

D E C I S I O N
In the name of the law

THE SUPREME COURT OF JUSTICE

1 August 2023

Chişinău municipality

The Special Panel, established at the Supreme Court of Justice to examine the appeals against the decisions of the Independent Evaluation Commission for assessing the integrity of candidates for the position of member in the self-administration bodies of judges and prosecutors

consisting of:

Hearing Chairperson, Judge
Judges

Ion Guzun
Mariana Pitic
Ion Malanciuc

Clerk

Olesea Suduc

With the participation of:

plaintiff's representative, counsel

Petru Balan

representatives of the defendant, counsels

Roger Gladei,
Valeriu Cernei

having examined in public court session, under the administrative dispute procedure, the appeal brought by Angela Bostan, represented by counsel Petru Balan, against the Independent Evaluation Commission for assessing the integrity of candidates for the position of member in the self-administration bodies of judges and prosecutors, seeking that the decision be annulled and that the candidate evaluation procedure be resumed.

i t e s t a b l i s h e d:

Submissions of the Participants in the Proceedings

On 9 January 2023, Angela Bostan, represented by counsel Petru Balan, filed an appeal against the Independent Evaluation Commission for assessing the integrity of candidates for the position of member in the self-administration bodies of judges and prosecutors, further supplemented on 30 January 2023, seeking that the decision be annulled and that the candidate evaluation procedure be resumed.

In the reasoning of her appeal and of her supplementary submission, Angela Bostan argued that she was a judge with the Chişinău Court of Appeal, that she had never been subject to disciplinary sanctions throughout her career, and that she had an impeccable reputation as she had never been the subject of journalistic investigations either and had never been involved in situations that could tarnish her image as a judge.

She also mentioned that she submitted her declarations of assets and personal interests to the National Integrity Authority in due time and as required by law. Throughout her entire career as a judge, the National Integrity Authority had never established that the plaintiff violated the legal regime of conflicts of interest, incompatibilities, restrictions and limitations, declaration and control of assets and personal interests.

The plaintiff explained that she had applied to be registered as a candidate for the position of member in the Superior Council of Magistracy, and had submitted her CV and Letter of Motivation alongside that application, before the amendment of the legal framework and before the “preliminary evaluation” of candidates to the position of member in the self-administration bodies of judges and prosecutors was introduced. The list of candidates to the position of member in the Superior Council of Magistracy was published on 5 November 2021, the plaintiff being the 12th on the list.

The law on the *pre-vetting* of candidates to the position of member in the Superior Council of Magistracy and in the Superior Council of Prosecutors was voted in the first reading in early 2022. On 10 March 2022, the Parliament passed in final reading the Law on measures related to the selection of candidates for the positions of members in the self-administration bodies of judges and prosecutors No 26 of 10 March 2022, effective from 16 March 2022.

The plaintiff, who was a candidate for the position of member in the Superior Council of Magistracy, was subject to the procedure of evaluation of candidates for the position of member in the judicial administration body, which was carried out by the Independent Commission for the evaluation of the integrity of candidates for the position of member in the self-administration bodies of judges and prosecutors.

Angela Bostan claimed that the process of preliminary evaluation of candidates for the position of member in the Superior Council of Magistracy was politicized and that the candidates that were inconvenient to the political power were blocked.

She noted in this regard that the evaluation of her integrity was done by unknown individuals selected secretly/confidentially to work in the Secretariat of the Commission. What is more, the evaluation was carried out by people who do not meet the minimum ethical and financial integrity requirements for being a member of a Commission that claims to be independent and consisting of members of integrity.

The fact that these persons were selected as members of the Commission does not dismiss the plaintiff's doubts, informed by public sources, that the members appointed to the Commission have neither the highest level of ethical and financial integrity, nor the highest level of independence to assess the plaintiff's level of ethical and financial integrity.

Commission member Tatiana Răducanu, former judge at the Supreme Court of Justice and former President of the Administration Board of the Legal Resources Centre from Moldova is politically affiliated to the executive power of the Republic of Moldova. She was the subject of a number of journalistic investigations and was directly culpable for the fact that the European Court of Human Rights found human rights violations and condemned the Republic of Moldova in seven cases she examined as a judge at the Supreme Court of Justice. Tatiana Răducanu also appeared in several TV and media coverages where her integrity was called in question.

As for Commission member Nadejda Hriptievschi, who is also a member of the Legal Resources Centre from Moldova, notwithstanding the fact that she did not vote on the decision concerning the plaintiff – her capacity of member of the Commission, given that she didn't meet the legal requirements – should be looked into.

The situation of the relatives of Commission members also matters for the evaluation work of the Commission. According to Sentence of 7 December 2021, passed by Chişinău Court, Buiucani Office, Turdor Hriptievschi – the father of Nadejda Hriptievschi, was pronounced guilty of the offence set out in Article 264(3)(a) of the Criminal Code and was sentenced to three years in prison and deprivation of the right to drive a vehicle for a period of two years. The victim of the offence passed away, and the judge who passed down the sentence was not reconfirmed in her position by the President of the country.

The involvement of Nadejda Hriptievschi with the Commission and her political affiliation exert great pressure on appellate judges who are examining the criminal case of the father of this Commission member.

As regards the evaluation procedure, Angela Bostan stated that it started for her on 6 April 2022, when the Superior Council of Magistracy sent the Commission the list of candidates to the position of member in the Superior Council of Magistracy.

On 21 June 2022, the Commission sent an ethics questionnaire to the candidate to be filled in and returned to the Commission by 5 July 2022.

On 15 July, the plaintiff submitted to the Commission her 5-year declaration of assets and personal interests, as request by the Commission.

On 1 August 2022, the Commission sent the plaintiff a request for clarifying information, containing 11 questions, including 27 sub-questions and 13 requests for further documentation. The plaintiff answered all questions within the requested time period, on 5 August 2022.

On 14 September 2022, the Commission sent the plaintiff a second round of ten questions, including 26 sub-questions and ten requests for further documentation, to clarify some issues that came out during the evaluation. The plaintiff answered all questions within the requested time period, on 17 September 2022, and she sent some additional information on 29 September 2022.

On 12 October 2022, the Commission sent the plaintiff a third round of six questions, including 11 sub-questions and three requests for further documentation, to clarify some issues that came out during the evaluation.

The plaintiff answered all questions within the requested time period, on 15 October 2022, and she sent some additional information on 27 October 2022.

On 28 October 2022, the plaintiff was heard in a public hearing by the Commission, and was announced at the end of the hearing that deliberations would follow.

On 4 November 2022, after the hearing, the Commission sent a fourth round of two questions, including three sub-questions and two requests for further documentation. The plaintiff answered all questions within the requested time period, on 5 November 2022.

The plaintiff provided all the requested information and documents, and fully answered all the questions asked by the Commission. The Commission did not convoke a new hearing.

On 4 January 2023, at 11:46, the plaintiff received an e-mail from the Secretariat of the Commission, accompanied by four attachments: Commission Decision No 6 of 9 December 2022 on the candidacy of Angela Bostan, candidate for the Superior Council of Magistracy, in two languages – Romanian and English, and the Dissenting Opinion of Commission member Vitalie Miron of 12 December 2022 in Romanian and in English.

The plaintiff detailed that she had previously not received other messages from the Secretariat of the Commission regarding Decision No 6 of 9 December 2022 and the Dissenting Opinion of 12 December 2022. Therefore, she found out about the unfavorable individual administrative act as late as 4 January 2023, at 11:46.

As per Decision No 6 of 9 December 2022 on the candidacy of Angela Bostan, candidate for the Superior Council of Magistracy, the adopted decision was the following: “Based on art. 8 para. (1), (2) lit. a) and c) [Translator’s note: inconsistent translation – original English version made reference only to letter a) of para. (2)], (4) lit. a) and b), and (5) lit. a), b), c), d) f) and g) [Translator’s note: inconsistent translation – original English version made reference only to letters b), c) and d) of para. (5)] and art. 13 para. (5) of Law No. 26/2022, the Commission decided that the candidate does not meet the integrity criteria as serious doubts have been found as to the candidate’s compliance with the ethical and financial integrity criteria and thus fails the evaluation.”

According to the Opinion of the Commission member Vitalie Miron, dissenting from Decision No 6 of 9 December 2022, said member substantiated his disagreement with the existence of serious doubts about both the financial integrity – through the lens of Article 8 of the Law No 26 of 10 March 2022 – and the ethical integrity of the plaintiff. In disagreement with the rest of the Commission members, he maintained that the actions and the role assumed by the plaintiff at the General Assembly of Judges on 27 September 2019 were in strict compliance with the provisions of the Law on Judicial Organization No 514-XIII of 6 July 1995 and that they were not indicative of a violation of ethical rules.

To further support her disagreement with the decision of 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 plaintiff stated that the decision was an illegal unfavorable individual administrative act.

In this regard, she underscored that according to Article 8(4)(a) and (b) of the Law No 26/2022, the candidate shall be deemed to meet the criterion of financial integrity if the candidate's assets have been declared in the manner established by law and if the Commission finds that his/her wealth acquired in the past 15 years corresponds to the declared revenues.

As regards the right to discretion, the plaintiff underscored that this notion, as envisaged in the Administrative Code, has three different meanings: i) discretion in substantive administrative law; ii) procedural discretion relating to strictly procedural matters; iii) judicial discretion granted to judges. Therefore, passing the evaluation is an individual administrative act which is mandatory, not discretionary. If all the conditions set out in Article 8(2) and (4) of the Law No 26 of 10 March 2022 are satisfied, it means that the Commission has the obligation to issue a favorable decision to pass the candidate to the position of member of the Superior Council of Magistracy and deem that the candidate met the financial and ethical integrity criteria.

The Commission only has procedural discretion, which pertains to the investigation and clarification of the facts on its own motion (and other matters relating to the drafting and issuance of the individual administrative act), which does not mean that the individual administrative act falls under the category of discretionary acts.

Angela Bostan insisted that the Commission did not establish in its Decision No 6 of 9 December 2022 that she hadn't declared her wealth in line with the law in force or that the wealth acquired by her over the last 15 years didn't correspond to the income she had declared. What it said was:

“As for the financial contribution from a family member living abroad, the candidate has been able to provide documentation relating to international bank transfers amounting to 6,300 EUR. In addition, an affidavit by this family member indicates that a donation in cash of 3,000 USD has taken place in 2017. The affidavit also states that over a period of 10 years, a total amount of between 7 – 10,000 USD has been provided to support the candidate's mother. However, this statement is not accompanied by supporting documentation and it remains unclear whether such support was provided in the context of the purchase of the apartment.”

The plaintiff argued that that statement in the decision of the Commission calling into question the amount of 3,000 USD given to the plaintiff's mother in 2017 by her brother, cannot be rated as sufficient for claiming “serious doubts” about the compliance of the plaintiff with the provisions of Article 8 of the Law No 26 of 10 March 2022. The wording “serious doubts” not mitigated by the evaluated person appears only in Article 13(5) . The law does not provide a definition of this significant new concept for the national legal system. Therefore, the Commission has a wide margin of appraisal of the factual situations which it can classify, in its decisions, as “serious doubts” about the integrity criteria of a candidate. Still, the Commission's margin of appraisal cannot be absolute, and it is limited by Articles 16 and 137(1) of the Administrative Code, that provide imperatively that the discretion or margin of appraisal of the authorities cannot be arbitrary and is to be exercised in good faith.

In her particular case, to substantiate her explanations and the information provided to the Commission, the plaintiff submitted account statements for the period June to September 2016, confirming the international transfers made by Raisa Codrean (family member of the plaintiff's mother) to Paraschiva Bostan (plaintiff's mother), totaling 6,300 EUR. In addition, the affidavit of Raisa Codrean confirms that she personally donated 3,000 USD to Paraschiva Bostan when she was on vacation in Moldova in 2017. The affidavit also said that over a period of 10 years Raisa Codrean has been financially supporting the plaintiff's mother, such support having amounted to around 7,000 USD-10,000 USD.

The statement made in Decision No 6 of 9 December 2022 that documentation to support the affidavit of Raisa Codreanu was not provided is not enough to serve as grounds for "serious doubts", because the Commission did not take into account: a) the years when these funds were given to the plaintiff's mother (2016-2017); b) the habitual conduct of individuals who are not engaged in public activities and offices and who have no serious reason to keep money transfer documents for years because they have no reason to believe that in the indefinite future they may have to present them to the authorities. Under these circumstances, in the absence of indications of fraud or bad faith, of which Raisa Codrean could be suspected, the Commission had no reason to cast doubt on her affidavit and insist on the need for supporting documentation.

This is in a context where the Commission didn't have information to disprove the existence of close family relationships and affection between Alexandru Bostan, Paraschiva Bostan, Raisa Codrean and the plaintiff. It is specifically close family relationships that prompt a strong presumption that the affidavit of Raisa Codrean was true, and this presumption was not overthrown by the information that the Commission had about the plaintiff. The Commission ignored the reality of the strong bonds of kinship, affection and mutual support in this small family community. For instance, Paraschiva Bostan and Raisa Codrean only have one another as siblings, and the latter doesn't have children of her own. The plaintiff and her brother, Alexandru Bostan, don't have other siblings, and share a strong emotional bond and mutual affection also towards their mother and aunt. Therefore, providing support to one another, including material support, is natural, and does not pursue a hidden agenda. These realities were inexplicably disregarded by the Commission.

As regards the finding in the appealed decisions that "it remains unclear whether such support was provided in the context of the purchase of the apartment", the plaintiff emphasized that – considering the limitations to discretion set out in Articles 16 and 137(1) of the Administrative Code – this discretionary assessment made by the Commission should have been based on information acquired from the inquiries into the plaintiff, but as certain matters of fact were not expounded sufficiently for reasons not attributable to the plaintiff, the Commission shouldn't have, to the detriment of the plaintiff, ascribed that to her.

The reasoning set out above is all the more solid given that Article 10 of the Law No 26 of 10 March 2022 provided the Commission with a wide range of tools and levers for collecting all the necessary information on the plaintiff and assessing the data and documents submitted by the plaintiff during the evaluation. The

Commission and its Secretariat were conferred the right of free and real-time access to the information systems containing all the data and information on the plaintiff and close persons; they were conferred the right to request from natural and legal persons of public or private law, including from financial institutions, the documents and information necessary for the evaluation of the plaintiff, etc.

Since the Commission did not discharge its obligation to carry out a full formal inquiry, we are in a situation of insufficient investigation of the facts, which is a procedural flaw, that – in consequence – renders the challenged unfavorable individual administrative act unlawful.

Further to the above, and in view of the failure to substantiate the rejection of the arguments and evidence submitted by the plaintiff in the course of the evaluation, it follows that the discretion and margin of appraisal of the Commission in assessing the existence of serious doubts about the compliance of the candidate with the requirements set out in Article 8, which have not been mitigated by the evaluated person, were exercised in bad faith and arbitrarily, which is contrary to Articles 16 and 137(1) of the Administrative Code.

Yet the circumstances that could have led to a different decision of the Commission were argued in the Dissenting Opinion of 12 December 2022. One member of the Commission, who signed the Dissenting Opinion, rightfully believed that the plaintiff's mother had the financial capacity to contribute to the procurement of the apartment in Chişinău.

The Commission did not provide any plausible explanation to cast reasonable doubt over the source of funds used to purchase the apartment of the plaintiff's mother in Chişinău.

The appealed decision did not rescind the following circumstances of fact: that as per the sales and purchase agreement No 6856 of 8 August 2018, Paraschiva Bostan had personally bought from Doina Jechiu a 74.0 sq. m. apartment in Chişinău, for 973,500 MDL. The contract had been signed personally by Paraschiva Bostan who acted in her own name and interest.

In this regard, the plaintiff stated that on the basis of Article 10 of the Law No 26 of 10 March 2022, the Commission had the right to ask the seller Doina Jechiu for the information that it needed regarding that transaction in order to understand whether the purchase of that apartment was limited solely to Paraschiva Bostan's personal property matters or had any direct or indirect connection with the plaintiff. It is clear from the information submitted to the Commission that the plaintiff's mother was a licensed entrepreneur. The Commission's conclusion that the plaintiff's mother did not have any taxable income in the years prior to the purchase of the apartment, and that the explanations about personal savings and income from entrepreneurship at the village market remain unsubstantiated, is deemed unlawful by the plaintiff, because the income earned under entrepreneurial certificate is not taxable, which means that Paraschiva Bostan was not required to and therefore did not file returns with the State Tax Service.

The plaintiff also mentioned that there was no evidence to cast doubt on the affidavit submitted to the Commission on behalf of the plaintiff's mother, according to which that apartment was bought with money from three different people, meaning the personal contribution of Paraschiva Bostan, the contribution

of her brother Alexandru Bostan who lives in the Russian Federation and the contribution of her son who has been working in Italy for about 17 years.

Angela Bostan clarified that the personal contribution of Paraschiva Bostan consisted of proceeds of 108,756 MDL from the sale of apartment No 50 located in the town of Cahul, 31 Ștefan cel Mare Street, and from income gained from her business carried out on the basis of entrepreneurial certificate.

With regard to the financial contribution from Alexandru Bostan, the plaintiff reported that the Commission took a critical view of the two affidavits from him. In his first affidavit, Alexandru Bostan stated that his contribution to the procurement of that apartment was 30,000 EUR: 10,000 EUR from personal savings, and 20,000 EUR representing a loan taken from a bank in Italy. However, confronted with the fact that the loan had been contracted eight months later than the transaction, Alexandru Bostan submitted a new affidavit. In this second affidavit, he clarified that at the stage of procurement, his contribution was 30,000 EUR from personal savings, and that the 20,000 EUR loan, taken later, was used for refurbishing and furnishing the apartment and for the procurement of essential items.

The Commission disregarded the information provided by the plaintiff in order to clarify those issues which, at first sight, appear to be inconsistent. To address this situation, the plaintiff submitted to the Commission a statement of the salary account of her brother Alexandru Bostan, who – from 2 May 2005 to 1 October 2022 – had earned in Italy an income of 329.466 EUR (between 2 May 2005 and 1 January 2018 specifically, his income totaled 246.514 EUR).

The plaintiff believes that this information is of particular interest given the fact that Alexandru Bostan certainly had sufficient financial resources available for him to contribute the amount declared to the purchase of an apartment for his mother. The alleged inconsistencies in the two affidavits, deemed essential by the Commission, would have been of crucial importance only if Alexandru Bostan had not adequately proved his sources of income in Italy that enabled him to support his mother financially. The plaintiff's explanations given during the hearing before the Commission were therefore plausible. She explained that in his first affidavit, Alexandru Bostan made a mistake because he has been living for a long time outside the Republic of Moldova and had difficulty expressing himself in written and spoken Romanian, especially as the affidavit was written and sent to the plaintiff in haste.

When the mistake became known, action was taken to address it and a new notarized affidavit was submitted.

The plaintiff stated that in her opinion the decision of the Commission in which it concluded that her conduct and role at the General Assembly of Judges cast serious doubt on her compliance with the criterion of ethical integrity laid down in Article 8(2)(a) of the Law No 26 of 10 March 2022 was unlawful.

In this regard Angela Bostan noted that according to the Bangalore Principles of Judicial Conduct, integrity was essential for the proper performance of judicial duties. A judge shall ensure that his or her conduct is above reproach in the view of a reasonable observer. The behaviour and conduct of a judge must reaffirm the people's faith in the integrity of the judiciary. Justice must not merely be done but

must also be seen to be done.

The plaintiff argued that she did not violate the principle of integrity, as the details of the plaintiff's behavior as a judge and as a participant to the General Assembly of Judges of 27 September 2019 did not deviate from judicial correctness, fairness, honesty and morality.

In the appealed decision, the Commission insisted: "Of concern with respect to the candidate's participation at the General Assembly was the role she undertook.

She essentially opened the General Assembly, standing in place of the President of the SCM and read both the decision and resolution of her Court Panel that had ordered the convening of the General Assembly. She declared the decision final and enforceable. The candidate also declared there was a quorum and therefore, a deliberate and valid Extraordinary Assembly. She proceeded with the agenda and directed the election of the presiding Chairperson and Secretary for the forum, also herself nominating a judge for President of the General Assembly of Judges. The candidate essentially presided over and directed the Assembly she had ordered be convened. The candidate's leadership role at the General Assembly was improper in that it contributed to an appearance of bias: due to the candidate's role in the appellate proceedings and the decision and resolution which convened the General Assembly, the judge was seen as implementing her own decision. Such involvement inevitably raises doubts about the judge's impartiality and undermine public confidence in the impartiality of the judge and the judiciary." The following statement made by the Commission is also serious: "Rather than mitigating the candidate's behavior, the invitation should have served as a warning to the candidate that her participation was being sought to lend the imprimatur of her office and role in the appellate decision that convened the Assembly to the General Assembly proceedings and therefore, was improper."

In the plaintiff's opinion, such findings are unlawful, as the Commission phrased it in a manner that could be interpreted as meaning that the holding of the General Assembly of Judges in an extraordinary session on 27 September 2019 was unlawful and that the decision of Chişinău Court of Appeal of 20 September 2019 was unlawful.

The Commission did not take into account that the decision of the Supreme Court of Justice of 26 September 2019 upheld the decision of the Chişinău Court of Appeal of 20 September 2019, which therefore became final, it acquired the status of a matter already judged, and consequently – the absolute presumption of legality both in terms of the merits and the procedure.

As regards the so-called "appearance of bias" referred to in the appealed decision, the plaintiff called attention to the widely-known concept of the right to a fair trial – Article 6 §1 of the Convention for the Protection of Human Rights and Fundamental Freedoms, that refers to a case being heard "by an independent and impartial tribunal". Similarly, considering that the decision of the panel of judges, of which the plaintiff was a member, was subject to a review of legality on appeal, it should be noted that it is emphasized in the ECtHR case law that "the lack of independence or impartiality of the decision-making body or the violation of a fundamental procedural guarantee by this body cannot imply a violation of Article 6 §1 if the decision was subject to subsequent control by a judicial body that had

full jurisdiction” and did provide the guarantees of Article 6, thus making reparation for the initial violation (*De Haan v. the Netherlands*, §§ 52-55; *Crompton v. the United Kingdom*, §79).

Therefore, the issue of a magistrate’s impartiality, as well as the issue of apparent bias can only be discussed when the case is heard.

The plaintiff insisted that none of the parties to the proceedings asked for her disqualification and that, on appeal, the Supreme Court of Justice found no appearance of bias of the panel of judges the member of which the plaintiff was, and upheld the issued decision.

The Commission calls unlawfully into question the matter of an alleged bias of the plaintiff although at the General Assembly of Judges of 27 September 2019, she just read out the solution of the Chişinău Court of Appeal of 20 September 2019. This is because the matter of bias of magistrates can no longer be called into question after the court they were part of has dismissed itself by settling a case and issuing a decision on the case.

The plaintiff also mentioned that the Commission had superficially and unlawfully set out in its decision that “the judge was seen as implementing her own decision”, but this conclusion is subjective and emotional and not based on any legal text.

At the General Assembly of Judges of 27 September 2019, the plaintiff did not implement her own decision, she implemented and observed the legal provisions governing the conduct of the General Assembly of Judges. The Decision of the Chişinău Court of Appeal of 20 September 2019 was carried through by issuing, under the enforcement procedure, the individual administrative act convoking the General Assembly of Judges. The Decision of the Chişinău Court of Appeal of 20 September 2019 exhausted its effect at that moment, and subsequently the provisions of the law on the General Assembly of Judges became directly applicable.

Angela Bostan insisted that – within the meaning of the legal provisions on the enforcement of decisions issued in administrative dispute proceedings – informing the attendees by reading out the decision of the Chişinău Court of Appeal of 20 September 2019 does not equate and does not mean implementation of that decision.

By this action for injunction, Angela Bostan reclaims her right as a judge to stand as a candidate and a member of the Superior Council of Magistracy and seeks the annulment of an individual administrative act rejecting the plaintiff’s request in administrative procedure, and requests that the public authority be compelled to issue the sought administrative act.

On 16 January 2023, the Independent Evaluation Commission for assessing the integrity of candidates for the position of member in the self-administration bodies of judges and prosecutors filed a defense statement requiring that the appeal filed by Angela Bostan be rejected.

In that defense statement, the Independent Evaluation Commission for assessing the integrity of candidates for the position of member in the self-administration bodies of judges and prosecutors claimed that its Decision No 6 of 9 December 2022 was lawful and that it did not violate the rights and legal interests

of the plaintiff.

The Commission is subject to the Law on measures related to the selection of candidates for the positions of members in the self-administration bodies of judges and prosecutors No 26 of 10 March 2022.

The Commission claimed that Decision No 6 of 9 December 2022 on the candidacy of Angela Bostan, candidate for the Superior Council of Magistracy, was issued following an evaluation that fully observed the Law No 26 of 10 March 2022. The Commission has diligently and in good faith discharged all the obligations incumbent on it, in particular, when it found certain uncertainties, it gave the plaintiff the possibility to clarify them by submitting additional data and information, and by giving her sufficient time to do so. The Commission accepted the explanations of the plaintiff in her application for relief from the effects of failing to meet the deadline, of 27 October 2022, and examined the documentation submitted with delay.

In the initial stage, it is the Commission's duty to gather data and information by exercising its legal powers and fulfilling its legal obligations. However, to clarify uncertainties as and when they arise, the Commission gives the candidate the opportunity to submit additional data and information. The submission of additional data and information is a right, not an obligation of the candidate, but not exercising this right carries the risk of leading the Commission to the conclusion that there are serious doubts as to whether the candidate meets the integrity criteria. It is therefore in the candidate's interest to take on the burden of proof, and this legislative transfer not only does not violate but also effectively protects the candidate's rights.

Angela Bostan declined the shifting of the burden of proof in the *pre-vetting* process, but she also argued that the Commission was supposed to address those doubts and to disprove the existence of close family relationships and affection between Alexandru Bostan, Paraschiva Bostan, Raisa Codrean and the plaintiff, and to ask the seller Doina Jechiu for the information that it needed regarding that transaction in order to understand whether the purchase of that apartment was limited solely to Paraschiva Bostan's personal property matters or had any direct or indirect connection with the plaintiff.

The Commission noted that the integrity assessment process and the appealed decision did not affect the professional status of the candidate, as it strictly adhered to its mandate and was explicit in the operative part of the decision stating that Angela Bostan, the candidate, does not meet the integrity criteria as serious doubts have been found as to the candidate's compliance with the ethical and financial integrity criteria and thus fails the evaluation.

The ambit of the Commission's mandate is also set out in the law and it is specifically to assess the ethical integrity and financial integrity of candidates against the ethical and financial integrity criteria. The law itself stipulates when, in which situation, the candidate fails the integrity test. As such, 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 requirements set out in Article 8, which have not been mitigated by the evaluated person.

The law imposes therefore a rigorous test consisting of two elements: the

Commission's finding of serious doubts as to whether the candidate meets the criteria of ethical and financial integrity and the candidate's opportunity to mitigate those doubts.

The legal effect of the Commission's decisions is expressly and exhaustively established by law, thus, the fail decision is the legal basis for not admitting the candidate to the elections or competition. In other words, no other legal effect, claimed by the candidate who failed the integrity test, has any legal support.

In this particular case, nothing prevents the plaintiff from continuing her professional career and the exercise of her duties as a judge, since the result of the integrity assessment of the candidates to the position of member of the Superior Council of Magistracy and of the Superior Council of Prosecutors and their specialized bodies will have no effect on their careers as judges or prosecutors. The assessment conducted under this project is only focused on the position for which the candidate is applying and is not intended to assess the professional aptitude of candidates. Consequently, the proposed mechanism does not affect the guarantee of constitutional independence of judges and prosecutors, and does not preclude candidate judges and prosecutors from exercising their duties.

The Independent Evaluation Commission for assessing the integrity of candidates for the position of member in the self-administration bodies of judges and prosecutors mentioned that following the assessment of the candidates' ethical and financial integrity, on the basis of data and information received from the candidate and third parties, the Commission determines whether or not there are serious doubts as to the candidate's compliance with the legal integrity criteria.

Therefore, the decision to pass or fail the the candidate is an assessment, in its sole discretion, as to whether or not there are serious doubts about the candidate's compliance with the criteria of financial and ethical integrity.

The Commission does not establish that the candidate meets or does not meet the integrity criteria, only that there are or there aren't serious doubts as to compliance with the integrity criteria. Certain facts may be sufficient to conclude that there are serious doubts as to compliance, but they may not be sufficient to conclude that there is non-compliance.

Therefore, the Commission does not assume the position of a court of law or of any other similar body, and its actions are not a judicial or other type of verification intended to establish with certainty a particular fact.

The decision indicates that there are serious doubts as to the plaintiff's compliance with the criteria of ethical and financial integrity. However, the decision is not, and is not intended to be, a determination of non-compliance with those criteria.

What is more, the Independent Evaluation Commission for assessing the integrity of candidates for the position of member in the self-administration bodies of judges and prosecutors insisted that the decision could not be subject to judicial review because the Commission's conclusion was a matter of appropriateness.

In the particular case of the plaintiff, the Commission observed the requirements detailed above, having conducted the assessment against the compliance criteria laid down by Law No 26 of 10 March 2022, in the light of the facts emerging from the collected data and information, to conclude whether or not

there are serious doubts as to the plaintiff's compliance with the criteria of ethical and financial integrity.

The decision represents the expression of this discretionary power, which is not subject to judicial review. The court is required to review the legality of the decision and has no right to review the appropriateness of the decision. More specifically, it would be in the remit of the court to uphold the plaintiff's action and to order the resumption of evaluation only if it finds that there are circumstances that could have led to the candidate passing the evaluation.

The Commission argued that the case lacked circumstances that could have led to Angela Bostan passing the evaluation because her objections were unfounded.

Angela Bostan accused the Commission of lacking good faith and legitimacy, of not discharging its supposed obligation to positively evaluate the plaintiff, of violating its supposed obligation to acquire information to disprove certain facts, and of exercising its powers in bad faith and arbitrarily. The plaintiff argued that from the moment the executive power – controlled by the pro-presidential party took charge of the governance of the state – it has subjugated all its judicial processes, including by enchaining the members of the Superior Council of Magistracy; that the purpose of the Superior Council of Magistracy – guided by the executive and political powers – was to delay the General Assembly of Judges, which is the supreme body of judicial self-administration, to give the government time to pave the way for the so-called “extraordinary evaluation” of candidates for the position of member in the Superior Council of Magistracy from among the judges, so that the executive power could secure the necessary buffer in order to be able to promote to the Superior Council of Magistracy only those magistrates who are loyal to the political power. As soon as the composition of the Commission was approved, it became clear that they wanted to appoint to the Superior Council of Magistracy magistrates loyal to the power, not honest magistrates.

The Commission stated that in the absence of evidence to support the allegations above, Angela Bostan turned to sophistry, to false assumptions or assumptions that needed to be demonstrated. Moreover, in her attempt to mislead, the plaintiff also makes use of the majority opinion – another logical fallacy.

The Commission stated that Angela Bostan failed to meet her burden of proof, as each party must prove the circumstances they invoke as the basis for their claims and objections, unless the law provides otherwise. In the present case, none of the plaintiff's allegations is supported by relevant and admissible evidence, and in the absence of evidence, the plaintiff resorts to techniques that are inadmissible in the evidentiary process, such as sophistry, criticism of the applicable law, and attempts to mislead the court into considering the appropriateness of the decision.

The material in the file confirms beyond doubt that the Commission acted independently, diligently and in good faith, in full compliance with the evaluation procedure, the rules regarding the burden of proof, the ambit and legal limits of its mandate and within the legal margin of discretion. The very way in which the Commission was created and in which it operates ensures its independence; the independence of the Commission having been a goal pursued by the authors of Law No 26 of 10 March 2022.

In accordance with the requirements of the Law No 26 of 10 March 2022 and in the strict context of the extraordinary evaluation, the Commission is functionally independent and autonomous in its decision-making. The national law expressly stipulates that in carrying out the evaluation on the basis of the criteria laid down in paras (2) and (5) and in taking decisions thereon, the Commission shall not be bound by the findings of other bodies with authority in the area of concern. Therefore, the Commission has no obligation to pass the candidate, as it has a certain margin of discretion, which it duly observed.

In the case under consideration, the plaintiff – in contradiction to Article 16 of the Administrative Court – demands first that the discretion margin of the Commission be limited, and then that this margin be eliminated altogether.

In the opinion of the Commission, however, these demands are not based on a legal text, but only arise from arbitrary interpretations, synchronized with an attempt to force the court to consider the appropriateness of the decision, both of which are inadmissible.

The Commission assesses the collected information, including the information provided by the candidate and third parties, in its sole discretion. The plaintiff's allegation that passing the assessment is a binding, but not discretionary individual administrative act is at odds with the purpose of Law No 26 of 10 March 2022, as defined by the law itself.

It is therefore for the Commission to assess whether or not certain circumstances are sufficient to establish the existence or absence of serious doubts about compliance. This is because this specific issue is related to the appropriateness of the decision, which is not subject to judicial review.

The points listed below, raised by the plaintiff, are also not to be subject to judicial review, namely the statements in Decision No 6 of 9 December 2022 that:

- the affidavit of Raisa Codrean is not backed by supporting documentation is not sufficient to substantiate possible serious doubts, as the Commission did not take into account the period when those funds were given and the habitual conduct of individuals who are not engaged in public activities and offices and who have no serious reason to keep money transfer documents for years;

- The Commission ignored the reality of the strong bonds of kinship, affection and mutual support in this small family community. As well as the statement that the Commission disregarded the information provided by the plaintiff in order to clarify those issues which, at first sight, appear to be inconsistent;

- while the ideal of integrity is easy to state in general terms, as the Commission did in its decision, it is much more difficult to go into detail;

- the details of plaintiff's behaviour as a judge and as a participant to the General Assembly of Judges of 27 September 2019 reveal no deviation from judicial correctness, fairness, honesty and morality. Hence the plaintiff did not violate the principle of integrity;

- the Commission phrased it in the appealed decision in a manner that could be interpreted as meaning that the holding of the General Assembly of Judges was unlawful;

- The Commission phrased it in the appealed decision in a manner that could

be interpreted as meaning that the Decision of the Chişinău Court of Appeal of 20 September 2019 was unlawful;

- the Commission had superficially and unlawfully set out in its decision that the judge was seen as implementing her own decision.

In the opinion of the Commission, the above-listed statements of Angela Bostan are in fact subjective remarks about the findings of the Commission, which show disagreement with the merits of the decision. In no way do these contentions lead to the conclusion that the Commission acted arbitrarily or in bad faith and that the decision is unlawful and therefore annulable.

Contrary to the claim of the plaintiff – the court does not have to answer the question whether Angela Bostan satisfies the requirements under Article 8(2) and (4) of Law No 26 of 10 March 2022, i.e. whether she has the right to a positive decision, and whether the Commission has the obligation to adopt such a decision, because the Commission doesn't have to establish whether a candidate satisfies those requirements.

The Commission is required to determine whether there are serious doubts about the compliance of a candidate with the legal integrity criteria, and not the existence or lack of such compliance. It is not required to determine in the decision that the plaintiff didn't declare her wealth in line with the law in force or that the wealth acquired by her over the last 15 years didn't correspond to the income she had declared.

The decision to pass or not to pass a candidate is a determination of the Commission, subject to the legal margin of discretion, depending on whether or not it finds that there are serious doubts about the candidate's compliance with the requirements of Article 8 of the Law No 26 of 10 March 2022, which have not been mitigated by the candidate.

Under the circumstances of fact and of law detailed above, as well as in compliance with Article 14(8)(a) of the Law No 26 of 10 March 2022, the Independent Evaluation Commission for assessing the integrity of candidates for the position of member in the self-administration bodies of judges and prosecutors moved for the rejection of the appeal filed by Angela Bostan.

At the court hearing, counsel Petru Balan, representing the plaintiff Angela Bostan, upheld the appeal against Decision No 6 of 9 December 2022 on the candidacy of Angela Bostan, and moved for the appeal to be allowed on the factual and legal grounds set out in the application of appeal.

The counsel also contended, as a procedural matter, that the court was not presented with the administrative file in accordance with the Administrative Code, the documents were not translated from Romanian into English, while three members of the Commission did not know Romanian, so it was not clear whether they understood the plaintiff's arguments.

At the court hearing, the representatives of the Independent Commission for assessing the integrity of candidates for the positions of members in the self-administration bodies of judges and prosecutors, counsels Roger Gladei and Valeriu Cernei, upheld the arguments put forward in the defense statement, and moved for the dismissal of the action as unfounded.

The Determination of the Court

Having heard the parties and their representatives, having examined the documents in the administrative and judicial files, the Special Panel of the Supreme Court finds that the appeal is admissible and well founded, for the following reasons.

Case Examination Period

According to Article 14(7) of the Law No 26/2022, by derogation from the provisions of Article 195 of the Administrative Court No 116/2018, the appeal against the decision of the Commission shall be examined within 10 days.

The case file materials attest that the appeal against the decision of the Commission was filed by Angela Bostan on 9 January 2023.

According to the Integrated Case Management Program, the appeal against the decision of the Commission filed by Angela Bostan was assigned to the judge-rapporteur Ala Cobăneanu, who is a member of the Special Panel consisting of: Vladimir Timofti, Svetlana Filincova and Ala Cobăneanu (f. d. 1, vol. I).

By the ruling of 10 January 2023, the Special Panel – established at the Supreme Court of Justice to examine the appeals against the decisions of the Independent Evaluation Commission for assessing the integrity of candidates for the position of member in the self-administration bodies of judges and prosecutors – received for examination the appeal of Angela Bostan and scheduled a court hearing for 23 January 2023, at 10:00 (f. d. 226-228, vol. I).

At the court hearing of 23 January 2023, Angela Bostan, represented by counsel Petru Balan, made several motions that were rejected by the Special Panel, specifically: the motion to decline jurisdiction of the Special Panel in favor of the panel of judges specialized in administrative disputes, the motion to involve the Ministry of Justice as a third party, the motion to compel the Commission to submit the list of people working in the Secretariat of the Commission.

In the same hearing of 23 January 2023, counsel Petru Balan filed a motion requesting that the Commission be required to submit the administrative file, in accordance with Articles 82 and 221 of the Administrative Code, numbered, with certified copies and the list of documents.

By the formal SCJ ruling of 23 January 2023, the SCJ passed the motion of counsel Petru Balan representing plaintiff Angela Bostan, and gave the representative of the Commission time till 30 January 2023 to submit the file of the candidate – certified and assembled in accordance with the legal provisions; the hearing was adjourned until 30 January 2023, at 10:30 (f. d. 117, vol. II).

At the hearing of 30 January 2023, Angela Bostan, represented by counsel Petru Balan, put forward a motion to require the counsels of the Commission to submit to court the information confirming that they were authorized by the National Center for Personal Data Protection to operate with personal data.

By the formal SCJ ruling of 30 January 2023, the Supreme Court of Justice rejected the motion of counsel Petru Balan calling for the counsels of the Commission to submit to court the information confirming that they were authorized by the National Center for Personal Data Protection to operate with personal data (f. d. 119, vol. II).

It was also on 30 January 2023 that counsel Petru Balan put forward a motion raising a constitutional challenge.

By SCJ ruling of 30 January 2023, the motion put forward by Angela Bostan, represented by counsel Petru Balan, raising a constitutional challenge was adopted in part. Consequently, the constitutionality of “if it finds the existence of some circumstances that could have led to candidate’s passing of evaluation” – in Article 14(8) of the Law No 26 of 10 March 2022 on measures related to the selection of candidates for the positions of members in the self-administration bodies of judges and prosecutors – was challenged (f. d. 121-122, vol. II).

According to the minutes of the hearing held on 30 January 2023, the hearing was adjourned without a time limit pending the examination by the Constitutional Court of the motion challenging constitutionality (f. d. 120, vol. II).

On 22 February 2023 the Constitutional Court sent the Supreme Court of Justice a copy of its Decision No 5 of 14 February 2023 on the constitutionality of certain provisions of the Law No 26 of 10 March 2022 (f. d. 130, vol. II).

Due to the examination by the Constitutional Court of the motion challenging constitutionality, the Supreme Court of Justice scheduled a hearing for 9 March 2023, at 10:00, and summonsed the participants to appear in court (f. d. 143, vol. II).

On 2 March 2023 the administrative case was reassigned through the Integrated Case Management Program because the Judge-Rapporteur resigned.

As a result, according to the reassignment form – the appeal brought by Angela Bostan, represented by counsel Petru Balan, against the Independent Evaluation Commission for assessing the integrity of candidates for the position of member in the self-administration bodies of judges and prosecutors, seeking that the decision be annulled and that the candidate evaluation procedure be resumed – was assigned to Judge-Rapporteur Tamara Chișca-Doneva, who joined the specialized panel of magistrates, consisting of: Vladimir Timofti, Dumitru Mardari and Tamara Chișca-Doneva (f. d. 155, vol. II).

On 2 March 2023, Judge-Rapporteur Tamara Chișca-Doneva recused herself from the examination of the appeal brought by Angela Bostan, represented by counsel Petru Balan, against the Independent Evaluation Commission for assessing the integrity of candidates for the position of member in the self-administration bodies of judges and prosecutors, seeking that the decision be annulled and that the candidate evaluation procedure be resumed (f. d. 160-163, vol. II).

The Supreme Court of Justice approved the recusal of Judge Tamara Chișca-Doneva by its ruling of 7 March 2023 (f. d. 169-172, vol. II).

According to the reassignment form – the appeal brought by Angela Bostan, represented by counsel Petru Balan, against the Independent Evaluation Commission for assessing the integrity of candidates for the position of member in the self-administration bodies of judges and prosecutors, seeking that the decision be annulled and that the candidate evaluation procedure be resumed – was assigned, on 9 March 2023, to Judge-Rapporteur Ion Guzun – an alternate of the Special Panel (f. d. 173, vol. II).

The minutes of the hearing of 9 March 2023 show that the plaintiff Angela Bostan and her counsel Petru Balan did not appear in court, and that they informed

the court by e-mail that the plaintiff Angela Bostan was on a business trip abroad until 16 March 2023, and that her counsel Petru Balan was out of the country and requested that the hearing be postponed until after 16 March 2023, as they were both unable to appear in court.

By formal SCJ ruling of 9 March 2023, the SCJ granted the request of counsel Petru Balan to postpone the hearing and the hearing was adjourned until 22 March 2023, at 10:00 a.m. (f. d. 176-179, vol. II).

Owing to the fact that Judge Dumitru Mardari resigned, Acting Chief Justice of the Supreme Court of Justice adopted the Ruling No 39 of 22 March 2023 changing the membership of the Special Panel that was assigned the examination of the appeal brought by Angela Bostan, represented by counsel Petru Balan, against the Independent Evaluation Commission for assessing the integrity of candidates for the position of member in the self-administration bodies of judges and prosecutors, seeking that the decision be annulled and that the candidate evaluation procedure be resumed, as follows: Vladimir Timofti, Mariana Pitic and Ion Guzun (f. d. 197-198, vol. II).

Judge Mariana Pitic filed a motion to recuse herself from the examination of the appeal brought by Angela Bostan against the Independent Evaluation Commission for assessing the integrity of candidates for the position of member in the self-administration bodies of judges and prosecutors, seeking that the decision be annulled and that the candidate evaluation procedure be resumed (f. d. 186-187, vol. II).

The Supreme Court of Justice rejected the recusal of Judge Mariana Pitic by its ruling of 22 March 2023 (f. d. 191-193, vol. II).

At the hearing of 22 January 2023, Angela Bostan, represented by counsel Petru Balan, put forward a motion raising a constitutional challenge.

By SCJ ruling of 22 January 2023, the motion put forward by Angela Bostan, represented by counsel Petru Balan, raising a constitutional challenge was adopted in part (f. d. 240-242, vol. II).

As per the formal ruling of 22 March 2023 of the Supreme Court of Justice, the request for postponement of the hearing made by the plaintiff's representative was granted, and the hearing was adjourned until after the examination by the Constitutional Court of the motion challenging constitutionality (f. d. 196, vol. II).

By its Decision of 6 April 2023, the Constitutional Court dismissed the referrals challenging the constitutionality of the provisions of the Law No 26 of 10 March 2022 on measures related to the selection of candidates for the positions of members in the self-administration bodies of judges and prosecutors (f. d. 1- 26, vol. II).

Due to the examination by the Constitutional Court of the motion challenging constitutionality, the Supreme Court of Justice scheduled a hearing for 12 April 2023, at 10:00, and summonsed the participants to appear in court (f. d. 249, vol. II).

On 10 April 2023, the Independent Evaluation Commission for assessing the integrity of candidates for the position of member in the self-administration bodies of judges and prosecutors moved to recuse Judge Mariana Pitic (f. d. 251, vol. II).

By Order of the Commission for Emergency Situations of the Republic of

Moldova No 66 of 10 April 2022 – in the context of the prompt response of the government to the issue of ensuring the operation of the Supreme Court of Justice, expressed in amendments to the regulatory framework and enshrining in it mechanisms to resolve the challenges linked to the provisional filling of judicial vacancies at the supreme judicial court, and having regard to the subsequent actions of the Superior Council of Magistracy, which – following recent legislative intervention through the Law No 65/2023 on External Assessment of Judges and Candidates for the Position of Judge of the Supreme Court of Justice, at the Plenary Meeting of the Superior Council of Magistracy on 10 April 2023 – examined the issue of announcing a competition for filling, by temporary transfer, the vacant judgeships at the Supreme Court of Justice – the specific measures in the field of justice established by the Order of the Commission for Emergency Situations of the Republic of Moldova No 64/2023 were revisited, and it was established that subitem 1.2 of item 1 of the said Order shall be repealed.

By Order No 69 of 4 May 2023 Amending Order No 29 of 29 March 2022, the Acting Chief Justice of the Supreme Court of Justice appointed Judge Ion Malanciuc as an alternate in the Special Panel tasked with the examination of appeals against the decisions of 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 motion to disqualify Judge Mariana Pitic was distributed electronically via the Integrated Case Management Program on 15 May 2023 and was examined at the hearing of 23 May 2023, the deliberation and outcome regarding it having been postponed until 25 May 2023.

By ruling of 25 May 2023, the Special Panel established at the Supreme Court of Justice rejected the motion to disqualify Judge Mariana Pitic, filed by the Independent Evaluation Commission for assessing the integrity of candidates for the position of member in the self-administration bodies of judges and prosecutors (f. d. 33-37, vol. III).

The participants in the proceedings were summonsed to the next hearing on the case on 19 June 2023, at 10.00.

In this context and in the light of the above, the Special Panel notes that the failure to meet the 10-day time limit for the examination of the appeal was due to the complexity of the case, the conduct of the parties to the proceedings, including that of the defendant authority, the difficulty of the debate, the mass resignation at the Supreme Court of Justice, and to the impossibility to form a Special Panel to hear the appeal.

What is more, the length of time the case was pending was conditioned, *inter alia*, by the need to ensure respect for the rights of the participants in the proceedings, which cannot be regarded as a delay in the examination of the case, because the purpose of examining the appeal was to ensure observance of the parties' guaranteed right to a fair trial, which is enshrined in Article 38 of the Administrative Code and in Article 6 § 1 of the Convention for the Protection of Human Rights and Fundamental Freedoms.

At the hearing on 19 June 2023, the case was examined on the merits, the parties' explanations were heard, the evidence was examined, the pleadings were

heard and, in accordance with Article 14(9) of the Law No 26/2022 – the issuance and placement of the decision on the website of the Supreme Court of Justice was announced.

Applicability of the Administrative Code

The Special Panel notes that, during the judicial proceedings, the representatives of the Commission raised the non-application of Books I and II of the Administrative Code to the examination of cases pending before the Supreme Court of Justice, an argument that cannot be accepted in the light of the following considerations.

The Special Panel notes that the application of the Administrative Code and the limits of its application are a matter of interpretation and application of the law over which the Supreme Court of Justice has jurisdiction as a court with jurisdiction to examine administrative disputes (DCC No 163 of 1 December 2022, § 24, DCC No 2 of 18 January 2022, § 19).

It is first of all necessary to explain why the Administrative Code is applicable not only to the evaluation procedure but also to the administrative dispute procedure.

In terms of regulatory content, the Law No 26/2022 contains rules pertaining to substantive public law, procedural law and administrative dispute.

More specifically, the legal provisions regarding the definition and conditions under which the ethical/financial integrity is to be assessed are, by their nature, rules of substantive administrative law, which form the legal basis as per Article 21(1) of the Administrative Code for the issuance of the individual administrative act by the Commission. Accordingly, the provisions of Article 8(1)-(4) of the Law 26/2022 are rules of substantive administrative law.

According to Articles 9(2) and 69(1) of the Administrative Code, the initiation of the evaluation procedure is the initiation of an administrative procedure, at the request of the candidate, for one of the positions of member of the bodies listed in Article 2(1) of the Law No 26/2022. Pursuant to Article 189(1) of the Administrative Code, the initiation of administrative dispute proceedings is conditioned on a plaintiff's claim that a right has been infringed by administrative activity.

The Special Panel thus notes that the decision of the Commission is an individual administrative act within the meaning of Article 10(l) of the Administrative Code. The individual administrative act is the final output of the administrative procedure.

The pass or fail decision adopted by the Commission completes the administrative procedure under Article 78 of the Administrative Code.

Furthermore, the authors of the law noted in the explanatory note to Law No 26/2022 the following: “as a result of its work, the Commission will issue a decision. Given that such decision is an administrative act, it may be appealed in accordance with the provisions of the Administrative Code No 116/2018 with the explicit exceptions set out in this draft.”

It is the lawmaker itself that called the decision of the Commission an individual administrative act that may be challenged in an administrative

proceeding.

Accordingly, the rules of the Administrative Code on administrative proceedings and the concept of the individual administrative act are applicable to the evaluation procedure, subject to the exceptions provided for by Law No 26/2022.

The Special Panel points out that the evaluation of candidates for the positions of member of the bodies listed in Article 2(1) of the Law No 26/2022 is, by its nature, a specific field of activity within the meaning of Article 2(2) of the Administrative Code.

Although the Administrative Code establishes uniform administrative and administrative litigation proceedings, its Article 2(2) provides that certain aspects may be governed by special legislative rules as long as they are not at odds with the principles of the Administrative Code.

The special rules of the Law No 26/2022 do not preclude the application of Books I and II, with the exception of certain aspects, such as, in particular, the initiation of administrative proceedings, clarification of facts on own motion, quorum and majority, the right of the candidate to be heard, and others. The wording “certain aspects” in Article 2(2) of the Administrative Code does not mean that the Administrative Code shall not apply.

Therefore, in the circumstances of this case, it is impossible not to apply Books I and II in their entirety because of the central role and the organic link of the Administrative Code with the areas/sub-areas of administrative law.

According to Article 14(6) of Law No 26/2022, an appeal against the decision of the Commission shall be heard and determined in accordance with the procedure laid down in the Administrative Code, subject to the exceptions laid down in this Law, and shall not have a suspensive effect on the Commission decisions, elections or competition in which the candidate concerned participates.

The principles governing the administrative dispute proceedings are set out in Book I of the Administrative Code, in particular Articles 21-27 and Articles 36-43.

There is an organic and substantive link between Books I and II, and III, which governs the administrative dispute proceedings, which cannot be denied or excluded under no circumstances.

Judicial review is a control of legality, which includes checking the legality of the grounds underpinning the form of administrative procedures; whether vague legal concepts were interpreted correctly; the proportionality of equal treatment, impartiality, legal certainty, reasoning; the exercise of discretionary right; whether the authority is allowed to exercise such right; the protection of legitimate expectation etc.

For the considerations stated above, the Special Panel rejects as unfounded the contention of the representatives of the Commission that Books I and II of the Administrative Code are not applicable. If this were the case, it would be tantamount to a denial of the principles of legality, own-initiative investigation, equal treatment, security of legal relationships, proportionality, impartiality of the Commission, good faith etc.

The application of the rules of administrative dispute is conditioned on the application of the same rules that refer to the administrative procedure, such as the

collection of evidence under Articles 220(1), 87-93 of the Administrative Code, referrals under Articles 223, 97-114 of the Administrative Code, impartiality under Article 25 of the Administrative Code, recusals under Articles 202, 49-50 of the Administrative Code, forms of administrative activity under Articles 5, 10-15 and 189 of the Administrative Code, the concept of party in an administrative dispute under Articles 204 and 7 of the Administrative Code, legal effects of an individual administrative act, e.g. the enforceable nature of the Commission decision as an individual administrative act under Article 171(4) of the Administrative Code, the validity, binding force and *res judicata* of the Commission decision under Articles 139(2)-(4) and 140 of the Administrative Code etc.

The non-application of Books I and II of the Administrative Code would be virtually the same as disqualifying the Commission decision as an individual administrative act and, consequently – the same as denying access to effective judicial review.

In this context, the Special Panel thus emphasizes that the decision of the Commission is an individual administrative act within the meaning of Article 10(1) of the Administrative Code, because: 1) it is issued by a public authority; 2) it is a decision, order or other official output; 3) it falls within the field of public law; 4) it is a regulation; 5) it relates to an individual case; 6) it has direct legal effects.

Functionally and organizationally, the Independent Evaluation Commission for assessing the integrity of candidates for the position of member in the self-administration bodies of judges and prosecutors is a “public authority” within the meaning of Articles 7, 10, 203(a) and 204 of the Administrative Code, because it was established by law, it has public law tasks by virtue of its mandate as defined in Article 8 of the Law No 26/2022, and pursues a public interest.

The Special Panel also emphasizes that the administrative procedure of evaluation has a clarifying and guiding purpose owing to the procedural nature of the formal action of evaluating candidates for the position of member of the Superior Council of Magistracy. Respect for the basic principles, safeguards and rules of administrative procedure is therefore a requirement directly rooted in the concept of the rule of law stipulated in Article 1(3) of the Constitution of the Republic of Moldova.

The Law No 180 of 7 June 2023 reinforced the understanding that the Commission is a public authority specific in its own way, i.e. it is not a legal entity of public law, although Article 7 of the Administrative Code – which has a universal meaning – includes and defines the concept of public authority both in the sense interpreted by the Parliament of the Republic of Moldova, i.e. functionally and organizationally, and in the sense of a legal entity of public law, as the case may be or require. This conclusion also follows from the indefinite pronoun “any organizational structure” in Article 7 of the Administrative Code. A public authority – in addition to the element of any organizational structure or body, established by law or other regulatory act to pursue public interests – also falls in the purview of public regime, which establishes the tasks and remits, which gives the right to impose legal force on people with whom the public authority engages in legal relations. A different interpretation and application would mean that the work of the Commission and its decisions are not binding as individual

administrative acts, but represent legal acts under private law. The Special Panel points out that a natural person can also be a public authority if they are delegated by law the tasks pertaining to public authorities and the corresponding powers to carry them out. Furthermore, according to Article 72(6) of the Law No 100 of 22 December 2017, the interpretation law does not have retroactive effect, except in cases where the interpretation of the sanctioning rules leads to a more favorable situation.

The Special Panel emphasizes that the Commission's tasks do not pertain to the private, but to the public areas of activity, which is why it was vested, by Law No 26/2022, with powers that allow it to have a legally binding effect over those evaluated under Article 8 of the Administrative Code. The Special Panel notes, as a matter of principle, that the concept of public authority cannot be mistaken – from a functional and organizational point of view – for that of a legal entity governed by public law, for otherwise the Commission decisions would not fall within the concept of an individual administrative act.

At the same time, it holds that there was no in-depth understanding of Article 2(2) of the Administrative Code, which regulates conditions of derogation by legal provisions from the uniform nature of the Administrative Code for “certain aspects” of administrative activity. Accepting the argument that the Commission is not a public authority would mean denying the legal reality that it carries out administrative activity of public law through administrative procedure and that its decision is an individual administrative act subject to judicial review under administrative litigation procedure. Thus, the public authority concept is not limited to the concept of legal entity of public law, but has its own functional meaning under Article 7 and Article 2(2) of the Administrative Code and for the purposes of Law No 26/2022.

According to Article 10(1) of the Administrative Code, the Commission's decision is related to the trait of “*any decree, decision or other official measure*” as a defining element of the individual administrative act. This reveals that the Commission does not perform legislative or judicial activity, but that it has a law implementation activity.

According to Article 10(1) of the Administrative Code, the Commission's decision fits within the concept of “*public law domain.*” According to Article 5 of the Administrative Code, the individual administrative act is one of the forms of administrative activity by means of which the law is applied. The Commission's decision applied Law No 26/2022, which regulates the substantiation of the decision, and this normative regulation falls, in its legal nature, under the substantive public law. Due to this trait, the Commission's decision is exempt of private, criminal, contraventional, and constitutional disputes to which public authorities can be party as per Article 2(3)(a)-(c) of the Administrative Code.

According to Article 10(1) of the Administrative Code, the Commission's decision is a “*regulation*” by means of which the defendant exercises unilaterally its substantive competence in line with Article 6 of Law No 26/2022.

The Court emphasizes that this element of the individual administrative act delimits it from other forms of administrative activity, such as the real act and the administrative contract.

According to Article 10(1) of the Administrative Code, the Commission's decision relates to "an individual case", which consists of the concrete situation of plaintiff's evaluation.

This trait of the individual administrative act has the function to delimit it from the normative administrative act, which is an abstract regulation as per Article 12 of the Administrative Code.

According to Article 10(1) of the Administrative Code, the Commission's decision meets the criterion of "*with the purpose to produce direct legal effects*", which means to create, alter or terminate legal relationships under the public law. The Special Panel holds that the Commission's decision produces direct legal effects in the legal sphere of the plaintiff, in her capacity of a judge that applied for the position of member in the Superior Council of Magistracy. This criterion has the function to differentiate the individual administrative act from a simple administrative operation carried out under an administrative procedure of assessing the candidate's financial and ethical integrity.

The Special Panel thus notes that the decision of the Commission is an individual administrative act whereby the administrative procedure is completed. The concepts of administrative procedure defined in Article 6 of the Administrative Code and of public authority defined in Article 7 of the Administrative Code have a universal nature, being applicable to any area/sub-area of public law. These are the reasons why the Commission had and has the obligation to apply the provisions of the Administrative Code and the procedural rules laid down in Law No 26/2022 in the part related to derogations from the uniform nature of the Code.

It is therefore unacceptable that the defendant's representatives argue that the evaluation procedure is not an administrative procedure governed by the rules of the Administrative Code, such as the principle of legality (Article 21), the principle of investigation of own motion (Article 22), the principle of equal treatment (Article 23), the principle of good faith (Article 24), the principle of impartiality (Article 25), the principle of procedural language and reasonableness (Article 26, Article 27), the principle of efficiency (Article 28), the principle of proportionality (Article 29), legal certainty (Article 30), the principle of motivation of administrative acts and administrative operations (Article 31), the principle of comprehensibility (Article 32), the principle of protection of legitimate expectations and others.

Furthermore, the Special Panel highlights that during the court hearing the defendant's representatives invoked the cases *Țurcan v. the Pre-Vetting Commission* and *Clevadi v. the Pre-Vetting Commission*, where the court established with the force of *res judicata* that the provisions of Book I and II of the Administrative Code are not applicable to the cases filed against the Pre-Vetting Commission.

Thus, based on the aforementioned, the Special Panel mentions that the cases to which the Pre-Vetting Commission's representatives referred, initiated upon the applications of *Anatolie Țurcanu* (No 3-5/23) and *Natalia Clevadi* (No 3-13/23) do not form unitary case-law. The role of case-law is to interpret and apply the law to specific cases. Respectively, not every decision that differs from another decision

represents a case-law divergence.

The *res judicata* principle does not force the national courts to follow precedents in similar cases, as implementing legal coherence requires time and periods of case-law conflicts can, therefore, be tolerated without undermining legal certainty.

As a matter of principle, jurisprudence must be stable, but this should not obstruct the evolution of the law. That is why the Strasbourg Court stated that there is no right to an established jurisprudence, so that the change in the jurisprudence imposed by a dynamic and progressive approach is admissible and does not violate the principle of legal certainty (ECHR, *Unedic v. France*, 2008, §74; *Legrand v. France*, 2011), however two conditions must be met: the new approach has to be consistent at the level of that jurisdiction and the court that ruled on the change must provide a detailed explanation of the reasons for which it decided so (ECHR, *Atanasovski v. Macedonia*, 2010, §38).

Under these circumstances, the Special Panel rejects the argument invoked by the Commission that when issuing a solution on a case the court must reason its opinion and issue the solution based on mentioned considerations and judicial practice examples.

To conclude, the Special Panel states that a judge, according to the judicial organization rules, is not, generally, bound by the decision issued by another judge and not even by his/her prior decisions, because he/she pronounces a decision on the particular case brought before court.

Application admissibility.

According to Article 207(1) of the Administrative Code, the court shall check of its own motion if admissibility requirements for an administrative dispute application are met.

Pursuant to Article 189(1) of the Administrative Code, every person that claims that their right has been infringed by administrative activity may file an application for administrative dispute.

According to Article 5 of the Administrative Code, the administrative activity under the public law of public authorities includes the individual administrative act as the main form of administrative action of the authorities.

The Special Panel reasoned in the section of applicability of the Administrative Code why the Commission's decision is an individual administrative act. Therefore, in terms of application admissibility, it is emphasized that the Commission's decision is an unfavorable individual administrative act.

According to Article 11(1)(a) of the Administrative Code, individual administrative acts can be unfavorable acts – acts which impose obligations, sanctions, and burdens on their addressees or affect the legitimate rights/interests of persons or which refuse, in whole or in part, to grant the requested benefit.

According to Article 17 of the Administrative Code, the prejudiced right is any right or freedom established by law that is infringed by an administrative activity.

The Special Panel notes that by means of the filed application, plaintiff

Angela Bostan is claiming an infringement of a right by administrative activity, according to Article 189(1) of the Administrative Code, namely that by issuing Decision No 6 of 9 December 2022, the Pre-Vetting Commission violated her right to be elected to the position of a member in the Superior Council of Magistracy (Article 14 of the Law on the status of judges No 544/1995), right to self-administration of judges (Article 23¹ of the Law on Judiciary Organization No 514/1995).

By derogation from Article 209 of the Administrative Code, Article 14(1) and (2) of the Law on certain measures related to the selection of candidates for the positions of members in the self-administration bodies of judges and prosecutors No. 26 of 10 March 2022 regulated a special time frame for filing the administrative lawsuit application. Thus, the decision of the Pre-Vetting Commission may be appealed by the evaluated candidate within 5 days from the date of receiving the reasoned decision, without following the preliminary procedure

The evaluated candidate may appeal the unfavorable decision of the Evaluation Commission before the Supreme Court of Justice, which shall form a special panel consisting of 3 judges and a substitute judge. Judges and substitute judge shall be appointed by the President of the Supreme Court of Justice and confirmed by the decree of the President of the Republic of Moldova.

In this context, note that the decision of the Independent Evaluation Commission for assessing the integrity of the candidates for the position of member in the self-governing bodies of judges and prosecutors No 6 of 9 December 2022 was submitted by e-mail to the plaintiff, Angela Bostan, on 4 January 2023, which is confirmed by an abstract from the e-mail, attached to case materials (case file page 66, vol. I).

The Special Panel concludes that the appeal application filed by Angela Bostan is admissible because the plaintiff complied with Article 14(1) of Law No 26/2022, being filed to the Supreme Court of Justice on 9 January 2023, within the time frame laid down in the law.

With respect to the type of application for administrative litigation, the Special Panel holds the filed application as an action for injunction of a specific nature. By means of a regular action for injunction, the plaintiff, according to Articles 206 (1)(b) and 224(1)(b) of the Administrative Code, aims at the annulment of the individual administrative act rejecting his/her request for obtaining a legal advantage of any kind and at obliging the public authority to issue the rejected individual administrative act. At the same time, the specificity of the filed action is about annulling the Commission's decision on failing the candidate and ruling for a resumption of the evaluation.

The Special Panel, in line with Article 219(3) of the Administrative Code, is not bound by the wording of the motions submitted by the parties to the proceeding, thus the appropriateness argument expressed in the statement of defense by the defendant will be appreciated in terms of admissibility.

Effective judicial review involves a full check of factual and legal matters, however it excludes the checking of appropriateness as per Article 225(1) of the Administrative Code and limits the review regarding the discretionary individual

administrative act when the law provides for such a reason for issuance. Appropriateness is a matter of admissibility, not a matter of substance in an administrative litigation. The defendant's argument in the submitted statement of defense that the application has to be rejected for the reason of appropriateness is unsubstantiated, as the plaintiff based the application on legality matters, not on appropriateness.

The statement of defense and the appropriateness aspects highlighted by the defendant therein deny the right to file the application for an administrative litigation in line with Articles 39 and 189(1) of the Administrative Code. Thus, neither the Administrative Code nor Article 14(8) of Law No 26/2022 exclude the candidate's right to file an application to court. Accepting the solution suggested by the defendant is legally unsubstantiated and contrary to the rule of law. The Special Panel notes that provisions of Article 225(1) of the Administrative Code are clear and cannot be confused, as they regulate, in functional unity with Articles 36, 39, 189, 190, and 207 of the Administrative Code, only aspects related to excluding or limiting the judicial review.

The Special Panel deems the Commission's decisions issued based on Article 8 of Law No 26/2022 as a mandatory administrative act, i.e. it is not issued based on discretionary right. The Commission is obliged to issue the decision regardless of whether it is favorable or not. In case of discretionary decisions, the public authority has even the right not to act and when it decides to act under administrative law, then it has the possibility to select the legal consequences, except for the situation when discretion is reduced to zero, as per Article 137(2) of the Administrative Code.

With respect to the substance of the case, the Special Panel holds the following factual and legal situation.

According to Article 6(1) of the European Convention on Human Rights, 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.

For the purposes of Article 13 of the European Convention on Human Rights, everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.

According to Article 20(1) and (2) of the Constitution of the Republic of Moldova, any individual is entitled to effective satisfaction from the part of competent courts of law against actions infringing upon his/her legitimate rights, freedoms and interests. No law may restrict the access to justice.

According to Article 53(1) of the Constitution of the Republic of Moldova, any person prejudiced in any of his/her rights by a public authority by way of an administrative act or failure to solve a complaint within the legal term, is entitled to obtain acknowledgement of the declared right, cancellation of the act and payment of damages.

According to Article 114 of the Constitution of the Republic of Moldova, justice shall be administered in the name of the law only by the courts of law; they

shall have the entire range of procedural mechanisms for a fair solution of a case, without unjustified limitation in actions to be carried out, so that, upon the fulfilment of the ultimate goal, the judicial decision would not become illusory.

Effective legal protection against administrative actions of public authorities implies a full judicial review of legality, which covers both factual and legal issues, as regulated by Articles 194(1), 219, 22, 36, and 21 of the Administrative Code.

Density of judicial review means clarifying the content of judicial review over the decisions of the Commission, which applies not only to the depth, but also to the scope of the review. This relates both to enforcement of the law and to establishment of the facts that are relevant for a legal and founded judicial decision.

Effective judicial review involves checking all aspects of procedural and substantive legality, particularly fairness, proportionality, legal security, reasoning, correctness of factual investigation of own motion, impartiality, misinterpretation of undefined legal notions, and others. This is the only way to reach the standard of effective protection embedded in Article 53 of the Constitution of the Republic of Moldova. To this end, Article 194(1) of the Administrative Code provides that during first-level court procedure, appeal procedure, and procedure of examining challenges against judicial decisions, the factual and legal issues shall be solved of own motion.

The court's review of the work of an administrative authority of public law requires an independent determination of relevant facts, an interpretation of relevant provisions, and their subordination. Such an administrative legality review obviously excludes, as a matter of principle, a binding of justice to factual or legal findings and determinations made by other powers with respect to what is legal in the given case.

In accordance with Article 14(8) of Law No 26 of 10 March 2022, when examining the appeal against a decision of the Evaluation Commission, the Special Panel of the Supreme Court of Justice may adopt one of the following decisions: a) reject the appeal; b) accept the appeal, if there are circumstances that could have led to candidate's passing the evaluation, and order to resume the evaluation of the candidate by the Pre-Vetting Commission (the constitutionality of this provision was checked by Decision of the Constitutional Court No 5 of 14 February 2023 on unconstitutionality exceptions of some provisions of Law No 26 of 10 March 2022 on measures related to the selection of candidates for the positions of members in the self-administration bodies of judges and prosecutors (competence of the Supreme Court of Justice in case of examining appeals filed against the decisions of the Pre-Vetting Commission)).

The Constitutional Court held that the explanatory note to the draft law does not include any argument regarding the needs to limit the judicial review of Pre-Vetting Commission's decisions. Still, based on the opinion submitted by the authorities and the content of the challenged text, the Constitutional Court deduced that the legislator intended to avoid situations where the Pre-Vetting Commission decisions are annulled for some insignificant procedural irregularities and, on the other hand, it wanted to ensure the celerity of solving appeals, in order to have sooner an operational Superior Council of Magistracy. The Constitutional Court

held that these legitimate goals can fit under the overall objectives of public order and guarantee of justice authority and impartiality, as provided for in Article 54(2) of the Constitution (DCC No 5 of 14 February 2023, §78).

Thus, the Constitutional Court has ruled that, until the law is amended in accordance with the reasoning of this decision, the Special Panel of the Supreme Court of Justice, when examining appeals, may order the reevaluation of failed candidates if it finds (a) that the Pre-Vetting Commission made serious procedural errors during the evaluation procedure, affecting the fairness of evaluation, and (b) that circumstances exist which could have led to the candidate passing the evaluation (DCC No 5 of 14 February 2023, §88).

Consequently, the Special Panel of Judges found that the Constitutional Court has established a double test that has to be met for the candidate's appeal against the decision of the Independent Evaluation Commission for assessing the integrity of candidates for the position of member in the self-administration bodies of judges and prosecutors to be accepted, namely: 1) the Pre-Vetting Commission made serious procedural errors during the evaluation procedure, affecting the fairness of evaluation, and 2) circumstances exist which could have led to the candidate passing the evaluation.

Law No 147 of 9 June 2023, in force as of 21 June 2023, amended Article 14(8) of Law No 26 of 10 March 2022 as follows: When examining the appeal against a decision of the Evaluation Commission, the Special Panel of the Supreme Court of Justice may adopt one of the following decisions: a) reject the appeal; b) accept the appeal and order a re-evaluation of the candidates that failed the evaluation if it finds that during the evaluation procedure the Pre-Vetting Commission committed severe procedural errors that affect the fairness of the evaluation procedure and that there are circumstances that could have led to candidate's passing the evaluation.

The Special Panel highlights that Article 14(8) of Law No 26 of 10 March 2022 amended by Law No 147 of 9 June 2023 design an effective judicial review, which involves the legality of the evaluation procedure and the substantive legality of the decision to fail the evaluation.

The review of the procedural legality of the Decision will be limited to whether or not the Pre-Vetting Commission committed serious procedural errors that could affect the fairness of the evaluation procedure. The review of the substantive legality of the Decision will be limited to whether there are circumstances that could have led to the candidate Angela Bostan passing the evaluation.

The Special Panel of the Supreme Court of Justice notes that the Administrative Code regulates the concept of serious errors and particularly serious errors. In case of particularly serious errors, as per Article 141(1) of the Administrative Code, the individual administrative act shall be null and, consequently, it shall not produce legal effects since the moment of issuance. On the other hand, in case of serious errors, the individual administrative act is unfounded and produces legal effects until its final annulment. So, when an issue of procedural legality is invoked, it has to be analyzed through the lens of both particularly serious error and serious error.

The Commission's decision is unfounded and the plaintiff would have the right to a favorable decision, because the appealed decision is vitiated, especially from the perspective of proportionality, misinterpretation of undefined legal notions and fair treatment. The Commission is bound to follow proportionality and fair treatment when issuing decisions on the evaluation of candidates for Superior Council of Magistracy membership. Denying this would put under question not just the rule of law, but the purpose for which Law No 26/2022 was passed. The serious doubts of the Commission have to be analyzed/evaluated both in terms of proportionality and fair treatment.

It follows from the Decision No 6 of 9 December 2022 that, with respect to candidate Angela Bostan, the Pre-Vetting Commission found two non-compliances, namely: (i) source of funds for financing the candidate's mother's apartment in Chişinău and the right of habitation declared by the candidate in connection to this real estate; (ii) ethical violation related to her participation in the General Assembly of Judges.

The Pre-Vetting Commission concluded that it had serious doubts (Article 13(5) of Law No 26/2022) about the compliance of the candidate with the criterion of financial integrity as per art. 8 para. (4) lit. b), para. (5), lit. c), d) and g) of Law No. 26/2022 in relation to the procurement and financing of the mother's real estate in Chişinău in 2018, which have not been mitigated by the candidate.

The Pre-Vetting Commission held that, according to the candidate, the purchase of the 74.0 sq.m. apartment in Chişinău at the price of 973,500 MDL by the candidate's mother, Paraschiva Bostan, took place with the contribution of: candidate's mother, a family member that lives in the Russian Federation, and candidate's brother.

The Pre-Vetting Commission's conclusion relies on the fact that the candidate did not manage to prove the income sources of her mother in order to be able to contribute to the purchase of the apartment.

The Commission's doubts expanded given that the plaintiff's mother did not have any taxable income in the years prior to the purchase of the apartment, and that the explanations about personal savings and income from entrepreneurship at the village market remain unsubstantiated.

As for the financial contribution from a family member living in the Russian Federation, in the Commission's opinion the candidate has been able to provide documentation relating to international bank transfers amounting to 6,300 EUR. In addition, an affidavit by this family member indicates that a donation in cash of 3,000 USD has taken place in 2017. The affidavit also states that over a period of 10 years, a total amount of 7,000 – 10,000 USD has been provided as financial support to the candidate's mother. However, this statement is not accompanied by supporting documentation and it remains unclear whether such support was provided in the context of the purchase of the apartment.

As well, the Pre-Vetting Commission noted that it is concerned with the two affidavits, which are obviously contradictory, filed by the candidate's brother with respect to his contribution to purchasing the apartment.

In this context, the Pre-Vetting Commission specified that the first affidavit stated that the brother provided 30,000 EUR for the purchase of the apartment

based on his personal savings (10,000 EUR) and a bank loan (20,000 EUR).

However, when confronted with the fact that the loan was contracted 8 months later than the apartment was purchased, the candidate provided a second affidavit, according to which the personal savings of the brother amounted to 30,000 EUR and the loan was meant for repairs, furniture and equipment. Despite that, no documents were provided to support the second affidavit.

Thus, the Pre-Vetting Commission appreciated that the serious doubts raised by the candidate in connection with financing the purchase of the apartment in 2018 by her mother had not been mitigated by candidate Angela Bostan.

Having looked into the analysis of the Decision No 6 of 9 December 2022 with respect to the first non-compliance, the Special Panel believes that the Pre-Vetting Commission found unjustified serious doubts in relation to the source of funds for financing the candidate's mother's apartment in Chişinău and the right of habitation declared by the candidate in connection to this real estate.

To support the stated opinion, the Special Panel holds that on 8 August 2018, the plaintiff's mother purchased a 74.0 sq.m. apartment in Chişinău, at the declared price of 973,500 MDL.

According to the affidavit submitted to the Commission on behalf of the plaintiff's mother, the apartment was bought with money from three different people, meaning the personal contribution of candidate's mother, the contribution of a family member who lives abroad and the contribution of a close relative that had been working abroad for about 17 years.

At the same time, according to the same affidavit, the personal contribution of candidate's mother was possible due to the income obtain after selling an apartment in Cahul city, as well as income she earned based on an entrepreneurial certificate.

Also, the Pre-Vetting Commission viewed critically and deemed unjustified the explanations regarding the savings of the candidate's mother during the time prior to the purchase of the mentioned apartment.

In this case, the Special Panel notes that the Commission examined a sale-purchase contract that certainly indicates that the candidate's mother sold an apartment she owned, located in Cahul city.

This transaction took place on 1 August 2007 and, as a result of this transfer of property, the plaintiff's mother obtained an income of 108,756 MDL (6,500 EUR).

At the same time, the Pre-Vetting Commission did not take into account the explanation regarding the additional income obtained by plaintiff's mother from her patent-based entrepreneurial activity related to the period of time when it would have been obtained.

Particularly since the Independent Evaluation Commission for assessing the integrity of the candidates for the position of member in the self-governing bodies of judges and prosecutors stated that the first source of income, according to the mother's statement, consisted of savings made after retirement, as she was selling various goods at the market of her home-village before 2010-2013. Nevertheless, the Commission stated that according to the information received from the tax authority, the candidate's mother obtained no taxable income on the territory of the

Republic of Moldova between 2007 and 2021.

However, the Commission did not make any reference to the tax legislation that would lead to such an obligation for the plaintiff's mother.

Note that according to Article 20(x) of the Tax Code, the income earned by individuals under entrepreneurial certificate [translator's note: that is what we call patent] is not taxable.

Furthermore, according to Article 83 of the Tax Code, the obligation to file income tax returns falls on people that earn taxable income.

Thus, given that the income earned under entrepreneurial certificate is not a taxable income source, the plaintiff's mother did not have the obligation to file tax returns with the State Tax Service.

In this context, note that Article 12(1) of the Law on Entrepreneurial Certificates No 93 of 15 July 1998 stipulates that tax liability of a certificate holder shall take the form of certificate fee, which includes the income tax, fees for natural resources, fees for sale and/or service provision units, land-use fee.

According to Article 14(1) and (2) of the same Law, the entrepreneurial certificate fee shall be paid towards the local budget until filing the request to receive or prolong the certificate, in the amount appropriate for the requested term, which cannot be shorter than the one provided at Article 7. In order to extend the term of the entrepreneurial certificate starting the day after the period for which said certificate was issued or extended previously, the fee related to the following period shall be paid before the expiry of that period. If the fee is paid after the expiry of the period when the entrepreneurial certificate is valid, the extension shall act as of the day following the day of paying the certificate fee. The tax collectors of the mayor's offices are entitled to collect the fee for the certificate, with its subsequent transfer to the local budget account.

When paying the entrepreneurial certificate fee, the State Tax Service or, as appropriate, the mayor's office shall issue to the certificate holder a counterfoil(s) cut out of the certificate duplicate, which confirms that the entrepreneurial certificate is valid until a certain date and that record is made on the reverse of the certificate.

Therefore, the Special Panel deems reasonable the plaintiff's argument that the income earned under entrepreneurial certificate is not taxable, which means that candidate's mother, Paraschiva Bostan, was not required to and therefore did not file returns with the State Tax Service. Thus, income earned based on the entrepreneurial certificate is not subject to book-keeping, it can vary from hundreds and thousands up to millions of lei. This circumstance denotes that the statements made before the Commission with respect to the income earned by candidate's mother, Paraschiva Bostan, based on the entrepreneurial certificate, are truthful.

As for the financial contribution from a family member living abroad, it was ascertained that in September 2016 that person made a bank transfer to the candidate's mother, in the amount of 6,300 EUR. In additions, according to the affidavit received from the mentioned person, in the summer of 2017, being on vacation in the Republic of Moldova, he/she donated personally 3,000 USD to the candidate's mother. The Pre-Vetting Commission viewed these statements critically, arguing that the affidavit was not accompanied by supportive documents

that would confirm the statements of the envisaged person and that it was still unclear if that financial support was provided particularly in the context of purchasing the apartment in Chişinău municipality.

In the given context, the Special Panel of the Supreme Court of Justice reiterates that, according to the information held by the Pre-Vetting Commission, in 2016 the plaintiff's mother obtained from this person the amount of 6,300 EUR by means of a bank transfer.

At the same time, it is worth mentioning that, according to the affidavit, this person declared that given absence of own children, the plaintiff's mother and her family are the only close relatives.

This statement is also supported by the fact that previously, in connection to the death of a common relative, this person gave up her inheritance share in favor of candidate's mother. All these aspects reveal a close connection among these people and, in such circumstances, it had to be held that this family member had the needed financial capacity and willingness to contribute to the purchase of the apartment in Chişinău municipality.

With regard to the financial contribution from the close relative of candidate Angela Bostan, the Commission took a critical view of the two affidavits received from that person. Note that this person has indeed filed the first affidavit stating that the contribution to the procurement of that apartment was 30,000 EUR of which 10,000 EUR from personal savings, and 20,000 EUR representing a loan taken from a foreign bank. However, confronted with the fact that the loan had been contracted eight months later than the transaction, the candidate's close relative submitted a new affidavit. In this affidavit, the respective person clarified that at the stage of purchasing the apartment, his/her contribution was of 30,000 EUR from personal savings, and that the 20,000 EUR loan, taken later, was used for refurbishing and furnishing the apartment and for the procurement of essential items.

In order to clarify this aspect, during the public hearing, candidate Angela Bostan was asked about the discrepancy between the two affidavits submitted by her brother.

As a result, the candidate provided an explanation that boils down to the fact that there was a mistake in the first affidavit, and it happened because her brother had difficulties in expressing his thoughts, given that he had been living for a long time outside of the Republic of Moldova.

The candidate's explanation during the hearing is deemed justified that when the mistake became known, action was taken to address it and a new notarized affidavit, drawn up in the Republic of Moldova, was submitted.

In order to clarify this issue, it is worth mentioning that candidate Angela Bostan submitted to the Commission a statement of the close relative's salary account.

According to the submitted information, this person – from 2 May 2005 to 1 January 2022 – had earned an income of 329.466 EUR (note: between 2 May 2005 and 1 January 2018 specifically, the income amounted to 246.514 EUR).

The Special Panel underscores that this information is of particular interest given the fact that this person certainly had sufficient financial resources, which

would allow him/her to contribute the amount declared to the purchase of an apartment for the plaintiff's mother. Moreover, the Special Panel holds that as per Article 22(2) of the Administrative Code, it is a known fact and an element of national culture for parents to help their children and, in their turn, for children to help their parents. This is an expression of the principle of solidarity among family members, which is deeply rooted in the national traditions and culture. The elements of tradition and culture define the political-legal concept of a people (nation) as an element of the state and, consequently, the national sovereignty the people are entitled to.

The Special Panel highlights that state's failure to fulfil the constitutional task of taking measures so that every person would have decent living, which would ensure their and their family's health and wellbeing, including food, clothing, accommodation, medical care, as well as necessary social services, does not exclude the possibility of economic, financial and material solidarity among people based on family, friendship and other similar relationships.

At the same time, according to Article 10(9) of Law No 26/2022, the Pre-Vetting Commission was supposed to assess the gathered materials about candidate Angela Bostan based on a multi-faceted, comprehensive and objective review of the information and to rely the serious doubts only on pertinent direct evidence, not on abstract hypotheses taken out of the social-economic context of the Republic of Moldova.

However, it is found in this case that the Pre-Vetting Commission did not hold such evidence as candidate's explanations, written records she submitted to support her position.

Furthermore, the Special Panel found the lack of reasoning regarding the right of habitation declared by the candidate with respect to the real estate purchased by her mother in Chapter III, section 1(c) of the Decision of the Pre-Vetting Commission No 6 of 9 December 2022, only some facts being described in this respect.

Thus, the Special Panel finds that these circumstances mitigate effectively any serious doubt regarding the source of funds for financing the apartment of candidate's mother in Chişinău.

Subsequently, the Special Panel noticed that Chapter III, section 1(c) of the Decision of the Pre-Vetting Commission No 6 of 9 December 2022 does not include a serious and logical reasoning with respect to the purchase and financing of candidate's mother's apartment in Chişinău in 2018 so that the Pre-Vetting Commission could qualify it as "non-compliance with the financial integrity criterion."

Accordingly, the Special Panel concludes that the Pre-Vetting Commission failed to comply with procedural and substantive legality, in particular when it comes to the correctness of the multi-faceted investigation of its own motion of the factual situation, the reasoning of its decision, and it misinterpreted the legal concepts of "non-compliance with the financial integrity criterion" and "serious doubt" with respect to the source of funds for financing the candidate's mother's apartment.

The Special Panel highlights as a matter of jurisprudential principle that the

wording “serious doubts” in Article 13(5) of Law No 26/2022 establishes a derogation from the standard of proof laid down in Article 93 of the Administrative Code, even this article opens the way towards such a derogation, including under Article 2(2) of the Administrative Code.

At the same time, the phrase “serious doubts” is not compatible with the formalism and subjectivism of the defendant public authority. This standard relates to the result of evidence assessment in order for it to be deemed as a highly likely factual circumstance, different from the beyond-any-doubt standard. Thus, should the evaluated candidate submit logical arguments and explanations to the Commission, which are true to the social-economic context of the Republic of Moldova, then the likelihood of a fact being in a way or another should be weighed and any doubt has to be treated in favor of the candidate and this is a cornerstone principle of the rule of law.

The Special Panel holds that the plaintiff provided sufficient logical arguments and that the fact happened in the way she stated and the Commission wrongly failed to consider these arguments as relevant.

With respect the second non-compliance, the Commission had serious doubts (Article 13(5) of Law No 26/2022) about the compliance of the candidate with the criterion of ethical integrity as per art. 8 para. (2) lit. a) of Law No. 26/2022 with respect to participation of the candidate in the General Assembly of Judges, which have not been mitigated by the candidate.

Furthermore, with respect the second non-compliance, the Commission concluded that it had serious doubts (Article 13(5) of Law No 26/2022) about the compliance of the candidate with the criterion of ethical integrity as per art. 8 para. (2) lit. a) of Law No. 26/2022 with respect to participation of the candidate in the General Assembly of Judges, which have not been mitigated by the candidate.

The Pre-Vetting Commission noted that on 20 September 2019, as chairperson of the Administrative Panel of the Civil, Commercial, and Administrative College of the Chisinau Court of Appeal, together with other judges, the candidate examined the case regarding the obligation of Superior Council of Magistracy to convene the Extraordinary General Assembly of Judges.

In the Decision of 20 September 2019, the panel determined that the General Assembly of Judges should be convened on 27 September 2019, with the establishment of an agenda for the meeting.

On 27 September 2019, the candidate participated in the General Assembly of Judges that was convened on the basis of this decision. At the opening of the Assembly, the candidate publicly announced the decision adopted on 20 September 2019 and read the operative part of the decision to the Assembly. In addition, in her opening speech, the candidate expressed her personal position on the state of affairs in the judiciary and the need for change.

The candidate confirmed during the hearing that at the opening of the General Assembly of Judges she publicly announced the decision adopted on 20 September 2019, read out the operative part of the decision, declared the existence of a deliberate and valid Extraordinary Assembly, and proceeded with the agenda and election of a President and Secretary for the forum.

The candidate also stated that, as a magistrate, she had the right to exercise

her freedom of expression within the General Assembly, and that she expressed her personal position, as a judge participating in the Assembly and not as a judge who issued the decision regarding its convening. The candidate emphasized that her presence and her opinions expressed at this Assembly represented her personal vision on the situation in the judiciary at that time and that she felt that for this opinion she was criticized and "persecuted" by some members of the Superior Council of Magistracy.

The appealed decision shows that the Pre-Vetting Commission considered the role that the candidate took on during the General Assembly, namely that she essentially opened the General Assembly, standing in place of the President of the Superior Council of Magistracy and read both the decision and resolution of her Court Panel that had ordered the convening of the General Assembly. She declared the decision final and enforceable. The candidate also declared there was a quorum and therefore, a deliberate and valid Extraordinary Assembly. She proceeded with the agenda and directed the election of the presiding Chairperson and Secretary for the General Assembly of Judges, also she nominated a judge for President of the General Assembly of Judges. The candidate essentially presided over and directed the Assembly she had ordered be convened.

The plaintiff's representative stated that the details of plaintiff's behavior as a judge and as a participant to the General Assembly of Judges of 27 September 2019 reveal no deviation from judicial correctness, fairness, honesty and morality. Hence the plaintiff did not violate the principle of integrity.

The Special Panel accepts the arguments of the plaintiff's representative, because as per Article 4(2) of the Judge's Code of Ethics and Professional Conduct approved by the Decision of the General Assembly of Judges No 8 of 11 September 2015, the judge shall carry out his/her duties without bias and prejudice, shall not express preconceptions in words or deeds and shall not afford words, phrases, gestures or other actions that could be perceived as signs of bias or prejudice.

According to Article 9(1) of the Judge's Code of Ethics and Professional Conduct approved by the Decision of the General Assembly of Judges No 8 of 11 September 2015, the judge shall benefit of the freedom of expression provided the following: he/she shall not disclose, comment and use for personal purposes the confidential or secret information he/she learned while performing job duties.

At the same time, according to the Bangalore Principles of Judicial Conduct, integrity is essential for the proper performance of the judicial duties. A judge shall ensure that his or her conduct is above reproach in the view of a reasonable observer. The behavior and conduct of a judge must reaffirm the people's faith in the integrity of the judiciary. Justice must not merely be done but must also be seen to be done.

According to section 4.6 of the Bangalore Principles, a judge, like any other citizen, is entitled to freedom of expression, belief, association and assembly, but, in exercising such rights, a judge shall always conduct himself or herself in such a manner as to preserve the dignity of the judicial office and the impartiality and independence of the judiciary.

The Special Panel holds that both the provisions of the Judge's Code of Ethics

and Professional Conduct and the Bangalore Principles of Judicial Conduct recognize judges' freedom of expression.

Under these circumstances, it is material to establish the details, which are important in order to determine the way candidate Angela Bostan acted at the General Assembly of Judges of 27 September 2019, namely if her behavior could have been perceived by a professional and an impartial observer as lacking ethical integrity and whether such a perception could diminish the community's respect towards the judge or the judiciary as a whole.

The Special Panel holds that Article 6 § 1 of the European Convention on Human Rights provides that a case shall be heard by "an independent and impartial tribunal."

In this case, candidate Angela Bostan, as a judge in Chişinău Court of Appeal, took part in issuing the decision of 20 September 2019, whereby they accepted the lawsuit application filed by a group of plaintiff judges against the Superior Council of Magistracy regarding the obligation to issue a favorable individual administrative act. The decision issued by the panel the plaintiff was part of was subjected to a legality review during the appeal, and was upheld by the Supreme Court of Justice.

ECtHR case law is relevant in this context, as it emphasized that lack of independence or impartiality of the decision-making body or the violation of a fundamental procedural guarantee by this body cannot imply a violation of Article 6 §1 if the decision was subject to subsequent control by a judicial body that had full jurisdiction and did provide the guarantees of Article 6 §1, thus making reparation for the initial violation (*De Haan v. the Netherlands*, §§ 52-55; *Crompton v. the United Kingdom*, §79).

Therefore, the issue of one judge's impartiality, as well as the issue of apparent bias can only be discussed when the case is heard.

Thus, details of plaintiff's behavior as a judge and as a participant to the General Assembly of Judges of 27 September 2019 reveal no deviation from judicial correctness, fairness, honesty and morality. Hence the plaintiff did not violate the principle of ethical integrity. The plaintiff's actions during the Extraordinary General Assembly of Judges derived directly from the law, because summoning the meeting fulfilled entirely the judicial decision whereby the Superior Council of Magistracy was obliged to issue a decision to summon the Extraordinary General Assembly of Judges.

Actions/activities happening during the General Assembly of Judges are autonomous and do not derive from the summoning decision; they represent a direct enforcement of the law whereby judges exercise their right to judicial self-administration.

Therefore the Special Panel cannot accept the conclusions of the Pre-Vetting Commission that the fact of the candidate having participated in the General Assembly of Judges raises serious doubts about the candidate's compliance with the ethical integrity criterion, in line with article 8(2)(a) of Law No 26/2022.

As per Article 8(2)(a) of Law No 26/2022, the candidate shall be deemed to meet the criterion of ethical integrity if 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.

In context, the Constitutional Court explained in § 118-120 of the Inadmissibility Decision No 42 of 6 April 2023 that, although Law No 26 does not define the meaning of “seriously”, “wrongful”, and “inexplicable” in Article 8(2)(a), the competent court must consider both the grammatical meaning that the given notion has, depending on the meaning of the notion it modifies, and the legal meaning, which could result from the interpretation of some provisions that regulate similar legal situations.

Although Law No 26 does not define the meaning of “seriously”, “wrongful”, and “inexplicable” in Article 8(2)(a), the Court must consider the principle of coherent regulatory system.

A systemic interpretation would allow the clarification of these qualifiers. For instance, the interpreter applying Article 8(2)(a) may analyze it in corroboration with Articles 4, 4¹, and 6 of the Law on disciplinary liability of judges, which represent the common law for the assessment of all candidates for the position of members in the Superior Council of Magistracy.

The Constitutional Court held that by means of the phrase “seriously”, the legislator limited the discretionary margin of the Pre-Vetting Commission when assessing the ethical integrity of the candidates. This criterion allows the Commission to decide on failure of the candidate only if it finds violations of ethics and professional conduct that are of a high severity. This means that the candidate can discuss the seriousness of violations found by the Commission before the Special Panel of the Supreme Court of Justice, which could ultimately appreciate the “serious” nature of the found deviation, depending on the specific circumstances of the case.

In this respect, the Special Panel notes that Chapter III, section 2 of the Decision of the Pre-Vetting Commission No 6 of 9 December 2023 does not include a serious, consistent, justified and logical reasoning, which would explain how the Pre-Vetting Commission qualified the participation of judge Angela Bostan in the General Assembly of Justice to be a “serious violation of the rules of ethics and professional conduct of judges.”

Taking into account the aforementioned circumstances, the Special Panel concludes that the decision issued by the Pre-Vetting Commission contrary to Article 21 of the Administrative Code does not meet the requirements of procedural and substantive legality and that the found circumstances reveal the candidate’s right to a favorable evaluation decision from this point of view.

The Special Panel highlights that the terms “seriously”, “wrongful”, and “inexplicable” from Article 8(2)(a) of Law No 26/2022 are, in their nature, undefined legal notions (vague legal notions) that do not grant discretion to the Pre-Vetting Commission, but rather oblige it to conduct a complex and rigorous interpretation of the provision in the context of serious violations of rules of ethics and professional conduct, while in this case, the Commission noted briefly that the candidate’s actions were a serious violation of the rules of ethics and professional conduct of judges.

In the same respect, the Special Panel highlights that given its constitutional function to deliver justice, the court had the ultimate competence to interpret a vague legal notion in a concrete case.

The Special Panel finds that the Pre-Vetting Commission did not analyze and reason the legitimate purpose of the issued decision. The preamble of Law No 26/2022 provides that the purpose of the Law is to increase the integrity of future members of the Superior Council of Magistracy and its specialized bodies, as well as the society's trust in the activity of the self-administration bodies of judges and overall in the justice system.

It is not clear from the appealed decision and the documents submitted by the defendant which of those goals are pursued by the decision to fail the evaluation. Any of these goals would be legitimate, however none of them were analyzed.

However, it is worth mentioning that the Commission is fundamentally free to choose its legitimate goal or goals, but this has to result from the content of the decision and be confirmed by the administrative case file documents.

According to Article 29(2)(a) of the Administrative Code, a measure is proportionate if it is suitable for achieving the established purpose based on the powers laid down in the law. Therefore, the exclusion, not just limitation of the right to be elected as a member of the bodies listed in Law No 26/2022 for the minor acts held by the Pre-Vetting Commission is in no way an adequate measure for the fulfilment of the purposes laid down in the law. Given the urgent issue of proper operation of the judicial self-administration bodies at the moment when the decision was issued, not evaluating the candidate [translator's note: they probably mean failing] does not only fail to fit the reasons of not passing the evaluation, but it is also an unnecessary, thus groundless, violation of the plaintiff's rights.

At the same time, according to Article 29(2)(b) of the Administrative Code, a measure is proportionate if it is necessary for achieving the established purpose. This element of proportionality means that the official measure must be the mildest means of reaching the regulatory purpose. The Pre-Vetting Commission did not carry out such an analysis in relation to this case. Thus, the Pre-Vetting Commission failed to analyze the regulatory alternatives of the individual case, which would have achieved the regulatory purpose in the same way. The disadvantages that other regulatory options have must be considered and are characterized as being a milder means. A milder means for the achievement of the desired purpose would have been the participation of the candidate in the election for membership in the Superior Council of Magistracy while making public some of the minor issues that were found and which are part of the social reality of the Republic of Moldova, also based on the constant amendment of the domestic legislation.

According to Article 29(2)(c)-(3) of the Administrative Code, a measure undertaken by public authorities is deemed proportionate if it is reasonable. A measure undertaken by public authorities is reasonable if the interference it causes is not disproportionate compared to its purpose. This requirement involves a balancing of the legally protected values. The more damage is caused to a right, the more it is required for the advantage resulting from the interference to be superior.

Note that excluding the right of a judge to be a candidate for membership in the Superior Council of Magistracy involves not just an interference, but rather an improper annulment of the right to be elected into this position. Such a solution cannot be accepted under the rule of law, as it is incompatible with the dignity of a human being and of a judge. The goal of trust in the justice system can be achieved by complex means, but in no way can it be done by reducing to nothing the idea of free, transparent, and competitive election for the membership of the Superior Council of Magistracy and its bodies. The judge, holding such a position, is presumed to have integrity and, should the opposite be proven, than he/she shall be dismissed from the judiciary by means of a disciplinary procedure or another procedure that would take into account the guarantees of his/her independence. The Special Panel notes that the purpose of Law No 26/2022, among other things, is to boost the trust in justice.

To conclude on this legality aspect, the Special Panel finds that the decision of the Pre-Vetting Commission is also contrary to the proportionality principle.

Furthermore, the Special Panel reiterates that the so-called violations of financial and ethical integrity had been assessed by the Commission in a subjective way and isolated from the historical-social background, which affects the security of legal relationships. Generally, the legal systems accepts the retroactive effect of the law if it favors the legal situation of a person, but this effect cannot be projected by way of legal interpretation.

With respect to the plaintiff's argument that the Pre-Vetting Commission made severe procedural errors during the evaluation procedure in terms of violating the language of the evaluation process, expressed in lack of translation to English of documents and statements submitted by the candidate at the stage when Commission members were collecting and checking data, given that the Commission members Herman von Hebel, Victoria Henley, Nona Tsotsoria, who are English speakers and for whom the Commission Secretariat did not ensure a translation to English, the Special Panel holds the following.

As per Article 10(9) of Law No 26/2022, the Commission shall assess the gathered materials using its own judgement, 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.

This provision leads to the rule of direct research of evidence, freedom of evidence and direct assessment of evidence by the Commission members.

The Special Panel finds that the plaintiff's representatives in the court hearing confirmed that there was no written translation of documents into the language known by the foreign member of the Pre-Vetting Commission, designated by the development partners, which contradicts Article 10(9) of Law No 26/2022, as well as Article 22 and Article 92 of the Administrative Code.

In the same context, the Special Panel finds that the Commission failed to ensure candidate's right to have effective access to the content of the administrative case file, which gives the candidate the right to become familiar with and make copies of any document and information related to him/her as a participant in an assessment administrative procedure. Obstructing the access to the

administrative case file led to violation of another guarantee, i.e. the candidate's right to defense before the Pre-Vetting Commission.

The Special Panel deems well founded the plaintiff's argument that the time the Commission granted for submitting information was insufficient and limited, thus making it impossible to gather evidence in order to mitigate entirely the potential "serious doubts" of the Pre-Vetting Commission.

In this respect, the Special Panel emphasizes that, according to Article 82 of the Administrative Code, if the administrative procedure is to be carried out in writing as per Article 28 or is carried out in writing, the public authority, when starting the procedure, shall create a digital or hard copy folder that would include all documents and records regarding the said procedure. The digital folder shall include, as appropriate, scanned copies of paper-based documents and the authenticity of these copies shall be confirmed by the electronic signature applied by the responsible person within that public authority, electronic documents, other relevant records and information in digital format. Scanned digital copies of official documents issued on paper and digital records on which the electronic signature was not applied are used without restriction in the relationship with the public authority and may be included in the administrative case file, unless the regulatory acts require expressly the signature to be applied on these copies/records or the observance of requirements towards electronic documents.

When included in the file, a document is referenced with continuous page numbers. Should documents be retrieved from the file for a certain period, a mention shall be made in this respect, which must include: a) name of the retrieved document; b) number of retrieved pages; c) reason for retrieving the document; d) name of the person that ordered the retrieval of the document; e) date when the document is retrieved. This mention shall be included in the file instead of the retrieved document. Administrative case files shall be kept until the expiry of their term of storage, which results from the applicable legal provisions in force.

In line with Article 83 of the Administrative Code, the public authority holding the administrative procedure shall grant, to the participants, access to the administrative case file. Participants shall not have access to draft individual administrative acts before the completion of the procedure. No access to the administrative case file is allowed if that would affect the appropriate performance of duties by the public authority or if it is necessary to maintain a secret protected by law or if it is necessary to protect the rights of participants to the administrative procedure or of third parties. Should it be justified, the public authority holding the administrative procedure may also allow, upon request, access to the file on the premises of another public authority or a diplomatic or consular mission of the Republic of Moldova overseas. When accessing the case file, participants are allowed to take notes or make copies of the file. The cost of copies shall be incurred by every participant individually, which is 0.02 conventional units per page. Electronic copies of the case file, as well as electronic documents and copies thereof shall be provided free of charge.

Furthermore, the Special Panel notes that the Pre-Vetting Commission had the obligation to submit to the court, as per Articles 221 and 82 of the Administrative Code, the entire administrative case file of candidate Angela Bostan, so that the

court could fulfil its constitutional task of effective judicial review of factual and legal matters.

Similarly, the special provisions under Article 10(5) and Article 12(4)(c) of Law No 26/2022 and Article 2(1)(g) of the Evaluation Rules pursuant to Law No 26/2022, adopted at the meeting of the Pre-Vetting Commission of 2 May 2022, guarantee the candidate's right to access the materials gathered by the Pre-Vetting Commission and its Secretariat for the purpose of candidate's evaluation.

The Special Panel finds that, according to the minutes of the court hearing of 23 January 2023, the Special Panel of Judges accepted the request of the plaintiff's counsel, Petru Balan, and obliged the Pre-Vetting Commission to submit the entire case file of the candidate, certified and formatted in line with the applicable legal provisions (vol. 117, vol. II).

Thus, as a result of implementing the protocolary conclusion of 23 January 2023 of the Supreme Court of Justice, the defendant's representatives submitted to the court and to the plaintiff the case file to which the candidate did not have access with at least 3 days prior to the hearing, as provided by Article 12(4)(c) of Law No 26/2022.

Moreover, during the consideration of this administrative case, the defendant's representatives admitted that not all materials gathered by the Pre-Vetting Commission were submitted, but only the records that the Pre-Vetting Commission deemed to be relevant.

These circumstances prove that the Pre-Vetting Commission violated candidate Angela Bostan's right to defense, as it did not ensure her access to the administrative case file, which is supposed to include all materials gathered by the Pre-Vetting Commission, with at least 3 days before the hearing, in line with Article 82 and 83 of the Administrative Code, in corroboration with Article 10(5), 12(4)(c) of Law No 26/2022 and Article 2(1)(g) of the Evaluation Rules under Law No 26/2022.

Therefore, the Pre-Vetting Commission did not exercise entirely its competence to investigate the situation of its own motion, which is provided for by Article 6(f) of Law No 26/2022, which stipulates that in order to exercise its powers, the Pre-Vetting Commission shall request information from individuals or legal entities of public or private law, and gather any information relevant to the fulfilment of its mandate.

Therefore, the legislator has given the Pre-Vetting Commission a wide range of tools and levers to gather all the necessary information. Therefore, failure to fulfil the obligation to inquire of its own motion led to the Commission passing an erroneous decision and, respectively, violation of the candidate's right to defense.

The Special Panel holds that the established circumstances reveal a violation of the guarantees of the administrative assessment procedure, such as the right to a full examination of the facts, the right to a reasoned and impartial decision, the right to an effective hearing, the right of access to the administrative file, the right to be effectively involved in the assessment procedure, the right to effective cooperation in clarifying the facts and the right to a decision without discretionary errors in the assessment of the evidence.

The Special Panel finds that only these isolated violations of administrative

procedure guarantees are severe procedural errors, which have affected the fairness of the administrative assessment procedure and, as a consequence, the existence of some procedural circumstances that would have led to the candidate passing the evaluation.

The Special Panel notes that the State has vested the Pre-Vetting Commission with the prerogative to be guided by certain standards in order to select the candidates with highest integrity for membership, inter alia, in the Superior Council of Magistracy, who in turn could ensure the proper functioning of the judicial system as a whole, including through the implementation of coherent policies in line with generally accepted standards.

The plaintiff proved to the Special Panel of the Supreme Court of Justice the plausible nature of the elements invoked in her appeal, including the ones related to the correctness and observance of ethical and professional conduct rules.

Also, the Special Panel notes that Venice Commission recommended for the final decision on assessment to be made by the competent court. Despite that, the Special Panel highlights that, for the reason of effective protection of the rights, it has the right and the obligation to conduct a full judicial legality review of the factual and legal matters.

Even though the Special Panel of the Supreme Court of Justice is limited in adopting a final decision, still its arguments, conclusions and findings are mandatory and enforceable for the Pre-Vetting Commission. This conclusion results directly from Article 120 of the Constitution of the Republic of Moldova, which regulates the mandatory nature of the final sentences and other judicial decisions.

The Special Panel also relies its argument on the case-law of the Constitutional Court, which stated that, even though the Special Panel of Judges of the Supreme Court of Justice cannot oblige the Pre-Vetting Commission to pass the evaluated candidate, the arguments and conclusions made by this court when examining the appeals stay mandatory for the Commission (DCC No 42 of 6 April 2023 §143).

The Special Panel notes that, for reasons of effective judicial review, as well as of the quality of the law, the Commission is not obliged, after it is ruled to resume the evaluation procedure, to inquire other circumstances than the ones underlying the acceptance of the plaintiff's appeal.

Thus, evaluation after resumption of procedure should not transform into a vicious circular argument and activity, which is contrary to the standard of effective protection of rights, legal certainty, and mandatory effect of the final judicial decisions.

The Special Panel notes that the circumstances held by the Pre-Vetting Commission do not fit, from a proportionality perspective, the reasons of candidate Angela Bostan failing the evaluation.

Therefore, the exclusion, not just limitation, of candidate Angela Bostan's right to take part and be elected as a member of the Superior Council of Magistracy for the minor acts held by the Pre-Vetting Commission is in no way an adequate measure for the fulfilment of the purposes laid down in the law. Given the issue of proper operation of the judicial self-administration bodies at the moment when the

decision was issued and failing the candidate for minor acts, that does not only fail to fit the reasons of not passing the evaluation, but it is also a violation of the mentioned rights.

The Special Panel reiterates that the measure undertaken by the defendant public authority is reasonable only if the interference caused by it is not disproportionate in relation to its purpose. This requirement of the legislator involves a balancing of values protected by law, a weighing of the interests at stake. The bigger the damage caused to the right, the more it is required for the advantage resulting from integrity to be superior.

Therefore, excluding the right of a judge to be a candidate for membership in the Superior Council of Magistracy involves not just an interference, but also rather an improper annulment of the right to be elected into this position. Such a solution cannot be accepted under the rule of law, as it is incompatible with the dignity of a human being and of a judge.

Taking into account the aforementioned, the Special Panel finds that in this case there are legal grounds for annulling the decision of the Independent Evaluation Commission for assessing the integrity of the candidates for the position of member in the self-governing bodies of judges and prosecutors No 6 of 9 December 2022 regarding the candidacy of Angela Bostan.

The Special Panel holds that illegality of the appealed decision leads to the annulment of the decision and ruling of a re-evaluation of the candidate. Ruling a re-evaluation is the final and implicit results that includes a loss of validity for the decision, as per Article 139(1) and (2) of the Administrative Code (see DCC No 42 of 6 April 2023 § 143; Ramos Nunes de Carvalho e Sá v. Portugal [MC], 6 November 2018, §184 and the case-law quoted therein).

In line with Article 224(1)(b) and Article 195 of the Administrative Code, Articles 238-241 of the Civil Procedure Code, Article 14(6), (8)(b), (9) of the Law on measures related to the selection of candidates for the positions of members in the self-administration bodies of judges and prosecutors No 26 of 10 March 2022, the Special Panel established within the Supreme Court of Justice to examine the appeals against the decisions issued by the Independent Evaluation Commission for assessing the integrity of the candidates for the position of member in the self-governing bodies of judges and prosecutors

d e c i d e s :

To accept the administrative lawsuit application filed by Judge Angela Bostan against the Independent Evaluation Commission for assessing the integrity of the candidates for the position of member in the self-governing bodies of judges and prosecutors regarding the annulment of Decision No 6 of 9 December 2022 on the candidacy of Angela BOSTAN, candidate for the Superior Council of Magistracy, and to order the resumption of candidate evaluation procedure.

To annul the Decision No 6 of 9 December 2022 on the candidacy of Angela Bostan, candidate for the Superior Council of Magistracy.

To order the re-evaluation of candidate Angela Bostan by the Independent

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

This decision is irrevocable.

Hearing chaired by

Judge

Ion Guzun

Judges

Mariana Pitic

Ion Malanciuc