



Independent Evaluation Commission for assessing the integrity of candidates
for the position of member in the self-administration bodies of judges and prosecutors

Comisia independentă de evaluare a integrității candidaților la funcția
de membru în organele de autoadministrare ale judecătorilor și procurorilor

*Decision No. 32 of 26 April 2023 on the Candidacy of Dumitru OBADĂ,
Candidate for the Superior Council of Prosecutors*

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 21 April 2023 and 26 April 2023. 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

Dumitru OBADĂ, currently serving as the Governmental Agent of the Republic of Moldova at the European Court of Human Rights (“the candidate”), was on the list of candidates submitted by the Superior Council of Prosecutors to the Commission on 7 April 2022, as updated 13 January 2023, for evaluation for the position of member of the Superior Council of Prosecutors.

The candidate was appointed as a prosecutor in 2011. He has served as a prosecutor at the General Prosecutor’s Office, at the Anticorruption Prosecution Office and in various other capacities. In June 2022 he was detached as a prosecutor and appointed for a mandate of four years as the Governmental Agent of the Republic of Moldova at the European Court of Human Rights.

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 5 July 2022.

On 23 January 2023 the Commission sent a request to the candidate for completing and submitting by 30 January 2023 the Declaration of assets and personal interests for the past five 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. For good cause, the Commission extended the candidate’s time for submission of the five-year declaration to 4 February 2023. The candidate submitted a completed declaration to the Commission on 3 February 2023.

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 15 March 2023 the Commission sent to the candidate a request for clarifying information, containing 17 questions, including 54 sub-questions and 35 requests for further documentation. The candidate replied within the requested time period on 19 March 2023 to the Commission's questions and provided most of the requested documents.

On 28 March 2023, the Commission sent a second round of four questions, including nine sub-questions and two requests for further documentation, to clarify some issues that came out during the evaluation. The candidate replied within the requested time period on 31 March 2023 to the Commission's questions and provided the requested documents.

On 3 April 2023, the Commission sent a third round of two questions, including two sub-questions and one request for further documentation, to clarify some issues that came out during the evaluation. The candidate replied within the requested time period on 6 April 2023 to the Commission's questions and provided the requested documents.

Following the candidate's request, on 20 April 2023 the candidate was granted access to the evaluation materials according to art. 12 para. (4) lit. c) of Law No. 26/2022.

On 21 April 2023, the candidate took part in a public hearing of the Commission.

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 prosecutors over the period of time covered by the evaluation. The codes were *Prosecutor's Code of Ethics*, approved by the Prosecutor General order No. 303/35 of 27 December 2007, *Prosecutor's Code of Ethics*, approved by the Superior Council of Prosecutors' decision No. 12-3d-228/11 of 4 October 2011, *Prosecutor's Code of Ethics and Conduct*, approved by Superior Council of Prosecutors' decision No. 12-173/15 of 30 July 2015 and *Prosecutor's Code of Ethics*, approved by the General Assembly of Prosecutors' decision No. 4 of 27 May 2016, amended by General Assembly of Prosecutors' decision No. 1 of 22 February 2019.

Opinion No. 13 (2018) of the Consultative Council of European Prosecutors (CCPE) on the "Independence, accountability and ethics of prosecutors", adopted on 23 November 2018 ("CCPE (2018) Op. No. 13") provides further guidance.

The *Public Servant's Code of Conduct*, adopted by Law No. 25/2008 regarding the public servant's Code of conduct, last amended by Law No. 305/2017, was applicable over the period of time covered by the evaluation.

In the absence of rules of ethics and conduct approved for the field in which the candidate works or has worked, it shall be verified whether or not the past conduct of the candidate gives rise to reasonable doubts as to his/her compliance with the ethical and conduct standards established for judges and prosecutors (art. 8 para. (3) of Law No. 26/2022).

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. 2 para. (2) of Law No. 26/2022 provides that the evaluation of candidates includes a verification of the assets of persons close to candidates, as defined in Law No. 133/2016 on declaration of assets and personal interests, as well as of the persons referred to in art. 33 para.

(4) and (5) of Law No. 132/2016 on the National Integrity Authority.

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]n 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 of 2 May 2022, pursuant to Law No. 26/2022, (hereinafter “Evaluation Rules”), only if a candidate fully meets all of the indicators set forth in art. 8 para. (2) - (5) of Law No. 26/2022 does the candidate satisfy the criterion of “ethical and financial integrity”.

III. Evaluation of the candidate

The candidate was asked at the hearing about the following financial and ethical issue:

1. Failure to declare rental expenses for wife’s business in the manner prescribed by law

a. The facts

In the five-year declaration that the candidate submitted to the Commission on 3 February 2023 as part of the evaluation process, he declared various expenses in connection with his wife’s notary office. The amount that he listed for rental expenses for each of the five years differed from the amounts that had been declared to the State Tax Service (hereinafter “STS”). In the five-year declaration for 2017, he declared rental expenses of 29,300 MDL; 137,382 MDL was reported to STS for that year. For 2018, he declared rental expenses of 28,100 MDL; 130,932 MDL was reported to STS. For 2019, he declared rental expenses of 160,000 MDL; 205,746 MDL was reported to STS. For 2020, he declared rental expenses of 228,000 MDL; 214,125 MDL was reported to STS. For 2021, he declared rental expenses of 327,000 MDL; 323,099 MDL was reported to STS for that year. Thus, for the years 2017-2019 in the five-year declaration, the candidate underestimated the amount of rental expenses incurred by his wife’s notary office. For the years 2020 and 2021, he overestimated the amount of rental expenses. The candidate did note in the five-year declaration that each amount furnished was an approximation.

When asked by the Commission in written questions and at the hearing about the difference between the amounts of rental expenses in the candidate’s five-year declaration and in the declarations to STS, he stated that the amounts he provided in his five-year declaration were

estimates of the amount of rent paid and that he had not received information on actual rental costs from the accountant when he filed the declaration. In response to the Commission's written questions, the candidate provided rental contracts covering the period of 2017 to 2021 and provided documentation concerning the calculation of rental expenses for 2017.

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.

Pursuant to art. 8 para. (2) lit. c), para. (4) lit. a) and para. (5) lit. b) of Law No. 26/2022 a candidate's failure to declare personal assets and interests in the manner established by law is a failure to meet both the financial integrity criterion and the ethical integrity criterion.

According to art. 9 para. (2) of Law No. 26/2022, the Evaluation Commission shall request the candidate to submit to the Commission a declaration of assets and personal interests with the updated data for the past five years, including the expenses of that period.

The Evaluation Rules state that undeclared income or expenditures are relevant for financial integrity, insofar as items have not been declared truthfully, and for ethical integrity, including but not limited to insofar as they relate to prohibited secondary incomes, tax evasion, or violation of anti-money laundering provisions. (art. 6 para. (1)).

c. Reasoning

Art. 8 para. (2) lit. c), para. (4) lit. a) and para. (5) lit. b) of Law No. 26/2022 require the Commission to verify that a candidate has complied with the legal regime of declaring assets and personal interests.

In this instance, for each year of the five-year declaration the candidate provided rental amounts for his wife's notary business that were not consistent with the amounts previously declared to STS. For three years, the candidate understated rental expenses; for two years, the candidate overstated the amounts paid. The amount of the net difference between the amounts in the five-year declaration and the amounts reported to STS, was 238,884 MDL.

The candidate explained in response to written questions and at the hearing that the annual amounts of rental expenses he provided in the five-year declaration were estimates as he was not able to obtain information from the accountant before filing his declaration. When the candidate was asked about the differences in the first round of questions from the Commission, the candidate promptly explained the errors and provided confirmatory documentation for the amounts of rent paid. The differences between the candidate's estimates of rent paid by his wife's

notary office and the amounts declared to STS had no effect on the amount of taxes owed or paid for his wife's notary income because the actual expenses had previously been reported to STS and taxes had already been paid. The candidate did indicate on his declaration that each amount furnished was "approximate."

In light of the above circumstances, the Commission did not find serious doubts (art. 13 para. (5) of Law No. 26/2022) as to the candidate's compliance with the criterion of ethical integrity as per art. 8 para. (2) lit. c) and financial integrity as per art. 8 para. (4) lit. a) and para. (5) lit. b) of Law No. 26/2022 with respect to the amounts declared in his five-year declaration as rental expenses for his wife's business because the candidate's mistaken estimates – submitted with an appropriate caveat due to time constraints – appear to have been unintentional, were promptly explained, not made for any improper purpose and, thus, the Commission's concerns were fully mitigated by the candidate.

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 Prosecutors. 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 Prosecutors 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