Decision No. 9 of 29 December 2022 on the Candidacy of Sergiu CARAMAN, Candidate for the Superior Council of Magistracy and for the Board for Performance Evaluation of Judges

The Independent Evaluation Commission for assessing the integrity of candidates for the position of member in the self-administration bodies of judges and prosecutors ("the Commission") deliberated in private on 1 December 2022 and on 29 December 2022. The members participating were:

1. Herman von HEBEL
2. Victoria HENLEY
3. Nadejda HRIPTIEVSCHI
4. Vitalie MIRON
5. Tatiana RĂDUCANU
6. Nona TSOTSORIA

The Commission delivers the following decision which was adopted on that date:

I. The procedure

Sergiu CARAMAN, judge at the Criuleni Court ("the candidate"), was on the list of candidates submitted by the Superior Council of Magistracy to the Commission on 6 April 2022 for evaluation for the position of member of the Superior Council of Magistracy and member of the Board for Performance Evaluation of Judges.

During the period 2008-2009 the candidate worked as an inspector and as a criminal investigative officer in the Police Commissariat in Chisinau, for the Ministry of Internal Affairs. During the period 2009-2010 he worked as superior inspector at the Center for Combating Economic Crimes and Corruption. The candidate was appointed as a judge for a period of 5 years to serve at the Floresti Court on 19 October 2012. On 3 November 2017 he was appointed as judge until retirement age. On 12 March 2018 he was transferred to the Criuleni Court, where he presently works.

On 21 June 2022 the Commission sent an ethics questionnaire to the candidate to be filled in voluntarily and returned to the Commission by 5 July 2022. The candidate submitted the completed questionnaire to the Commission on 4 July 2022.

On 8 July 2022 the Commission sent a request to the candidate for completing and submitting by 15 July 2022 the Declaration of assets and personal interests for the past 5 years as required by art. 9 para. (2) of Law No. 26/2022 on certain measures relating to the selection of candidates for position as a member of the self-administration bodies of the judges and prosecutors (hereinafter "Law No. 26/2022"). The declaration also includes the list of close persons in the judiciary, prosecution and public service, as required by the same article. The candidate submitted a

completed declaration to the Commission on 15 July 2022.

Pursuant to art. 10 para. (1) of Law No. 26/2022, after receipt of the candidate's declaration and questionnaire, the Commission obtained information from numerous sources in order to assess the candidate's financial and ethical integrity. The sources from which information was obtained concerning evaluated candidates generally included the National Integrity Authority, State Fiscal Service, General Inspectorate of Border Police, financial institutions, public institutions, open sources such as social media and investigative journalism reports and reports from members of civil society. Not all sources produced information concerning each candidate and not all of the information produced by sources about a candidate was pertinent to the Commission's assessment. All information received was carefully screened for accuracy and relevance.

To the extent that issues were raised from the candidate's declaration and questionnaire and collected information, those issues were raised in written questions with the candidate and during the public hearing.

Written communication with candidate:

On 9 August 2022, the Commission sent to the candidate a request for clarifying information, containing 19 questions, including 54 sub-questions and 22 requests for further documentation. The candidate replied within the requested time period on 13 August 2022 to all questions.

On 21 September 2022 the Commission submitted to the candidate the 2nd round of questions, in total 9 questions with 14 sub-questions including 9 requests for further documentation. The candidate replied within the requested time period on 24 September 2022.

On 20 October 2020, the Commission submitted to the candidate the 3rd round of questions, 6 questions in total with 11 sub-questions including 6 requests for further documentation. The candidate replied on 30 October 2022, within the extended deadline approved by Commission, answering all questions and providing all of the documents requested.

II. The law relating to the evaluation

The Commission's evaluation of candidates' integrity consists of verifying their ethical integrity and financial integrity (art. 8 para. (1) of Law No. 26/2022).

Art. 8 para. (2) of Law No. 26/2022 provides that a candidate is deemed to meet the criterion of *ethical integrity* if:

a) he/she has not seriously violated the rules of ethics and professional conduct of judges, prosecutors or, where applicable, other professions, and has not committed, in his/her activity, any wrongful actions or inactions, which would be inexplicable from the point of view of a legal professional and an impartial observer;
b) there are no reasonable suspicions that the candidate has committed corruption acts, acts related to corruption or corruptible acts, within the meaning of the Law on Integrity No. 82/2017;

c) has not violated the legal regime of declaring personal assets and interests, conflicts of interest, incompatibilities, restrictions and/or limitations.

A number of versions of ethical codes applied to judges over the period of time covered by the evaluation. The codes were *Judge's Code of Ethics*, approved by the Superior Council of Magistracy decision No. 366/15 on 29 November 2007, *Judge's Code of Ethics and Professional Conduct,* approved by decision No. 8 of the General Assembly of Judges of 11 September 2015, amended by decision no. 12 of the General Assembly of Judges of 11 March 2016, as well as the *Commentary to the Code of Judges' Ethics and Professional Conduct*, approved by Superior Council of Magistracy's decision No. 230/12 of 8 May 2018. Since 2018, the *Guide for Judges' Integrity* approved by the Superior Council of Magistracy's decision No. 318/16 of 3 July 2018 is another relevant source for the purpose of assessing judicial integrity issues.

Also, the Bangalore Principles of Judicial Conduct, adopted by the Judicial Group on Strengthening Judicial Integrity as The Bangalore Draft Code of Judicial Conduct 2001 and as revised at the Round Table Meeting of Chief Justices on 25-26 November 2002 and endorsed by United Nations Social and Economic Council, resolution 2006/ 23 ("Bangalore Principles of Judicial Conduct") provide relevant guidance.]

[Opinion no. 3 of the Consultative Council of European Judges (CCJE) to the attention of the Committee of Ministers of the Council of Europe on the principles and rules governing judges' professional conduct, in particular ethics, incompatible behaviour and impartiality, adopted on 19 November 2002 ("CCJE (2002) Op. N° 3") provides further guidance.]

Art. 8 para. (4) of Law No. 26/2022 provides that a candidate shall be deemed to meet the criterion of *financial integrity* if:

a) the candidate's assets have been declared in the manner established by law;
b) the Evaluation Commission finds that his/her wealth acquired in the last 15 years corresponds to the declared revenues.

Art. 8 para. (5) of Law No. 26/2022 provides that in order to assess the applicant's financial integrity, the Commission is required to verify the following:

a) compliance by the candidate with the tax regime in the part related to the payment of taxes when using the means and income derived from the property held, as well as taxable income and the payment of import duty and export duty;
b) compliance by the candidate with the regime of declaring assets and personal interests;
c) the method of acquiring the property owned or possessed by the candidate or persons referred to in art. 2 para. (2), as well as the expenses associated with the maintenance of such assets;
d) the sources of income of the candidate and, where appropriate, of the persons referred to in art. 2 para. (2);
e) existence or not of loan, credit, leasing, insurance or other contracts capable of providing financial benefits, in which the candidate, the person defined in art. 2 para.

(2) thereof, or the legal entity in which they are beneficial owners, is a contracting party;

f) whether or not donations exist, in which the candidate or the person established in art. 2 para. (2) has the status of donor or recipient of donation;

g) other relevant aspects to clarify the origin and justification of the candidate's wealth.

In assessing and deciding upon the criteria related to financial and ethical integrity, the Commission is not to depend on the findings of other bodies competent in the field concerned. (art. 8 para. (6) of Law No. 26/2022). The Commission is required to assess the information gathered about candidates using its own judgment, formed as a result of multi-faceted, comprehensive and objective review of the information. None of the submitted materials has a predetermined probative value without being assessed by the Commission. (art. 10 para. (9) of Law No. 26/2022).

A candidate shall be deemed not to meet the integrity criteria if serious doubts have been found as to the candidate's compliance with the above-listed requirements which have not been mitigated by the evaluated person (art. 13 para. (5) of Law No. 26/2022). As noted in the recent Venice Report on vetting in Kosovo, "In a system of prior integrity checks, the decision not to recruit a candidate can be justified in case of mere doubt, on the basis of a risk assessment. However, the decision to negatively assess a current post holder should be linked to an indication of impropriety, for instance inexplicable wealth, even if it cannot be proven beyond doubt that this wealth does come from illegal sources." Also, "[I]in other investigations like wider integrity checking the burden of proof will be discharged on the balance of probability." Venice Commission, CDL-AD (2022)011-e, Kosovo - Opinion on the Concept Paper on the Vetting of Judges and Prosecutors and draft amendments to the Constitution, adopted by the Venice Commission at its 131st Plenary Session (Venice, 17-18 June 2022), §§10,9.

Shifting the burden of proof to the candidate, once the evaluating body has identified integrity issues, has been found permissible by the European Court of Human Rights, even in the vetting of sitting judges who may lose their positions or otherwise be sanctioned as a consequence of the evaluation. In *Xhoxhaj v. Albania,* no. 15227/19, §352, 31 May 2021 the Court stated that "it is not per se arbitrary, for the purposes of the "civil" limb of Article 6 § 1 of the Convention, that the burden of proof shifted onto the applicant in the vetting proceedings after the IQC [Independent Qualification Commission] had made available the preliminary findings resulting from the conclusion of the investigation and had given access to the evidence in the case file."

Under art. 5 para. (1) of the Evaluation Rules of the Independent Evaluation Commission for assessing the integrity of candidates for the position of member in the self-administrative bodies of judges and prosecutors, pursuant to Law No.26/2022, of 2 May 2022 (hereinafter "Evaluation Rules"), only if a candidate fully meets all of the indicators set for the in art. 8 para. (2)- (4) of Law No. 26/2022 does the candidate satisfy the criterion of "ethical and financial integrity."

III. Evaluation of the candidate

At the hearing, the candidate was asked about the following financial and ethical issues:

1. Failure to declare the candidate's wife's bank accounts in the manner prescribed by law

a. The facts

The candidate and his wife were married in September 2014. In 2014 and 2015, the candidate's wife had three bank accounts, as follows:

> (1) Bank Account 2011 – No. 1 – opened on 13 September 2011 which was a salary account. In addition to salary payments, there was a deposit of 800 MDL in 2013 and 5,100 MDL in 2014.
> (2) Bank Account 2011 – No. 2 – opened on 19 April 2011 which had incoming cash of 7,864 MDL in 2011 and 3,700 MDL in 2019. No other transactions were identified on this bank account.
> (3) Bank Account 2012 – No. 3 – opened on 26 September 2012 with a credit of 20,000 MDL. A credit of 44,000 MDL was received on this account on 18 July 2017.

The candidate did not declare any of his wife's bank accounts in his declarations of assets and personal interests (hereinafter "annual declarations") for the years 2014-2015.

In response to written questions from the Commission asking why he had not declared his wife's bank accounts in his 2014 and 2015 annual declarations, the candidate explained that "At the time when I filled in the asset and interest declarations, the funds on these accounts were not above 15 average salaries. Therefore, pursuant to Article 4(1)(d) of the Law No. 1264 of 19 July 2002 (in force until 1 August 2016), those funds were not to be declared. I would also like to inform you that the majority of these are loan accounts in commercial banks on which the monthly instalments for loan repayment are placed. There are also salary and/or social security and/or credit card accounts, the contents of which throughout the entire year have been declared under income/debts, as established by law". With his answer to the Commission, the candidate provided the bank statements from his wife's bank accounts.

At the public hearing, the candidate explained that bank account No. 1 was a salary account of his wife's and the transactions of 800 MDL and 5,100 MDL that took place in 2013 and 2014 were deposits made by his wife to this account. The candidate explained that all the funds on this salary account were declared in full as income in his annual declarations. With reference to bank account No. 2, the candidate explained that this account was used only for obtaining and repaying loans of 20,000 MDL and 44,000 MDL which his wife received in 2012 and 2014. With regard to bank account No.3, the candidate explained that this bank account was opened in 2011 when he did not yet know his wife and was used by her to receive taxes from the USA following the completion of the Work & Travel Program. The candidate explained that since 2011 this bank account had a zero balance and was not used for further transactions. With regard to the transaction of 3,700 MDL that took place on this account in 2019, the candidate explained that this transaction was an inter-bank transfer made by the bank from one of his wife's bank accounts to another. The candidate also stated at the hearing that his wife forgot about the accounts, other than the salary account, and did not disclose them to him at the time he submitted his declarations.

When asked by the Commission at the public hearing why he had not declared his wife's bank

accounts in his 2014 and 2015 declarations, the candidate explained that the law in force until 2016 obliged the subject of declaration to declare all financial assets. The candidate indicated that the legislature listed a bank account, among other things, as a financial asset. The candidate stated that in financial and banking terms, a financial asset is defined as a financial indicator that is used in the banking system where the asset consists of bank notes, current/old bank accounts, bank credits, long-term obligations, shares as well as insurance premiums. The candidate explained that if a bank account has no assets on it, meaning no funds in it, then in his opinion the account is not a financial asset that belongs to him but it belongs to the bank. In this regard, the candidate reasoned that if there are no funds in a bank account, the account did not have to be disclosed as a financial asset in the declaration. The candidate was asked by the Commission if he had come up with this interpretation of the law when he submitted the declaration and if this interpretation was the reason he had not declared the accounts in his 2014 and 2015 declarations. The candidate acknowledged that he came to this interpretation of the law after he had received the questions about these bank accounts from the Commission. The candidate further explained that when he submitted his 2014 and 2015 annual declarations, he had no intention of hiding any of the bank accounts that belonged to him or his wife, or the contents of those accounts.

b. The law

In determining whether a candidate meets the criterion of financial integrity, the Commission must verify that the candidate has complied with the legal regime of declaring assets and personal interests, as per art. 8 para. (4) lit. a) and para. (5) lit. b) of Law No. 26/2022.

Art .6 para. (1) of Law No. 1264/2002 concerning the declaration and control of incomes and assets of state dignitaries, judges, prosecutors, civil servants and some persons in leading positions (in force at the time) provided that the declaration on income and assets (hereinafter referred to as the declaration) is a personal and irrevocable act, which is made in writing, on the declarant's own responsibility, and which may be rectified only under the conditions of art. 10 para. (2).

A candidate does not meet the criterion of financial integrity under art. 8 para. (4) lit a) of Law No. 26/2022 when assets have not been declared in the manner required by law. A finding that the candidate has violated the legal regime of declaring personal assets and interests is a failure to meet the criterion of ethical integrity under art. 8 para. (2) lit. c).

According to art. 4 para.(1) lit. d) Law No. 1264/2002 (in force until 1 August 2016), the subject of declaration was obliged "to declare financial assets, i.e. bank accounts, investment funds, equivalent forms of saving and investing, investments, bonds, cheques, bills of exchange, certificates of exchange, other documents incorporating property rights of the declarant or their family members, direct investments in national currency or foreign currency made by them or by their family members, as well as other financial assets".

Instruction of the mode of completing the declaration of income and property approved by Ordinance of the President of National Integrity Commission No. 5 of 8 February 2013 states that the subject of the declaration was obliged to declare as financial assets under Column IV. Financial Assets of the declaration "all bank accounts, investment funds, equivalent forms of

saving and investing, investments, bonds, cheques, bills of exchange, certificates of exchange, other documents incorporating property rights of the declarant or their family members, direct investments in national currency or foreign currency made by them or by their family members, as well as other financial assets".

From 1 August 2016, the new Law No.133/2016 regulates the mode of submitting the asset declaration. According to art. 4 para. (1) lit. d) of Law No. 133/2016, the subject of declaration is obliged "to declare the financial assets of the subject of the declaration, namely the monetary amount in the national currency or a foreign currency which exceeds the value of 15 average national salaries and which does not represent the object of a deposit in a financial institution. Bank accounts, creation units in investment funds, equivalent forms of investments and savings, investments, bonds, checks, bills of exchange, loan certificates, other documents that include personal patrimonial rights of the subject of the declaration, of his/her family members or of his/her cohabitant, direct investments in the national currency or in a foreign currency, made by him/her or by his/her family members or his/her cohabitant, as well as other financial assets, if their combined value exceeds 15 average national salaries".

c. Reasoning

The Commission finds that the candidate provided detailed answers regarding his wife's bank accounts both in the written procedure as well as at the hearing. After examining the bank statements on these bank accounts that were provided by the candidate, the Commission was able to establish both the nature and level of activity in the candidate's wife's bank accounts. Bank Account 2011 No. 1 was primarily a salary account. There were only two small deposits in addition to salary, one in 2013 and one in 2014, which according to the candidate were made by the candidate's wife for personal needs. These sums did not raise any suspicion. Bank account No. 2 was an account on which the candidate's wife received two loans, one in 2012 and one in 2014. Both loans were received by the candidate's wife before they were married and according to the law in force at the time, the loans were not required to be declared by the candidate. Bank account No. 3 was a checking account which had incoming cash in 2011. According to the candidate's explanation, this account was used by his wife to receive taxes following the completion of the Work & Travel Program. In 2019, inter-bank transfers were made to the account from the candidate's wife's bank accounts. The Commission did not find any suspicious or dubious bank transactions, undeclared sources of funds or other bank accounts belonging to the candidate or his wife that were subject to declaration.

The Commission noted that the candidate's initial explanation, in part, for not declaring his wife's bank accounts was that, at the time when he filled in the asset and interest declarations, the funds on these accounts were not above 15 average salaries and therefore, were not to be declared. This explanation misstates the law. The requirement for declaring bank accounts only when the amount of the funds in the account exceeded 15 average salaries was not introduced into the law until 2016 (art. 4 para. (1) lit. d) of Law No. 133/2016, effective 1 August 2016).

The explanation and interpretation of the law given by the candidate at the hearing was also not accepted by the Commission as a valid reason for non-declaration of his wife's bank accounts. The candidate himself acknowledged that his interpretation of the notion "financial asset" is based

on financial/banking terms. The legal provisions in force at the time as well as the Instruction of the mode of completing the declaration of income and property expressly establish that the subject of the declaration was obliged to declare as financial assets under Column IV. Financial Assets of the declaration "all bank accounts, investment funds, equivalent forms of saving and investing, investments, bonds, cheques, bills of exchange, certificates of exchange, other documents incorporating property rights of the declarant or their family members, direct investments in national currency or foreign currency made by them or by their family members, as well as other financial assets*"*. Nowhere in the law then in effect did it state that the subject of the declaration would have been obliged to declare a bank account as a financial asset only if it had funds on it or if it had financial activity. Furthermore, according to the provisions of Art. 43 of Law No. 780/2001 regarding the legislative acts (in force until 12 January 2018), the only competent authority to provide an official interpretation of the provisions of the law is the Constitutional Court (in case of the Constitution or constitutional laws) and the Parliament (for all the other laws). As far as the Commission is informed, no such law of the interpretation regarding the notion of "financial asset" was approved by the Parliament. Therefore, the Commission does not accept the candidate's argument and interpretation of the law that he had no obligation to declare these bank accounts in his 2014 and 2015 declarations. Moreover, in the public hearing, the candidate candidly acknowledged that this interpretation of the law was made by him after he received the Commission's questions and not when he submitted the declarations for 2014 and 2015. Therefore, it cannot be given weight as a factor in his failure to declare the accounts.

While the candidate's legal justifications for not declaring the bank accounts was unavailing, the Commission found that the circumstances relating to the candidate and the accounts were relevant. Taking into account the inactivity of some of the candidate's wife's bank accounts, the absence of suspicious transactions, the fact that these bank accounts were opened in his wife's name prior to their marriage, the fact that the candidate declared all his wife's salary and income in all his declarations as well as the candidate's explanation that his wife forgot about two of the accounts and did not disclose them to him when he submitted his declarations, the Commission finds that there was no intention or reason to hide or not disclose these bank accounts in the candidate's declarations and his failure to do so was likely, at most, inadvertent.

In light of the above circumstances, the Commission determined that its concerns regarding the non-declaration of the candidate's wife's three bank accounts in his 2014 and 2015 annual declarations were mitigated by the candidate and that the Commission did not have serious doubts (art. 13 para. (5) of Law No. 26/2022) as to the candidate's compliance with the criterion of financial and ethical integrity as per art. 8 para. (2) lit. c) and (4) lit. a) of Law No. 26/2022 with respect to the issue of non-declaration of his wife's bank accounts in his 2014 and 2015 annual declarations.

IV. Decision

Based on art. 8 para. (1), (2) and (4) and art. 13 para. (5). of Law No. 26/2022, the Commission decided that the candidate is compliant with the ethical and financial integrity criteria and thus passes the evaluation.

V. Appeal and publication of the decision

Pursuant to art. 14 para. (1) of Law No. 26/2022, the candidate is entitled to appeal this decision within 5 days from receiving the decision.

Pursuant to art. 13 para. (7) of Law No. 26/2022, this decision is sent by email to the candidate and to the institution responsible for organizing the election or competition, which in the present case is the Superior Council of Magistracy. If within 48 hours of sending the decision, the candidate does not notify the Commission of his or her refusal to publish the decision, the decision shall be published on the website of the Superior Council of Magistracy in a depersonalized form, except for the surname and first name of the candidate that remain public. The Commission will also publish the decision on its website if the candidate does not object to publication.

This decision was adopted unanimously by all participating members of the Commission.

Done in English and translated into Romanian.

Signature: 

Herman von HEBEL
Chairman, Commission