Decision No. 46 of 31 July 2023 on the Candidacy of Veaceslav GUȚAN,
Candidate for the Superior Council of Magistracy

The Independent Evaluation Commission for assessing the integrity of candidates for the position of member in the self-administration bodies of judges and prosecutors ("the Commission") deliberated in private on 14 July 2023 and 31 July 2023. The members participating were:

1. Herman von HEBEL
2. Victoria HENLEY
3. Nadejda HRIPTIEVSCHI
4. Vitalie MIRON
5. Tatiana RĂDUCANU
6. Nona TSOTSORIA

The Commission delivers the following decision which was adopted on that date:

I. The procedure

Veaceslav GUȚAN, retired and former university lecturer at the "Ștefan cel Mare" Police Academy ("the candidate"), was on the list of candidates submitted by the Parliament to the Commission on 5 May 2023 for evaluation for the position of member of the Superior Council of Magistracy.

The candidate has been an investigator inspector with the Călărași District Police Commissariat since 1987 and a senior inspec or with the Economic and Financial Police section of the same Commissariat since 1993 and the Directorate of Special Missions of the Ministry of Internal Affairs from 2000 to 2004 Since then, the candidate has been a university lecturer at the "Ștefan cel Mare" Police Academy. In 2020, the candidate retired from this position.

On 12 May 2023, the Commission sent an ethics questionnaire to the candidate to be filled in voluntarily and returned to the Commission by 1 June 2023. The candidate submitted the completed questionnaire to the Commission on 24 May 2023.

On 18 May 2023, the Commission sent a request to the candidate for completing and submitting by 25 May 2023 the Declaration of assets and personal interests for the past five years as required by art. 9 para. (2) of Law No. 26/2022 on certain measures relating to the selection of candidates for position as a member of the self-administration bodies of the judges and prosecutors (hereinafter "Law No. 26/2022"). The declaration also includes the list of close persons in the judiciary, prosecution and public service, as required by the same article. The candidate submitted a completed declaration to the Commission on 23 May 2023.

The Commission obtained information from numerous sources in order to assess the candidate's financial and ethical integrity. The sources from which information was obtained concerning evaluated candidates generally included the National Integrity Authority, State Fiscal Service, General Inspectorate of Border Police, financial institutions, public institutions, open sources such as social media and investigative journalism reports and reports from members of civil society. Not all sources produced information concerning each candidate and not all of the information produced by sources about a candidate was pertinent to the Commission s assessment. All information received was carefully screened for accuracy and relevance.

To the extent that issues were raised from the candidate's declaration and que tionnai e and the information collected, those issues were raised in written questions with the c ndidate and during the public hearing.

Written communication with candidate:

On 8 June 2023, the Commission sent to the candidate a request for clarifying information, containing four questions, including 15 sub-questions and six requests for further documentation. The candidate replied within the requested time period on 13 June 2023 to all questions and provided most of the requested documents.

On 21 June 2023, the Commission sent a second round of eight questions, including 29 sub-questions and nine requests for further documentation, to clarify some issues that came out during the evaluation. The candidate replied within the requested time period on 26 June 2023 to all questions and provided most of the r quested documents.

On 28 June 2023, the Commission sent a third round of one question, including two sub-questions and one request for fu ther documentation, to clarify some issues that came out during the evaluation. The candidat replied within the requested time period on 30 June 2023 to all questions and provided all of the requested documents.

The candidate d d not request access to the evaluation materials according to art. 12 para. (4) lit. c) of Law No. 26 2022 and therefore did not receive the materials.

On 14 July 2023, the candidate took part in a public hearing of the Commission.

II The law relating to the evaluation

The Commission's evaluation of candidates' integrity consists of verifying their ethical integrity and financial integrity (art. 8 para. (1) of Law No. 26/2022).

Art. 8 para. (2) of Law No. 26/2022 provides that a candidate is deemed to meet the criterion of

ethical integrity if:

a) he/she has not seriously violated the rules of ethics and professional conduct of judges, prosecutors or, where applicable, other professions, and has not committed, in his/her activity, any wrongful actions or inactions, which would be inexplicable from the point of view of a legal professional and an impartial observer;
b) there are no reasonable suspicions that the candidate has committed corruption cts, acts related to corruption or corruptible acts, within the meaning of the Law on Integrity No. 82/2017;
c) has not violated the legal regime of declaring personal assets and interests, conflicts of interest, incompatibilities, restrictions and/or limitations.

The *Public Servant's Code of Conduct*, adopted by Law No. 25/2008 regarding the public servant's Code of conduct, last amended by Law No. 305/2017, was pplicable over the period of time covered by the evaluation. Prior to that, Law No. 443/1995 on public service (in force until 22 December 2008) and Law No. 158/2008 on public of ice and status of public official (in force since 23 December 2008) were applicable over the period of time covered by the evaluation.

Art. 8 para. (4) of Law No. 26/2022 provides that a candidate shall be deemed to meet the criterion of *financial integrity* if:

a) the candidate's assets have been de lared in the manner established by law;
b) the Evaluation Commission finds that his/her wealth acquired in the last 15 years corresponds to the declared revenues.

Art. 2 para. (2) of Law No. 26/2022 provides that the evaluation of candidates includes a verification of the assets of persons close to candidates, as defined in Law No. 133/2016 on declaration of assets and personal interests, as well as of the persons referred to in art. 33 para. (4) and (5) of Law No. 132/2016 on the National Integrity Authority.

Art. 8 para. (5) of Law No. 26/2022 provides that in order to assess the applicant's financial integrity, the Comm ssion is required to verify the following:

a) compliance by the candidate with the tax regime in the part related to the payment of taxes when using the means and income derived from the property held, as well as taxable income and the payment of import duty and export duty;
b) compliance by the candidate with the regime of declaring assets and personal interests;
c) the method of acquiring the property owned or possessed by the candidate or persons referred to in art. 2 para. (2), as well as the expenses associated with the maintenance of such assets;
d) the sources of income of the candidate and, where appropriate, of the persons referred to in art. 2 para. (2);
e) existence or not of loan, credit, leasing, insurance or other contracts capable of providing financial benefits, in which the candidate, the person defined in art. 2 para.

(2) thereof, or the legal entity in which they are beneficial owners, is a contracting party;

f) whether or not donations exist, in which the candidate or the person established in art. 2 para. (2) has the status of donor or recipient of donation;

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

In assessing and deciding upon the criteria related to financial and ethical integrity the Commission is not to depend on the findings of other bodies competent in the field concerned (art. 8 para. (6) of Law No. 26/2022). The Commission is required to assess he information gathered about candidates using its own judgment, formed as a result of multi-faceted, comprehensive and objective review of the information. None of the submi ted materials has a predetermined probative value without being assessed by the Commission (art 10 para. (9) of Law No. 26/2022).

A candidate shall be deemed not to meet the integrity criteria if serious doubts have been found as to the candidate's compliance with the above-listed requirements which have not been mitigated by the evaluated person (art. 13 para. (5) of Law No. 26/2022). As noted in the recent Venice Report on vetting in Kosovo, "In a system of prior integrity checks, the decision not to recruit a candidate can be justified in case of mere doubt, on the basis of a risk assessment. However, the decision to negatively assess a cu rent po t holder should be linked to an indication of impropriety, for instance inexplicable wealth, even if it cannot be proven beyond doubt that this wealth does come from illegal sources". Also, "[I]n other investigations like wider integrity checking the burden of proof will be discharged on the balance of probability". Venice Commission, CDL-AD(2022)011-e, Kosovo - Opinion on the Concept Paper on the Vetting of Judges and Prosecutors and draft amendments to the Constitution, adopted by the Venice Commission at its 131st Plenary Session (Venice, 17-18 June 2022), §§10,9.

Shifting the burden of proof to the candidate, once the evaluating body has identified integrity issues, has been found permissible by the European Court of Human Rights, even in the vetting of sitting judges wh may lose their positions or otherwise be sanctioned as a consequence of the evaluatio In *Xhoxhaj v. Albania,* no. 15227/19, §352, 31 May 2021 the Court stated that "it is not per se arbitrary, for the purposes of the "civil" limb of Article 6 § 1 of the Convention, that the burden of proof shifted onto the applicant in the vetting proceedings after the IQC [Independent Qualification Commission] had made available the preliminary findings resulting from the conclusion of the investigation and had given access to the evidence in the case file".

Under art. 5 para. (1) of the Evaluation Rules of the Independent Evaluation Commission for assessing the integrity of candidates for the position of member in the self-administrative bodies of judges and prosecutors of 2 May 2022, pursuant to Law No. 26/2022 (hereinafter "Evaluation Rules"), only if a candidate fully meets all of the indicators set for the in art. 8 para. (2) - (5) of Law No. 26/2022 does the candidate satisfy the criterion of "ethical and financial integrity".

III. Evaluation of the candidate

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

1. Failure to declare loans in 2014 and 2015 and bank accounts from 2012 to 2015

a. The facts

According to information available to Commission, during the period of 20 2 2016, the candidate took out two loans. As of 2013, the candidate was obliged to submit annual declarations on income and property (hereinafter "annual declarations") according to Law No. 1264/2002 on declaration and control of income and property of state dignitaries, judges, prosecutors, civil servants and some persons in leading positions submitted to the National In egrity Commission (hereinafter "NIC").

In 2012, the candidate took out a loan of 50,000 MDL from a Moldovan bank for the term of 2012 – 2015. He declared this loan in his 2013 annual declar tion but did not declare the loan in his 2014 annual declaration. The candidate repaid the loan according to the payment schedule between July 2012 and June 2015.

In 2014, the candidate took out a loan of 30,000 MDL from a Moldovan bank for the term of 2014 – 2016. The candidate declared the loan in his 2014 annual declaration but did not declare the loan in his 2015 annual declaration. He r paid the loan according to the payment schedule between March 2014 and February 2016.

In both written responses to the Commission and at the hearing, the candidate confirmed the existence and purpose f the two loans. He also provided all relevant documents relating to the loans, including the payment schedule and clarified the source of funds he used to repay the loan.

According to information available to the Commission, the candidate and his wife had three active bank accounts during the period 2013 - 2015 which he did not declare in his annual declarations for these years. One bank account was opened in December 2010 and is still active, which the candidate used as his salary account. One bank account was opened in December 2013 and closed in December 2020 and was used by the candidate's wife as a pension account. The third bank account was opened in April 2014 and closed in 2022 and was used exclusively for the interest payments on the loans provided by the bank. The candidate provided to the C mmission all bank statements relating to these accounts.

In response to written questions by the Commission, the candidate explained that when the annual declaration was first submitted in 2013, not much attention was paid to declaring loan contracts. The candidate also explained that he did not consider it necessary to declare salary and pension bank accounts as these were not accounts in which specific amounts of money were deposited

and saved. In relation to the bank account used for interest payments, the candidate stated that he did not remember the exact reason why he did not declare the account and that it was possible that he may have forgotten it, unintentionally.

At the hearing, the candidate confirmed that he had not consistently declared loans and ba k accounts and that he should have always disclosed them. He reiterated that, at the time, the submission of annual declarations was a relatively new development, and he might not have paid sufficient attention to his obligations.

At the hearing, the candidate also explained that he had never personally open d a bank account and that all accounts in his or his wife's names were opened by the bank and based on a request from his employer or the institution responsible for payment of hi wife's pension. He emphasized that if he had opened the bank account himself, he would have declared it in his annual declaration. The candidate emphasized that he had always declared his income and his wife's pension and that he had not hidden anything and had no in ention to avoid his obligations. With respect to the bank account relating to the payment of the loan the candidate considered that his non-declaration of this account was a technical omi sion.

b. The law

In determining whether a candidate meets the criterion of financial integrity, the Commission must verify that the candidate has complied with the legal regime of declaring assets, personal interests and the existence of loans as per art 8 para. (4) lit. a) and para. (5) lit. b) and e) of Law No. 26/2022.

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

Art. 2 para (2) of Law No. 26/2022 provides that the evaluation of candidates includes a verification of assets of persons close to candidates, as defined in Law No. 133/2016 on declaration of assets and personal interests, as well as of third persons referred to in art. 33 para. (4) and (5) of Law No. 132/2016 on the National Integrity Authority.

"Close persons", as defined in Law No. 133/2016 on declaration of assets and personal interests, are: "husband/wife, child, cohabitant of the subject of the declaration, the person supported by the subject of the declaration, as well as any person related through blood or adoption to the subject of the declaration (parent, brother/sister, grandparent, nephew/niece, uncle/aunt) and any person related by affinity with the subject of the declaration (brother-in-law/sister-in-law, father-in-law/mother-in-law, son-in-law/daughter-in-law).

According to art. 4 para. (1) lit. f) of Law No. 1264/2002 on declaration and control of income and property of state dignitaries, judges, prosecutors, civil servants and some persons in leading positions, the candidate was obliged to declare debts (including unpaid taxes), mortgages, guarantees issued for the benefit of third parties, loans and credits.

According to art. 4 para. (1) lit. d) of Law No 1264/2002 on declaration and control of income and property of state dignitaries, judges, prosecutors, civil servants and some persons in leading positions, the subject of the declaration had the obligation to declare all financial assets, i.e. bank accounts, investment funds, equivalent forms of saving and investing, inve tmen s, bonds, cheques, bills of exchange, loan certificates, other documents incorporating property rights of the declarant or their family members, direct investments in national currency r foreign currency made by them or by their family members, as well as other financial assets

According to art. 26 para. (1) lit. i) of Law No. 320/2012 regarding the activity of the Police and the status of the police officer (in force since 1 March 2013) provides that the police officer carries out his professional activity in the interest and in support of the person, the community and the state institutions, exclusively on the basis and in the xecution of the law, and is obliged to submit the income and property declarations, as wel as declarations of personal interests, in the manner and under the conditions provided by law.

Law No. 320/2012 regarding the activity of the Police and the status of the police officer (in force since 1 March 2013) was applicable over the period of time covered by the evaluation.

According to the Evaluation Rules, art 5 para. (2), in assessing a candidate's ethical integrity, the Commission may take into account the gravity or severity, the surrounding context, and the willfulness, of any integrity incident, and as to minor incidents, whether there has been a sufficient passage of time without further reoccurrences. While determining the gravity, the Commission will take into account all circumstances, including but not limited to:

a) wh ther the incident was a single event;
b) caus ng n or insignificant damage to private or public interests (including public trust) – such as the occasion of an ordinary traffic violation;
c) or not eing perceived by an objective observer as an attitude of disrespect for the social order arising from disregard for its rules and regulations.

c. Reasoning

The Commission is required to verify that the candidate has complied with the legal regime of declaring assets and personal interests and the existence of loans, as per art. 8 para. (2) lit. c), para. (4) lit. a) and para. (5) lit. b) and e) of Law No. 26/2022.

During the period of 2012 – 2016, the candidate contracted two loans. Although the candidate was obliged to submit annual declarations beginning in 2013, he omitted to declare one loan in

2014 and one loan in 2015. The candidate provided all relevant information relating to the loan contracts and the payment schedules. During the period 2013 - 2015, the candidate and his wife held three active bank accounts which he did not declare in his annual declarations for these years. One bank account was used as his salary account and one as his wife's pension account. The candidate did declare the salary and the pension in his annual declarations in the income section. The third account was used exclusively for interest payments on loans taken by the candidate. The candidate provided all bank statements relating to these accounts to the Commission.

Both in writing and at the hearing, the candidate admitted that he had not declared each of the loans on one occasion and that he had not declared any of the bank accounts during the period 2012 - 2015. He indicated that during that time, the submission of income and property declarations was in its initial phase and declaring loans was not given mu h attention. As for the bank accounts, he argued that at that time he thought it was not necessary to declare salary and pension bank accounts, as the salary and pension were already declared. At the hearing, he also argued that he had never personally opened the bank accounts, they were opened by the bank based on requests from his employer or the institution resp nsible for payment of his wife's pension. He stated that if he had opened the bank account himself, he would have declared it in his annual declarations.

In relation to the bank account used for intere t paym nts, the candidate did not remember the exact reason why he had not declared it and it was possible that he had just forgotten. At the hearing, he stated that he considered this a technical omission. He also repeatedly emphasized that he had no intention to avoid his obligations and that he had never hidden anything.

Annual declarations filed with the NIC serve a critical role for monitoring the financial and ethical integrity of prosecutors, judges and other public officials and uncovering corruption. The Evaluation Rules state that undeclared income or expenditures are relevant for financial integrity, insofar items have not been declared truthfully, and for ethical integrity, including but not limited to insofar as they relate to prohibited secondary incomes, tax evasion, or violation of anti-money laundering provisions (art. 6 para. (1)). A failure to declare income and assets and financial obligations nece sarily raises concerns about financial and ethical integrity.

In relation to the loans, the Commission observes that the candidate was inconsistent in declaring th loans. Both in relation to the 2012 and 2014 loans, the candidate declared the loans in the first annual declaration after contracting these loans, but not in the following year.

The argument presented by the candidate at the hearing that the salary and pension accounts were not opened by him but by the bank and that he would have declared them if he had opened the accounts himself, is based on a misstatement of the law. Art. 4 para. (1) lit. d) of Law No. 1264/2002 on declaration and control of income and property of state dignitaries, judges, prosecutors, civil servants and some persons in leading positions clearly provides that the subject of the declaration had the obligation to declare all financial assets, including bank accounts.

As the Commission does in instances when candidates have not fully disclosed bank accounts in accordance with the law, the Commission reviewed information about the bank accounts that had not been declared including the length of the period of non-disclosure, the level of activity, the type of account and the presence of any suspicious transactions. Two of the three bank accounts related to the salary of the candidate and the pension of his wife, and the candidate declared both the salary and the pension. The third bank account was used exclusively for the interest payments on the loans provided by the bank. The candidate also provided all necessary information regarding these accounts and the Commission was able to establish that no suspicious transact ons took place in these accounts. The Commission also took into account tha th candidate acknowledged that the non-declaration of these bank accounts was an omission on his part. The Commission furthermore did not find any benefit for the candidate not to discl se these bank accounts and did not find any other sources of income of the candidate or his wife, besides the ones declared by him. The candidate's answers also revealed no intent on to hide.

In conclusion, the Commission is of the view that, although th loans and the bank accounts should have been disclosed by the candidate in his annual declarations, the candidate's failure to do so under the circumstances does not amount to a serious doubt about the candidate's financial and ethical integrity.

In light of the above circumstances, the Commission did not find serious doubts (art. 13 para. (5) of Law No. 26/2022) as to the candidate's compliance with the criterion of ethical integrity as per art. 8 para. (2) lit. c) and financial integrity as per art. 8 para. (4) lit. a) and para. (5) lit. b) and e) of Law No. 26/2022 with respect to the non-declaration of loans and bank accounts because the candidate mitigated the Commission s concerns regarding this issue.

IV. Decision

Based on art. 8 pa a. (1), (2) and (4) and art. 13 para. (5) of Law No. 26/2022, the Commission decided that the candidate is compliant with the ethical and financial integrity criteria and thus passes th evalu tion.

V. Appeal and publication of the decision

Pursuant to art. 14 para. (1) of Law No. 26/2022, the candidate is entitled to appeal this decision within 5 days from receiving the decision.

Pursuant to art. 13 para. (7) of Law No. 26/2022, this decision is sent by email to the candidate and to the institution responsible for organizing the election or competition, which in the present case is the Parliament. If within 48 hours of sending the decision, the candidate does not notify the Commission of his or her refusal to publish the decision, the decision shall be published on

the website of the Parliament in a depersonalized form, except for the surname and first name of the candidate that remain public. The Commission will also publish the decision on its website if the candidate does not object to publication.

This decision was adopted unanimously participating members of the Commission.

Done in English and translated into Romanian.

Signature: 

Herman von HEBEL
Chairman Commission