

Case no. 3-3/23
2-23003858-01-3-09012023

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

THE SUPREME COURT OF
JUSTICE

1 August 2023

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

consisting of:

Hearing Chairperson, Judge
Judges

Tamara Chișca-Doneva
Mariana Pitic
Ion Guzun

clerks

Natalia Arapu,
Dumitru
Braga, Irina
Safonov,
Oxana Gîscă

with the participation of:

the plaintiff's representative, counsel
Leșan the defendant's representatives, counsels
Gladei

Nicolae
Roger

in the absence of plaintiff

Irina Sugoneaco
Vitalie Stratan

having examined in public court session the administrative lawsuit filed by Vitalie Stratan against the Independent Evaluation Commission for assessing the integrity of the candidates for the position of member in the self-governing bodies of judges and prosecutors regarding the annulment of Decision No 5 of 9 December 2022 on the candidacy of Vitalie Stratan, candidate for the Superior Council of Magistracy, and to order the resumption of candidate evaluation procedure,

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

Submissions of the Participants in the Proceedings:

On 9 January 2023, Vitalie Stratan filed an administrative appeal with the Supreme Court of Justice against the Independent Evaluation Commission for assessing the integrity of the candidates for the position of member in the self-governing bodies of judges and prosecutors (hereinafter referred to as the Pre-Vetting Commission), seeking that Decision No 5 of 9 December 2022 on the Candidacy of Vitalie Stratan, Candidate for the Superior Council of Magistracy – be annulled, and that the candidate evaluation procedure be resumed.

In support of his appeal, the plaintiff stated that, as a judge of the Chişinău Court, Central Office, he decided to participate in the competition for the position of a member of the Superior Council of Magistracy.

On 6 April 2022, he submitted his application to the Pre-Vetting Commission, enclosing all the necessary documents in his possession.

From June 2022 through October 2022, he consistently answered all questions posed, providing additional documents requested by the Pre-Vetting Commission.

On 27 October 2022, he was publicly heard before the Pre-Vetting Commission, and on 9 December 2022, the Commission adopted Decision No 5 on the Candidacy of Vitalie Stratan, Candidate for the Superior Council of Magistracy, by which, pursuant to Article 8 para. 1 and 2(a) and (c), para. 4(a) and (b) and para. 5(b), (c), (d), (e) and (g) and Article 13(5) 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 (hereinafter Law No 26/2022), decided that Vitalie Stratan, as a candidate for membership in the Superior Council of Magistracy, does not meet the integrity criteria laid down in Law No 26/2022, as serious doubts were found regarding his compliance with the criteria of ethical and financial integrity and, as a result, fails the evaluation.

Vitalie Stratan holds that Decision No 5, dated 9 December 2022, issued by the Pre-Vetting Commission is unfounded and unlawful for the following reasons.

The plaintiff submits that by the appealed administrative act he was suspended from participation in the competition for membership of the Superior Council of Magistracy, and his professional integrity was assessed, which indicates a double negative impact of the appealed decision, namely, on the one hand, his legitimate rights and interests are directly affected, and on the other hand, the conclusion of the Pre-Vetting Commission is a veiled form of punishment.

The plaintiff holds that, pursuant to Articles 19, 20, 44(1) and 163(c) of the Administrative Code and Article 14(1) of Law No 26/2022, he is the subject whose legal right has been violated and is entitled to assert his right by filing the present

action before the Administrative Court.

He also noted that there was no need to follow a preliminary procedure in this case, as the current legislation expressly provides that such disputes should be brought directly to the administrative court.

The complainant also alleged that the appealed decision was issued on 9 December 2022 and served at the electronic address on 4 January 2023. Thus, he considers that the appeal registered on 9 January 2023 was filed in compliance with the deadline provided in Article 14(1) of Law No 26/2022.

On the merits of the appeal, Vitalie Stratan stated that the Pre-Vetting Commission rejected his candidacy for the position of a member of the Superior Council of Magistracy on the grounds that it had serious doubts about the candidate's compliance with the criteria of financial and ethical integrity.

The plaintiff believes that this conclusion is erroneous, capable of causing serious and irreparable damage to his professional reputation, including the loss of the position he currently holds as a judge of the Chişinău Court.

In addition, this conclusion can be qualified as unlawful, exceeding the powers granted by law to the Pre-Vetting Commission.

The plaintiff noted that according to Article 8(2)(a) of Law No 26/2022, a candidate shall be deemed to meet the criterion of ethical integrity if: a) he/she has not seriously violated the rules of ethics and professional conduct of judges, prosecutors or, where applicable, other professions, and has not committed, in his/her activity, any wrongful actions or inactions, which would be inexplicable from the point of view of a legal professional and an impartial observer; b) there are no reasonable suspicions that the candidate has committed corruption acts, acts related to corruption or corruptible acts, within the meaning of the Law on Integrity No 82/2017; c) c) he/she has not violated the legal regime of declaration of assets and personal interests, conflicts of interest, incompatibilities, restrictions and/or limitations.

In this case, the Pre-Vetting Commission did not state the legal grounds on which the failure to meet the criterion of ethical integrity was found. It also failed to establish the relationship between the legal grounds and the factual circumstances.

The plaintiff submits that, according to the appealed decision, the central argument of the Pre-Vetting Commission was that Vitalie Stratan had purchased a property (apartment) at a preferential price, the purchase of which the Commission had serious doubts about.

In this regard, the plaintiff noted that he had submitted to the Pre-Vetting Commission all the documents in his possession at the time of their request and it does not appear from their contents that there are serious doubts as to the integrity of his candidacy.

In the plaintiff's opinion, the conclusions of the Pre-Vetting Commission, based on the absence of evidence of the income of the persons from whom he borrowed money (namely the amount of MDL 200,000), or the failure to provide the contract for the purchase of real estate, or the failure to provide the application to the Superior Council of Magistracy requesting inclusion in the program for the purchase of an apartment at a preferential price, lack evidentiary basis. Doubts cannot arise from a lack of information, but only from the existence of information.

Moreover, the fact that the candidate failed to provide the application to the Superior Council of Magistracy filed several years ago, failed to provide a copy of the sale and purchase agreement, and failed to substantiate the income of the third party from whom he borrowed money, cumulatively raise serious and reasonable doubts that the candidate does not meet the criteria of integrity.

The plaintiff also submitted that, in fact, he does not have the information requested and that obtaining it, if it is possible, takes longer than the time provided by the Pre-Vetting Commission. In addition, the Pre-Vetting Commission did not attempt to obtain the requested information, although it did justify the lack of need for the plaintiff to keep the information for a long period of time.

Thus, a request to the Superior Council of Magistracy is only a request and is to be kept no longer than until a reply is received.

After receiving a reply from the Superior Council of Magistracy, the copy of the contract of sale and purchase is to be kept by the candidate as long as he has the property which is the subject of this contract, and if the property is sold, there is no need for further keeping of the copy of the contract. The apartment in question, which the plaintiff purchased at a preferential price, was sold in 2018, which also meant that there was no further need to keep the copy of the initial purchase contract for the apartment.

In addition, a person who has borrowed money from another person cannot be held liable for that person's financial affairs if he or she is unaware of the origin of the money.

In this case, he borrowed the amount of MDL 200,000 from people close to him, and to date there is no credible information that these funds are of illegal or criminal origin.

From this point of view, he believes that the doubts and conclusions of the Pre-Vetting Commission are inexplicable, prejudicial to his rights as a candidate undergoing evaluation, since no person can defend oneself against these kinds of allegations in the circumstances in which they are made.

The Pre-Vetting Commission explicitly stated that during the evaluation he had never claimed that he was eligible for a preferential housing program due to the lack of living space in Chişinău, and this conclusion is not true. Since that was a precondition of eligibility, and he obtained the property at a preferential price, it

is presumed that he was eligible for the preferential housing program.

At the same time, according to Article 8(4) of Law No 26/2022, a candidate shall be deemed to meet the financial integrity criterion if: a) his/her assets have been declared in the manner prescribed by law; b) the Pre-Vetting Commission has established that the wealth acquired by the candidate in the past 15 years corresponds to the declared revenue.

In fact, the Pre-Vetting Commission has not cited any legal basis, in conjunction with the factual circumstances of the case, on the basis of which serious doubts were raised about the integrity of the candidate as he had declared his wealth in the manner prescribed under the applicable law (National Integrity Authority) has not received any notification or issued any finding/sanctioning decision in this respect.

The above shows that the Pre-Vetting Commission has exceeded its powers beyond those expressly established by law, finding certain circumstances which were not confirmed even by the competent authority.

In addition, it does not follow from the text of the challenged administrative act that the Pre-Vetting Commission found that the wealth acquired by Vitalie Stratan over the past 15 years does not correspond to the declared revenue. The plaintiff submits that the property was acquired legally, which is confirmed by the relevant documents.

The fact that he received an apartment at a preferential price while his wife had other property is not an indication of lack of integrity, since the Superior Council of Magistracy, by Regulation, had unambiguously established the eligibility criteria for receiving an apartment at a preferential price, and he had passed the eligibility test, and neither the Superior Council of Magistracy nor other relevant authorities had found any deficiencies.

The plaintiff stated that in applying for the discounted apartment, he submitted strictly the amount of data requested at the time of application, which were accurate and correct.

Thus, if the purpose of acquiring apartments at a preferential price was not a pre-condition of eligibility which had to be complied with even after the acquisition of the apartment, then the acquisition of the property with its subsequent sale cannot be regarded as a failure of the candidate to meet the criteria of financial/ethical integrity.

According to the plaintiff, the fact that he declared the amount of the debt of MDL 200,000 only in 2014 and did not include this amount of debt in his subsequent declarations is not an obstacle in this respect.

Moreover, the Pre-Vetting Commission did not even ask him or analyze whether, in subsequent years, the amount of his debt fell below the legally required limit – 10 average monthly salaries in the economy. To avoid possible suspicions,

on 4 November 2022, the plaintiff filed a new annual declaration of assets and personal interests for the year 2021, indicating in the section 'Debts' the existence of a loan (year of contracting – 2014) in the amount of MDL 200,000, with an interest rate of 0% and maturity in 2030, with the notation 'omission, pre-vetting' (also confirmed by protocol No 1073/19 of 8 December 2022, issued by the National Integrity Authority).

The arbitrary interpretation of the plaintiff's statements shows a lack of impartiality on the part of the Pre-Vetting Commission because, at the insistence of the members of the Commission, he stated that the acquisition of the apartment at a preferential price did not contribute to the improvement of his housing conditions, which was interpreted negatively by the Commission in the sense of lack of need to acquire housing.

He explained to the Pre-Vetting Commission that the acquisition of the two-room apartment in dispute was insufficient to resolve the family's situation by improving their living conditions, since he had originally requested a three-room apartment in his application to the Superior Council of Magistracy, whereas he had received a two-room apartment that could not meet his family's needs, which had eventually led to its sale and the subsequent acquisition of another apartment suitable to meet their daily needs.

In the challenged decision, it was repeatedly stated that he answered a limited number of questions and sub-questions, indicating a negative connotation of his behavior. In fact, he answered all the Pre-Vetting Commission's questions to the best of his ability, with some answers applicable to more questions/sub-questions.

The plaintiff is critical of the Pre-Vetting Commission's conclusion about the financial losses after the sale at the same price of the apartment purchased at a preferential price, since he stated the factual situation, given that the sale price of the apartment was the same as the purchase price (without taking into account exchange rate fluctuations).

Therefore, for serious doubts to arise as to the integrity of the candidate, the Pre-Vetting Commission only needed to properly verify the information using the ample opportunities provided to it by the law and only upon confirmation of this additional information to conclude that serious doubts do exist. The purchase and sale of a property at the same price cannot in itself give rise to serious doubts unless additional circumstances are identified.

In the present case, the Pre-Vetting Commission did not find or refer to such circumstances, which shows abuse on the part of the Commission.

Also, the Commission's message, 'It is submitted that the asset was sold at such-and-such a price. We do not believe that this price is true. Therefore, there is no doubt that the asset has been sold at a price other than the stated price' regarding the existence of doubt about its integrity is based only on illogical syllogisms and

is neither supported by facts nor documented.

Moreover, in the challenged decision, the Pre-Vetting Commission noted that a judge must refrain from any conduct, action or manifestation that could undermine public confidence in the judiciary by implying that the plaintiff has engaged in such conduct, which has not been proven and is not in accordance with the truth.

According to the plaintiff, the statement of the Pre-Vetting Commission that ‘a judge is prohibited from illegally receiving material goods, services, benefits or other advantages, including accepting or purchasing goods (services) at a price (tariff) lower than their real value’ is also inadmissible, as it was stated in relation to obtaining real estate at a preferential price, which was provided for by a statutory program and was intended exclusively for the judiciary of the Republic of Moldova.

In the opinion of the Pre-Vetting Commission, any participant in the judges' preferential real estate program is potentially subject to the qualifier – of questionable financial and ethical integrity.

The plaintiff submits that the Pre-Vetting Commission's conclusion that there was no relevant evidence of the sources of funds used to purchase the apartment in 2014 is erroneous because the defendant failed to consider that he has been working in the legal system since the 1990s and that the sum of all his salaries to date, in addition to the financial sources he cited, constitute sufficient justification for the sources of funds used to purchase the preferentially priced apartment.

Therefore, the facts of non-submission of documents on inter-family loans (which were made in the absence of documents), non-counting of family savings (there was not even a mention of the candidate's family income), non-submission of documents concerning payments on the MDL 100,000 loan (the keeping of which by the candidate is superfluous, and the requirement to submit them in the absence of motivation as to why they are needed by the Commission), cannot in themselves raise doubts that question the confidence in the integrity of the candidate for the position of member of the Superior Council of Magistracy.

Therefore, shifting the burden of proof to the candidate is only possible if the evaluating body has identified integrity issues and these issues have been brought to the attention of the candidate.

In this case, he was unaware of the integrity concerns raised by the Pre-Vetting Commission and could not defend himself against the allegations because it was not until the day of the public hearing on 27 October 2022, that the Commissioners asked him questions suggestive of certain suspicions, and until then he did not know and could not present evidence against what the Commission considered purely subjectively to be ‘integrity concerns’.

As a matter of law, the plaintiff based his action on Articles 20, 93, 171-172,

177, 189, 211-212, 206(1)(a), 141(1) of the Administrative Code, Articles 119, 166-168, 174 and 177 of the Civil Procedure Code, Articles 216(3), 220(3), 219(2), 219¹(1) of the Civil Code, Articles 13 and 14 of Law 26/2022.

On 16 January 2023, the Commission filed a defense statement, whereby it sought that the appeal of Vitalie Stratan be rejected. (case file page 45-62, 68-69, vol. I).

In support of the defense statement, the Pre-Vetting Commission indicated that the decision No 5 of 9 December 2022, issued against Vitalie Stratan, candidate for the position of member of the Superior Council of Magistracy, is justified and legitimate, issued following an evaluation carried out in accordance with the provisions of Law No 26/2022.

The Pre-Vetting Commission noted that on 8 July 2022, it asked the candidate Vitalie Stratan to complete and submit a declaration of assets and personal interests filed by him before 15 July 2022. The Commission then verified and obtained information from the National Integrity Authority, the State Tax Service, the General Inspectorate of Border Police, financial institutions, government agencies and other public sources.

Three rounds of inquiries and submission of additional information and documents by the plaintiff followed to clarify the identified uncertainties, and within the limits of discretion, the Pre-Vetting Commission made its assessment of the materials and information gathered by the plaintiff and third parties.

On 27 October 2022, the candidate for the position of member of the Superior Council of Magistracy, Vitalie Stratan, was heard at a public hearing, followed by the presentation of additional data and information, and by Decision No 5 of 9 December 2022, the Pre-Vetting Commission decided that the candidate did not meet the criteria of integrity, as serious doubts were identified about his compliance with the criteria of ethical and financial integrity, as a result of which he failed the evaluation.

The Pre-Vetting Commission is of the view that it has discharged its obligations under Act 26/2022 with utmost diligence and good faith. In particular, having found certain uncertainties (caused in particular by the existence of discrepancies between the declarations filed by the plaintiff himself with the relevant authorities), it gave the plaintiff the opportunity to clarify them by providing additional data and information (within the meaning of Article 10(7) of Law No 26/2022) by granting him a reasonable time limit.

With regard to the time limit granted to Vitalie Stratan, the Pre-Vetting Commission noted that he had also referred in his appeal to the need for more time than that granted by the Commission to provide the requested information and documents, but the plaintiff did not request the Commission to extend the time limit granted to him to provide the requested written answers and documents,

which raises doubts as to the objections raised in the appeal. In such a situation, the burden of proof in the evaluation process shifts to the candidate.

The plaintiff's contention that it was not until the day of the public hearing on 27 October 2022, that the Commission's questions raised doubts which he intended to address, the Pre-Vetting Commission finds it erroneous because on the day of the plaintiff's hearing, the members of the Commission did nothing other than repeatedly refer to the questions previously formulated in the August 15, September 21, and October 13, 2022 requests. The plaintiff was aware that once he received the questions from the Pre-Vetting Commission, it was his duty to resolve any possible doubt about the events and circumstances investigated by the Commission.

In the present case, the Pre-Vetting Commission has strictly adhered to its mandate as Decision No 5 dated December 9, 2022 was issued in strict compliance with the provisions of Article 13(5) of Law No 26/2022.

The Pre-Vetting Commission held that the plaintiff Vitalie Stratan's contention that the conclusion of the Evaluation Commission was a veiled form of sanction capable of causing serious and irreparable damage to his professional reputation, including loss of office, was erroneous because, pursuant to Article 13(6) of Law No 26/2022, the findings contained in the decision have no evidentiary value for any other proceedings or processes.

The same conclusion is confirmed in Item 39 of the Joint Opinion of the Venice Commission and the Directorate General for Human Rights and the Rule of Law (DGI) of the Council of Europe (Opinion No 1069/2021 of 13.12.2021, Moldova), according to which the new version of the Draft Law clearly states that the results of integrity assessment will not have any influence on the career of a candidate for the position of judge or prosecutor.

In the opinion of the Evaluation Commission, the evaluation of the integrity of Vitalie Stratan, candidate for the position of member of the Superior Council of Magistracy, did not violate his legal rights and interests and did not affect his professional status or reputation. Following the assessment of the candidate's ethical and financial integrity, based on data and information obtained from the candidate and third parties, the Pre-Vetting Commission has determined whether or not there is serious doubt that the candidate meets the legal integrity criteria.

According to the Pre-Vetting Commission, the plaintiff's interpretations set forth in the appeal that doubts cannot arise from lack of information, but only from its existence, are erroneous and based on a fragmentary analysis of Law No 26/2022, which renders his objections devoid of any legal basis.

The Pre-Vetting Commission holds that, in evaluating the candidate Vitalie Stratan, it acted on the basis of the strict eligibility criteria established by Law No 26/2022, as applied to the factual circumstances arising from the data and

information collected, to conclude whether or not there are serious doubts as to the plaintiff's compliance with the criteria of ethical and financial integrity. The decision rendered is an exercise of that discretion, which cannot be subject to judicial review. Thus, none of the plaintiff's allegations are supported by relevant and conclusive evidence.

The plaintiff Vitalie Stratan, being legally notified of the date and time of the hearing, did not appear at the court hearing, therefore the Special Panel of Judges decided to consider the appeal in his absence, but with the participation of his representative, counsel Nicolae Leșan, who supported the arguments set forth in the appeal, requested that the appeal be accepted as formulated, with the annulment of the decision of the Pre-Vetting Commission No 5 of 9 December 2022 on the candidacy of Vitalie Stratan, candidate for the position of member of the Superior Council of Magistracy, and the resumption of the procedure of evaluation of the candidate by the Commission.

The representatives 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, counsels Roger Gladei, Irina Sugoneaco and Valeriu Cernei, sustained the arguments put forward in the defense statement, and moved for the dismissal of the action as unfounded.

In addition to their arguments in the submitted defense statement, the representatives of the Commission stated that the Commission observed all the rights provided for in Article 12(4) of Law No 26/2022.

The Determination of the Court:

Having heard the parties and their representatives, and having studied the documents in the administrative and judicial case files, the Special Panel established within the Supreme Court of Justice to consider 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 finds the claim admissible and well-founded for the following reasons.

Case Examination Period:

Pursuant to Article 14(7) of Law No 26/2022, by way of derogation from the provisions of Article 195 of the Administrative Code No 116/2018, the application for appeal against a decision of the Pre-Vetting Commission shall be considered within 10 days.

A Special Panel 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 was established by Order of the Acting Chief Justice No 29 of 29 March 2022, amended by Order No 35 of 14 April 2022: Vladimir Timofti – Chair, Ala

Cobăneanu, Svetlana Filincova – judges, Dumitru Mardari – substitute judge.

It should be noted that the appeal filed by Vitalie Stratan was registered with the Supreme Court of Justice on 9 January 2023 (file page 2-15, vol. I).

According to the case assignment form, this case was distributed, on 9 January 2023, via the Integrated Case Management Program to Judge-Rapporteur Ala Cobăneanu (case file page 1, vol. I).

By the decision of 10 January 2023 of the Special Panel of the Supreme Court of Justice, the appeal of Vitalie Stratan against the decision of the Pre-Vetting Commission was accepted for examination as an administrative dispute, and the participants in the trial were summoned to a hearing scheduled for 24 January 2023, at 2 p.m., in room No 4 of the Supreme Court of Justice, located at 18 Petru Rareș Street, Chișinău (file page 33-35, 36, vol. I).

On 16 January 2023, the Commission submitted, by the deadline set by the court, its defense statement against the appeal filed by Vitalie Stratan seeking the annulment of Decision No 5 of 09 December 2022 (case file page 45-62, vol. I).

In this case, it is noted that at the hearing on January 24, 2023, plaintiff Vitalie Stratan filed a request to adjourn the hearing in order to review the administrative case file compiled by the Pre-Vetting Commission, with the provision of certified copies of that case file (case file page 67, vol. I).

Thus, according to the minutes of the hearing of 24 January 2023, the request of the plaintiff Vitalie Stratan was satisfied and the consideration of the case was adjourned to 2 February 2023, at 3.00 p.m. (case file page 70-72, vol. I).

On 2 February 2023, counsel Nicolae Leșan, on behalf of the plaintiff Vitalie Stratan, filed an application for adjournment of the case on the grounds that he had concluded a legal assistance contract with his client only on 1 February 2023 and he needed time to familiarize himself with the case documents (case file page 79, vol. I), which the court satisfied and adjourned the case to 6 February 2023, at 3.00 p.m. (case file page 80-82, vol. I).

On 3 February 2023, the representative of the plaintiff Vitalie Stratan, counsel Nicolae Leșan, submitted a request by means of e-mail to get acquainted with the case documents (case file page 86-87, vol. I).

At the court hearing of 6 February 2023 (case file page 99-101, vol. I), the motion challenging constitutionality, filed by Vitalie Stratan, represented by counsel Nicolae Leșan was examined (case file page 88-101, vol. I); the motion was accepted by ruling of 6 February 2023 of the Special Panel of the Supreme Court of Justice, and the hearing was adjourned without a date until the settlement of the matter by the Constitutional Court (case file page 102-107, vol. I).

The Constitutional Court ruled on the plaintiff's motion No 5 of 14 February 2023, declaring unconstitutional the text 'if it finds that there are circumstances that could have led to candidate's passing of evaluation' in Article 14(8)(b) 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 was upheld (case file page 110-120, vol. I).

Thus, by the ruling of the Constitutional Court of 14 February 2023, the participants in the proceedings were summoned to the next hearing scheduled for 6 March 2023 at 2.00 p.m. (case file page 121-129, vol. I).

By Decisions of the Superior Council of Magistracy Nos 23/2 and 27/2 of 14 February 2023, the Plenary of the Superior Council of Magistracy accepted the resignations of the judges who were on the Special Panel, effective on 1 March 2023.

By ruling of 2 March 2023 of the Acting Chief Justice of the Supreme Court of Justice, the casefiles that had been assigned to the judges who resigned, opened following 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, were sent to the Unit for the Procedural Registration of Civil, Commercial and Administrative Cases for redistribution via the Integrated Case Management Program to other judges (case file page 131-133, vol. I).

By order of the Acting Chief Justice of the Supreme Court of Justice No 33 of 2 March 2023 Amending Decision No 29 of 29 March 2022 and Decision No 35 of 14 April 2022, the composition of the Special Panel was changed (case file page 134-135, vol. I).

According to the case redistribution form of 2 March 2023, 1.55 p.m., this case was assigned to a different Judge-Rapporteur (case file page 130, vol. I).

Given that the representative of the plaintiff Vitalie Stratan, counsel Nicolae Leșan, filed a recusal against Supreme Court judges Vladimir Timofti, Dumitru Mardari and Ion Guzun (case file page 147-149, vol. I), the hearing of 6 March 2023 was adjourned to 13 March 2023, at 1.00 p.m. (case file page 151, vol. I).

On 7 March 2023, at 10.30 a.m., the consideration of the application for recusal took place (case file page 161-162, vol. I), where, by an opinion of the Special Panel of the Supreme Court of Justice of 7 March 2023, the recusal application filed by the representative of the plaintiff Vitalie Stratan, counsel Nicolae Leșan, was rejected (case file page 167-173, vol. I).

Subsequently, on 13 March 2023, the plaintiff Vitalie Stratan's representative, counsel Nicolae Leșan, filed an application by means of e-mail, by which he sought the recusal of the Supreme Court Judge Tamara Chișca-Doneva (case file page 238-241, vol. I). On the same day, by e-mail, the plaintiff filed a request for the recusal of Supreme Court judges Vladimir Timofti and Dumitru Mardari (case file, pp. 242-245, vol. I).

In an application filed on 13 March 2023, the plaintiff Vitalie Stratan's

representative, counsel Nicolae Leşan, requested that the consideration of the recusal motions against the members of the Special Panel be postponed (case file page 246-247, vol. I).

Also on 13 March 2023, the representative of the plaintiff Vitalie Stratan, counsel Nicolae Leşan, filed another application via e-mail, in which he requested a ruling ordering the Independent Evaluation Commission to provide a copy of the minutes of the meeting at which the evaluation of Vitalie Stratan for the position of a member of the Supreme Council of Magistracy was conducted and Decision No 5 of 9 December 2022 was issued (case file page 248-250, vol. I). The case was adjourned to March 21, 2023 at 10.00 a.m. (case file page 251, vol. I).

The recusal hearings were scheduled for 16 March 2023 at 2.00 p.m. and 21 March 2023 at 9.30 a.m. (case file page 2-3, 16-17, vol. II), and by decisions of the Special Panel of the Supreme Court of 16 and 21 March 2023, the recusal applications filed by the plaintiff Vitalie Stratan and his counsel Nicolae Leşan were rejected (case file page 6-10, 20-26, vol. II).

At the hearing of 21 March 2023, the representative of the plaintiff Vitalie Stratan, counsel Nicolae Leşan, filed a repeated application, in which he requested the lifting of the exception of unconstitutionality with the referral to the Constitutional Court to verify the constitutionality of certain provisions of Law No 26/2022 (case file page 27-37, vol. II), where the opinion of March 21, 2023 of the Special Panel of the Supreme Court accepted the request to lift the exception of unconstitutionality (case file page 38-44, vol. II).

The composition of the Special Panel was changed by Decision No 39 of 20 March 2023 “Amending Decision No 34 of 2 March 2023” because one of its judges was on medical leave since 17 March 2023, whose resignation was accepted by Decision of the Superior Council of Magistracy No 68/3 of 23 February 2023, effective on 18 April 2023; Decision of the Superior Council of Magistracy No 103/4 of 16 March 2023 amended the Decision of the Superior Council of Magistracy No 68/3 of 23 February 2023 by changing effective date of resignation of the Special Panel judge from the position of judge at the Supreme Court of Justice from 18 April 2023 to 20 March 2023.

By Decision of the Superior Council of Magistracy No 66/3 of 23 February 2023, the resignation of Supreme Court of Justice judge, member of the Special Panel was accepted, effective on 27 March 2023.

The composition of the Special Panel was changed by Order of the Acting Chief Justice of the Supreme Court of Justice No 46 of 28 March 2023 Amending Decision No 39 of 20 March 2023. For the rest, the Order of the Acting President of the Supreme Court of Justice No 39 of 20 March 2023, maintaining the order of the Acting President of the Supreme Court of Justice No 34 of 2 March 2023, in the part concerning the appointment of the substitute judge, was upheld.

By Order of the Commission for Emergency Situations of the Republic of Moldova No 64 of 31 March 2023 – for the period of the state of emergency – a provisional measure for a 30-day period was taken to suspend administrative procedures on resignation applications filed by the judges of the Supreme Court of Justice before the entry into force of the Order of the Commission for Emergency Situations of the Republic of Moldova No 64 of 31 March 2023, and to suspend the legal effect of the resignation applications already accepted, unless the termination of service occurred earlier than the effective date of the Order of the Commission for Emergency Situations of the Republic of Moldova No 64 of 31 March 2023.

By Order No 53 of 4 April 2023 Amending Orders Nos 46 of 28 March 2023, 34 of 2 March 2023 and 39 of 20 March 2023, the composition of the Special Panel, provided for in Item 1 of the Order of the Acting Chief Justice of the Supreme Court of Justice No 46 of 28 March 2023 was changed, and a new composition of the Special Panel tasked with the examination of appeals against the decisions of the Independent Evaluation Commission for assessing the integrity of candidates for the position of member in the self-administration bodies of judges and prosecutors, was established as follows: Tamara Chișca-Doneva – Chair, Judge; Marjana Pitic – Judge, Ion Guzun – Judge. The substitute judge in the Special Panel tasked with the examination of appeals against the decisions of the Independent Evaluation Commission for assessing the integrity of candidates for the position of member in the self-administration bodies of judges and prosecutors, referred to in Item 2 of the Order of the Acting President of the Supreme Court of Justice No 34 of 2 March 2023, was changed.

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

On 6 April 2023, by Inadmissibility Decision No 42, the Constitutional Court

ruled on applications Nos 75g/2023, 76g/2023, 77g/2023, 86g/2023, 87g/2023, 88g/2023, 89g/2023, 90g/2023, 96g/2023, 101g/2023 and 102g/2023 challenging the constitutionality of certain provisions of Law No 26/2022 (case file page 58-83, vol. II).

Thus, following the ruling of the Constitutional Court on 6 April 2023, the participants in the proceedings were summonsed to the next hearing scheduled for 12 April 2023, at 3.00 p.m. (case file page 48-54, vol. II), which was postponed due to the fact that on 10 April 2023, the Commission filed a motion to disqualify one of the judges of the Special Panel.

By Decision of the Superior Council of Magistracy No 33/2 of 14 February 2023, the resignation of a Supreme Court of Justice judge, member of the Special Panel was accepted, effective on 31 March 2023.

By Order No 69 of 4 May 2023 Amending Order No 29 of 29 March 2022, the Acting President of the Supreme Court of Justice appointed a substitute judge in the Special Panel tasked with the examination of appeals against the decisions of the Independent Evaluation Commission for assessing the integrity of candidates for the position of member in the self-administration bodies of judges and prosecutors (case file page 98-99, vol. II).

The Special Panel of the Supreme Court of Justice noted that the Law No 64 of 30 March 2023 on the Supreme Court of Justice and the Law No 65 of 30 March 2023 on the External Assessment of Judges and Candidates for the Position of Judge of the Supreme Court of Justice entered into force on 6 April 2023.

According to Article 8 of the Law No 64/2023, the Plenary of the Supreme Court of Justice is formed by all the judges of the Supreme Court of Justice and has, inter alia, the task to establish, on an annual basis, the composition of court panels.

Having regard for the legal provisions referred to above and for the fact that during the period March-April 2023 the majority of the Supreme Court of Justice judges resigned, the Special Panel notes the impossibility of the Plenary of the Supreme Court of Justice, which is not currently deliberative, to form panels.

The transitional provisions of Law No 64/2023 on the Supreme Court of Justice, however, were amended by Law No 89 of 27 April 2023, in force since 2 May 2023, to establish when the new composition of the Supreme Court of Justice, including the Plenary, would start its work, with the effect that the Chief Justice of the Supreme Court of Justice would have the power to form the panels as was previously the case.

In accordance with Article 12(8) of the Law No 65/2023, the Superior Council of Magistracy announced – by Decision No 120/6 of 10 April 2023 – a competition for filling, by temporary transfer, the judicial vacancies at the

Supreme Court of Justice, and by Decision of the Superior Council of Magistracy No 142/8 of 2 May 2023, it was decided to temporarily transfer 7 judges from national courts to the Supreme Court of Justice, for a period of 6 months, starting on 10 May 2023.

The Special Panel noted that the operation of the Supreme Court of Justice was halted from 30 March 2023 to 10 May 2023, which was a period of time when both the factual and legal examination of pending cases was not possible.

The motion to disqualify a judge of the Special Panel, distributed on 15 May 2023 as per the case distribution form (case file page, 101, vol. II), was examined at the hearing of 23 May 2023, at 9.20 a.m., the deliberation and outcome regarding it having been postponed until 25 May 2023 (case file page 111-114, vol. II).

By ruling of 25 May 2023, the Special Panel of the Supreme Court of Justice rejected the motion to disqualify a Special Panel judge, filed by the Commission (case file page 116-120, vol. II).

The participants in the proceedings were summonsed to the next hearing on the case on 12 June 2023, at 10.00 a.m. (case file page 121-129, vol. II).

On 12 June 2023 the representative of the plaintiff Vitalie Stratan, counsel Nicolae Leșan, filed a request for postponement of the case for another date because the plaintiff personally requested to be present at the hearing to give the necessary explanations related to the unreasonableness of the challenged decision (case file page 130, vol. II). The request was granted, the examination of the appeal was postponed, and the plaintiff was summoned for 3 July 2023, at 1:00 p.m. (case file page 131-133, vol. II).

At the hearing of 3 July 2023 the representative of the plaintiff Vitalie Stratan, counsel Nicolae Leșan, stated several motions (case file page 146-147, 148 vol. II), including to disqualify the entire Special Panel and to bring a third party to the proceedings, which were denied by the Panel.

At the same time, the minutes of the hearing of 3 July 2023 show that the examination of the merits of the case started and the representative of the plaintiff Vitalie Stratan, counsel Nicolae Leșan, did not give explanations on the case, in connection with which an adjournment of the hearing was announced for 6 July 2023, at 11.30 a.m., summoning and ordering the plaintiff Vitalie Stratan to appear at the hearing (case file page 149-152, vol. II).

In the application filed on 5 July 2023, Vitalie Stratan requested that the appeal be postponed and that the Pre-Vetting Commission be ordered to provide the plaintiff with the requested documents, which were not attached to the administrative case file (case file, pp 153-155, vol. II). The request was granted by the court, the Commission was ordered to provide the documents requested by the plaintiff, thereby adjourning the hearing to 7 July 2023, at 2.00 p.m., ordering the plaintiff, Vitalie Stratan, to appear at the hearing.

Although he was legally summoned and ordered to attend the hearing, the plaintiff Vitalie Stratan did not appear at the hearing on 7 July 2023, but filed a request for postponement due to his deteriorating health, attaching a copy of his medical certificate. The Special Panel granted the request for adjournment and rescheduled the hearing for July 28, 2023, at 10.00 a.m., summoning the plaintiff to appear again.

Neither the plaintiff nor his counsel, Nicolai Leșan, appeared at the hearing on 28 July 2023. However, in a request submitted by e-mail on 27 July 2023, counsel Nicolae Leșan stated that, due to the information in the media concerning him personally and his client, he still does not represent the plaintiff's interests, and therefore requests that the hearing be adjourned and that the plaintiff be given the opportunity to avail himself of the right to legal aid.

The Special Panel, finding the motion for adjournment to be without merit, denied it and ordered the appeal to proceed in the absence of the legally summoned plaintiff, who had failed to state a reason for his failure to appear at the hearing.

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

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

At the hearing on 19 June 2023, the case was examined on the merits, the parties' explanations were heard, the evidence was examined, the pleadings were heard and, in accordance with Article 14(9) of the Law No 26/2022 – the issuance and placement of the decision on the website of the Supreme Court of Justice was announced.

Applicability of the Administrative Code:

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

The Special Panel notes that the application of the Administrative Code and

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

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

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

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

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

The Special Panel thus notes that the decision of the Commission is an individual administrative act within the meaning of Article 10(1) of the Administrative Code. The individual administrative act is the final output of the administrative procedure.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

It is worth emphasizing that the Commission’s tasks do not pertain to the private, but to the public areas of activity, which is why it was vested, by Law No 26/2022, with powers that allow it to have a legally binding effect over those evaluated under Article 8 of the Administrative Code.

The Special Panel of the Supreme Court of Justice 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.

The Special Panel also emphasizes that the administrative procedure of evaluation has a clarifying and guiding purpose owing to the procedural nature of the formal action of evaluating candidates for the position of member of the

Superior Council of Magistracy. Respect for the basic principles, safeguards and rules of administrative procedure is therefore a requirement directly rooted in the concept of the rule of law stipulated in Article 1(3) of the Constitution of the Republic of Moldova.

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

The Special Panel points out that a natural person can also be a public authority if they are delegated by law the tasks pertaining to public authorities and the corresponding powers to carry them out.

Moreover, according to Article 72(6) of Law No 100 of 22 December 2017, an interpretative regulatory act shall not have retroactive effect, except when the interpretation of a regulation providing for liability creates a more favorable situation.

At the same time, the representatives of the Commission did not acquire an in-depth understanding of Article 2(2) of the Administrative Code, which sets out the conditions of derogation by legal provisions from the uniform nature of the Administrative Code for “certain aspects” of administrative activity. Accepting the argument that the Commission is not a public authority would mean denying the legal reality that it carries out administrative activity of public law through administrative procedure and that its decision is an individual administrative act subject to judicial review under administrative litigation procedure.

Thus, the public authority concept is not limited to the concept of legal entity of public law, but has its own functional meaning under Article 7 and Article 2(2) of the Administrative Code and for the purposes of Law No 26/2022.

According to Article 10(1) of the Administrative Code, the Commission’s decision is related to the trait of “any decree, decision or other official measure”

as a defining element of the individual administrative act. This reveals that the Commission does not perform legislative or judicial activity, but that it has a law implementation activity.

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

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

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

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

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

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

It is therefore unacceptable that the defendant's representatives argue that the

evaluation procedure is not an administrative procedure governed by the rules of the Administrative Code, such as the principle of legality (Article 21), the principle of investigation of own motion (Article 22), the principle of equal treatment (Article 23), the principle of good faith (Article 24), the principle of impartiality (Article 25), the principle of procedural language and reasonableness (Article 26, Article 27), the principle of efficiency (Article 28), the principle of proportionality (Article 29), legal certainty (Article 30), the principle of motivation of administrative acts and administrative operations (Article 31), the principle of comprehensibility (Article 32), the principle of protection of legitimate expectations and others. As regards the existing judicial practice on the appeals lodged against the Commission, (i.e. cases Nos 3-5/2023 and 3-13/2023), 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, the Special Panel of the Supreme Court of Justice notes that the cases at issue do not form a unified judicial practice.

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

Application Admissibility:

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

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

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

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

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

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

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

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

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

In this context, it should be noted that the Commission's decision No 5 of 9 December 2022 was communicated to the plaintiff Vitalie Stratan on 4 January 2023, which is confirmed by an abstract from the e-mail, attached to case materials (case file page 39, vol. I of the administrative case file).

The quoted legal provisions are unequivocally indicative of the grounds of admissibility of the appeal in administrative litigation, specifically: the existence of an unfavorable individual administrative act sent to the addressee, rejecting his application; the substantive and territorial jurisdiction of the court to examine the appeal in administrative proceedings and the time-limit for filing suit.

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

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

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

Effective judicial review involves a full check of factual and legal matters, however it excludes the checking of appropriateness as per Article 225(1) of the Administrative Code and limits the review regarding the discretionary individual administrative act when the law provides for such a reason for issuance. Appropriateness is a matter of admissibility, not a matter of substance in an administrative litigation. The defendant's argument in the submitted statement of defense that the application has to be rejected for the reason of appropriateness is unsubstantiated, as the plaintiff based the application on legality matters, not on appropriateness.

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

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

The substance of the administrative dispute:

According to Article 6(1) of the European Convention on Human Rights, in the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.

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

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

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

According to Article 114 of the Constitution of the Republic of Moldova, justice shall be administered in the name of the law only by the courts of law; they shall have the entire range of procedural mechanisms for a fair solution of a case, without unjustified limitation in actions to be carried out, so that, upon the fulfilment of the ultimate goal, the judicial decision would not become illusory.

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

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

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

The court's review of the work of an administrative authority of public law

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

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

The Constitutional Court held that the explanatory note to the draft law does not include any argument regarding the needs to limit the judicial review of Pre-Vetting Commission's decisions. Still, based on the opinion submitted by the authorities and the content of the challenged text, the Constitutional Court deduced that the legislator intended to avoid situations where the Pre-Vetting Commission decisions are annulled for some insignificant procedural irregularities and, on the other hand, it wanted to ensure the celerity of solving appeals, in order to have sooner an operational Superior Council of Magistracy. The Constitutional Court held that these legitimate goals can fit under the overall objectives of public order and guarantee of justice authority and impartiality, as provided for in Article 54(2) of the Constitution (DCC No 5 of 14 February 2023, §78).

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

Consequently, the Special Panel of Judges found that the Constitutional Court has established a double test that has to be met for the candidate's appeal against the decision of the Independent Evaluation Commission for assessing the integrity of candidates for the position of member in the self-administration bodies of judges and prosecutors to be accepted, namely: 1) the Pre-Vetting Commission made

serious procedural errors during the evaluation procedure, affecting the fairness of evaluation, and 2) circumstances exist which could have led to the candidate passing the evaluation.

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

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

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

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

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

The serious doubts of the Commission have to be analyzed/evaluated both in terms of proportionality and fair treatment.

Thus, by the Decision No 5 of 9 December 2022 on the candidacy of Vitalie Stratan, candidate to the Superior Council of Magistracy, based on Article 8 para. 1, 2(a) and (c), para. 4(a) and (b), para. 5(b), (c), (d), (e) and (g) of Law No 26/2022, the Pre-Vetting Commission decided that the candidate does not meet the financial and ethical integrity criteria, and thus fails the evaluation.

Relevant here are the provisions of Article 8 para. (1), (2) (a) and (c), para. (4) (a) and (b), para. (5) (b), (c), (d), (e) and (g) of the Law No 26/2022, according to which, for the purposes of this Law, the evaluation of the integrity of candidates consists in verifying their ethical and financial integrity.

The candidate shall be deemed to meet the criterion of ethical integrity if:

a) he or she has not committed serious violations of the rules of ethics and professional conduct of judges, prosecutors or, as the case may be, members of other professions, nor has he or she committed reprehensible acts or omissions in his or her work that would be inexplicable from the point of view of a legal professional and an impartial observer;

c) he or she has not violated the legal regime of declaration of assets and personal interests, of conflicts of interest, incompatibility, restrictions and/or prohibitions.

A candidate shall be deemed to meet the financial integrity criterion if:

a) the candidate's assets have been declared in the manner established by law;

b) the Pre-Vetting Commission finds that his/her assets acquired in the last 15 years correspond to the declared income.

To assess the financial integrity of a candidate, the Pre-Vetting Commission shall verify:

b) The candidate's compliance with the declaration of assets and personal interests;

c) the method of acquiring the property owned or possessed by the candidate or persons referred to in art. 2 para. (2), as well as the expenses associated with the maintenance of such assets;

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

e) existence or not of loan, credit, leasing, insurance or other contracts capable of providing financial benefits, in which the candidate, the person defined in art. 2 para. (2) thereof, or the legal entity in which they are beneficial owners, is a contracting party;

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

At the same time, in accordance with Article 2(2) of the said law, as part of the evaluation of the candidates referred to in paragraph (1), the wealth of persons close to the candidates, as defined in Law No 133/2016 on the Declaration of

Assets and Personal Interests, as well as the persons referred to in Article 33(4) and (5) of Law No 132/2016 on the National Integrity Authority, shall also be verified.

The Special Court holds that a close person within the meaning of Article 2 of Law No 133 of 17 June 2016 on the Declaration of Assets and Personal Interests, is the spouse, child, cohabitant of the subject of the declaration, a person dependent on the subject of the declaration, as well as any person related by blood or adoption to the subject of the declaration (parent, brother/sister, grandparent, nephew/niece, uncle/aunt) and any person related by affinity with the subject of the declaration (brother-in-law/sister-in-law, father-in-law/mother-in-law, son-in-law/daughter-in-law).

According to Article 33(4) and (5) of Law No 132 of 17 June 2016 on the National Integrity Authority, the control of assets and personal interests shall cover family members, parents/parents-in-law, and adult children of the person subject to control. If the person subject to control cohabitates with another person, then the control shall cover the assets of that person, too.

If it appears that the property of the person subject to control has been registered in the name of other persons, the control will extend to such property and persons. If the subject of the declaration reported income and assets obtained from donations or holds assets on bailment, the control will also extend to the donor and the bailor. They may be requested to provide explanations about the origin of funds used to purchase and maintain the goods in question. In order to clarify these matters, the integrity inspector may request relevant information from any natural or legal person.

According to Article 3(1)(a) of the Law No 133 of 17 June 2016 on the Declaration of Assets and Personal Interests, the subjects of the declaration of assets and personal interests are the persons holding public office provided for in the Annex to the Law No 199 of 16 July 2010 on the Status of State Dignitaries.

It follows from the provisions of the Annex to Law No 199 of 16 July 2010 on the Status of State Dignitaries that the category of public office includes the position of court judge.

Thus, Vitalie Stratan, who works as a judge of the Chişinău Court, is subject to the declaration of assets and personal interests under Law No 133/2016.

According to Article 11 of Law No 199/2010, a public official is obliged to submit a declaration of assets and personal interests in accordance with the law. The public official is obliged to strictly observe the legal regime of conflict of interest.

Returning to the circumstances of the present case, the Special Panel of the Supreme Court of Justice notes that in Decision No 5 of 9 December 2022, in Section III, 'Evaluation of the candidate', the Pre-Vetting Commission found that

there were serious doubts about Vitalie Stratan, candidate for the position of member of the Superior Council of Magistracy, with regard to the criteria of financial and ethical integrity, namely:

1. Purchase of an apartment at a preferential price – eligibility and improvement of living conditions and understating the sale price;
2. Purchase of an apartment at a preferential price in 2014 – source of funds;
3. Failure to declare a credit of MDL 200,000 in the manner prescribed by law

Having analyzed the conclusions of the Pre-Vetting Commission on this circumstance in connection with the evaluation criteria, the Special Panel holds that the appeal filed by Vitalie Stratan is well founded.

The Special Panel of the Supreme Court of Justice notes that when the Commission faces the task to make a decision about the integrity of a candidate, it must establish whether there are serious doubts as to the compliance of the candidate with the ethical and financial integrity criteria set out in Article 8 of the Law.

It should be noted that the law obliges the Pre-Vetting Commission to issue a reasoned decision, which must contain the relevant facts, reasons and the Commission's conclusion on passing or failing the evaluation.

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.

By its decision, the Evaluation Commission found that the candidate Vitalie Stratan did not resolve serious doubts regarding the compliance with the criteria of ethical and financial integrity established in Article 8 of Law No 26/2022, regarding the manner of acquisition of the 66.9 sq. m. apartment at a preferential price in 2014 and its sale in 2018; regarding the source of funds used to acquire a 66.9 sq. m. apartment in Chişinău, regarding the loan taken from a close relative.

The Special Panel concludes that the plaintiff's arguments before the court demonstrate the existence of circumstances that could have led to his passing the evaluation before the Pre-Vetting Commission and that justify the reopening of the candidate's evaluation procedure.

With regard to the first non-compliance concerning the acquisition of an apartment at a preferential price in Chişinău – eligibility and improvement of living conditions and understating the sale price, the special court holds the following.

The Pre-Vetting Commission pointed out that its doubts resulted from the fact that the plaintiff failed to communicate to the Superior Council of Magistracy about all real estates he owned at the moment of filing the application for improvement of living conditions, i.e. he had never claimed that he was eligible for the preferential housing program due to his lack of living space in Chişinău. The Commission also stated that it had serious doubts as to whether the reported price at which the apartment was sold in 2018 was true.

In accordance with Item 4 of the Regulation on the selection of applicants included in the list of judicial employees in need of better housing conditions, approved by the Decision of the Superior Council of Magistracy No 3 of 6 September 2013, the following categories of employees of the judiciary may be applicants under the conditions of this Regulation: a) judges of Chişinău courts who have no or insufficient housing space within the Chişinău municipality; b) judges residing in Chişinău but working in other courts of the country and not provided with housing at their place of work or having insufficient housing space within the Chişinău municipality; c) employees of courts and employees of the Superior Council of Magistracy, who have

no or insufficient housing space in the Chişinău municipality and at the date of application have a stay in the judicial system of not less than 6 months (case file page 176-177 of the administrative case file).

According to Items 5, 6 and 7 of the same Regulation, the selection of applicants included in the list of judiciary employees in need of improving their housing conditions using the mortgage method is based on the examination of applications and documents submitted by them in accordance with the legislation in force, taking into account: a) the condition that the applicant is currently working in the judicial system; b) the period of employment in the judicial system; c) the living conditions of the applicant and his/her family; d) the number of family members; e) other conditions.

The Commission considers and verifies applications submitted by applicants in their absence.

If necessary, the Commission has the right to request additional information and documents.

It follows from the attached documents that on the date of the application, 17 September 2013, in order for Vitalie Stratan to participate in the program for the improvement of housing conditions of judicial employees, the applicant requested the Superior Council of Magistracy to include him in the list of applicants for the allocation of living space – a 4-room apartment in an apartment building at xxxx St., city of xxxx or xxxx St., on the grounds that he currently does not have any housing and that his family consists of 4 members, two of whom are minors (case file page 177, vol. I).

According to certificate No 0002/13/2435 dated 9 September 2013, issued by the State-Owned Entity ‘Cadastru’, which confirmed that according to the central cadastral data bank as of 6 September 2013, Vitalie Stratan is registered only as the owner of the unoccupied premises located in xxxx municipality, xxxx commune, xxxx village, x, xxxx street, No xxxx (case file page 181, vol. I).

The plaintiff also submitted other relevant documents on the matter, such as a copy of his identity card, a copy of his employment record book, a copy of his family composition certificate, etc. (case file page 178-178, 180-198, vol. I).

Respectively, when filing the application to the Superior Council of Magistracy, the candidate did not own real estate that would meet his living needs and which, as an effect, could have led to rejecting the applicant’s request to benefit of purchasing the apartment at a preferential price.

The Pre-Vetting Commission unjustifiably held that the objective of the program to improve the housing conditions of the plaintiff was not achieved by providing the apartment at a preferential price, which is contrary to the facts submitted by the plaintiff.

At the moment of filing the application with the Superior Council of Magistracy, the plaintiff had a family consisting of four members, the spouses and two children.

The Special Panel deems unfounded the Commission’s findings that it has doubts that the apartment would have been awarded to the candidate at a preferential price had he disclosed all relevant information about his real estate.

According to Article 6(c) of Law No 26/2022, in order to carry out its functions, the Pre-Vetting Commission must collect and verify any data relevant to the evaluation of candidates.

In this case, the Special Panel concludes that the Commission did not check all

factual circumstances and did not give a correct appraisal to the records submitted by the candidate, because at the time of filing the application for an apartment the plaintiff did not have sufficient accommodation for all his family members and the contract on capital investment in the construction of accommodation was concluded on 8 August 2014 (case file page 210-217, 219, vol. I), but the apartment purchased at preferential price was transferred into use only in 2017 (case file page 208-209, vol. I).

Moreover, the observation of the Pre-Vetting Commission in the decision that the plaintiff did not submit a copy of the excerpt from the land cadaster is irrelevant, since in accordance with the norms of law, the Commission in the performance of its duties collects and verifies any data relevant to the evaluation of candidates.

In addition, the Special Panel notes that the candidate Vitalie Stratan was not given the opportunity to remove serious doubts about himself with additional data and information, which due to the short timeframe (about 2 months) could not be provided by the plaintiff.

In this regard, the Special Panel finds the plaintiff's observation to be well-founded, given that the Pre-Vetting Commission exercised superficial control over the accumulation of information and did not give the candidate the opportunity to submit it himself, given that at the time of the request, Vitalie Stratan did not have all the requested documents, but informed the Commission that he needed additional time to provide them, as evidenced by Vitalie Stratan's September 24, 2022 email to the Pre-Vetting Commission, which contains the following message: 'In view of the limited time granted by the Commission for the production of the requested documents, which are in the possession of individuals or bodies and instances both at home and abroad, I respectfully request that their presentation, the answer to these questions, as well as to others that may arise during the proceedings, be given in the presence of the members of the Commission, in order to avoid uncertainty' (case file page 49 of the administrative file).

Therefore, the argument of the Pre-Vetting Commission, given in the statement of defence, that the candidate Vitalie Stratan did not even make any attempt to obtain the relevant information and did not apply for extension of the time limit for providing the requested answers and documents, cannot be sustained as it is contrary to the case materials.

The above indicates that Vitalie Stratan did not avoid answering additional questions and sub-questions of the Pre-Vetting Commission to which there were doubts, but it took more time to provide them in order to clarify all the suspicions that were presented to the candidate Vitalie Stratan.

The Special Panel also finds unfounded the opinion of the Pre-Vetting Commission that the plaintiff never claimed to be eligible for the preferential housing program due to the lack of housing space in Chişinău, because when applying for inclusion in the program for improvement of housing conditions of judicial employees on 17 September 2013, the Commission of the Superior Council of Magistracy for the selection of applicants included in the list of judicial employees in need of improvement of housing conditions did not establish any circumstances that would allow to deny Vitalie Stratan inclusion in the list of persons in need of improvement of housing conditions using the mortgage method.

Moreover, there is no evidence that the respective Commission requested additional information or documents from the plaintiff in this regard.

It can be concluded that the plaintiff, as of 17 September 2013, when he applied to the Commission of the Superior Council of Magistracy for the selection of applicants included in the list of judicial employees in need of improvement of housing conditions, within the framework of the documents attached to the application (copy of the identity card, certificate of family composition, certificate from the cadastral office of Chişinău, copy of the work record book, certificate of employment), was eligible to participate in the program for the provision of housing at preferential prices.

The purpose of purchasing an apartment at a preferential price was not a prerequisite for selection, which had to remain after the apartment was purchased, so the acquisition of real estate with its subsequent sale cannot be considered as a failure of the candidate to meet the criteria of financial and ethical integrity.

It is also impossible to agree with the conclusion of the Pre-Vetting Commission that Vitalie Stratan received real estate at a preferential price, while his wife owned another real estate with an area of 50.2 sq.m., located in Chişinău. As it follows from the case file, this real estate is the personal property of the plaintiff's wife, received on the basis of the donation contract No 5195 of 1 December 2000 (case file page 172 of the administrative case file).

In this regard, it is necessary to refer to the Article 22(1) of the Family Code, which clearly defines that property belonging to each spouse before marriage, as well as property received by one of the spouses during the marriage as a gift, inheritance or other gratuitous way, is the personal property of each spouse.

Taking into account the above circumstances, the fact that candidate Vitalie Stratan took advantage of a preferential price apartment in 2014 and sold it in 2018, does not constitute a violation that raises serious doubts under Article 13(5) of Law No 26/2022 regarding the candidate's compliance with the criterion of ethical integrity and the criterion of financial integrity under Article 8(2)(a), (4)(b) and (5)(c) of Law No 26/2022, i.e. the solution of the Pre-Vetting Commission is clearly unreasonable.

Further, analyzing the Decision No 5 of 9 December 2022, regarding the second mentioned non-compliance, the Special Panel holds that the Pre-Vetting Commission found unjustified serious doubts about the source of funds for the acquisition in 2014, at a preferential price, of an apartment with an area of 66.9 sq.m., located in Chişinău.

According to Article 33(4) and (5) of Law No 132 of 17 June 2016 on the National Integrity Authority, the control of assets and personal interests shall cover family members, parents/parents-in-law, and adult children of the person subject to control. If the person subject to control cohabitates with another person, then the control shall cover the assets of that person, too.

If it appears that the property of the person subject to control has been registered in the name of other persons, the control will extend to such property and persons. If the subject of the declaration reported income and assets obtained from donations or holds assets on bailment, the control will also extend to the donor and the bailor. They may be requested to provide explanations about the origin of funds used to purchase and maintain the goods in question. In order to clarify these matters, the integrity inspector may request relevant information from any natural or legal person.

According to Article 4(1) of Law No 133 of 17 June 2016 on the declaration of assets and personal interests, in force in the version of the adoption date, subjects falling under the provisions of Article 3(1) shall declare:

- a) income obtained jointly with the family members during the declaration period;
- b) all types of movable and immovable property, that is owned with the right of usufruct, use, habitation, superficies, or is possessed by the affiant or his/her family members based on contract of mandate, commission, trust management and on contracts on transfer of possession and use (lease, rental, leasing, bailment) as of the date of filing the Income and Property Statement;
- c) property acquired through an intermediary or transferred for valuable consideration to ascendants, descendants, brothers, sisters and in-laws of the same kinship degree, as well as property transferred free of charge to any person;
- d) financial assets, meaning bank accounts, investment funds, equivalent forms of investments and savings, investments, bonds, checks, bills of exchange, loan certificates, other documents that include personal patrimonial rights held by the subject of declaration, of his/her family members, direct investments in national currency or in a foreign currency, made by him/her or by his/her family members, as well as other financial assets;
- e) declarant's and his/her family members' stock in the share capital of companies;
- f) debts in the form of debit (including unpaid taxes), mortgages, guarantees issued to third parties, loans and credits.

The Special Panel notes that during the hearing, the candidate informed the Commission that he had three different sources of funds for the purchase of the apartment: a loan of MDL 200 thousand taken from a close relative; a loan of MDL 100 thousand taken from a bank (case file page 222, vol. I); and family savings until 2014 – funds that were declared according to the legal manner and regime of declaration. Thus, the facts cited cannot be viewed as serious doubts regarding his compliance with the financial integrity criterion under Article 8 para. 4(b) and para. 5(c), (d) and (e) of Law No 26/2022.

The funds referred to by the candidate, which were included in the income declarations, have not been subject to a control of assets and personal interests by the National Integrity Authority.

In the challenged decision, the Pre-Vetting Commission noted that a judge must refrain from any conduct, action or manifestation that could undermine public confidence in the judiciary, and that a judge is prohibited from illegally receiving material goods, services, benefits or other advantages, including accepting or purchasing goods (services) at a price (tariff) lower than their real value, alluding to the purchase of the apartment at a preferential price, without, however, establishing with certainty whether Vitalie Stratan had actually violated ethical standards.

After the plaintiff, on the basis of the investment contract of 8 August 2014, received an apartment of 66.9 sq.m. located in Chişinău at a preferential price, it is certified that the Commission of the Superior Council of Magistracy for the selection of applicants included in the list of judicial employees in need of improvement of housing conditions, did not identify any deficiencies that would not entitle him to this right.

The Special Panel points out that the Commission's findings that it has serious doubts about the source of funds for the purchase of the 66.9 sq.m. apartment, which have not been mitigated by the candidate, cannot be regarded as a true violation of financial integrity, or this would be an infringement of the rule of protecting the legitimate expectation towards the activity of public authorities of the state, who have tasks and powers to act.

As for the loan amount of MDL 100,000, it was confirmed by Victoriabank SA with certificate No 52 dated February 19, 2023 (case file page 222, vol. I).

Moreover, if the Pre-Vetting Commission had doubts about the loan of MDL 100,000 received by the plaintiff from CB 'Victoriabank' SA in 2016, this information could have been obtained by it before the stage of requesting additional information from the evaluated candidate.

At the same time, during the court session, the candidate presented pension certificates from Romania, additionally confirming the income of close persons from whom Vitalie Stratan took a loan of MDL 200,000 in 2014 (case file page 224-236, vol. I).

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

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

However, it is found in this case that the Pre-Vetting Commission did not preserve evidence such as the explanations given by the candidate in support of his position.

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

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

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

The Special Panel highlights as a matter of jurisprudential principle that the wording "serious doubts" in Article 13(5) of Law No 26/2022 establishes a derogation from the standard of proof laid down in Article 93 of the Administrative Code, even this article opens the way towards such a derogation, including under Article 2(2) of the Administrative Code.

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

The Special Panel holds that the plaintiff provided sufficient logical arguments and that the fact happened in the way she stated and the Commission wrongly failed to consider these arguments as relevant. As regards the third non-compliance, the Pre-Vetting Commission had serious doubts due to his failure to declare the loan of MDL 200,000 as required by law.

According to Article 4(1)(e) of Law No 133 of 17 June 2016 on the Declaration of Assets and Personal Interests, the entities referred to in Article 3(1) must declare the personal debts of the subject of declaration or debts of his/her family members, his/her cohabitee in the form of debit, pledges, mortgages, guarantees to a third party, loans and/or credits, if their value exceeds 10 average salaries in the economy.

Similar provisions are contained in Item 41 of the Regulation on the procedure for completing the declaration of assets and personal interests in electronic form, approved by Order No 4/2022 of the Chairman of the National Integrity Authority.

The fact that Vitalie Stratan declared only in 2014 a loan in the amount of MDL 200,000, and did not declare this debt in subsequent declarations, is not an obstacle not to analyze in detail whether in the following years the amount of the loan debt did not fall

below the legal limit for declaration – if it exceeds the value of 10 average salaries in the economy.

In particular, it is noted that Protocol No 1073/19 of 8 December 2022 on the verification of declarations of assets and personal interests, drawn up by the National Integrity Authority, found that Vitalie Stratan, on 4 November 2022, filed a new declaration of assets and personal interests for the year 2021, indicating in the section ‘Debts’ the existence of a loan (year of contracting – 2014) in the amount of MDL 200,000 lei, with an interest rate of 0% and maturity in 2030, with the notation ‘omission, pre-vetting’ (case file page 30-32, vol. I).

During the public hearing of Vitalie Stratan, posted on the website of the Pre-Vetting Commission, he confirmed the existence of the loan in question. He also confirmed that the said amount had not been repaid, indicating that he was not aware of the need to indicate the amount of MDL 200,000 in later declarations (2014 declaration).

The National Integrity Authority determined that there was no appearance of a material difference between the income received, expenses incurred, and assets acquired of the subject of the declaration, and no appearance of concealment of conflicts of interest, incompatibilities, restrictions, and limitations.

The Special Panel points out that the so-called violations of financial and ethical integrity were assessed by the Pre-Vetting Commission subjectively and in isolation from the historical and social context, which affects the security of legal relationships. Generally, the legal system accepts the retroactive effect of the law if it favors the legal situation of a person, but this effect cannot be projected by way of legal interpretation.

The Special Panel notes that in issuing the appealed decision, the Pre-Vetting Commission focused on the fact that the candidate did not submit: a copy of the application submitted to the Superior Council of Magistracy for inclusion in the program to improve housing conditions; a copy of the excerpt from the cadastral office about the real estate owned by Vitalie Stratan at the time of his application to the Superior Council of Magistracy for the purchase of an apartment at a preferential price; a copy of the investment contract for the construction of housing (in full), the schedule of payment for the cost of the apartment and payment methods; other additional information about the financial situation of the persons close to Vitalie Stratan who granted him the loan of MDL 200,000, namely their citizenship of another European country and their pension in that country, confirming that they had the financial capacity to grant him this amount; a copy of the credit agreement for the amount of MDL 100,000, etc. The absence of these documents raised serious doubts with the Pre-Vetting Commission.

However, these documents were not submitted by the plaintiff in the present appeal, as obtaining this additional information requires a longer time. This argument was also made by the plaintiff in his letter dated September 24, 2022 (case file page 49 of the administrative case file), but was not taken into account by the Commission, which informed the plaintiff that it was preparing for a hearing (case file page 50 of the administrative case file).

The Special Panel highlights that Commission’s conclusions regarding the existence of serious doubts related to the plaintiff’s ethical and financial integrity are clearly unreasonable. The Pre-Vetting Commission did not make a correlation between

the legal ground and the factual circumstances related to the candidate's ethical and financial integrity.

The Special Panel highlights that the terms 'seriously', 'wrongful', and 'inexplicable' from Article 8(2)(a) of Law No 26/2022 are, in their nature, undefined legal categories (vague legal provision) that do not grant the Commission discretion and arbitration, but require a complex and rigorous interpretation of the norm in the light of firmly established facts.

The Court, by virtue of its constitutional function of administering justice, has the ultimate authority to interpret a vague legal notion in a concrete case. The Court notes that persons engaged in professional activities must exercise great prudence in their work and must assume the risks inherent in their activities (see CCD No 173 of 13 December 2022, § 28).

Moreover, it cannot be overlooked that, in the context of the principle of equal treatment, in the case of the other candidate prosecutor evaluated, the Pre-Vetting Commission concluded that, given the specific circumstances of the case, the irregularities found did not reach a level of severity so as to consider the candidate as failing to meet the criteria of ethical and financial integrity.

From this perspective, the Special Panel is going to establish to what extent the peers, judges and prosecutors running for positions in the self-administration bodies, were treated equally or unequally in terms of the practice formed by the Pre-Vetting Commission since the beginning of the evaluation process until nowadays.

In this respect, without expressing an opinion about the quality and legality of Commission decisions regarding other candidates, the Special Panel will study by way of comparison, in terms of equal treatment, decisions to pass the evaluation issued before the case of Vitalie Stratan, in order to find the existence or inexistence of different treatments in similar situations, as well as decisions to pass the evaluation issued after 09 December 2022, in order to determine if the Pre-Vetting Commission changed its practices for the future, in line with Article 137(4) of the Administrative Code.

As a result of this activity, the Special Panel identified cases in the practice of the Pre-Vetting Commission, both before and after the evaluation of Vitalie Stratan, when it found violations of the legal regime of asset declaration in relation to other candidates, violations expressed in non-declaration of assets, differences in prices of immovable/movable property, but accepted the explanations of the candidates, considering that they made technical omissions, without any intention to circumvent the legal regime of asset declaration.

Nevertheless, in its Decision No 5 of 09 December 2022 regarding candidate Vitalie Stratan, the Pre-Vetting Commission did not explain the factual aspects that would show that he is appreciated as lacking integrity compared to other candidates in the same situation. Thus, as opposite to other identical cases before and after 09 December 2022, the Pre-Vetting Commission disconsidered the plaintiff's explanations and took a selective and unfounded attitude in comparison to similar situations.

Therefore, the Pre-Vetting Commission will have to re-examine all the circumstances related to whether the plaintiff had the right to purchase an apartment in Chişinău at a preferential price, as well as the source of funds to purchase the apartment

at a preferential price in 2014, including the issue of non-declaration of a loan of MDL 200,000 in the manner prescribed by law.

The Special Panel established under the Supreme Court of Justice notes that the state has vested the Pre-Vetting Commission with the prerogative to be guided by certain standards in order to select the candidates with highest integrity, who could ensure the proper functioning of the judicial system *as a whole*, including through the implementation of coherent policies in line with generally accepted standards.

It should be mentioned that the said Commission has only duties in relation to selecting candidates for membership in the Superior Council of Magistracy and is not empowered to set qualifiers or make findings regarding the candidate's capacity as a judge.

Thus, in the opinion of the Special Panel, the plaintiff justified the necessity and consistency of his actions to acquire at a preferential price the 66.9 sq.m. apartment, given that the plaintiff had previously met the criteria necessary for its acquisition.

From the text of the decision subject to judicial review, the Special Panel notes that, with regard to the second non-compliance, the Pre-Vetting Commission concluded that it had serious doubts (Article 13(5) of Law 26/2022) about the candidate's compliance with the criterion of ethical integrity under Article 8, para. 2(c), para. 4(a) and para. 5(b) and (e) of Law No 26/2022 in connection with a loan taken from a close relative, which were not resolved by the candidate.

The Commission also argued that according to Article 3(3) of the 2007 Code of Ethics for Judges, a judge must refrain from any conduct, action or manifestation that could undermine public confidence in the judiciary, and according to Article 14(2) of the same Code, a judge is prohibited from illegally receiving material goods, services, benefits or other advantages, including accepting or purchasing goods (services) at a price (tariff) lower than their real value.

Also, the Pre-Vetting Commission noted that the 2015 Code of Ethics and Professional Conduct for Judges in Articles 5.1 and 5.2 states that judges must adhere to the highest standards of integrity to ensure public confidence in the courts.

A judge shall be aware of the risks of corruption and shall not engage in or create the appearance of corrupt behavior in his/her work; and shall not solicit, accept or receive gifts, favors or benefits for the performance or non-performance of his/her duties or by virtue of his/her office.

A judge shall conclude transactions regarding personal property in a way that does not cause doubt, does not affect his/her independence and impartiality or trigger conflict of interest.

Also, according to art. 6 para. (2) of the same Code, a judge “must refrain from any behavior, action or manifestation that could prejudice the public's trust in the judicial system.”

The Special Panel notes that ethical conduct is determined by the contemporary realities of democratic societies.

Thus, the Judge's Code of Ethics provides the people who fall under it with rules of conduct in concrete situations, which would help them fulfil their duties in the institution, but also outside of the job, in order to contribute to keeping public trust in the justice system. These rules supplement the legal duties of professionals and are

meant to raise their accountability when doing their job.

In this respect, the rationale of the Constitutional Court is indispensable, as reflected in section 120 of Decision No 42 of 6 April 2023, where it held that by means of the phrase “seriously”, the legislator limited the discretionary margin of the Pre-Vetting Commission when assessing the ethical integrity of the candidates.

This criterion allows the Commission to decide on failure of the candidate only if it finds violations of ethics and professional conduct that are of a high severity. This means that the candidate can discuss the seriousness of violations found by the Commission before the Special Panel of the Supreme Court of Justice, which could ultimately appreciate the “serious” nature of the found deviation, depending on the specific circumstances of the case.

Therefore, the Special Panel cannot agree with the conclusions of the Pre-Vetting Commission that under Article 8(2)(c) of Law No 26/2022, the candidate raises serious doubts about the candidate's compliance with the criterion of ethical integrity in respect of the loan taken from a close relative.

According to Article 8(2)(c) of Law 26/2022, a candidate is considered to meet the criterion of ethical integrity if he or she has not violated the legal regime of declaration of assets and personal interests, conflict of interest, incompatibility, restrictions and/or limitations.

The Special Panel noticed that Chapter III, section 2 of the Decision of the Pre-Vetting Commission No 5 of 9 December 2022 does not contain a serious and logical justification for the second non-compliance, ‘non-compliance with the ethical integrity criterion’.

Moreover, the violations noted by the Pre-Vetting Commission do not meet the criterion that would allow the Commission to decide not to pass the candidate for violations of the rules of ethics and professional conduct of a high severity.

In addition, note that should the evaluated candidate submit logical arguments and explanations to the Commission, which are true to the social-economic context of the Republic of Moldova, then the likelihood of a fact being in a way or another should be weighed and any doubt has to be treated in favor of the candidate and this is a cornerstone principle of the rule of law.

The Special Panel characterizes as untenable the Pre-Vetting Commission’s approach that a judge is prohibited from illegally receiving material goods, services, benefits or other advantages, including accepting or purchasing goods (services) at a price (tariff) lower than their real value, implying that any participant in the judges' preferential real estate program is potentially subject to the qualifier – of questionable financial and ethical integrity.

The program for the improvement of housing conditions, in the sense of obtaining living space at a reduced price compared to the market price, was intended exclusively for employees of the judiciary of the Republic of Moldova.

Also here, the Special Panel points out that the Judge's Code of Ethics in Section 13(3) provides that a judge may acquire or dispose of property, engage in financial and commercial transactions in a manner that does not give rise to ethical doubts, suspicion of the judge's impartiality or conflict of interest.

In the present case, the transactions for the purchase of apartments at preferential

prices were not recognized as illegal, hence, the Pre-Vetting Commission improperly qualified and questioned the validity of the transaction on Vitalie Stratan's purchase of an apartment at a preferential price.

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

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

In this respect, the Special Panel emphasizes that, according to Article 82 of the Administrative Code, if the administrative procedure is to be carried out in writing as per Article 28 or is carried out in writing, the public authority, when starting the procedure, shall create a digital or hard copy folder that would include all documents and records regarding the said procedure. The digital folder shall include, as appropriate, scanned copies of paper-based documents and the authenticity of these copies shall be confirmed by the electronic signature applied by the responsible person within that public authority, electronic documents, other relevant records and information in digital format.

Scanned digital copies of official documents issued on paper and digital records on which the electronic signature was not applied are used without restriction in the relationship with the public authority and may be included in the administrative case file, unless the regulatory acts require expressly the signature to be applied on these copies/records or the observance of requirements towards electronic documents.

When included in the file, a document is referenced with continuous page numbers.

Should documents be retrieved from the file for a certain period, a mention shall be made in this respect, which must include: a) name of the retrieved document; b) number of retrieved pages; c) reason for retrieving the document; d) name of the person that ordered the retrieval of the document; e) date when the document is retrieved. This mention shall be included in the file instead of the retrieved document.

Administrative case files shall be kept until the expiry of their term of storage, which results from the applicable legal provisions in force.

In line with Article 83 of the Administrative Code, the public authority holding the administrative procedure shall grant, to the participants, access to the administrative case file.

Participants shall not have access to draft individual administrative acts before the completion of the procedure.

No access to the administrative case file is allowed if that would affect the appropriate performance of duties by the public authority or if it is necessary to maintain a secret protected by law or if it is necessary to protect the rights of participants to the

administrative procedure or of third parties.

Should it be justified, the public authority holding the administrative procedure may also allow, upon request, access to the file on the premises of another public authority or a diplomatic or consular mission of the Republic of Moldova overseas.

When accessing the case file, participants are allowed to take notes or make copies of the file. The cost of copies shall be incurred by every participant individually, which is 0.02 conventional units per page. Electronic copies of the case file, as well as electronic documents and copies thereof shall be provided free of charge.

Furthermore, the Special Panel notes that the Pre-Vetting Commission had the obligation to submit to the court, as per Articles 221 and 82 of the Administrative Code, the entire administrative case file of candidate Vitalie Stratan, so that the court could fulfil its constitutional task of effective judicial review of factual and legal matters.

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

The Special Panel finds that the hearing granted the motion of the plaintiff's representative, counsel Nicolae Leșan, and ordered that the Pre-Vetting Commission produce the candidate's case file, certified and formatted in line with the applicable legal provisions. Thus, as a result of implementing the protocolary conclusion of the Supreme Court of Justice, the Commission's representatives submitted to the court and to the plaintiff the case file to which the candidate did not have access at least 3 days prior to the hearing, as provided by Article 12(4)(c) of Law No 26/2022.

Moreover, during the consideration of this administrative case, the Commission's representatives admitted that candidate Vitalie Stratan did not receive and the case file of candidate Vitalie Stratan did not include all materials gathered by the Pre-Vetting Commission, but only the records that the Pre-Vetting Commission deemed to be relevant.

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

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

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

In the view of the Special Panel set up within the Supreme Court of Justice in this case, although the decision of the Pre-Vetting Commission to fail the evaluation does not prevent the candidate from continuing to work as a judge, or in another position previously held in the field of law, it may affect the candidate's professional reputation – protected by the right to respect for private life – since it includes findings regarding the candidate's lack of ethical and financial integrity (Denisov v. Ukraine [MC], 25 September 2018, §§ 107-109 and 115-116).

In this context, the plaintiff's observation is of crucial importance – integrity evaluation is an interference with the candidate's right to professional reputation, which is protected, among other things, by Article 8 of the European Convention on Human Rights.

The European Court of Human Rights established, in *Özpinar v. Turkey* (judgment of 19 October 2010, §§ 45, 46, 48), that Article 8 guarantees “private life” in a broad meaning, which includes the right to a “private social life”, i.e. a individual's right to develop his or her social identity.

In this respect, that right enshrines the possibility of turning to others in order to establish and develop relationships with the peers (see, to that effect, *Campagnano v. Italy*, no. 77955/01, § 53, ECHR 2006-V, and *Bigaeva v. Greece*, no. 26713/05, § 22, 28 May 2009).

The European Court reiterated that there is no reason of principle why the notion of "private life" should be taken to exclude professional activities. Some restrictions imposed in the area of professional activities may contravene Article 8 when they affect how individuals form their social identity by developing relationships with other human beings. It should be noted here that it is at work that most people most often have opportunities to reconnect with the outside world (*Niemetz*, cited above, para. 29).

In those circumstances, the European Court considered that the inspector's inquiry into the plaintiff's professional and private life, in the course of which witnesses were questioned about various aspects of the plaintiff's life, and the removal from administrative office resulting from that inquiry, which was motivated mainly by the conclusions drawn from her actions, could be regarded as an interference with her right to respect for private life (see, *mutatis mutandis*, the judgments in the *Vogt* case, cited above, para. 44, and *Smith and Grady v United Kingdom*, Nos 33985/96 and 33986/96, para. 71, ECHR 1999-VI).

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

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

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

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

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

According to Article 29(2)(c)-(3) of the Administrative Code, a measure undertaken by public authorities is deemed proportionate if it is reasonable. A measure undertaken by public authorities is reasonable if the interference it causes is not disproportionate compared to its purpose. This requirement involves a balancing of the legally protected values. The more damage is caused to a right, the more it is required for the advantage resulting from the interference to be superior. Note that excluding the right of a judge to be a candidate for membership in the Superior Council of Magistracy involves not just an interference, but rather an improper annulment of the right to be elected into this position. Such a solution cannot be accepted under the rule of law, as it is incompatible with the dignity of a human being and of a judge. The goal of trust in the justice system can be achieved by complex means, but in no way can it be done by reducing to nothing the idea of free, transparent, and competitive election for the membership of the Superior Council of Magistracy and its bodies. The judge, holding such a position, is presumed to have integrity and, should the opposite be proven, than he/she shall be dismissed from the judiciary by means of a disciplinary procedure or another procedure that would take into account the guarantees of his/her independence. The Special Panel notes that the purpose of Law No 26/2022, among other things, is to boost the trust in justice. To conclude on this legality aspect, the Special Panel finds that the decision of the Pre-Vetting Commission is also contrary to the proportionality principle.

The Special Panel finds that only these isolated violations of administrative procedure guarantees are severe procedural errors, which have affected the fairness of the administrative evaluation procedure and, as a consequence, the existence of some procedural circumstances that would have led to the candidate passing the evaluation.

The Special Panel notes that the State has vested the Pre-Vetting Commission with

the prerogative to be guided by certain standards in order to select the candidates with highest integrity for membership, inter alia, in the Superior Council of Magistracy, who in turn could ensure the proper functioning of the judicial system as a whole, including through the implementation of coherent policies in line with generally accepted standards.

The plaintiff proved to the Special Panel of the Supreme Court of Justice the plausible nature of the elements invoked in his appeal, including the correctness of the financial transactions carried out in the management, sale and purchase of movable and immovable property, as well as the observance of ethical and professional conduct rules.

The Special Panel holds that the found circumstances reveal the candidate's right to a different evaluation decision from the Pre-Vetting Commission than the appealed one, because their nature could lead to candidate Vitalie Stratan passing the evaluation.

Also, the Special Panel notes that Venice Commission recommended for the final decision on assessment to be made by the competent court, but the Parliament of the Republic of Moldova chose a different legal policy in relation to this topic. Despite that, the Special Panel highlights that, for the reason of effective protection of the rights, it has the right and the obligation to conduct a full judicial legality review of the factual and legal matters.

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

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

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

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

The Special Panel notes that the circumstances held by the Pre-Vetting Commission do not fit, from a proportionality perspective, the reasons of candidate Vitalie Stratan failing the evaluation. The Commission did not provide an analysis and reasoning of the legitimate purpose.

In the preamble to Law No 26/2022, the legislator provided expressly that it has adopted the mentioned law in order to increase the integrity of future members of the Superior Council of Magistracy, Superior Council of Prosecutors and their specialized bodies, as well as the society's trust in the activity of the self-administration bodies of

judges and overall in the justice system.

It is not clear from the appealed decision and the documents submitted by the defendant which of those goals are pursued by the decision to fail the evaluation of candidate Vitalie Stratan. Any of these goals would be legitimate, however none of them were analyzed by the Pre-Vetting Commission and the defendant's representatives did not provide a plausible answer to this question during the court hearing.

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

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

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

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

d e c i d e s :

To accept the administrative lawsuit brought by Judge Vitalie Stratan 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 decision No 5 of 9 December 2022 on the candidacy of Vitalie Stratan be annulled, and that the candidate evaluation procedure be resumed.

To annul 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 No 5 of 09 December 2022 on the candidacy of Vitalie Stratan.

To order the re-evaluation of candidate Vitalie Stratan by the Independent Evaluation Commission for assessing the integrity of the candidates for the position of

member in the self-governing bodies of judges and prosecutors.

This decision is irrevocable.

Hearing chaired by

Judge

Tamara Chișca-Doneva

Judges

Mariana Pitic

Ion Guzun