law provisions and principles for criminal investigations. Thus, the consequence of a failed test would include criminal sanctions. One can doubt, whether the integrity testing program would pass scrutiny if the ECtHR had to decide on a case as the one above today. The lack of a detailed statutory basis, of oversight mechanisms, and the provocation issues would probably raise concerns regarding human rights.

One application reached the **ECtHR**, but the Court had not to decide on it. The case concerned a medical expert at a social security agency, who took a bribe. During the trial, the medical expert alleged that the bribe giver as well as witnesses were acting as agents provocateurs on behalf of the criminal police. In 2006, the Supreme Court of Georgia upheld her criminal conviction. None of the courts had addressed the issue of provocation in their decisions. Subsequently, the medical expert lodged a complaint with the ECtHR. The Government unilaterally declared a violation of Article 6 paragraph 1 European Convention on Human Rights – ECHR (fair trial). As a consequence, the Court decided to strike the application out of its list of cases. The Court emphasised "that the Government's current acknowledgment of the violation [would] [...] in no way prejudicially affect the Court's examination of the admissibility and merits of the present case, should it proceed to such an examination."[40] The case therefore provides no guidance on substance, but only shows that Georgia saw a violation. It remains unclear though what had happened in that case and what the violation concretely was.

[35] GIBS (2016), ibid. p.3.

[36] GIBS (2016), ibid, p.3.

[37] GIBS (2016), ibid, p.59.

[38] GIBS (2016), ibid, p.61

[39] The World Bank (2012), *Fighting Corruption in Public Services Chronicling Georgia's Reforms*, 104 pages, available at https://openknowledge.worldbank.org, accessed 24 April 2016.

[40] ECtHR, Taktakishvili v. Georgia, Application no. 46055/06, *Decision of 16 October 2012*, available at http://hudoc.echr.coe.int, accessed 24 April 2016.

1.3.4. Hungary

Hungary introduced integrity testing in 2012.[41] The National Protective Service[42] is in charge of conducting the tests.[43] The tests cover the entire public service and "professional personnel of armed forces". Tests consist of realistic situations "which could normally occur during the performance of the job." Prosecutors approve the planned methods and supervise the integrity tests. An integrity test may be ordered for up to three times a year regarding a certain public servant. Regardless of the result of the test, the NPS has to inform the tested person about the tests completion within three working days. Tests may result in prosecutions.[44]

1.3.5. Kenya

The Ethics and Anti-Corruption Commission (EACC) **introduced** integrity testing in 2006, together with the Kenya Revenue Authority.[45] The Kenyan statutory law does not foresee any specific provision on integrity tests. Thus, the programme is based on the general prevention and detection provisions.

The three main **objectives** of the programme are: "To identify particular officers who engage in corrupt practices or unacceptable behaviour and determine appropriate courses of action; To increase the actual and perceived risk to corrupt officials that they may be detected, thereby deterring corrupt behaviour and encouraging officials to report instances when they are offered bribes; and to identify officials who are honest and trustworthy, and therefore likely to be suitable for assignment to sensitive areas."[46]

In the reporting year 2014/2015, the EACC conducted 263 integrity tests. 169 public servants **failed** the test (64%). The biggest share of tests (and failures) concerned the police services: out of 141 tested officers, 120 failed the test (85%).[47] The EACC notified the relevant public institutions of any failed test so they could take administrative action.[48]

Public institutions conduct their own, **decentralised** tests. This includes the Revenue Authority, universities, or the customs authorities.[49]

1.3.6. Republic of Moldova

Legal framework

In 2012, the Moldovan Ministry of Justice drafted a "Law on Professional Integrity Testing" reportedly with the help of international donors, namely the German Corporation for International Cooperation (GIZ). The Council of Europe Secretariat provided an Opinion on the draft law in January 2013.[50] In December 2013, the Moldovan Parliament modified the draft and adopted the Law No. 325 "On Professional Integrity Testing" ["privind testarea integrităţii profesionale"].[51] The

[41] EU (2014), Anti-Corruption Report, COM(2014) 38 final, *Annex on Hungary*, p.4. http://ec.europa.eu.

[42] NPS, *website introduction*, available at http://nvsz.hu, accessed 24 April 2016.

[43] NPS, *website integrity tests*, available at http://nvsz.hu, accessed 24 April 2016.

[44] Idem.

[45] EACC, *Annual Report 2006/2007*, p.11, available at www.eacc.go.ke, accessed 24 April 2016.

[46] Idem.

[47] EACC, *Annual Report 2014/2015*, p.39, available at www.eacc.go.ke, accessed 24 April 2016.

[48] Idem.

[49] EACC (2010), Speech by a Member of the Commission on "*Rolling Out Integrity Testing in the Public Service*", available at www.eacc.go.ke; University of Nairobi (2012), Presentation on "*Sensitization of the UoN Procurement Department Staff on Anti-corruption Strategies and the Implementation of the Integrity Testing Programme*", available at www.uonbi.ac.ke; World Customs Organisation (2011), *Integrity Newsletter No. 3*, *Snapshot of Members' best practices*, p.3, available at www.wcoomd.org, accessed 24 April 2016.

[50] Council of Europe Secretariat (2013), *Opinion on Draft Law "On Professional Integrity Testing" of the Republic of Moldova*, available at www.coe.md, accessed 24 April 2016.

[51] *Law No. 325* of 23 December 2013 (Romanian and Russian), available at http://lex.justice.md, accessed 24 April 2016.

Law was published on 14 February 2014 and, pursuant to its Article 21, entered into force on that date only for employees of the National Anti-Corruption Centre (NAC) that were to be tested by the Information and Security Service. For other public agents (i.e. 99.9% of the total), the Law No. 325 entered into force on 14 August 2014, with the NAC being the testing body.

Implementation

In February 2014, the NAC set up a specialized subdivision, the **Integrity Testing Directorate** (ITD) as part of the General Directorate for Preventing Corruption. On 19 March 2014, the NAC assigned overall responsibility for the testing programme to one of its two deputy directors. Furthermore, the ITD hired new staff to work as testers.[52]

The new testers were subject to **special checks**, including undergoing mandatory lie-detector tests. Furthermore, the testers attended trainings by integrity testing experts from Hungary, Romania, and the United Kingdom.

Based on an internal directive implementing Law 325/2013, the ITD carries out **three types** of integrity tests: quality control tests that are sector oriented, targeted tests that focus on individuals, and tests upon request by heads of public entities.

The following experiences by the National Anti-Corruption Center of Moldova illustrate the necessity for strict **confidentiality** when implementing integrity tests:

- Public officials at all levels would try to find out through their personal contacts at the National Anti-Corruption Center which unit was in charge of the tests and who was working for it.
- Public officials would try to explore the possibility of arranging to get informed about the test in advance so that they could make sure to pass it.
- The media, social networks, and public TV debates would speculate which public organisation would be the next to be tested, how the tests were performed, how many testers there actually were in the country, and what the results of the tests were. Pictures of faces of alleged testers were posted in social networks or in office rooms.

Although this effect was helpful in raising awareness of the tests and in preventing public officials from requesting bribes, it proved to be a risk for the functioning of the testing unit. To this end, the National Anti-Corruption Agency kept the testing unit confidential even within the Agency. The solution adopted was that only the Agency's Deputy Director in charge for the integrity tests had all information on the unit and was the only internal and external communication focal point.

Impact

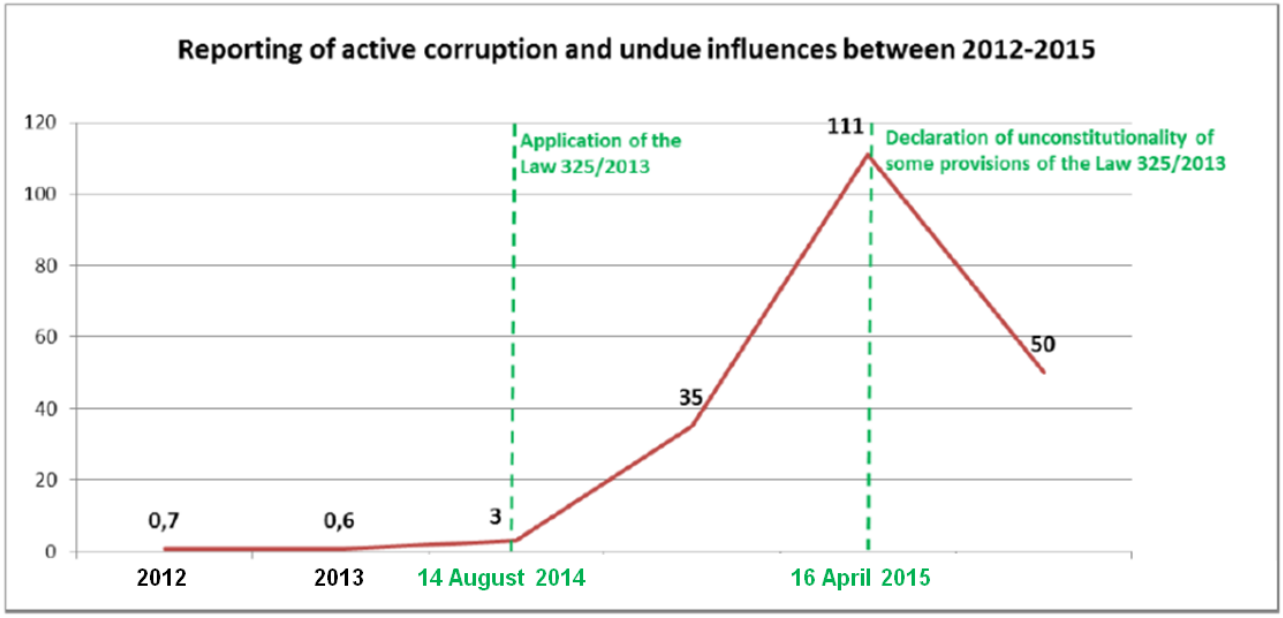
The impact of the Law No. 325 unfolded in two phases: the period before 14 August 2015, when integrity tests did not yet apply to all public officials in Moldova, and the period after 14 August 2015, when the National Anti-Corruption Center started applying the tests. The Law had, inter alia, the following impact already **before the tests** were being applied:

- Public institutions and public officials from all sectors flooded the National Anti-Corruption Center with requests for training on what benefits public officials may legally accept.
- Public officials similarly requested trainings on how to properly report offers of undue benefits.
- Heads of public institutions requested instructions on how they could properly guide their employees on reporting corruption and on undue benefits.

[52] National Anti-Corruption Center (February 2015), *Report on the implementation of Law no.325/23.12.2013 as of 14 February 2015 and on activities to test professional integrity carried out from 14 August 2014 to 30 January 2015*, section 2.1, available at http://cna.md, accessed 24 April 2016.

Before the Law No. 325 came into effect, the interest of public officials in this topic had been minimal at best. However this seemed to have changed once officials were faced with the possibility of being subjected to the test.

After the tests started being applied on 14 August 2015, the law had the following striking impact:[53]



The effect was such that, for example, for the first time in the history of the Republic of Moldova, judges started reporting bribes. However, the number of reports started decreasing soon after the judges found out that the Law did not apply to them. On average, about 50 percent of the tested public servants failed the integrity tests, with some institutions faring better than others.[54]

Legal challenges

Following a constitutional complaint filed by members of the Communist Party against the Law, the Moldovan Constitutional Court asked the Venice Commission to provide an *amicus curiae* brief regarding the applicability of integrity testing to judges. The Commission issued the opinion in November 2014, criticising several substantial points.[55] In April 2015, the Constitutional Court rendered parts of the Law unconstitutional.[56] The Monitoring Committee of the Parliamentary Assembly of the Council of Europe noted in May 2015:

> *"While the Venice Commission challenged some provisions of a law to be applied to judges, the Constitutional Court invalidated the law as it would be applied to any public civil servant. [...] Transparency International Moldova incriminated a bad translation of the amicus curiae brief and a 'manipulation' by the Constitutional Court to dismiss the law."*[57]

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[53] National Anticorruption Centre (2016), *Progress Report* 2014-2015, p.20, available at www.cna.md, accessed 27 June 2016.

[54] Latvian Interests in the European Union (2015), *Eastern Partnership: on the Way to the Riga Summit*, Special edition, p.51, available at www.esmaja.lv, accessed 24 April 2016. A comprehensive overview on integrity testing in Moldova can be found in the National Anti-Corruption Center (February 2015), *Report on the implementation of Law no.325/23.12.2013 as of 14 February 2015 and on activities to test professional integrity carried out from 14 August 2014 to 30 January 2015*, available at http://cna.md, accessed 24 April 2016. Since the Constitutional Court decision of April 2015, the Republic of Moldova has been preparing a revised version of the law in order to continue with integrity testing.

[55] Venice Commission (2014), *Amicus Curiae Brief for the Constitutional Court of Moldova on certain provisions of the law on professional integrity testing*, CDL-AD(2014)039-e, available at www.venice.coe.int, accessed 24 April 2016.

[56] Application no. 43a/2014, *Judgment No. 7 of 16 April 2015*, available at www.constcourt.md, accessed 24 April 2016.

[57] Parliamentary Assembly of the Council of Europe, Committee on the Honouring of Obligations and Commitments by Member States of the Council of Europe "Monitoring Committee" (May 2015), *Honouring of obligations and commitments*

In 2015, Moldova drafted a revised version of the law. An expert opinion by the Council of Europe Eastern Partnership Programmatic Co-operation Framework Project found the draft in line with international standards.[58] The government has not yet adopted this draft for submission to parliament.

This aside, until 4 July 2016, 32 officials subjected to tests have filed complaints with Moldovan courts, claiming they have been **unfairly dismissed** as the result of an integrity test. In the 27 cases decided so far, courts upheld the dismissals in 17 cases. The other 10 cases were won by the public officials (at least in first instance) for a variety of reasons, for example, because their employers had not conducted a proper disciplinary proceeding before the dismissal, or because the recent Constitutional Court decision affected the procedure.[59]

1.3.7. Romania

Legal framework

In 2011, Romania passed **Law No. 38/2011**,[60] which for the first time put integrity testing on a statutory basis. Ministerial Order No. 256/2011 complements the Law.[61] During the years before, only a classified order by the Minister of Internal Affairs (MoIA) regulated the testing programme.[62]

Before being adopted, the draft law met "significant resistance": "proactive operations being conducted by investigators, particularly those involving a technique that could be interpreted as agent provocateur, caused great angst and took much **explaining** and convincing [...]. The British police services' [...] experience of integrity testing provided an example for both the EC and the Romanian legislators to support the necessary legal changes."[63]

The Law focuses the testing programme on the staff of the **MoIA**. This covers a wide range of subordinated structures, such as various police forces, the General Directorate of Passports, the Directorate for Driving and Vehicle Registration, or the General Inspectorate for Immigration.[64] Testers have to check "in every single case, if a professional integrity testing is absolutely necessary to the intended purpose, combating corruption and safeguarding the integrity of the MoAI staff."[65] The Law establishes integrity testing as an independent administrative procedure regulated outside the Criminal Procedure Code. The test results can be used as evidence in disciplinary and criminal proceedings. The Law does not permit testers to commit criminal offences insofar they would constitute provocation: "inciting or instigating the tested person to perpetrate crimes or discipline infringements is strictly forbidden".[66] However, if the tested public servant "shows availability to be rewarded [...], the testing official will let the test subject communicate the nature and the quantum of the wished reward and he will hand out the requested amount of money or goods."[67]

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by the Republic of Moldova Information note by the co-rapporteurs on their fact-finding visit to Chisinau and Comrat, AS/Mon(2015)20 rev, at No. 37/footnote 27, available at http://assembly.coe.int, accessed 24 April 2016.

[58] Council of Europe Programmatic Cooperation Framework (2015), *Expert Opinion on: Moldovan Draft Law "On Institutional Integrity Assessment"*, available at www.coe.int, accessed 24 April 2016.

[59] Data provided by the National Anti-Corruption Center per email.

[60] *Law 38/2011* on modifying the Emergency Government Ordinance No. 30/2007 on the organization and functioning of the Ministry of internal Affairs (in Romanian), introducing a new Article 17-1, available at www.luju.ro, accessed 24 April 2016.

[61] MoIA *Order No. 256/2011* of 16 November 2011 on the procedure for testing the professional integrity of the Ministry of Internal Affairs staff, available at www.mai-dga.ro, accessed 24 April 2016.

[62] MoIA *webpage* on "main activities carried out by the Anti-corruption General Directorate", available at www.mai-dga.ro, accessed 24 April 2016.

[63] Foster S., *Counter corruption: an international perspective*, in: MacVean A., Spindler P., Solf C. (2012), *Handbook of Policing, Ethics, and Professional Standards*, chapter 15, p.149 (emphasis by author).

[64] MoIA *webpage* on subordinated structures, available at www.mai.gov.ro, accessed 24 April 2016.

[65] MoIA (2014), summary on "*Professional Integrity Testing in Romania*", available at www.stt.lt, accessed 24 April 2016.

[66] MoIA (2014), ibid.

[67] Idem.

Implementation

Within the MoIA, the Anti-corruption General Directorate (DGA) is in charge for the integrity tests. It maintains a **special unit** that conducts professional integrity tests.[68] Integrity testing is embedded into broader efforts by the DGA of preventing corruption, such as risk assessment, advice, and training.[69]

The special unit draws up an integrity **testing plan** for a round or period of tests. The Head of the DGA signs off on each plan. The plan includes the subjects to testing, the testers, and the testing scenarios. Testers are staff of the DGA working **undercover**. For documentation purposes, the testers can secretly **record** the tests. Following the test, the testers have to prepare a detailed **report** on the implemented test and its results.[70]

Before implementation of the tests, all testers undergo comprehensive **training**. The DGA prepares the undercover **identity** of testers ("identity cards, driving licences, registration plates, passports, residence permits under cover, authorisations from different companies, birth certificates, etc.").[71] These measures are part of classified internal orders and procedures.

As stated earlier, the tested public servant might request the undercover tester to provide an illegal **favour**. In this case, the tester can provide the requested favour, such as money or goods ("cash amounts, alcoholic drinks, cigarettes, coffee, etc.").[72] The result of this test can be the basis for prosecutors conducting a sting operation (under criminal law) with the objective of "catching" the public servant red-handed. If the result of the test is "positive" (no integrity violation), the DGA will inform the head of the public institution about the test results; however, information of the tested subjects is not mandatory. The test result can be the basis for measures under administrative and/or **disciplinary** law. It can also be the basis for prosecutors conducting a **sting operation** in the criminal sphere with the objective of "catching" the public servant red handed.[73]

Impact

The following chart is based on data provided by the DGA:[74]

Year	Total	Positive	Negative	%
2009-2012	173	139	34	19,65
2013	113	103	10	8,85
2014	137	133	4	2,91
2015	87	75	12	13,79

These statistics from 2009 to 2014 point to an increase in integrity compliance among MoIA staff. The rate of public servants reporting bribe offers increased 8 times in the first year of conducting the tests (2009).[75] The sudden increase of negative results in 2015 can be the result of the fact that

[68] Idem.

[69] Topoloiu V. (2015), Presentation on "*Preventing corruption officer at the Anti-corruption General Directorate of Ministry of Internal Affairs of Romania*", available at http://rai-see.org.

[70] Idem.

[71] For further details see Romanian Ministry of Internal Affairs and others (2013), *Best Practices Manual on Strengthening Regional Cooperation to Prevent and Combat Corruption at the EU External Boundaries*, p.28, available at www.antykorupcja.gov.pl, accessed 24 April 2016.

[72] Idem.

[73] Idem.

[74] MoIA *webpage* on "main activities carried out by the Anti-corruption General Directorate", ibid; data for 2014 and for 2015 provided by DGA by email.

[75] National Anti-Corruption Center (February 2015), *Report on the implementation of Law no.325/23.12.2013 as of 14 February 2015 and on activities to test professional integrity carried out from 14 August 2014 to 30 January 2015*, p.16, note 21, available at http://cna.md, accessed 24 April 2016.

the testing scenarios were diversified and improved for that year, and that new groups of public officials were addressed.

Legal challenges

As far as can be seen, there have been no successful challenges so far before the Constitutional Court or the ECtHR to the validity of the Romanian legal framework on integrity testing. Instead, upper courts have upheld measures applied against public servants failing the test. In one case of 2015, a police office had taken a bribe during an integrity test. The DGA informed the public prosecutor of the fact, who started his own investigation. During the investigation, the public servant was caught with taking yet another bribe. The Alba Iulia Court of Appeal upheld his conviction through a final judgment.[76] Academics explain the absence of legal challenges inter alia with the caution the DGA applies regarding provocation of public servants.[77] In 2009, the Galaţi Court of Appeal upheld the criminal conviction of a police officer, who had been randomly tested and had accepted a bribe. The Court of Cassation rejected his further appeal. Similarly, the ECtHR dismissed his complaint in April 2014 in its *Rotaru*-decision (see for further details below Section 2, Commentaries on Article 1).[78] The decision apparently did not immediately reverberate in Romania. In October 2014, the Brasov Appeal Court upheld a decision convicting a police officer who accepted a bribe following an exchange with the tester that exposed the officer's predisposition to corruption. The Appeal Court did not find any provocation in the case; however, it referred only to older jurisprudence of the ECtHR without also quoting the *Rotaru*-decision.[79]

1.3.8. United States

Random integrity testing is widely and routinely employed in many U.S. jurisdictions.[80] Several major police departments, including the Los Angeles Police Department (LAPD); the New York City Police Department (NYPD); and the New Orleans Police Department (NOPD) routinely conduct random integrity tests of their officers to determine if their conduct in handling their official duties is appropriate.[81] The practice of the NYPD is the internationally best documented one. Since 1994, the New York City Police Department has conducted targeted and random integrity tests within the following framework: [82]

- Realistic scenarios such as the offering of cash from an arrested "drug dealer", who is staged by an undercover officer of the integrity unit.
- Integrity tests are recorded using audio and video electronic surveillance as well as the placement of witnesses at the scene.
- Targeted tests: These aim at specific officers who are suspected of corruption, based upon previous allegations by citizens, criminals or colleagues.
- Random tests: Aimed at a random selection of officers.
- All officers are aware that such a programme exists, but are not told about the frequency or occurrence of such tests.

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[76] Alba Iulia Court of Appeal, decision no. 541 of 26 May 2015, summarised in: MoIA, *Report on main activities carried out by the Anti-corruption General Directorate during the second quarter of 2015*, p.9, available at www.mai-dga.ro, accessed 24 April 2016.

[77] Diaconu N. (2012), *Testul De Integritate – Între Necesitate Şi Legalitate* [Integrity Tests – Between Necessity and Legality], Revista De Investigare A Criminalităţii 2/2012, p.10 and 14, available at cij.ro, accessed 24 April 2016.

[78] ECtHR, Rotaru v. Roumanie [available only in French], Application no. 27797/10, *Decision of 15 April 2014*, available at http://hudoc.echr.coe.int, accessed 24 April 2016.

[79] Brasov Appeal Court, *Decision 6/2014* of 24 January 2014, available at www.avocatura.com, accessed 24 April 2016.

[80] Ferguson G., Q.C., Report *On the Review and Recommendations Concerning Various Aspects of Police Misconduct*, Volume I, p.27, available at www.torontopolice.on.ca, accessed 24 April 2016.

[81] Rothlein S. (April 2010), Legal & Liability Risk Management Institute, *Conducting Integrity Tests on Law Enforcement Officers, Issues and Recommendations*, available at www.patc.com, accessed 24 April 2016.

[82] OSCE (2004), *Best practices in combating corruption*, (English and Russian), Chapter 12, p.142-144 ("Integrity testing"); Chapter 6 ("Building an ethical administration"), available at www.osce.org, accessed 24 April 2016.

- No police officer can now know whether or not a bribe being offered to him/her is part of an integrity test.

The integrity tests have had the following impact so far:[83]

- Officers believe that it is better to be safe and to report the incident, instead of overlooking it or accepting the bribe offer.
- About 20 percent of the officers who were tested based on previous suspicions failed the test, and were removed from the force.
- Only 1 percent of the officers who are subjected to random tests fail.

The integrity tests were run under the monitoring of the Commission to Combat Police Corruption (CCPC). The CCPC was created based upon the 1994 recommendations of the "Commission to Investigate Allegations of Police Corruption and the Anti-Corruption Procedures of the Police Department" (the "Mollen Commission"). The study of the "Mollen Commission" found that the New York City Police Department has undergone alternating cycles of corruption and reform. The CCPC evaluated the programme of random integrity testing in December 1996 and came to the following conclusion:

> *"The Commission conducted an earlier study and issued this report with respect to random integrity tests. In that report, the Commission reviewed the random integrity testing program and found it to be a positive attempt to enhance integrity within the Department. While the Commission found it difficult to determine the deterrent effects of the program, it believes that simply having such a policy creates a sense of IAB omnipotence that is likely to have some deterrent effect. The Commission recommended that the Department continue to conduct significant numbers of integrity tests but that it should focus on the targeted tests rather than random tests. Further, the Commission advised the Department to aim for more realistic scenarios in its targeted testing, increase the complexity in its random tests and utilize such tests whenever there is some level of suspicion of improper conduct."*[84]

Random integrity tests are run even today.[85] Whereas information on targeted and random tests is not fully public, the Commission has published an instructive summary.[86]

There is no scientific evidence yet, whether integrity testing will lead to a change in ethical attitudes. It seems, however, that it could have an impact on ethical behaviour:

> *"In the 1970's, ABC News conducted an integrity test in Miami, where 31 wallets containing money and identification were turned over by role players to 31 police officers. Nine of the officers kept the money and were subsequently fired and/or prosecuted. Thirty years later, ABC News replicated the integrity test in Los Angeles and in New York. Twenty wallets containing money and identification were turned in to officers of the LAPD and another twenty were turned in to officers of the NYPD. All forty wallets were recovered by the officers without a single penny missing. It is unclear if the officers have become more ethical over the past three decades, or if they suspected the wallets was simply bait being offered in some type of sting operation."*[87]

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[83] Ibid.

[84] New York City Commission to Combat Police Corruption (December 1996), *The New York City Police Department Random Integrity Testing Program*, available at www.nyc.gov, accessed 24 April 2016; see also: Idem (March 2000), *The Performance Study: the Internal Affairs Bureau's Integrity Testing Program*, available at www.nyc.gov, accessed 24 April 2016.

[85] U.S. Department of State (13 April 2011), *Fighting Police Corruption: An Interview with Charles Campisi*, available at http://iipdigital.usembassy.gov, accessed 24 April 2016.

[86] New York City Commission to Combat Police Corruption (March 2000), *The Performance Study: the Internal Affairs Bureau's Integrity Testing Program*, available at www.nyc.gov, accessed 24 April 2016.

[87] Rothlein S. (April 2010), *Conducting Integrity Tests on Law Enforcement Officers, Issues and Recommendations*, available at www.patc.com, accessed 24 April 2016.

1.3.9. United Kingdom

Within the United Kingdom, there are 43 policing areas all operating independently of each other. Even though they adhere to the same legislation, they may operate each with their unique means of operation. The **Metropolitan Police Service** (MPS) is the only police force in the United Kingdom with a designated Integrity Testing Unit (being embedded within the Department of Professional Standards).

Legal framework

The United Kingdom does not have a dedicated statutory framework for integrity tests. The MPS used to base the tests on general police law. In 1998, the Human Rights Act came into force, which incorporated the European Convention of Human Rights into UK law. As a consequence, the legislator adopted the **Regulation of Investigatory Powers Act** (RIPA)[88] in the year 2000. The 83 sections of the RIPA set comprehensive thresholds for applying covert tactics in criminal investigations and similar measures. Integrity tests are implemented in a way to comply with these requirements. Integrity tests, which invariably involve the use of covert recording devices, are authorised by a senior police officer. However, beyond this, there is an independently appointed body, the Office of Surveillance Commissioners, who must be informed of such activity and will review the respective authority. The Office can make comment on all cases, and in some instances, their prior approval is required before the activity is to be carried out.

Implementation

In the mid 1990s, the MPS identified a serious corruption problem and realised that it had to take drastic steps to address it.[89] A covert unit was established which scoped the scale of the issues.[90] In February 1999, an **Integrity Testing Unit** (ITU) started undertaking integrity testing based on thematic inspections of the MPS dealing with specific crime types.[91] Tests took the form of interacting with employees to assess the corporate and individual responses. The testing programme was subsequently re-named Quality Assurance Checks and the responsibility for these eventually moved to the MPS Inspectorate.

At this time the **Quality Assurance Check** definition adhered to was as follows: “A check (or series of checks) to test staff compliance with organisational policies and procedures.” A Quality Assurance Check should only be used to gather information when the following five principles apply:

- It is a proportionate means of obtaining information.
- Individuals will not be targeted.
- Checks will address an area of corporate concern.
- Checks will not be conducted with a view to criminal or disciplinary proceedings.
- The grounds for completing a QAC and the relevant authority are documented.

Quality Assurance Check operatives were given the following instructions prior to deployment: “The check you are being asked to carry out has been designed to recreate a realistic scenario such as a Police employee would expect to face during their normal everyday duties. There is nothing unfamiliar in its content and in the requirement being made of those being tested. This check will allow the participant(s) to act with total integrity and to conform with the requirements of the law and Police internal requirements.”

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[88] *RIPA*, available at www.legislation.gov.uk, accessed 24 April 2016.

[89] This text is taken from or based on UNODC (2004) *Anti-Corruption Tool Kit*, Version 3, p.396, available at www.pogar.org, accessed 24 April 2016.

[90] Council of Europe (2004), Anti-corruption services – Good practice in Europe, p.69.

[91] This and the following text are largely based on input provided by Council of Europe expert Phil Collins.

It was identified at an early stage that one requirement for the successful use of integrity testing as a tool was **confidentiality**. If the testing tactic is not widely reported on, it can support the perception within the public body that any interaction or real life work occurrence is a test and this can have a significant preventative impact. As the ITU was formed it was clear that extensive covert tools were necessary to assist with such deployments and that staff needed to be trained and to become familiar gain with the use of covert tactics. However, during the use of Quality Assurance Checks there was no use of **recording equipment** as the main purpose was to assess the appropriateness and quality of responses in specific areas. For example these would test police response to the introduction of new legislation or internal policies.

In the early 2000s there was a deliberate move away from Quality Assurance Checks to **Intelligence Led Integrity Tests** (ILITs). The use of ILITs was borne from the need to comply with the Regulation of Investigatory Powers Act (RIPA) in the UK in 2000. However, the tests cover a wide range of offences that fall inter alia under "misconduct in public office".[92]

After its introduction, the RIPA 2000 legislation was the basis upon which all covert policing activity was based. It covered activities such as undercover officers, covert human intelligence source, and the installation and maintenance of **covert recording devices**. Approximately 95% of ILITs currently deployed in the MPS are completed with the use of authorised undercover officers and body/non-body worn covert recording devices and as a consequence need to be intelligence led.

Ever since the ITU has strictly confined itself to conducting intelligence led integrity tests only. The intelligence led approach has resulted in a significant up lift in the quality of tests. It has also led to more acceptance within the MPS as the **intelligence** available before a test justifies that the test is only appropriate.
The current directions are given when conducting an ILIT:

1. Consideration has been given to a particular problem, which has arisen, and it has been decided that the use of an intelligence led integrity test is an **appropriate police response**. This intelligence led integrity test is being carried out to create a realistic condition or situation which is designed to generate a reaction by a member of the police service in order that the conduct, behaviour and professional standards can be assessed.

2. An intelligence led integrity test comprises of a test deployed in response to **specific information** that the person(s) who are the subject of the test is/are suspected of being engaged in a course of conduct which leads to serious corporate concern.

3. The test you are being asked to carry out has been designed to recreate a **realistic scenario** such as a police employee would expect to face during their **normal every day** duties. There is nothing unfamiliar in its content and the requirements being made of those tested (in particular no provocation). This test will allow the participant(s) to act with total integrity and to conform with the law and internal police requirements. Conversely, as it is suspected the person(s) being the subject of the test is/are engaged in malpractice, it will also allow them to engage in malpractice in response to the situation being presented.

There is no requirement in the United Kingdom to **inform** tested subjects or their managers that a test has been conducted. The use of an ILIT will remain covert, unless prosecution/disciplinary hearings ensue. Consequently, this allows for the reuse of the testing tactic when necessary as there are only a finite number of scenarios that can be deployed.

[92] This common law offence is committed when: "a public officer acting as such wilfully neglects to perform his duty and/or wilfully misconducts himself to such a degree as to amount to an abuse of the public's trust in the office holder without reasonable excuse or justification", *website* of the Crown Prosecution Office, available at www.cps.gov.uk, accessed 24 April 2016

Since integrity tests in the United Kingdom are intelligence led and primarily aimed at criminality, it will leave no area of **public life** or employment sector untouched. While ILITs are mainly aimed at countering corruption within the police service, the Integrity Testing Unit will take on the investigation if intelligence gives rise to suspicion of corrupt activity in other areas. However, to date no work in the area of the judiciary or legislature has been undertaken. The ITU itself is not subject to integrity tests by a specific body. If need should arise, another police unit would be asked to conduct the test on the ITU.

Impact

The MPS has made use of internal and external media, whenever an ILIT lead to successful criminal prosecutions. As a result, police officers have become widely **aware** of the risk being subject to such tests. In practice, police officers often believe that they have been the subject of tests, when in reality they have merely been approached by ordinary members of the public. The positive outcome of this fear and omni-presence of testing is that it has raised the standard of **service delivery** when the general public and the police interact. Over time, a significant knock on effect has been the increase of **public confidence** in the police and public sector.

Legal challenges

From the introduction of intelligence tests in 2001 until to date, the legality of the measure as such has not be subject of a court decision as far as can be seen. However, the manner of implementing tests in individual cases may have been subject of arguments during subsequent disciplinary or criminal trials.

2. REGULATORY GUIDELINES AND COMMENTARIES

User Instructions

Several countries, such as the United Kingdom or the United States, have applied integrity testing for many years without any explicit **statutory** basis. The differences in the Common Law tradition may explain this. However, this has left countries that wish to introduce this tool by legislation without any example to draw from. As far as can be seen, Romania has been the first country in Europe to draft a law on integrity testing in 2011, which inspired Moldova to draft its law in 2013. Ukraine followed suit in 2015 with a draft that drew largely from the Moldovan law. The Moldovan and Ukrainian (draft) laws received international criticism on some provisions (see above section 1.3).

The scarcity of legislative examples pairs with a scarcity of **jurisprudence**. In Common Law countries, where integrity testing has been applied for many years, the legality of integrity testing has apparently never been challenged in an upper court. Only in Romania, several upper court decisions have upheld the legality of random integrity testing. The European Court of Human Rights so far has ruled only on suspicion lead tests against individuals in a criminal procedure context.[93] There is only one judgement concerning random integrity tests in Romania; in this case, the Court found no violation of the ECHR. The Council of Europe's Venice Commission reviewed both the Moldovan law and the Ukrainian draft law, and identified weak points.[94] However, knowing about weak points in legislation of other countries still leaves policy makers and legal drafters without positive guidance on how to draft legislation on integrity testing having possible human rights concerns in mind.

This toolkit intends to close this gap. It takes the following approach:

- **Regulatory guidelines** provide a starting point to users of the toolkit for their own draft law. They offer several options whenever appropriate. Obviously, this is not a prescriptive proposition. Rather, it is an attempt to illustrate concretely how one can formulate a law on integrity testing.
- For each provision, **commentaries** clarify the rationale; illustrate the necessity of regulation with case examples; and point out what to pay attention to. This way, legal drafters will hopefully get a clearer picture of their room for manoeuvre when formulating draft provisions.

It is obvious that this legislative toolkit, including its regulatory guidelines, cannot replace a process of careful legal drafting: each national draft law will need **tailoring** to the needs, terminology, and legal framework of the given country. However, it is hoped that with this legislative toolkit **drafting** of laws on integrity testing will become much easier.

[93] Venice Commission (2015), *Interim Opinion On the Draft Law On Integrity Checking of Ukraine*, CDL-AD(2015)031, No. 25, available at www.venice.coe.int, accessed 24 April 2016.

[94] Venice Commission (2015), ibid; Venice Commission (2014), *Amicus Curiae Brief for the Constitutional Court of Moldova on certain provisions of the law on professional integrity testing*, CDL-AD(2014)039-e, No. 79-80, available at www.venice.coe.int, accessed 24 April 2016.

Chapter I: General provisions

Article 1 – Objective

(1) *[Purpose]* **Integrity tests are performed in order to:**

(a) Identify corruption risks within public entities;

(b) Set an incentive for reporting violations of integrity rules;

(c) Increase the risk for detecting violations of integrity rules;

(d) Ensure discipline in the public sector regarding integrity rules.

(2) *[Exclusion]* **The results and materials of the professional integrity test are not admissible as evidence in a criminal proceeding against any of the tested subjects.**

Commentary

Before drafting a law on integrity testing, one has to make a basic strategic choice on which direction the testing program should take. There are essentially three options:

Option 1	Testing only **individuals** on whom a **concrete suspicion** exists that they are engaged in the violation of an offence ("sting operations").
Option 2	Testing **groups** of people in areas of heightened corruption risk without any concrete individual suspicion, while the results can be used in **criminal** trials.
Option 3	Testing **groups** of people in areas of heightened corruption risk without any individual concrete suspicion, while the results can be used (only) in **disciplinary** trials.

In principle, all three options are possible under the jurisprudence of the ECtHR.

Option 1
Law enforcement authorities all across the world apply sting operations in **criminal** investigations. The tool applies to more or less any crime and suspect. Its main requirement is that already existing information gives rise to the suspicion that an individual is engaged in criminal conduct. For a sting operation to work, undercover officers will pose as potential victims or accessories to the crime. They will pretend to be willing to deliver drugs to suspected drug dealers, to pay human traffickers, or to purchase weapons or stolen art. Sting operations are normally already regulated under **criminal** procedure and similar law enforcement laws. Therefore, should one want to limit tests to sting operations, one usually would not have to draft a separate law, but could simply rely on existing provisions and jurisprudence in the area of criminal investigations (provided they comply with the ECtHR's jurisprudence[95] on sting operations). The United Kingdom has taken by and large this approach with its "Intelligence Led Integrity Tests" (see above chapter 1.3.8.). The tests are based on legislation for criminal investigations and intelligence surveillance.

Should a country see a need to regulate sting operations in a separate law based on this legislative toolkit, Article 1 could be rephrased as follows:

- Adding a letter (e) to paragraph 1: "Collecting evidence where information gives rise to the suspicion that the person who is subject of the test engages in a criminal offence or another violation of an integrity rule".
- Eliminating paragraph 2 or changing "not admissible" into "admissible".

There would be one more major difference in one of the articles of this toolkit. The grounds for initiating an integrity test in Article 7 paragraph 1 should be replaced by: "A test can be initiated

[95] See for example: ECtHR (2014), *Guide on Article 6 Right to a Fair Trial (criminal limb)*, No. 150, available at www.echr.coe.int, accessed 24 April 2016.

where information gives rise to the suspicion that the person who is subject of the test engages in the violation of a criminal offence or another integrity rule (Article 4)."

The main disadvantage of this option is that it may not achieve much impact in countries with **prevalent corruption**. In such countries, corrupt public officials can **trust** the fact that usually their colleagues or citizens will not dare to report them, or these will even profit from the corruption as well. Random integrity tests will systematically shake this confidence of corrupt public officials; they cannot be sure anymore whether the person in front of them is a normal citizen, or an undercover tester. Sting operations (based on individual suspicions) are possible already in all countries, including with high corruption rates. Thus, apparently, they do not sufficiently deter corrupt public officials.

Option 2

Criminal convictions based on **random** integrity tests are in principle in line with the jurisprudence of the **ECtHR**. In April 2014, the ECtHR had to decide on a complaint by a Romanian police officer, who challenged a criminal conviction based on an integrity test randomly targeting him in 2008.[96] The undercover testers were driving on a national highway while intentionally violating the speed limit. The police officer happened to notice the traffic violation and stopped the testers. The police officer indicated that he was willing to overlook the infraction and subsequently accepted a bribe of 400 lei offered by the testers (equalling 105 €).[97] He was subsequently convicted for passive bribery, which the Romanian Court of Cassation upheld.

The police officer based his complaint to the ECtHR on a violation of the principle of **fair trial** (Article 6 ECtHR) because of an alleged provocation. The Court however pointed out that – before the bribe offer – he had already indicated his willingness to overlook the testers' infraction, had inquired about their financial situation, and had pointed to the disadvantage they would suffer in case their driver's license would be suspended. Therefore, the testers had not "exceeded the limits of a passive attitude" towards provocation, as required by the Court's jurisprudence.[98]

The police officer did not complain about an unlawful intrusion of his **privacy** by the undercover recording devices. However, the Court took note of the "difficulties inherent in the police's task of searching for and gathering evidence for the purpose of detecting and investigating offences. To perform this task, they are increasingly required to make use of undercover agents, informers and covert practices, particularly in tackling organised crime and corruption."[99] The Court underlined that the use of undercover agents was tolerable where it was "clearly prescribed and accompanied by guaranties adequate and sufficient against abuse, and notably by a procedure clear and foreseeable for authorising, executing and controlling the investigative measures at hands".[100] In this case, the Court was not concerned with any *prima facie* violation of the plaintiff's privacy despite his being secretly recorded and the recording being a basis for his criminal conviction. It therefore dismissed the case. Even though the complaint did not reference Article 8 ECHR, the Court was not "bound by the characterisation given by"[101] the applicant, but could review the case regarding this aspect of the ECHR as well. Equally, the apparent random (i.e. accidental) targeting of the police officer apparently did not give the Court cause for concern, nor did the fact that Romania had no statutory basis for integrity tests at that time. In theory, the Court could still bring up concerns in this direction in a future similar case; however, this would raise the question why it had not done so already in this case.

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[96] ECtHR, Rotaru v. Roumanie [available only in French], Application no. 27797/10, *Decision of 15 April 2014*, available at http://hudoc.echr.coe.int, accessed 24 April 2016.

[97] National Bank of Romania, *Exchange Rate on Forex Market – daily values*, value for 16 October 2008, available at www.bnr.ro, accessed 24 April 2016.

[98] Rotaru v. Roumanie (ibid) at § 25, 30.

[99] Ramanauskas v. Lithuania, Application no. 74420/01, *Judgment of 5 February 2008*, § 49, available at http://hudoc.echr.coe.int, accessed 24 April 2016, as referenced and rephrased by the Court in Rotaru v. Roumanie (ibid) § 24.

[100] Rotaru v. Roumanie (ibid) § 25.

[101] Bati v. Turkey, Applications nos. 33097/96 and 57834/00, *Judgment of 3 June 2004*, § 127, available at http://hudoc.echr.coe.int, accessed 24 April 2016.

The advantage of this option is that it can help in countries with endemic corruption to shake the confidence of **corrupt** public officials, that neither citizens nor colleagues – who often profit from the corruption as well – will report them. In addition, the possibility of criminal sanctions will have a strong deterrent effect.

Option 3
The above mentioned decision by the ECtHR concerns a criminal conviction. The question remains, whether in the area of **disciplinary** sanctions limits on provocations would be less strict (see below at Article 9). This aside, in some countries policy makers may find it easier to justify an integrity testing program if it leads to criminal convictions of public officials ultimately deterring colleagues. In other countries, police makers may find it easier to win acceptance from public officials for an integrity testing program if it does not expose them to the risk of criminal liability. Different constitutional traditions and arguments may also be the course for such a choice.

Option 3 has two major **downsides**. First, it might be hard to sell to citizens or honest colleagues why corrupt public officials who are caught red-handed are spared criminal sanctions. Second, prosecutors might perceive integrity tests as an unwelcome "competition" which can ruin criminal statistics: Each case detected during an integrity test is a case lost for the criminal justice sector.

This legislative toolkit follows the most cautious approach of option 3. Under this option, integrity testing pursues a different objective than criminal sting operations. Its ultimate aim is not to punish criminals, but to create a culture of **integrity** within the public service. For this, it only targets public servants, not ordinary citizens. It is a **preventive**, not a repressive tool.

Paragraph 1 (a) to (c) describes this perspective: Do public institutions comply with integrity rules? Are there "islands" of non-compliance, such as certain services? Do public officials care about a culture of integrity in their public institution, or do they look the other way if colleagues violate rules? Do public officials comply with certain integrity rules whereas they do not with others? Is there a culture of impunity within a public institution where citizens and public officials equally profit from corruption? Discipline of individuals under paragraph 1 (d) serves a similar purpose. Discipline at the workplace shall "encourage employees to behave sensibly at work, where being sensible is defined as adhering to rule and regulations".[102]

Paragraph 2 provides individuals with a concrete legal right. In any criminal trial they can object to evidence that derives from an integrity test under this law. Paragraph 2 only excludes criminal trials against the tested subject. Should the **testers**, though, engage in criminal activity, the recordings can be used as evidence against them.

Article 2 – Institutional scope

(1) *[Institutions]* **All public institutions are subject to integrity testing.**

(2) *[Exceptions]* **The following exceptions apply: [...]**

Commentary

In any given country, certain public sectors, institutions, or even only departments show less integrity than others. For example, most countries struggle with integrity in public procurement, no matter their international ranking in corruption indices. Australia, the United Kingdom and the United States narrowed integrity testing down on the police sector, Romania on the staff of the Ministry of Internal Affairs, whereas Hungary, Kenya and Moldova apply the tool across sectors.

[102] Dessler, G. (2001): Human resource management, (7th ed.), quoted after Singh, B.D. (2009), Industrial Relations, p.161.

For a law on integrity testing, it would seem inappropriate to target ex ante only specific institutions. The level of integrity in particular parts of public service may change over time. Moreover, integrity testing is a tool for assessing these levels – excluding certain sectors cuts this option off. Lastly, selecting one institution over another – including its staff – requires a justification. Constitutionally, this touches on the issue of equal treatment. Thus, the Moldovan Constitutional Court did not approve of a privileged treatment of certain institutions:

> *"The Law [on integrity testing] excludes from its scope the President of the Republic of Moldova, the Prime Minister, the Members of Parliament [...]. [T]he Court notes, as a principle, that professional integrity testing may be applied to all professional categories of public agents. No professional category is, by its nature, excluded from professional integrity testing."*[103]

Any selection should thus rather be a matter of implementing the law. A mechanism for selecting the institutions targeted will ensure that the tool applies where relevant (see below Article 7).

One should note in this context that the Venice Commission recommended in two past opinions to exclude the **judiciary** from the scope of integrity testing. However, the opinions concerned laws that not only regulated integrity testing, but also disciplinary proceedings and mandatory sanctions for a failed test. The Venice Commission noted that "laws regulating the assessment or evaluation of the professional duties of judges must be worded and applied with great care and the role of the executive or legislative branches of government in this process should be limited to the extent absolutely necessary". It further stated that "the exclusion of judges from the scope of application of a general law on integrity checking and the introduction of special legal acts focussing specifically on the judiciary [...] fully comply with this requirement."[104] It appears that these opinions might not apply to laws on integrity testing which do not "regulate the assessment or evaluation of the professional duties of judges" or other independent branches of power. The commentaries on "Independent Institutions" under Article 8 contain observations in this regard, as to what limits integrity tests have to keep when applied in the judiciary or in the legislative.

Legal drafters will also have to feel out at the **earliest stage** possible to what extent various branches of power will be willing to take part in integrity testing. A draft law might be stalled or not pass parliament, if it subjects parliamentarians to integrity testing who do not agree to this. Similar applies to the judiciary, which has the ultimate say over the legality of tests or even the constitutionality of the law itself.

Article 3 – Personal scope

(1) *[Persons]* **All public servants (public officials, civil servants, and public employees [as defined by other laws]) are subject to integrity testing.**

(2) *[Exceptions]* **The following exceptions apply: [...]**

Commentary

Article 3 follows the same all-inclusive rationale of Article 2, with the possibility of exceptions. The UNCAC uses the term "public official" in its Article 2 paragraph (a) in order to reach the widest circle of public officials for the Convention's measures (which do not explicitly embrace integrity testing). The term includes those working for a "public enterprise" or "providing a public service" outside a formal public institution. In some countries, the term "public official" refers only to higher-level elected or appointed positions, as opposed to ordinary civil servants. Therefore, Article 3 uses the term "public servants". In any case, drafters will have to adapt the definition to the national

[103] Application no. 43a/2014, *Judgment No. 7 of 16 April 2015*, at no. 13 and 181, available at www.constcourt.md, accessed 24 April 2016.

[104] Venice Commission (2015), ibid, No. 43.

context. Reference to legislation such as the Constitution and public service laws will be useful to this end.

Article 4 – Integrity rules covered

[Integrity rules] **The following integrity rules are subject to testing under this law:**

(a) Conflict of interest [law and provisions to be specified];

(b) Gift rules [law and provisions to be specified];

(c) Notification of corruption acts [law and provisions to be specified];

(d) Bribery [provisions of the Criminal Code to be specified];

(e) Abuse of office [provisions of the Criminal Code to be specified];

(f) Embezzlement [provisions of the Criminal Code to be specified];

(g) Procurement violations [law and provisions to be specified];

(h) Rules on hiring and promotion of public agents [law and provisions to be specified];

(i) [Other laws and provisions to be specified].

Commentary

It is not sufficient, if a law on integrity testing simply refers to "integrity rules" without defining them exactly. Similarly, it would not be enough if Article 4 only contained a blanket reference to other laws such as a law on prevention of corruption, a law on conflict of interest, or a code of conduct. Integrity testing can touch on human rights, in particular on the right to privacy and the right to a fair trial (see below at Articles 9 and 10). It is therefore necessary to define from the outset what is tested and what not. For example, it would seem rather disproportionate to conduct integrity tests regarding the proper "dress code" of public servants.[105] It would also be unclear, if vague concepts as "loyalty" or "efficiency"[106] of the public servant would be tested.

This does not mean that programs for testing such "**soft rules**" are automatically illegal. In the United States, tests are also conducted, for example, in order to check the proper service mentality of the police.[107] The testing unit conducts these tests probably without secret recording devices and the tests might be without relevance for any disciplinary proceeding. In any case, Article 4 focuses on clearly defined, concrete, and substantial integrity obligations.

For **subsection (a)** it is not sufficient to reference a law on conflict of interest. The subsection should link concrete provisions concerning obligations such as: restrictions and incompatibilities, provisions on proper managing a conflict of interest, or obligations of supervisors to intervene in case subordinates mishandle or abuse a conflict of interest situation.[108]

In the context of **subsection (b)**, the failure to declare a gift and the failure to refuse prohibited gifts are most relevant.

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[105] See for example : Prosecutors of Latvia (1998), *Code of Ethics*, at "Mutual Relations and Basic Principles of Behaviour, No. 2", available at www.coe.int, accessed 24 April 2016.

[106] Article 5, Recommendation No. R (2000) 10 of the Committee of Ministers to Member states on codes of conduct for public officials. Appendix, *Model code of conduct* for public officials, available at www.coe.int, accessed 24 April 2016.

[107] New York Times (24 September 1999), *Police Used in Stings to Weed Out Violent Officers*, available at www.nytimes.com, accessed 24 April 2016.

[108] Council of Europe Programmatic Cooperation Framework (2015), *Legislative Toolkit on Conflict of Interest*, Article 25, available at www.coe.int, accessed 24 April 2016.

Subsection (c) is of utmost importance in order to establish a culture of integrity in a public institution. The legislation in many if not most countries with high levels of corruption obliges public officials to notify superiors or the anti-corruption agency of corrupt acts. However, the compliance rate is very low: public officials feel quite safe in "looking the other way" when citizens try to engage them into corruption, or when colleagues act corruptly. As the Group of States against Corruption noted: "Despite the widespread existence of requirements for officials to report corruption, GRECO has rarely found that these have helped change the culture of silence that corruption can breed."[109] Once any citizen could be an undercover tester, "silence" becomes a risky option.

Subsection (c) is also a reminder that integrity testing is "more" than just sting operations. The obligation to notify the employer on corruption offers is a purely **disciplinary** obligation in most if not all countries. Violating this obligation does usually not entail criminal sanctions. Therefore, (criminal) sting operations fail to incentivise public officials to comply with their reporting duty, since – under criminal law – simply refusing to take a bribe is enough to pass the test.

Subsections (d) to (f) refer to offences as defined by the Council of Europe Criminal Law Convention on Corruption and the UNCAC.

Subsection (g) concerns in particular obligations on publishing tenders, observing time limits, involving the prescribed stakeholders in the decisions (supervisors, commissions, etc.), using mandatory electronic procurement systems, and complying with conflict of interest restrictions (insofar not already covered by subsection (a)).

Subsection (h) aims at somewhat similar obligations as subsection (g): publishing vacancy notes, observing time limits, involving the prescribed stakeholders in the decision, and complying with conflict of interest restrictions (insofar not already covered by subsection (a)).

Subsection (i) depends on the text to which national legislation contains concrete obligations, such as to process freedom of information requests; provide transparency in decision-making process; or provide access to asset declarations (if they are stored in paper form).

For an example of what a testing **scenario** could look like for each of above integrity rules, see below at Article 8.

It is important that legal drafters review whether above integrity rules are sufficiently **precise**. Regulations might contain loopholes that reduce the effectiveness of tests. For example, the obligation to notify superiors on bribe offers might lack rules on documentation that such a notification took place. This will make it easier for the public servant and his/her possibly colluding superior to pretend the notification took place, should they be later on confronted with a negative test result.

Chapter II: Testing procedure

Article 5 – Testing body

(1) *[Main body]* **The [to be defined body] is responsible for integrity testing of the institutions as defined in Article 2.**

(2) *[Supervising body]* **The [to be defined body, different than the one in Paragraph 1] is responsible for integrity testing of the institution under Paragraph 1.**

[109] GRECO (2012), *Lessons learnt from the three evaluation rounds (2000-2010)*, p.31, available at www.coe.int, accessed 24 April 2016.

Commentary

Paragraph 1: Different countries select different state entities as testing bodies. In Australia, Romania, the United Kingdom, and the United States, an internal integrity unit of the police forces or of the ministry carries out the tests. In Kenya and Moldova, the anti-corruption agencies are in charge (Ethics and Anti-Corruption Commission; National Anti-Corruption Centre). The selection reflects the institutional scope of the tests (Article 2): Where integrity tests target only one sector – mostly the police, an internal unit is in charge for the tests. Where integrity tests target a broader range of public institutions, an external anti-corruption agency already in charge for preventing corruption in the entire public sector takes on the function of integrity testing as well.

Often, countries have more than one state entity dedicated to integrity in the public sector. For example, in Moldova the National Anti-Corruption Centre has rather broad preventive and investigative functions, whereas the National Integrity Commission focuses on preventive work in the area of conflicts of interest and financial disclosure of public officials.[110] When deciding which of several anti-corruption bodies to select for the tests, one needs to consider in particular the following arguments:

- Does the body have experience in identifying and analysing **corruption risks** in the public sector? This expertise is important for selecting targets based on corruption risks and for utilising the results in preventing corruption.
- Which capacity necessary for the **tests** as such exists already at the state body? This concerns technical means for recordings, experience in undercover work, and the possibility of maintaining a unit of testers with confidential identity.
- Will the body be able to carry out administrative integrity tests kept fully **separate** from any department carrying out law enforcement investigations? Otherwise, there is a risk that the body will mix the results from the purely preventive and disciplinary integrity tests with investigations carried out in the criminal sphere.[111]
- Does the body have the necessary **independence** for selecting and carrying out the tests without favouring any public institution or individual?
- How do the public service and civil society perceive the body's **integrity** and professionalism? The public will accept undercover measures only if there is a sufficient level of trust in the state body carrying out the tests. This is in particular true for transitioning countries where former regimes built their power on abusive secret services.
- Does the public body have the necessary capacities for reaching out to the public servants and buying in the necessary support for the tests? Proper **public communication** is key to successfully introducing and implementing this tool.

One of the worst-case scenarios of introducing integrity testing is as follows: The tests as such are highly effective and substantially disturb the making of illicit profits at public institutions from violating integrity rules. At the same time, one or two testers give in to the temptation of making their new-found power in fighting corruption to money: they sell information of the targets and timing of tests so (corrupt) public institutions can pretend good behaviour during the tests. The Venice Commission thus noted: A "gapless chain of control [...] is a necessary feature. Integrity testing does not work if the testers themselves lack integrity since an integrity tester has precious information as to the time, object and subject of the next integrity testing. It is thus necessary to put the testers and their controllers under the risk of being tested as well."[112] **Paragraph 2** addresses this challenge.

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[110] Transparency International (2014), *Moldova National Integrity System Assessment 2014*, available at www.transparency.org, accessed 24 April 2016.

[111] See the "concerns that integrity checks (which have a preventive purpose) might interfere with the criminal law agenda of the NABU (mainly a law enforcement agency)", noted by the Venice Commission as voiced in several interviews during an in-country visit, Venice Commission (2015), ibid, No. 49.

[112] Venice Commission (2015), ibid, No. 46.

Where internal integrity units are in charge of integrity testing in a specific sector, there is usually no supervising entity "testing the testers". One can explain this absence that in countries with an overall low level of corruption and a long-standing rule of law tradition, such as the United Kingdom, there is enough trust in the testing unit to function with integrity. Where countries opted for a supervising body as foreseen in paragraph 2, they have selected the (domestic) **secret service**.[113] The main reason behind this selection is probably the following: The secret service has already the technical and human resource capacity for carrying out undercover tests in full confidentiality. In the case of the Ukrainian draft law, the Venice Commission took notice of the secret service being the supervisory tester without any critical observation.

Article 6 – Notification on tests

(1) *[Notification]* **Before integrity test are implemented for the first time, the testing body (Article 5 paragraph 1) informs all public institutions, and, through their heads, all public servants on the possibility of tests.**

(2) *[Consequence]* **Prove of information received (paragraph 1) is not a prerequisite for a test or its legal consequences.**

Commentary

Paragraph 1: The notification in paragraph 1 is a one-time event after the law comes into force. Informing public institutions and public servants about the possibility of tests serves two purposes. First, it has a **preventive** effect, as knowing about the tests will incentivise all stakeholders to comply with integrity rules. The Venice Commission stated in this context: "It is advisable to ensure that all public officials falling under the scope of integrity testing are explicitly warned upfront of the possibility of the test, which would better serve the preventive purpose of such test."[114]

Secondly, the upfront information serves as a juristic argument for the **legality** of tests. It makes a difference legally, whether a public servant can expect a test, or whether such a test comes as a surprise. The right to privacy illustrates this: If an employee knows that his/her employer records calls on the workplace phone, the employer enjoys less privacy than when he/she is not aware of this.[115] One can make a similar observation regarding provocation: A public official might have asked for a bribe, after an undercover officer ambiguously asked "whether he could do something to speed up the case". Did the public official not know about the possibility of integrity tests, he/she can argue entrapment more easily than when he/she was warned explicitly upfront. For a full discussion of both human rights, see below at Articles 9 and 10.

However, conditioning integrity testing to an explicit upfront individual information entails risks from a **practical** perspective: Informing all public servants upfront may draw from substantial resources. Not all countries can easily provide through a central record the total number and identity of public servants. Furthermore, an upfront notification procedure may also delay introducing integrity testing, because of obstructive public servants. The case of Moldova illustrates all three aspects. In order to initiate the information of public institutions and public servants, the National Anti-Corruption Centre sent out "a total of 1,036 letters to public entities". In response, public institutions reported that they had notified 57,427 public servants, who had individually acknowledged information with their signature. For an estimated further 56,510 public servants, such written acknowledgment was missing. Reportedly, several public servants refused "to sign the notice of

[113] Venice Commission (2014), ibid; Venice Commission (2015), ibid.

[114] Venice Commission (2015), No. 50.

[115] ECtHR, Halford v. The United Kingdom, Application no. 20605/92, *Judgment of 25 June 1997*, § 45: "There is no evidence of any warning having been given to Ms Halford, as a user of the internal telecommunications system operated at the Merseyside police headquarters, that calls made on that system would be liable to interception. She would, the Court considers, have had a reasonable expectation of privacy for such calls […].", available at http://hudoc.echr.coe.int, accessed 24 April 2016.

acknowledgement", even though this would not absolve them from any legal consequence of the tests.[116] Therefore, the National Anti-Corruption Centre had to engage in an intense exchange of communication with a list of public institutions failing to cooperate on informing public servants. **Paragraph 2** thus decouples notification under paragraph 1 from legal consequences under this toolkit. It is worth noting in this context that the United Kingdom made use of the fact that police officers need to log-on regularly on their office computers. At the request of its Directorate of Professionalism, the Metropolitan Police Service commissioned the use of a biannual **pop-up window** installed with a reminder of various disciplinary/legislative obligations that apply to all police officers and civilian members of staff. Police officers could only continue the log-on after ticking a box that they had understood the reminder. The reminder in and of themselves are presumed to have a preventive effect.

In many if not most countries, employers inform **newly hired** public servants on their integrity obligations, such as gift limits or managing conflict of interest. Information on integrity tests should be added to that information.

Article 7 – Initiation

(1) *[Grounds for initiating a test]* **A test can be initiated based on the following criteria:**

- **(a)** *[Surveys]* **Surveys indicating an elevated probability that violations of integrity rules occur in a particular public institution;**
- **(b)** *[Complaints]* **An increased number of complaints to integrity bodies about violations of integrity rules in a particular public institution;**
- **(c)** *[Oversight reports]* **Findings by oversight institutions, such as a court of auditor or an internal oversight unit, indicating a lack of compliance with integrity rules;**
- **(d)** *[Previous tests]* **Previous tests in line with Article 14 paragraph 1;**
- **(e)** *[Random selection]* **Annual selection of a sample of public institutions by a random mechanism;**
- **(f)** *[Institutional request]* **Upon request by a particular public institution;**
- **(g)** *[Personal consent]* **Upon consent by a particular public official.**

(2) *[Timing]* **The integrity test initiated under paragraph 1 (a) to (e) has to be implemented within [a specified] period of time after establishing the selection criteria. For integrity tests initiated under paragraph 1 (f) to (g) the timing is subject to discretion of the testing body.**

(3) *[Documentation]* **The integrity test is initiated in writing signed by a [specified] senior manager of the testing body and is based on a testing plan documenting at least the following information:**

- **(a)** *[Grounds]* **The grounds for initiating the test;**
- **(b)** *[Tested institution]* **The tested institution, if applicable the targeted departments, units, or, particular public servants;**
- **(c)** *[Testers]* **The testers (the identity can be encrypted by using recognition codes traceable to specific testers);**
- **(d)** *[Time frame]* **The time frame in which the testing will be carried out;**
- **(e)** *[Scenarios]* **The test and exit scenarios (Article 8);**

[116] National Anti-Corruption Center (February 2015), *Report on the implementation of Law no.325/23.12.2013 as of 14 February 2015 and on activities to test professional integrity carried out from 14 August 2014 to 30 January 2015*, p.8-9, available at http://cna.md, accessed 24 April 2016.

(f) *[Limits of provocations]* **The limits of provocation specifying the applicable cases of Article 9;**

(g) *[Technical means]* **The use of technical means (Article 10).**

Commentary

The Venice Commission has noted in the context of privacy: "The European Court has left a space for undercover operations to take place without judicial pre-authorisation. In such cases, however, 'a clear and foreseeable **procedure** for **authorising** investigative measures, as well as their proper supervision, should be put into place in order to ensure the authorities' good faith and compliance with the proper law-enforcement objectives'."[117] Article 7 serves this purpose notwithstanding the fact that Chapter IV foresees judicial oversight.

Integrity tests under this legislative toolkit have a purely preventive and administrative function: "The results and materials of the professional integrity test are not admissible as evidence in a criminal investigation or proceeding against any of the tested subjects." (Article 1 paragraph 2). Therefore, the tests require **no concrete suspicion** that an individual person committed or is about to commit a criminal offence. In the words of the Venice Commission: "The ECtHR has repeatedly drawn attention to the problems involved in cases, where 'no objective suspicions that the applicant had been involved in any criminal activity' exist. In the criminal procedure, to which the ECHR refers, the requirement of the objective suspicion needs to be construed very strictly, as relating to the concrete person. In the disciplinary procedures, it is possible that the requirement may be interpreted more broadly, as relating to the public institution rather than the concrete person. The amount of corruption in [a specific country] [...] also argues for such a broad approach."[118]

However, referring to an overall high level of corruption in a country is not enough to justify an integrity test. As the Venice Commission stated, "the authorisation of the conducting of an integrity check should be specific enough".[119] **Paragraph 1 (a) to (c)** lists such specific grounds. All three grounds are based on objective data collected outside the testing body. This reduces the risk of the testing body selecting testing targets arbitrarily. In any case, the ECtHR did not find any violation of human rights where a police officer was criminally convicted based on a **random** integrity test.[120] The police officer had not been subjected to the test because of an individual suspicion, but simply because he belonged to a public sector (road police) with a notorious inclination towards corruption. While the testers drove along a national highway, the police officer accidently happened to be there looking out for traffic violations.

Paragraph 1 (d) allows for repeating a test, if a previous test exposed violations of integrity rules. One should keep in mind that there are a finite number of scenarios one can perform. Hence repeated tests may become less effective as they become known and can condition response.

Paragraph 1 (e) can be important for the following reasons: First, data on compliance with integrity rules is not always available for all public institutions. Surveys, for example, often cover only a selection of public sectors. Second, "corruption is, by its nature, secretive".[121] A lack of information exposing corruption might be deceptive about the real extent of the problem. Third, integrity testing has a preventive function no matter the current level of compliance. In this context, it serves to identify corruption risks in a public institution. One can draw an analogy to the audit of tax declarations of citizens, or an audit of the financial disclosures by public officials. In both areas, it is

[117] Venice Commission (2015), ibid, No. 72.

[118] Venice Commission (2015), ibid, No. 63:

[119] Venice Commission (2015), ibid, No. 63.

[120] See above at Article 1.

[121] Council of Europe Civil Law Convention on Corruption, *Explanatory Report*, No. 77. available at http://rm.coe.int, accessed 24 April 2016.

usual practice to randomly select declarations for an in-depth audit in order to incentivise general compliance.[122] As mentioned earlier, the ECtHR has not put the random selection of public officials in question in the one case it had to decide so far on integrity testing (see above at Article 1).

Paragraph 1 (f) and **(g)** are based on the principle of **consent**. Where testing subjects agree to the tests, this in and of itself constitutes a justification for a test. A public servant in such a case could not argue a violation of fair trial, because a sufficient ground for testing had been absent. The ECtHR has admitted in several cases and with regard to different human rights that they can be waived for certain instances,[123] including Article 8 ECHR.[124]

The Romanian Law foresees that "**implicit** consent with integrity testing is presumed where somebody becomes staff of the Ministry of Interior".[125] This toolkit does not take on this approach as it cannot be excluded to raise questions under the ECHR. The ECtHR decided in the somewhat different context of Article 4 ECHR (forced labour) that by entering a certain profession citizens do not "voluntarily" accept just any condition of the employment.[126] A similar rationale might apply to other conditions of the work, such as integrity testing.

Paragraph 2 reflects the necessity of the "authorisation of the test being specific enough".[127] The authorisation is not specific enough if integrity tests are carried out years after a survey finds the customs services to be highly corrupt. The tests and the grounds need to link also time-wise with certain proximity. In case of consent under paragraph 1 (f) and (g), obviously no such time-limit applies, unless the consent sets such a limit.

The documentation under **paragraph 3** ensures internal control and legitimacy, and provides a court exercising external judicial control with a basis for its decision.

Article 8 – Tests

(1) *[Definition]* **Integrity tests replicate encounters of citizens and public servants with a public institution performing its functions, with only the testers knowing that the situation is simulated.**

(2) *[Exit]* **Exit scenarios define situations in which the testers abort the test because there is a significant risk that the objective of the test cannot be achieved within the limits set by these provisions.**

Commentary

Paragraph 1 contains the basic definition of an integrity test. The definition also sets limits to the tests: they are not movie-style scenarios where undercover officers come with a suitcase full of cash to apply for a building permit. On the contrary, they are in principle **everyday** situations, such as a citizen registering a business, seeking medical help from a doctor, or getting caught on a

[122] For tax declarations see for example: OECD (2004), *Use of Random Audit Programs*, available at www.oecd.org, accessed 24 April 2016; for asset declarations see for example: GRECO, *Evaluation Report Bosnia and Herzegovina* (Eval IV Rep (2015) 2E), Recommendation v: "coupling the disclosure system with an effective control mechanism (including random verifications)", available at www.coe.int, accessed 24 April 2016.

[123] Kempees P., A Systematic Guide to the Case-Law of the European Court of Human Rights, 1960-1994, Volume II, 1996, pages 1365 following (Waiver of a Right) with reference to different decisions.

[124] M.S. v. Sweden, Application no. 20837/92, *Judgment of 27 August 1997*, available at http://hudoc.echr.coe.int, accessed 24 April 2016; the waiver was however not valid in the concrete case.

[125] *Law 38/2011* on modifying the Emergency Government Ordinance No. 30/2007 on the organization and functioning of the Ministry of internal Affairs (in Romanian), introducing a new Article 17-1, available at www.luju.ro, accessed 24 April 2016.

[126] ECtHR (2012), *Key Case-Law Issues, Prohibition of Slavery and Forced Labour, Article 4 of the Convention*, p.7, available at www.echr.coe.int, accessed 24 April 2016.

[127] See above note 119.

traffic violation. In real life, such a situation often suffices for the (corrupt) public servant requesting an illicit favour. Thus, it is clear from paragraph 1 that **provoking** corruption is not an essential part of the test (on the prohibition of provocation see Article 9). However, the undercover aspect of the scenario is essential, as otherwise it would not be a test.

The definition extends to encounters of **public officials** with a public institution. This is important as tests cover the integrity of promoting public officials as well (Article 4).

The definition of exit scenarios in **paragraph 2** is much less important than the definition of the tests in paragraph 1. The definition serves the planning of the tests, in order to provide testers with guidance on aborting the test when appropriate or necessary. This is the case when their undercover identity is about to be blown, or when the public official is "smart" enough to play the situation so that the "citizens" in front of him/her would have to provoke corruption and thus act outside the legal limits. The Romanian framework foresees the following cases for interrupting or aborting a test: "a) cases of force majeure generated by health condition, mission and/or unpredicted actions; b) logistic deficiencies which may not be immediately removed; c) intervention of the risk of committing physical violence against the tester; d) other situations denoting removal of the scope for which the testing was decided."[128]

The following are examples for test scenarios for each of the integrity rules listed in Article 4:

- **Conflict of interest** cases are most difficult to address through integrity tests. Conflict of interest requires a close personal connection, which is hard to exploit for a test if the tester shall act undercover. One option still could be an offer of a job to a public servant, the acceptance of which would require notification and consent of his/her employer. The job offer per se would not be a provocation, as it would be legal as such. Should the public servant not notify his/her employer as foreseen by law, this would be his/her own free decision.
- **Gift rules**: An example could be the provision of a gift which is within the legal limits but which the public official is obliged to notify to the employer. As with above case it would not be provocation, as the gift would be legal per se.
- **Notification** of corruption acts: Should a public servant ask for a bribe, testers could make an effort so that colleagues see the handing over of the money. This way the test would also check if the colleagues are willing to report such incidents.
- **Bribery**: Testers could apply for a building permit indicating that they would need the permit very soon as otherwise they would be losing money on a contract. This would probably not amount to undue emotional pressure (see Article 9), but might still trigger a bad faith public servant to ask for an illicit "speed payment".
- **Abuse of office**: Testers could check if the public servant would violate the law in exchange for the "pleasure" of being able to harass a member of an unpopular ethnic or sexual minority.
- **Embezzlement**: Testers could offer to pay a fee for a public service in cash instead of by banking transfer. The money might not end up in the cashier's office of the public institution, but in the private pockets of the official instead.
- **Procurement** violations: Testers could check if public servants are willing to discuss inside information on the tender, such as internal files or offers by other bidders. Public officials agreeing in principle to such violations usually do so in the hope for receiving a favour in exchange, such as becoming part of a kick-back scheme.
- Rules on **hiring** and promotion of public agents: Testers could apply to job offers and check if the procedure complies with the regulations.

[128] See above at 1.3.7.

Excursus – Independent institutions

In the context of Article 2, the legislator will have to decide to what extent it wants to **include** independent institutions into the testing regime (see above at Article 2). This can concern independent executive public institutions, such as the central bank. It may also concern the judicial or legislative branch, which are both independent from the executive power. The level of integrity, as well as the willingness and capacity to address shortcomings in these institutions factor in for this decision.

From the perspective of fighting corruption, **parliamentarians** are important stakeholders: This group of officials exercises great power lending itself to be perceived as a high-priced "commodity". Integrity tests of parliamentarians done by journalists or NGOs in the past did uncover high-profile bribery cases. Most recently, journalists conducted an integrity test at the European Parliament.[129] The test led to the successful criminal prosecution of an Austrian, Slovak, and Romanian Member of European Parliament. Similar initiatives were also taken in other countries, such as Azerbaijan, where a secretly recorded video showed a Member of Parliament bargaining a seat in the Parliament for a price between 500,000 and 1 million US$.[130] She was subsequently convicted to three years imprisonment.[131]

Similarly important for fighting corruption is to weed out corrupt judges from the **judiciary**. As the ECtHR stated in a case on undercover operations: "Corruption – including in the judicial sphere – has become a major problem in many countries".[132] Any reform measure ultimately depends on the reliability of courts, e.g. the prosecution of corrupt officials, fair procurement procedures, or the objective hiring for public positions. A corrupt judge can render any good governance measures useless. In a global survey of 95 countries, the judiciary came in second as public service where people had to pay a bribe.[133] This is an extraordinarily high figure, considering the fact that only a fraction of households would ever come into contact with the judiciary**.** At the same time, it is very hard to prove abuses of function among judges. In regards to the applicability of integrity tests to judges, the Venice Commission set specific legal thresholds for conducting such tests in its amicus curiae brief for the Republic of Moldova. However, it did not completely exclude the possibility of judges being subjected to integrity testing. It should be noted at this point that exclusion of judges from the testing realm was seen as one of the major flaws of the system in the Republic of Moldova.[134]

Independence of institutions such as parliament or the judiciary is constitutionally not **unlimited**. The (executive) police investigate crimes of judges or parliamentarians, the tax office audits their tax declarations, and rules on workplace safety or gender-equality apply in courts and parliament as well.

However, there is a significant particularity of integrity tests: testers act **undercover** and the public official involved does not know he/she is being tested (and recorded). Parliamentarians and/or judges might not feel at ease with such undercover measures. They might perceive the tests as a means for an executive agency to "spy" on them, or to influence them improperly. A somewhat artificial example could be that an integrity tester engages in a lengthy discussion with a

[129] BBC (9 August 2012), *Austrian ex-MEP on bribery charge over Strasbourg 'deal', A former Austrian interior minister and Euro MP, Ernst Strasser, has been charged in Vienna with corruption*, available at www.bbc.co.uk, accessed 24 April 2016.

[130] Electionswatch (30 September 2012), *Ruling Party MP resigns, has party membership revoked as video reveals corruption at the heart of the political system in Azerbaijan*, available at http://electionswatch.org, accessed 24 April 2016.

[131] Radio Liberty (2 December 2013), *Ahmadova Sentenced to 3 Years*, available at www.azadliq.org, accessed 24 April 2016.

[132] Ramanaukas (ibid), § 50.

[133] Transparency International, *Global Corruption Barometer 2013*, available at www.transparency.org, accessed 24 April 2016.

[134] The Polish Institute of International Affairs (June 2015), *Anti-Corruption in Moldova and Ukraine, A V4 Handbook of Best Practices*, p.17, available at www.pism.pl, accessed 24 April 2016.

parliamentarian in order to feel out the politician's stance in a future plenary vote. Or, in constitutional or administrative court the case might involve the executive branch as a party. A tester could give in to a judge's request for a bribe and pay the requested (significant) bribe. As a consequence, the executive could win the case. There are more or less five ways of dealing with this challenge:

- Categorically **excluding** the judicial and legislative branch;
- Tasking a body with testing that is **independent** from all three branches of power;
- (Co-)**ownership** of the judicial and legislative branch in implementing the tests;
- Judicial and/or parliamentary **oversight** of the tests;
- Setting additional limits for the **implementation** of the tests.

Exclusion of the judicial and legislative branch is the most radical measure. To this end, Article 2 paragraph 2 could list parliament and courts from the scope of integrity testing. However, such a measure would probably be too far reaching. Parliament and courts employ to a large extent staff that does not enjoy judicial independence or parliamentary privileges. This concerns for example civil servants working in the judiciary on procuring goods or on other administrative tasks. A better alternative would thus be to exclude parliamentarians and judges from the personal scope of tests (Article 3 paragraph 2). The advantage of this solution is its legal simplicity. However, it raises the question of equal treatment of public servants and of the efficiency of fighting corruption in all public sectors.

Where the testing body is sufficiently **independent** from government, parliament, and the judiciary, there is lesser issue of one branch of power overreaching into another. This will depend on the legal and actual framework ensuring the independence of the testing body. An example could be an integrity body that is constitutionally independent from all three branches of power and only reports to the public at large. Guiding Principle 3 of the "Council of Europe 20 Guiding Principles for the Fight against Corruption" commends such "independence and autonomy".

In some countries, the anti-corruption agency is not responsible to the government, but to parliament. Where such an anti-corruption agency conducts tests in parliament, this will per se not be an issue of infringing on the independence of parliament: parliament so to speak owns the integrity tests in this case. Other forms of **co-ownership** could be that the testing body coordinates with a parliamentary committee or with the judicial council on the admissible testing scenarios and on the limits of tests. The timing and concrete targets could still be up to the discretion of the testing body; however, there could be general guidelines on which scenarios the testing body has to avoid. Obviously, any such co-ownership increases the risk that corrupt judges will learn upfront how to work around integrity tests. To the extent this risk cannot be mitigated, it is the price to pay for co-ownership. In any case, disciplinary decisions following a test would always fall under the exclusive disciplinary competence of parliament or court. Would the judiciary or parliament deem tests to be off-limit, they could still abstain from opening a disciplinary proceeding.

Ex ante or ex post **oversight** of the (planned) tests is another form of limiting the risks from one branch of power conducting tests in another branch of power. The commentaries in Chapter IV contain observations and suggestions in this regard.

Closely related to co-ownership are limits on the **implementation** of tests. For the judiciary, the following observations are relevant:

- **No judicial decision-making**: As long as the test does not concern the decision-making of judges, their independence is not at stake. For example, an integrity test could only start after the trial is concluded and could target a possible widespread practice of judges taking gifts from court parties. Post-trial gifts cannot affect the judicial decision making of the (past) trial anymore. However, a gift culture in the judiciary would be a substantial integrity problem, and would usually be indicative of larger integrity issues. Similar is true with administrative issues related to judicial staff. This includes for example the filing of a case

with a certain preference, for example an altered day of registration, or issues of procurement.

- **Judicial decision-making**: As long as cases are made up for the sole purpose of conducting an integrity test, independence is not at stake. Independence of the judiciary serves impartial decision-making.[135] Where the entire trial is a facade (or both parties are privy to the test), justice and impartial decision-making are irrelevant. Where cases are real, and one party does not know about the test, the testing body has to avoid any real influence on the outcome of the case. The test would have to stay short of providing any favour, even if the judge pro-actively asks for a bribe. In such case, the testing body would anyhow need to notify the judiciary about the judge's lack of impartiality before any outcome of the trial becomes final.

For **parliament**, above observations would apply *mutatis mutandis*. There is a purely administrative sphere, where parliament acts as any administration, for example when procuring goods. Where the decision-making of parliamentarians is concerned, the testing body would need to abstain from actually influencing the parliamentarian. For example, the testers could pose as lobbyists for the financial sector, wanting to push for a legislative amendment. If the parliamentarian would ask for a bribe in exchange for taking on the legislative initiative,[136] the testers could not provide the bribe or would have to disclose the test immediately after doing so.

As possible **paragraph 3** for Article 8 limiting tests in the judiciary and parliament could be worded as follows: "*[Judiciary and Parliament]* Tests may not lead to an actual influence on the decision-making of a judge or a parliamentarian."

Article 9 – Prohibition of provocation

(1) *[Inadmissible evidence]* **Test results are inadmissible if testers**

(a) *[Lack of predisposition]* **provoke the public servant to violate an integrity rule, without the public servant having shown any pre-existing intent; or**

(b) *[Persistency]* **have reiterated their offer to engage in violation of integrity rules despite the public servant's clear refusal; or**

(c) *[Excessive benefit]* **have offered an unusually high benefit; or**

(d) *[Emotional blackmail]* **have appealed to the public servant's compassion in an unusually strong manner; or**

(e) *[Other pressure]* **have similarly provoked the public servant into violating integrity rules.**

(2) *[Admissible evidence]* **In the following situations, testers may offer or engage in violation of integrity rules while the tests are admissible as evidence in disciplinary proceedings:**

(a) *[Request]* **A public servant explicitly or implicitly has solicited the violation of an integrity rule, and the tester engaged in this or similar violations; or**

(b) *[Predisposition]* **There is probable cause that the public servant has a pre-existing intent of violating integrity rules, and the tester caused a similar violation;**

(c) or *[Consent]* **A public servant consented in writing in advance to being tested including provocations; or**

[135] *Recommendation CM/Rec(2010)12 of the Committee of Ministers to member states on judges: independence, efficiency and responsibilities*, see in particular no. 11, available at https://wcd.coe.int/ViewDoc.jsp?id=1707137: "In the decision-making process, judges should be independent and be able to act without any restriction, improper influence, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason."

[136] See for a similar case occuring in the European Parliament above note 129.

(d) *[De minimis]* **The public servant responded to the tester's explicit or implicit indication of a general and unspecified willingness to engage in a violation of integrity rules.**

(e) *[Notification compliance]* **The bribe offered serves to test compliance with the obligation of notifying bribe offers, the bribe is within the usual or expected range of bribes for the testing situation, and the test is only used as evidence in proceedings concerning the obligation to notify bribe offers.**

(3) *[No evidence]* **Testers can engage in violation of integrity rules outside the limits of paragraphs 1 and 2 as long as the tests are not used as evidence in disciplinary proceedings against public servants.**

(4) *[Benefits]* **Within the limits of this Article, the testing body can provide the public servant through the testers with financial or non-financial benefits.**

Commentary

As stated above under Article 8, testing scenarios are per se no provocation. They are in principle **everyday** situations, such as a citizen applying for a passport, seeking medical help from a doctor, or getting caught on a traffic violation. It depends solely on the public servant's predisposition, whether he/she wants to take the "innocent" request by a "citizen" for public service as an opportunity for abusing the power of his/her office.

Testing scenarios could also include **provocation**, to make the tests more effective. For example, a tester could indicate his/her general willingness "to do his part for speeding up procedures". A feistier provocation would be a straight offer of money. In the area of criminal proceedings, provocations entail an unfair trial, unless investigators stay within clear limits. For Council of Europe member States, the ECtHR has defined these limits through comprehensive case law. This legislative toolkit prohibits testing results to be used in criminal proceedings (Article 1) and stays exclusively in the administrative and disciplinary sphere. The ECtHR has not yet decided on provocation in the context of an integrity test confined to disciplinary consequences. The only case on integrity tests decided so far involved a criminal sanction (see above under Article 1). In cases concerning disciplinary sanctions, the Court so far declared Article 6 ECHR (fair trial) as non applicable (see below Excursus on "Provocation and the ECHR"). The Venice Commission appears to see a probability that the ECtHR could apply Article 6 ECHR in the future to disciplinary proceedings based on administrative integrity tests. Therefore, the Venice Commission applied the case law by the ECtHR in the past to laws on integrity testing. However, in both cases the laws contained links to mandatory disciplinary sanctions. This toolkit does not contain such a mandatory link. Nonetheless, Article 9 takes a cautious approach and reflects by and large the case law by the ECtHR concerning criminal proceedings.

Paragraph 1 (a) draws from case law, according to which there is no provocation leads to an unfair trial where the person "was not predisposed to commit" the offence.[137]

Paragraphs 1 (b) to (e) borrow directly from language of the ECtHR. The Court has regarded the following as conduct which one can deem to have pressured a person into committing an offence:[138] Reiterating the offer despite the applicant's initial refusal, insistent prompting **(b)**,[139] raising the price beyond average **(c)**,[140] and appealing to a drug dealer's compassion by

[137] ECtHR (2014), Guide, ibid, No. 147-150.

[138] ECtHR (2014), *Guide on Article 6 Right to a Fair Trial (criminal limb)*, No. 150, available at www.echr.coe.int, accessed 24 April 2016.

[139] Ramanauskas v. Lithuania, Application no. 74420/01, *Judgment of 5 February 2008*, § 67, available at http://hudoc.echr.coe.int, accessed 24 April 2016.

[140] ECtHR, Malininas v. Lithuania, Application no. 10071/04, *Judgment of 1 July 2008*, § 37, available at http://hudoc.echr.coe.int, accessed 24 April 2016.

mentioning withdrawal symptoms **(d)**.[141] Paragraph 1 **(e)** condenses all three cases in order to apply to comparable cases.

Paragraph 2 (a) and **(b)** reflect case law, according to which there is no provocation where the person "was predisposed to commit" the offence.[142] For example, in the following case, the ECtHR found no entrapment: "the applicant had not been entrapped into committing an offence but had volunteered, offered and agreed to supply drugs without being subjected to pressure. In this regard, reliance was placed by the trial judge both on the applicant's familiarity with the current price of cocaine and drug dealing, as demonstrated by the fact that he was able to arrange a deal within fifteen minutes and the fact that, although the applicant had a number of opportunities to withdraw from the deal, he did not do so, seeing the financial advantages for himself. The conclusion of the trial judge was upheld by the Court of Appeal which, while noting that the applicant had plainly been encouraged in a broad sense to do what he did by the setting in which he found himself and the opportunity which it appeared to present, found that he had voluntarily and readily applied himself to it when faced early on with M's apparent interest in acquiring drugs."[143]

In practice, testers will have to find out if a public official is predisposed without provoking him or her. Undercover testers from integrity testing units such as Moldova, Romania, or United Kingdom, would for example engage a road police officer in a conversation and would ask him/her questions such as "Can you not let it go this time?" when being confronted with a traffic violation. The police officer might then respond at a certain stage of the conversation: "Well, what do you propose?" This already would be a first step showing that the police officer is willing to negotiate outside the law, if it is mandatory for him/her to register the traffic violation. A first predisposition of the officer to not play by the rules is established. This would justify the integrity tester offering something such as: "Well, I would be willing to help you." After which the police officer might take the next step. Video-material from real life cases taken by experienced integrity testing units such as Moldova, Romania, or the United Kingdom provides compelling examples of how testers can "**dance**" along with a predisposed official, with the official each time taking the next step in further revealing his/her predisposition, and the tester merely "joining in the dance. The case of random integrity testing decided by the ECtHR is such an example of a dance led by the public official, who revealed in the course of a conversation step by step his predisposition to play outside the rules. Thus, the ECtHR did not deem the ultimate offer of 100 € by the testers provocation, even though the police officer never asked for the bribe.

It is not the aim of this toolkit to reveal the secret **testing tactics** of integrity units. However, it should be noted here that real life keeps available more varieties than one could possibly think off. In one case, for example, the public official started reciting a poem about how he would like to drive a nice Mercedes, but that his salary was low. In another case, the tester was wearing a gold watch (which in fact was fake gold). The video showed that the official's eyes were virtually locked on the gold watch during the entire conversation. The official would also obnoxiously inquire about the gold watch. So the tester asked him if he would like to own such a watch. Integrity testing units with practical experience can instruct new testing units on how to conduct tests, what psychological tricks to apply, and what possibilities there are to make a scenario realistic.

Paragraph 2 (c) reflects case law by the ECtHR according to which it is possible to waive rights under Article 6 ECHR: "Neither the letter nor the spirit of Article 6 of the Convention prevents a person from waiving of his own free will, either expressly or tacitly, the entitlement to the guarantees of a fair trial."[144] There are two caveats: "Such a waiver must, if it is to be effective for

[141] ECtHR, Vanyan v. Russia, Application no. 53203/99, *Judgement of 15 December 2005*, §§ 11 and 49, available at http://hudoc.echr.coe.int, accessed 24 April 2016.

[142] ECtHR (2014), Guide, ibid, No. 147-150.

[143] ECtHR, *Decision of 6 April 2004* as to the Admissibility of Application no. 67537/01, p.12, available at http://hudoc.echr.coe.int, accessed 24 April 2016.

[144] ECtHR, Hermi v. Italy [GC], Application no. 18114/02, *Judgment 18 October 2006*, § 73, available at http://hudoc.echr.coe.int, accessed 24 April 2016; Sejdovic v. Italy [GC], Application no. 56581/00, *Judgment of 1 March 2006*, § 86, available at http://hudoc.echr.coe.int, accessed 24 April 2016; ECtHR (2014), Guide, ibid, No. 158-159.

Convention purposes, be established in an unequivocal manner and be attended by minimum safeguards commensurate with its importance [...]. In addition, it must not run counter to any important public interest." Paragraph 2 (c) would appear to comply with both requirements: the waiver would have to take place "in writing" and "in advance".

Paragraph 2 (d) describes actions falling under the threshold of provocation. Some of the many possible scenarios could be the following: The tester states that he/she needs the public servant's decision as soon as possible; the tester states to the doctor that he wants the best treatment available and asks the doctor what the tester can do from his/her side in this regard; the tester displays signs of considerable wealth and states that he/she has helped many of his/her friends in public service; the tester shows compassion with the low salaries paid in public service; etc. None of these statements would seem to provoke a public servant without "predisposition" to request a bribe. However, a corrupt public servant might easily do so.

It is a clear case of provocation, where a tester would offer a bribe to an unsuspected public official, and the public official accepts the bribe. However, in many if not most cases the officials will clearly refuse the bribe. This can have two reasons: The public official has integrity. Or, the public official has no integrity and refuses the bribe only pro forma. This could be a tactic of raising the bribe offer. Or it could be a tactic to make sure he/she "passes" the integrity test; after all, provocations are not possible after a clear refusal. Still, there is one more aspect to this scenario one should not forget: The public official has to report the bribe offer to his/her employer or to an external integrity body, depending on the country's legislation. In case the official has refused to accept the bribe, he/she is not bound or influenced in any to not report the bribe offer. Thus, regarding his/her notification obligation, there is no provocation. **Paragraph 2 (e)** covers this case. It is an important provision as it can be a strong incentive for ethically weak public officials to report bribe offers. Once officials start reporting bribe offers, citizens will stop offering them. The vicious cycle is broken.

For Paragraph 2 (e) to work, notifications on bribe offers have to be "**fraud-proof**". An obligation of notifying only the supervisor might not be enough in highly corrupt public organisations. Often, supervisors profit from bribery through pyramid schemes. Supervisors could thus collude with their subordinates and simply store the reports on bribe offers. If the bribe exchange was an integrity test, they can show the subordinate reported the bribe. Otherwise, they simply "forget" to forward the report to the law enforcement authorities, or claim the letter to the law enforcement authorities "must have gotten lost", or otherwise passively obstruct proper investigation of the case (e.g. not being able to describe the citizen). Therefore, an obligation to notify an external integrity body seems the preferable option in this regard. The law setting out the notification obligation needs to address and mitigate all these risks, because the preventive effect of integrity testing hinges on proving that a public official failed to report the briber offer (properly).

Provocation is an issue of fairness relevant in criminal or disciplinary proceedings establishing innocence or guilt. Outside such proceedings, there is no general prohibition on provoking statutory violations (see below Excursus). **Paragraph 3** therefore opens the possibility of provocations outside general limits, if the testing body wants to use the results exclusively for the purpose of risk assessment or public awareness. One has to consider very carefully, though, if one wants to include paragraph 3 into a national legislation. Provocations outside the limits of paragraph 1 and 2 might not go down well with public opinion. The general public may also not be able to distinguish between tests under paragraphs 1 and 2, and tests under paragraph 3. Thus, provocations under paragraph 3 may harm the credibility of the entire testing process and citizens and/or the public sector may lose faith in the testing body.

Paragraph 4 serves the technical implementation of paragraphs 1 to 3: as far as provocation is admissible, testers can provide benefits. Thus, for example, if a public servant asks for 300 € to issue a building permit, the tester may provide this benefit in order to complete the test.

Legal drafters need to keep in mind in this context, to what extent existing law already obliges the public servant to return this money. **Civil law** concepts such as unjust enrichment might provide a

basis for claiming back any "testing" benefit. Should the law not provide a sufficient basis, it is commendable to amend paragraph 4 with a clause such as: "The public servant is obliged to return the benefit to the testing body." However, one should also keep jurisdictional issues in mind. It might be, that without special regulation the testing body will have to proceed at many courts across the country, with the jurisdiction depending either on the place where the test took place, or – possibly different – the domicile of the public servant. There are two possible options. One could define the jurisdiction for such claims at the court competent for the testing body. Another option could be an administrative deed by the testing body stipulating the obligation of paying back the benefit seems preferable. Under administrative law, this deed would probably become an enforceable title if the public servant does not object to it.

Excursus – Provocation and the ECHR

The manner in which one conducts integrity testing may, on the face of it, also engage the protection provided under Article 6 paragraph 1 of the ECHR relating to the fairness of proceedings, namely provocation. There are various terms for the provocation of criminal offences:[145] entrapment; police incitement and agent provocateurs; or sting operations. This paper will use the term agent provocateur. In principle, it is considered unfair if a defendant is convicted for a crime which the punishing State instigated from the very beginning.

However, outside the sphere of establishing innocence or guilt, there is no general prohibition on provoking statutory violations. The following are some of the examples of provocations used in civil/administrative settings:[146]

- An underage agent is filmed buying alcohol or cigarettes at a store whose license to sell such goods is suspended based on the footage.
- A big company is fined after arranging to have its waste dumped illegally by trash haulers who turn out to be undercover environmental police.
- A mail-order business is ordered to shut down after cheating on consumer protection investigators posing as customers.
- Agents place a stuffed deer in the woods off-season for hunting leading the hunters who shoot at it lose their hunting licenses.
- Black agents are placed in targeted working environments to determine whether black employees are being harassed on the job.
- Agents pretend to be purchasers of a business to determine whether taxes have been properly paid.

In the United Kingdom, "Her Majesty's Revenue and Customs" (HMRC) sends out tax inspectors undercover:

> *"Examples include inspectors acting as customers needing haircuts to gain an understanding of how a salon operates. Other inspectors pose as couples out for a meal at a restaurant. The meal is later checked against the restaurant's end-of-year books to see whether it has been properly accounted for. [...] On the same night as these mystery shopping exercises, inspectors are also likely to have an observation van carrying photographic equipment outside the business, counting the number of people going in or out. If they have seen 150 go in, but the books only account for 100, they could have a case for fraud against the business*."[147]

[145] ECtHR (2014), Guide, ibid, p.26, available at www.echr.coe.int, accessed 24 April 2016.

[146] Hay B. (2005), *Sting Operations, Undercover Agents, and Entrapment*, Missouri Law Review, Volume 70, Issue 2, Spring 2005, p.387, 391, available at http://scholarship.law.missouri.edu, accessed 24 April 2016.

[147] Financial Times (16 November 2012), *Ten ways HMRC checks if you're cheating*, available at www.ft.com, accessed 24 April 2016.

The issue of entrapment would however come into play when it came to the use of integrity testing results in subsequent proceedings.

In criminal law cases, the ECtHR has defined entrapment as a situation:

> *"where the officers involved - whether members of the security forces or persons acting on their instructions – do not confine themselves to investigating criminal activity in an essentially passive manner, but exert such an influence on the subject as to incite the commission of an offence that would otherwise not have been committed, in order to make it possible to establish the offence, that is to provide evidence and institute a prosecution".* [148]

The following questions appear in the context of integrity tests and subsequent disciplinary procedures:

- Do the restrictions applicable to agents provocateurs in police investigations apply to administrative disciplinary proceedings?
- Is the restriction less strict if public officials are warned in advance that they may be subject to possible provocations?

Applicability to disciplinary procedures

The ECtHR has considered the issue of entrapment to date only in the criminal context, not the civil.[149] This may be a reflection of the fact that the issue of entrapment traditionally arises in criminal settings. This ties it to the presumption of innocence guarantee falling within the criminal limb of Article 6. As discussed above, the ECtHR has so far by and large not found the Article 6 subsection 2 guarantees to be relevant for disciplinary proceedings. It would therefore seem that using evidence gathered through integrity testing, would not jeopardize the fairness of proceedings based on the entrapment argument. For this conclusion, one would have to consider all the differences between integrity testing and criminal undercover operations:

- Undercover operations by the police aim at establishing **criminal guilt**, whereas administrative integrity tests assess whether public officials perform their **work duties** and have the necessary level of integrity.
- Public officials are explicitly **warned** in advance of possible tests.
- Under the ECtHR case-law, public officials cannot expect to enjoy the same degree of human rights **protection** as ordinary citizens in certain settings (e.g. privacy, free speech, and freedom of assembly)
- Public officials have to abide by **higher standards** of integrity than ordinary citizens.
- Administrative tests take place in the professional sphere of **public** offices, not in the private sphere of homes.

It goes without saying that the official concerned must have the opportunity to challenge the evidence presented against him/her.

Factor of advance warning

As noted above, one of the key distinguishing factors between undercover operations and integrity testing is the factor of lesser degree of covertness (or almost no covertness) of integrity testing. Public officials are **informed upfront** of "the trap" (i.e. integrity tests).

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[148] Ramanauskas v. Lithuania, Application no. 74420/01, *Judgment of 5 February 2008*, § 55, available at http://hudoc.echr.coe.int, accessed 24 April 2016.

[149] See ECtHR (2014), Guide, ibid, no. 12, available at www.echr.coe.int, accessed 24 April 2016, and ECtHR (2013), *Guide on Article 6 Right to a Fair Trial (civil limb)*, available at www.echr.coe.int, accessed 24 April 2016.

Article 10 – Use of special means

(1) *[Technical devices]* **During integrity tests, hidden audio or video recording devices can be used within the following limits:**

(a) *[Public servants]* **The recordings can only target public servants and the testers.**

(b) *[Workplace]* **The recordings can only take place in the workplace and regarding work-related communication, and are forbidden relating to private correspondence, and in private homes.**

(2) *[Identities]* **The testing bodies can request from all state bodies the necessary support in creating simulated identities for the testers.**

Commentary

Regarding integrity testing and the right to **privacy**, the Venice Commission stated: "The collection of information or recording by a state official of an individual without his or her consent, as a rule, falls within the scope of private life. The ECtHR went as far as to hold that 'an individual may, under certain conditions, claim to be the victim of a violation occasioned by mere existence of secret measures or of legislation permitting secret measures, without having to allege that such measures were in fact applied to him'."[150] The Venice Commission further noted: "The protection of privacy is less intensive in the workplace than outside it, especially with respect to public officials. Yet, according to the European Court´s case law, telephone calls or e-mail sent from work are covered by the notions of 'private life' for the purposes of Article 8 of the European Convention. The right to privacy therefore may extend to the workplace."[151] In any case, the **ECtHR** did not raise any concern regarding the use of secret audio/video-recordings in the one case on **random** integrity testing it had to decide.[152] This is in line with a recent decision by the **Grand Chamber** of the ECtHR which limits the privacy of employees at work. An employer had secretly monitored the workplace Yahoo Messenger account of one of its employees. The account was set up for professional purposes only. The Court found "that it is not unreasonable for an employer to want to verify that the employees are completing their professional tasks during working hours."[153] The Court came to this conclusion even though the communication monitored was with the employee's "fiancée" and "brother" and thus "was purely private".[154] Compared to this case, the recording of purely professional situations, such as a civil servant's handling of a passport application in the course of an integrity test fade only remotely relate to privacy, if at all.

Paragraph 1 addresses these concerns: It strictly confines integrity tests to the workplace and workplace related communication; any private communication is explicitly excluded, as is the sphere of private homes. In any case, it is practically hard to imagine how an integrity test could record private emails or private phone calls: The public servant would need to talk over the phone with his/her spouse during the test, or show the testers a private email on his/her computer screen. Doing so in the presence of the tester being a full stranger would make it hard for the public servant to claim privacy. In any case, public officials will be aware of the possibility of tests and thus have less expectation of privacy than ordinary citizen would have it, who are not subject to these tests.

Paragraph 2: A well backed-up undercover identity is important. For example, it will be easy for a police commissioner to check in the police or civil registry database whether the "citizen" in front of him/her is "real" or an integrity tester. Therefore, undercover identities need to be supported by general registries. This is common practice for undercover agents of the police or of intelligence

[150] Venice Commission (2015), ibid, No. 69.

[151] Venice Commission (2015), ibid, No. 71.

[152] See above in the Commentary on Article 1.

[153] Bărbulescu v. Romania, *Application no. 61496/08*, 12 January 2016, § 59, available at www.echr.coe.int, accessed 24 April 2016.

[154] At § 44.

services. In practical terms, it is necessary to “create” such identities. For this, other authorities, such as the civil registry, need to assist. Without a statutory provision, these authorities might doubt their competence to support the testing body. Assisting bodies includes the secret service. In fact, the secret service might contact with other authorities for the testing body, without disclosing for which purpose the fake identities are. By this, nobody outside the testing body or secret service will know that the fake identities are for testers (and not secret service agents).

Article 11 – Reporting and evidence

(1) *[Results]* **A written report on the test is signed by the senior manager in charge of the tests and contains at least the following information:**

(a) *[Time]* **Actual date and time of the test;**

(b) *[Transcript]* **A written transcript of any decisive verbal statements or non-verbal actions;**

(c) *[Results]* **Whether the test exposed corruption risks within the public entity, and whether any public servant violated an integrity rule or exposed a predisposition to violate an integrity rule;**

(d) *[Recommendations]* **Possible need for follow-up.**

(2) *[Internal version]* **An internal version of the report is additionally signed by the tester and may include further information going beyond paragraph 1, such as sources of information, methods, or general testing tactics.**

(3) *[Original recording]* **The original audio/video recordings of the integrity test shall be annexed to the internal version of the report.**

(4) *[Redacted recording]* **A redacted version of the original audio/video recording, in which the identity of the testers is visually and acoustically obliterated by maintaining the original at most, is also annexed to the written report.**

Commentary

Article 11 serves two purposes: documenting the tests for internal supervision at the testing body, for external supervision by the courts, and for facilitating judicial complaints by public servants.

Paragraph 1 sets the minimum contents of a test report. The report is accessible to supervisors at the testing body, to a court in a procedure on the legality of a test, and it is shared with the public institution under Article 12 “Notification”.

The testing body may want to add information to the report, which is irrelevant for an external stakeholder and which is highly confidential. This could be general strategic information, for example a suggestion how one could frame future scenarios in order to be more effective, or an observation that the average size of bribes requested at a particular institution has apparently risen recently. **Paragraph 2** ensures that this general strategic information stays internal.

Paragraphs 3-4: The recording is essential evidence. Any complainant and any judge thus have access to this evidence (Article 12 paragraph 4; paragraphs 2 of Articles 15 and 16).

The original recording might disclose the real identity of the testers – acoustically or visually. This could be the case, when a complainant or his/her legal representative reviews the recording in a disciplinary proceeding. Therefore, a redacted version of the recording obliterates their identity. **Paragraph 4** makes clear that the obliteration can only go as far as is essential for maintaining the identity. In practice, this means that the spoken words by testers cannot be fully muted, but could only be distorted, for example. Similarly, their bodies cannot be fully altered out of the recording, but only their faces could be covered by a black bar or similar.

The redacted version aside, a court still might want to review the original recording (paragraphs 2 of Article 15 and 16). This could be essential for verifying the authenticity of the redacted version or in case the court is not content with the quality of the redacted recording. Therefore, **paragraph 3** obliges the testing body to keep the original recording.

Chapter III: Consequences

Article 12 – Notification of institutions and persons

(1) *[Institutions]* **Within a [specified] period of time, the testing body notifies the head of the institution, in which the test was carried out, about the result.**

(2) *[Report]* **The notification includes the report under Article 11 paragraph 1.**

(3) *[Tested persons]* **The head of the institution, in which the test was carried out, ensures that the tested person is notified in line with the applicable law on disciplinary procedure.**

(4) *[Recording]* **The head of institution, the tested person, its legal representative, and expert witnesses have the right to examine the redacted evidence under Article 11 paragraph 4 in line with the applicable law on disciplinary procedure.**

(5) *[Disciplinary proceedings]* **The results and materials of the professional integrity test are by no means prejudicial to any disciplinary proceeding.**

Commentary

Tested institutions and individuals need to know that a test occurred related to them and what the results of the tests were. **Paragraphs 1 to 3** ensure this information. The testing body and the integrity tests have by no means any disciplinary function towards the institution or any of its employees. In order to avoid any misperception on this point, the testing body is not informing any individuals about the test results, but only the head of the public institution. It is up to him/her how to follow up on the notification.

Paragraphs 2 and **4** serve the right to an effective **defence**. The Venice Commission noted regarding the Ukrainian Draft Law: "The head has the right to familiarise him/herself with the audio/video recordings and any other relevant materials. For the sake of effective defence and the right to 'adequate facilities to prepare his/her defence' as required under Article 6 ECHR, the right to familiarize with the audio/video recordings should be extended to the person subject to the integrity testing as well. Further, he/she should have the possibility to be heard during the disciplinary proceedings."[155] Legislative drafters thus need to review the disciplinary law whether it foresees a possibility of the public servant to be heard; however, it appears hard to imagine that a Council of Europe member State would not foresee this basic right. Paragraph 4 does not necessarily mean that the recording is handed over to the public servant or the legal representative. This depends on the relevant procedural law.

Furthermore, the notification of the tested subject under **paragraph 3** is relevant in the context of Article 8 (**privacy**): "The exclusion of the checked employee from knowing that he/she was being tested might be questionable under the ECtHR case-law concerning the control of undercover measures."[156] One has to be careful, though, to not make the range of testing scenarios publicly known nor to divulge the identity of the testers. Otherwise, corrupt employees will establish workarounds to cheat integrity tests. The Venice Commission noted in this context: "It is however important that the employee cannot draw conclusions as to the identity of the testers. Therefore,

[155] Venice Commission (2015), ibid, 78.

[156] Venice Commission (2015), ibid, 76.

the notification of the employee should rather indicate a time-frame during which the test has been conducted and could come after a minimum time has passed."[157]

As noted earlier under Article 9 paragraph 2 (d), integrity testing should not link to any mandatory disciplinary sanction. This legislative toolkit does not contain any such link. However, in order to avoid any misperception, **paragraph 5** not only takes out any link to disciplinary offences, but to any disciplinary proceeding altogether.

Article 13 – Report on implementation

(1) *[Integrity measures]* **The head of institution reports back to the testing body [or another similar body] within three months of receipt of the report on measures taken for improving the integrity at the institution.**

(2) *[Disciplinary measures]* **The head of institution reports back to the testing body within three months of receipt of the report on disciplinary measures taken in line with the applicable law on disciplinary procedure in case of individual violations of integrity rules.**

Commentary

It is necessary that the testing body or another body related to anti-corruption reforms is aware if and when integrity measures have been taking. Such another body could be a ministry overseeing anti-corruption reforms in the public sector or a commission in charge of implementing anti-corruption action plans. **Paragraph 1** serves this purpose. In case legal drafters opt for another body than the testing body to be notified, they might wish to consider adding this body to the initial notification in Article 12 as well.

In transition countries with rather high corruption levels, disciplinary bodies often do not act sufficiently despite compelling evidence. There are various reasons for this such as: protection of peers; a corrupted disciplinary system; or simply the lack of understanding corruption offences. In its publication "Lessons learnt from the three evaluation rounds (2000-2010)", GRECO noted:

> *"Still, the ineffectiveness – often noted – of disciplinary proceedings creates the feeling that the system is corrupt overall."*[158]

In principle, the head of each public organisation is responsible for the discipline of their employees. However, in practice, this is often not enough to ensure compliance. Transparency of disciplinary proceedings and their outcome is one option to motivate appropriate action of disciplinary bodies. In this context, it is worth noting that GRECO

> *"considered in certain cases that to improve the effectiveness of, and the follow up to, such proceedings and to evaluate the relevance of the penalties, provisions should be made for establishing an appropriate system for registering disciplinary proceedings and sanctions and for centralising the relevant information, at least when they concern acts of corruption or related infringements."*[159]

Paragraph 2 reflects above observations by GRECO. It also ensures that the testing body receives feedback on whether disciplinary bodies considered evidence to be unclear, inconclusive, or otherwise insufficient. By this, the testing body can improve testing scenarios and train its employees.

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[157] Venice Commission (2015), ibid, 76.

[158] GRECO (2012), *Lessons learnt from the three evaluation rounds (2000-2010)*, p.16, available at www.coe.int, accessed 24 April 2016.

[159] Ibid.

Article 14 – Repeated testing

(1) *[Time limit]* **The testing body can repeat the integrity test within one year after the public institution having received the report under Article 11 paragraph 1.**

(2) *[New grounds]* **The testing body can carry out further tests in case grounds for initiation under Article 7 persist or arise anew after the time-limit in paragraph 1.**

Commentary

Regarding the frequency of integrity tests regarding one and the same institution and its employees, the Venice Commission has recommended limiting discretion.[160] **Paragraph 1** serves this purpose: the testing body can conduct a test maximum two times, no matter whether integrity violations occurred or not. The second possibility of the test is necessary as otherwise the public institution could feel safe once it learns it "passed" a test.[161]

Outside this limit, only if new grounds for testing arise, **paragraph 2** opens the possibility of a new test. This is for example the case, if one year after the test the Court of Auditors finds indications of systemic embezzlement in a public institution.

Chapter IV: Oversight

Article 15 – Ex officio judicial control

(1) *[Scope]* **The initiation of integrity tests and their implementation are subject to ex officio judicial control [to be specified: ex ante or ex post, for a sample or for an aggregation of cases] by the [specified] competent court.**

(2) *[Evidence]* **The court may review all evidence, including the original audio/video recordings, the testing plan (Article 7 paragraph 3), or testimony by the testers. General procedural rules including on examining confidential evidence apply.**

(3) *[Decision]* **In case the court finds minor non-compliances with regulations, it renders a declaratory judgment served to the testing body. Purely formal violations not infringing the human rights of the tested subject are minor violations. In case the court finds substantial violations of the rights of tested subjects, it renders the test void and informs the tested subject. The tested subject's right under Article 16 remains unaffected.**

(4) *[Transparency]* **The testing body regularly publishes statistical information on the outcomes of judicial oversight [frequency to be defined].**

Commentary

None of the countries with long tradition of **rule of law**, such as Australia, United Kingdom, or the United States feature ex-ante or ex-post judicial control as an integral part of their administrative testing programmes. Judicial control comes only into play, once a tested person challenges a consequence of the test in court. As far as can be seen, there are no upper court decisions so far in these countries on the legality of their testing programme as such.

As noted already above (Article 10), the Venice Commission has found it "**problematic**" where "integrity checks do not require judicial authorisation. This is [...] in that the integrity checks which

[160] Venice Commission (2015), ibid, No. 67 and 90: "the Draft Law might contradict this requirement, because it does not set any limits to the discretion of the person carrying out the check and the coordinator to determine the subject and frequency of the check, thus providing no guarantees against the abuse of the power."

[161] See above section 1.3.1 at footnote 23.

also involve audio/video recording, may encroach upon the person´s right to privacy granted by Article 8 ECHR."[162] The Commission also observed that "the European Court [...] has left a space for undercover operations to take place **without** judicial pre-authorisation. In such cases, however, 'a clear and foreseeable procedure for authorising investigative measures, as well as their proper supervision, should be put into place in order to ensure the authorities' good faith and compliance with the proper law-enforcement objectives'."[163] In the one case the ECtHR had to decide on random integrity testing, the Court did not raise any concern regarding the fact that the test was authorised "only" by a prosecutor, and only one month after the test was conducted.[164]

In short, it is probably fair to say that judicial authorisation is not an indispensable feature; however, the higher the intensity of judicial oversight, the lesser the risk there is for an integrity testing law to receive criticism from a human rights perspective. Thus, Article 15 **paragraph 1** leaves it up to national legislators if, at what time, and to what degree they want to involve the judiciary in overseeing integrity tests.

From the perspective of **effectiveness**, the opposite dynamic is probably true: the lesser outside stakeholders are involved in integrity testing, the lesser the risk that details on timing, location, and scenarios of future tests will be leaked. This risk is rather low in case of **ex-post** review. At the same time, ex-post review could have an intense coverage by looking individually into all testing cases carried out. Ex-post review could be done within a set time-limit following the test, or within regular intervals, such as quarterly, covering all tests that occurred within that time. The ex-post review could be for the testing body an incentive for exercising caution when implementing the tests.

In the case of **ex-ante** review, the risk of leaking information could also be minimised by limiting the review to samples of cases, or by leaving certain information out of the (ex-ante) review, such as timing and location of the tests. Entrusting oversight to a **specialised court** might also be an option, where there is not sufficient trust in the integrity and confidentiality of the general judiciary. This can be an option where it seems realistically possible to create an "island of integrity"[165] within a corrupt judiciary.

Paragraph 2 should go without saying. In order to avoid any discussion the paragraph makes it clear that the court has full access to all evidence. This might be important if, for example, the authenticity of the recording is at question. Legal drafters might want to reference the applicable procedural law, such as the code of administrative court procedure.

Paragraph 3 links the ex-officio judicial control with individual complaints of tested persons. Tested persons might not know their rights have been violated until the court informs them. They might have an interest of pursuing additional action under Article 16 if they feel the need for a remedy going beyond the already existing court decision.

Paragraph 4 sets an incentive for the testing body to comply with all regulations and to stay clear of violating the rights of tested subjects. Anything but a 100% compliance rate will risk harming the public reputation of the testing body.

Article 16 – Judicial complaints

(1) *[Recourse]* **Should any person's rights be violated by any measure under this law, he/she may have recourse to the [specified] court according to the [specified] law.**

[162] Venice Commission (2015), ibid, No. 69.

[163] Venice Commission (2015), ibid, No. 72.

[164] Rotaru v. Roumanie, ibid, § 6.

[165] Transparency International created the concept of "Islands of Integrity" in the mid-1990's; ever since, international organisations have taken it on, see for example: UNODC (2004), *UN Anti-Corruption Toolkit*, p.56, available at www.pogar.org, accessed 24 April 2016.

(2) *[Evidence]* **Article 15 paragraph 2 applies.**

Commentary

Article 16 reflects a fundamental right all citizens have in a state of rule of law: In principle, they have the right to judicial redress whenever the state violated their rights. The competent courts in such cases are often the **administrative** courts, with the law of administrative court procedure applying. The referenced procedural law will define the various forms of judicial redress and the requirements for a complaint.

Judicial complaints may not only concern the way an **integrity test** was conducted. They may also concern other aspects, such as for example data protection under Article 20. In this regard, Article 16 aims at an all-inclusive basis for judicial recourse.

Article 17 – Parliamentary control

The testing body shall submit annually to Parliament a public report including information on

(a) *[Institutions]* **the institutions tested;**

(b) *[Tests]* **the results of the tests;**

(c) *[Measures]* **the measures taken by institutions to address integrity violations;**

(d) *[Discipline]* **statistics and challenges related to disciplinary sanctions.**

Commentary

Parliamentary control can be an additional or alternative feature of oversight. Where a country opted already for example for ex-officio judicial oversight, additional parliamentary control would not seem to be indispensable, though. Compared with judicial oversight, parliamentary control is probably the rather **weaker** option. Parliamentary review usually goes less into detail, does not review case-by-case, and does not involve judicial expertise to the same extent as in court. However, a confidential specialised parliamentary committee might be able to achieve a higher level of review than a standing committee, where the review will be just one of many other items on the agenda. The comments regarding confidentiality (see under Article 15) apply *mutatis mutandis*.

Subsections **(a)** to **(d)** contain an example of what information parliament might receive on integrity tests. Legal drafters have wide discretion in how much information they intend to be available.

Subsection (b) does not list the **number** of tests. This can be an important detail. If the actual number of tests is not known by the general public, the preventive effect of integrity testing could be much stronger: five actual tests could create the same incentive for public servants to comply with integrity rules, as could do 500 or 5,000 tests – as long as public servants to not know the exact number.

Subsections (c) and **(d)** are an important feature in order to inform the public and to set an **incentive** for public institutions to pursue disciplinary proceedings seriously.

Article 18 – Civil society control

(1) *[Integrity trends]* **The testing body shall regularly release data on trends and patterns of integrity as derived from the tests, and the percentages of tests with and without violation of integrity rules.**

(2) *[Recordings]* **The testing body shall publish selected audio and video recordings in order to inform the public on the practice of integrity tests.**

(3) *[Anonymization]* R**ecordings published under paragraph 1 fully anonymize individual persons, unless they consent.**

Commentary

The Council of Europe "**Twenty Guiding Principles** for the Fight against Corruption" recommend "to raise public awareness and promoting ethical behaviour" (Principle 1). Similarly, Article 13 paragraph 1 UNCAC calls on member States "to raise public awareness regarding the existence, causes and gravity of and the threat posed by corruption".

Paragraph 1: Releasing data on the results of integrity testing informs the public on the effectiveness of this tool. It also informs the public on how public institutions live up to their integrity obligations. Above section 1.3 on foreign practices shows examples where data on the testing results being available to the public.

Integrity testing programmes can create a lot of myths, even before their implementation starts. The main reason is their secrecy. This will give cause to all kinds of speculations – What do the tests look like? Who are the testers? How many testers and tests are there? Which institution will be up next for a test? Such myths can create a "healthy paranoia" reminding public servants of their integrity obligations. However, myths should not go as far as alienating the public towards the tests. On the contrary, it is important to actively inform the public at large to buy in support and acceptance of this tool, and to be accountable to citizens. **Paragraph 2** serves this purpose.

Paragraph 3: Obviously, published recordings cannot show any individual identity, unless these people consent. Otherwise, disclosing the video would violate their privacy and their right to control their personal data. Public institutions, by contrast, do not have a right to privacy as natural persons have. Therefore, the recordings can indicate at which institution it took place. This could inform the public on specific patterns of corruption at specific public institutions.

Published recordings may not allow the viewer or listener to gather from the recording the identity of an individual person. This means, for example, that voices have to be **distorted** or to be replaced by **subtitles**.

Chapter V: Confidentiality and data protection

Article 19 – Confidentiality

(1) *[Scope]* **The following are confidential information, which are only disclosed to the stakeholders and limits defined by this law:**

- **(a) The identity of testers;**
- **(b) The testing plans;**
- **(c) The testing reports;**
- **(d) The audio or video recordings.**

(2) *[Total numbers]* **The total number of testers and tests performed is not disclosed beyond the testing body.**

Commentary

Integrity tests depend on the confidentiality of the undercover testing scenarios. If any of the information listed in paragraph 1 was leaked to testing subjects or, worse, to the public, the effectiveness of tests would take serious harm. Therefore, this legislative toolkit allows only for narrow disclosure:

- To the extent they deem the evidence relevant for an individual case, judges can review the **testing plan** or call the testimony of a **tester** (Article 15 paragraph 2).
- The head of the relevant public institution and any public servant concerned receive the **testing report** (Article 12). In the framework of judicial oversight, a judge can review the report as well (Article 15 paragraph 2).
- The head of the relevant public institution, any public servant concerned, his/her legal representative, an expert witness, and a judge can examine the audio or video **recordings** (Article 12 paragraph 4). Selected anonymized versions are also available to the public (Article 18).

Article 19 tries to find a balance between two But, (ii) sees it can be a limiting factor when tackling more serious cases of corruption with individuals who are familiar with covert tactics and may lead to a false read on the deployed Test.
It also gives rise to the likelihood of compromise of assets, both physical and technical and increases the risk during deployment. In terms of organizational and reputational risk it also limits the effectiveness of the response as corrupt employees will establish workarounds to cheat Integrity Tests.

Article 20 – Data protection

(1) *[Time limits]* **The testing body and the tested institution store the audio/video recordings (Article 11 paragraph 3 and 4) and any information on tested individuals in line with the applicable law on personal data protection and within the following time limits:**

(a) *[Positive result]* **In case no violation of integrity rules was found, until the court in Article 15 has reviewed the test by final decision, alternatively, until a [specified] number of years have elapsed;**

(b) *[Negative result]* **In case a violation of integrity rules was found, until a court has decided with final decision on the disciplinary consequences.**

(2) *[Destruction]* **After the deadlines in paragraph 1 have elapsed, the testing body and the tested institution destroy the recordings.**

Commentary

Audio and video recordings are **personal data** and as such protected under Article 8 ECHR (privacy). The Venice Commission noted in this context, "The storing of the data – without any distinction as to what type of data might have been recorded – could conflict with Article 8 ECHR, granting protection to the personal data. The ECtHR has repeatedly held that 'the storing by a public authority of information relating to an individual's private life amounts to an interference within the meaning of Article 8. The subsequent use of the stored information has no bearing on that finding'. Such interference can be justified, but only on the condition that sufficient guarantees against the abuse of the data exist."[166] Therefore, it is first of all important that data protection laws apply to the information stored. To this end, the Venice Commission recommended, "as a matter of legislative technique, [...] instead of formulating new data protection or state secrecy rules, [one] could refer to the already existing legislation on data protection for the protection of data obtained during the integrity checks."[167] Article 20 **paragraph 1** follows this approach. However, it is

[166] Venice Commission (2015), ibid, No. 73.

[167] Venice Commission (2015), ibid, No. 52.

necessary to define time limits for the storage of the recordings. Such specific time limits may not be included in general data protection laws. At the same time, it is important that personal data is not stored longer than necessary. Subsections (a) and (b) describe such necessary maximum time limits.

The time limits are only relevant for recordings containing personal data. This is the case for the **original** recordings as well as for the **redacted** version. Paragraph 1 therefore explicitly references Article 11 paragraph 3 and 4. For the **published** versions, no time limits apply; after the anonymization they do not contain any personal data anymore relevant for protection.

Annex I – Other regulatory issues

Articles 1 to 20 of this toolkit provide the essence of a comprehensive integrity testing regulation. Obviously, it is necessary to review a number of laws so they align with or support the integrity testing law. Among the issues to be considered are:

- **Conflict of interest** laws should cover the staff of the testing body. Conflict of interest laws will help staff to react properly when confronted with a close person during a test. It will also set clear limits on favouring close persons when initiating the tests.
- **Disciplinary law** needs to provide sufficient procedural rules for judges to review confidential evidence, such as testimony from undercover testers. As for the effectiveness of disciplinary laws, see comments under Article 13. See also comments related to Article 12 paragraph 5 and above section 1.1.3.
- **Professional rules** for integrity testers need to ensure that testers are bound by confidentiality beyond their active duty. This is important since testing tactics need to stay confidential. In practice, testers have been tempted to publish books filled with anecdotes of their often humorous or adventurous testing work. Such publications could do serious damage by providing public officials with intelligence on how to work around testing scenarios.

Annex II – Foreign legislation

Australia, New South Wales Police Act 1990:[168]

> *Section 207A Commissioner may conduct integrity testing programs*
>
> *(1) The Commissioner may conduct, or authorise any police officer or other person to conduct, a program (an "integrity testing program") to test the integrity of any particular police officer or class of police officers.*
>
> *(2) An integrity testing program may involve an act or omission (by a person who is participating in the program) that offers a police officer whose integrity is being tested the opportunity to engage in behaviour, whether lawful or unlawful, in contravention of the principles of integrity required of a police officer.*
>
> *(3) Any such act or omission is declared to be lawful, despite any other Act or law to the contrary, but to the extent only to which it occurs in the course of and for the purposes of the integrity testing program.*
>
> *(4) In particular, a police officer or other person who participates in any such act or omission is not guilty of any of the following:*
>
> > *(a) an offence against section 200 of this Act,*
> >
> > *(b) an offence against section 89 or 90 of, or corrupt conduct within the meaning of, the Independent Commission Against Corruption Act 1988 ,*
> >
> > *(c) an offence against section 109 or 110 of the Police Integrity Commission Act 1996 ,*
> >
> > *(d) an offence against section 93X, 314, 319, 323, 325 or 547B of the Crimes Act 1900 ,*
> >
> > *(e) an offence of conspiring to commit an offence,*
> >
> > *(f) an offence of aiding, abetting, urging, inciting, soliciting, encouraging, counselling or procuring the commission of an offence (in whatever terms expressed), including an offence against section 2 or 3 of the Crimes Prevention Act 1916 or section 351B or 546 of the Crimes Act 1900 .*
>
> *(5) Subsections (3) and (4) do not exempt a police officer or other person from liability in respect of any offence other than those referred to in subsection (4).*
>
> *(6) A certificate that is issued by the Commissioner, or by a Deputy Commissioner or Assistant Commissioner authorised by the Commissioner in that regard, being a certificate that states that, on a specified date or during a specified period, a specified police officer or other person was authorised to participate in an integrity testing program involving a specified act or omission is admissible in any legal proceedings and is conclusive evidence of the matters so specified.*
>
> *(7) The Commissioner is to furnish to the Police Integrity Commission, within 14 days after the end of each quarter, a report on all integrity testing programs conducted during that quarter. For the purposes of this subsection, "quarter" means a period of 3 months ending on 31 March, 30 June, 30 September or 31 December.*
>
> *(8) Such a report must be prepared in accordance with any guidelines established by the Police Integrity Commission and notified to the Commissioner.*

Republic of Moldova

[Unofficial translation of the revised Law provided by the Moldovan authorities in August 2014; an earlier version of the Law is available on the website[169] of the Venice Commission.]

[168] New South Wales Police Act 1990, *Section 207A*, available at www.austlii.edu.au, accessed 24 April 2016.

Law on Institutional Integrity Assessment
No. 325 dated 23 December 2013
Official Gazette No.35-41/73 dated 14 February 2014

* * *
CONTENT

Pursuant to Art. 72 para.(3) letter r) of the,
The Parliament adopts this organic law.

[169] Venice Commission *website*, available at www.venice.coe.int, accessed 24 April 2016.

Chapter I
GENERAL PROVISIONS

Article 1. Scope

This law sets forth the purpose, principles, means, methods, procedures, and legal effects of the institutional integrity assessment within public entities.

Article 2. Purpose of the institutional integrity assessment

The institutional integrity assessment is performed to:

a) increase the accountability of heads of public entities and self-governing bodies for developing, maintaining, and enhancing the professional integrity environment within public entities;

c) identify, assess, and remove corruption risks within public entities;

Note: Letters b) and d) art.2 are declared to be unconstitutional, according to the Decision of the Constitutional Court No.7 dated 16.04.2015, in force since 16.04.2015.

e) secure professional integrity of public agents, to prevent and combat corruption within public entities;

f) increase the denunciation of corruption acts by public agents.

Article 3. Principles

The institutional integrity assessment process shall be performed under the mandatory observance of the following principles:

a) legality;

b) observance of the fundamental human rights and freedoms, of human and professional dignity;

b^1) fair balance between the fundamental rights and freedoms of the citizens affected by public agents' corruption acts, on one hand, and the fundamental rights and freedoms of the public agents, on the other hand;

c) unbiased, equitable, and non-discriminatory treatment of the public agents subject to testing;

d) presumption of good faith of the assessment subjects;

e) presumption of institutional integrity of the public entities;

f) transparency of institutional integrity assessment results, with exceptions provided in the Law No. 245 dated 27.11.2008 on State Secret.

Article 4. Concepts

For the purpose hereof, the following concepts shall have the following meanings:

public agent – a person employed within a public entity and exercising a public function, a special status public function, a public dignity function, a person employed in the office of the person exercising a public dignity function or providing services of public interest;

public entity – legal entity with the status of:

a) public authority, central authority, specialized central public authority, local public authority, as well as the organizational structure under such authorities or from their area of competence;
b) state, autonomous, independent, self-governing and/or regulatory authority, institution, body, organization, office or agency;
c) Constitutional Court, court, Prosecutor's Office
d) state enterprise, with state majority capital or municipal enterprise.

services of public interest – performing activities for servicing the population in the public area, within institutions, enterprises, organizations, and other state structures, with state majority capital, municipal or local ones;

institutional integrity – professional integrity of all public agents from public entities, which is fostered, controlled, and enhanced by the heads of entities, as well as zero tolerance to public agents' corruption acts, by sanctioning their missing professional integrity;

professional integrity – performance of all professional activities by the public agent in an ethical manner, free of inappropriate influence and corruption acts, observing the public interest, supremacy of the Constitution of the Republic of Moldova and of the law;

institutional integrity assessment – the process of identifying corruption risks within public entities, assisted by analytical and practical methods (professional integrity testing), describing the factors determining the identified risks and their consequences, and providing recommendations for mitigating such risks, performed in compliance with the provisions set forth in this law;

corruption risk – possible even of corruption act occurrence, affecting the achievement of public entity's objectives;
risk factor – a circumstance of any type, allowing, encouraging, and provoking the occurrence of corruption acts within the public entities or perpetuating them;
professional integrity test – the creation and application by the tester of certain virtual, simulated situations, similar to those in the work activity, materialized through dissimulated operations, conditioned on the activity and behavior of the tested public agent, in order to passively monitor and establish the reaction and conduct of the tested public agent, hence determining the level of damage to the institutional integrity environment and the corruption risks of the public entity within the institutional integrity assessment;
professional integrity testing – all the processes related to performance of the professional integrity test, a stage of the institutional integrity assessment;
tester – person from the National Anticorruption Center and Security and Information Service empowered by this law and by special laws with duties and competences to perform the professional integrity tests;
integrity incident – corruption act occurred in real circumstances, any other deed similar to the corruption act, occurred during a professional integrity test;
corruption acts – corruption deeds, corruption related acts and corruption behavior acts, specified in the Law No. 90 dated June 13, 2008 on Preventing and Combating Corruption;
integrity plan – internal plan adopted under the conditions of this law by the head of the public entity and/or self-governing body, as a result of the institutional integrity assessment, through which the institutional integrity environment may be developed and/or enhanced during the implementation period;
inappropriate influence – interference in the public agent's professional activity from third parties manifested through pressure, threats or requests in order to determine the respective public agent to perform his/her professional activity in a certain way, whenever the given interference is illegal and is not accompanied by promising, offering or giving, personally or through an intermediator, goods, services, privileges or advantages in any form, which are not due to him/her (does not meet the elements of an offense).
Note: In article 4 the text "justified risk – risk without which the socially useful purpose to objectively set the public agent's conduct within the professional integrity test cannot be reached, and the professional integrity tester who risks took measures to prevent damages of the interests protected by law" is declared unconstitutional, according to the Decision of the Constitutional Court No.7 dated 16.04.2015, in force since 16.04.2015.

Article 4[1]. Institutional integrity environment
(1) The public entities shall perform their activity in the public interest, ensuring the institutional integrity environment. The public agents shall exercise their duties with professional integrity.
(2) The institutional integrity environment shall be secured through enforcement of national and sector anticorruption policies, as well as of specific professional integrity requirements for the activity of the public agents within public entities. The following shall be deemed as national and sector anticorruption policies securing the institutional integrity environment:
a) employment and promotion of public agents on merit and professional integrity basis;
b) regime of incompatibilities, restrictions in hierarchy and limitations of publicity;
c) regime of property and personal interests' declaration;
d) regime of conflicts of interest;
e) avoidance of favoritism;
f) regime of gifts;
g) denunciation and treatment of inappropriate influences;
h) denunciation of corruption acts and protection of integrity denunciators;
i) non-admission of corruption acts;
j) transparency in decision-making process;
k) access to information of public interest;
l) transparent and responsible management of public patrimony, reimbursable and non-reimbursable finances;
m) professional ethics and deontology;

n) regime of restrictions and limitations related to termination of the mandate, work relations, duty relations, or migration to the private sector of the public agents (revolving doors).
(3) The provisions of para. (2) shall be applied appropriately for different categories of public agents, with the derogations provided by the special laws regulating the respective activity.
(4) The specific requirements of professional integrity for the activity of public agents from public entities shall be adopted through departmental acts of the public entities, which cannot provide for other derogations than those set forth in para. (3) or less rigorous behavioral standards for the heads of public entities and public agents than those provided by the national and sector anticorruption policies.
(5) The public entities shall determine the institutional policy for sanctioning any professional integrity lacking behavior of public agents, in compliance with the provisions of the legislation in force, aiming to discourage other public agents from such behavior in future.

Article 5. Subjects of institutional integrity assessment
(1) Public entities, self-governing bodies, public agents, the National Anticorruption Center, and the Security and Information Service shall be subjects of the institutional integrity assessment.
(2) The institutional integrity assessment shall be applied for public entities, providing the possibility to apply the professional integrity tests for public agents.
(3) The institutional integrity assessment and the professional integrity tests shall be performed by the National Anticorruption Center and Security and Information Service, involving testers.

Article 6. Rights and obligations of public agents
(1) Public agents shall be entitled:
a) to be informed about the specific professional integrity requirements for the public agents within public entities, as well as about the disciplinary sanctions which may be applied for nonobservance of such requirements, in compliance with the provisions set in art. 4^1;
b) to be informed about the integrity plan of the public entity, adopted after announcing the institutional integrity assessment results;
c) to be informed about the integrity tests performed in relation to them;
d) to challenge in the court the application of the integrity test performed in relation to them.
(2) Public agents shall have the following obligations:
a) not to admit corruption acts;
b) to denounce immediately to the competent bodies any attempt of being involved in the actions provided under letter a);
c) to know and to observe the duties they have to perform according to the national and sector anticorruption policies, provided under art. 4^1;
d) to know and to observe the specific professional integrity requirements for the activity of public agents within public entities, about which they were informed;
e) to perform the measures set forth in the integrity plan, adopted by the public entity, or, as appropriate, by the self-governing body, as a result of the institutional integrity assessment.

Article 7. Rights and obligations of public entities and self-governing bodies
(1) Public entities and self-governing bodies shall be entitled:
a) to be informed, within the deadlines provided herein, about the results of the institutional integrity assessment and application of professional integrity tests in relation to the public agents for whose ethics and discipline they are responsible for.
b) to deem the positive result of the professional integrity test as an additional reason to promote the public agent, without disclosing such reason.
(2) Public entities and self-governing bodies shall have the following obligations:
a) to foster the institutional integrity environment, as it is set forth in Article 4^1.
a^1) to inform the public agents about the specific professional integrity requirements for the activity of public agents within public entities, as well as about the disciplinary sanctions which may be applied for non-observances of such requirements, in compliance with the provisions set in art. 4^1;
a^2) to inform the public agents, with a signature-based confirmation, about the possibility to be subject to the professional integrity test. Such information shall be provided upon the appointment of the newly-employed public agents; and for the public agents employed upon the coming into force of this law – within the deadlines set in the final and transitory provisions. The non-

information of the public agent by the public entity or the non-signature of the information confirmation by the public agent based on this law shall not be a barrier to perform the professional integrity tests in relation to such a public agent, to undertake the institutional integrity assessment of the public entity, as well as to apply the disciplinary sanctions in compliance with the legislation in force;
a^3) to adopt, secure, and report the implementation of the integrity plans within the deadlines set in this law;
a^4) to inform the public agents about the performed professional integrity tests concerning them;
a^5) to take the necessary measures concerning the public agents who underwent the testing, based on the qualification of the behavior they proved to have during the test and the evidences confirming it;
b) to ensure the access of the institution assessing the institutional integrity to all the registers and record forms fostering the institutional integrity environment provided in art.4^1, including in electronic format, as well as to any other necessary information under the conditions and limits set in letter e) Article 6 of the Law No. 1104 dated June 6, 2002 on National Anticorruption Center and letter j) para. (1) Article 9 of the Law No. 619 dated October 31, 1995 on State Security Bodies.
c) to allow withdrawal of the documents submitted to the public entity during the professional integrity test, of the audio-video recordings performed by the public entity during the professional integrity test, and to undertake other measures necessary to secure the confidentiality of testers, codifying documents, special means and techniques used during the professional integrity test.

Article 8. Rights and obligations of the institutions assessing the institutional integrity
(1) The institutions assessing the institutional integrity shall be entitled:
a) to determine, under the conditions of this law, the areas for performing the institutional integrity assessment, assessed public entities, categories of public agents from the public entities subject to random professional integrity tests, and frequency of assessments;
b) to organize and benefit from special trainings on methods and means applied within the professional integrity testing;
c) to use within the professional integrity testing documents encoding the identity of persons, structures, organizations, premises, and transportation means, as well as the identity of the persons set in art.12 para. (2);
d) to perform repeatedly an institutional integrity assessment of a previously assessed public entity in order to verify the progress for enhancing the institutional integrity as a result of the integrity plan adoption and implementation;
e) to suggest the hierarchically superior public entities or self-governing bodies to dismiss the heads of the public entities subject to repeated assessment provided in letter d), if the integrity plan failed;
f) to challenge the decisions of the public entities' heads in relation to the reports on institutional integrity assessment and the refuse of the hierarchically superior public entities to proceed with the proposal provided in letter e) in the administrative dispute court, observing the prior procedures.
(2) The institutions assessing the institutional integrity shall have the following obligations:
a) to ensure confidentiality of testers' activities, codifying documents, and special technical means used during the testing, except for the cases provided in this law;
a^1) to observe the regime of personal data protection, under the conditions set in the Law No. 133 dated July 8, 2011 on Personal Data Protection, except for the cases provided in this law;
b) to send to the heads of the public entities or, self-governing body, as appropriate, the full version of the report on institutional integrity assessment, according to the provisions set in art.13 para.(2^1) letter a);
b^1) to publically release the depersonalized version of the report on institutional integrity assessment results, according to the provisions set in art.13 para. (2^1) letter b), simultaneously with sending the full version to the public entity or to the self-governing body, as appropriate;
b^2) to publically release the full version of the report on institutional integrity assessment results, according to the provisions set in art.13 para. (2^1) letter a), if the assessed public entity has no hierarchically superior entity, as well as if the integrity plan adopted by the self-governing body failed;
c) to undertake all the measures to prevent the eventual negative consequences for third parties in relation to the performance of the professional integrity test;

d) to ensure the destruction of the audio/video recordings performed during the integrity test within the deadlines set in art. 18 para. (1);
e) to adopt and publish the methodology for identification of corruption risks and analysis of risk factors, within the institutional integrity assessment.
(3) The obligations of the institutions assessing the institutional integrity shall duly cover the testers and the persons analyzing the corruption risks within public entities.

Article 8[1]. Testers' integrity
(1) The institutions assessing the institutional integrity shall ensure testers' integrity, adopting internal policies for this purpose, in compliance with the provisions set in this article.
(2) The candidates for tester's position shall be subject to a prior special control, mandatory polygraph testing, and psychological tests related to the integrity of their professional past, in order to establish existing inappropriate motivations to perform the activity of professional integrity testing, and other relevant aspects stated in the internal policies.
(3) To ensure objectiveness and to conspire the professional integrity testing activities, the testers shall be subject to periodical polygraph verifications, psychological verifications, lifestyle monitoring, and professional integrity tests, according to the competences set in art.5, as well as according to the extended obligation to state the potential personal interests and conflicts of interest, in relation to the general legal regime applicable to public agents.
(4) The extended obligation to state the potential personal interests and conflicts of interest implies the obligation for the selected testers to submit a statement, under their own responsibility, regarding their previous jobs, kinship, friendship or hostility relations from their private lives with any public agents, whose testing falls under the competence of the institution they are a part of. The submitted statement shall be updated by the tester once biannually, as well as whenever the tester finds out that he/she is to perform a professional integrity testing of a public agent, the private life relations with whom were not included in the submitted statement and/or not updated previously. The respective statement shall be submitted to the testing activity coordinator, according to the template provided in the internal policies set forth in para. (1).
(5) If during the performance of the professional integrity test, the tester finds out that he/she knows in private settings the public agent subject to the respective test, and the tester did not know that the respective public agent works in the respective public entity, he/she shall undertake, if possible, actions to avoid the professional integrity testing of the respective public agent and to stop such testing, in order not to admit the testing activities' uncovering.
(6) The result of the professional integrity test performed in relation to a public agent with violation of provisions set in para. (4) and para. (5) shall be assessed by the specialized court as inconclusive, under the conditions set in art. 12[1].
(7) The tester using the materials accumulated during the performed professional integrity test for other reasons than those provided in this law shall be criminally or administratively liable for abuse of office, excess of duties, and other offences, as appropriate.
(8) The testers' integrity obligations provided in this article shall be applied accordingly to the testing activity coordinator as well.

Article 9. Guarantees and responsibilities
(1) In case the public agent's behavior is assessed as a negative result of the professional integrity test, the tested public agents shall be subject only to disciplinary liability, depending on the severity of the established deviations and in compliance with the legislation regulating the activity of the respective public entities, observing the provisions set in art. 16.
(2) The results and materials of the professional integrity test shall not be used as means of evidence in a criminal or minor offence trial against the tested public agent.
(3) The methods and means to test and set professional integrity tests shall not represent special investigation activities as provided by the Law No. 59 dated March 29, 2012 on Special Investigation Activity.
(4) The use of the professional integrity test materials in a civil trial shall be admitted as provided by the civil procedural legislation. The results of the professional integrity testing and the materials of the professional integrity test may be used as evidence in a civil trial if they are pertinent, admissible, veridical, observing the public interest, human rights and freedoms, and the declassification conditions.

Note: Paragraph (5) of art. 9 is declared unconstitutional according to the 7 dated 16.04.2015, in force since 16.04.2015
(6) By derogation from the provisions set in para. (2) of this article, if during the professional integrity test performance, the tester finds out real illegal activities carried out by tested public agents or third parties, which are not generated by application of the professional integrity testing plan, the institution performing the institutional integrity assessment shall notify the competent body for measures provided by the legislation in the area to be taken.
(7) The persons from the institution assessing the institutional integrity shall be liable for disclosing the confidential data provided in art.7 para. (2) letter b), the information related to private life beyond the professional activities of the public agent and for publishing the personal data in contradiction to the provisions set in art.8 para. (2) letters a) and a^1) which became available to them during the performance of the professional integrity tests.

Chapter II
INSTITUTIONAL INTEGRITY ASSESSMENT PROCEDURE

Article 10. Institutional integrity assessment initiation
The institutional integrity assessment shall be initiated by:
a) the National Anticorruption Center – regarding all the public entities under the jurisdiction of this law, except for the Security and Information Service;
b) the Security and Information Service – regarding the National Anticorruption Center;
c) the internal security subdivision of the Security and Information Service – regarding the Security and Information Service. In this case, the internal security subdivision of the Security and Information Service has the possibility to go through all the assessment stages provided in art.10^1 or only the stage of professional integrity testing of the public agents from the Security and Information Service.
Note: Paragraphs (2)-(3) of art.10 are declared unconstitutional, according to the Constitutional Court Decision No. 7 dated 16.04.2015, in force since 16.04.2015

Article 10^1. Institutional integrity assessment stages
(1) The institutional integrity assessment shall be performed through the following stages:
- Stage 1. Identification of corruption risks within the public entity;
- Stage 2. Testing the professional integrity of public agents;
- Stage 3. Description of corruption risks and analysis of factors generating such risks;
- Stage 4. Recommendations for improving the institutional integrity environment.

(2) Stage 1 shall be carried out based on the examination of the integrity incidents admitted by the public agents from the public entities; information sent by the citizens, materials from mass-media; analytical sources (reports, studies, surveys, indicators, etc.); as well as of the modalities affecting the human rights through the identified corruption risks.
(3) Stage 2 is an optional stage of the professional integrity test. The tester shall be responsible for performing this stage. The public agents to be subject to testing shall be selected on random basis, depending on the corruption risks identified in line with para. (2). The motivated decision to initiate the professional integrity testing of the public agents within a public entity shall be taken by the institution assessing the institutional integrity, with the endorsement of the specialized court, under the conditions set in art. 10^2, without prior information of the given public entity management or of the self-governing body, as appropriate.
(4) Stage 3 shall be carried out by describing the corruption risks identified during the stage 1 and, where appropriate, confirmed during the professional integrity testing in stage 2 of the assessment, as well as by analyzing the risk factors which increase the likelihood of such risks' materialization. The analysis shall be carried out according to the following risk factors' types:
a) external factors – risk factors which are outside the control of the public entity;
b) internal factors – organizational, control, and sanctioning risk factors which are under control of the public entity, which are the result of their action or lack of action;
c) operational factors – factors emerging during the activity of the public entity;
d) individual factors – factors which may motivate a certain public agent to admit corruption acts and to act contrary to the institutional integrity environment.

(5) Stage 4 implies setting some minimum requirements and meeting these requirements would allow the public entity to reduce the corruption acts among the public agents.
(6) If the institutional integrity assessment is performed without stage 2 of professional integrity testing, stages 3 and 4 shall follow the fulfilment of stage 1.

Article 10^2. Endorsement of the professional integrity test
(1) The decision to initiate the professional integrity test within the institutional integrity assessment shall be taken by the institution assessing the institutional integrity and endorsed by the specialized court. The decision to initiate the professional integrity test and the endorsement shall be confidential until the submission of the institutional integrity assessment report.
(2) The motivated decision to initiate the professional integrity test shall indicate:
a) the reasons for initiating the professional integrity test within the public entity;
b) the corruption risks identified within the public entity subject to assessment;
c) the objectives of the professional integrity testing of the public agents within the entity;
d) the criteria for selecting the public agents in the public entity to be subject to the professional integrity testing;
e) the possibility of using the audio/video recording means, communication means, and other technical means for obtaining information in a concealed way, as well as the possibility to offer, promise or send goods, services, provision of privileges and advantages, in order to capture the public agents' behavioral acts and not to disclose the testers' activity.

Article 11. Professional integrity test planning and fulfilment
(3) The professional integrity test plan is a confidential document, which is approved by the coordinator of the professional integrity testing activity, based on the motivated decision endorsed by the court according to art. 10^2 ; it shall contain the following information:
a) the initiator of the test and the motivated decision to initiate the test;
a^1) testing objectives;
b) testing subjects;
c) envisaged dissimulated operations;
d) place, duration, participations, and logistical assurance of the testing;
e) simulated virtual situations, behavior hypotheses and action options of the professional integrity tester and the tested public agent;
g) other information relevant for performing the test.
Note: Paragraphs (1), (2) and (4) of art.11 are declared unconstitutional, according to the Constitutional Court Decision No. 7 dated 16.04.2015, in force since 16.04.2015
(5) During the professional integrity testing, the testers shall undertake the necessary measures to support the simulated virtual situations, planned in line with para.(3) letter e), hence ensuring the fulfilment of the plan's provisions. Upon the request of the institution assessing the institutional integrity, other state institutions shall provide free-of-charge assistance to carry out the measures for supporting the simulated virtual situations.
(6) In certain contingencies, the testers may deviate from the approved plan, to the extent in which their actions contribute to the achievement of the testing objectives and do not lead to chancing the motivated decision endorsement conditions, set forth in art.10^2.
(7) If the contingencies emerged during the enforcement of the plan lead to identification of new corruption risks unforeseen in the motivated decision, the motivated decision completed with the new identified risks shall be endorsed by the specialized court within 3 working days since the occurrence of the respective contingencies. If the judge refuses to endorse, the materials accumulated by the tester in the given contingencies shall be destroyed, except for the cases when these materials are necessary for the purpose of art. 9 para. (6).
(8) If needed, when performing the professional integrity testing, the testers shall collaborate with the representatives of the public entities in which the tested public agents work, under the conditions of this law and of the special rules regulating the cooperation in the area.

Article 12. Means and methods to test and set professional integrity tests
(1) The testers shall perform their activity on confidential basis. They may use for this purpose the means and methods set forth in art.8 para. (1) letter c).

(2) In exceptional cases, other persons may participate in performing the professional integrity testing, with the prior approval and guarantees that they will not disclose the performed activity.
(2^1) The professional integrity tests shall be performed observing the fundamental rights and freedoms of the public agent. The possibility to restrict such rights and freedoms during the professional integrity testing shall be provided in the motivated decision to initiate the professional integrity test, endorsed by the judge under the conditions set in art. 10^1 para. (3).
(2^2) During the professional integrity testing of judges, the institutions assessing the institutional integrity and the testers shall observe the guarantees of judges' independency, being prohibited to interfere in justice application in real cases trialed in courts.
Note: Paragraphs (3)-(6) of art.12 are declared unconstitutional, according to the Constitutional Court Decision No. 7 dated 16.04.2015, in force since 16.04.2015
(7) To capture the behavior of the public agent under the professional integrity testing, there shall be used means for audio/video recording, communication means, other technical means for obtaining information in a concealed way, held by the institutions assessing the institutional integrity or from other sources, and the possibility to send the goods, to provide services, to grant privileges and advantages shall be provided only if it is reflected in the motivated decision to initiate the professional integrity testing, endorsed by the judge under the conditions set in art. 10^2.

Article 12^1. Assessing the result of the professional integrity test
(1) The situation when the public agent proves to have professional integrity, observing the obligations set forth in art. (6) para. (2) letters a)-c), shall be considered as positive result of the professional integrity test; the situation when the obligations are not observed shall be considered as negative results, and the situation when the behavior of the public agent can be classified neither as positive result nor as negative result, as well as the situation when the integrity test was performed with violations of the provisions set in this law shall be considered as inconclusive.
(2) The materials of the professional integrity tests shall be verified by the judge from the specialized court which has endorsed the decision to initiate the testing. While verifying, the judge shall review how the tester has observed the motivated decision to initiate the test, shall confirm or change the proposal of the institution assessing the institutional integrity regarding the assessment of the tested public agent's behavior, and shall determine the test results in compliance with the provisions set forth in para. (1).
(3) The judge shall decide upon the assessment of the public agents' testing results as positive, negative and inconclusive through a decision. At the same time, the judge shall decide within the same decision or another decision for the tested public agents to return / voluntarily recover the assets, according to the situation set forth in art.16 para.(5).
(4) Upon the request of the institution assessing the institutional integrity, the judge shall solve via a decision any other situation emerged during the professional integrity testing, in order to secure the observance of fundamental human rights and freedoms, not to disclose the identity of the testers and to conspire the testing activity.

Article 13. Report on institutional integrity assessment results and evidence-bearing materials
(1) After passing through all the stages set forth in art. 10^1, the institution assessing the institutional integrity shall compile a report on assessment results, which will cover the following information:
a) the initiator of the institutional integrity assessment and the assessment stages;
b) the corruption risks affecting the activity of the public entity;
c) the findings regarding the integrity environment in the public entity, in line with the provisions set in art. 4^1;
d) the integrity incidents admitted by the public agents;
e) the results of the professional integrity testing of public agents, describing the performed testing activities according to the test plan, as well as the behavior and actions of the public agents during the testing;
f) how the human fundamental rights and freedoms are affected by the corruption acts in the public entity;
g) recommendations / minimum requirements for removing the corruption risks.
(2) The report drafted under the conditions of para. (1) shall be compiled so as not to allow the disclosure of the persons involved in performing the professional integrity test, the forces, means,

sources, methods, and activity plans of the National Anticorruption Center and of the Security and Information Service, as well as other information with limited accessibility.
(2^1) The report mentioned in para. (1) shall be concluded in two versions:
a) full version, containing data about the tested public agents' identity;
b) depersonalized version, without including data about the identity of tested public agents, such as name, surname, as well as other data leading to public agents' identification.
(3) The original audio/video recordings performed during the integrity testing shall be annexed to the full version of the report concluded under the conditions set in para. (1) and shall be kept, on mandatory basis, together with the full version of the report in the institution which has carried out the institutional integrity assessment.
(4) The full version of the report on institutional integrity assessment results shall be submitted to the head of the public entity or to the self-governing body, as appropriate, within three working days since the moment the report is finalized. At the same time, the copies made under the conditions set in art.14 para.(8) of the original audio/video recordings and other materials confirming the negative results of the professional integrity test shall be also submitted, with the note about their confidential nature and the liability for disclosing other persons than those mentioned in art. 14 para. (8^1).
(5) The depersonalized version of the report on institutional integrity assessment results shall be released publically on the webpage of the institution which has performed the institutional integrity assessment, alongside the submission of the full version of the report, under the conditions set in para. (4).
(6) By derogation from the provisions set in para. (5), the full version of the report on institutional integrity assessment results shall be published on the webpage of the institution which had assessed the institutional integrity of the public entities which do not have a hierarchically superior public entity, and for whose public agents the legislation does not provide the possibility of being held disciplinary liable, as well as in the situations set forth in art. 15 para. (6).

Chapter III
CONSEQUENCES OF THE INSTITUTIONAL INTEGRITY ASSESSMENT AND PROFESSIONAL INTEGRITY TEST

Article 14. Public entity's actions after receiving the institutional integrity assessment report
(1) The public entity or the self-governing body, as appropriate, shall review the institutional integrity assessment report immediately after submission.
(2) If the institutional integrity assessment report determines corruption risks in the public entity, the public entity or the self-governing body, as appropriate, shall adopt an integrity plan within one month since the day the report was submitted.
(3) The integrity plan shall be implemented within two months since the day it was adopted, ensuring at least the fulfilment of the recommendations / minimum requirements formulated in the institutional integrity assessment report. The integrity plan shall cover:
a) corruption risks (according to the report);
b) actions for reducing / excluding the risks;
c) deadlines;
d) indicators;
e) responsible people.
(4) For the corruption risks described in the institutional integrity assessment report, the occurrence of which is determined by external risk factors, the public entity or the self-governing body, as appropriate, shall include indirect actions preparing the mitigation of such risks in the integrity plan.
(5) During the development of the integrity plan, the public entity or the self-governing body, as appropriate may organize consultations with the civil society. The institution which has assessed the institutional integrity shall provide, upon request, methodological support for the given process. The responsibility for adopting and implementing the integrity plan belongs exclusively to the public entity or self-governing body, as appropriate.
(6) Upon the expiration of the deadline set in para. (3), the public entity or the self-governing body, as appropriate, shall conclude a report regarding the implementation of the integrity plan, which should be published on its webpage and sent to the institution which has performed the institutional integrity assessment.

(7) Within 60 days since the receipt of the institutional integrity assessment report, the public entity or the self-governing body, as appropriate, shall examine the materials confirming the negative result of the professional integrity test, sent under the conditions set in art.13 para.(4) and shall inform the institution which has assessed the institutional integrity about the undertaken measures and applied sanctions, providing a copy of the respective decision.
(8) To ensure confidentiality and conspiracy, the copy of records sent to the public entity or self-governing body, as appropriate, for confirming the negative results of the professional integrity test, may present the image and the voice of other persons than the tested public agent, the images of cars, places, and other backgrounds, as well as the sounds of recorded circumstances in such a way so as not to be recognized.
(8^1) While reviewing the materials provided under para. (8), the public entity or the self-governing body, as appropriate, shall ensure the access of the tested public agent or his/her representative, as appropriate, and of the specialized court to the materials sent by the institution which has performed the institutional integrity assessment.
(9) If the head of the public entity or a member of the respective entity's disciplinary body is in a direct kinship relation or affinity relation up to the fourth degree with the public agent subject to the professional integrity testing, the report about the negative result of the professional integrity test shall be communicated to the head of the hierarchically superior entity, who will take a decision on applying disciplinary sanctions to the tested public agent.
(10) After receiving the report on institutional integrity assessment, when taking the decision on promoting the public agents subject to the professional integrity testing, the public entity or the self-governing body, as appropriate, shall take into consideration the test results.

Article 15. Repeated institutional integrity assessment. Consequences of integrity plan failure
(1) Upon receipt of the report on implementation of the integrity plan, the institution which has performed the institutional integrity assessment shall assess the progress achieved in enhancing the institutional integrity environment of the public entity, verifying if the institutional integrity plan was successfully implemented or failed. For the purpose of creating and continuously maintaining the institutional integrity environment, the public entities shall be subject to periodical institutional integrity repeated assessments, carried out in line with the provisions set in Chapter II; the number of such repeated assessment is unlimited.
(2) The implementation of the integrity plan shall be deemed as successful in the following cases:
a) if all or majority of measures included in the plan were fulfilled, with some exceptions, due to reasons outside the control of the public entity;
b) if the results of the repeated institutional integrity assessment of the public entity reveals the non-involvement of the public agents in corruption acts, less involvement of public agents in such acts as compared to the results of the previous assessment, but in any case does not denote a higher involvement than the level set in para. (3) letter c).
(3) The integrity plan shall be deemed failed in the following cases:
a) if the plan is not adopted within the set deadlines;
b) if the measures included in the plan are not fulfilled due to reasons under the control of the public entity;
c) if at least one third or more public agents are involved in corruption acts and this is revealed during the repeated institutional integrity assessment.
(4) If the integrity plan implementation failed, the institution which assessed the institutional integrity shall ask the hierarchically superior public entity to apply disciplinary sanctions, including the sanction of dismissing the head of the public entity. The limitation period for applying the disciplinary liability shall start since the receipt of the request.
(5) The refuse of the hierarchically superior public entity to apply the disciplinary sanction requested by the institution assessing the institution integrity under the conditions set in para. (4) may be challenged in the specialized administrative dispute court, observing the prior procedure. The challenge of the refuse in this case shall suspend the limitation period for the disciplinary liability.
(6) If the integrity plan adopted by the self-governing body of the public entity subject to repeated institutional integrity assessment failed, the full versions of the initial and repeated, as appropriate, institutional integrity assessment reports shall be deemed as being of public interest and shall be published on the webpage of the institution assessing the institutional integrity.

Article 16. Consequences of the negative result of the professional integrity test
(1) The disciplinary sanctions as a result of the negative result of the professional integrity test, including the dismissal of the tested public agent, shall be applied according to the legislation regulating the activity of the public entity where the respective public agent works. The limitation period for applying the disciplinary liability shall start since the receipt of the institutional integrity assessment report.
Note: Para. (2) art.16 is declared unconstitutional, according to the Constitutional Court Decision No. 7 dated 16.04.2015, in force since 16.04.2015
(3) As of the date of receiving the institutional integrity assessment report containing the negative results of the professional integrity test until finishing the disciplinary procedures, the public agent may not be dismissed based on the resignation application or transferred based on the transfer request.
(4) When finalizing the disciplinary procedure, the employees of the public entity in which the tested public agent works shall be informed about the main aspects established during the testing process and about the applied sanctions.
(5) The goods received during the professional integrity testing or their equivalent value shall be returned /recovered by the tested public agent who received them.
(6) The record regarding the professional integrity of the public agents shall be kept by the National Anticorruption Center and Security and Information Service, which shall issue information upon request. The purpose of the integrity record, as well as the situations when the employer request the information from such records, shall be provided in the Regulation on keeping and using the respective record, which is approved by the Government.
(7) The information about the negative results of the professional integrity test, assessed according to the provisions of art.12^1 shall be kept in the public agents' professional integrity records for:
a) 5 years – regarding the violation of art.6 para.(2) letter a);
b) 1 year – regarding the violation of art.6 para.(2) letters b) and c).

Article 17. Challenge of applied disciplinary sanctions
(1) The disciplinary sanction applied further to the negative result of the professional integrity test may be challenged by the tested public agent in the administrative dispute court, as provided by the legislation.
(2) The disciplinary sanction applied to a judge further to the negative result of the professional integrity test may be challenged according to the provisions set in the Law No.178 dated July 25, 2014 on Judges' Disciplinary Liability.
(3) The challenge of the disciplinary sanctions set forth in para. (1) and (2) shall suspend the limitation period of the disciplinary liability.
(4) The competence to examine the challenges submitted according to this article in the administrative offence regime belongs to the specialized court. The judge who has endorsed the decision to initiate the test and who has verified the test results cannot participate in examining the challenge.

Article 18. Keeping the recordings performed during the professional integrity tests
(1) The audio/video recordings performed during the professional integrity testing shall be kept observing the rules for personal data protection, as set forth in the Law No. 133 dated 08.07.2011 on Personal Data Protection:
a) in case of a positive result – until the information of the employees working in the public entity the public agent subject to testing is part of;
b) in case of a negative result – until the court decision remains final and irrevocable or until the expiry of the limitation period for challenging the sanction, if the institution which has performed the professional integrity testing holds no information on a possible challenge.
(1^1) If the recordings set forth in para.(1) contain state secret information, the keeping and management of such materials shall be performed in line with the legislation on state secret protection.
(2) After the expiry of the deadlines established in para. (1), the original copy of the audio/video recordings performed during the professional integrity testing shall be destroyed by the institution

which has performed the institutional integrity assessment, and the copies made under the conditions set in art. 14 para. (8) shall be destroyed by the public entities or the self-governing bodies, as appropriate, which have received them.
(3) In case of violation of the regime set for keeping, accessing, and destroying the audio/video recordings performed during the professional integrity testing, the liability for violation of provisions set forth in the Law No. 133 dated 08.07.2011 on Personal Data Protection or the Law No. 245 dated 27.11.2008 on State Secrete, as appropriate, shall arise.

Chapter IV
CONTROL AND FINANCING OF INSTITUTIONAL INTEGRITY ASSESSMENTS

Article 19. Parliamentary control over the institutional integrity assessment activity
(1) The parliamentary control over the institutional integrity assessment activity shall be exercised by the National Security, Defense and Public Order Commission and the Legal, Appointments and Immunity Commission.
(2) The National Anticorruption Center and the Security and Information Service shall submit to the commission mentioned in para.(1), on annual basis, until March 30, a public report on institutional integrity assessment activities, to include:
a) the number of public entities subject to the institutional integrity assessment;
b) the number of performed professional integrity tests and their results;
b^1) the number of integrity plans adopted and implemented with success or failed;
c) the number of challenges related to applied disciplinary sanctions.
(3) The National Security, Defense and Public Order Commission and the Legal, Appointments and Immunity Commission may request, within their competence limits, any additional information on the activity of institutional integrity assessment of public entities and the professional integrity testing of public agents, if they consider that the submitted reports are incomplete.

Article 19^1. Judicial control over the professional integrity testing activity
(1) The endorsement of the professional integrity testing activity, the verification over observance of the endorsement conditions for assessing the results of the professional integrity tests, examining the challenges related to professional integrity test performance and disciplinary sanctions as a result of such testing negative results, as well as the refusal to apply disciplinary sanctions as a result of failed integrity plan shall be under the judicial control, being ensured by the specialized courts.
(2) The selection and appointment of judges from the specialized courts shall be carried out by the Superior Council of Magistrates based on the Regulation approved by this Council after consultation with the National Anticorruption Center. The following rules shall be observed during the selection and appointment of judges:
a) the selected judges should have unimpaired reputation;
b) the judges should be appointed in the courts of different jurisdictions, including the level of the courts of appeal.
(3) The list of judges appointed in line with para. (2) shall be public and shall be posted on the official webpage of the Superior Council of Magistrates.

Article 20. Financing the measures to organize the institutional integrity assessment and to perform the professional integrity testing
The measures to organize the institutional integrity assessment and to perform the professional integrity testing, as well as the measures for recording, keeping, and systematizing the information obtained during the tests shall be financed from the state budget within the limit of available means.

Chapter V
FINAL AND TRANSITORY PROVISIONS

Article 21. Final provisions
This law shall come into force from its publication data and be enforced as follows:

a) in case of the employees of the National Anticorruption Center and competences of the Security and Information Service – since the date of publication;
b) in case of the employees of other public entities – after the expiry of the 6-month term since the date of publication.

Article 22. Transitory provisions
(1) Within 10 days from the publication of this law, the public entities falling under it shall inform, under signature, public agents of the possibility to apply professional integrity tests. The refusal to sign shall not exonerate public agents from their disciplinary liability in case of a negative result of the professional integrity test.
(2) The financial resources necessary for the application hereof shall be provided in the budget of the National Anticorruption Center and of the Information and Security Service.
(3) Until the application of this law, the National Anticorruption Center shall verify the public entities regarding the information of public agents according to para. (1), as well as the manner of keeping the gift registers and inappropriate influence denunciation registers, granting them methodological support, if necessary.
(4) The Government of the Republic of Moldova, within 3 months since the enforcement of this law:
a) shall submit to the Parliament proposals on harmonizing the legislation in force with this law;
b) shall make its normative documents compliant hereto and ensure the adoption by the subordinated institutions of the normative documents necessary for the application hereof;
c) shall ensure, from available means, the financial and technical resources necessary for the immediate application hereof.
(5) The National Anticorruption Center and the Security and Information Service shall submit, within 12 months since the coming into force of this law, a report regarding the implementation of the law to the National Security, Defense and Public Order Commission and to the Legal, Appointments and Immunity Commission of the Parliament.

THE PRESIDENT OF THE PARLIAMENT Igor CORMAN

Chisinau, December 23m 2013.
No. 325.

Romania

Order no. 256 of 16 November 2011 on the Procedure for Professional Integrity Testing of the MAI Staff,[170]

published in the Official Journal no. 836 of 25 November 2011, 1st Part

Having in view the provisions of art. 171 from the Government Emergency Ordinance no. 30/2007 on the organizing and functioning of the Ministry of Administration and Interior, approved with modifications through Law no. 15/2008, with ulterior modifications and completions, of the Law no. 360/2002 on Police Staff status, with ulterior modifications and completions, of the Law no. 80/1995 on the Military Staff status, with ulterior modifications and completions, of the Law no.188/1999 on civil servants status, republished, with ulterior modifications and completions, as well as of the Law no. 53/2003 on the Work Code, with ulterior modifications and completions,

Taking into account the Government Emergency Ordinance no. 120/2005 on rendering operational the Anticorruption General Directorate within MAI, approved with modifications through Law no. 383/2005,

Based on art. 7 item. (4) of the Government Emergency Ordinance no. 30/2007 approved with modifications through Law no. 15/2008, with ulterior modifications and completions,

The Minister of Administration and Interior issues the present Order.

[170] MoIA *Order No. 256/2011* of 16 November 2011 on the procedure for testing the professional integrity of the Ministry of Internal Affairs staff, available at www.mai-dga.ro, accessed 24 April 2016.

Art. 1 – The present Order establishes the procedure for testing the professional integrity of the staff of the Ministry of Administration and Interior, named hereinafter M.A.I.

Art. 2 – Testing may be performed at the initiative of the Anticorruption General Directorate, hereinafter called AGD, or by request of the MAI structures.

Art. 3 - Any MAI employee can be subject to testing.

Art. 4 – The test has as objective preventing corruption deeds which could involve MAI staff.

Art. 5 – (1) The test is to be carried out observing the fundamental human rights and freedoms, the human and professional dignity of the subjects to testing.

(2) Using the testing activity for the purpose of negatively affecting the authority, pride, image of the tested persons or of the legal interests circumscribed to their position is forbidden. (3) During the testing activity it is forbidden to incite/ instigate the person subject to testing to perpetrate crimes and/ or discipline infringements. (4) Provocation means the action of the AGD policeman to incite/ instigate the perpetration of crimes and/ or discipline infringements.

Art. 6 – The selection of the persons to be tested is made depending on the areas and places with corruption risks and vulnerabilities.

Art. 7 – (1) The persons taking part in performing the test are a part of AGD and, usually, they carry out the specific activities in a conspired way.

(2) Testing is achieved only with AGD leadership's approval.

Art. 8 – (1) While carrying out the testing, audio-video recording, transport and communications means from MAI endowment are used, as well as cover documents, in the conditions provided by the normative acts in force.

(2) If the situation requires, means from other sources may also be used, only with the previous consent of the owner or person who uses them, avoiding desconspiring or other negative consequences.

Art. 9 – The carrying out of the testing will be directly led by an officer of the AGD competent structure, appointed by the leadership of the AGD, who will notify in a report the aspects result following the test.

Art. 10 – If with the opportunity of testing the professional integrity, the perpetration of criminal deeds by MAI staff is found out, AGD policemen notify ex officio, drawing up an agreed minute for this purpose, according to the provisions of the Criminal Law procedure Code.

Art. 11 – (1) If the tested person requested or received money or advantages used in the testing activity, and, following the notification, the competent bodies find out that the deed is not a crime, AGD informs the head of structure/ institution the person submitted to testing is a part of, and he orders the disciplinary and / or administrative measures, according to the legal provisions, notified to AGD.

(2) AGD makes available to the head of structure/ institution, upon his request, copies of the materials achieved during the testing.

(3) If with the opportunity of testing the professional integrity, other infringements of the professional tasks and duties are found out, not connected to the specific testing activity, the head of the structure/ institution orders measures according to the normative acts in force.

Art. 12 – AGD will inform the head of the structure/ institution about the result and the findings of the testing activity if the staff submitted to testing proved integrity.

Art. 13 – The heads of the structures/ institutions have the obligation to discuss with the subordinated staff the most important aspects highlighted as a follow to the carrying out of the tests.

Art. 14 – In order to perform the test, AGD uses financial resources from MAI budget, intended for this activity.

Art. 15 – The present Order will be published in the Romanian Official Journal, Part I.

The Minister of Administration and Interior,
Constantin Traian Igas
Bucharest, 16th of November 2011
No.256