File No. 3-27/23
2-23086935-01-3-16062023

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

SUPREME COURT OF JUSTICE

01 August 2023 mun. Chisinau

Special panel, established within the Supreme Court of Justice, to examine appeals against decisions of the Independent Commission for assessing the Integrity of Candidates for membership in Self-Administration Bodies of Judges and Prosecutors

comprising:
President, Judge Tamara Chisca-Doneva
Judges Mariana Pitic
Ion Guzun

Registrar Alina Spataru

With the participation of:
applicant Anatolie Gîrbu

the defendant's representatives, lawyers Roger Gladei,
Valeriu Cernei

Having examined in a public court hearing, in the administrative litigation procedure, the appeal filed by Anatolie Girbu against the independent Commission for assessing the integrity of candidates for membership in the self-administration bodies of judges and prosecutors regarding the annulment of the decision and ordering the resumption of the candidate's evaluation procedure,

F o u n d:

Arguments of participants in the process.

On June 16, 2023, Girbu Anatolie filed an appeal against the Independent Commission for assessing the Integrity of Candidates for the Position of Member of Self-Administration Bodies of Judges and Prosecutors, requesting the full admission of the application, annulment of the decision of the Independent Commission for assessing the Integrity of Candidates for Membership in the Self-Administration Bodies of Judges and Prosecutors no. 36 of 02 June 2023 on the candidacy of Anatolie Gîrbu, candidate for membership in the Superior Council of Prosecutors and ordering the resumption of the evaluation procedure of candidate Anatolie Gîrbu by

Independent Commission for assessing the integrity of candidates for membership in the self-administration bodies of judges and prosecutors.

In motivating the action, the applicant mentioned that he was removed from participating in the competition for the position of member of the Superior Council of Prosecutors, but also assessed his level of integrity and professional probity. This situation gives a double unfavorable character to the issued administrative act: on the one hand, the rights and legitimate interests of the complainant are directly affected.

In accordance with the provisions of art. Art. 20 of the Administrative Code, if an administrative activity violates a legitimate right or freedom established by law, this right may be claimed through an administrative action, decided by the courts competent to examine the administrative litigation procedure, according to this Code.

According to art. 8 para. (4) letters a) and b) of Law no. 26 of 10.03.2022, a candidate is considered to meet the financial integrity criterion if: a) the candidate's wealth was declared in the manner established by the legislation; b) The evaluation Commission finds that the wealth acquired by the candidate in the last 15 years corresponds to the declared income.

Returning to the present case, the applicant considered that the Evaluation Commission had not found in its decision that the candidate had culpably failed to declare his assets under the legislation in force or that the wealth acquired by the applicant over the previous 15 years did not correspond to the income he had declared.

Also, from the content of the decision under consideration, it is stated that, in addition to not passing the evaluation, the ad hoc Commission found: "(...) serious doubts about the candidate's compliance with ethical and financial integrity criteria. "

This conclusion is likely to seriously and irremediably damage the candidate's image and professional probity, including to the extent that it leads to the loss of his position. This perspective makes the conclusion to be qualified as illegal and contrary to the normative provisions regulating the case, but also exceeding the competences granted by law to the specialized Commission.

Thus, according to art. 8 para. (2) of Law no. 26 of 10.03.2022, a candidate is considered to meet the ethical integrity criterion if:

a) has not seriously violated the rules of ethics and professional conduct of judges, prosecutors or, as the case may be, of other professions, as well as has not admitted, in his work, reprehensible actions or inactions that would be inexplicable from the point of view of a legal professional and an impartial observer;

b) regarding him, there are no reasonable suspicions regarding the commission of acts of corruption, acts related to acts of corruption or corruptible acts under the law on integrity no. 82/2017;

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

According to art. 8 para. (4) of Law no. 26 of 10.03.2022, a candidate is considered to meet the financial integrity criterion if:

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

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

From the analysis carried out by the Commission on the factual circumstances established in the case of the candidate Anatolie Girbu, the applicant noted that the decision in this aspect was not based on an objective examination of the case, as although the candidate provided the identity data of the persons aware of the case, the Commission did not hear the persons indicated by the candidate, to elucidate the issue investigated by the Commission. It merely specified that the alleged events were not supported or confirmed by any statement by a person with direct knowledge of the events.

Thus, the Commission simply left this aspect unresolved and interpreted it to the detriment of the candidate, as it did not question the persons indicated by the candidate, who would have confirmed the information submitted to the Commission by the candidate. Moreover, as can be seen from the reasoning of the Commission indicated in the decision, it appears that the candidate, in his own assessment, was to hear the persons concerned and submit their statements to the Commission, but there were no requests from the Commission in this regard, and in the end it was specified that the statements of persons confirming the candidate's allegations had not been submitted. Thus, in this respect, the Commission's behaviour was unclear and unobjective.

As regards the Commission's analysis of the management of the two accounts as not entirely consistent with the information provided by the applicant, the Commission did not take into account that the information in question was related to a period of time of approximately 10 years ago and without hearing the persons directly connected with those accounts the Commission has drawn its conclusions, which are wrong, unobjective and even offensive to the candidate, as it is very unfair to insinuate that you had accounts, of which you did not even know, did not use that money and to be told that for this reason you do not have integrity.

The second reason why the Commission decided the candidate not to pass the evaluation relates to obtaining service housing, privatizing it and alienating it.

Having analyzed the Commission's arguments on this point, the complainant considered that the Commission had been superficial in this case too, without getting into the essence of the matter.

From the outset, the Commission established that by the Court Decision of 2008 the local public administration was obliged to provide the candidate with service housing under the Law on Prosecutor's Office in force at that time, but the Commission did not take into account and did not specify that the candidate, pursuant to art. 38 of Law no. 118/2003 on the Prosecutor's Office (in force at that time), the public authority, if a prosecutor did not have a home or it was necessary to improve his housing conditions, within one year from the appointment of the prosecutor, had to provide him with service housing during his activity in that locality, which the local public administration did not do, as the candidate, who had been working in the Ungheni District Prosecutor's Office since 2005 and, requesting in writing the granting of service housing, was not provided with that service housing space, and like any citizen, considered it necessary to go to court.

Also, after the issuance of the court decision in 2008, the local public administration did not honor its obligation to the candidate and only 4 years later in 2012 ordered the granting of a service apartment, or rather an apartment, to 2 prosecutors with separate court decisions, formally dividing it into

two with bathroom and shared kitchen. But even then it didn't happen, because it was distributed only on paper, in reality it was not given to the candidate, because it was abusively occupied by a person who did not even have any rights to that apartment.

Upon objections made to the local public administration, it remained apathetic again, thus, seeing that the candidate's right was not respected for many years, having a court decision, the phrase service was excluded by the local public administration, so that only around 2016 he and his colleague came into possession of that apartment, finding that there were no living conditions. It was in a deplorable condition, requiring capital repair. At the same time, we both created families, and after we legally privatized it, we decided to alienate it to improve living conditions and only in 2018 alienated it with 125,000 MDL.

At the same time, the complainant also noted that, although the Commission in its decision acknowledged that the candidate and prosecutors have the same right to seek legal damages as other citizens, nevertheless the candidate's statements in this case implied an advantage, which was granted to him as prosecutor.

The Commission's conclusions in this regard are wrong and unobjective, as if a simple calculation was made, then it would be established that from 2006 when, according to the Law on Prosecutor's Office in force at that time, the candidate had to be provided with service housing space until 2018, when the Commission catalogued the alienation of the dwelling space in question with 125,000 MDL as patrimonial advantage, At that time, it had to establish that during this entire period, as long as the candidate was not provided with the service housing space due to him according to the law, this amount divided monthly, did not cover even half of the rent payment of an apartment in that locality at that time, the candidate working throughout this period in the respective territorial prosecutor's office.

Therefore, Anatolie Girbu, by the present action in compulsion, seeks to claim the violation of the right in his capacity as prosecutor to run and be a member of the Superior Council of Prosecutors and seeks the annulment of an individual administrative act rejecting the applicant's request in the administrative procedure and obliging the Public Authority to issue the requested individual administrative act .

On June 27, 2023, the Independent Commission for Assessing the Integrity of Candidates for the Position of Member of Self-Administration Bodies of Judges and Prosecutors submitted a reference, requesting the rejection of the appeal submitted by Girbu Anatolie, on the grounds that it is groundless.

In the reference, the Independent Commission for Assessing the Integrity of Candidates for the Position of Member of Self-Administration Bodies of Judges and Prosecutors indicated that, in this case, the Commission has diligently and in good faith executed all obligations in its charge, stipulated by Law no. 26 of 10 March 2022. in particular, when the Commission noted some uncertainties, it gave the complainant the opportunity to clarify them by submitting additional data and information (under Article 10 para. (7) of Law no. 26 of 10 March 2022), providing sufficient time (which was implicitly confirmed by the complainant by submitting additional data and information).

In addition, it noted that the burden of proof shifts to the candidate during the evaluation process. in the initial phase (see steps 1 and 2 above) is

the obligation of the Commission to accumulate data and information, making use of its legal powers (Article 6 of Law no. 26 of 10 March 2022) and in compliance with legal obligations (Article 7 of Law no. 26 of 10 March 2022).

However, once some ambiguities arise and in order to elucidate them, the Commission offers the applicant the opportunity to submit additional data and information (Article 10 paragraph (7) of Law no. 26 of 10 March 2022). The submission of additional data and information is a right, not an obligation, of the candidate (Art. 12 para. (4) of Law no. 26 of 10 March 2022), but failure to exercise this right (by refusal, open or tacit, or by submitting incomplete or inconclusive data) risks leading the Commission to conclude that there are serious doubts that the candidate does not meet the integrity criteria (Article 13 paragraph (5) of Law no. 26 of 10 March 2022). Respectively, it is in the candidate's interest to take over the burden of proof, and this legislative transfer not only does not violate but also effectively protects the candidate's rights.

As far as the integrity assessment process is concerned, but also the Decision, it does not affect the professional status of the candidate, as the object of the Commission's mandate is expressly established by law (art. 3 para. (l) of Law no. 26 of 10.03.2022), as follows: The independent Commission for assessing the integrity of candidates for the position of member in the self-administration bodies of judges and prosecutors (hereinafter - Evaluation Commission) performs the evaluation of the integrity of candidates for the position of member in the bodies provided for in art. 2 para. (1) (including in the Superior Council of Prosecutors).

Similarly, it was pointed out that the applicant's objections are unfounded in the absence of evidence proving the illegality of the Decision, as the applicant proceeds to criticize the applicable law, but all these criticisms of the applicable law are irrelevant for examining the legality of the contested Decision. This is because, in the context of the criteria established by the decision of the Constitutional Court no. 5 of 14.02.2023, the criticism of the law does not represent (i) neither serious procedural errors (admitted by the Evaluation Commission) affecting the fairness of the evaluation procedure, (ii) nor circumstances that could lead to the promotion of the evaluation by the applicant, and the objections regarding the quality of the law are to be resolved by means of another remedy, e.g. the verification of the constitutionality of such a law by the Constitutional Court.

In this respect, attention was drawn to the fact that so far, the Constitutional Court has analyzed several times the content of Law no. 26 of 10 March 2022 stating its constitutional character (except for some expressions in art. 14 para. (2), (3) and (8) b) and explaining the content of the institutions regulated by this law (see Decision no. 42 of 06.04.2023).

However, the applicant insists on objections which are not to be examined by the court, but have already been examined by the Constitutional Court. Moreover, the applicant even criticizes the draft law on the evaluation of judges and prosecutors, although this draft is absolutely irrelevant for examining the legality of the contested decision.

It was also noted that the complainant had failed to explain how the circumstances invoked by him in his action would constitute: (i) a serious procedural error affecting the fairness of the evaluation procedure and, at the same time, (ii) a circumstance that could lead to the candidate passing the assessment.

All these circumstances indicate the lack of good faith of the applicant when filing his action. At the hearing, the applicant asked the court to view a video disc showing the apartment privatized by the applicant, while also requesting the hearing of three witnesses, highlighting the most important arguments in the action.

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

Being heard, the witness Brașoveanu Alexandra, being warned of criminal liability according to art. 312, 313 of the Criminal Code, essentially communicated that she carried out actions of registering bank accounts as well as trading financial sources in the name of her daughter, Girbu Ramina, without the latter knowing about this fact. She also reiterated that all banking operations (transfer, bank account opening/closing, etc.) were carried out personally without Girbu Ramina knowing about these issues.

Being heard, the witness Brașoveanu Grigori, being warned of criminal liability according to art. 312, 313 of the Criminal Code, essentially communicated that between 2008 and 2020 he worked in the field of construction in the Russian Federation. Having family problems, he decided to transfer the money to his sister (Brașoveanu Alexandra). He mentioned that he thought he was transmitting the money to the bank account opened in the name of his sister, Brașoveanu Alexandra, he did not know in whose name the bank account where he transferred the money was opened, as when performing banking operations, he only needed a bank code. He knew that there were about 300,000 MDL–400,000 MDL on his bank account, money sent by transfer, as well as deposited personally when he was in the Republic of Moldova. He also pointed out that he also sent other people's money (via receipt). The transfer of money from Banca Sociala to Agroindbank, was personally signed.

Being heard, the witness Gîrbu Ramina, being warned of criminal liability under art. 312, 313 of the Criminal Code, essentially communicated that she did not know about the bank accounts opened in her name until she was asked by her husband, who participated in the evaluation. She never checked how many bank accounts she had, because she knew she only had one bank account, the salary account.

Assessment of the court.

Having heard the parties, and their representatives, having examined the documents of the administrative and judicial file, the special panel of the Supreme Court of Justice finds that the action is admissible and well founded, for the following reasons.

According to art. 14 para. (7) of Law no. 26 of March 10, 2022, by derogation from the provisions of art. 195 of the Administrative Code no. 116/2018, the request to challenge the decision of the Evaluation Commission is examined within 10 days.

Time limit for consideration of the action.

By the order of 20 June 2023 of the Judge-Rapporteur, member of the special panel of the Supreme Court of Justice, the present application for challenge was accepted for examination in the administrative proceedings, and the copy of the defendant's application was ordered to be sent with the granting of the deadline

until June 27, 2023 at 17.00 for the presentation of the candidate's file, reference and opinions on the circumstances, existence / non-existence of grounds of inadmissibility, accompanied by evidence (F.D. 41-42).

The hearing to examine the case has been scheduled for June 30, 2023 at 1:00 p.m. (f.d. 42).

On June 27, 2023, the Independent Commission for Assessing the Integrity of Candidates for the Position of Member of Self-Administration Bodies of Judges and Prosecutors, represented by Vitalie Miron, submitted a reference, requesting the rejection of the appeal submitted by Gîrbu Anatolie (f.d. 50-66).

The panel reiterates that, for June 30, 2023, at 13:00, the court hearing was set to examine the appeal filed by Gîrbu Anatolie against the independent Commission for assessing the integrity of candidates for the position of member in the self-administration bodies of judges and prosecutors, on the annulment of Decision no. 36 of 02 June 2023 on the candidacy of Gîrbu Anatolie, candidate for the position of member of the Superior Council of Prosecutors and ordering the resumption of the candidate's evaluation procedure.

At the hearing on 30 June 2023, the applicant's request to view the video clips from the CD presented at the hearing and to hear witnesses was granted. The hearing was adjourned until 04 July 2023, 09.00 (f.d. 85).

At the hearing on July 4, 2023, three witnesses were heard (f.d. 87-94). Also, during the court hearing, it was ordered to view the video sequences on the CD presented by the applicant (f.d. 97).

In this context, in view of the above, the special panel notes that exceeding the deadline for examining the appeal in 10 days was also influenced by the complexity of the case and the behavior of the parties.

Moreover, the duration of the case was also conditioned by ensuring the observance of the rights of the participants in the trial, which cannot be regarded as delaying the examination of the case, because the trial of the appeal was aimed at respecting the guaranteed right of the parties to a fair trial, enshrined in Article 38 of the Administrative Code and Article 6 §1 of the Convention for the Protection of Human Rights and Fundamental Freedoms.

During the court hearing on July 4, 2023, the case was examined on the merits, the explanations of the parties were heard, the evidence was investigated, the pleadings were heard and, according to art. 14 para. (9) of Law no. 26 of March 10, 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 para. (1)-(4) of the Law 26/2022 are rules of substantive administrative law.

According to Articles 9 para. (2) and 69 para. (1) of the Administrative Code, the initiation of the evaluation procedure is the initiation of an administrative procedure, at the request of the candidate, for one of the positions of member of the bodies listed in Article 2(1) of the Law No 26/2022. 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 para. (l) 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 para. (1) of the Law No 26/2022 is, by its nature, a specific field of activity within the meaning of Article 2 para. (2) of the Administrative Code.

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

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

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

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

The principles governing the administrative dispute proceedings are set out in Book I of the Administrative Code, in particular Articles 21-27 and Articles 36-43. There is an organic and substantive link between Books I and II, and III, which governs the administrative dispute proceedings, which cannot be denied or excluded under no circumstances.

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

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

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

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

In this context, the Special Panel thus emphasizes that the decision of the Commission is an individual administrative act within the meaning of Article 10 para. (l) 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 Prosecutors. Respect for the basic principles, safeguards and rules of administrative procedure is therefore a requirement directly rooted in the concept of the rule of law stipulated in Article 1 para. (3) of the Constitution of the Republic of Moldova.

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

The Special Panel emphasizes that the Commission's tasks do not pertain to the private, but to the public areas of activity, which is why it was vested, by Law No 26/2022, 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, the defendant's representatives did not enter the essence of the Article 2 para. (2) of the Administrative Code, which regulates conditions of derogation by legal provisions from the uniform nature of the Administrative Code for "certain aspects" of administrative activity. Accepting the argument that the Commission is not a public authority would mean denying the legal reality that it carries out administrative activity of public law through administrative procedure and that its decision is an individual administrative act subject to judicial review under administrative litigation procedure. Thus, the public authority concept is not limited to the concept of legal entity of public law, but has its own functional meaning under Article 7 and Article 2 para. (2) of the Administrative Code and for the purposes of Law No 26/2022.

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

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

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

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

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

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

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

The Special Panel thus notes that the decision of the Commission is an individual administrative act whereby the administrative procedure is completed. The concepts of administrative procedure defined in Article 6 of the Administrative Code and of public authority defined in Article 7 of the Administrative Code have a universal nature, being applicable to any area/sub-area of public law. These are the reasons why the Commission had and has the obligation to apply the provisions of the Administrative Code and the procedural rules laid down in Law No. 26 of 10 March 2022 in the part related to derogations from the uniform nature of the Code.

It is therefore unacceptable that the defendant's representatives argue that the evaluation procedure is not an administrative procedure governed by the rules of the Administrative Code, such as the principle of legality (Article 21), the principle of investigation of own motion (Article 22), the principle of equal treatment (Article 23),

the principle of good faith (Article 24), the principle of impartiality (Article 25), the principle of procedural language and reasonableness (Article 26, Article 27), the principle of efficiency (Article 28), the principle of proportionality (Article 29), legal certainty (Article 30), the principle of motivation of administrative acts and administrative operations (Article 31), the principle of comprehensibility (Article 32), the principle of protection of legitimate expectations and others.

Furthermore, the Special Panel highlights that during the court hearing the defendant's representatives invoked the cases Țurcan 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.

Application admissibility.

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

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

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

the main form of administrative action of the authorities.

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

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

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

The Special Panel notes that by means of the filed application, plaintiff Anatolie Gîrbu is claiming an infringement of a right by administrative activity, according to Article 189 para. (1) of the Administrative Code, namely that by issuing Decision No. 36 of 2 June 2023, the Pre-Vetting Commission violated her right to be elected to the position of a member in the Superior Council of Prosecutors, right to self-administration (Article 39 of Constitution of Republic of Moldova), the right to a decision of favorable evaluation of the candidate Gîrbu Anatolie.

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

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

In this context, note that the decision of the Independent Evaluation Commission for assessing the integrity of the candidates for the position of member in the self-governing bodies of judges and prosecutors Decision No. 36 of 2 June 2023 was receipted by the Anatolie Gîrbu, on 14 June 2023, which is confirmed by an abstract from the e-mail, attached to case materials (case file page 344).

The Special Panel concludes that the appeal application filed by Anatolie Gîrbu is admissible because the plaintiff complied with Article 14 para. (1) of Law No 26/2022, being filed to the Supreme Court of Justice on 16 June 2023, within the time frame laid down in the law.

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

evaluation.

The Special Panel, in line with Article 219 para. (3) of the Administrative Code, is not bound by the wording of the motions submitted by the parties to the proceeding, thus the appropriateness argument expressed in the statement of defense by the defendant will be appreciated in terms of admissibility. Effective judicial review involves a full check of factual and legal matters; however it excludes the checking of appropriateness as per Article 225 para. (1) of the Administrative Code and limits the review regarding the discretionary individual administrative act when the law provides for such a reason for issuance. Appropriateness is a matter of admissibility, not a matter of substance in an administrative litigation. The defendant's argument in the submitted statement of defense that the application has to be rejected for the reason of appropriateness is unsubstantiated, as the plaintiff based the application on legality matters, not on appropriateness. The statement of defense and the appropriate aspects highlighted by the defendant therein deny the right to file the application for an administrative litigation in line with Articles 39 and 189 para. (1) of the Administrative Code.

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

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

The substance of the action in administrative litigation

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

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

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

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

damages.

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

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

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

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

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

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

The Constitutional Court held that the explanatory note to the draft law does not include any argument regarding the needs to limit the judicial review of Pre-Vetting Commission's decisions. Still, based on the opinion submitted by the authorities and the content of the challenged text, the Constitutional Court deduced that the legislator intended to avoid situations where the Pre-Vetting Commission decisions are annulled for some insignificant procedural irregularities and, on the other hand, it wanted to ensure the celerity of solving appeals, in order to have sooner an operational Superior Council of Magistracy. The Constitutional Court held that these legitimate goals can fit under the overall objectives of public order and guarantee of justice authority and

impartiality, as provided for in Article 54 para. (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 Anatolie Gîrbu passing the evaluation.

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

The Special Panel highlights that Article 14 para. (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 Anatolie Gîrbu passing the evaluation.

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

The Commission's decision is unfounded and the plaintiff would have the right to a favorable decision, because the appealed decision is vitiated, especially from the perspective of proportionality, misinterpretation of undefined legal notions and fair treatment. The Commission is bound to follow proportionality and fair treatment when issuing decisions on the evaluation of candidates for Superior Council of Prosecutors

membership. Denying this would put under question not just the rule of law, but the purpose for which Law No 26 of 10 March 2022 was passed. The serious doubts of the Commission have to be analyzed/evaluated both in terms of proportionality and fair treatment.

Therefore, according to Decision no. 36 of 02 June 2023 on the candidacy of Gîrbu Anatolie, candidate for the position of member of the Superior Council of Prosecutors, the latter did not pass the evaluation under art. 8 para. (1), (2) (a) and (c), (4) (a) and (b), (5) (b), (c) and (d) and Art. 13 para. (5) of Law no. 26 of 10 March 2022, on the grounds that he does not meet the integrity criteria, as the Commission found serious doubts about compliance with ethical and financial integrity criteria.

In accordance with Art. 8 para. (1) of Law no. 26 of March 10, 2022, for the purposes of this Law, the assessment of the integrity of candidates consists of verifying their ethical integrity and financial integrity.

According to art. 8 para. (2) letter a) of Law no. 26 of March 10, 2022, a candidate is considered to meet the criterion of ethical integrity if, he has not seriously violated the rules of ethics and professional conduct of judges, prosecutors or, as the case may be, of other professions, as well as has not admitted, in his activity, reprehensible actions or inactions, which would be inexplicable from the point of view of a legal professional and an impartial observer.

According to art. 8 para. (4) letter b) of Law no. 26 of March 10, 2022, a candidate is considered to meet the criterion of financial integrity if, the Evaluation Commission finds that the wealth acquired by the candidate in the last 15 years corresponds to the declared income.

Paragraph (5) letters a) and c) of the same article provides that in order to assess the financial integrity of the candidate, the Evaluation Commission shall verify the candidate's compliance with the tax regime in the part related to the payment of taxes on the use of resources and income resulting from the property owned, as well as taxable income, and in the part related to the payment of import duties and export duties.

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

According to art. 13 para. (5) of Law no. 26 of March 10, 2022, a candidate is considered not to meet the integrity criteria if it has been found that there are serious doubts regarding the candidate's compliance with the requirements set out in Article 8, which have not been removed by the evaluated person.

At the same time, in accordance with art. 5 para. (1) of the Evaluation Regulations of the Independent Commission for the Assessment of Integrity of Candidates for the Position of Member in the Self-Administration Bodies of Judges and Prosecutors, adopted at the meeting of the Independent Evaluation Commission on 02 May 2022 pursuant to Law no. 26 of 10 March 2022, only if a candidate fully meets all indicators as defined in art. 8 para. (2)-(5) of Law no. 26 of 10 March 2022, he/she is considered to meet the criteria of ethical and financial integrity.

In this context, the special panel notes that, according to the above-mentioned legal provisions, the Evaluation Commission is required to ascertain whether or not there are serious doubts regarding the candidate's compliance with the legal integrity criteria. The evaluation Commission does not ascertain whether or not a candidate

meets the integrity criteria and/or the existence of which candidates have breached.

The decision to promote or not promote a candidate constitutes an assessment of the Commission, exercising its legal discretion, depending on whether it finds the existence or absence of serious doubts regarding the candidate's compliance with the requirements set out in art. 8 of Law no. 26 of March 10, 2022, which have not been removed by the candidate.

If the Evaluation Commission finds serious doubts regarding the candidate's non-compliance with the ethical and financial integrity criteria, it gives the candidate the opportunity to dispel these doubts by giving explanations to the questions raised and presenting evidence in support of his position.

In the case, Decision No. 36 of June 2, 2023 represents a finding of serious doubts regarding the compliance of Girbu Anatolie with the ethical and financial integrity criteria.

Having analyzed Decision No. 36 of June 2, 2023, the special panel of judges mentions that regarding the candidate Girbu Anatolie, the Independent Evaluation Commission found the existence of serious doubts regarding the candidate's compliance with the financial integrity criterion under art. 8 para. (4) letters a) and para. (5) letters b), c) and d), as well as with the criterion of ethical integrity pursuant to art. 8 para. (2) letter c) of Law no. 26 of March 10, 2022, referring to the source of funds, deposited during 2011-2014 in the two deposit accounts, registered in the name of the candidate's wife and failure by the candidate to declare account no. 2 for the years 2012-2014, doubts that have not been removed by the candidate.

The Independent Evaluation Commission also found serious doubts about the candidate's compliance with the financial integrity criterion under Art. 8 para. (4) letters b) and para. (5) letters a) and c), as well as with the criterion of ethical integrity pursuant to art. 8 para. (2) letter a) of Law no. 26 of
March 10, 2022, with reference to the method of obtaining the service apartment, privatization and sale of this building, doubts that have not been removed by the candidate.

With reference to the source of funds for two bank accounts, registered in the name of the candidate's wife during 2011-2015 and failure to declare bank accounts.

The evaluation Commission indicated that its doubts arose as a result of the fact that, during 2011-2015, two deposit bank accounts were held in the name of the candidate's wife at a commercial bank in the Republic of Moldova, hereinafter referred to as "Bank A".

The first deposit bank account, hereinafter referred to as "Account No. 1", was opened on 15 February 2011 and closed on 16 February 2012. Periodically, various amounts were deposited, totaling 266,770 MDL (including interest). The second deposit bank account, hereinafter referred to as "Account No. 2", was opened on September 12, 2012 and closed on March 23, 2015. Periodically, various amounts were deposited, totaling 98,456 MDL (including interest). Also, several sums of money were periodically withdrawn from the two deposit accounts.

Between 2010 and 2014, the candidate's wife earned a total net income of 247,939 MDL. The candidate had, during that period, a total net income of 287,930 MDL. Thus, the total amount of deposits in accounts no. 1 and no. 2 – 365,226 MDL – far exceeded the total income of the candidate's wife over the same period of time and represented

almost two-thirds of the couple's combined net income, which was deposited in other bank accounts held by the couple.

With reference to Accounts no. 1 and no. 2 and the source of the funds that were deposited in these accounts, the Commission found that the candidate's claim that deposit accounts were opened and managed by his mother-in-law in the name of the candidate's wife, without the knowledge of the candidate's wife, was not credible from numerous considerations. The alleged events were not supported or confirmed by any document or statement by any person with direct knowledge of the events, such as the candidate's mother-in-law, her brother or even the candidate's wife. It is difficult to consider credible that the purpose of the accounts was to protect the funds of the wife's uncle, given that she handed over more than half of the funds ever deposited.

The special panel notes that the Commission gave the candidate the opportunity to dispel any doubts via data and information, thus asking him questions of specification.

In response to written questions regarding Bank Accounts no. 1 and no. 2, opened at "Bank A" the candidate informed the Commission that neither he nor his wife knew about the accounts and in fact they had been opened by his mother-in-law at the request of her brother, who had worked abroad, and the money in the accounts actually belonged to her brother.

Next, in the court hearing on July 4, 2023, witnesses Brașoveanu Alexandra (mother-in-law of the candidate), Brașoveanu Grigori (brother of the candidate's mother-in-law) and Gîrbu Ramina (wife of the candidate) were heard.

In essence, Brașoveanu Alexandra stated that she carried out actions of registering bank accounts, as well as trading financial sources in the name of her daughter, Gîrbu Ramina, without the latter knowing about this fact. She also reiterated that all banking operations (transfer, bank account opening/closing, etc.) have been carried out personally without Girbu Ramina knowing about these issues.

The witness Brașoveanu Grigori, being heard in the court hearing, essentially stated that between 2008 and 2020 he worked in the field of construction in the Russian Federation. Having family problems, he decided to transfer the money to his sister (Brașoveanu Alexandra). He mentioned that he thought he was transmitting the money to the bank account opened in the name of his sister, Brașoveanu Alexandra, he did not know in whose name the bank account where he transferred the money was opened, as when performing banking operations, he only needed a bank code. He knows that there were about 300,000 MDL– 400,000 MDL on his bank account, money sent by transfer, as well as deposited personally when he was in the Republic of Moldova. He also pointed out that he also sent other people's money (via receipt). The transfer of money from Banca Sociala to Agroindbank, was personally signed.

The witness Girbu Ramina, being heard in the court hearing, essentially stated that she did not know about the bank accounts opened in her name until she was asked by her husband, who participated in the evaluation. She never checked how many bank accounts she had, because she knew she only had one bank account, the salary account.

In this regard, the Panel in particular states that the Commission did not exercise the positive obligation to clarify the factual and legal circumstances, as provided for in Art. 22 of the Administrative Code.

Therefore, the Evaluation Commission did not fully exercise its power to investigate the facts ex officio, which is expressly provided for by Art. 6 lit. f) of Law

no. 26 of 10 March 2022, which provides that in the exercise of its functions, the Evaluation Commission requests information from natural and legal persons of public or private law, as well as accumulates any relevant information for fulfilling its mandate, although the legislator provided the Evaluation Commission with a wide range of tools and levers to gather all the necessary information.

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

In the circumstances, the Special Panel finds that, in giving reasons for the contested decision, the Commission erroneously indicated that the applicant did not provide sufficient evidence to dispel any doubt. In the court hearing of July 4, 2023, the witness Brașoveanu Alexandra (mother-in-law of the candidate) was heard, being warned of criminal liability according to art. 312, 313 of the Criminal Code, stating that the bank accounts opened in the name of Girbu Ramina (the candidate's wife), as well as the banking operations were carried out without her daughter Girbu Ramina knowing this fact. Similar statements were also submitted by Brașoveanu Grigori.

Thus, from the applicant's answers and position on this subject, as well as from the overall analysis of the file materials, the Special Court notes that the circumstances found did not reveal the intention of candidate Gîrbu Anatolie to avoid declaring his wife's bank accounts, as both the applicant and his wife did not generally know about the existence of those bank accounts. Therefore, the Special Panel considers that the applicant's argument that the candidate should not assume what he does not know is well founded. Thus, the candidate did not admit in his work reprehensible actions or inactions, which would be inexplicable.

With reference to obtaining service housing, its privatization and alienation.

The evaluation Commission indicated that its doubts arose as a result of the fact that a number of ethical issues had been addressed in relation to the service apartment, in particular regarding its obtaining by the candidate, its conversion into private ownership and its subsequent sale.

The March 2008 judgment of the Ungheni Court obliged the Ungheni City Hall to provide the candidate with work housing. The candidate asked the court to order the City Hall to provide him with service housing under Art. 38 of Law no. 118/2003 on the Prosecutor's Office. In February 2012, in accordance with the judgment of the Ungheni Court, the Ungheni City Council granted the candidate and another prosecutor the right to use an apartment that was assigned the status of service housing. The candidate's right of use over the apartment was registered in the e-Cadastre information system.

After three and a half years from the acceptance without appeal of these decisions and the exercise of the right to register the right to use the apartment, the candidate asked the Ungheni City Council to modify the order on the distribution of the service dwelling, challenging the legality of designating the dwelling as
"service housing" and requesting the exclusion of the phrase "service" from the previous decision of the City Council, by derogation from the judgment of the Ungheni Court.

The evaluation Commission found that the candidate's actions were contrary to the law. First, Art. 5 para. (2) of Law no. 1324/1993 privatization of the housing stock (in force in 2016) provides that buildings located in military cities

of closed type, dormitories, service dwellings, damaged and irreparable dwellings, houses to be demolished, cantons and other constructions that are on the balance or owned by the state forest fund, cannot be sold or transferred free of charge to private property.

Art. 17 para. (1) of this law provides that state and departmental dwellings, except for service dwellings, shall be transferred, within the limits of the norms of this law, into private property.

By asking the Ungheni City Council to amend its 2012 Decision by excluding any "service" phrases referring to "service housing", the candidate was trying ways, contrary to the law, that would allow him to privatize and sell the building. Such conduct of a prosecutor is incompatible with the highest standards of integrity and accountability expected of prosecutors to ensure society's trust in the prosecution service and, inevitably, is the type of illegal action that would be inexplicable from the point of view of a legal professional and an impartial observer.

In the sequence of what happened, the Commission's doubts regarding the ethical integrity of the candidate are accentuated by the reasons invoked by the prosecutors (including the candidate), as well as by the Ungheni district prosecutor in the requests addressed to the Ungheni City Council to exclude the phrase "service" from the 2012 Council Decision. The Commission recognises that the candidate and prosecutors have the same right to seek legal compensation as other citizens. However, the candidate's statements in this case implied an advantage, which was granted to him as a prosecutor, namely, a property interest conferred on him as a prosecutor. The request to amend the 2011 Council Decision was made and was based on his status as prosecutor. In substantiating their request, prosecutors necessarily drew attention to themselves as prosecutors and to the Prosecutor's Office in general.

The prosecutors' requests invoke art. 4 para. (1) of Law no. 982/1996 on the housing stock with special status. This law establishes that service housing, under these provisions, is part of the special fund and is assigned exclusively to persons holding elective offices, during the exercise of these positions.

The annex to the law establishes an exhaustive list of subjects of this law: the President of the Republic of Moldova, MPs of Parliament, prime minister and his deputies, ministers and their deputies, prosecutor general and his deputies, judges of the Constitutional Court, among others. Since Law No. 982/1996 on the housing stock with special status referred only to officials in elective positions, the candidate and his fellow prosecutors argued that, since they did not hold elective positions, the provisions of this law establishing the provision of service housing were inapplicable to them, and their home could not be service housing. Thus, the candidate invoked in front of the local public authority a legal provision absolutely irrelevant for his capacity as prosecutor and housing rights, given those previously invoked in front of the Ungheni City Council and the Ungheni Court, as prosecutor, pursuant to art. 38 of the Law on Public Prosecution and Art. 28 and Art. 41 of the Housing Code. As mentioned, the orders and decisions granting service housing to candidates three years ago were never challenged, they were fully executed and accepted by the candidate. The lack of grounds for late appeal by the candidate of the decision to grant a service accommodation is not to be estimated

here. However, the submission of a legal challenge by the candidate, not to the court that issued the decision and not in the manner and term provided by law, but to the Ungheni City Council, in order to deviate from the court decision and subsequent decisions and orders, directly diminished the expectations regarding the observance of the highest standards of integrity and accountability by prosecutors.

The evaluation Commission noted in its conclusion that the candidate's behavior raised questions about the necessity and use of the service housing granted to him. Although the candidate fulfilled his right to work housing, which was confirmed by the Ungheni Court in 2012 and subsequently implemented by the Decision of the Ungheni City Council, the candidate did not register his residence in the service apartment until three and a half years after the registration of his right to use the apartment and the candidate never lived in the apartment. The candidate's inconsistent replies to the Commission as to why he never lived in the apartment increased doubts about the necessity and use of service housing. Initially, he said he did not live in the apartment because "it was abusively and illegally occupied by a person, so in fact between 2012 and 2015 I did not actually have the right to use it." Later, the candidate stated that "Since it was degraded inside, so there were no living conditions, significant investments in repair were needed, in addition, given that several years had passed until I took possession of this apartment, meanwhile, my colleague and I had created families, the last one also had children, it was practically impossible to live together in that apartment that had a kitchen and a common sanitary block, So we decided to sell it."

Further, the Commission highlighted, in 2013, less than a year and a half after obtaining the right to use the apartment as a service housing, the candidate started the construction of a residential house, located in Ungheni municipality. And in August 2015, following his requests and those of his fellow prosecutors, the Ungheni City Council amended its 2012 Decision by excluding all "service" phrases referring to "service housing", which allowed the candidate and his fellow prosecutors to privatize their homes. In December 2015, the candidate registered his residence at the address of the apartment, more than three and a half years after registering his right to use the apartment and without ever living in this apartment. In February 2016, the candidate obtained ownership of the apartment through a sale-purchase agreement, handover-receipt of the house in private ownership. Subsequently, in July 2018, without ever having lived there, the candidate sold apartment no. 39/2 for the sum of 125 000 MDL. This timeline raised doubts about the candidate's purpose, not to use the service housing, but to obtain ownership in order to sell the apartment and make a profit. Operating a housing benefit program designed to provide service housing for personal benefit constitutes conduct incompatible with the highest standards of integrity and accountability expected of prosecutors.

The special panel, having analyzed the materials of the case, notes that by

the decision of the Ungheni Court of 2008, the local public administration was obliged

to provide the candidate with service housing under the Law on Public Prosecution in force at that time.

In this regard, the court specifies that the Evaluation Commission did not take into account and did not specify that pursuant to art. 38 of Law no. 118/2003 on the Prosecutor's Office (in force at that time), the public authority, if a prosecutor did not have a home or it was necessary to improve his housing conditions, within one year from the appointment of the prosecutor, had to provide him with service housing during his activity in that locality, which the local public administration did not do, as the candidate, who had been working in the Ungheni District Prosecutor's Office since 2005 and, requesting in writing the granting of service housing, was not provided with service housing space, and, as any citizen, he demanded respect for his right in court.

It should be noted that, after issuing the court decision in 2008, the local public administration did not honor its obligation to the candidate and only after 4 years (in 2012) ordered the granting of a service apartment, or rather an apartment, to 2 prosecutors with separate court decisions, formally dividing it in half with shared bathroom and kitchen. Also, viewing in the court hearing the video with the stated immovable property, the Special Court Note that the immovable property was in a deplorable condition, requiring capital repair.

Thus, the circumstances found show that the applicant Girbu Anatolie, pursuing the legitimate aim of improving living conditions, certainly could not directly influence the period of time in which the application would have been settled or the execution of the 2008 court decision. Thus, following the legitimate aim mentioned above, taking into account the norms of housing space and living conditions, the applicant's explanation that he could not live with his family in the personally privatized apartment with another family is justified, thus leading to the idea of alienating the immovable property.

Taking into account the facts found in relation to the ethical norms of conduct of the prosecutor's office, the Special Panel of Judges rejects the serious doubts raised by the Commission regarding the candidate's compliance with the criterion of ethical integrity pursuant to Art. 8 para. (2) letter a) of Law no. 26 of March 10, 2022, in connection with obtaining the service housing, its privatization and alienation.

Next, the Special Panel points out that the Commission's decisions pursuant to Art. 8 of Law 26/2022, constitute mandatory individual administrative acts, i.e. they are not issued on the basis of discretionary law. In other words, the Commission is obliged to issue a decision on the candidate regardless of whether it is favourable or unfavourable, unlike discretionary decisions, where the institution is generally entitled not to act and, if it decides to act, it has the possibility of selecting legal consequences, unless discretion is reduced to zero, In accordance with art. 137 para. (2) of the Administrative

Code.

Moreover, Art. 23 of the Administrative Code, as a matter of principle, provides that public authorities and competent courts must treat persons in similar situations equally. Any difference in treatment must be objectively justified. In both administrative and contentious administrative proceedings or as a result thereof, no one may enjoy privileges, be disadvantaged, deprived of rights or exempt from obligations on Grounds of race, family origin, sex, language, nationality, ethnicity, religion, political or ideological beliefs, education, economic situation, social condition.

The panel, from this perspective, will determine to what extent judges and prosecutors candidates for positions in self-administration bodies, have been treated equally or unequally in terms of the practice formed by the Commission in the period since the beginning of the evaluation process until now.

In this respect, without exposing the quality and legality of the Commission's decisions regarding other candidates, the Special Panel will study comparatively, from the perspective of equal treatment, both decisions to promote the evaluation issued up to the case of Girbu Anatolie, in order to establish the existence or non-existence of different treatments in similar situations.

According to para. (7) of Art. 13 of Law 26/2022, if the candidate, within 48 hours from the moment of sending the decision, does not notify the Evaluation Board about his refusal to publish it, the decision regarding his evaluation shall be published on the website of the institution responsible for organizing the elections or, as the case may be, of the contest in depersonalized form, except for the name and surname of the candidate, which remain public.

Following the proposed exercise, the Special Panel of Judges identified in the Commission's practice, both before and after the evaluation of Girbu Anatolie, cases in which the Commission found similar acts of violation, but accepted the candidates' explanations, finding that they committed technical omissions, without intentions to circumvent the legal regime of declaring assets.

Despite these facts, in Decision No. 36 of 02 June 2023 regarding the candidate Gîrbu Anatolie, the Commission did not present the factual elements indicating that Gîrbu Anatolie is assessed as non-integral in relation to other candidates in the same situation. Thus, unlike other identical cases up to and after 2 June 2023, the Commission disregarded the complainant's explanations regarding the failure to declare accounts No. 1 and no. 2 (of which the applicant and his wife were not aware until the Commission assessment stage), adopting a selective and unfounded attitude towards similar situations.

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 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 Prosecutors 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 and in the court hearing, the defendant's representatives did not provide an answer to that question.

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 para. (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 para. (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 Prosecutors 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 para. (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 Prosecutors 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 prosecutor. 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 Prosecutors and its bodies. The prosecutor, holding such a position, is presumed to have integrity and, should the opposite be proven, than he/she shall be dismissed from the judiciary by means of a disciplinary procedure or another procedure that would take into account the guarantees of his/her independence. The Special Panel notes that the purpose of Law No 26/2022, among other things, is to boost the trust in justice but not to turn justice into an inefficient branch of state power and on which interference / dependence on political power would hover.

Therefore, the exclusion, not just limitation, of candidate Anatorie Gîrbu's right to take part and be elected as a member of the Superior Council of Prosecutors 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 useless and illegal 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 Prosecutors 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 prosecutor.

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 accepts the retroactive effect of the law if it favors the legal situation of a person, but this effect cannot be projected by way of legal interpretation.

So, the legislator provided the Evaluation Commission with a wide range of tools and levers for accumulating all the necessary information. Therefore, the failure to comply with the obligation of ex officio inquiry led to the adoption of an erroneous solution by the Commission and, respectively, to the infringement of the candidate's rights of defence.

The special panel notes that the circumstances found show a breach 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 to be effectively involved in the evaluation procedure, the right to effective cooperation in clarifying the facts and the right to a decision without discretionary errors in the assessment of evidence.

The special panel finds that only these isolated breaches of guarantees in the administrative procedure constitute serious procedural errors, which affected the fairness of the administrative evaluation procedure, and consequently the existence of procedural circumstances, which would have led to the promotion of the evaluation by the candidate.

The special panel notes that the State offered the Evaluation Commission the prerogative to be guided by certain standards in order to select the most upright candidates for the position of members, inter alia of the Superior Council of Prosecutors, who in turn could ensure the correctness of the functioning of the judicial system as a whole, including by applying coherent policies and in line with generally accepted standards.

The applicant demonstrated to the special panel of the Supreme Court of Justice the plausibility of the elements put forward in his challenge, including financial integrity, as well as compliance with ethical and deontological rules.

The special panel notes that the circumstances found show a right of the applicant to a decision of the Evaluation Commission other than the contested one, as they are of such a nature that could lead to the promotion of the evaluation by the candidate Girbu Anatolie.

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

Even if the Special Panel of the Supreme Court of Justice is limited in making a final decision, nevertheless its arguments, conclusions and findings are binding and enforceable for the Evaluation Commission. This conclusion is drawn directly from the provisions of Art. 120 of the Constitution of the

Republic of Moldova, which regulates the binding nature of sentences and other final court decisions.

The special panel of judges bases its argument also on the case-law of the Constitutional Court, which pointed out that, even if the special panel of the Supreme Court of Justice cannot compel the Evaluation Commission to promote the evaluated candidate, the arguments and conclusions made by this court when deciding appeals remain binding on the Commission (DCC no.42 of 06 April 2023 §143).

The special panel notes that, also for reasons of effective judicial review, but also for reasons of quality of law, the Commission is not obliged, after ordering the resumption of the evaluation procedure, to investigate circumstances other than those on which the applicant's action was upheld.

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

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. 36 of 2 June 2023 regarding the candidacy of Anatolie Gîrbu.

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 administrative action filed by prosecutor Gîrbu Anatolie against the independent Commission for assessing the integrity of candidates for membership in self-administration bodies of judges and prosecutors regarding the annulment of decision no. 36 of 02 June 2023 on the candidacy of Gîrbu Anatolie, candidate for the position of member of the Superior Council

of Prosecutors and to order the resumption of the candidate's evaluation procedure.

To annul the decision of the Independent Commission for the Evaluation of the Integrity of Candidates for the Position of Member of the Self-Administration Bodies of Judges and Prosecutors no. 36 of 02 June 2023 on the candidacy of Girbu Anatolie.

To resume the evaluation by the independent Commission for assessing the integrity of candidates for membership in self-administration bodies of judges and prosecutors of the candidate Girbu Anatolie.

The decision is irrevocable.

President

Judge Tamara Chisca-Doneva

Judges Mariana Pitic

Ion Guzun