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Justice Delayed: Countering Dilatory Tactics in Moldova's Anticorruption Prosecutions

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Executive Summary

Abusive motions, dilatory tactics, and frivolous requests are potent tools for defendants in anti-corruption prosecutions to delay justice. Where courts already face heavy caseloads, time-consuming motions can drain precious judicial resources while allowing defendants to continue to benefit from allegedly ill-gotten wealth with impunity. Such a status quo fails to provide the right to a fair trial in a reasonable time guaranteed by Article 6 of the European Convention on Human Rights. Judicial procedures must thus seek to balance goals of access to justice by well-meaning parties and judicial efficiency and economy in the face of abusive actions.

To help Moldova achieve this balance, particularly to overcome barriers to anti-corruption prosecutions, this report seeks to understand contemporary judicial procedure among European states related to potentially abusive motions. Using available criminal procedure codes and other legal texts, it seeks to understand procedures, criteria, and safeguards related to three types of motions with particular risks of abuse: judicial recusal motions, case transfer requests, and constitutional exceptions. To further understand the European norms and values at stake, the report looks further at guidance by EU institutions, especially Venice Commission, the European Court of Justice, and the European Court of Human Rights, on how judicial independence, efficiency, and access to justice can be harmonized.

It finds that many states across Europe implement degrees of safeguards against abusive requests, and that indeed such safeguards are often important to achieving a fair, independent, and expeditious trial. For instance, many countries institute high evidentiary standards for making recusal, transfer, or constitutional question motions. These standards seek to ensure that requests are well supported by documentary evidence, grounded in proper procedure and jurisdiction, and worthy of the court's time. Another common safeguard is time limitations, either on the parties' submissions, the court's deliberations, or both. While bearing in mind the risk that timelines which are too short may impede under-resourced parties' ability to mount a case, Moldova could learn from these case examples and consider implementing reasonable time limits to avoid egregious delays of justice. Finally, a handful of countries implement policies such as fines, reprimands, and other penalties for parties or their representatives who make groundless claims or cause improper delays. Although such measures always carry a risk of abuse in the other direction by dishonest judges, they could be a tool to prevent prosecution delays if narrowly and objectively crafted. These practices can serve as a guide as Moldova weighs the competing needs for access and efficiency in the context of its current judicial landscape.

Introduction

The right to a fair and expeditious trial is enshrined in the European Convention on Human Rights.[1] To achieve this, policymakers designing judicial procedures must balance access with efficiency; the opportunity to heard with judicial discretion. Countries across Europe take different approaches, reflecting unique historical experiences, judicial cultures, and contemporary objectives. Examining the full range of procedural features designed to avoid delays could help Moldova review whether its unique balance of access and efficiency meets its current judicial needs. The question is acute in anticorruption prosecutions, where defendants have made use of frivolous and dilatory motions to delay justice.[2] While access and efficiency are usually trade-offs, the solutions below highlight creative policy solutions that seek to preserve access broadly for parties while penalizing the most abusive litigants. Nonetheless, every measure of judicial discretion carries a risk of judicial abuse, so Moldova's policymakers should carefully weigh the risks and benefits.

Methodology

This paper examines three types of motions presenting risks of delays: judicial recusals, case transfers, and constitutional exceptions. For each type of motion, it assesses five dimensions: procedures (who may raise the motion and when), criteria for admissibility (what standards of proof it must meet), safeguards built into laws to avoid delays, EU-level guidance, and possible policy responses for Moldova. It concludes by discussing a few general policies measures aimed at penalizing procedural abuses. The analysis developed in two phases. First, it looked at a targeted set of five countries to develop hypotheses about the types of legal and policy responses that may be available for Moldova. These were: **Romania**, **France**, **Ireland**, **Italy**, and **Poland**. Phase I took place from May-July 2023. Once a range of solutions became clear, the second step was to build out a broader evidence base for these potential solutions. This phase looked at all available remaining EU member states' procedures, using the policy options identified in Phase I as a guide. Phase II took place from July-August 2023. This report captures the culmination of these efforts and attempts to paint a robust picture of European practice with ample country examples.

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[1] European Convention on Human Rights [Eur. Conv. on H.R.], § 1, art. 6, https://www.echr.coe.int/documents/d/echr/convention_ENG ("In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.").

[2] *See* MARIANA RATA & CRISTINA TARNA, MONITORING THE SELECTIVITY OF CRIMINAL JUSTICE 50-59 (Freedom House ed., 2021), https://freedomhouse.org/sites/default/files/2021-11/fh-Moldova_Report-Selective-Justice-2021_v2-Eng.pdf.

The principal sources relied on were codes of criminal procedure and national constitutions, where available online in an English or French translation, and secondary scholarly sources such as the Max Planck Handbooks[3] or Venice Commission surveys. Two notes on methodology are warranted. First, due to a lack of available online legal codes for a handful of countries, it was not possible to assess every country in the European Union. We are thus unable to conclusively assess whether a given law represents a majority or minority approach. If a country is not listed, it may because no information was available or because we could not find a specific provision in the criminal procedure code dealing with a given matter. That does not mean, however, that such a provision does not exist. In addition, although we took great care to find up-to-date sources, the dates of latest translations varied. The laws cited here are valid up to the translation dates listed in the footnotes, and it is important to double-check with an in-country expert before making concrete reliance.

Analysis

I. Judicial Recusal

A. Procedure

Judicial recusal concerns the circumstances under which a judge may not hear a case due to reasons of suspected bias or conflict of interest. Across Europe, the procedures and criteria for recusing a judge are relatively standard. In addition to encouraging judges' voluntary recusal in circumstances where they become aware of a conflict of interest, all European countries surveyed allowed recusal requests to be raised by parties to the case.[4] The procedural difference concerns who is allowed to decide on the request. A number of countries, including **France**, **Italy**, **Poland,** and **Romania**, require the recusal request

[3] *E.g.*, von THE MAX PLANCK HANDBOOKS IN EUROPEAN PUBLIC LAW: VOLUME III: CONSTITUTIONAL ADJUDICATION: INSTITUTIONS (Armin Bogdandy, Peter Huber, and Christoph Grabenwarter eds., Aug. 2020).
[4] *E.g.*, Kriminaalmenetluse seadustik [Code of Criminal Procedure] § 50(1) (Est.) (Translation date: 2023), https://www.riigiteataja.ee/en/eli/ee/530102013093/consolide/current [hereinafter Estonian Code of Criminal Procedure]; Ley de Enjuiciamiento Criminal [L.E. Criminal] [Code of Criminal Procedure] art. 53 (Sp.) (2016) https://www.mjusticia.gob.es/es/AreaTematica/DocumentacionPublicaciones/Documents/Criminal%20Procedure%20Act%202016.pdf [hereinafter Spanish Criminal Procedure Act]; Oikeudenkäymiskaari [Code of Judicial Procedure] Ch. 1 § 9 (Fin.) (Translation date: 2019), https://www.finlex.fi/fi/laki/kaannokset/1734/en17340004_20190812.pdf [hereinafter Finnish Code of Judicial Procedure]; Kriminālprocesa likums [Criminal Procedure Law] § 16(2) (Lat.) (2022), https://likumi.lv/ta/en/en/id/107820 [hereinafter Latvian Criminal Procedure Law]; Horvátországi büntetőeljárási törvény (Criminal Procedure Act) art. 38(1) (Cro.) (Translation date: 2003), https://www.vsrh.hr/CustomPages/Static/HRV/Files/Legislation__Criminal-Procedure-Act.pdf ("The judge may also be challenged by the parties") [hereinafter Croatian Criminal Procedure Act].

to be ruled on by a higher or separate body, such as: the President of the Appeal Court (France[5]); a separate chamber than that of the judge, depending on the court (Italy[6]); or a judge (Romania[7]) or panel of judges from the same court (Poland[8]). Recusal decisions by these bodies are generally final. **Ireland** by contrast, allows judges at certain levels to decide on their own recusal, subject to appeal to a higher body.[9] Interestingly, the Irish Supreme Court has explicitly warned judges *not* to follow an overly "scrupulous approach" when there is a risk that litigants are engaged in forum-shopping.[10] **Croatia**[11] and **Romania**[12] also allow judges to participate in deciding on the recusal application to a limited extent. In **Estonia,** criminal cases heard by a single judge may also warrant self-recusal decisions.[13]

B. Procedure

Across European countries surveyed, criteria for judicial recusal usually include both objective and subjective grounds for questioning a judge's impartiality. There is typically a mention of blood or family relations, previous connections to the case, or financial conflicts of interest.[14] While most of these elements are narrow and objective

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[5] Code de procédure pénale [C. pr. pén.][Criminal Procedure Code] art. 670 (Fr.) (Translation date: 2006), https://sherloc.unodc.org/cld/uploads/res/document/fra/2006/code_of_criminal_procedure_en_html/France_Code_of_criminal_procedure_EN.pdf [hereinafter French Code of Criminal Procedure].

[6] Codice di procedura penale [C.p.p.] [Criminal Procedure Code] art. 40 (It.) (Translation date: 2013), https://www.legal-tools.org/aee4e8/, [hereinafter, Italian Code of Criminal Procedure].

[7] Codul de procedură penală al României [Criminal Procedure Code of Romania] art. 67(6) (Rom.) (Translation date: 2014), https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-REF(2018)043-e ("The Judge for Rights and Liberties, the Preliminary Chamber Judge or the judicial panel with which a challenge to disqualify was filed shall decide on preventive measures, with the participation of the disqualified judge.") [hereinafter Romanian Code of Criminal Procedure].

[8] Ustawa o Kodeks postępowania karnego [Code of Criminal Procedure] art. 41(4) (Pol.) (Translation date: 2020), https://legislationline.org/sites/default/files/documents/f6/Polish%20CPC%201997_am%202003_en.pdf [hereinafter Polish Code of Criminal Procedure]. Spain and Latvia also have detailed procedures for determining which. authority should be involved in the case of a judicial challenge based on the status of the challenged judge. Spanish Criminal Procedure Act, art. 68; Latvian Criminal Procedure Code, § 54.

[9] EUR. COMM., THE 2015 EU JUSTICE SCOREBOARD 42 (2015), available at: https://commission.europa.eu/system/files/2017-06/justice_scoreboard_2015_en.pdf.

[10] Rooney v. Minister for Agriculture 2, 37 I.L.R.M. (2001) ("On the other hand a judge cannot permit a scrupulous approach by him to be used to permit the parties to engage in forum shopping under the guise of challenging the partiality of the court.").

[11] Croatian Code of Criminal Procedure, art. 39(1)-(5).

[12] Romanian Code of Criminal Procedure, art. 67(6).

[13] Estonian Code of Criminal Procedure, § 50(6) ("Where a criminal case is heard by the judge sitting alone, any motions to recuse the judge are disposed of by that judge.").

[14] *E.g.*, Code d'instruction criminelle [Code of Criminal Procedure] art. 828 (Belg.) (Translation date: 2019), https://legislationline.org/sites/default/files/documents/5d/Belgium_CPC_1808_am2019_fr.pdf [hereinafter, Belgian Code of Criminal Procedure]; Finnish Code of Judicial Procedure Ch. 13 § 4-6; French Code of Criminal Procedure, art. 668; Estonian Code of Criminal Procedure, art. 49; Strafprozessordnung [StPO] [Code of Criminal Procedure] § 22 (Ger.) (Translation date: 2022), https://www.gesetze-im-internet.de/englisch_stpo/englisch_stpo.html [hereinafter German Code of Criminal Procedure]; Romanian Code of Criminal Procedure, art. 64; Den rättegångsbalken [Code of

(e.g., specific degree of blood relations to one of the parties, or financial interests held by the judge and family members), most if not all codes include a subjective assessment of reasonable doubt. For instance, Article 668(9) of the **French** Code of Criminal Procedure grants recusal powers where "anything has taken place between the judge [or their spouse] . . . and one of the parties sufficiently serious to put [their] impartiality in question."[15]

C. Safeguards

i. Fines

Several countries surveyed required fines to attach to requests denying a recusal, evidently with the intent to deter unfounded motions.[16] **France's** Article 673 provides that "[a]ny order dismissing a challenge application carries a civil fine for the applicant of between €75 and €750." **Italy's** fines are twice as high: from €258 to €1,549.[17] In **Spain**, costs are always imposed against the moving party in the case of a rejection. Additional fines may be imposed on a sliding scale from €2 to €30 based on the seniority of the challenged judge, where there is evidence of acting "recklessly or in bad faith."[18]

ii. Evidentiary standards

Many countries require recusal requests to meet a certain plausibility standard before they must be considered. The most obvious is the requirement that grounds for suspicion be "reasonable" (**Poland**[19] and **Romania**[20]) or "serious" (**Italy**.[21]) This seems to suggest that the moving party must meet some burden of proof and that facially requests would not merit recusal consideration. The **Spanish** Criminal Procedure Act

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Judicial Procedure] Ch. 4, art. 13 (Swe.) (Translation date: 1999), https://www.government.se/contentassets/a1be9e99a5c64d1bb93a96ce5d517e9c/the-swedish-code-of-judicial-procedure-ds-1998_65.pdf [hereinafter Swedish Code of Judicial Procedure]; Organic Law No. 6/1985 of July 1, 1985, on the Judicial Power (as amended up to Organic Law No. 4/2018 of December 28, 2018), art. 219 (Sp.);
Zakonik o krivičnom postupku [Code of Criminal Procedure] art. 37 (Serb.) (Translation date: 2019), https://mpravde.gov.rs/files/CRIMINAL%20PROCEDURE%20CODE%20%202019.pdf [hereinafter Serbian Code of Criminal Procedure]. Finland also includes criteria for recusal relating to a judge's involvement in similar cases and prior disposition of similar cases. Finnish Code of Judicial Procedure, Ch. 13, art. 7.

[15] French Code of Criminal Procedure, art. 668(9).

[16] Part IV below explores European precedents on fines for general dilatory tactics, without specific mention of recusal.

[17] Italian Code of Criminal Procedure, art. 44.

[18] Spanish Code of Criminal Procedure, art. 70 ("For orders rejecting the challenge, an order as to costs will be made against the person advocating it. Where it can be appreciated that they acted recklessly or in bad faith, a fine of 200 to 2,000 pesetas will also be imposed where the party challenged was an Examining Magistrate; 500 to 2,500 pesetas, if it was a Senior Judge, and 1,000 to 5,000, if it was the Supreme Court.").

[19] Polish Code of Criminal Procedure, art. 41.

[20] Romanian Code of Criminal Procedure, art. 64(f).

[21] Italian Code of Criminal Procedure, art. 36(h) (emphasis added).

specifies that "Magistrates, Judges and Advisors, whatever their level and hierarchy, may only be challenged with just cause."[22] **Belgian** law also allows judges to dismiss an order where the movant fails to provide "proof in writing or prima facie evidence of the causes of the challenge;"[23] similarly, in **Germany,** motions lacking "any means of substantiating the challenge" may be rejected as inadmissible.[24] Many countries like **Serbia,**[25] **Latvia,**[26] **Romania**,[27] and **Croatia,**[28] also require that the recusal request be based on grounds which have not previously been rejected by the court.[29]

iii. Limiting request to pre-trial

Many states required that recusal requests be filed only before the start of trial unless new circumstances arise. This is the case in at least **Poland,**[30] **Estonia,**[31] **Croatia,**[32] **Spain,**[33] and **Serbia.**[34] In **Spain,** recusal requests must be filed within ten days of notice of the identity of the judge unless the grounds for suspicion are new.[35]

iv. Time limits

Many countries specified time limits within which various parts of the recusal requests must be decided. The strongest example here was **Romania**, where a recusal request must be ruled on within 24 hours unless the judge deems further hearings necessary.[36] The **Spanish** Criminal Procedure Act gives three days for parties to be heard in a separate recusal proceeding, "which may only be extended by a further two when, in the opinion of the Court, there is just cause to do so."[37] The matter then enters into evidence for eight days, at the expiration of which a summons must be made giving a date

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[22] Spanish Criminal Procedure Act, art. 52.
[23] Belgian Criminal Procedure Code, art. 839,
[24] German Criminal Procedure Code, § 26(a)(1)(2).
[25] Serbian Criminal Procedure Code, art. 39.
[26] Latvian Code of Criminal Procedure, art. 55.
[27] Romanian Code of Criminal Procedure art. 67(5).
[28] Croatian Code of Criminal Procedure, art. 38(2) ("The parties may submit a petition to challenge any time up to the opening of the trial, and if they learn of a reason for exclusion later (Article 36 paragraph 1), they shall submit the petition immediately after they have learnt of that reason.")
[29] In Sweden, recusal of a judge cannot be raised in a superior court if it was already discussed in the lower court unless the recusal decision is appealed or new circumstances come to light. Swedish Code of Judicial Procedure, Ch. 4, art. 14.
[30] Polish Code of Criminal Procedure, art. 41.
[31] Estonian Code of Criminal Procedure, § 50.
[32] Croatian Code of Criminal Proc, art. 38(2).
[33] Spanish Code of Criminal Procedure, art. 56.
[34] Serbian Code of Criminal Procedure, art. 39.
[35] Spanish Organic Law No. 6/1985 of July 1, 1985, on the Judicial Power (as amended up to Organic Law No. 4/2018 of December 28, 2018), art. 223(1(1)).
[36] Romanian Code of Criminal Procedure, art. 68(5) ("An abstention or challenge to disqualify shall be ruled on within maximum 24 hours, in chambers. If the judge or the judicial panel, as applicable, deems it necessary for the settlement of such application, these may conduct any verification and may hear the prosecutor, the main subjects, the parties and the person who abstains or whose challenge to disqualify is requested.")
[37] Spanish Code of Criminal Procedure, art. 64.

for the hearing if a remaining question of law exists.[38] In **Germany,** judges may set a timeline within which movants must provide written grounds for a challenge; failure to meet this results in a motion being inadmissible.[39] Challenges may also be inadmissible if "it is obvious that the challenge is made merely to delay the proceedings or for purposes which are irrelevant to the proceedings."[40]

v. Exemptions for other urgent circumstances

Several countries permit judges to continue some degree of urgent work either while the recusal matter is pending or after it has been decided against them. **Spain** takes the most liberal position on continuing work as its Criminal Procedure Act states that "[t]he challenge will not hold back running the case," with the exception of oral arguments or hearings (which must be paused pending the recusal decision.)[41] **Ireland** also takes a liberal approach in not requiring the recusal of a judge at all where "no other tribunal can be constituted to deal with the case or, because of urgent circumstances, failure to act could lead to a serious miscarriage of justice."[42] **Latvian** law appears to imply that the cessation of work on a case is not always necessary: "In exceptional cases, a person may be relieved from the execution of duties until the taking of a decision."[43]

The more common position seems to be that work could carry only for urgent matters, until a new judge is appointed. In **Poland**,[44] **Finland,**[45] and **Estonia**,[46] judges who are found incompatible may continue to carry out urgent duties until a new judge can be appointed. In **Croatia,** judges must cease activity after being found incompatible, but may continue working on "procedural actions with respect to which there is a danger in delay" before the decision is rendered.[47] **Serbia** treats the question of continued work differently based on whether the recusal request refers to objective or subjective criteria. If the former, the judge must suspend all work as soon as the request is filed. Yet if the request is only for other "circumstances which raise doubt as to his/her impartiality," they

[38] Spanish Code of Criminal Procedure, art. 65, 67 ("Where, due to the matter being a question of law, evidence of the challenge has not been received or the time limit granted in article 65 has passed, an order will be made to summons the parties giving a day for the hearing.").
[39] German Code of Criminal Procedure, § 26(1), § 26(a)(1)(2).
[40] German Code of Criminal Procedure, § 26(a)(1)(3).
[41] Spanish Criminal Procedure Act, art. 65.
[42] JUDICIAL COUNCIL OF IRELAND, GUIDELINES FOR THE JUDICIARY ON ETHICAL CONDUCT (2022), https://judicialcouncil.ie/judicial-conduct-committee/.
[43] Latvian Code of Criminal Procedure, § 56(3).
[44] Polish Code of Criminal Procedure, art. 42(4).
[45] Finnish Code of Criminal Procedure, Ch. 13 § 1 (noting that the judge "may decide 'urgent issue[s] with no bearing on decision in principal issue if it [is] not possible without delay to obtain a judge who is not disqualified.").
[46] Estonian Code of Criminal Procedure, art. 50(3).
[47] Croatian Code of Criminal Procedure, art. 40.

may "up until the issuance of a ruling on the motion, undertake only those actions for which there is a risk from postponement."[48]

D. EU-level guidance

Statements and rulings by various EU-linked institutions may help to interpret the need for judge recusal under the right to a fair trial. The Council of Europe's recommendation regarding judicial independence states that cases may only be withdrawn from a judge for "valid reasons," defined as "objective, pre-established criteria following a transparent procedure by an authority within the judiciary." [49] This transparency and objectivity serves the ultimate purpose of judicial independence, which under Article 6, Section I of the European Convention on Human Rights "is to guarantee every person the fundamental right to have their case decided in a fair trial."[50] The CoE recommendation goes on further to state that "only judges themselves should decide on their own competence in individual cases as defined by law," which would seem to weigh against the involvement of higher bodies in the recusal process, as we saw with many countries above.[51]

The European Court of Justice's own practice follows this guidance only to an extent. The Court's recusal criteria are narrow when compared with the national criteria discussed above (which contain both objective and subjective provisions.) Article 18 of the ECJ Statute says that judges may not take part in cases in which they have previously taken part in certain capacities. It further states that judges who, "for some special reason," feel that they should not take part in a case, should so inform the judge. It does not seem to require recusal for subjective reason and is not clear as to whether parties to a case have a right to challenge the judge.[52] Regarding process and who is involved, much of this discretion is left to judges, in accordance with the CoE recommendation, yet the Statute notes that "[a]ny difficulty arising as to the application of this Article shall be settled by decision of the Court of Justice."[53]

The European Court of Human Rights' own Rule 28 on judge recusal contains some objective provisions (e.g., having a familial, personal, or professional relationship with any of the parties) but also more ambiguous criteria, such as having "expressed opinions publicly . . . capable of adversely influencing [their] impartiality" or "any other

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[48] Serbian Code of Criminal Procedure, art. 40.
[49] Council of Europe Recommendation CM/Rec(2010)12, *Judges: Independence, Efficiency, and Responsiveness,* 7 (Nov. 7, 2010), https://rm.coe.int/cmrec-2010-12-on-independence-efficiency-responsibilites-of-judges/16809f007d.
[50] Eur. Conv. on H.R. § 1, art. 6.
[51] CM/Rec(2010)12, *supra* note 50, at 8.
[52] Statute of the Court of Justice of the European Union, art. 18, https://curia.europa.eu/jcms/upload/docs/application/pdf/2016-08/tra-doc-en-div-c-0000-2016-201606984-05_00.pdf.
[53] *Id.*

reason . . . [that their] independence or impartiality may legitimately be called into doubt."[54] This broad rule is more similar to national precedents, discussed below. There is no formal procedure to challenge a judge in the ECtHR, however.[55] Some Court decisions have encouraged courts to respond to *ad hoc* requests for recusal, but the Court has generally not responded favorably to such requests.[56] Voluntary recusal requests are evaluated by the President of the Chamber; in the case of doubt, the judge will present views and the Chamber will deliberate and vote in secret.[57]

A final note relevant to the safeguards explored above is that the Venice Commission has stated that from the perspective of access to justice, "very short time-limits may in practice prevent individuals from exercising their rights" and "[h]igh fees may discourage a number of individuals, especially those with a low income, from bringing their case to court."[58] The latter may refer to court fees and would be less relevant to the fines discussed above, but the question of timelines and inclusiveness should be kept in mind.

E. Policy options

Generally, the policies above limiting recusal requests are a double-edged sword. Anything that can be used to prevent a frivolous request may also be used to prevent a legitimate request against judges potentially acting in bad faith. It is thus important to consider Moldova's unique judicial environment when weighing the costs and benefits of the proposals below. With that in mind, a few policy options which could help to limit frivolous requests are as follows:

Allow courts to impose fines for frivolous requests: Moldova could follow France, Spain, and Italy in imposing a fine for challenge requests which are dismissed. To avoid potential abuse, the fine should not be so high as to expel litigants from court, but enough to serve as a public signal of disapproval against truly meritless claims.

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[54] ECtHR Rules of Court (20 March 2023), Rule 28(2), https://www.echr.coe.int/documents/d/echr/rules_court_eng.
[55] Gregor Puppinck, *Improving the impartiality of the European Court*, Eur. Ctr. L. Just. (Jan. 2023), https://eclj.org/geopolitics/echr/measures-aimed-at-providing-additional-safeguards-to-preserve-the-independence-and-impartiality-of-the-judges-of-the-european-court ("The Rules of Court (Article 28) only envisage a procedure for the voluntary withdrawal of the judge, on his or her own initiative, which is different from a challenge procedure initiated at the request of the parties.").
[56] *Id.* (citation omitted) (noting that the Court has dismissed, without public justification, four requests for dismissal filed by the Bulgarian Government alleging conflict of interest by the judge to their case).
[57] ECtHR Rules of Court, Rule 28(3).
[58] VENICE COMMISSION, RULE OF LAW CHECKLIST 43 (2016), https://www.venice.coe.int/images/SITE%20IMAGES/Publications/Rule_of_Law_Check_List.pdf [hereinafter, Venice Commission Rule of Law Checklist].

Heighten the evidentiary standards: Like Serbia, Latvia, and others, Moldova could ensure that its laws do not allow recusal requests to be repeatedly raised on the same grounds. It could also ensure, like Sweden, that the recusal of a judge cannot be discussed in a higher court if it was already decided in a lower court, without a formal appeal.

Impose stricter time-limits on recusal requests: Moldova could consider imposing stricter limits on when recusal requests can be raised and when they must be decided. We saw above that several countries including Poland, Estonia, Croatia, Spain, and Serbia allow recusal requests to be raised only in pre-trial hearings unless new conditions appear. This seems to incentivize an early due diligence and punish meritless requests. Moldova could also consider setting time bounds within which requests should be considered. Following Romania, it could require that recusal requests be ruled on within 24 hours, with an option of extension if there is a need to hear the parties.

Allow exceptions to recusal in urgent circumstances: Finally, Moldova could follow Denmark, Finland, Estonia, Serbia, and others in allowing work to continue on urgent matters while the recusal request is pending. Specifying objective criteria for what constitutes an urgent matter could help to limit the potential for abuse.

II. Case Transfers

A. Procedure

European nations generally allow case transfers, but as is the case with judge recusal, differ as to who can raise the motion (parties, judges, or only higher authorities).[59] **Romania**,[60] **Italy,**[61] and **France**[62] seem to allow parties to file a motion. **Sweden**,[63]

[59] For countries not specifically mentioned in the analysis, we were either not able to find a specific mention of case transfers in their Code of Criminal Procedure, or the Code was not available online in up-to-date, translated (or translatable) form. Note also that we were only concerned with case transfers for reasons of bias or incompatibility. We did not examine case transfers for reasons concerned with territorial or subject matter jurisdiction as a question of law.
[60] Romanian Code of Criminal Procedure, art. 72.
[61] Italian Code of Criminal Procedure, art. 45-46(2). ("The request shall be filed, together with the related documents, with the Court Registry and shall be served within seven days on the other parties by the petitioner. . . . The court shall immediately forward the request with the enclosed documents and any possible remark to the Court of Cassation.").
[62] French Code of Criminal Procedure, art. 662.
[63] Swedish Code of Judicial Procedure, Ch. 19 § 7 (stating that the prosecutor can request a transfer of the case to a different district court, "if the latter court is competent and there is special reason.").

Poland,[64] **Estonia**,[65] and **Croatia**[66] place the decision in the hands of prosecutors or judges, who must often involve superior courts in the decision. For instance, Article 31 of the Croatian Code of Criminal Procedure specifies:

> If a court having jurisdiction is prevented from conducting proceedings due to legal or factual reasons, it shall inform the immediately superior court thereof which shall, after having heard opinion from the State Attorney, designate another court with subject matter jurisdiction which is located within its jurisdictional territory to conduct proceedings.[67]

It is not clear whether in the countries which empower judges to raise case transfer issues, parties may take the initiative to raise such a matter with the judge.

B. Criteria

Most codes adopt extremely vague descriptions of when a case transfer is permissible. In **France**, the criterion is a simply a "grounded suspicion of bias"; [68] in **Poland**, a determination that transfer would be "in the interests of justice";[69] in **Sweden**, "special reason."[70] **Italy** spells out the criteria more clearly, allowing transfers where:

> [S]erious local situations, which may hinder the progress of the trial and may not be otherwise eliminated, compromise either the free determination of the persons involved in the proceedings or public security or safety, or raise reasonable reasons of suspicion.[71]

Romania also specifies that parties may file a motion for case transfer "when there is a reasonable suspicion that the impartiality of judges of that court is impaired due to the case circumstances, the capacity of parties or that there is a threat of a public order

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[64] Polish Code of Criminal Procedure, art. 43 ("If, due to the exclusion of judges hearing the case in the courts is impossible, superior court to another court shall refer the matter to equivalent.").
[65] Estonian Code of Criminal Procedure, § 24 (2) ("Exceptional transfer of a criminal case within the judicial district of a circuit court of appeal is decided by the president of the circuit court of appeal; in other situations, the transfer is decided by the Chief Justice of the Supreme Court.").
[66] Croatian Criminal Procedure Code, Ch. 2, art. 31.
[67] *Id.*
[68] Transfers may also be made "in the interests of the proper administration of justice" upon the application of the relevant prosecutor general, "either on [their] own initiative or upon the application of the parties" by filing a motion with the relevant prosecutor. If the prosecutor does not agree, the party has 10 days to file an appeal. "The Court may then rule on the case or refer the case to the criminal chamber, which has 8 days to decide." French Code of Criminal Procedure, art. 665.
[69] Polish Code of Criminal Procedure, art. 37 (emphasis added).
[70] Swedish Code of Judicial Procedure, Ch. 19, § 7. *See also* Croatian Code of Criminal Procedure, art. 32(1) ("The immediately superior court may within its jurisdictional territory designate another court having subject matter jurisdiction to conduct the proceedings if it is evident that the proceedings will be facilitated or if there are other important reasons.").
[71] Italian Code of Criminal Procedure, art. 45.

disturbance."[72] As legal expert Cristian Dan further characterizes the Romanian approach:

> [A]ll judges of a court must obviously be in a situation of incompatibility or there must be a reasonable suspicion as to the possibility of a risk of bias hovering over the whole court or section of a court. [. . .] An example could be a procedural subject whose quality is of influential politician in the community in which the case is being tried.[73]

Poland[74] and **Estonia**[75] seem to allow cases to be transferred only in narrower circumstances: where no other judge is available to replace a recused one, or where, in Estonia's case, the president of the appeal court or Supreme Justice of the Supreme Court decides that a case should be heard in the "court that serves the locality in which the consequences of the criminal offence occurred or where the majority of the accused or victims or witnesses are."

C. Safeguards

i. Evidentiary standards

Similar to the safeguards for judge recusal, countries which allow parties to request a case transfer also tended to include terms that would prohibit frivolous requests. For instance, **Italy's** Article 45 of the Criminal Procedure Code specifies that the request for transfer must be "reasoned" and based on "reasonable reasons of suspicion."[76] Motions will also be inadmissible for being "manifestly ill-founded" if they are not based on "new elements compared with those of a previous request which has already been rejected or declared inadmissible."[77] **Romania** specifies that the request must "contain the grounds for case transfer, as well as the factual and legal reasoning" and attach documents on which the application is based.[78] It also prohibits repeat requests on the same evidence.[79]

ii. Continuance of the case

Motions for case transfer often do not require suspending trial. In **Romania**[80] and **France,**[81] the motion for case transfer does not suspend trial. In **Italy**, the court *may* suspend trial after the request is submitted and must do so "prior to the conclusion and

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[72] Romanian Code of Criminal Procedure, art. 71-72.
[73] *Cristian Dan, Aspects Regarding the Case Transfer of Criminal Cases in Romania,* 26th International RAIS Conference on Social Sciences and Humanities [Conference Paper], SCIENTIA MORALITAS RES. INST. (2022).
[74] Polish Code of Criminal Procedure, art. 43.
[75] Estonian Code of Criminal Procedure, § 24 (2), § 51.
[76] Italian Code of Criminal Procedure, art. 45.
[77] *Id.* art. 47(2), 49.
[78] Romanian Code of Criminal Procedure, art. 72(2)-(3).
[79] *Id.* art. 72(7).
[80] *Id.* art. 72(8) ("filing for case transfer shall not suspend a case trial.").
[81] French Code of Criminal Procedure, art. 662. Note that the Court of Cassation may order the suspension of trial where it deems necessary.

the debate."[82] Even then, "such suspension does not prevent urgent actions from being carried out."[83]

iii. Time limits

All three of the countries we found which permitted parties to motion for case transfer included time limits for at least some part of the filing process. In **Romania,** case transfer applications must be decided at a public hearing within a maximum of 30 days of the application date.[84] **Italy** does not specify a timeline for deciding on the transfer request, but notes that the request for transfer must be served on the other party within seven days.[85] In **France**, the party who is served with a transfer motion has ten days to file a statement with the Court of Cassation.[86]

iv. Fines

Italy appears to the only of the three countries to issue fines if a case transfer request is rejected. Yet they are steep, ranging from €1,000 to 5,000 (higher than for recusal requests.) Moreover, "[t]his amount may be increased up to its double, taking into account the cause of inadmissibility of the request."[87]

D. EU-level guidance

Although it was difficult to find guidance related to case transfer motions specifically, the Venice Commission has made amply clear the need for a transparent, objective, and mostly random case distribution system. For instance, the Venice Commission Rule of Law Checklist emphasizes that judges should be assigned to cases through clear and objective criteria and that they should not be removed from cases without due cause:

> It is not enough if only the court (or the judicial branch) competent for a certain case is determined in advance. That the order in which the individual judge (or panel of judges) within a court is determined in advance, meaning that it is based on general objective principles, is essential"[88]

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[82] Italian Code of Criminal Procedure, art. 47(3) ("After the request for trial transfer is submitted, the court may decide by order to suspend the trial until an order declaring the request inadmissible or rejecting it is issued . . . The court must suspend the trial prior to the conclusion and the debate.").
[83] *Id.*
[84] Romanian Code of Criminal Procedure, art. 73(1).
[85] Italian Code of Criminal Procedure, art. 46(1).
[86] French Code of Criminal Procedure, art. 662.
[87] Italian Code of Criminal Procedure, art. 48(6).
[88] Venice Commission Rule of Law Checklist, *supra* note 59, at 38; *see also* CDL-AD(2017)031, *Opinion on the Draft Act amending the Act on the National Council of the Judiciary; on the Draft Act amending the Act on the Supreme Court, proposed by the President of Poland, and on the Act on the Organisation of Ordinary Courts*, §120 ("[…] If there are to be exceptions to the general principle of random allocation of cases, they should be clearly and narrowly formulated in the law. Setting of the method of distribution of cases should not be within the discretionary power of the MoJ.").

Regarding transfers between judges based on indicators such as caseload or specialization, the Commission has also cautioned against giving discretion to court presidents and other higher bodies given the risk of politicization.[89]

Looking at European practice, in general, member states may transfer cases amongst themselves based on prior agreements, on the grounds that one of the member states may provide a biased or otherwise unsuitable forum to hear the case.[90] The European Commission expressed its support for case transfers in principle, noting that the lack of current agreements between member states leads to two problems: "(1) inefficient transfers of criminal proceedings and (2) lack of effective prosecution—transfers of proceedings do not take place where they would be in the interest of justice."[91] Yet it is not clear the degree to which support for case transfers applies within states, given the Venice Commission's cautions against abuse and support for objective criteria (which would seem to exclude more abstract notions such as jurisdictional bias).

E. Policy options

Consider limiting parties' ability to raise case transfer motions: Several countries surveyed, such as Estonia, did not appear, at least based on the text of their criminal procedure codes, to allow parties to bring case transfer motions. Depending on the degree of abuse and weighing other potential downsides, Moldova could consider abridging this pathway for parties and rendering case transfers simply a default option if all judges in a given jurisdiction are found incompatible. This would seem to be supported by Venice Commission guidance on transferring cases only based on transparent and objective criteria, with minimal discretion.

Strengthen evidentiary standards: Moldova should ensure, at a minimum, that it prevents case transfer requests from being raised repeatedly on the same grounds. It could also require, like Italy and Romania, that requests contain supporting evidence that points to "reasonable" grounds for suspicion.

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[89] VENICE COMMISSION CDL-PI(2019)008, COMPILATION OF VENICE COMMISSION OPINIONS AND REPORTS CONCERNING COURTS AND JUDGES § 4.2.3 (Dec. 11, 2019), https://www.venice.coe.int/webforms/documents/?pdf=CDL-PI%282019%29008-e ("In order to prevent any risk of abuse, court presidents and the President of the NJO (National Judicial Office) should not have the discretion to decide which cases should be transferred or to select the 'sending' or 'receiving' courts.").

[90] *See* [Press Release] *Transfer of Criminal Proceedings*, EUR. COMM. (Apr. 5, 2023), https://commission.europa.eu/law/cross-border-cases/judicial-cooperation/types-judicial-cooperation/transfer-criminal-proceedings_en.

[91] European Commission Staff Working Document SWD(2023)-77-final, *Proposal for a Regulation of the European Parliament and of the Council on the transfer of proceedings in criminal matters*, 5 (May 4, 2023), https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:52023SC0077.

Allow cases to continue pending consideration of the request: Romania and France did not seem to require the case to be stayed while a case transfer request was considered. In Italy, this was optional.

Institute time limits for consideration: Time limits could be instituted on the periods in which a party is required to serve the motion or file a response, or in which the court as a whole must rule on the motion. Keeping in mind Venice Commission guidance on access to justice, this time period should not be so short as to prevent under-resourced litigants from preparing an answer, but most not delay service of justice.

Implement fines: Finally, Moldova could follow Italy in penalizing groundless transfer requests with a fine.

III. Constitutional Exceptions

A. Procedure

Nearly all European countries allow for some type of constitutional review of legislation.[92] The first distinction can be drawn between what are referred to as systems of *diffuse* or *concentrated* constitutional review. The former is best known as the American model where lower courts may rule on constitutional questions as part of their decisions on a case, subject to ordinary appeal. It is in the minority in Europe, and includes **Denmark, Finland, Iceland, Norway,** and **Sweden.** Diffuse review is less relevant to the question of constitutional questions as delay tactics, since the court is generally empowered to rule on these questions as part of its regular deliberations.[93] More relevant is concentrated review, which is the majority model in Europe. This includes **Albania, Austria** (where it was pioneered,) **Belgium, Croatia, Czechia, France, Germany, Hungary, Italy, Latvia, Lithuania, Poland, Serbia, Slovakia, Slovenia, and Spain.**[94]

Within concrete systems, there are two pathways for parties to access constitutional review: preliminary questions (also called constitutional exceptions) and constitutional complaints. Preliminary questions are constitutional issues referred by a court, possibly at the initiative of one of the parties, to a higher court for resolution before making a final

[92] COUNCIL OF EUROPE, EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW (VENICE COMMISSION), REVISED REPORT ON INDIVIDUAL ACCESS TO CONSTITUTIONAL JUSTICE 6 (Strasbourg, Feb. 22, 2021), CDL-AD(2021)001, https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2021)001-e [hereinafter Venice Commission Constitutional Access Report 2021].
[93] Note that in the United States, and archetypal diffuse system, courts may directly request an opinion by the Supreme Court on a constitutional question. This is an exception to the general diffuse model. *Id.* § 43.
[94] *Id.* § 18.

ruling. Constitutional complaints, by contrast, are complaints filed directly by parties with a constitutional court or other higher court claiming an infringement upon their constitutional rights.[95] With some exceptions, complaints are generally filed after a ruling as they are commonly available after exhausting other legal pathways, so we will not examine them here.[96]

Nearly all European countries with concentrated constitutional systems allow preliminary questions. **Latvia**, **Serbia**, and **Portugal** are noted exceptions.[97] **Bulgaria** and **Greece** limit preliminary questions to only the highest courts.[98] Within countries which allow lower courts to raise exceptions, the key procedural distinction is whether parties may raise the motion with judges or whether only judges may raise it at their own initiative. The majority practice seems to be that parties may petition the court to submit a preliminary question (e.g., **Albania**, **Austria, Belgium, Bulgaria, Croatia, Czechia, France**, **Hungary, Italy, Lithuania**, **Poland**, **Slovakia, Spain**.) [99] **Moldova** is in this category. In a minority of countries, only the judge may submit a question. **Germany** seems to be an example of this.[100]

B. Criteria

Judges have varying degrees of discretion as to whether to bring requests. **France** and **Lithuania** are among countries requiring a judge to assess requests against clear and somewhat restrictive criteria. For instance, France requires that a judge "have serious doubts about the constitutionality of a norm" before referring a question; it also specifies several criteria that a request must meet such as being serious, novel, relevant, and "not

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[95] *Id.* § 30.

[96] *See Chapter 6: Constitutional Review*, *in* CONSTITUTIONS IN OECD COUNTRIES: A COMPARATIVE STUDY: BACKGROUND REPORT IN THE CONTEXT OF CHILE'S CONSTITUTIONAL PROCESS (OECD ed., Feb. 2022), https://doi.org/10.1787/ccb3ca1b-en. For exceptions, *see, e.g.*, 2011. évi CLI. törvény a magyar Alkotmánybíróságról [Act CLI of 2011 on the Constitutional Court of Hungary] § 26(2) (holding that a complaint could be launched by exception "if a) due to the application of a legal provision contrary to the Fundamental Law, or when such legal provision becomes effective, rights were violated directly, without a judicial decision, and b) there is no procedure for legal remedy designed to repair the violation of rights, or the petitioner has already exhausted the possibilities for remedy.").

[97] Venice Commission Constitutional Access Report 2021, *supra* note 92, § 43, § 46.

[98] *Id.* § 48. Cyprus also limits the power to raise preliminary questions to family courts. France's system of Priority Preliminary Review has also introduced an additional layer of scrutiny between the court of first instance and the Constitutional Council, in the form of review by the highest court (the Council of State or the Court of Cassation).

[99] *Id.* § 54.

[100] *Konkrete Normenkontrolle* [Specific judicial review of statutes], Bundesverfassungsgericht (n.d.) (Ger.), https://www.bundesverfassungsgericht.de/EN/Verfahren/Wichtige-Verfahrensarten/Konkrete-Normenkontrolle/konkrete-normenkontrolle_node.html [accessed Aug. 16, 2023] (underscoring that preliminary questions are only available where the trial court "concludes that a law on whose validity its decision depends is unconstitutional.") [hereinafter, German Norm Control Wesbite]; *see also* Bundesverfassungsgerichtsgesetz [Federal Constitutional Court Act] § 80(3) (Ger.), https://www.bundesverfassungsgericht.de/SharedDocs/Downloads/EN/Gesetze/BVerfGG.pdf?__blob=publicationFile&v=1 ("The request of the court shall be independent of any claim on the part of a party to the proceedings that the legal provision is void.").

frivolous."[101] **Lithuania** specifies that interlocutory review is only available where the constitutional question "prevent[s] a case [in the lower court] from being heard on its merits"[102] Most countries fall somewhere in the middle, giving the judge at least some discretion to dismiss questions that are manifestly unfounded (e.g., **Czechia**,[103] **Hungary**,[104] **Poland**,[105] **Italy**[106] **Romania,**[107] and **Slovakia,**[108] and **Spain**.[109]) **Moldova** seems to be an outlier in requiring constitutional requests be automatically submitted for consideration.[110] **Romania** falls closer to this end of the spectrum as well, as judges must refer all complaints which are "related to the adjudication of the case," properly raised, and not based on questions previously decided by the Constitutional Court.[111] Note that these criteria is much lower than those of France, Italy, or Germany above, which require that the case *depend* on the resolution of a constitutional question. **Belgium** also requires mostly automatic referral for novel questions, save in cases where "lower court action is urgent and the impending judgment is only temporary."[112]

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[101] Nicolas Boring, *The Constitutional Council and Judicial Review in France*, LIBR. CONG. [Blog] (Nov. 4, 2020), https://blogs.loc.gov/law/2020/11/the-constitutional-council-and-judicial-review-in-france/ ("The criteria for a QPC to be admitted are that the challenged legislative provision must apply to the litigation, it must not have already been declared as constitutionally valid by the Constitutional Council, and the question must be novel but not frivolous.").

[102] Konstitucinio teismo įstatymas [Law on the Constitutional Court] art. 22 (Lith.)(Translation date: 2022), https://lrkt.lt/en/about-the-court/legal-information/the-law-on-the-constitutional-court/193 [hereinafter Lithuanian Law on the Constitutional Court].

[103] Venice Commission Constitutional Access Report 2021, *supra* note 92, § 55.

[104] *Id.*

[105] *Id.*

[106] *Le funzioni della Corte* [The Functions of the Court], *Corte constituzionale* [Constitutional Court] (n.d.), https://www.cortecostituzionale.it/jsp/consulta/istituzioni/le_funzioni_EN.do [accessed Aug. 16, 2023] ("If the question of the constitutionality of the law appears to be clearly without foundation, the judge must reject the request for constitutional review by the party on the grounds of 'manifest unfoundedness.' Where this is not the case, the judge is not permitted to resolve the question himself, and must refer it to the Constitutional Court.").

[107] Legea nr. 47/1992 privind organizarea şi funcţionarea Curţii Constituţionale [Law No. 47/1992 On the Organisation and Operation of the Constitutional Court] art. 29(2) (Rom.) (Translation date: 2020), https://www.ccr.ro/wp-content/uploads/2020/11/LAW-No47.pdf [hereinafter, Romanian Law on the Constitutional Court].

[108] Venice Commission Constitutional Access Report 2021, *supra* note 92, § 52.

[109] Spain seems to give judges complete freedom to refer or not refer, so long as they have heard parties to the case and explained their reasoning. *Id.* fn. 59.

[110] Judgment no. 2 of 9 February 2016, concluded that cases should be automatically accepted if: "[1] the object of the exception falls into the category of acts contained in Article 135.1.a of the Constitution; [2] the exception is raised by a party or its representative, or indicates that it is raised by the trial court ex officio; [3] the challenged provisions shall be applied in settling the case; [4] there is no earlier judgment of the Court dealing with the challenged provisions." Assoc. Const. Just. of the Countries of the Baltic & Black Sea Reg., *Profound changes in the legal system: Constitutional Court of the Republic of Moldova made it possible for every litigant to raise the exception of unconstitutionality* (July 1, 2016), http://www.bbcj.eu/profound-changes-legal-system-constitutional-court-republic-moldova-made-possible-every-litigant-raise-exception-unconstitutionality/.

[111] Romanian Law on the Constitutional Court, art. 11(1)(A)(d); art. 29(1)-(4)

[112] Loi spéciale du 6 janvier 1989 sur la Cour constitutionelle [Special Act of 6 January 1989 on the Constitutional Court] art. 26(2)-(3) (Belg.), https://www.const-court.be/fr/court/basic-text.

C. Safeguards

i. Evidentiary standards

The criteria referred to above, such as gravity, relevance (or indispensability), novelty, and a preliminary judgment on the merits all help judges serve as gatekeepers[113] against frivolous requests. Note that the most restrictive of all would be **Germany's** system, where parties are prevented from raising constitutional questions during trial and may only raise a *complaint* (post-judgment claim, which entail greater effort and expense by claimants) after exhausting recourse through the courts.[114] As a result of this system, there is an average of only one constitutional question for every 60 constitutional complaints heard in the relevant higher court each year.[115]

ii. Time limits

Several countries set limits either on when the trial court must decide whether to refer a case, or when the Constitutional Court must issue a ruling. Timelines generally range from two to six months. **Spain** has the tightest turnaround at two months (with an option for a one-month extension)[116] followed by **Hungary**[117] and **France** at three months,[118] **Lithuania** at four, [119] and **Belgium** at six.[120] In **Italy**, although there is no general deadline for when the Constitutional Court must reach a decision, the Court has 60 days to appoint an investigating judge, produce an initial report, and decide on the appropriate hearing.[121] Italy also regulates the time period in which a lower court must initially decide to refer a question: "parties and Public Prosecutor must be heard for the common and

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[113] Italy refers to its judges as "gatekeepers" in this way. *See The Functions of the Court*, *supra* note 106.
[114] German Federal Constitutional Court Act, §§ 90 et seq.; *see also Verfassungsbeschwerde* [Constitutional Complaints], Bundesverfassungsgericht (n.d.), https://www.bundesverfassungsgericht.de/EN/Verfahren/Wichtige-Verfahrensarten/Verfassungsbeschwerde/verfassungsbeschwerde_node.html [accessed Aug. 16, 2022] [hereinafter German Constitutional Complaints Website].
[115] *Compare* German Norm Control Website, *supra* note 100, *with* German Constitutional Complaints Website, *supra* note 114.
[116] Ley Orgánica del Tribunal Constitucional [Organic Law of the Constitutional Court] art. 35 (Sp.) (Translation date: 2016), https://www.tribunalconstitucional.es/es/tribunal/normativa/Normativa/LOTC-en.pdf.
[117] Magyarország Alaptörvénye [The Fundamental Law of Hungary] art. 24(b) (Translation date: 2020), https://www.parlamet.hu/documents/125505/138409/Fundamental+law/73811993-c377-428d-9808-ee03d6fb8178.
[118] Nicolas Boring, *The Constitutional Council and Judicial Review in France*, LIBR. CONG. [Blog] (Nov. 4, 2020), https://blogs.loc.gov/law/2020/11/the-constitutional-council-and-judicial-review-in-france/.
[119] Lithuanian Law on the Constitutional Court, art. 29.
[120] Belgian Special Act on the Constitutional Court, art. 109.
[121] Norme Integrative per i giudizi davanti alla Corte Costituzional [Supplementary Rules for Judgments before the Constitutional Court], art. 8-9 (It.) (2021), https://www.cortecostituzionale.it/documenti/comunicatistampa/CC_CS_20220601145710.pdf.

non-extendable ten day period . . . Then, without further formality, the court will adopt a decision within three days."[122]

iii. Continuance of proceedings

Although several countries require a stay in proceedings during a preliminary question proceeding (e.g, **Belgium, Croatia, Czechia, France, Hungary, Latvia, Lithuania, Poland, Slovakia**), some grant exceptions for specific types of laws or motions. For instance, **Austria** allows courts to continue urgent actions so long as they are not affected by the outcome of the constitutional court's ruling.[123] Other countries like **Slovenia** and **Croatia** do not require a stay where the challenged legislation is a by-law or administrative proceeding.[124]

D. EU-level guidance

A series of studies on constitutional access by the Venice Commission provides some insight into European norms on preliminary questions. With regards to limitations on which courts can bring constitutional questions, the Commission has said:

> Whilst imposing restrictions on which courts may refer preliminary questions to the constitutional court is an effective tool to reduce the number of preliminary requests and consistent with the logic of the exhaustion of remedies (the individual should follow the ordinary sequence of courts), this leaves the parties to the proceedings in a potentially unconstitutional situation for a long period of time if lower courts are obliged to apply the law even if they have serious doubts as to its constitutionality. *The Venice Commission is of the opinion that, from the viewpoint of human rights protection, it is more expedient and efficient to give courts of all levels the possibility to directly refer preliminary questions to the constitutional court.*[125]

The Commission has also lent its support to allowing parties, not only judges (like Germany) to raise constitutional questions:

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[122] *La cuestión de inconstitucionalidad* [The Question of Constitutionality], Tribunal Constitucional de España [Constitutional Court of Spain] (n.d.), https://www.tribunalconstitucional.es/en/tribunal/Composicion-Organizacion/competencias/paginas/021-cuestion-de-inconstitucionalidad.aspx [accessed Aug. 16, 2023].

[123] VENICE COMMISSION CDL-AD(2010)039rev, STUDY ON INDIVIDUAL ACCESS TO CONSTITUTIONAL JUSTICE (Jan. 27, 2011) § 141, https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=cdl-ad(2010)039rev-e [hereinafter Venice Commission Constitutional Access Report 2010].

[124] *Id.*

[125] Venice Commission Constitutional Access Report 2021, *supra* note 92, § 49 (emphasis added).

> The Venice Commission thus considers preliminary requests on the initiative of parties to be a very effective means of achieving individual access if the ordinary court is obliged to refer the preliminary question to the constitutional court.[126]

Regarding the criteria for assessing constitutional questions, the Commission lent its support to a moderately high threshold of "serious doubt":

> The Commission further notes that, when individuals have no direct access to a constitutional court, it would be too high a threshold condition to limit preliminary requests to circumstances in which an ordinary judge is convinced of the unconstitutionality of a provision. In these circumstances, serious doubt should suffice.[127]

Yet it supports the principle that constitutional courts should be able to reject requests that are not properly submitted, outside of the court's jurisdiction, or not relevant to a matter. It notes: "The constitutional court should not be overburdened and if ordinary courts can initiate preliminary proceedings, they should be able to formulate a valid question."[128] It also comments on the risk of abuse of constitutional complaints (though not preliminary questions specifically) and emphasizes parties' duties to exercise their rights in a *bona fide* manner. Failing this, it takes note of (but does not explicitly support or reject) states' allowance of constitutional courts to reject repeated requests and possibly fine abusive applicants.[129]

Finally, the Venice Commission has also opined, albeit indirectly, on the question of safeguards. The Commission lent some support to the notion of staying proceedings while a constitutional question is under consideration, but possibly only once the matter has been taken up by the constitutional court, with the goal of avoiding the direct application of challenged laws:

> Ordinary proceedings should be stayed, when preliminary questions in this case are raised to the constitutional court. . . . [I]t must be ensured, that the ordinary judge does not have to apply a law, he holds to be unconstitutional and whose constitutionality is to be decided by the constitutional court with regard to the same case.[130]

On the question of timelines, the Commission has made at least two relevant observations. The first concerns timelines for constitutional complaints submitted directly by litigants. Although this is not directly applicable to the question of preliminary ruling motions raised by applicants, the general principles are apt:

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[126] *Id.* § 58.
[127] *Id.* § 53.
[128] Venice Commission Constitutional Access Report 2010, *supra* note 124, § 125.
[129] *Id.* § 119.
[130] *Id.* § 142.

> While these time limits should not be too long, they must be reasonable in order to enable the preparation of any complaint by an individual personally, or to enable a lawyer to be instructed to prosecute the complaint and defend the individual's rights. . . . The Venice Commission recommends that with regard to individual acts the court should be able to extend the deadlines in cases where an applicant is unable to comply with a time-limit due to reasons not related to either their or their lawyer's fault or, where there are other compelling reasons.

Secondly, concerning the timelines in which constitutional courts should issue a decision, it notes the need to balance due consideration with the efficient protection of rights:

> Time limits for the adoption of decisions, if they are established, should not be too short to provide the constitutional court with the opportunity to examine the case fully and should not be so long to prevent the effectiveness of the protection of human rights via constitutional justice. From the perspective of the effectiveness of constitutional justice, time limits are often impossible to preview, so the constitutional court should be able to extend the mentioned time limits in exceptional cases.[131]

E. Policy options

Heighten evidentiary standards and expand judicial discretion: Even in countries where referral of constitutional questions was near-automatic, judges retain discretion to dismiss manifestly ill-founded requests based on objective criteria. In Romania, for instance, the judge is still responsible for ensuring that questions are novel, properly raised, and relevant to the case. Although the Venice Commission generally supports automatic referral, it seems to lend support for basic criteria, such as the need for at least "serious doubt" by judges about a law's compatibility with the constitution. The Commission's reports also found no example of a country where a judge is required to blindly refer cases without making a preliminary assessment, nor does it support the principle that constitutional courts must accept all such cases.

Set timelines for constitutional review: If judges retain some discretion to dismiss baseless requests, the most relevant timelines are those in which parties must submit materials and within which the judge must rule on the request. Italy provides a strong example of regulating this initial period, in requiring a ten-day hearing followed by a decision period of three days. Although this tight timeline may run into concerns by the Venice Commission about access to justice, a milder version could help Moldova overcome current backlogs and delays. Meanwhile, if Moldova continues to give judges

[131] *Id.* § 149.

little discretion about case dismissal, it could consider shortening its timeline for the entire constitutional decision process, perhaps closer to Spain, Hungary, or France's 2-3 month limit.

IV. Other relevant legislation on judicial delays

Finally, we did a quick survey of legislation relevant to preventing delays in judicial proceedings overall. We found several examples of judicial provisions which both required courts to avoid delays and imposed sanctions against parties which caused them. Croatia adopts particularly strident measures. Article 10 of **Croatia's** Criminal Procedure Code holds that "The court shall be bound to carry out proceedings without delay and prevent any abuse of the rights of the procedural participants."[132] Subsection (3) takes the dramatic step of denying parties who cause delays a right of action:

> The party, defence counsel, the injured party, the legal representative or the legal guardian who apparently delay the criminal proceedings or otherwise abuse a right under this Act shall be denied the right to the action in question by a ruling of the court.[133]

If a defense counsel or legal representative loses this right, the court will appoint another defense counsel to take their place for the remainder of the proceedings.[134] Moreover, the court may impose fines of up to €2,600 (20,000 kuna) on a counsel or legal representative whose "actions are clearly aimed at delaying the criminal proceedings."[135] **Estonia** also allows the removal from a case of an attorney who "in the course of proceedings, has shown themselves to be dishonest, incompetent or irresponsible, or if they have maliciously obstructed the fair and expeditious conduct of proceedings."[136] In **Poland**, "serious violation[s] by counsel [of] part of their duties in the court process" must be notified to the district bar association and copied to the Minister of Justice, and may carry a fine of €2,230 (10,000 zlotys).[137] In **Latvia**, a fine of up to three months of the national minimum wage may be imposed "upon a person who interferes with the

[132] Croatian Code of Criminal Procedure, art. 10.
[133] *Id.* art. 10(3).
[134] *Id.* art. 10(4)
[135] *Id.* art. 176(1)
[136] Estonian Code of Criminal Procedure, art. 267 (4.1).
[137] Polish Code of Criminal Procedure, art. 20§ 1(9)-(10). Finland also allows a person who "uses a manner of speech or writing in a session or in a document submitted to the court that offends the dignity of the court" or "otherwise disturbs the consideration or behaves inappropriately" to be fined up to €1,000. Finnish Code of Criminal Procedure, Ch. 14 § 7 (244/2006).

procedures laid down in criminal proceedings or ignores the requirements of the person directing the proceedings."[138]

Conclusion

Across Europe, countries strike different balances between preserving open access to courts and strengthening judicial discretion to dismiss baseless or ill-founded claims. From a normative standpoint, the Venice Commission charts a middle path: regarding judicial recusal and case transfers, it underscores judicial independence and the need for judges not to be dismissed without good cause. Regarding constitutional exceptions, it seems to lean slightly more towards upholding individuals' ability to assert their constitutional rights, yet acknowledges the need for basic quality-control measures. It cautions that very tight deadlines or high court fees could impede access to justice, but seems ambivalent or even supportive of tools like fines and moderate time limits to ensure justice is delivered in the face of dilatory tactics. Practically, many countries in Europe implement a number of safeguards against delays, such as evidentiary standards, time limits, fines and other penalties, exceptions for urgent procedural matters. Moreover, a number of countries have general provisions in their criminal procedure codes to flexibly target dilatory behavior. These policies could be useful for Moldova in minimizing judicial delays in anti-corruption prosecutions. It is worth bearing in mind that judicial discretion is always a double-edged sword: what can be used against abusive litigants today could be misused tomorrow against legitimate parties. Careful consideration of the local governance and anti-corruption context is necessary. In any case, these examples can hopefully serve as a practical guide to help Moldova achieve the goal of a fair and timely trial for all.

[138] Latvian Criminal Procedure Code § 292; *see also* § 14 (holding that "each person has the right to the completion of criminal proceedings within a reasonable term, that is, without unjustified delay."); § 67, 80(1), 86(4) (specifying duties for the suspect and defense counsel to avoid delaying or hindering the case).