

JUDGMENT
In the name of the law
SUPREME COURT OF JUSTICE

1 August 2023

Chişinău municipality

Special Panel of Judges, set up within the Supreme Court of Justice, to examine appeals filed against decisions of the Independent Commission for assessing the integrity of candidates for the positions of members in the self-administration bodies of judges and prosecutors,

In the panel:
Presiding judge
Judges

Tamara Chişca-Doneva
Mariana Pitic
Ion Guzun

Clerks

Marianna Boico
Alexandr Beriozchin

With participation:
of the appellant

Postică Aureliu

represent
atives of the
respondent,
lawyers
Roger Gladei
Valeriu Cernei

having examined in a public court hearing, within the procedure of administrative litigation, the appeal submitted by Valentin Caisîn against the Independent Commission for assessing the integrity of candidates for the positions of members in the self-administration bodies of judges and prosecutors, seeking the annulment of Decision No. 23 of January 27 2023, regarding the candidacy of Postica Aureliu for the position of member of the Superior Council of Magistracy, and ordering the resumption of the candidate's evaluation procedure,

finds:

Arguments of the parties to proceedings:

On 12 February 2023, Aureliu Postică filed a lawsuit against the Independent Commission for assessing the integrity of candidates for the positions of members in the self-administration bodies of judges and prosecutors, requesting:

- a) the annulment of Decision No. 23 of January 27, 2023, of the Independent Commission for assessing the integrity of candidates for the positions of members in the self-administration bodies of judges and prosecutors, regarding the candidacy of Aureliu Postică for the position of a member of the Superior Council of Magistracy;
- b) ordering the resumption of the evaluation procedure of the candidate by the Independent Commission for assessing the integrity of candidates for the positions of members in the self-administration bodies of judges and prosecutors.

In the reasoning of the action, he invoked that he does not agree with the decision of the Independent Commission for assessing the integrity of candidates for the positions of members in

the self-administration bodies of judges and prosecutors, issued regarding his candidacy. He considers it unfounded, as well as disagrees with the findings of the Commission stated in the decision.

Regarding the subject of the action, he explained that the decision of the Independent Commission for assessing the integrity of candidates for the positions of members in the self-administration bodies of judges and prosecutors, Decision No. 23 of January 27, 2023, regarding the candidacy of Aureliu Postică, represents an individual administrative act emanating from a public entity that produces legal effects (both explicit and disguised) with direct repercussions on the appellant. In this sense, through the appealed decision, the appellant was excluded from participating in the competition for the position of member of the Superior Council of Magistracy (SCM), and an assessment was made of his level of integrity and professional probity. In the appellant's view, the described situation gives a doubly unfavorable character to the issued administrative act: on the one hand, the appellant's rights and legitimate interests are directly affected, and on the other hand, the Commission's conclusion is a veiled form of sanction.

Regarding the evaluation criteria used by the Commission, he invoked that the Commission's conclusions, which state that there are serious doubts about the candidate's compliance with ethical and financial integrity criteria, are likely to seriously and irreparably damage the candidate's image and professional probity, including to the extent of causing the loss of the occupied position. This perspective qualifies the conclusion as illegal and contrary to the regulatory provisions governing the case, as well as exceeding the powers granted by law to the specialized Commission.

Analyzing the content of the appealed decision, the appellant identified that the arguments put forth by the Commission, which led to the failure of the candidate Aureliu Postică to pass the evaluation, were based on the alleged non-compliance with the criteria of ethical and financial integrity arising from serious doubts about the candidate's declarations concerning the profits of companies managed by his wife, Diana Postică; serious doubts about the acquisition of the apartment at a preferential price, the privatization of the apartment, and the allocation of the land by the local public administration; and serious doubts about the alleged financial imbalance for 2017 and 2019. The appellant considers these findings unfounded, lacking logical and mathematical reasoning, and even disproportional and erroneous in several aspects, such as incorrect calculations and evidently subjective assessments.

Regarding the candidate's declarations concerning the profits of companies managed by his wife, he explained that in his 2018 declaration of assets and personal interests, he indicated as a subject of declaration, in section II "Income obtained by the declarant, family members during the year," that his wife, Diana Postică, had a profit of 100,000 MDL from the financial sources generated as a result of the activity of the LLC "D.B. Express Account."

The information about the income from sales generated by the LLC "D.B. Express Account" was provided to him by his wife, Diana. Subsequently, the candidate reflected this information in his Declaration, based on the financial situation (turnover) of the managed company for the year 2018, which was communicated to him by his wife.

Furthermore, in the 2019 asset and personal interests' declaration, as the subject of the declaration, he indicated his wife Diana Postică's income under section II "Income obtained by the subject of the declaration, by members of his family during the year." He reported the financial sources generated as a result of the activity of the LLC "D.B. Express Account" – 504,045 MDL, and as a salary – 30,000 MDL. The data about the income from sales generated by the LLC "D.B. Express Account" were presented to him by his wife, and he, in turn, reflected them in the Declaration, guided by the financial situation (turnover) of the managed company for 2019, which was communicated to him by his wife.

In the 2020 asset and personal interests' declaration, as the subject of the declaration, he indicated his wife Diana Postică's income under section II "Income obtained by the subject of the declaration, by members of his family during the year." He reported the financial sources generated as a result of the activity of the LLC "D.B. Express Account" – 880,978.80 MDL, and as a salary – 45,665 MDL. The data about the income from sales generated by the LLC "D.B. Express Account" were presented to him by his wife, and he, in turn, reflected them in the Declaration, guided by the financial situation (turnover) of the managed company for the year 2020, which was

communicated to him by his wife.

Similarly, in the 2021 asset and personal interests' declaration, as the subject of the declaration, he indicated his wife Diana Postică's income under section II "Income obtained by the subject of the declaration, by members of his family during the year." He reported the financial sources generated as a result of the activity of the LLC "D.B. Express Account" – in the amount of 578,191 MDL, as well as from the LLC "Dilexcont" – in the amount of 725,500 MDL. The data about the income generated from sales by the companies LLC "D.B. Express Account" and LLC "Dilexcont" were presented to him by his wife, and he, in turn, reflected them in the Declaration, guided by the financial situation (turnover) of the managed companies for the year 2021.

The discrepancies in the information under the "Income" section of the asset and personal interests' declarations for the years 2018-2021, compared to the information presented by the State Tax Service (FVID18 forms), was explained by the appellant as follows: he considered that he was supposed to indicate the data from the turnover of the companies managed by Diana Postică for the indicated years, but not the actual funds reimbursed from the legal entities as dividends. Considering this, the amounts reflected in the "Income from Sales" section of the companies, which were invoiced by the administrator Diana Postică, were also indicated by the appellant in the Declarations for 2018-2021.

According to the updated information as of September 16, 2022, from the FVID18 forms of the taxpayer Diana Postică, which were submitted to the Commission upon request on December 20, 2022, after the public hearing stage, the following income generated by Diana Postică is evident:

For 2019, an income generated from salary in the amount of 24,000 MDL and from dividends obtained from the activity of LLC "DB Express Account" in the amount of 370,522.60 MDL.

For 2020, an income generated from salary in the amount of 47,000 MDL and from dividends obtained from the activity of LLC "DB Express Account" in the amount of 623,678.85 MDL;

For 2021, an income generated from salary in the amount of 49,500 MDL and from dividends obtained from the activity of LLC "DB Express Account" in the amount of 581,170.21 MDL, and from the activity of LLC "Dilexcont" in the amount of 357,872.34 MDL.

Based on the comparisons made by the Commission in the appealed decision, the income declared by the candidate's wife in the candidate's annual declarations, the personal income of the candidate's wife according to STS, and the net income of the candidate's wife's companies reported to the National Bureau of Statistics, the Commission concluded that the appellant, as a candidate, declared total annual income of his wife for 2018 - 2021 amounting to 2,864,379 MDL. However, the personal income of his wife, according to information from STS, was 1,059,966 MDL. During the same period, the net profit of the two companies owned by the candidate's wife was 2,431,600 MDL.

In this regard, the appellant proposed the analysis of all incomes submitted to the three institutions, presenting a table according to which the incomes for the years 2018-2021, as reflected by the appellant in the Declarations submitted to NAI, and the sales incomes of the companies for the same period, as reflected in the NBS records, do not substantially differ, being in the following proportion: NAI: 2,864,379 MDL and NBS: 2,808,100 MDL.

On this occasion, the appellant explained that by indicating these data about the activities of Diana Postică, his wife, in the Declarations for the years 2018-2021, he did not seek any undeserved benefit or other vested interest. He did not intentionally introduce such information to create a false appearance of the size of his family's income, but he provided official statistical data communicated by his wife, including those transparently reflected on the NBS website.

Therefore, the appellant considered that the Commission's findings that he, as a candidate, was unable to explain the differences in the financial amounts recorded with different authorities, do not correspond to the factual circumstances. The Commission reached arbitrary conclusions about serious doubts regarding the candidate's compliance with the ethical integrity criterion under art. 8 para. (2) lit. c) and the financial integrity criterion under art. 8 para. (4) lit. (a) and para. (5) lit. b) and (d) of Law No. 26/2022, regarding the declaration of assets and personal interests, particularly the income of his wife from the two companies she owns.

In the view of the appellant, both the explanations provided before the Commission and the materials and information presented during the evaluation process justify the objective justification of the circumstances concerning the discrepancies observed in the amounts recorded as his wife's income. These explanations completely eliminate any doubts regarding financial and ethical integrity related to the declaration of his wife's income.

Regarding the purchase of the apartment at a preferential price, obtaining the apartment from the state, its privatization, as well as the allocation of land by the local public administration and its subsequent transfer, the appellant provided the following explanations.

Regarding the apartment obtained at a preferential price, the applicant stated that in 2006, he submitted an application to benefit from an apartment under the preferential housing program for employees of the Prosecutor's Office. In the application, he stated that he was living with his wife in a rented apartment. He pursued this application until he obtained the apartment from the state, through legal proceedings that lasted from 2006 to 2008. Being accepted as a person eligible for improving living conditions, in the same year, 2006, he entered into an investment contract with the contractor. At the time of signing the investment contract, the appellant's family did not have personal living space, which is why he invested in purchasing this apartment on N. Sulac Street. He paid for it in installments from 2006 to 2013, and on April 19, 2013, the property was completed, and the appellant and his wife became its owners.

Regarding the apartment privatized from the state, the appellant explained that since the construction of the residential building on N. Sulac Street, with apartments for prosecutors at a preferential price, was expected to take a long time beyond the contractual terms, in 2007, he submitted an application to the Chişinău City Hall to benefit from a service apartment in Chişinău, based on the fact that he worked in that locality as a prosecutor. Initially, the local public administration refused to grant the housing application, invoking a lack of state housing funds. The appellant pursued the allocation of the housing through a civil action in court. Later, in 2008, the final and irrevocable court decision obliging the local public administration to allocate housing to the appellant was executed. The appellant obtained the housing in 2008 based on art. 38 of the Law on the Prosecutor's Office, which ensures social guarantees provided by the state to prosecutors. Based on this court decision, the appellant received a distribution order for the service apartment in 2008, issued by the Chişinău City Hall.

After the birth of their first child, the appellant decided to address the City Hall with a request to change the status of the apartment and initiate the privatization procedure. In this regard, on September 9, 2022, all relevant documents regarding the privatization of the apartment were presented to the Commission during the answers' round.

The appellant stated that he did not personally participate in the privatization of the apartment, as he had previously participated in the co-privatization of his parents' apartment on 3/2 Dacia Boulevard. Only his wife and minor child were included in the privatization list, on the grounds that they had not previously participated in the privatization of state-owned housing and the buy-sell procedure was to take place at a modest price. Such a procedure was in strict accordance with the provisions of art. 5 of the Law on the Privatization of the Housing Fund.

The appellant emphasized that the privatization of this apartment from the state was carried out in strict accordance with legal norms. Art. 38 of the Law on the Prosecutor's Office provided ensuring prosecutors with housing, including cases where they needed to improve their living conditions. The appellant stated that he fell within these legal conditions, considering that after his marriage in 2005, the size of his family had increased, and in 2008, their first child was born. Additionally, his ½ share of his parents' apartment no longer met the housing needs for his family.

Regarding the land allocated by the local public administration, the appellant communicated that in 2005, after their marriage was registered, they also submitted a request for the free allocation of land in the town of Durleşti, with the purpose of building a house. At the time of submitting the application, they did not possess any property jointly owned with the newly formed family, they had not initiated any legal proceedings against the Chisinau City Hall regarding the allocation of state housing, and they had not submitted any applications within the housing program at a preferential price.

The 0.06 ha land was allocated to him free of charge in 2010, without any restrictions regarding its sale or the construction of a property within a specific timeframe. Although initially they indeed intended to build a house on this land with their family, they soon decided to sell it

and use the funds obtained for the renovation of the preferential-priced apartment they obtained, where they have been residing up to the present.

In this context, the appellant considered the Commission's findings regarding the lack of ethical integrity in obtaining these three properties to be unfounded and inconsistent.

Thus, the privatized apartment and the one obtained at a preferential price were acquired by the candidate in a perfectly legal context, constituting a guarantee provided by the state to prosecutors and their family members to ensure them with necessary living space. At the time of the privatization of the state-owned apartment in 2009, the candidate's family did not own any other private housing, apart from a ½ share of his parents' apartment (with a total area of 44 sq.m.), and therefore needed an improvement in living conditions. Consequently, they benefited from this state-offered guarantee and obtained ownership rights for the apartment on L. Tolstoi Street in 2009.

Similarly, the apartment obtained from the Prosecutor's Office at a preferential price was paid off by 2013, when the ownership right was registered thereto.

In this context, the reasoning of the Commission regarding the lack of ethical elements on the part of the candidate is not clear to him. Given the circumstances of purchasing the apartment at a preferential price on N. Sulac Street, the natural course of events would be the registration of apartment's ownership rights. At that point, his family was already the legitimate owner of the apartment on L. Tolstoi Street, and they couldn't relinquish a right obtained by law. Accordingly, following the logical and consecutive sequence of events, obtaining and registering ownership rights for both apartments adhered to perfectly legal, transparent procedures without any doubts about the ethical or financial integrity of the candidate or his family members.

Obtaining the land from the local public administration constituted, on one hand, a right for the newly formed family to build a residential house in the locality where they had lived with their parents, and on the other hand, a discretionary right of the local council to allocate this land to the requesting family. It was not obligatory for the candidate to inform the local council about owning an apartment with ownership rights since 2010, especially considering that the apartment at a preferential price was registered only in 2013. Furthermore, owning an apartment in no way constituted a reason for the Postică family to be denied the allocation of land for building their house.

In the view of the candidate, it is unacceptable for the Commission to mention that prosecutors who are perceived to use the law to create opportunities for personal benefits, demonstrate suspicious behavior and undermine the public's trust in their activities and their title as prosecutors. This statement is made in relation to the purchase of real estate either based on the law or at a preferential price - an official program exclusively intended for individuals in the prosecutor's office bodies. What is the necessity of this mention if not to cast a negative shadow over the conclusions drawn through arbitrary and biased reasoning and findings? It creates the impression that, in the Commission's perception, any participant in the program exclusively designed for prosecutors to acquire real estate at a preferential price or anyone who has obtained a legally guaranteed housing right is potentially susceptible to being labeled as "suspicious" in terms of financial and ethical integrity.

The candidate also finds it unclear why the Commission did not provide an individual assessment for each property in terms of the doubts raised, specifying explicitly in regard to which properties there are reasonable suspicions and in regard to which ones there are fewer or none at all.

The candidate expresses confusion over which specific actions or circumstances are considered incorrect (lacking ethics) on his part as the owner of these properties. He is unsure when he has gained illegitimate benefit or acted non-transparently. The Commission's characterization of all the properties in question as obtained improperly without distinguishing between those obtained ethically and those obtained unethically, has added to the confusion.

The candidate implies that the Commission's doubt regarding Aureliu Postică's ethical integrity might be linked to his ownership of all three properties (apartments and land), suggesting that the implication is that, to meet the ethical and financial criteria outlined in Law No. 26/2022, he should have continued living with his three children in the 44 sq.m. apartment, alongside the parents, sharing the ownership of the ½ share, and potentially, under these conditions, his integrity

evaluation would have been more favorable.

Finalizing the property topic, the appellant concludes that the mentioned violations demonstrate the uncertain nature of the individual unfavorable administrative act. The Commission's conclusions regarding serious doubts related to the acquisition of an apartment at a preferential price, the acquisition of a nominally priced apartment during privatization, and the acceptance of a free land plot followed by its sale after three months are not consistent with the factual circumstances. The candidate perceives these conclusions drawn by the Commission as unsubstantiated and arbitrary, resulting in unjustified and disproportionate claims about his non-compliance with the ethical integrity criteria, as outlined in art. 8 para. (2) lit. of Law No. 26/2022.

In regard to the alleged financial imbalance for the years 2017 and 2019, the candidate references his explanations provided during the public hearing concerning the presumed discrepancies between the declared income of the Postică family and the expenses identified by the Commission for those years. Similarly, in response to a series of 2 post-hearing questions from the Commission's Secretariat dated December 21, 2022, the candidate addressed specific aspects related to the income and expenses of 2017 and 2019.

Therefore, according to Decision No. 23/2023, the Commission found, in an unjustified and arbitrary manner, a difference of 158,190 MDL between the income of the Postică family and the expenses incurred for 2017.

In challenging the erroneous findings of the Commission, the appellant specified that the income earned from savings in 2017, the amount of 140,000 MDL, represents the balance of a deposit account from 2016. This deposit account was funded by the social allowance for child support, which can be easily verified by consulting the 2016 Declaration under the "Financial Assets" section. This amount was saved since 2016 and was kept in the deposit account of Diana Postică. Additionally, the amount of 49,927 MDL from the allowance in 2017 was added to this sum, resulting in a total income deposited into the account for 2017 of approximately 190,000 MDL.

Regarding the expenses and savings in 2017, as previously mentioned in the response provided earlier, including during the public hearing, the appellant clarified that the indicated bank deposit amount in the 2017 Income Declaration, totaling 195,000 MDL, is incorrectly recorded. The amount reflected under the "Financial Assets" section is the accumulation deposit on the current account of Diana Postică, resulting from child support allowances. The amount of 195,000 MDL is composed of the interest and capitalization on the previously saved social allowances, as indicated in 2016 (140,000 MDL). Therefore, the amount of 195,000 MDL doesn't represent savings from 2017 itself. Only the allowance received in the current year (49,927 MDL) can be considered as savings for 2017, which was added to the previously accumulated amounts: 140,000 MDL + 49,927 MDL + capitalization, resulting in the sum of 195,000 MDL.

The appellant repeatedly emphasized that the amount of 195,000 MDL is incorrectly attributed by the Commission under the "Expenses" section.

The appellant also highlighted the uncertainty of the Commission's conclusion regarding the cash savings amounts of 50,000 MDL and 7,000 MDL (estim. 145,600 MDL), as these amounts are not indicated in the 2017 Income Declaration under the "Cash in National Currency and/or Foreign Currency" section. As a result, the sums of 195,000 MDL + 190,350 MDL, totaling 385,350 MDL, were erroneously calculated by the Commission under the "Expenses" section. Only the amount of the saved allowance for 2017, which is 49,927 MDL, can be deducted from this sum.

The appellant specified that, according to Decision No. 23/2023, the Commission found, in an unjustified and arbitrary manner, a difference of 108,147 MDL between the declared income of the Postică family and the expenses incurred 2019.

In challenging the erroneous findings of the Commission, the appellant specified that regarding the income derived from savings in 2019, the correct amount of 107,414 MDL was accurately recorded, to which an allowance of 5,100 MDL was added, totaling 112,514 MDL. This specific amount of 107,414 MDL was reflected by the appellant in the 2019 Declaration under the section "Financial Assets." This sum of 107,414 MDL was saved from 2018 (as shown in the 2018 Declaration), being kept in the deposit account of the appellant's spouse, Diana Postică.

As mentioned in the previous response and also during the public hearing, the amount of 534,045 MDL indicated in the Declaration under the section "Financial Assets" does not constitute

a part of the cash savings of 646,496 MDL as indicated by the Commission. This is easily noticeable from the fact that in the "Financial Assets" section, the amount of 534,045 MDL is not indicated as a deposit or savings but as a sum that was transacted in the current bank account of Diana Postică at "Victoriabank" BC throughout 2017. In reality, this amount represents the income generated by the company managed by the appellant's spouse in the amount of 534,045 MDL (504,045 MDL annual income and 30,000 MDL administration salary) as indicated in the Declaration.

The Commission was urged to verify the previous Declarations of the candidate Aureliu Postică under the section "Financial Assets" for 2014-2016 period in order to observe that the appellant reflected the same amounts from his current accounts generated from salaries but did not indicate them as savings. Accordingly, from the savings amount indicated by the Commission of 646,496 MDL, the amount of 534,045 MDL should be excluded, and it would result in savings of only 112,451 MDL, which corresponds to the amount indicated under "Income."

Furthermore, the lack of the so-called savings or bank deposits at the end of 2017, in the amount of 195,000 MDL and 190,350 MDL, as well as the savings at the end of 2019, in the amount of 646,496 MDL, can be easily verified. The appellant provided the Commission with bank statements from BC "MAIB" for the relevant periods, on which all the amounts obtained as income by the spouse were reflected. These statements will show that there were no such savings identified by the Commission at the end of 2017 and 2019.

Therefore, as the subject of the evaluation, the appellant considered the calculations made by the members of the Secretariat or the Commission to be arbitrary and entirely unfounded. These calculations purportedly highlighted alleged discrepancies between the income and expenses of the appellant's family in 2017 and 2019.

The evaluations made by the Commission, indicating that the candidate failed to remove serious doubts raised regarding the financial imbalance for 2017 and 2019, were seen by the appellant as tendentious and disparaging. The appellant reserved the right to defend his legitimate interests, including through the request for a financial and accounting audit or expertise, aimed at challenging the Commission's allegations. These allegations, made in a superficial and non-judicious manner, apparently imply elements of alleged illicit enrichment. Such allegations could have serious repercussions on the appellant's professional reputation and integrity. Moreover, they could potentially have a directly unfavorable impact in the context of the ongoing criminal investigation against the appellant under art. 330² para. (2) of the Criminal Code.

Furthermore, the candidate's assets were declared in accordance with legal provisions, and the competent authority in this field, namely the National Integrity Authority, was neither notified nor did it issue any findings or sanctions on this matter. Consequently, the specialized Commission exceeded its remit beyond the explicitly defined scope of its duties by noting certain circumstances that not even the competent authority had attested to.

Additionally, from the text of the appealed document, it is not evident that the Evaluation Commission has determined that the assets acquired by the candidate over the last 15 years do not correspond to the declared income. In this case, all the candidate's acquired assets fall within legal limits and are substantiated by appropriate documentation.

On 20 February 2023, the Independent Commission for assessing the integrity of candidates for the positions of members in the self-administration bodies of judges and prosecutors submitted a reference, requesting the rejection of the appeal submitted by Aureliu Postică.

In the reasoning of the reference, the respondent has invoked that Decision No. 23 of January 27, 2023, issued by the Evaluation Commission, is legal and well-founded, while the appellant's allegations are unfounded and lack evidentiary support. The respondent mentioned that the Evaluation Commission executed all obligations stipulated by Law No. 26 of March 10, 2022 on measures related to the selection of candidates for the positions of members in the self-administration bodies of judges and prosecutors, and when certain ambiguities were identified, the Commission offered the appellant the opportunity to clarify them by providing additional data and information, setting a sufficient deadline for this purpose.

The respondent explained that the integrity evaluation process and Decision No. 23 of January 27, 2023, issued by the Evaluation Commission, do not affect the professional status of the candidate. The Commission does not replace or assume the functions of any public authority in the Republic of Moldova. Moreover, the decision regarding the candidate's failing the

evaluation constitutes the legal basis for not admitting the candidate to elections or competitions, and it does not have any other legal effects.

Moreover, according to p. 39 of the Joint Opinion of the Venice Commission and the Directorate General of Human Rights and Rule of Law of the Council of Europe (Opinion No. 1069/2021 of December 13, 2021, Moldova), the revised draft law clearly indicates that the results of the integrity assessment will not have any effect on the candidate's career as a judge.

According to the respondent, the burden of proof falls on the candidate during the evaluation process. In the initial phase, it is the Commission's duty to collect data and information, utilizing its legal powers (art. 6 of Law No. 26/2022) and adhering to legal obligations (art. 7 of Law No. 26/2022). However, when uncertainties arise and for the purpose of clarifying them, the Commission provides the candidate with the opportunity to present additional data and information (art. 10, para. (7) of Law No. 26/2022).

Furthermore, the presentation of additional data and information is a right of the candidate (art. 12, para. (4) of Law No. 26/2022). However, the non-exercise of this right (by refusal, explicitly or implicitly, or by presenting incomplete or inconclusive data) risks leading the Commission to the conclusion that there are serious doubts that the candidate meets the integrity criteria (art. 13, para. (5) of Law No. 26/2022). Accordingly, it is in the candidate's interest to assume the burden of proof, and this legislative transfer not only does not violate but also effectively protects the candidate's rights.

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.

The respondent emphasized that the conclusion of the Evaluation Commission in the decision regarding the existence of serious doubts about the candidate's compliance with the ethical and financial integrity criteria pertains to the decision's appropriateness, and the court is bound to exercise legal control over the decision and is not entitled to conduct an appropriateness review. Moreover, the court may order the reevaluation only if it finds circumstances that could have led to the candidate's passing the evaluation or procedural violations, which are absent in this case.

Although art. 10 para. (7) and art. 12 para. (4) lit. (d) of Law no. 26/2022 clearly state that it's the candidate who can remove suspicions raised by the Commission, the appellant asserts that the Commission itself was supposed to clarify these uncertainties that it had identified. The appellant's argument suggests that „in situations where ambiguities about a vehicle arose repeatedly during the questions' rounds, the Evaluation Commission avoided seeking official information from the authorities”. However, as reiterated earlier, transferring the burden of proof to the candidate is lawful and doesn't infringe upon his/her rights; it's an appropriate measure within the pre-vetting process, a notion supported by international bodies such as the Venice Commission and the ECHR.

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 respondent also emphasized that it is not within the jurisdiction of the court to address the appropriateness of the Decision, and that the court's control should be limited to legality aspects. However, it considered it necessary to draw attention to the following matter. By the ruling of March 30, 2023, the Supreme Court of Justice accepted the request of lawyer Nicolae Leșan, the representative of the appellant Aureliu Postică, regarding the lifting of the exception of unconstitutionality of:

- art. 10 para. (5) (according to which „by derogation from the provisions of Law no 133/2011 on the Protection of Personal Data, processing the personal data of candidates and of persons referred to in Article 2(2) shall be allowed as long as the Evaluation Commission and its Secretariat operates. The candidate's right to access these data shall be ensured by the Secretariat of the Evaluation Commission. The candidate has the obligation to keep the confidentiality of personal data from the evaluation materials presented by the Commission.”);

- art. 12 para. (2) (according to which „The hearings shall take place in a public session, which shall be audio/video recorded. The Evaluation Commission may decide to conduct a part of the hearings in a closed meeting if the interests of public order, privacy or morality are

undermined. If the Evaluation Commission rejects the candidate's request to hold the hearings or part of them in a closed meeting, s/he may immediately notify the Commission of his/her withdrawal from the competition.”);

- art. 15 para. (1) (according to which „During the period of application of this Law, the provisions of other legal acts of equal or lesser legal power shall apply in so far as they do not conflict with the provisions of this Law.”)

all from 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 10.03.2022

By the ruling of April 5, 2023, of the Supreme Court of Justice, the request of lawyer Nicolae Leșan, the representative of the appellant Aureliu Postică, regarding the lifting of the exception of unconstitutionality was accepted in relation to:

- terms „seriously”, „wrongful” and „inexplicable” from art. 8 para. (2) lit. a);
- phrase: „in the past 15 years” from art. 8 para. (4) lit. b);
- term „not” from art. 8 para. (6) (according to which: „In assessing the criteria referred to in paras (2)-(5) and in deciding on them, the Evaluation Commission shall not depend on the findings of other bodies competent in the field concerned”);

- art. 12 para. (4) lit. d) insofar as it is interpreted that the person has the right „to submit in writing additional data and information, which s/he deems necessary, in order to remove suspicions about his/her integrity, if s/he was in impossibility to present them previously” prior the public hearing by the Evaluation Commission;

The candidate has the following rights: a) attend the meetings of the Evaluation Commission and give oral explanations; b) be assisted by an attorney or a trainee attorney during the evaluation procedure; c) consult the evaluation materials, at least 3 days before the hearing; d) submit in writing additional data and information, which s/he deems necessary, in order to remove suspicions about his/her integrity, if s/he was in impossibility to present them previously; 7 e) appeal the decision of the Evaluation Commission

- the phrase „serious doubts” from art. 13 para. (5) (according to which „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 laid down in Article 8, which have not been mitigated by the evaluated person”);

- the phrase „The decision on failing the integrity evaluation constitutes a legal basis not to allow the candidate to the elections or competition”.

- art. 14 para. (6) (according to which „An appeal against the decision of the Evaluation 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 Evaluation Commission decisions, elections or competition in which the candidate concerned participates”), all from 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 10.03.2022

By the decision of April 06, 2023, of the Constitutional Court, the submissions, including those from lawyer Leșan Nicolae, the representative of Aureliu Postică, were declared inadmissible concerning the unconstitutionality exceptions of the provisions of Law No. 26 of March 10, 2022, on measures related to the selection of candidates for the positions of members in the self-administration bodies of judges and prosecutors

Furthermore, by the decision of April 11, 2023, of the Constitutional Court, the submission of Postică Aureliu regarding the unconstitutionality exceptions of the provisions of Law No. 26 of March 10, 2022, on measures related to the selection of candidates for the positions of members in the self-administration bodies of judges and prosecutors, was declared inadmissible.

By ruling of the Supreme Court of Justice of 07 July 2023, Aureliu Postica's request regarding the lifting of the exception of unconstitutionality was rejected in regard to:

- phrase „legal regime of declaring assets and personal interests”;
- phrase „candidate's assets have been declared in the manner established by law”;

- phrase „compliance by the candidate with the legal regime of declaring assets and personal interests”;
- phrase „shall not depend”, all from art. 8 of the Law No. 26 of March 10, 2022, on measures related to the selection of candidates for the positions of members in the self-administration bodies of judges and prosecutors.

In the court hearing, the appellant argued the case based on the factual and legal grounds presented and requested the annulment of Decision No. 23 dated January 27, 2023, along with a reevaluation of the evaluation process.

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, lawyers Roger Gladei and Valeriu Cernei, supported the arguments presented in the submitted reference and requested the rejection of the action as unfounded.

During the court hearing, the witness Diana Postică, who is the spouse of the appellant, testified essentially that she is the sole founder and administrator of the companies LLC "DB Express Account" and LLC "Dilexcont". She stated that, at her husband's request, she presented him the annual income figures of the companies whose beneficial owner she is, based on the data reported by those companies to the National Bureau of Statistics during the period 2018-2021.

She further explained that over the tax year, financial situations might change due to delayed or subsequent payments for services, or corrections in the forms submitted to the state authorities, which are legally permitted for legal entities. Therefore, the updated data might differ from what was reported by Aureliu Postică annually until March 21. All income was reported to the appropriate authorities, and the necessary taxes were paid thereto. The amounts indicated by the appellant in his annual declarations are official figures. Any discrepancies between the appellant's annual declarations and the data from the tax authority, the National Bureau of Statistics, could be explained by the fact that Aureliu Postică indicated the income of the companies of which she is the beneficial owner and not her income as an individual.

Court's assessment

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.

Timeline for review of the action

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. In this regard, the Special panel of judges of the Supreme Court would like to highlight that Aureliu Postică's application was automatically and randomly assigned on February 13, 2023, to Judge-Rapporteur Svetlana Filincova, who, through an order issued on February 14, 2023, took the application under examination and initiated preparatory actions for the judicial hearings, scheduling the court hearing for February 24, 2023. On February 23, 2023, the appellant's representative, lawyer Nicolae Leșan, submitted a request for the postponement of the court hearing. Considering the court's schedule and the participants' availability, a new hearing date was set for March 14, 2023.

However, through an order issued on March 2, 2023, by the interim President of the Supreme Court, the case was subjected to redistribution to another judge due to the resignation of Judge-Rapporteur Svetlana Filincova. On the same date, the case was reassigned to Judge-Rapporteur Dumitru Mardari.

During the hearing on March 14, 2023, appellant Aureliu Postică submitted a request to recuse the members of the Special panel, which was processed on the same day.

Through the order issued on March 20, 2023, by the interim President of the Supreme Court, the case was redistributed to another judge due to the resignation of Judge-Rapporteur Dumitru Mardari. It was then assigned to Judge-Rapporteur Mariana Pitic on March 21, 2023.

Furthermore, through the order issued on March 30, 2023, by the Supreme Court, the appellant Aureliu Postică's request for recusal was rejected.

In the hearing on March 30, 2023, the examination of the case was resumed, and the appellant, Aureliu Postică, submitted two requests in which he sought the court's assistance in obtaining evidence from the respondent and raised a constitutional objection according to the provisions of art. 121 of the Civil Procedure Code. Both of the appellant's requests were granted, and due to the expiration of the allocated time for the hearing, the next hearing was scheduled for April 5, 2023. Similarly, on April 4, 2023, the appellant's representative, lawyer Nicolae Leșan, requested the raising of constitutional objections to certain legal provisions. In the hearing on April 5, 2023, he explained that he did not submit a single request for the raising of constitutional objections but rather two separate ones, asserting that this is how he deemed it necessary and appropriate for the defense of the appellant's rights.

By the same date's ruling, the request was granted, and through a recorded ruling, the parties and participants in the proceedings were given time to study the documents submitted on April 4, 2023. The court hearing was adjourned until April 6, 2023.

On April 5, 2023, after the court hearing was closed, the appellant's representative, lawyer Nicolae Leșan, submitted a request to suspend the proceedings.

In the hearing on April 6, 2023, through a protocol ruling, the Independent Commission for assessing the Integrity of candidates for the positions of members in the self-administration bodies of judges and prosecutors was ordered to present the documents previously submitted on April 4, 2023, translated into the language of the proceedings. The deadline was set until April 10, 2023, and the hearing was adjourned until that date.

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

Subsequently, the Panel of the Supreme Court of Justice notes that on April 6, 2023, Law No. 64 of March 30, 2023, regarding the Supreme Court of Justice, as well as Law No. 65 of March 30, 2023, regarding the external evaluation of judges and candidates for the position of judge of the Supreme Court of Justice, came into force.

According to the provisions of art. 8 of Law No. 64/2023, the Plenum of the Supreme Court of Justice is composed of all judges of the Supreme Court of Justice and has, inter alia, the responsibility to determine the composition of the panels of judges, annually.

The Panel of Judges acknowledges the aforementioned legal provisions and the fact that during the period of March-April 2023, the majority of the magistrates of the Supreme Court of Justice resigned, which makes it impossible to constitute panels of judges by the Plenum of the Supreme Court of Justice, which is not deliberative at the moment.

However, by Law No. 89 of April 27, 2023, which came into effect on May 2, 2023, the transitional provisions of Law No. 64/2023 regarding the Supreme Court of Justice were modified to establish the moment when the new composition of the Supreme Court of Justice, including the Plenum, would begin its activities. This change reinstated the authority to form panels of judges according to the previous rule – by the President of the Supreme Court of Justice.

In accordance with the provisions of art. 12 para. (8) of Law No. 65/2023, the Superior Council of Magistracy, through Decision No. 120/6 of April 10, 2023, announced the competition for the temporary transfer to fill vacant judge positions at the Supreme Court of Justice. Additionally, through Decision No. 142/8 of May 2, 2023, the Superior Council of Magistracy decided to temporarily transfer 7 judges from national courts to the position of judge at the Supreme Court of Justice for a period of 6 months, starting from May 10, 2023.

Therefore, the panel of judges notes that the activity of the Supreme Court of Justice was halted during the period of March 30, 2023, to May 10, 2023. During this time, neither the factual nor the legal examination of pending cases was possible.

Considering this, the request for the recusal of Judge Mariana Pitic was subjected to reassignment on May 15, 2023, after the resumption of the activities of the Supreme Court of Justice. Through the ruling issued on May 25, 2023, the request for recusal was rejected.

The hearing for the case was initially scheduled for June 26, 2023. However, the appellant, Aureliu Postică, and his representative, lawyer Leșan Nicolae, submitted requests for postponement, leading to the rescheduling of the hearing for July 3, 2023. Additionally, the parties and participants in the trial were informed about the consequences of failure to appear in court in

case they are legally summoned for the new hearing date.

However, on June 30, 2023, the appellant Aureliu Postică once again submitted a request to postpone the hearing scheduled for July 3, 2023, invoking the fact of him being on annual leave outside the country. As a result, the hearing was rescheduled to July 5, 2023.

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(1) 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 *Clevadî 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 Clevadî (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.

Admissibility of the action:

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 of judges notes that through the submitted action, the appellant Aureliu Postică claims the violation of a right through administrative activity, in accordance with art. 189 para. (1) of the Administrative Code. Specifically, he argues that Decision No. 23 of January 27, 2023, issued by the Evaluation Commission, violated his right to be elected as a member of the Superior Council of Magistracy (art. 14 of the Law on the Status of Judges No. 544/1995), his right to judicial self-administration (art. 231 of the Law on Judicial Organization No. 514/1995), his right to dignity and professional reputation as a judge, the fundamental right to the independence and immovability of judges (art. 16 of the Constitution of the Republic of Moldova), as well as the fundamental right to administration (art. 39 of the Constitution of the Republic of Moldova), and the right to a favorable evaluation decision for candidate Aureliu Postică.

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.

In this context, it is noted that the decision of the Independent Commission for assessing the integrity of candidates for the positions of members in the self-administration bodies of judges and prosecutors, Decision No. 23 of January 27, 2023, was received by Aureliu Postică on February 7, 2023, a fact confirmed by the attached email excerpt in the case materials.

The special panel of judges concludes that Aureliu Postică's action is admissible, as the appellant has complied with the provisions of art. 14 para. (1) of Law No. 26 of March 10, 2022 on measures related to the selection of candidates for the positions of members in the self-administration bodies of judges and prosecutors. He filed the present application on February 13, 2023, within the legal time limit, with the Supreme Court of Justice.

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.

Regarding the substance of the case, the special panel notes the following facts and legal context.

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 decision of the Commission is deemed illegal, and the appellant would be entitled to a favorable decision, as the appealed decision is flawed, particularly in terms of proportionality, incorrect interpretation of undefined legal concepts, and equality of treatment. The Commission is bound to observe proportionality and equality of treatment when making decisions concerning the evaluation of candidates for positions of members of the Superior Council of Magistracy. Denying this fact would not only raise questions about the rule of law but also the very purpose for which Law No. 26/2022 was enacted. The serious doubts raised by the Commission must be analyzed and evaluated through the lens of proportionality, equality of treatment, and other elements of the principle of legality of individual administrative acts.

According to art. 2 para. (2) of the above law, the evaluation of the candidates referred to in para. (1) herein includes a verification of the assets of persons close to candidates, as defined in Law no. 133/2016 on Declaration of Assets and Personal Interests, as well as of the persons referred to in art. 33 para. (4) and (5) of Law no. 132/2016 on the National Integrity Authority

Accordingly, under art. 2 of Law no. 133/2016, close persons, are: “husband/wife, child, cohabitant of the subject of the declaration, the person supported by the subject of the declaration, as well as any person related through blood or adoption to the subject of the declaration (parent, brother/sister, grandparent, nephew/niece, uncle/aunt) and any person related by affinity with the subject of the declaration (brother-in-law/sister-in-law, father-in-law/mother-in-law, son-in-law/daughter-in-law).

Furthermore, according to art. 33, para. (4) and (5) of Law No. 132 of June 17, 2016, regarding the National Integrity Authority, the scrutiny of assets and personal interests extends to family members, parents-in-law, and adult children of the individual subject to scrutiny. If the individual subject to scrutiny is in a domestic partnership with another person, the verification will also encompass the assets of that person.

If there is an appearance that the assets of the individual under scrutiny have been registered in the name of other persons, the investigation will extend to these assets and persons as well. If the subject of declaration has indicated income and assets received from donations or holds assets in a loan agreement, the investigation will also extend to the donor and the donee. They can be asked for clarifications regarding the source of income used for the acquisition and maintenance of those assets. For the clarification of these aspects, the integrity inspector can request relevant information from any natural or legal person.

According to art. 4, para. (1), subparagraphs (b) and (d) of Law No. 133 of June 17, 2016 on the declaration of assets and personal interests, in force according to the wording at the adoption date, the subjects specified in art. 3, paragraph (1) declare:

- a) the income obtained by the declarant together with the family members, cohabitant in the previous tax year.

According to art. 2 of Law No. 133 of June 17, 2016, regarding the declaration of assets and personal interests, income is defined as any financial benefit, regardless of the source of origin, obtained by the declarant and his/her family members, cohabitant, both in the country and abroad.

According to Government Decisions No. 1233/2016, No. 54/2018, No. 21/2019, and No. 923/2020, the amount of the average monthly salary in the economy, projected for 2017, 2018, 2019, 2020, and 2021, was 5,300 MDL, 6,150 MDL, 6,975 MDL, 7,953 MDL, and 8,716 MDL, respectively.

The content of Decision No. 23 of January 27, 2023, shows that regarding the candidate Postică Aureliu, the Evaluation Commission identified three non-compliances, namely:

1. The companies owned by the candidate's spouse as the beneficial owner and the income declarations associated with them;
2. The acquisition of an apartment at a preferential price, the privatization of an apartment, and the allocation of land;
3. Financial imbalance in 2017 and 2019.

Analyzing the conclusions of the Evaluation Commission regarding these three circumstances in relation to the evaluation criteria, the special panel of judges highlights that during the written communication phase, Postică Aureliu was requested to provide additional information and documents to be presented to the Evaluation Commission.

Thus, from the information obtained by the Commission during the pre-vetting procedure concerning candidate Postică Aureliu, it was noted that, *regarding the first issue*, the candidate's spouse is the founder and beneficial owner of two companies. Financial information related to the income and net profit of the candidate's spouse and the companies reveals significant discrepancies between the amounts indicated by the candidate in the annual declarations and the information about the spouse's income recorded at the Tax Service, as well as the information about the companies' profits recorded at the National Bureau of Statistics.

Furthermore, during the reference period, the income of the candidate's spouse from her company activities, as indicated in the annual declarations by candidate Postică Aureliu, is higher than the personal income recorded with the tax authorities by the spouse and higher than the net profit of the companies recorded with the National Bureau of Statistics.

Even during the hearing, candidate Postică Aureliu was unable to remove the serious doubts regarding the first issue. Although, after the hearing, Postică Aureliu presented a document issued by the tax authority dated September 16, 2022, the Commission, considering the provisions of art. 3 para. (4) of the Evaluation Rules, and the fact that this document existed on November 11, 2022, the date when he was asked to provide additional clarifications, concluded that the document presented cannot be considered during the hearing.

However, even if the information presented during the hearing were taken into account, after a comparison of these, the difference between the declared incomes and those reported to the state authorities still exists in the amount of 810,637 MDL. Thus, considering all the documents presented, clarifications, adjustments, and corrections made, it is ultimately confirmed that the candidate's spouse earned 0 MDL for 2018, compared to the 100,000 MDL declared by Postică Aureliu; earned 394,522 MDL for 2019, compared to 534,045 MDL declared by Postică Aureliu; earned 679,678 MDL for 2020, compared to the 926,643 MDL declared by Postică Aureliu; and earned 988,542 MDL for 2021, compared to 1,303,691 MDL declared by Postică Aureliu.

The special panel of judges notes that it was precisely these circumstances that were identified by the Evaluation Commission as the reason for the candidate, Postică Aureliu, not passing the evaluation.

In this regard, the Commission identified serious doubts regarding the candidate's compliance with the ethical integrity criterion under art. 8 para. (2) lit. (c) and the financial integrity criterion under art. 8 para. (4) lit. (c), as well as art. 8 para. (5) lit. (b) and (d) of Law No. 26/2022, related to the declaration of assets and personal interests, particularly the income of his wife from the two companies she owns, in accordance with the provisions of the legislation.

In accordance with the provisions of art. 85 para. (3) and art. 92 of the Administrative Code, the public authority must establish ex officio the factual aspects of the case that is the subject of the procedure, not limited to the evidence and assertions of the participants. The public authority decides according to its own free conviction whether it considers a fact to be established, taking into account the entire administrative procedure, including all evidence. The public authority

considers all facts relevant to the case, including those favorable to the participants..

According to art. 2 of Law No. 133/2016, income is defined as any financial benefit, regardless of the source of origin, obtained by the declarant and his/her family members, cohabitant, both in the country and abroad.

According to art. 4 para. (1) lit. d) of the same law, subjects provided at art. 3 para. (1) shall declare: *financial assets* held by the subject of the declaration and family members, his/her cohabitant, including as *beneficial owners*, i.e. cash in national currency or in foreign currency that exceed the value of 15 average salaries per economy and are not subject to deposits in financial institutions. Bank accounts, mutual funds in investment funds, equivalent forms of savings and placements, investments, bonds, checks, bills of exchange, loan certificates, other documents incorporating personal property rights of the subject of the declaration and his/her family members, his/her cohabitant, including as beneficial owners, direct investments in national currency or foreign currency made by the subject of the declaration and his/her family members, his/her cohabitant, including as beneficial owners, and other financial assets, if the overall amount exceeds the value of 15 average salaries per economy.

The special panel of judges notes that by declaring the income of the companies, which includes salary and dividends, both of which are effectively received by the appellant's wife, the appellant has acted in good faith, thus removing the serious doubts regarding the disparity between the information in the annual declarations and that provided by the tax authority.

Furthermore, the special panel of judges notes that the appellant has not concealed, diminished, or disguised his wife's income from her management activities in the companies concerned, to the extent that her income would be wrongful, inexplicable, or even carrying an *implication of illegality*, as suggested by the Venice Commission in *amicus curiae* (CDL-AD(2022)011, § 9-10).

Additionally, during the evaluation procedure, the appellant provided updated information from the FVID18 forms, which, compared to the initial data held by the Commission, does not indicate a substantial difference that would raise serious doubts about the financial ethics of the candidate. However, the Commission did not give the proper consideration to the updated information during the evaluation process.

Similarly, throughout the evaluation procedure and during the examination of the present case, the appellant, Postică Aureliu, acknowledged that he reported the entire income of the companies owned by his wife as her income. His wife is the sole founder and beneficiary of these companies, and the difference between the amounts in the annual declarations and those reported to the National Bureau of Statistics by these companies is not substantial.

In this regard, to assess the gravity or seriousness of this discrepancy, the Special Panel of Judges reiterates that from the case materials, it is evident that in the annual declarations submitted by the appellant, Postică Aureliu, under the section concerning his wife's income, a total income of 2,864,379 MDL was indicated for the period 2018-2021. According to updated information from the National Bureau of Statistics, the companies owned by the appellant's wife reported sales income of 2,808,100 MDL for the same period. The difference of 56,279 MDL, in the context of the definition contained in art. 2 of Law 133/2016 regarding the declaration of assets and personal interests, cannot be considered a substantial difference, as its value does not exceed 20 average monthly salaries per economy.

După cum a fost menționat supra, cu referire la *amicus curiae* (CDL-As mentioned above, with reference to the *amicus curiae* (CDL-AD(2022)011, § 9-10), the decision to not pass the candidate could be justified in the case of a simple doubt based on a risk assessment. However, this doubt must be linked to an *indication of illegality*, which was not observed in this case. The severity level of the omissions did not reach the minimum threshold prescribed by law, and there are no justifications to hold serious doubts about this aspect.

In those circumstances, the special panel concludes on this subject that, the appellant has made every effort to remove to a full extent any doubt as to the part relating to financial and ethical integrity in declaring his wife's income, and the Commission, for its part, acknowledged an

uncertain assessment of the evidence in combination with the candidate's explanations, incorrectly exercising the discretion to obtain and evaluate the evidence.

The Commission further highlighted serious doubts as to the purchase of an apartment at a preferential price, the privatization of another apartment and the allocation of land from the State, actions that took place in the period 2006-2013, the candidate working predominantly in the prosecutor's office. Although the candidate applied to the three programs for obtaining real estate in 2005-2007 and, as he stated in the hearing and in the judicial debates, was not sure whether the applications would be accepted, ownership over the three buildings was obtained in 2008, 2010 and 2013.

As a consequence of these events, in 2006, when submitting an application for obtaining an apartment at a preferential price, Postică Aureliu selectively omitted, according to the Commission's opinion, information about his ownership of a ½ share in an apartment in Chişinău in 1996. Furthermore, in 2005-2006, when applying for the free allocation of land for building a house, he did not inform the local public administration that he simultaneously applied for a preferential-priced apartment. Additionally, three months after receiving the free land in 2010, he sold it at a commercial price. Similarly, in 2007, he applied for a service apartment in Chişinău, and in 2008, when concluding the privatization contract, only his wife and daughter participated, to benefit from a nominal price significantly lower than the commercial price.

Beyond the legality aspect regarding the purchase of the three properties, the Special Panel of Judges observes that Postică Aureliu was ethically questioned about why he utilized such state programs three times. However, the candidate responded only by stating that he availed himself of the legal provisions in force during that period, as it was a guarantee for civil servants.

According to p. 6, lit. a) of the Code of Ethics for Prosecutors (in the version in force since 2007), prosecutors must exhibit impeccable behavior that would maintain and enhance public trust in the impartiality and prestige of public authorities' activities. Prosecutors who are seen to use the law to create personal benefits opportunities demonstrate questionable behavior and undermine public trust in their activities and their prosecutor title.

Furthermore, according to art. 71 of the Law on Prosecutor's Office (in the version relevant to the case), if a prosecutor does not possess living space, they have the right to use a service apartment. Thus, art. 5 of Law No. 1324/93 regarding the privatization of housing fund (in the version relevant to the case) stipulated the right to privatize state-owned housing when citizens already owned another privately acquired property that did not result from privatization.

Furthermore, according to art. 11 of the Land Code (in the version relevant to the case), local public administration authorities allocate land plots from the urban reserve to newly-formed families for the construction of residential houses, household annexes, and gardens. In urban areas, these plots can range from 0.04 to 0.07 hectares, while in rural areas, they can be up to 0.12 hectares. The specific dimensions of these land plots are determined by local public administration authorities.

Similarly, it's important to note the provisions of art. 42 of the Housing Code of the Moldavian Soviet Socialist Republic (in force at the relevant time of the case), which state that the housing norm is set at *nine square meters per person*.

Thus, the circumstances established indicate that the appellant, Postică Aureliu, pursuing the legitimate goal of *improving living conditions*, submitted *three applications* in the period 2005-2007, specifically in accordance with the Law on the Prosecutor's Office, in compliance with art. 5 of Law No. 1324/93 on the privatization of the housing fund, and within the preferential housing program for Prosecutor's Office staff. The fact that at least one of these applications was approved was not solely dependent on the appellant.

It is certain that the resolution, whether positive or negative, of the mentioned applications was not directly dependent on the appellant, and the time frame in which these applications would have been resolved is unclear. Therefore, while considering the legitimate goal mentioned above and taking into account housing space norms and living conditions, the appellant's explanation appears justified. According to his explanation, he could not reside with his family of three in the privately privatized property of his father, nor in the property privatized by his wife and first daughter, as the family would have expanded to five people. Additionally, the appellant's explanation for the sale of the land allocated by the local public administration appears acceptable,

as the funds obtained from the sale were used for the investment and renovation of the apartment acquired through the preferential housing program for Prosecutor's Office staff, in which the appellant's family has been residing since 2013 until now.

Considering the facts established in relation to the ethical standards of conduct for prosecutors, the special panel of judges dismisses the serious doubts raised by the Commission regarding the candidate's compliance with the ethical integrity criterion under art. 8 para. (2) lit. (a) of Law No. 26/2022, concerning the acquisition of an apartment at a preferential price, the acquisition of an apartment at a nominal price in the context of privatization, and the acceptance of land for free, as well as its subsequent sale. These doubts have been removed by the candidate.

During the evaluation of candidate Postică Aureliu, the Commission also identified periods in which annual expenditures exceeded the respective year's income. However, the Commission focused particularly on the years 2017 and 2019. When asked during the written questions' round, the candidate did not respond. Nevertheless, during the hearing, the candidate commented on certain calculation aspects and answered the Commission's questions.

Regarding this issue, the Special Panel notes that during the evaluation of the candidate, the Commission organized the candidate's income and expenditures/savings into a table, and Postică Aureliu confirmed all amounts except for savings amounting to 190,350 MDL and a bank deposit of 195,000 MDL. Postică Aureliu explained that the bank deposit of 195,000 MDL was inaccurately represented, as it consisted of 140,000 MDL as savings from 2016 and only 49,927 lei from allowances in 2017, which is also reflected in the Income column. Thus, only the amount of 49,927 MDL should be considered as additional savings.

During the judicial debates, the appellant explained that he confirms the savings amounting to 190,350 MDL, which were actually reflected in his annual declaration, but he initially did not notice them because he consulted his depersonalized declaration on the National Integrity Authority's website, and the cash savings were crossed out. In regard to the data presented by the Commission, the appellant objected only to the amount of 195,000 MDL in the deposit account. In this regard, the appellant admitted that the deposit account, which was actually used to deposit funds received by his wife as childcare allowances, had approximately 141,666 MDL spent during 2017. Despite this fact, the appellant acknowledged that he erroneously indicated that the deposit balance remained intact throughout 2017, mentioning that the amount of 195,000 MDL, composed of savings from the previous year and the allowance with interest for 2017, is the total amount that flowed into this account, but not necessarily that this amount existed at the time of declaration submission. Therefore, following a mathematical calculation of the data presented by the Commission, if the expenditure amount of 141,666 MDL is excluded, the difference between income and expenses for 2017 is only 16,524 MDL, which the appellant considers an insignificant difference.

In the financial presentation of the candidate for 2019, expenses amounting to 964,324 MDL were identified, while the total of available savings and income for 2019 adds up to 856,177 MDL. Consequently, the expenses in 2019 seem to have exceeded the candidate's income and savings by 108,147 MDL. In this regard, Postică Aureliu explained both during the hearing and subsequently in writing that he agrees with all the data indicated in the "Income" and "Expenditures" sections, with the exception of the savings amount of 646,496 MDL. He clarified that this sum was calculated based on the 2019 annual declaration and consists of the amount of 112,451 MDL as a bank deposit in his wife's name and the amount of 534,045 MDL as a bank deposit of his wife's company. Thus, challenging the amount of 534,045 MDL, the candidate explained that this is the bank account turnover of the company and not the available balance at the time of declaration submission. As a result, the challenged sum was identical to the declared income of his wife for that year and by no means represented savings.

In accordance with art. 23 of the Administrative Code, as a fundamental principle, it is provided that competent public authorities and courts must treat individuals in similar situations equally. Any differential treatment must be objectively justified. Both in administrative procedures and in administrative litigation procedures, *no person can benefit from privileges, be disadvantaged, deprived of rights, or exempted from obligations* on grounds of race, family origin, gender, language, citizenship, ethnic affiliation, religion, political or ideological beliefs, education, economic situation, or social status.

From this perspective, the Special panel of judges will need to determine to what equal extent, judges, prosecutors, and members of civil society who are candidates for positions in self-administration bodies have been treated equally or unequally with regard to the practices established by the Commission during the period from the start of the evaluation process until the present.

In this regard, without delving into the quality or legality of the Commission's decisions regarding other candidates, the Special panel of judges will undertake a comparative study, with an emphasis on equal treatment. This study will encompass both passing decisions issued prior to the case of Postică Aureliu, aiming to determine the presence or absence of differential treatment in similar situations, as well as passing decisions issued after January 27, 2023. The purpose of this analysis is to ascertain whether the Commission has not changed its practices in accordance with art. 137 para. (4) of the Administrative Code.

Following the proposed exercise, the Special panel of judges has identified instances in the Commission's practice both before and after the evaluation of Postică Aureliu, where the Commission noted violations of the legal regime for declaring assets in the cases of other candidates. These violations were manifested through failure to declare of assets and discrepancies in the prices of real estate or movable property. However, the Commission accepted the explanations provided by the candidates, determining that these omissions were of a technical nature and were not indicative of an intention to evade the legal regime for declaring assets.

In light of these facts, in Decision No. 23 of January 27, 2023, concerning the candidate Postică, the Commission did not provide factual elements indicating why Postică Aureliu was assessed as lacking integrity compared to other candidates in similar situations. Unlike other identical cases before January 27, 2023, as well as after that date, the Commission rejected the explanations provided by the appellant regarding the incorrect inclusion of the available sum from the deposit account in the 2017 declaration. The Commission adopted a selective and unfounded attitude in relation to similar situations.

In regard to the alleged financial imbalance for 2019, the special panel of judges also identified similar cases in which the Commission itself concludes that declaring a bank account, where only the candidate's salary was deposited, should not have been declared when the candidate directly declared this salary under the Income section. In the case of the appellant Postică Aureliu, who indicated his wife's bank account where her income was deposited, as separately declared by the appellant and included in his wife's income declaration, the Commission treated it as additional savings made by the appellant's wife.

Thus, in reviewing the financial presentation of the candidate for 2019, the Commission twice indicated the sum of 534,045 MDL, both as the wife's income and the wife's bank account, which consequently artificially increased the candidate's expenditures/savings for 2019. By excluding this sum incorrectly indicated by the Commission, the special panel of judges certifies the absence of discrepancies between income and expenditures/savings.

It should be noted that the income and expenses of the appellant and his family for the 2018-2021 period were the subject of the investigation of the Anticorruption Prosecutor's Office in terms of illicit enrichment, investigations which resulted in the issuance of the order of 9 March 2023 to remove the appellant from criminal prosecution and to dismiss the case, on the grounds that his actions do not meet the elements of the crime.

In this regard, the special panel of judges emphasizes that the Evaluation Commission attributed to the candidate, Aurel Postică, a serious violation of the rules of ethics and professional conduct of judges as a direct result of his failure to meet the financial integrity criterion. Thus, given that the Evaluation Commission's conclusion regarding the candidate's failure to meet the financial integrity criterion is unsubstantiated, the conclusion of a serious violation of the rules of ethics and professional conduct of judges is consequently unjustified, given the causal relationship between these two criteria.

By combining the circumstances stated above, the special panel of judges concludes that the decision issued by the Evaluation Commission is contrary to the provisions of art. 21 of the

Administrative Code, meaning it does not meet the requirements of procedural and substantive legality. The observed circumstances indicate the candidate's right to a potential favorable evaluation decision from this perspective.

From the preamble of Law No. 26/2022, it is evident that its purpose is to enhance the integrity of future members of the Superior Council of Magistracy and its specialized bodies, aimed at increasing trust in the self-administration bodies of judges and, more broadly, in the judicial system.

From the appealed decision and the documents presented by the respondent, it is not evident which of these purposes are pursued by the decision of failing the evaluation. Any of these purposes could be legitimate, but none of them are analyzed.

However, it must be noted that the Commission is fundamentally free to choose its legitimate purposes or purpose, but this fact should be evident from the content of the decision and confirmed by the documents in the administrative file.

Therefore, the special panel of judges concludes that the Evaluation Commission did not conduct an analysis and justification of the legitimate purpose of the issued Decision.

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. A judge, while in office, is presumed to be of good integrity. In case evidence to the contrary is demonstrated, then a balanced process, taking into account the guarantees of their independence, should follow, leading to their appropriate release from the judicial system through a disciplinary or other procedure.

The special panel of judges acknowledges that the purpose of Law No. 26/2022 is, *inter alia*, to enhance trust in the judiciary, rather than transforming the judiciary into an inefficient

branch of state power subject to undue interference. Thus, the exclusion, and not merely limitation, of the right of candidate Aureliu Postică to participate and be elected as a member of the Superior Council of Magistracy for the minor actions identified by the Evaluation Commission is not an appropriate measure for achieving the purposes outlined in the law.

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 of judges reiterates that the identified breaches of financial and ethical integrity were assessed by the Commission in isolation from the historical and social context, which affects the legal relationships' security. In general, the legal system accepts the retroactive effect of a law if it benefits the legal situation of a person, but this effect cannot be projected through 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 of judges appreciates that the time granted by the Commission for presenting information was insufficient and limited, making it impossible to gather comprehensive evidence to completely remove any "serious doubts" identified by the 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. Taking into consideration the aforementioned points, the special panel of judges notes that the Evaluation Commission had the obligation to fully present the administrative file of the candidate Aureliu Postică to the court in accordance with the provisions of art. 221 and 82 of the Administrative Code. This would enable the court to fulfill its constitutional task of effective judicial review over both 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.

During the examination of the present administrative litigation case, the representatives of the appellant have acknowledged that not all the materials handled by the Evaluation Commission were included in the administrative file of the candidate Aureliu Postică. Only the documents that the Evaluation Commission deemed relevant in their opinion were presented in the file.

These circumstances prove that the Pre-Vetting Commission violated candidate Aureliu Postică'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 legislator has given the Pre-Vetting Commission a wide range of tools and levers to gather all the necessary information. Therefore, failure to fulfill 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 appellant has demonstrated to the Special Panel of the Supreme Court of Justice the plausible nature of the elements invoked in his appeal. This includes aspects related to the accuracy of financial transactions related to the management, sale, and purchase of movable and immovable assets, as well as compliance to ethical and conduct norms.

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 Aireliu Postica'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 Aureliu Postica.

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

decides:

The action in administrative litigation filed by Aureliu Postică against the Independent Commission for assessing the integrity of candidates for the positions of members in the self-administration bodies of judges and prosecutors is admitted. The decision No. 23 of January 27, 2023, regarding the candidacy of Aureliu Postică, is annulled. The Independent Commission for assessing the Integrity of candidates for the positions of members in the self-administration bodies of judges and prosecutors is ordered to reevaluate the candidate Aureliu Postică.

The decision is final and irrevocable.

Presiding judge,
judge

Tamara Chișca-Doneva

Judges

Ion Guzun

Mariana Pitic