

**D E C I S I O N**  
**In the name of the Law**

**SUPREME COURT OF JUSTICE**

**01 August 2023**

**mun. Chisinau**

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

**Composed of: President,  
Judge Judges**

**Tamara Chisca-Doneva  
Mariana Pitic  
Ion Guzun**

**Registrar**

**Victoria Melinte  
Renata  
Gorodişteanu**

***With the participation of:*  
Applicant**

**Alexandru Rotari**

**representatives of the defendant,  
lawyers**

**Roger Gladei,  
Valeriu Cernei**

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

**F o u n d:**

**Arguments of the participants in the process:**

On April 3, 2023, Alexandru Rotari filed a summons against the Independent Commission for assessing the Integrity of Candidates for the Position of Member of Self-Administration Bodies of Judges and Prosecutors, requesting the annulment of the decision of the Independent Commission for assessing the Integrity of Candidates for the Position of Member of the Self-Administration Bodies of Judges and prosecutors No. 31 of March 28, 2023, on the candidacy of Alexandru Rotari, candidate for the position of member of the Superior Council of Magistracy, ordering the resumption by the Independent Commission for assessing the integrity of Candidates for the Position of Member of the Self-Administration Bodies of Judges and Prosecutors of the Procedure for Evaluating the Candidate for the Position of

Member in Superior Council of Magistracy, Alexandru Rotari.

In motivating the action, Alexandru Rotari invoked, according to Law No. 26 of March 10, 2022, on some measures related to the selection of candidates for the position of member of the self-administration bodies of judges and prosecutors, has started the procedure for assessing the integrity of candidates for the position of member of the Superior Council of Magistracy, of the Superior Council of Prosecutors, as well as of candidates for the position of member in their specialized bodies, as a mandatory stage of the process of selecting candidates and electing or appointing them to the respective positions in the mentioned entities.

The applicant mentioned that he was a judge at the Circuit Commercial Court, currently a lawyer at BAA "Academic Partnership for Justice", license No. 850 of December 10, 2002. Was included in the list of candidates submitted on June 9, 2022 by the Parliament of the Republic of Moldova to the Commission, for evaluation for the position of member of the Superior Council of Magistracy.

Respectively, all necessary documents requested by the decision of the Parliament of the Republic of Moldova were submitted.

On 21 June 2022, the Evaluation Commission sent him an ethics integrity questionnaire, to be completed voluntarily and returned to the Commission by 05 July 2022. Given the optional nature of the request, he decided not to respond to this request.

On December 27, 2022, the Evaluation Commission sent to the applicant a request to complete and submit by January 3, 2023 the declaration of assets and personal interests for the last 5 years, in accordance with the provisions of art. 9 para. (2) of Law No. 26 of 10 March 2022, on certain measures related to the selection of candidates for the position of member of the self-administration bodies of judges and prosecutors. The declaration also included the list of close persons in the judiciary, prosecutor's office and public service, according to the same article.

The complainant communicated that he complied with the request and submitted to the Evaluation Commission the completed declaration on January 3, 2023, in the proposed deadline.

On 11 February 2023, the Evaluation Commission sent a request for clarification of information, containing 18 questions, including 62 sub-questions and 33 requests for additional documents.

All questions were answered within the requested deadline and on February 15, 2023, he sent to the Evaluation Commission the answers, to which were attached most of the requested documents, which could be obtained in limited terms or which existed in the complainant's possession at the time of the request.

On February 22, 2023, the defendant sent the second round of 13 questions, including 25 sub-questions and 17 requests for additional documents, to elucidate some issues that arose during the assessment.

The complainant replied to all questions within the requested deadline and on 25 February 2023 sent to the Evaluation Commission the answers, to which were attached most of the requested documents, which could have been obtained in limited terms or which existed in the complainant's possession at the time of the request.

On March 3, 2023, the defendant sent the third round of three questions, including 5 sub-questions and 5 requests for additional documents, to elucidate some issues

that appeared as part of the assessment.

Within the deadline requested by the Commission, he replied to all questions and on 05 March 2023 sent to the Evaluation Commission the replies to which most of the requested documents were attached, which could have been obtained within limited terms or which were in the applicant's possession at the time of the request.

On March 09, 2023, as a candidate, he participated in a public hearing with the Evaluation Commission.

On 16 March 2023, confirmatory documents were sent to the Commission concerning the bank account about which he was previously asked by the Commission, including during public hearings (as the confirmatory documents requested from the banking institution for submission to the Evaluation Commission were made available to the complainant after the hearings on 09 March 2023), as well as additional information on calculations related to family income and expenses.

On 21 March 2023, the Evaluation Commission sent the fourth round of questions, including 11 sub-questions and 4 requests for additional documents, to elucidate some issues that had arisen in the evaluation.

Respectively, answers were given within the requested deadline to all questions and on March 23, 2023, he sent to the Evaluation Commission the answers to which were attached most of the requested documents, which could be obtained in limited terms or which existed in the applicant's possession at the date of the request.

The complainant noted that on March 30, 2023, via electronic mail, he received decision No. 31 of 28 March 2023 on the candidacy of Alexandru Rotari, candidate for the position of member of the Superior Council of Magistracy, according to which, pursuant to art. 8 para. (1), (2) (c), para. (4) letters b) and para. (5) lit. b) and d), art. 13 para. (5) of Law No. 26 of 10 March 2022, the Commission decided that the candidate did not meet the integrity criteria, as serious doubts have been found about the candidate's compliance with the ethical and financial integrity criteria, and therefore he does not promote the evaluation.

He considers the findings of the Evaluation Commission to be unfounded.

The decision of the Evaluation Commission affects the applicant's right to be appointed as a member of the Superior Council of Magistracy, as a result of which he was removed from participating in the contest for determining candidates for the position of member of the Superior Council of Magistracy.

At the same time, he noted that the contested decision contained the assessment of professional integrity and probity. This situation gives a double unfavourable character to the administrative act issued: on the one hand, the rights and legitimate interests of the applicant are directly affected, and, on the other, the conclusion of the Commission is a camouflaged form of sanction.

Therefore, being directly concerned by Decision No. 31 of March 28, 2023, on the candidacy of Alexandru Rotari, candidate for the position of member of the Superior Council of Magistracy, of the independent commission for assessing the integrity of candidates for the position of member in the self-administration bodies of judges and prosecutors, is a procedural subject whose legitimate right is alleged to have been violated and is entitled to assert his violated right by filing an action in the competent administrative court.

The complainant indicated that the decision of the Independent Commission for assessing the Integrity of Candidates for Membership in the Self-Administration

Bodies of judges and prosecutors No. 31 of March 28, 2023, regarding the candidacy of Alexandru Rotari, candidate for the position of member of the Superior Council of Magistracy, is focused on one ground of non-compliance of the candidate/applicant with the criteria of ethical and financial integrity, provided in art. 8 para. (2) (c) (4) letter b) of Law No. 26 of 10 March 2022, namely:

- violation of the legal regime of declaration of assets and personal interests;
- the property acquired by the applicant and his family for 2013; 2014; 2017; 2021 does not correspond to declared income.

According to art. 8 para. (2) (a) c) of Law No. 26 of March 10, 2022, a candidate is considered to meet the criterion of ethical integrity, if he has not violated the legal regime of declaring assets and personal interests, conflicts of interest, incompatibilities, restrictions and/or limitations. Para. (4) letter b) a candidate shall be considered to meet the criterion of financial integrity if the Evaluation Commission finds that the wealth acquired by the candidate in the last 15 years corresponds to the declared income. Para. (5) letter b) in order to assess the financial integrity of the candidate, the Evaluation Commission shall verify the candidate's compliance with the legal regime of declaring assets and personal interests, letter d) sources of income of the candidate and, where appropriate, of the persons specified in art. 2 para. (2).

He noted that the Evaluation Commission did not find in its decision No. 31 of 28 March 2023 that the applicant did not declare his assets to the Evaluation Commission under the legislation in force or that the wealth acquired by the applicant's family in the last 15 years did not correspond to the income that the applicant's family declared, or declared to the defendant absolutely all income in the last 5 years and all wealth acquired by his family in the last 15 years.

Thus, he considers that the Commission did not examine the information in the file in a multifaceted, complete and objective manner, which makes it necessary to resume the evaluation procedure with regard to the applicant candidate in the present case.

In this context, he mentioned that he submitted to the Commission those documents, which he possessed at the time of the request, and from the content of the documents submitted there is no doubt that would raise questions about ethical and financial integrity.

The Commission's conclusions suffer from shortcomings in misinterpretations of the factual circumstances and from the doubts set out in the contested decision. In his opinion, the defendant's doubts cannot be justified by a lack of information, invoked by the latter, that the applicant did not submit confirmatory documents regarding the cash savings held at the end of several years (obligation introduced by Law No. 133 of 17 June 2016, during the period when the applicant already did not hold the position of judge) but, on the contrary, on the existence of (truthful and conclusive) information.

In this context, the Evaluation Commission did not give due assessment to all the circumstances of the case and did not make use of the possibilities offered by law to obtain relevant information, as on the case, the defendant did not take into account the simple circumstance that he had a professional experience since 1995, combining at the same time several jobs, initially including teacher and lawyer, then judge and teacher, then lawyer and teacher, and the summation of salaries, in addition to the financial sources referred to by the candidate, would constitute a sufficient justification of the financial sources

to allow him to cover the expenses invoked by the Evaluation Commission.

Therefore, the facts of non-presentation of documents related to inter-family loans and donations (which were made in the absence of any documents, the preparation and storage of which by the applicant is unnecessary), the failure to take into account the savings of the applicant's family and the inclusion in expenses of withdrawals from the account (which could actually be used by the applicant for the purchase of currency, as well as the granting of inter-family loans), cannot in itself raise doubts that would test confidence in the applicant's probity.

Thus, his and his family members wealth was declared to the Evaluation Commission in the manner established by the legislation and it corresponds to the declared income, the competent authorities in this field such as the State Tax Service, as well as the National Integrity Authority being neither notified nor self-notified, nor issuing any decision and / or sanction in this regard.

In the case, all the property acquired by the applicant together with his family was acquired within the legal limits and is justified by the corresponding documents attached to the answers to the 4 rounds of questions.

Since the provisions of Article Art. 8 para. (2) letters (c) and (b) of paragraph (4) letter b) of Law No. Article 26 of 10 March 2022 indicates the ethical and financial integrity criteria which, in the opinion of the Evaluation Commission, the applicant in the present case does not correspond, the contested decision was to contain the circumstances, which manifested the violation of the legal regime of declaring assets and personal interests, as well as to overturn by pertinent evidence the imbalance of assets invoked for 2013; 2014; 2017 and 2021. Moreover, in accordance with the provisions of art. 93 para. (1) of the Administrative Code, each participant proves the facts on which he bases his claim. (2) By way of derogation from the provisions of para. 1, each participant shall prove facts attributed exclusively to its scope. (3) Additional or derogating regulations are admissible only under legal provisions.

The disagreement with the grounds for the Commission's invocation of serious doubts which have not been dispelled by the applicant that the wealth acquired by him in the last 15 years does not correspond to the declared income lies in the following:

1. Non-compliance by the Commission with the calculation formula for the annual analysis of incoming and outgoing cash flows set out in the Annex "Undue wealth" to the Valuation Regulation.

In its decision, the Commission notes (p. 18 para. (2)) that "... the annual analysis of incoming and outgoing cash flows used by the Commission takes into account savings in previous years. This is clearly stated in the "annex: Unjustified wealth" to the Valuation Regulation, which defines the incoming flows in point (b). 2.1 as "income plus other cash flows (loans received, cash remaining from previous periods, etc.), which increase the funds (liquidity), which the declarant may have in the current period".

Also in the decision, item 1 "Imbalance of wealth for the years 2013, 2014, 2017 and 2021", the Commission presents the applicant's incoming and outgoing flows for each of the years covered by this point, where for the years 2013, 2014, 2017 the Commission did not comply with the calculation formula provided by the Regulation and omitted from the calculation "the available cash balance of the applicant and his family from the previous calendar year" in cash. At the same time, in its explanations to the Commission, he presented an Excel table with the

calculation of balances in cash, receivables and bank accounts at the end of each year, including for the years covered by this point.

The Commission's explanation for the omission of liquidity from previous years from the complainant's financial flow analysis for the years 2013, 2014 and 2017 was that "[...] The candidate did not submit to the Commission any document confirming the cash balance claimed by him for 2012, amounting to 733,683 MDL"; "[...] The candidate did not submit to the Commission any document confirming the claimed cash balance for 2013, amounting to 481,010 MDL"; No document confirming the cash balance for 2016 amounting to 2,223,132 MDL was presented, but the candidate presented the following explanations: two deposit accounts of USD 70,000 (estimated 982,100 MDL) closed in 2015, donation from parents in 2015 in the amount of 23,000 USD (estimated 430,000 MDL) and 334,205 MDL (according to his calculations) = total of 1,796,775 MDL."

In the rounds of additional questions and clarifications, the Commission was provided with absolutely all declarations of income, assets and interests that had been requested from the applicant since 2007, all documents confirming his wife's income since 2005, as well as all confirmatory documents requested for income from other sources (except for a donation of money from the mother following the death of the father). In the same vein, by virtue of the exercise of the Commission's competence conferred by Art. 6 lit. d) of Law No. 26 of 10 March 2022, the Commission has access to any information systems containing data relevant to the fulfilment of its mandate, had sufficient resources to obtain income declarations for the years, which were not requested from the complainant. In the same context, the outgoing flows of the applicant and his family in the years concerned were also justified by truthful confirmatory documents, as well as by estimations based on the average consumption established by the National Bureau of Statistics. It is redundant to request confirmatory documents for the mathematical balance, which results from taking into account the income and expenses thus justified.

Similarly, in 2012, 2013, the applicant was not obliged to declare in the annual declaration of assets and personal interests the cash savings held at the end of the year. The obligation arose with the adoption of Law No. 133 of June 17, 2016, and in 2016 he did not hold a public office and, likewise, he was not obliged to declare his wealth and personal interests for 2016. At the same time, the eclectic omission by the Commission from the analysis of the annual cash flow for these transferred funds from previous years, in light of the explanations that the Commission does not have statements or confirmatory documents for these savings in cash from the complainant (since they were not even declared, failing legal obligation, as explained above) does not justify the Commission's breach of the formula laid down in the Regulation, since the omission of these transferred sources from previous years affects not only the liquidity available to the complainant for that year, but also the ability to accumulate a certain cash saving already in the next year. Therefore, the omission from the analysis of these transferable sources from year to year reverses the correctness of the figures with which the Commission operated in its analysis. The fact that the Commission considered that the balance calculated by the complainant at the end of each year should not be included in the calculation because no confirmatory documents were submitted does not serve as an argument for the correctness of the Commission's findings, but, on the contrary, confirms that the Commission's calculation is incomplete, and therefore does not correspond to reality, which serves as an additional argument as to the illegality of the statement of reasons

for the decision. Last but not least, he noted that this approach has been applied by the Commission in its analysis of financial flows also for years other than those referred to in point 1 of the Decision.

2. Use in the flow analysis of inflows and outflows of the net income of the applicant and his family members.

During rounds 2, 3, 4 supplementary questions, he presented a wide variety of explanations and arguments in favor of applying gross incomes in the analysis of the financial flow of income and expenses of his family, among which it was mentioned that the average expenses estimated based on the standards proposed by the National Bureau of Statistics seem not to include some expenses that We had (in one of the tables presented in round 3 of questions in support of this claim, possible additional expenses that the family could have incurred, including income taxes, mandatory contributions, etc.), which is why all the income indicated by the applicant in the analysis of the financial situation of the family over the years was by applying gross income.

Moreover, the Commission expressly notes (p. Motivation, p. 22) that "The candidate also insisted on using gross amounts instead of nets, which only artificially increases financial outgoing flows of wealth analysis (since taxes and other withholdings are not reflected as expenses)." This allegation serves as an argument that the Commission neglected the arguments and explanations raised in round 3 of questions by the complainant, where taxes and other deductions were presented in an unfolded table of possible expenses. At the same time, the complainant explained in the clarification rounds, but also at the hearing, that the Commission erroneously perceived the annual balance calculated in the table as cash held, because this balance contained a certain portion, which represented precisely those possible expenses, which could not be reflected in the calculation. This presentation, as mentioned, was amended after the hearing when the complainant submitted the amended Excel table in which additional expenses to the standard ones were included in the calculation.

The Commission insisted on applying net income, which helped to reflect artificial double taxation and reduce the annual balance, to which the Commission refers in the decision. At the same time, he noted that the Regulation on evaluation of candidates does not contain any clear provision regarding the use of net incomes in the calculation. This circumstance highlights the Commission's application of formulas by which they are not regulated, which serves as yet another argument as to the illegality of the statement of reasons for the decision.

3. The Commission's omission of the relevant arguments put forward by the complainant and the grounds for serious doubts arising from incomprehensible arguments.

The reasons for the decision follow the clear logic based on the fact that the Commission does not understand the explanations and arguments put forward by the complainant. The Commission shall note:

"[...] What was incomprehensible was the alleged difference claimed by the candidate between the balances of..." - p. 18 para. 2: "... Regarding the difference of 613 337 MDL, the candidate offered an incomprehensible explanation, namely, that this difference ..." - p. Article 20(3) '... Given the incomprehensible explanation of...' - p. 21 para. 3; "[...] When asked for clarification, the candidate offered an incomprehensible explanation..." - p. 22 para. 2.

The issue of a decision which is likely to seriously and irretrievably damage the applicant's professional reputation and his personal and professional relations cannot be motivated by the Commission's lack of understanding of the circumstances analysed.

In this context, in Round 3 of follow-up questions, the Commission requested explanations and confirmatory documents on the difference between the cash balance indicated by the applicant at the end of each year from 2017 to 2021 and the cash savings declared to the Commission.

In particular, referring to 2017, it was explained that the difference between the cash savings indicated in the 2017 declaration and the amount of cash savings declared in answers to the second round of questions to the Commission (difference of 613,337 MDL) is cumulative. It is logical to consider that if there is a cash balance, which is transferred from one year to the next, it represents part of the liquidity available to the complainant in the year in which it was transferred. At the same time, the balance transferred from the previous year also represents the total amount of liquidity that the applicant was able to accumulate by the end of the previous year, taking into account the balance transferred at the beginning of the previous year, and so on.

Also, in the context of the explanations given regarding the difference of 613,337 MDL for the end of 2017, it was explained to the Commission during the rounds of questions, but also in the public hearing, that The Excel table is only an estimate, because it does not contain exact details related to family expenses. Since part of the inflows and outflows were not indicated in the analysis of the incoming and outgoing flows, the de facto funds spent by the family on various routine necessities not indicated in the table remained as part of the calculation submitted by the applicant in the annual balance. In other words, de facto expenses incurred by the family were not deducted from the family's total liquidity. The complainant also submitted declarations for the period 2017-2021 where he indicated cash savings at the end of each year. Thus, the Commission found a discrepancy between the cash declared in the 2017 return and the balance resulting from the calculation explained in detail in this paragraph.

In this context, it was logical for the applicant to explain that the difference of 613,337 MDL is only part of the gradually accumulated balance history and transferred from year to year starting with the first year (2002) reflected in the Excel table. And since expenses not included in the calculation remained in the calculation as part of the annual balance, it was logical to conclude that the difference between the cash savings indicated in the 2017 declaration and the amount of cash savings declared in replies to the second round of questions to the Commission, is only the part of the balance made up of undeclared expenditure. Also in its explanations to the Commission, he argued that this difference (which represents undeclared expenditure) cannot be attributed only to 2017, as it is part of the balance gradually formed since 2002. Correspondingly, this represents the family expenses incurred from 2002 to 2017, for 15 years in the family (annually about 40,889 MDL)".

Following the public hearing, the complainant amended the Excel table, where he tried to illustrate how this difference, represented by the annual amount of 40,889 MDL, forms part of the annual balance for 15 years and how this influenced the annual balance of the family.

This explanation was considered by the Commission to be unexplainable, and in motivating its decision, the Commission neglected the last calculation presented



in the Excel table with the application of the annual amount of expenditure until 2017, thus continuing to refer to the previous analysis of the family's financial flow.

In connection with this discrepancy, he noted that the Commission, by neglecting the arguments put forward by the complainant, presents a contradictory interpretation of the information, motivating the conclusion, that the applicant violated the legal regime of declaration of assets, namely, in p. "Reasoning" of decision No. 31 of March 28, 2023 The Commission notes: "The difference for 2017 was 613,337 MDL. The funds for this amount were not identified in any of the active bank accounts that the candidate and his wife held at the end of 2017. At the same time, the candidate was obliged to declare all cash exceeding 15 average monthly salaries per economy, which has been done by him, but declared 1,571,650 MDL (\$85,000), while in his Excel table he indicated a cash savings balance of 2,184,987 MDL. If the difference of 613,337 MDL was not deposited in bank accounts, it must have been kept in cash. If so, declaring a smaller amount of cash than actually held would be a violation of the legal regime of declaring assets and personal interests. However, the candidate insisted in written communication and at public hearings that he had correctly declared all cash held."

It follows from the Commission's conclusion that this difference is to be classified as a cash-strapped economy which, in breach of the legal regime for declaring wealth, has not been declared. In the light of the arguments put forward in this regard, the Commission's interpretation is manifestly omissive and contradictory to the provisions of the Annex "Undeclared assets" to the Valuation Regulation, from which it follows that "Outgoing cash flows" are expenses plus other ways in which the declarant spends/invests their funds (liquidity), such as loans to third parties, savings at the end of the current period, etc. " and that "The outgoing cash flow of savings at the end of the period equals the incoming cash flow of savings at the beginning of the next period."

In other words, these two provisions describe how balances are transferred from one year to the next. And if part of the annual cash balance transferred from year to year represents an amount of undeclared expenses of the family, they were accumulated in the balance gradually, similarly to the other portion of the balance representing cash savings from the first year included in the table (2002).

The assessment of the excess to the de facto declared balance (of the difference of 613,337 MDL) as a violation of the legal regime for declaring assets and motivating the Commission's conclusion that the applicant's candidacy does not meet the ethical integrity criteria. Due to this circumstance it is liable to seriously and irremediably damage the applicant's professional reputation. In the grounds of its decision, the Commission did not explain the reasons which prevented the Commission from giving a proper interpretation of the explanations presented, and the invocation of the Commission's lack of understanding of the circumstances under consideration does not in any way substantiate the alleged infringement of the legal regime for declaring assets.

4. Erroneous reference to inconsistencies in documents and arguments provided to the Commission by the complainant.

In the decision, but also in the public hearing and in the questions asked in round 4 post-hearing, the Commission repeatedly finds that the cash balances presented in the Excel table submitted to the Commission during the evaluation were different: "What was incomprehensible was the alleged difference claimed by the

applicant between cash balances and cash savings to justify the use of amounts different for years 2017-2021, amounts that changed repeatedly during the evaluation process." - p. 18 of the decision, "Please explain why did you present different amounts on different occasions, according to the four columns above." Question 1 round 4, etc. The use of the different amounts in the table by the complainant was also invoked by the Commission during the public hearing. The complainant in his replies to the Commission in round 4 explained that these allegations are erroneous and that the Commission is misled by its own omissions. In round 3 of supplementary questions, the complainant indicated on page 6 that "There is an error in the table submitted by the Commission ", but the Commission continued to allege divergences in the information submitted by the complainant. In round 4, the Excel table attached to each round was presented, where it is clear that it contains identical information in all rounds leading up to the hearing, and it was changed after the hearing to illustrate the explanations he supported during the hearing and which the Commission stated it did not understand, namely, what it meant by the fact, that 'the annual balance shall contain a portion representing undeclared expenditure'.

Moreover, in round 3 of follow-up questions, the Commission's omission was explained and clarified by the complainant (page 6 of the questionnaire) and the Commission seemed to have accepted this clarification, since after this round it continued to refer to some correct amounts arising from the use of the correct balances indicated in the table by the complainant, But, despite this, it continued to invoke divergences on various information indicated by the applicant in the table , which does not correspond to reality and which raises reasonable suspicions from the applicant as to the unbiased nature of the contested decision. Thus, the Commission's insistence on the applicant's repeated change of amounts is erroneous and, in fact, serves as an additional argument in support of the present challenge to the legality of the decision, since the analysis of the information was carried out with an admission of omissions and mistakes from the Commission, which makes it necessary to reassess the application in order to elucidate possible evaluation errors, as the argument put forward by the Commission in motivating its final conclusion: "The candidate's financial data, constantly changing during the evaluation process, prevented the Commission from fulfilling its obligation to verify the candidate's income" is irrelevant, in the light of the Commission's own errors in analysing the data obtained. At the same time, he reiterated that the competences assigned to the Commission by law provided it with all possible information resources to make its own assessment, which would have excluded obstacles arising from the frequent change of information presented by candidates.

5. Fair treatment in assessing the seriousness of doubts, the wealth acquired by the applicant in the last 15 years does not correspond to the declared income.

Leaving aside all the extensive and detailed analysis that was undertaken by the Commission during the evaluation of its application, the Commission could have made a simple calculation: from (sum of all declared revenues for the years presented in the calculation – 6,819,434 MDL) to be deducted (sum of all current expenses for all years presented in the calculation – 3,120 535.77 MDL), also to be deducted (sum of all outflows in the form of savings kept in bank accounts and receivables or loans granted – 3,394,096 MDL). The result obtained represents the cash saving at the end of the last calculated year (2021), which, according to the calculation, is equal to 304,801.87 MDL, which is 185,798.13 MDL less than the amount declared to the

Commission in the 5.-year declarations (490,600 MDL). This calculation overturns the Commission's final conclusion, which invokes differences of more than about 500,000 MDL.

This aspect is notorious, because the Commission did not consider as an element of serious doubts regarding financial and/or economic integrity the fact that in case of one of the candidates who passed the evaluation, one of the friends "contributed with financial aid" to the purchase of the car in the amount of 9,000 euros (about 180,000 MDL). The reason that would have determined a person who is not defined as "close person" in the spirit of Law No. 133/2016 to donate such a considerable amount of money seems very dubious, even if he has high incomes (I refer to decision No. 26 of March 13, 2023).

However, the Commission considered this circumstance not to be of doubt, and the explanations presented by me in round 4 of post-hearing clarifications were interpreted as: 'the candidate has provided absolutely new information with regard to his sources of income, namely, the financial support his family has received over the years from the candidate's parents who, according to him, have sufficient funds to provide this support.' P. 22.

This serves as a further argument in favour of the reasoning that the Commission, unlike its attitude towards and assessment of another candidate's arguments, neglected, during its assessment, the information and statements made by the complainant to the effect that the applicant has benefited from the support of his parents over the years. Among the applicant's statements can be mentioned: "this amount representing a part of the family income (to which my salaries, savings and accumulations in the family budget from other years, regular support provided by parents are accumulated)." - Round 1, p. 3, 4; "As well as the income obtained from different sources by my family: salaries, donations of money from parents in 2015 (following the death of my father, I received a donation of money - round 2, p. 10; "Monetary help from parents obtained in the first years of marriage" - round 2, p. 6; "I personally consider that the permanent income initially from salaries, awards, then also from salaries and monthly life allowances, obtained during 58 years of work, of which 38 years of The judge, as well as the savings of his parents and in-laws, passed on to my father, demonstrate his financial ability to accumulate sufficient cash savings to pass on to both his only child and surviving wife, especially considering that during his life my parents had at the same moment only one dwelling space (initially an apartment, then a house) and a second hand car that is, they did not incur major expenses that would have diminished their cash savings. " - round 3 pp. 9- 10.

In view of the above, it is a *sine qua non* to the following conclusion: either the above statements were not obvious to the Commission and the explanations given in round 4 were qualified by the Commission as "absolutely new information on his sources of income" – page 22 of the decision, or society as a whole witnesses unfair treatment of candidates, where, contrary to the expectations of a vertical and impartial evaluation, certain interests are camouflaged in the shadows of the trial, which the justice system cannot get rid of for decades.

Consequently, he observes that the contested decision does not contain circumstances denoting the applicant's violation of the legal regime of declaration of assets and personal interests, as well as of the imbalance of assets.

Thus, the statement of reasons for the contested decision, in the present case, cannot be limited to the mere invocation of legal provisions, but must contain precisely the legal elements in fact enabling the addressee to know and assess the

grounds for the decision and, on the other hand, to enable the review of legality to be carried out.

Non-compliance by the issuing authority with the mandatory condition of full motivation of the individual administrative act conditions its illegality, as a consequence imposing the need to annul it.

Additionally, he pointed out that the lack of indication in the unfavorable administrative act of the reasons underlying its issuance represents, from the perspective of ECHR jurisprudence, an arbitrary exercise of public power (see *hot. ECHR Lupşa v. Romania*; Application No. 10.337/04, §§ 31 - 34).

Similarly, contrary to the principle of 'good governance', the defendant, by failing to give reasons for the administrative act, failed to act appropriately and with the utmost consistency (see *Hot. ECHR of 08.07.2008, Megadat.com SRL v. Republic of Moldova*, No. 21151/04, § 72; *Beyeler v. Italy [GC]*, No. 33202/96, § 120, ECHR 2000-1).

According to the unitary case-law of the ECtHR, the dismissal or non-promotion from administrative office of a person constitutes an interference in the exercise by him of the right to respect for private life, under art. 8 of the Convention, namely from the perspective that private life includes the right of an individual to create and develop relationships with others, including relationships of a professional or business nature." (see *Volkov v. Ukraine*, No. 21722/11, p. 165-167, January 9, 2013).

In addition to the decision not to pass the competition, the Evaluation Commission concluded that "the Commission decided that the candidate did not meet the integrity criteria, as serious doubts have been found regarding the candidate's compliance with the criteria of ethical and financial integrity".

This conclusion is liable to seriously and irreparably damage the applicant's professional reputation as well as his personal and professional relationships. At the same time, the conclusion contained in the contested decision is capable of leading to the loss of the applicant's possibility of aspiring to eligible public offices in the future. This perspective renders the defendant's decision illegal and contrary to the normative provisions governing the case, exceeding the powers granted to the defendant by law and constituting an interference that does not meet the requirement of legality, legitimate aim and fails the proportionality test.

On April 11, 2023, the Independent Commission for Assessing the Integrity of Candidates for the Position of Member of Self-Administration Bodies of Judges and Prosecutors submitted a reference, requesting the rejection of Alexandru Rotari's appeal request.

In substantiating its reference, the defendant argued that Commission Decision No. 31 of March 28, 2023, is legal and does not violate the legal rights and interests of Alexandru Rotari.

It noted that the Commission had diligently and in good faith executed all obligations under Law No. 26 of 10 March 2022. When the Commission found uncertainties, it gave the complainant the opportunity to resolve them by submitting additional data and information, allowing sufficient time. Furthermore, where the complainant provided additional documents outside the deadline requested by the Commission, they were taken into account by the Commission, the complainant being fully assured the right to dispel any potential suspicions as to his integrity.

The burden of proof shifts to the candidate during the assessment process. In the initial phase, it is the Commission's obligation to gather data and information,

making use of its legal powers and in compliance with legal obligations. Once and with the aim of clarifying uncertainties, the Commission shall give the applicant the opportunity to submit additional data and information. The submission of additional data and information is a right of the candidate, but failure to exercise this right risks leading the Commission to conclude that there are serious doubts that the candidate does not meet the integrity criteria. Respectively, it is in the candidate's interest to take over the burden of proof, and this legislative transfer not only doesn't violate, but effectively protects the candidate's rights.

The integrity assessment process, but also the decision, does not affect the professional status of the candidate, as the object of the Commission's mandate is expressly established by art. 3 para. (1) of Law No. 26 of 10 March 2022. Respectively, the commission does not replace or take over the functions of any public body in the Republic of Moldova.

In the present case, the Commission strictly complied with the purpose of its mandate by stating in the operative part of the Decision that the candidate did not meet the integrity criteria, since... Serious doubts have been found as to whether the candidate complies with the criteria of ethical and financial integrity and therefore does not pass the evaluation. The decision shall be taken in strict accordance with the provisions of Article 13 para. (5) of Law No. 26 of 10 March 2022.

It considers that the applicant's findings in the action, in which he found that "the contested decision contains the assessment ... his professional probity (candidate) ... on the other hand, the Commission's conclusion is a camouflaged form of sanction". In fact, the decision reflects nothing more than the findings of the Commission which, pursuant to the provisions of Art. 13 para. (5) of Law No. 26 of March 10, 2022, is entitled to find serious doubts regarding the candidate's compliance with the requirements set out in art. 8.

The scope of the Commission's mandate is also expressly established by law, i.e. the verification of the ethical integrity and financial integrity of candidates, in relation to ethical and financial integrity criteria.

The law itself determines when (in what situation) the candidate fails the integrity test, as follows.

Respectively, the law imposes a rigorous test, with two elements, the finding of the Commission on the existence of serious doubts regarding the candidate's compliance with the ethical and financial integrity criteria and the candidate's possibility to dismantle these doubts.

In the present case, the Commission fully applied that legal construct, giving the applicant the opportunity to dispel any doubts by means of additional data and information. In each of its appeals to the complainant dated 11 February 2023, 21 February 2023, 03 March 2023, 21 March 2023, the Commission referred to the legal basis and gave the complainant the opportunity to submit additional documents.

It considers that nothing prevents the applicant from continuing his professional career and his activity.

The applicant's arguments in the action that the decision is likely to seriously and irreparably damage the applicant's professional reputation and his personal and professional relationships, or that the conclusion contained in the contested decision is such as to result in the applicant losing the possibility of aspiring to eligible public office in the future are declaratory, as the legal provisions set out above indicate that the Commission's conclusions cannot be regarded as evidence for any proceedings

or trials.

The candidate may refuse to publish the decision of the Commission relating to him pursuant to Article 1. 13 para. (7) of Law No. 26 of 10 March 2022. In the present case, the complainant exercised that right by informing the Commission of his refusal to publish the decision.

In the informative note to the draft Law No. 26 of 10 March 2022 it is indicated that the result of the integrity assessment of candidates for the positions of members of the SCM, SCP and their specialized bodies will have no effect on their career as judges or prosecutors. The evaluation proposed through this project is made only in relation to the position for which the candidate is applying and does not aim to assess the professional skills of the candidates. In context, art. 71 para. (4) of Law No. 100/2017 on normative acts, provides that the interpretation of the normative act shall take into account the informative note that accompanied the draft normative act.

Thus, the assessment of the applicant's integrity, carried out in accordance with the provisions of Law No. 26 of March 10, 2022 and culminating in the decision, did not violate his legal rights and interests, and contrary to the opinion of the applicant in the action, cannot result in the applicant losing the possibility of aspiring to public office in the future...".

The Commission's conclusion is in accordance with and in the spirit of Law No. 26 of 10 March 2022.

Thus, after assessing the ethical and financial integrity of the candidate on the basis of data and information received from the candidate and third parties, the Commission finds whether or not there are serious doubts regarding the candidate's compliance with the legal integrity criteria.

Law No. 26 of 10 March 2022 expressly and explicitly establishes the Commission's margin of discretion when making its findings, thus the solution offered by the Commission, through the decision establishing whether or not to pass the evaluation, represents an assessment, in its intimate conviction, of whether or not there are serious doubts regarding the candidate's compliance with the criteria of financial and ethical integrity.

The Commission does not establish the existence or non-compliance of the candidate with the integrity criteria, only the existence or absence of serious doubts as to compliance, or certain factual circumstances may be sufficient to establish that there are serious doubts about compliance, but at the same time may be insufficient to establish non-compliance.

This conclusion is confirmed by the provisions of Art. 13 para. (6) of Law No. 26 of 10 March 2022 and by Joint Opinion of the Venice Commission and DGI of the Council of Europe (Opinion No 1069/2021 of 13 December 2021, paragraph 14): integrity checks targeting candidates for SCM, SPC and their specialised bodies are a filtering process and not a judicial verification process and, as such, can be considered, if properly implemented, as balancing the benefits of the measure, in terms of contributing to the confidence of justice and its possible negative effects.

At the same time, according to the Venice Commission's opinion on the concept of vetting of judges and prosecutors, Kosovo (Opinion No. 1064/2021 of 20 June 2022):

'In a system of prior integrity checks, the decision not to recruit a candidate may be justified in case of mere doubt on the basis of a risk assessment. However, the decision to negatively assess a current post holder should be linked to an indication

of a violation of the law, for example unexplained wealth, even though it cannot be proven beyond a reasonable doubt that this wealth comes from illegal sources.

Thus, the Commission does not act as a court or other similar body, and its actions are not a judicial or other verification aimed at ascertain with certainty a fact (existence or lack of compliance with integrity criteria).

The Commission does not find non-compliance with the integrity criteria provided by Article 8 of Law No. 26 of March 10, 2022, but only checks whether or not there are serious doubts regarding the integrity (financial and ethical) of the candidate, which means that the Commission is not obliged to demonstrate circumstances demonstrating violation of the legal regime of the declaration of assets and personal interests.

The decision is a finding of serious doubts about the complainant's compliance with ethical and financial integrity criteria. However, the decision does not represent, and does not pretend to represent, a finding of non-compliance with these criteria.

It also indicated that the appropriateness of the decision could not be subject to judicial review. The Commission's conclusion, expressed in the Decision, that there are serious doubts as to whether the applicant complies with the criteria of ethical and financial integrity is a matter of the opportunity of the decision. The assessment of opportunity as a legal effect falls solely within the competence of the public administration, and the court is not competent to rule on the opportunity of an administrative act. The assessment of the opportunity of administrative acts is not the competence of the judiciary, which can examine the administrative act only from the point of view of its legality, including for its compliance with the purpose of the law. Because the opportunity of the administrative act derives from the capacity of the body issuing the act to choose, from several possible and equal solutions, the same extent as that which corresponds best to the public interest to be satisfied. If legality refers to the law, then opportunity seeks compliance with the spirit of the law.

When making a decision, the Commission must comply with the requirements of the law and within the limits set by law. However, these limits do not imply a rigid constraint, a total lack of freedom of movement, in the sense of not having the independence to assess concretely a given situation or not having initiative. The law cannot be applied mechanically, nor can it foresee in its contents all situations that may arise in the life of society and citizens.

In the present case, the Commission acted and assessed on the basis of the conformity criteria established by Law No. 26 of 10 March 2022, in relation to the factual circumstances resulting from the data and information collected (including with the concurrence of the complainant), whether or not there are serious doubts about the complainant's compliance with ethical and financial integrity criteria. The decision issued in this regard represents the realization of this discretionary power that cannot be subject to judicial review.

The court is bound to exercise review of the legality of the decision and is not entitled to carry out the opportunity review.

It considers that the applicant's references to the provisions of Art. 21, 29, 44 or Art. 93 of the Administrative Code.

By decision No. 5 of 14 February 2023, the Constitutional Court established a double test to be met for the candidate's action against a decision issued by the Commission to be admitted, namely: there must be serious procedural errors admitted by the Evaluation Commission and, at the same time, there must be

circumstances that could lead to the candidate passing the evaluation.

According to the decision, the Commission found that there were serious doubts as to whether the complainant complied with the requirements of Art. 8 of Law No. 26 of 10 March 2022 in relation to wealth imbalance for the years 2013, 2014, 2017 and 2021.

At the court hearing, the applicant Alexandru Rotari supported the application for summons, requesting the annulment of the decision of the Independent Commission for assessing the Integrity of Candidates for the Position of Member of the Self-Administration Bodies of Judges and Prosecutors No. 31 of March 28, 2023, on the candidacy of Alexandru Rotari, candidate for the position of member of the Superior Council of Magistracy, ordering the resumption by the Independent Commission for assessing the Integrity of Candidates for the Position of Member of the Self-Administration Bodies of Judges and Prosecutors of the Evaluation Procedure of the Candidate for the Position of Member of the Superior Council of Magistracy, Alexandru Rotari.

The representatives of the Independent Commission for assessing the Integrity of Candidates for the Position of Member of the Self-Administration Bodies of Judges and Prosecutors, lawyers Valeriu Cernei and Roger Gladei, at the court hearing supported the arguments invoked in the reference, requesting the dismissal of the action as unfounded.

### **The Determination of the Court**

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

#### **Time limit for consideration of the action.**

In accordance with Art. 14 para. (7) of Law No. 26 of 10 March 2022 on certain measures related to the selection of candidates for the position of member of the self-administration bodies of judges and prosecutors, by derogation from the provisions of art. 195 of the Administrative Code No. 116/2018, the request to challenge the decision of the Evaluation Commission is examined within 10 days.

The special panel reveals that failure to comply with the 10-day deadline established by art. 14 para. (7) of Law No. 26 of March 10, 2022 is due to circumstances that did not depend on the will of the court and cannot be imputed to it.

The materials of the file show that the Supreme Court of Justice registered the application for summons filed by Alexandru Rotari against the Independent Commission for assessing the Integrity of Candidates for the position of member of the self-administration bodies of judges and prosecutors, with regard to the annulment of the decision and ordering the resumption of the candidate's evaluation procedure on April 3, 2023.

According to the file allocation sheet dated April 04, 2023, the nominated case



was randomly assigned, through the Integrated Case Management Program, to Judge-Rapporteur Ion Guzun.

By the order of April 6, 2023 of the Supreme Court of Justice, the request for summons filed by Alexandru Rotari against the Independent Commission for assessing the Integrity of Candidates for the Position of Member in the self-administration bodies of judges and prosecutors, regarding the annulment of the decision and the order to resume the evaluation procedure of the candidate was received for consideration, the court hearing being set for April 14, 2023, at 09:30.

The special panel notes that on April 6, 2023, Law No. 64 of 30 March 2023 on the Supreme Court of Justice, as well as Law No. 65 of 30 March 2023 on the external evaluation of judges and candidates for the position of judge of the Supreme Court of Justice entered 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, among other things, the power to determine, annually, the composition of the panels of judges.

The panel, noting the legal provisions cited above and the fact that, between March and April 2023, most magistrates from the Supreme Court of Justice resigned, attests to the impossibility of forming panels of judges by the Plenum of the Supreme Court of Justice, which is currently not deliberative.

On April 11, 2023, the Independent Commission for Assessing the Integrity of Candidates for Members of Self-Administration Bodies of Judges and Prosecutors filed a request for the recusal of Judge Mariana Pitic.

On April 14, 2023, the court hearing was not held due to the impossibility of setting up a special panel of judges to examine the request for recusal of judge Mariana Pitic, from examining the appeals filed against decisions of the Independent Commission for assessing the integrity of Candidates for Membership in Self-Administration Bodies of Judges and Prosecutors.

In accordance with Art. 21 para. (8) of the Law on external evaluation of judges and candidates for the position of judge of the Supreme Court of Justice No. 65 of 30 March 2023, if the proper functioning of the Supreme Court of Justice is seriously affected due to the number of vacancies, the Superior Council of Magistracy may temporarily transfer, by way of derogation from the provisions of Law No. 544/1995 on the status of judges, judges from lower-level courts who meet the criteria of legal occupation of office of judge of the Supreme Court of Justice.

By decision of the Superior Council of Magistracy No. 142/8 of 02 May 2023, it was decided to temporarily transfer, for a period of 6 months, starting with 10 May 2023, to the position of judge of the Supreme Court of Justice, the following judges: Aliona Donos, Sergiu Daguta, Ion Malanciuc, Viorica Puica, Oxana Parfeni, Boris Talpa, Ghenadie Eremciuc.

According to the order of the Acting President of the Supreme Court of Justice No. 69 of 04 May 2023, judge Ion Malanciuc was appointed as an alternate member of the special panel of judges for examining appeals against the decisions of the Independent Commission for assessing the integrity of candidates for the position of member of the self-administration bodies of judges and prosecutors. (f.d. 259-260, vol. II).

On May 15, 2023, through the Integrated Management Program, the request for recusal of judge Mariana Pitic was randomly assigned to reporting judge Ion Guzun.

By the order of 25 May 2023 of the Special Panel of Judges, established within the Supreme Court of Justice, to examine appeals against the decisions of the Independent Commission for assessing the Integrity of Candidates for the Position of Member of the Self-Administration Bodies of Judges and Prosecutors, was rejected as unfounded the request submitted by the Independent Commission for assessing the Integrity of Candidates for the Position of Member of the Self-Administration Bodies of Judges and Prosecutors regarding the recusal of the Supreme Court of Justice judge, Mariana Pitic, in the administrative case, to the request for summons filed by Alexandru Rotari against the Independent Commission for assessing the integrity of candidates for membership in self-administration bodies of judges and prosecutors, with regard to annulment of the decision and ordering the resumption of the candidate's evaluation procedure.

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 para. (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 para.

(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 para. (2) and 69 para. (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 of 10 March 2022. Pursuant to Article 189 para. (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.

Thus, the Special Panel notes that the decision of the Commission is an individual administrative act within the meaning of Article 10 para. (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 of 10 March 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 of 10 March 2022.

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

Although the Administrative Code establishes uniform administrative and administrative litigation proceedings, its Article 2 para. (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 of 10 March 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 para. (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 para. (6) of Law No 26 of 10 March 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 para. (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 para. (4) of the Administrative Code, the validity, binding force and *res judicata* of the Commission decision under Articles 139 para. (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 para. (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 para. (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 para. (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 of 10 March 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 para. (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 para. (2) of the Administrative Code and for the purposes of Law No 26 of 10 March 2022.

According to Article 10 para. (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 para. (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 of 10 March 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 para. (3)(a)-(c) of the Administrative Code.

According to Article 10 para. (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 of 10 March 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 para. (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 para. (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 of 10 March 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 vs. the Pre-Vetting Commission* and *Clevadi vs. 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.

### **Application admissibility.**

According to Article 207 para. (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 para. (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 para. (1)(a) of the Administrative Code, individual administrative acts can be unfavorable acts – acts which impose obligations, sanctions, and burdens on their addressees or affect the legitimate rights/interests of persons or which refuse, in whole or in part, to grant the requested benefit.

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

The special panel notes that, by the action filed, the applicant Alexandru Rotari claims the violation of a right through administrative activity, according to art. 189 para. (1) of the Administrative Code, namely that by decision No. 31 of March 28, 2023, the Evaluation Commission violated his right to be elected as a member of the Superior Council of Magistracy, the fundamental right to administration (Article 39 of the Constitution of the Republic of Moldova), the right to a favorable evaluation decision of candidate Alexandru Rotari.

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

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

In this context, note that the decision of the Independent Evaluation Commission for assessing the integrity of the candidates for the position of member in the self-governing bodies of judges and prosecutors No. 31 of 28 March 2023 was received by the Alexandru Rotari on 30 March 2023, which is confirmed by an abstract from the e-mail, attached to case materials (case file page 1436).

The Special Panel concludes that the appeal application filed by Alexandru Rotari is admissible because the plaintiff complied with Article 14 para. (1) of Law No 26 of 10 March 2022, being filed to the Supreme Court of Justice on 3 April 2023, within the time frame laid down in the law.

With respect to the type of application for administrative litigation, the Special Panel holds the filed application as an action for injunction of a specific nature. By means of a regular action for injunction, the plaintiff, according to Articles 206 para. (1)(b) and 224 para. (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 para. (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 para. (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 para. (1) of the Administrative Code.

Thus, neither the Administrative Code nor Article 14 para. (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 para. (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 of 10 March 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 para. (2) of the Administrative Code.

#### **With respect to the substance of the case**

According to Article 6 para. (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 para. (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 para. (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 para. (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 para. (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 para. (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 para. (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 Alexandru Rotari 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 para. (1) of the Administrative Code, the individual administrative act shall be null and, consequently, it shall not produce legal effects since the moment of issuance. On the other hand, in case of serious errors, the individual administrative act is unfounded and produces legal effects until its final annulment. So, when an issue of procedural legality is invoked, it has to be analyzed through the lens of both particularly serious error and serious error.

The Commission's decision is unfounded and the plaintiff would have the right to a favorable decision, because the appealed decision is vitiated, especially from the perspective of proportionality, misinterpretation of undefined legal notions and fair treatment. The Commission is bound to follow proportionality and fair treatment when issuing decisions on the evaluation of candidates for Superior Council of Magistracy membership. Denying this would put under question not just the rule of law, but the purpose for which Law No 26 of 10 March 2022 was passed. The serious doubts of the Commission have to be analyzed/evaluated both in terms of proportionality and fair treatment.

The special court panel notes that, on April 3, 2023, Alexandru Rotari filed an application to challenge the decision of the Independent Commission for assessing the integrity of Candidates for the position of Member of the Self-Administration Bodies of Judges and Prosecutors No. 31 of March 28, 2023, regarding the candidacy of Alexandru Rotari, requesting its annulment and ordering the resumption of the candidate's evaluation procedure.

It is noted that, by Decision No. 31 of March 28, 2023, on the candidacy of Alexandru Rotari, candidate for the position of member of the Superior Council of Magistracy, based on art. 8 para. (1), para. (2) (a) c), para. (4) letter b), para. (5) (b), d) and Art. 13 para. (5) of Law No. 26 of March 10, 2022, on some measures related

to the selection of candidates for the position of member of the self-administration bodies of judges and prosecutors, the Independent Commission for assessing the integrity of Candidates for the Position of Member of the Self-Administration Bodies of Judges and Prosecutors decided that the candidate does not meet the integrity criteria, because serious doubts have been found about the candidate's compliance with ethical and financial integrity criteria and thus he does not promote evaluation.

According to Chapter III "Evaluation of the candidate" of Decision No. 31 of March 28, 2023, the Evaluation Commission indicated that Alexandru Rotari, candidate for the position of member of the Superior Council of Magistracy, does not meet the integrity criteria, taking into account the existence of serious doubts regarding the existence of negative difference between revenue and expenditure:

- for 2013 in the amount of – 281,439 MDL;
- for 2014 in the amount of – 207,388 MDL;
- for 2017 in the amount of - 1,689,962 MDL;
- for 2021 in the amount of - 529,732 MDL.

Having analyzed the conclusions of the Evaluation Commission on these circumstances in relation to the evaluation criteria, the Special Court concludes that the appeal filed by Alexandru Rotari is well founded.

Effective judicial review involves verification of all aspects of procedural and substantial legality, in particular, equal treatment, proportionality, legal certainty, reasoning, correctness of ex officio factual investigation, impartiality, misinterpretation of undefined legal concepts and others. Only in this way can the standard of effective protection enshrined in Art. 53 of the Constitution be achieved.

The special panel notes that, during the administrative activity prior to the issuance of the administrative act challenged by the present application, the applicant Alexandru Rotari fully and unreservedly ensured the execution of the requirements for the submission of the defendant's documents and requests, within the deadline, without any objections from the Evaluation Commission to the completeness of information presented, which could be removed by the applicant.

In the course of the prior verification, the Evaluation Commission did not object or specify which documents or information had not been submitted by the complainant, limiting itself to the wording of the administrative act challenged – '... After reviewing the assessment materials, the candidate submitted several documents, which were requested from different institutions, in order to resolve certain inconsistencies".

The special panel concludes that, from the applicant's arguments, presented in front of the court, it is established that there are circumstances which could lead to the promotion of his evaluation in front of the Commission and which would justify the resumption of the candidate's evaluation procedure.

In accordance with Art. 8 para. (1) of the Law on certain measures related to the selection of candidates for membership in the self-administration bodies of judges and prosecutors No. 26 of 10 March 2022, for the purposes of this Law, the assessment of the integrity of candidates consists of verifying their ethical integrity and financial integrity.

### **On ethical and financial integrity.**

According to art. 8 para. (2) of the Law on certain measures related to the selection of candidates for membership in the self-administration bodies of judges

and prosecutors No. 26 of 10 March 2022, a candidate shall be deemed to fulfil the ethical integrity criterion if:

a) has not seriously infringed the rules of ethics and professional conduct of judges, prosecutors or, where appropriate, other professions, nor admitted in his work any reprehensible actions or omissions which would be inexplicable from the point of view of a legal professional and an impartial observer;

b) There are no reasonable suspicions of committing acts of corruption, acts related to acts of corruption or corruptible acts under the Integrity Law No. 82/2017;

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

In accordance with the provisions of Art. 8 para. (4), (5) of the Law on certain measures related to the selection of candidates for membership in the self-administration bodies of judges and prosecutors No. 26 of 10 March 2022, a candidate shall be deemed to fulfil the financial integrity criterion if:

a) the candidate's wealth was declared in the manner established by legislation;

b) The evaluation Commission finds that the wealth acquired by the candidate in the last 15 years corresponds to the declared income.

In order to assess the financial integrity of the candidate, the Evaluation Commission checks:

a) compliance by the candidate with the tax regime in the part related to the payment of taxes on the use of funds and incomes resulting from the property owned, as well as taxable incomes, and in the part related to the payment of import duties and export duties;

b) compliance by the candidate with the legal regime of declaring assets and personal interests;

c) the manner of acquiring the property owned or possessed by the candidate or persons specified in art. 2 para. (2) as well as expenditure relating to the maintenance of such property;

d) sources of income of the candidate and, where appropriate, of the persons specified in art. 2 para. (2);

e) whether or not there are loan, credit, leasing, insurance or other contracts that can provide financial benefits, in which the candidate, the person specified in art. 2 para. (2) or the legal person in which they are beneficial owners is a contracting party;

f) Whether or not there are donations in which the candidate or person specified in art. 2 para. (2) has donor or donee status;

g) other issues relevant to clarifying the origin of the candidate's wealth and justifying it.

In the case, the Evaluation Commission found serious doubts regarding Alexandru Rotari's compliance with ethical and financial integrity criteria, namely, regarding the violation of the legal regime of wealth declaration, a negative difference between income and expenditure for the years 2013, 2014, 2017 and 2021.

Further, in accordance with Art. 2 para. (2) of the Law on certain measures related to the selection of candidates for the position of member of the self-administration bodies of judges and prosecutors No. 26 of 10 March 2022, in the context of the evaluation of the candidates referred to in para. (1) The assets of persons close to the candidates, as defined in Law No. 133/2016 on the 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.

According to art. 2 of Law No. 133 of June 17, 2016, close person is the spouse, child, cohabitee/concubine of the subject of declaration, the dependant of the subject of declaration, also the person related by blood or adoption to the subject of declaration (parent, brother/sister, grandfather/grandmother, nephew/niece, uncle/aunt) and the person related by affinity with the subject of declaration (brother-in-law/sister-in-law, father-in-law/mother-in-law, son-in-law/daughter-in-law).

And, according to art. 33 para. (4) and (5) of Law No. According to Law No. 132 of 17 June 2016 on the National Integrity Authority, the control of wealth and personal interests extends to family members, parents/in-laws and adult children of the person subject to control. If the person subject to control is in cohabitation with another person, the verification will also extend to the property of this person.

If there is an appearance that the property of the inspected person has been entered in the names of other persons, control shall extend to such property and persons. If the subject of the declaration has indicated income and goods obtained from donations or holds goods in the commodatum, control shall extend to the bailor and bailee. They may be asked for clarification on the origin of income used for the acquisition and maintenance of such goods. In order to clarify these issues, the integrity inspector may request relevant information from any natural or legal person.

Pursuant to Art. 4 para. (1) of Law No. 133 of 17 June 2016 on the declaration of assets and personal interests, in force according to the editorial office on the date of adoption, the subjects referred to in art. 3 para. (1) declare: a) income obtained by the subject of declaration together with family members, cohabitee in the previous tax year.

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

Relevant to the case are the provisions of art. 4 of the Law on declaration and control of income and property of persons with positions of public dignity, judges, prosecutors, civil servants and some persons with leading positions No. 1264 of 19 July 2002 (in force until 1 August 2016), the persons referred to in Article 3 declare:

- a) income earned together with family members during the declaration period;
- b) movable and immovable property of all types, owned, with the right of usufruct, use, habitation, superficies or in the possession of the declarant or his family members based on mandate contracts, commission, fiduciary administration, as well as translative possession and use agreements (lease, leasing, bailment) at the date of submission of the income and property declaration;
- c) goods made through persons interposed or transmitted for consideration to ascendants, descendants, brothers, sisters and affinities of the same degree, as well as those transmitted free of charge to any person;
- d) financial assets, i.e. bank accounts, investment funds, equivalent forms of saving and investing, investments, bonds, cheques, bills of exchange, loan certificates, other documents incorporating property rights of the declarant or members of his family, direct investments in national or foreign currency made by him or his family members, as well as other financial assets;
- e) the share in the share capital of the companies of the declarant and his family members;
- f) debts in the form of debts (including unpaid fees), mortgages, guarantees

issued for the benefit of third parties, loans and credits.

The Evaluation Commission, based on all the information submitted by the candidate and data obtained from various institutions, made its own assessment calculated in accordance with the "Annex: Unjustified wealth" to the Valuation Regulation, which defines the method for calculating undeclared wealth (Art. 6 para. (2)) and found that there is a negative difference between revenues and expenses amounting to -281,439 MDL for 2013 - 207,388 MDL for 2014 - 1,689,962 MDL for 2017 and – 529,732 MDL for 2021.

At this point, the applicant Alexandru Rotari explained that there was no difference between his income and expenses for the years 2013, 2014, 2017 and 2021, being presented an Excel table with calculations of his family's income and expenses for the period 2002-2021. The candidate also contested some amounts mentioned in the Commission's questions concerning his salary and his wife's income, in particular as regards the use of net versus gross amounts, arguing that gross amounts should be taken into account.

In order to clarify this information, the candidate answered the questions given, as well as attached to the file materials all the information he had.

The candidate invoked, in support of the lack of difference between revenues and expenses, the significant amounts of savings accumulated from year to year, and in particular, the amount of 733,683 MDL held at the end of 2012 , the amount of 481,010 MDL held at the end of 2014, the amount of 2,223,132 MDL held at the end of 2016.

In the circumstances, the Special Panel finds that the applicant's replies and position on this subject did not reveal his intention to dodge to declare all income from savings held in cash for the years indicated in the declarations, and the Commission did not give reasons for rejecting the applicant's calculation.

The conclusion of the Evaluation Commission that, having serious doubts regarding the difference between the candidate's income and expenses for the years 2013, 2014, 2017 and 2021, the Special Panel considers it unjustified.

On the one hand, the Evaluation Commission in its decision not to promote the candidate, Alexandru Rotari, found serious doubts regarding the given circumstances, and on the other hand, it supports the lack of bank accounts where the candidate's savings would have been kept.

According to an *amicus curiae* opinion of the Venice Commission, the concept of integrity assessment involves the implementation of a process of mechanisms aimed at guaranteeing the highest standards of conduct and financial integrity required for accession to public office. In a system of prior integrity check, the decision not to recruit a candidate may be justified in case of simple doubt on the basis of a risk assessment. However, a decision not to pass a candidate's assessment must be linked to an indication of illegality, such as unexplained wealth, even though it cannot be proven beyond doubt that this wealth comes from illegal sources (see CDL-AD(2022)011, §§ 9-10).

Moreover, Art. 6 para. (2) of the Evaluation Regulation of the Independent Commission for assessing the Integrity of Candidates for the Position of Member of the Self-Administration Bodies of Judges and Prosecutors, provides that the Annex defines the method of calculating undeclared assets, provisions which were not respected by the Evaluation Commission in the case.

Subsequently, the Special panel considers that the applicant's argument that the time allowed by the Commission for submitting information was insufficient and

limited is well founded, so it is not possible to accumulate evidence in order to completely disprove the doubts of the Evaluation Commission.

In particular, the panel held that the Commission failed to exercise its positive obligation to clarify the factual and legal circumstances, as provided for in Art. 22 of Administrative Code.

Therefore, the Evaluation Commission did not fully exercise its power to investigate the facts *ex officio*, which is expressly provided for by Art. 6 lit. f) of Law No. 26 of 10 March 2022, which provides that in the exercise of its functions, the Evaluation Commission requests information from natural and legal persons of public or private law, as well as accumulates any information relevant to the implementation of its mandate. The legislator provided the Evaluation Commission with a wide range of tools and levers to collect all the necessary information.

Therefore, the failure to perform the obligation of *ex officio* investigation led to the adoption of an erroneous solution by the Commission and, respectively, to the violation of the candidate's rights of defence.

What relates to the applicant's argument that serious procedural errors were admitted by the Evaluation Commission in the evaluation procedure, given that the members of the Commission Herman von Hebel, Victoria Henley, Nona Tsotsoria, who are English speakers, in the content of the decision argued that they do not understand the explanations and arguments of the candidate, the following is mentioned:

As per Article 10 para. (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 para. (9) of Law No 26 of 10 March 2022, as well as Article 22 and Article 92 of the Administrative Code

At the same time, the Special Panel finds that, as a result of non-compliance with the provisions of the Administrative Code, especially books I and II, the Evaluation Commission admitted the violation of the rights of defense, and respectively of the right to a fair trial provided by art. 6 of the European Convention on Human Rights, which qualifies as a serious procedural violation.

The special panel considers that this serious violation of procedure in light of the legal provisions serves as a basis for the candidate's reassessment, which could lead to the candidate's promotion of the evaluation.

The special panel points out that, in carrying out the procedure for re-evaluating the candidate, the Evaluation Commission is obliged to take into account the findings set out in this decision.

In paragraph 120 of the Decision of the Constitutional Court No. 42 of April 6, 2023, the notifications regarding the exceptions of unconstitutionality of the provisions of Law No. 26 of 10 March 2022 on certain measures related to the selection of candidates for the position of member of the self-administration bodies



of judges and prosecutors were declared inadmissible. The Court found, even though the special panel of the Supreme Court of Justice cannot compel the Evaluation Commission to promote the evaluated candidate, the arguments and conclusions made by that court when deciding on appeals remain binding on the Commission.

The Venice Commission recommended that the final decision on the assessment be taken by the competent court, however the Parliament of the Republic of Moldova has opted for a different policy of law on this subject. Despite this, the Court stresses that, for reasons of effective protection of rights, it is in law and obliged to carry out a full judicial review of legality on questions of fact and law.

Respectively, 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.

The evaluation after the resumption of the procedure should not turn into a vicious circular argument, which is alien to the effective protection of rights, separation of branches of state power, legal certainty and other principles of the rule of law.

For the reasons mentioned above, the Special Panel of Judges points out that, in the dispute before it, there are legal grounds to admit the appeal filed by Alexandru Rotari against the Independent Commission for assessing the integrity of Candidates for the Position of Member of the Self-Administration Bodies of Judges and Prosecutors on the annulment of decision No. 31 of 28 March 2023, regarding the candidacy of Alexandru Rotari and the ordering of the candidate's evaluation, because some procedural errors were admitted when issuing the administrative act subject to judicial review, and respectively, it was found that there were circumstances that could lead to the promotion of the evaluation by the candidate.

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. 31 of 28 March 2023 regarding the candidacy of Alexandru Rotari.

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

#### **d e c i d e s:**

To admit the appeal filed by Alexandru Rotari against the Independent

Commission for assessing the integrity of Candidates for the Position of Member of the Self-Administration Bodies of Judges and Prosecutors regarding the annulment of Decision No. 31 of March 28, 2023, on the candidacy of Alexandru Rotari and to order the candidate's evaluation.

To annul the decision of the Independent Commission for assessing the Integrity of Candidates for the Position of Member of the Self-Administration Bodies of Judges and Prosecutors No. 31 of March 28, 2023 on the candidacy of Alexandru Rotari.

To order the re-evaluation of candidate Alexandru Rotari 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.

The decision is irrevocable.

**President, Judge**

**Tamara Chisca-Doneva**

**Judges**

**Mariana Pitic**

**Ion Guzun**