

DECISION
In the name of the Law

THE SUPREME COURT OF JUSTICE

01 August 2023

Chisinau municipality

The special court panel, established within the Supreme Court of Justice, for the examination of appeals filed against the decisions of the Independent Evaluation Commission for assessing the integrity of candidates for the position of member in the self-administration bodies of judges and prosecutors

composed of:

the Chairman, the judge
the judges

Tamara Chișca-Doneva
Ion Guzun
Mariana Pitic

the clerks

Alexandr Beriozchin,
Victoria Melinte

With the participation of:

the plaintiff
the representative of the plaintiff, the defence lawyer

Ecaterina Buzu
Petru Balan

the representatives of the defendant, the defence lawyers

Roger Gladei
Irina Sugoneaco
Cernei Valeriu

having examined in a public court session, in the administrative proceeding, the application for appeal filed by Ecaterina Buzu 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, regarding the cancellation of the decision and ordering the resumption of the procedure for the evaluation of the candidate,

f i n d s o u t:

Arguments of the trial participants:

On 28 January 2023 Ecaterina Buzu, filed an appeal against the Independent Evaluation Commission for assessing the integrity of candidates for the position of member in the self-administration bodies of judges and prosecutors, requesting the annulment of 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. 10 of 4 January 2023, regarding the candidacy of Ecaterina Buzu, candidate for the position of member of the Superior Council of Magistracy and ordering the resumption of the evaluation procedure for the candidate Ecaterina Buzu by the Independent Evaluation Commission for assessing the integrity of candidates for the position of member in the self-administration bodies of judges and prosecutors.

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

On 06 April 2022, the Commission received from the SCM the list of candidates registered for the competition for the position of member of the Superior Council of Magistracy, including the plaintiff, for the beginning of the evaluation procedure, and on 21 June 2022, the Commission sent the plaintiff a questionnaire on ethical integrity to be completed voluntarily and returned to the Commission by 5 July 2022. The plaintiff requested the Commission to give her the possibility to send the questionnaire later; therefore the term was extended until 11 July 2022, the date on which the questionnaire concerned completed by Ecaterina Buzu was sent to the Commission.

Subsequently, several rounds of questions and sub-questions were addressed to the plaintiff and she answered them timely and accurately.

On 2 December 2022, the plaintiff participated in the hearings in public session of the Evaluation Commission, its end, deliberation were announced, and on 8 December 2022, she was sent the fifth round of questions, which contained 1 question, including 2 sub-questions, to make clear some aspects that arose during the evaluation. The answers to these questions were formulated by the plaintiff within the established deadline.

Further, on 23 January 2023, at 14 h. 13 min., the Decision of the Pre-Vetting Commission was e-mailed to the plaintiff by the Secretariat of the Evaluation Commission.

Thus, it was specified that the Decision no. 10 of 4 January 2023 regarding the candidacy of Ecaterina Buzu, candidate for the position of member in the Superior Council of Magistracy, is focused on the following aspects:

1. 'Serious doubts' of the Evaluation Commission (Art. 13(5) of the Law no. 26/2022) regarding the compliance by the candidate with the criterion of financial integrity under Art. 8(4)(a) and Art. 8(5)(b) and the criterion of ethical integrity according to Art. 8(2)(c) of the Law no. 26/2022 in respect of the declaration of assets and personal interests subject to the procedure established by the legislation, doubts that were not removed by the candidate, and in respect of the compliance by the candidate with the criterion of financial integrity according to Art. 8(4)(b) and(5)(c) and d) in relation to the sources of cash deposits in one of the bank accounts of the

candidate;

2. 'Serious doubts' of the Evaluation Commission (Art. 13(5) of the Law no. 26/2022) regarding the compliance by the candidate with the criterion of ethical integrity, based on Art. 8(2)(a) of the Law no. 26/2022, in relation to the rent-free use of the apartment, owned by a minor, for 14 years, doubts that were not removed by the candidate.

As regards these issues, the plaintiff mentioned that, according to Art. 8 of the Law no. 26 of 10 March 2022, a candidate is considered to meet the criterion of financial integrity if, para. (4)(a): the assets of the candidate were declared subject to the procedure established by the legislation; b) the Evaluation Commission finds out that the assets acquired by the candidate in the last 15 years match the declared income, and para. (5)(b) the compliance by the candidate with the legal provisions of declaration of assets and personal interests; c) the manner of acquiring the goods owned or possessed by the candidate or the persons specified in Art. 2(2), as well as the expenses of maintaining these goods; d) the sources of income of the candidate and, as the case may be, of the persons specified in Art. 2(2).

As regards the discretionary right, it was noted that the conception of the Administrative Code of the Republic of Moldova (articles referred to) outlines 3 distinct meanings: i) discretion in the field of material administrative law (the basis for issuing the individual administrative act is formulated in terms like 'may', 'possibly' or 'it is authorized'); ii) the procedural discretion that refers strictly to matters of administrative procedure (for example, the choice of communication methods according to Art. 96 of the Administrative Code of the Republic of Moldova, types of evidence to clarify a fact according to Art. 87 of the Administrative Code of the Republic of Moldova, etc.); iii) the judicial discretion, granted to the judge (for example, the court according to Art. 214 can suspend the execution of the unfavorable individual administrative act).

Therefore, passing the evaluation is an individual administrative act which is mandatory, not discretionary. If all the conditions set out in Article 8(2) and (4) of the Law No 26 of 10 March 2022 are satisfied, it means that the Commission has the obligation to issue a favorable decision to pass the candidate to the position of member of the Superior Council of Magistracy and deem that the candidate met the financial and ethical integrity criteria.

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

At the same time, the concept of 'serious doubt' constitutes undefined (undetermined) legal concepts, which outline the specifics of the administrative law, or they do not offer discretion, but a margin in establishing the facts from abstract to specific and, consequently, the application of the rules as appropriate as possible to a specific case (the so-called fair justice). The most common errors in the application of such legal concepts refer to the correct establishment of the facts and the interpretation of the law.

Returning to the disputed decision, the plaintiff indicated that the Evaluation Commission made the following conclusions regarding the existence of bank accounts opened in her name: At the public hearings, the candidate stated that the information the Commission received regarding the cash deposits on that account is wrong, that it

was impossible to deposit money on that account and that she did not deposit money on that account because it was a credit card.

As regards cash deposits in the bank account no. 2, the candidate did not provide other sources of funds for cash deposits than her salary. The plaintiff did not explain what funds she used to cover living expenses or how she was able to deposit most of her salary in an account and not use it.

After the hearings, the Commission asked the candidate to verify the account statements provided by the bank regarding the bank account no. 2 and no. 3. The candidate confirmed that the information the Commission received from the bank was correct. In the period 2011-2012, the amount of 79,124.35 MDL was withdrawn from her flexible account card. In the period 2011-2012, she deposited cash to replenish the card account balance with the amount of 111,956.32 MDL.

The amounts deposited in 2011 and 2012 are close to 90% of the total salary of the candidate in those years (the salary for 2011 totalled 72,056 MDL; the salary for 2012 totalled 60,082 MDL), but the candidate did not indicate any other sources of income for cash deposits. Moreover, the difference between the amount of total expenses of 79,124.35 MDL and the amount of cash deposits of 111,956.32 MDL is 32,831.97 MDL, which, according to the candidate, are penalties and interests.

The plaintiff considered this conclusion of the Evaluation Commission as hasty and arbitrary, because according to the findings of the report of the National Integrity Commission of the Republic of Moldova (ANI) no. 04/171 of 05.05.2016 (presented by the plaintiff in the form held (attached), the following findings result:

In Chapter IV 'Financial Assets' Mrs. Buzu Ecaterina declared a bank deposit in the amount of 28.65 EUR, opened in 2011, with BC 'Modindconbank' SA, without interest, and the salary card account with a balance as of the day of the declaration of 2,285.31 MDL.

At the same time, according to the documents submitted to the Commission by the banking institutions in the country, it was found out that the person subject to control did not declare the following accounts:

- the current account no. xxxxxxxxxxxxxxxx, (for credit repayment) opened in 2012, with xxxxxxxxxxxxxxxx|, with the balance as of 31.12.2014 of 42.12 MDL, turnovers in 2014 - 25,157.88 MDL, the holder Buzu Ecaterina;

- the current account no. xxxxxxxxxxxxxxxx, opened in 2013, with BC 'Modindconbank' SA, with the balance as of 12.03.2015 of 0 MDL, turnovers in 2014 - 1.69 MDL, the holder Buzu Ecaterina.

As regards the undeclared accounts, Mrs. Buzu Ecaterina specifies that these are collateral accounts of the credit she benefited from, a credit that was declared.

In Chapter VI 'Debts' Mrs. Buzu Ecaterina declared a debt in the amount of 120,000 MDL contracted in 2012, due in 2022, with the interest rate -15%, creditor xxxxxxxxxxxxxxxx.

According to the information provided by the commercial banks of the Republic of Moldova, at the time of submitting the declaration of income and property, Mrs. Buzu Ecaterina, did not take from credits other than the declared one.

In the plaintiff's view, the above mentioned facts confirm that the Commission exercised its discretion in bad faith and arbitrarily.

As for the rent-free use of the apartment during the period 2004-2018, in the decision, the Commission noted the following factual circumstances: From 2004 to 2018, the candidate and her children lived in a 47.7 sq.m. apartment located in

Chisinau. The owner of the apartment was a minor child who had inherited it at six years old, after the death of his mother. The guardian of the minor offered to allow the candidate and her children to live in this apartment until the minor reaches the age of majority, on the condition that the candidate takes care of the apartment and pays for the utilities. Living in the apartment was based on a verbal agreement with the guardian. The candidate submitted a statement from the guardian confirming the verbal agreement, according to which the candidate was allowed to live in the apartment on the condition that the utilities were paid and that the guardian did not request payment of rent or other payments.

In November 2018, one of the candidate's children and the husband of that child purchased the apartment from the owner, who was then 20 years old, at the price of 252,191 MDL. The couple sold the apartment in November 2020, at the price of 680,522 MDL (33,500 EUR).

The candidate stated, in response to the written questions, that she is not related and has no family relationship with the minor who was the owner of the apartment or the guardian of the latter, who was the minor's grandmother.

At the hearings, in a public meeting, the candidate confirmed that she has no family relationship with the guardian or the minor. She explained that she learned about the apartment from her father, who knew the grandfather of the minor. The candidate said that they are just acquaintances. At that time, the candidate was looking for an apartment in Chisinau, because her children went to school there. The candidate informed the Commission that the mother of the minor, who had inherited the apartment, a young woman of twenty years old, died in that apartment and that was a tragedy for the family. Because of this fact, the guardian of the minor was willing to allow the candidate to use the apartment, provided that she pays the utilities and takes care of the apartment. The grandparents of the minor had their own apartment in Chisinau. The grandparents did not want to sell the apartment without the minor's consent, so they waited until reaching 18 years old. The candidate stated that, if the guardian had requested a rent, she would have negotiated with them, but since there was no such condition, she did not pay any rent for the apartment for 14 years.

The candidate also confirmed at the hearings in public session that one of her children and the husband of that child purchased this apartment in 2018 and the candidate confirmed the details of the transaction. She explained that when the minor reached 18 years old, the guardian told her that the grandson of the guardian did not want to live in that apartment and that they wanted to sell it. The guardian asked the candidate if she wanted to buy it. The candidate had no funds, but one of her children and the husband of that child bought it. The candidate initially stated that she was not involved in the purchase transaction and only told her children that each transaction must be official, and the amount to be negotiated must be truthfully specified in the contract. The candidate specified that the purchase price was negotiated between the guardian, her grandson, the candidate's daughter and her husband. After several questions, the candidate admitted that she was present at the negotiations with her daughter and her husband when an agreement was reached. No real estate agents were involved in the transaction. The candidate told the Commission that the apartment was sold for a higher price in 2020 than it was purchased for in 2018, due to the repairs made by the candidate's daughter and her husband. When the apartment was put up for sale in 2020, the apartment was appraised by real estate agents, and the determined value was reflected in the contract.

After the hearings, the candidate provided additional information about the apartment in Chisinau. She reiterated that the guardian proposed her to live in the apartment owned by the minor on the condition that she pays the utilities and takes care of the apartment, (which was difficult because of the roof; she later made cosmetic repairs being helped by her brothers), because the guardian knew that she had no money and had two minor children. The candidate also provided photos of the apartment to show the condition of the apartment and the reason why it was offered for sale at a negotiated price lower than its sale value after repair. The photos, time-stamped from 2016, showed damaged ceiling and other interior parts. No photos or other information were provided to show the condition of the apartment when it was sold in 2020.

On this issue, the Evaluation Commission made the following conclusion: In the opinion of the Commission, although the arrangement was advantageous to the plaintiff, it was disadvantageous to the minor child and therefore raised ethical questions that a judge should have taken into account. While the minor's guardian undoubtedly bears the responsibility for failing to fully protect the minor's financial interests, involving the candidate in an unbalanced arrangement for fourteen years, especially after the candidate became a judge, raises the question that the minor was taken advantage of, which is not a conduct consistent with the high standards expected from judges.

However, the plaintiff insisted that her conduct as a simple citizen in relation to the owners of the apartment she lived in does not create any appearance of lack of integrity or conduct able of overturning the principle of professional ethics. The plaintiff violated neither the rights of the minor, nor of other third parties. The agreements reached were made within the limits of the law with the guardian of the minor, and the latter, after attainment of majority, did not have any negative reaction towards the plaintiff. Both the minor's guardian and he personally lived in decent conditions and there is no finding of any child protection body of any violation of the child's rights.

Therefore, Ecaterina Buzu, by this lawsuit, claims the violation of the right in her capacity of judge to run for office and be a member of the Superior Council of Magistracy, and requests the cancellation of the individual administrative act, whereby the plaintiff's request was rejected in the administrative procedure, and also obliging the Public Authority to issue the requested individual administrative act.

On 1 February 2023, the Independent Evaluation Commission for assessing the integrity of candidates for the position of member in the self-administration bodies of judges and prosecutors submitted a reference, whereby she requested rejection of the application for appeal submitted by Ecaterina Buzu, on the grounds that it is unfounded.

In the reference, the Independent Evaluation Commission for assessing the integrity of candidates for the position of member in the self-administration bodies of judges and prosecutors indicated that, in this case, the Commission fulfilled with due diligence and in good faith all its obligations, provided for by the Law no. 26/2022. In particular, when it found certain ambiguities, the Commission offered the plaintiff the possibility to clarify them, by providing additional data and information (within the meaning of Art. 10(7) of the Law no. 26/2022), offering enough time (as implicitly confirmed by the plaintiff submitting additional data and information within the timeframe offered by the Commission).

Additionally, attention was drawn to the fact that the burden of proof passes to the candidate during the evaluation process in the initial phase. Or, it is the Commission's

obligation to accumulate data and information, subject to its legal powers (Art. 6 of the Law no. 26/2022) and respecting the legal obligations (Art. 7 of the Law no. 26/2022).

However, when some ambiguities arose and in order to clarify them, the Commission offers the candidate the possibility to provide additional data and information (Art. 10(7) of the Law no. 26/2022). Submission of additional data and information is a right, rather than an obligation of the candidate (Art. 12(4) of the Law no. 26/2022), and the failure to exercise this right (by refusing, openly or tacitly, or by providing incomplete or inconclusive data) risks making the Commission to conclude that there are serious doubts that the candidate does not meet the integrity criteria (Art. 13(5) of the Law no. 26/2022). Accordingly, it is in the best interest of the candidate to take over the burden of proof, and this legislative transfer not only does not violate, but actually protects the rights of the candidate.

In the same vein, it was shown that the decisions of the Commission are consistent with the Law no. 26/2022, and results from the test carried out following the assessment of the ethical and financial integrity of the candidate, based on the data and information received from the candidate and third parties. The Commission ascertains whether or not there are serious doubts regarding the compliance by the candidate with the legal integrity criteria.

At the same time, the Law no. 26/2022 expressly and explicitly establishes the margin of discretion of the Commission in making its findings, as follows:

- in assessing the criteria provided for in para. (2)-(5) and in making decisions regarding them, the Evaluation Commission does not depend on the findings of other competent bodies in the respective field - Art. 8(6);

- the Evaluation Commission evaluates the accumulated materials according to its inner conviction, formed after the comprehensive, complete and objective study of the information. None of the submitted materials has a predetermined probative value without its assessment by the Evaluation Commission (Art. 10(9)).

Therefore, the solution offered by the Commission, through the decision on passing or failure of the evaluation, is an assessment, according to its inner conviction, of whether or not there are serious doubts regarding the compliance by the candidate with the criteria of financial and ethical integrity.

In other words, the Commission does not ascertain the existence or the lack of compliance by the candidate with the integrity criteria, but only the existence or the lack of serious doubts regarding compliance. However, certain factual circumstances could be enough to establish that there are serious doubts regarding the compliance, but at the same time they could be insufficient to establish the lack of compliance.

Thus, the Commission is not in the position of a court or another similar body, and its actions are not a judicial or other type of verification intended to establish with certainty a certain fact (the existence or lack of compliance with the integrity criteria).

In this case, the Commission acted in accordance with the described rules, assessing based on the compliance criteria set by the Law no. 26/2022, related to the factual circumstances resulting from the accumulated data and information (including with the plaintiff's participation), whether or not there are serious doubts regarding the compliance by the plaintiff with the criteria of ethical integrity and financial. The decision issued in this regard represents the exercise of this discretionary power, which cannot be subject to judicial review.

The exception to the above rule can only be extraordinary and would refer to cases of particularly arbitrary and inappropriate actions of the issuer, which lead to illegality.

The so-called possibility that can be subject to the review of the court refers to the situations in which the state of inopportuneness is so flagrant that it would lead to illegality, i.e. the issuance of the act by misappropriation of power or in violation of competence.

Therefore, the court is required to review the legality of the decision, and is not entitled to review the appropriateness. In particular, the court would be entitled to admit the plaintiff's lawsuit and order resumption of the evaluation only if it finds out circumstances that could lead to the candidate passing the evaluation, a situation that does not exist in this case.

As regards the above, it was noted first of all that the plaintiff violated the obligation to provide evidence.

Thus, attention was drawn to the fact that none of the plaintiff's statements are supported by relevant and admissible evidence. In the absence of evidence, the plaintiff uses inadmissible techniques in the probation process, such as sophisms (logical errors aimed at misleading the court), criticism of the applicable law (which has another remedial procedure, in accordance with the provisions of the Law no. 100/2017 on normative acts), as well as the attempt to make the court to examine the appropriateness of the decision (a fact that is prohibited by law - Art. 225 of the Administrative Code).

On the contrary, the materials of the plaintiff's file, submitted to the court, confirm that the Commission acted independently, with due diligence and in good faith, fully complying with the evaluation procedure, the rules regarding the burden of proof, the object and legal limits of its mandate and in accordance with the legal margin of discretion.

Contrary to the provisions of Art. 16 of the Administrative Code, the plaintiff first requests limitation of the margin of discretion of the Commission, and then waiver of the margin of discretion in its entirety. However, these claims are not based on a text of the law, but only result from arbitrary interpretations (of the concept of 'serious doubt') and an attempt to impose on the court the review of the appropriateness of the decision (under the pretext of an effective review), both of these means of argument are inadmissible and contrary to the logical and legal interpretation of the Administrative Code and the Law no. 26/2022.

Moreover, by virtue of the provisions of Art. 10(9) of the Law no. 26/2022, the Commission assesses the accumulated materials with the participation of the candidate and third parties according to its inner conviction, in its judgment, the Evaluation Commission does not depend on the findings of other bodies with competences in the respective field - Art. 8(6) of the Law no. 26/2022.

In the same vein, it is up to the Commission to assess whether or not certain circumstances are enough to establish the existence or absence of serious doubts regarding compliance. This is because this particular issue refers to the appropriateness of the decision, which cannot be subject to judicial review.

In conclusion, it was mentioned that the solution offered by the Commission, by decision, is an assessment, according to its inner conviction, of whether or not there are serious doubts regarding the compliance by the candidate with the criteria of financial and ethical integrity.

On 10 February 2023, Ecaterina Buzu, being represented by the defence lawyer Petru Balan, (on the basis of the defence lawyer's mandate no. 1876276 series MA from 10 February 2023), filed a request for removal of the exception of unconstitutionality

of the phrases ‘serious, reprehensible and inexplicable’ from Art. 8(2)(a), as well as of the phrase ‘in the last 15 years’ from Art. 8(4)(b) and the text ‘or the persons specified in Art. 2,(2)’ from Art. 8(5)(c) of the Law no. 26 of 10 March 2022, regarding some measures related to selection of candidates for the position of member in the self-administration bodies of judges and prosecutors and the phrase ‘if it finds existence of circumstances that could lead to the candidate passing the evaluation’ from Art. 14(8) of the Law no. 26 of 10 March 2022 on certain measures related to selection of candidates for the position of member in the self-administration bodies of judges and prosecutors.

By the Ruling of 10 February 2023 of the Supreme Court of Justice, the request submitted by Ecaterina Buzu, represented by the defence lawyer Petru Balan, regarding the removal of the exception of unconstitutionality, was admitted partially and the exception of unconstitutionality of the phrase ‘if it finds existence of circumstances that could lead to the candidate passing the evaluation’ from Art. 14,(8) of the Law no. 26 of 10 March 2022 on certain measures related to selection of candidates for the position of member in the self-administration bodies of judges and prosecutors, was removed.

The Constitutional Court, by the Decision of 14 February 2023, admitted the exceptions of unconstitutionality removed by the defence lawyer Petru Balan, in the interests of the judge Ecaterina Buzu, party in the file no. 3-7/2023, declared unconstitutional the text ‘if it finds existence of circumstances that could lead to the candidate passing the evaluation’ from Art. 14(8)(b) of the Law no. 26 of 10 March 2022 on certain measures related to selection of candidates for the position of member in the self-administration bodies of judges and prosecutors. Until the Parliament amends the law, the special panel of the Supreme Court of Justice, when examining appeals filed against the decisions of the Evaluation Commission, will be able to order the re-evaluation of the candidates who failed the evaluation if it finds out (a) that serious procedural errors were admitted in the evaluation procedure by the Evaluation Commission, which affect the fairness of the evaluation procedure, and (b) that there are circumstances that could lead to the candidate passing the evaluation.

On 04 April 2023, Ecaterina Buzu informed the special court panel that she terminated the legal assistance contract with the defence lawyer Petru Balan.

In the court session, the plaintiff supported the lawsuit on the invoked factual and legal grounds, explaining to the court the functionality of the accounts no. 2 and no. 3, which was wrongly perceived by the Commission, by summing up the deposits made in these accounts. She also stated that the apartment of the minor, in which she had the right to live without paying the rent, was in a bad condition, and the guardian of the minor was the initiator of the arrangement of residence in this real estate, in exchange for the payment of utilities, without any other financial claims. To support what was declared, the plaintiff requested the hearing of the witness Esipenco Larisa, who submitted statements in this sense, in compliance with the provisions of Art. 215 of the Civil Procedure Code.

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, the defence lawyers Roger Gladei and Irina Sugoneaco, supported the arguments invoked in the submitted reference, requesting rejection of the lawsuit as being unfounded. Additionally, they mentioned that the plaintiff had the possibility to get acquainted with the materials of the file before the hearings in order

to clarify some points to the Commission, but such a requirement did not arrive, and the hearing of some witnesses is not the subject of examination of this case.

Assessment of the court.

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

Term for consideration of the lawsuit

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

In this Chapter, the special panel of the Supreme Court of Justice would like to mention that the application submitted by Ecaterina Buzu was assigned automatically-randomly on 28 January 2023 to the judge-rapporteur Ala Cobaneanu, who by the ruling of the same date received for examination the application and ordered actions to prepare the case for judicial debates, setting the court hearing for 3 February 2023. On 2 February 2023, the plaintiff submitted a request for postponement of the court hearing, and thus, taking into account the agenda of the court and of the trial participants, it set a new deadline for examining the case, 07 February 2023.

During the court hearing on 07 February 2023, the plaintiff submitted a request for recusal of the judge Ala Cobaneanu, which was rejected on the same date, through a reasoned ruling, the court hearing being postponed to 10 February 2023. Later, during the hearing of 10 February 2023, the defence lawyer Petru Balan was involved by the plaintiff to represent her interests in this administrative litigation. Also then, the representative of the plaintiff submitted a request for removal of the exception of unconstitutionality, which was partially admitted, through a reasoned ruling, on the same date.

By the Ruling of 02 March 2023 of the interim Chair of the Supreme Court of Justice, the case was redistributed to another judge in connection with the resignation of the judge-rapporteur Ala Cobaneanu, being assigned on the same date to the judge-rapporteur Tamara Chisca-Doneva.

On 06 March, the judge Tamara Chisca-Doneva declared that she would abstain from adjudicating this application for appeal, on the grounds that the defence lawyer Petru Balan represents her interests in other cases pending before courts. That statement was admitted on 7 March 2023, by a reasoned ruling.

Later, through the Integrated Case Management Program, the case was redistributed to the judge Ion Guzun, and the court session was set for 16 March 2023. The hearing on 16 March took place, and an interruption was announced until 04 April 2023. However, this session did not take place, due to the impossibility of establishing the special court panel, being postponed to 10 April 2023.

By the Order no. 53 of 4 April 2023, a new composition of the special court panel was established within the Supreme Court of Justice for the examination of appeals filed 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 in the following composition: Tamara Chisca-Doneva – chair, judge, Mariana Pitic – judge, Maria Ghervas – judge, as for the rest the Order of the interim Chair of the Supreme Court of Justice no. 39 of 20 March 2023 was maintained,

whereby the Order of the interim Chair of the Supreme Court of Justice no. 34 of 02 March 2023 was maintained, in the part where Ion Guzun was appointed as substitute judge.

On 10 April 2023, the Independent Evaluation Commission for assessing the integrity of candidates for the position of member in the self-administration bodies of judges and prosecutors submitted a request to recuse the judge Mariana Pitic.

Subsequently, the court panel of the Supreme Court of Justice notes that, on 06 April 2023, the Law no. 64 of 30 March 2023 on the Supreme Court of Justice, as well as the Law no. 65 of 30 March 2023 on the external evaluation of judges and candidates for the position of judge of the Supreme Court of Justice.

According to the provisions of Art. 8 of the Law 64/2023, the Plenum of the Supreme Court of Justice is composed of all judges of the Supreme Court of Justice and has, among other things, the power to establish, annually, the composition of court panels.

The court panel, maintaining the legal provisions referred to above and the fact that in the period March-April 2023 the majority of magistrates of the Supreme Court of Justice resigned, faces the impossibility of forming court panels by the Plenum of the Supreme Court of Justice, which is currently not deliberative.

However, by the Law no. 89 of 27 April 2023, in force from 02 May 2023, the transitional provisions of the Law 64/2023 on the Supreme Court of Justice, were amended in order to establish the moment of beginning of the activity of the Supreme Court of Justice in the new composition, including the Plenum, providing as a result, powers to form court panels according to the previous rule – by the Chair of the Supreme Court of Justice.

In accordance with Art. 12(8) of the Law 65/2023, the Superior Council of Magistracy by the Decision no. 120/6 of 10 April 2023 announced the competition for holding, by temporary transfer, the vacant positions of judges at the Supreme Court of Justice, and by the decision of the Superior Council of Magistracy no. 142/8 of 02 May 2023, it was decided to temporarily transfer 7 judges from the national courts, for a period of 6 months, from 10 May 2023, to the position of judge of the Supreme Court of Justice.

Thus, the special court panel finds out that the activity of the Supreme Court of Justice was blocked in the period from 30 March 2023 to 10 May 2023, during which it was neither factually, nor legally possible to examine pending cases.

For this reason, the request for recusal of the judge Mariana Pitic was distributed on 16 May 2023, after resumption of the activity of the Supreme Court of Justice, and by the Ruling of 25 May 2023, the request for recusal was rejected.

On 26 June 2023, the next court session was set, during which the resumption of the administrative proceeding was ordered, in the following composition of the special court panel: Tamara Chisca-Doneva - Chair, judge, Mariana Pitic - judge, Ion Guzun - judge, as a consequence of the fact that the plaintiff refused the assistance of the defence lawyer Petru Balan, which, as shown above, was a reason for admitting the statement of abstention submitted by the judge Tamara Chisca-Doneva.

During the court session, the request of the plaintiff to hear the witness Esipenco Larisa, the guardian of the minor Esipenco Vadim, was admitted, and an interruption was announced until 06 July 2023.

In this context and in the light of the above, the Special Panel notes that the failure to meet the 10-day time limit for the examination of the appeal was due to the complexity

of the case, the conduct of the parties to the proceedings, including that of the defendant authority, the difficulty of the debate, the mass resignation at the Supreme Court of Justice, and to the impossibility to form a Special Panel to hear the appeal.

What is more, the length of time the case was pending was conditioned, *inter alia*, by the need to ensure respect for the rights of the participants in the proceedings, which cannot be regarded as a delay in the examination of the case, because the purpose of examining the appeal was to ensure observance of the parties' guaranteed right to a fair trial, which is enshrined in Article 38 of the Administrative Code and in Article 6 § 1 of the Convention for the Protection of Human Rights and Fundamental Freedoms. At the hearing on 6 July 2023, the case was examined on the merits, the parties' explanations were heard, the evidence was examined, the pleadings were heard and, in accordance with Article 14(9) of the Law No 26/2022 – the issuance and placement of the decision on the website of the Supreme Court of Justice was announced.

Applicability of the Administrative Code

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

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

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

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

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

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

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

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

Furthermore, the authors of the law noted in the explanatory note to Law No 26/2022 the following: "as a result of its work, the Commission will issue a decision. Given that such decision is an administrative act, it may be appealed in accordance with

the provisions of the Administrative Code No 116/2018 with the explicit exceptions set out in this draft.”

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

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

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

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

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

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

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

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

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

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

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

The application of the rules of administrative dispute is conditioned on the application of the same rules that refer to the administrative procedure, such as the collection of evidence under Articles 220(1), 87-93 of the Administrative Code, referrals under Articles 223, 97-114 of the Administrative Code, impartiality under Article 25 of

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

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

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

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

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

The Law No 180 of 7 June 2023 reinforced the understanding that the Commission is a public authority specific in its own way, i.e. it is not a legal entity of public law, although Article 7 of the Administrative Code – which has a universal meaning – includes and defines the concept of public authority both in the sense interpreted by the Parliament of the Republic of Moldova, i.e. functionally and organizationally, and in the sense of a legal entity of public law, as the case may be or require. This conclusion also follows from the indefinite pronoun “any organizational structure” in Article 7 of the Administrative Code. A public authority – in addition to the element of any organizational structure or body, established by law or other regulatory act to pursue public interests – also falls in the purview of public regime, which establishes the tasks and remits, which gives the right to impose legal force on people with whom the public authority engages in legal relations. A different interpretation and application would mean that the work of the Commission and its decisions are not binding as individual administrative acts, but represent legal acts under private law. The Special Panel points out that a natural person can also be a public authority if they are delegated by law the tasks pertaining to public authorities and the corresponding powers to carry them out. Furthermore, according to Article 72(6) of the Law No 100 of 22 December 2017, the interpretation law does not have retroactive effect, except in cases where the interpretation of the sanctioning rules leads to a more favorable situation.

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

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

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

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

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

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

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

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

According to Article 10(1) of the Administrative Code, the Commission's decision meets the criterion of “*with the purpose to produce direct legal effects*”, which means to create, alter or terminate legal relationships under the public law. The Special Panel holds that the Commission's decision produces direct legal effects in the legal

sphere of the plaintiff, in her capacity of a judge that applied for the position of member in the Superior Council of Magistracy. This criterion has the function to differentiate the individual administrative act from a simple administrative operation carried out under an administrative procedure of assessing the candidate's financial and ethical integrity.

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

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

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

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

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

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

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

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

Admissibility of the lawsuit.

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

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

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

In this context, note that the decision of the Independent Evaluation Commission for assessing the integrity of the candidates for the position of member in the self-governing bodies of judges and prosecutors No 6 of 9 December 2022 was submitted by e-mail to the plaintiff, Ecaterina Buzu, on 4 January 2023, which is confirmed by

an abstract from the e-mail, attached to case materials (case file page 66, vol. I).

The Special Panel concludes that the appeal application filed by Ecaterina Buzu 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.

As regards the merits of the case, the special court panel considers the following state of facts and law.

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 Ecaterina Buzu passing the evaluation.

The Special Panel of the Supreme Court of Justice notes that the Administrative Code regulates the concept of serious errors and particularly serious errors. In case of

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

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

By the Decision no. 10 of 04 January 2023 regarding the candidacy of Ecaterina Buzu, candidate for the position of member in the Superior Council of Magistracy, based on Art. 8(1),(2)(a) and (c), Art. 8(4)(a) and (b), Art. 8(5)(b), (d) and Art. 13(5) of the Law no. 26 of 10 March 2022 on certain measures related to selection of candidates for the position of member in the self-administration bodies of judges and prosecutors, the Independent Evaluation Commission for assessing the integrity of candidates for the position of member in the self-administration bodies of judges and prosecutors decided that, the candidate does not meet the integrity criteria, because serious doubts were found regarding the compliance by the candidate with the ethical and financial integrity criteria and, thus, she does not pass the evaluation.

On 28 January 2023, Ecaterina Buzu submitted an application for 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 no. 10 of 04 January 2023 regarding the candidacy of Ecaterina Buzu, requesting the cancellation of the decision concerned and ordering resumption of the candidate evaluation procedure.

According to Art. 14(8) of the Law no. 26 of 10 March 2022 on certain measures related to selection of candidates for the position of member in the self-administration bodies of judges and prosecutors, when examining the application for appeal against the decision of the Evaluation Commission, the special panel of the Supreme Court of Justice may adopt one of the following decisions:

a) rejection of the application for appeal;

b) admitting the application for appeal and ordering the re-evaluation of the candidates who did not pass the evaluation, if it finds out that, within the evaluation procedure, the Evaluation Commission admitted some serious procedural errors, which affect the fairness of the evaluation procedure, and that there are circumstances that could lead to the candidate passing the evaluation.

Therefore, taking into account the aforementioned legal rules and the fact that the object of this lawsuit is 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. 10 of 04 January 2023 regarding the failure by the candidate Ecaterina Buzu to pass the evaluation, the special court panel notes that, if necessary, it will verify the existence of circumstances that could lead to the candidate passing the evaluation.

The special court panel reiterates that, according to the Decision of the Evaluation Commission no. 10 of 04 January 2023, the candidate for the position of member in the Superior Council of Magistracy, Ecaterina Buzu, did not pass the evaluation based on Art. 8(1),(2)(a) and c), Art. 8(4)(a) and b), Art. 8(5)(b), c), d) and Art. 13(5) of the Law no. 26 of 10 March 2022 on certain measures related to selection of candidates for the position of member in the self-administration bodies of judges and prosecutors, on the grounds that she does not meet the integrity criteria, as serious doubts were found regarding the compliance by the candidate with the criteria of ethical and financial integrity.

According to Art. 8(1),(2)(a) and c), Art. 8(4)(a) and b), Art. 8(5)(b), c) and d) of the Law on certain measures related to selection of candidates for the position of member in the self-administration bodies of judges and prosecutors no. 26 of 10 March 2022, for the purposes of this law, the integrity assesment of candidates consists in checking their ethical and financial integrity.

A candidate is considered to meet the criterion of ethical integrity if:

a) he/she did not seriously violate the rules of ethics and professional conduct of judges, prosecutors or, as the case may be, of other professions, as well as did not admit, in his/her activity, reprehensible actions or inactions, which would be inexplicable from the point of view of a legal professional and an impartial observer;

c) he/she did not violate the legal regime of declaring assets and personal interests, conflicts of interests, incompatibilities, restrictions and/or limitations.

A candidate is considered to meet the criterion of financial integrity if:

a) the assets of the candidate were declared in the manner established by the legislation;

b) the Evaluation Commission finds that the assets acquired by the candidate in the last 15 years correspond to the declared income.

(5) To assess the financial integrity of the candidate, the Evaluation Commission verifies:

b) the compliance by the candidate with the legal procisions of the declaration of assets and personal interests;

c) the method of acquiring the ownership or possession of the goods the by the candidate or the persons specified in Art. 2(2), as well as the expenses related to the maintenance of these goods;

d) the sources of income of he candidate and, as the case may be, of the persons specified in Art. 2(2).

The special court panel mentions that, in the Decision no. 10 of 04 January 2023, in Chapter III 'Evaluation of the candidate', the Evaluation Commission indicated that Ecaterina Buzu, candidate for the position of member of the Superior Council of Magistracy, does not meet the criteria of integrity, taking into account the following circumstances and serious doubts about it:

1. Failure to declare the bank accounts in the manner established by law/ Cash deposits;

2. Use of the apartment without paying the rent during the period 2004-2018.

Analyzing the conclusions of the Evaluation Commission on these two factual circumstances related to the evaluation criteria, the special court panel reveals that, during the written questions phase, additional information and documents were requested from Ecaterina Buzu to be submitted to the Evaluation Commission.

Failure to declare the bank accounts in the manner established by law/ cash

deposits.

Based on the content of the Decision no. 10 of 04 January 2023, it is found out that in the period 2012-2015, the candidate had four accounts opened in her name with the banks of the Republic of Moldova:

- Bank account no. 1 – current account opened in 2010 and closed in 2016. This was an account in EUR, which the candidate used to make payments abroad.
- Bank account no. 2 – account opened in 2010 and closed in 2017. This bank account had cash deposits of approx. 111,000 MDL in 2011 and 2012.
- Bank account no. 3 - credit account opened in 2010. This bank account had total withdrawals of approx. 79,000 MDL, in 2011 and 2012.
- Bank account no. 4 - current account opened in 2012. In 2021 the candidate received a credit of 700,000 MDL in this bank account.

Likewise, it is also stated that: The candidate answered to the written questions that the bank account no. 2 was a flexible credit account, with a limit of 30,000 MDL, which was used when necessary and replenished with funds from her salary. The candidate noted that the bank account no. 3, a credit account, was attached to the bank account no. 2. In the answer to the written questions, the candidate also stated that she does not know why the transaction amounts on the two accounts do not match. The candidate did not provide any document from the bank regarding the bank account no. 3. She informed the Commission that she requested a copy of the credit contract from the bank, but the bank answered that it no longer held the contract.

At the hearings in public session, the candidate specified that the bank account no. 2 was associated with a credit card with a limit of 30,000 MD, if necessary, the candidate could withdraw up to 30,000 MDL. According to the condition of using the card, if withdrawals were made, the funds had to be replenished within two months to avoid interest payments on the withdrawn amount. According to the candidate, when she received her salary, it replenished her credit card account (bank account no. 2) to avoid paying interest.

At the hearings in public session, the candidate stated that the information the Commission received on the cash deposits on that account was wrong, that it was impossible to deposit money on that account and that she did not deposit money on that account because it was a credit card.

As regards cash deposits on the bank account no. 2, the candidate did not provide other sources of funds for money deposits than her salary. The candidate did not explain what funds she used to pay for living expenses or how she was able to deposit most of her salary on an account and not use it.

After the hearings, the Commission asked the candidate to verify the account statements provided by the bank regarding the bank account no. 2 and no. 3. The candidate confirmed that the information the Commission received from the bank was correct. In the period 2011-2012, the amount of 79,124.35 MDL was withdrawn from her flexible account card. In the period 2011-2012, she deposited cash to replenish the card account balance with the amount of 111,956.32 MDL (sheets 6-7 of the decision of the Commission).

Based on the above, the Evaluation Commission concludes that the amounts deposited in 2011 and 2012 are close to 90% of the total salary of the candidate in those years (the salary for 2011 totalled 72,056 MDL; the salary for 2012 totalled 60,082 MDL), but the candidate did not indicate any other sources of income for cash deposits.

Moreover, the difference between the amount of total expenses of 79,124.35 MDL and the amount of cash deposits of 111,956.32 MDL is 32,831.97 MDL, which, according to the candidate, are penalties and interests.

This conclusion is appreciated by the special court panel as being hasty and inappropriate to the materials of the file, or, the plaintiff, during the rounds of questions e-mailed by the Commission, explained that:

1) The bank account no. 2 was a flexible credit account, in the amount of 30,000 MDL, which she used when necessary and replenished it with funds (salary), and later replenished it after receiving her salary. The bank account no. 3 is attached to the credit bank account no. 2, which open in parallel.

The accuracy of the explanations that these bank accounts are opened in parallel, was to be deduced by the Commission, which in the addressed questions established that these accounts were opened on the same date 24.12.2010 with Moldindconbank (sheet of the administrative file 78). Furthermore, the explanations given by the plaintiff that these two bank accounts are attached, are also confirmed by the certificate no. 02/16- 343 of 09.11.2022, issued by the director of Telecomtrans Branch of the bank Moldindconbank, where it is mentioned that Mrs. Ecaterina Buzu previously obtained a credit card in the amount of 30,000 MDL under the contract no. 332/10/242 of 24.12.2010 (credit account - xxxxx/card account - xxxxx), which was paid in full, in advance, on 21.09.2012 (file sheet 67, vol. I).

In the same context, it is found out that during the rounds of questions, the Commission states that according to the information available to it, in the period 2010-2012, the plaintiff held the bank account no. xxxxx, opened on 24.12.2010, with Moldindconbank, and in 2011 and 2012 she deposited 79,022.73 MDL on this account, being requested to explain the sources of this money (sheet of the administrative file 78, question no. 4).

The plaintiff, for her part, reconfirmed that the bank account no. xxxxx is attached to the credit bank account no. xxxxx, which were opened in parallel, but she does not know why the transaction amounts on these accounts do not match.

Analyzing the statement of account no. xxxxx opened on 24.12.2010 and closed on 21.09.2012, the special court panel finds that the amount of 79,124.36 MDL refers to turnovers, rather than to the card top-up operation. Therefore the conclusion of the Evaluation Commission that the plaintiff deposited 79,022.73 MDL in cash on the account no. xxxxx, does not correspond to the information in the bank statement, issued by the banking institution (file sheet 274, vol. II).

Also, on the issue concerned, the Commission addresses the following rounds of questions, where as regards the question no. 2, it finds out, based on the information available to it, that on 17 September 2012 the plaintiff deposited 28,640 MDL in cash on the bank account no. xxxxx.

The special court panel, making repeated reference to the bank statement of account no. xxxxx opened on 24.12.2010, finds out that on 17.09.2012, the plaintiff replenished the card account with 28,640 MDL. These circumstances certify, beyond any reasonable doubt, that bank accounts no. xxxxx and no. xxxxx are attached to each other as the same information is reflected.

2) In the context of the 2 bank accounts discussed above (according to the decision of the Commission – account no. 2 and account no. 3), the Commission requested the plaintiff to explain the source of the amount of 28,640 MDL, and the plaintiff answered that, the credit account opened on 24.12.2010, with Moldindconbank, was closed on

17.09.2012, by depositing on this account cash in the amount of 28,640 MDL, which was taken from another credit contract opened on 14.09.2012, as it was difficult to pay 2 installments for both credit contracts (sheet of the administrative file 81, 82).

Based on what was reported by the plaintiff, the special court panel finds that, the credit contract no. 35 of 14.09.2012 to the materials of the administrative file, under which Ecaterina Buzu benefited from a credit line in the amount of 120,000 MDL due on 14.09.2022 (sheets of the administrative file 247-250).

This circumstance was ignored by the Evaluation Commission and thus, it made the following hasty conclusion in the adopted decision: The amounts deposited in 2011 and 2012 are close to 90% of the total salary of the candidate in those years (the salary for 2011 totalled 72,056 MDL; the salary for 2012 totalled 60,082 MDL), but the candidate did not indicate any other sources of income for cash deposits. Moreover, the difference between the amount of total expenses of 79,124.35 MDL and the amount of cash deposits of 111,956.32 MDL is 32,831.97 MDL, which, according to the candidate, are penalties and interests (sheets 6-7 of the decision).

Reiterating the aforementioned, the special court panel does not agree with the opinion of the Evaluation Commission that the candidate did not provide any explanation why she did not declare the bank account no. 2 and the bank account no. 4. Or, with reference to the last account, Ecaterina Buzu mentioned in the additional answers for the Evaluation Commission, that the accounts were opened based on the loan contracts, not being aware that they generate opening of new accounts, or, according to the explanations from the employees of the banking institution, these accounts serve for the deposit and repayment of credits, and the failure to declare them is an omission, as confirmed by the declaration of credit contracts and the income obtained at the workplace, transactions being made through those accounts.

Moreover, in the case of another judge candidate, who passed the evaluation, as regards the failure to declare bank accounts, the Evaluation Commission concluded that: 'it did not find any advantage for the candidate not to declare the two bank accounts [...]'.

Contrary to the explanations of the plaintiff and the documentation submitted by the latter, the Evaluation Commission concludes the following: Considering the above circumstances, the Commission has serious doubts (Art. 13(5) of the Law no. 26/2022) regarding the compliance by the candidate with the criterion of financial integrity according to Art. 8(4)(a) and Art. 8(5)(b) and the criterion of ethical integrity under Art. 8(2)(c) of the Law no. 26/2022 in relation to the declaration of assets and personal interests in the manner established by the legislation, doubts that were not removed by the candidate, and regarding the compliance by the candidate with the criterion of financial integrity, according to Art. 8(4)(b) and(5)(c) and (d) in relation to the sources of cash deposits on one of the bank accounts of the candidate (file 8 of the decision). However, the special court panel considers that these doubts were not confirmed in the case of the plaintiff, being contrary to the materials of the file.

Rent-free use of the apartment in the period 2004-2018.

In the period from 2004 to 2018, the candidate and her children lived in a 47.7 sq.m. apartment located in Chisinau municipality. The owner of the apartment was a minor child who had inherited the real estate at six years old, after the death of his mother. The guardian of the minor offered to allow the candidate and her children to live in this apartment until the minor reaches the age of majority, on the condition that

the candidate takes care of the apartment and pays for the utilities. Living in the apartment was based on a verbal agreement with the guardian. The candidate submitted a statement from the guardian confirming the verbal agreement, according to which the candidate was allowed to live in the apartment on the condition that the utilities were paid and that the guardian did not request payment of rent or other payments.

In November 2018, one of the candidate's children and the husband of that child purchased the apartment from the owner, who was then 20 years old, at the price of 252,191 MDL. The couple sold the apartment in November 2020, at the price of 680,522 MDL (33,500 EUR).

Considering the circumstances established in the adopted decision, the Commission noted serious doubts (Art. 13(5) of the Law no. 26/2022) regarding the compliance by the candidate with the criterion of ethical integrity under Art. 8(2)(a) of the Law no. 26/2022 in connection with the rent-free use of the apartment, whose owner was the minor, for 14 years, doubts that were not removed by the candidate.

In this case, the Commission established that by using the apartment without paying the rent in the period 2004-2018, the rights of the minor child were affected, although the offer to live in it came from his guardian, who was heard during the court session and confirmed that she was the one who called Ecaterina Buzu to propose her to live in the apartment, in exchange for paying the utilities and maintain the apartment. The witness also reported that he could have found a tenant to pay the monthly rent for the apartment, but at the same time, he risked not knowing this person, who could have worsened the bad condition of the apartment causing additional expenses.

From what was reported to the special court panel, it is certain that the guardian's conduct determined the plaintiff to live in the apartment, or the latter showed a more passive role in establishing this arrangement.

Also here, the court panel would like to note that the Evaluation Commission extensively and unfavorably attributes to the plaintiff an abuse of the rights of the minor by using the apartment without paying the rent in the period 2004-2018, also referring to the alienation of the real estate by the owner to the plaintiff's daughter and her husband, a transaction that has no causal connection with the residence of the plaintiff and the payment of the apartment rent in the period 2004-2018.

Moreover, it is certain that the minor was in the custody of his guardian, who acted in good faith and exclusively in the interests of the minor, by establishing a tenant, who would ensure the integrity of the apartment, which was already in a bad condition (leaking roof, mold), and would exempt from the additional payment for the utilities, so that later, upon reaching the age of majority, he can decide independently the fate of the inherited real estate, as was done in this case.

But, although the Commission admits that while the guardian of the minor undoubtedly bears the responsibility for inaction to fully protect the financial interests of the minor, it considers that the fact that the candidate was engaged in an unbalanced arrangement for fourteen years, especially after the candidate became a judge, raises the question that a minor was taken advantage of, which is not a conduct consistent with the high standards expected of judges. This opinion of the Evaluation Commission is contrary to what was declared by the minor's guardian, who rightly took measures not to violate his rights to the apartment, being given the possibility to decide the fate of this apartment at the age of 20 years, and until then, he lived with his guardian, in decent living conditions.

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

The Special Panel highlights that the terms "seriously", "wrongful", and "inexplicable" from Article 8(2)(a) of Law No 26/2022 are, in their nature, undefined legal notions (vague legal notions) that do not grant discretion to the Pre-Vetting Commission, but rather oblige it to conduct a complex and rigorous interpretation of the provision in the context of serious violations of rules of ethics and professional conduct, while in this case, the Commission noted briefly that the candidate's actions were a serious violation of the rules of ethics and professional conduct of judges. In the same respect, the Special Panel highlights that given its constitutional function to deliver justice, the court had the ultimate competence to interpret a vague legal notion in a concrete case.

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

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

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

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

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

of the Republic of Moldova, also based on the constant amendment of the domestic legislation.

According to Article 29 (2)(c)-(3) of the Administrative Code, a measure undertaken by public authorities is deemed proportionate if it is reasonable. A measure undertaken by public authorities is reasonable if the interference it causes is not disproportionate compared to its purpose. This requirement involves a balancing of the legally protected values. The more damage is caused to a right, the more it is required for the advantage resulting from the interference to be superior. Note that excluding the right of a judge to be a candidate for membership in the Superior Council of Magistracy involves not just an interference, but rather an improper annulment of the right to be elected into this position. Such a solution cannot be accepted under the rule of law, as it is incompatible with the dignity of a human being and of a judge. The goal of trust in the justice system can be achieved by complex means, but in no way can it be done by reducing to nothing the idea of free, transparent, and competitive election for the membership of the Superior Council of Magistracy and its bodies. The judge, holding such a position, is presumed to have integrity and, should the opposite be proven, then 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, but not to turn the judiciary into an inefficient branch of state power and over which interference/dependencies from political power would hover.

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

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

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

As per Article 10(9) of Law No 26/2022, the Commission shall assess the gathered materials using its own judgement, formed as a result of multi-faceted, comprehensive and objective review of the information. None of the submitted materials has a predetermined probative value without being assessed by the Commission.

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

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

Article 92 of the Administrative Code.

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

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

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

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

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

Furthermore, the Special Panel notes that the Pre-Vetting Commission had the

obligation to submit to the court, as per Articles 221 and 82 of the Administrative Code, the entire administrative case file of candidate Ecaterina Buzu, 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.

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

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

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

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

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

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

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

The plaintiff proved to the Special Panel of the Supreme Court of Justice the plausible nature of the elements invoked in her appeal, including the ones related to the correctness of the financial operations performed in the management, sale and purchase of movable and immovable assets, as well as compliance with the rules of ethics and

deontology.

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

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

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

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

Thus, the evaluation after resumption of the procedure should not turn into a vicious circular argument and activity, which is contrary to the standard of effective protection of rights, separation of the branches of state power, legal certainty and the binding effect of final court decisions.

The special court panel mentions that the circumstances upheld by the Evaluation Commission do not fall within the perspective of proportionality due to the failure of the candidate Ecaterina Buzu to pass the evaluation.

Therefore, the exclusion, not just limitation, of candidate Ecaterina Buzu's right to take part and be elected as a member of the Superior Council of Magistracy for the minor acts held by the Pre-Vetting Commission is in no way an adequate measure for the fulfilment of the purposes laid down in the law. Given the issue of proper operation of the judicial self-administration bodies at the moment when the decision was issued and failing the candidate for minor acts, that does not only fail to fit the reasons of not passing the evaluation, but it is also a violation of the mentioned rights.

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

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

Taking into account the aforementioned, the Special Panel finds that in this case there are legal grounds for annulling the decision of the Independent Evaluation Commission for assessing the integrity of the candidates for the position of member in

the self-governing bodies of judges and prosecutors No 6 of 9 December 2022 regarding the candidacy of Ecaterina Buzu.

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 admit the application for appeal filed by Ecaterina Buzu 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 regarding the cancellation of the Decision no. 10 of 04 January 2023 on the candidacy of Ecaterina Buzu, candidate for the position of member in the Superior Council of Magistracy, and ordering resumption of the evaluation procedure of the candidate.

To cancel the Decision no. 10 of 04 January 2023 regarding the candidacy of Ecaterina Buzu, candidate for the position of member in the Superior Council of the Magistracy.

To order the re-evaluation of the candidate Ecaterina Buzu by the Independent Evaluation Commission for assessing the integrity of candidates for the position of member in the self-administration bodies of judges and prosecutors.

The decision is irrevocable.

The chair, the judge

Tamara Chisca-Doneva

The judges

Ion Guzun

Mariana Pitic