

D E C I S I O N

In the name of the Law

THE SUPREME COURT OF JUSTICE

01 August 2023

Chisinau municipality

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

composed of:

the chair of the session, the judge
the judges

Tamara Chisca-Doneva
Mariana Pitic
Ion Guzun

with the participation of the clerk

Alexandru Toma

having examined in a public court session, in the administrative proceeding, the application for appeal filed by Holban Vladislav against the Independent Evaluation Commission for assessing the integrity of candidates for the position of member in the self-administration bodies of judges and prosecutors regarding the cancellation of the Decision no. 7 of 21 December 2022 on the candidacy of Holban Vladislav and ordering the re-evaluation of the candidate

finds out:

Arguments of the trial participants:

On 9 January 2023, Holban Vladislav filed an application for appeal against the Independent Evaluation Commission for assessing the integrity of candidates for the position of member in the self-administration bodies of judges and prosecutors, whereby he requested admission of the lawsuit, cancellation of the Decision of the Evaluation Commission no. 7 of 21 December 2022 and ordering resumption of the candidate evaluation procedure.

In the reasoning of the lawsuit, he stated that on 2 November 2021 he submitted through e-mail to the Superior Council of Magistracy, the participation file to run for the position of member of the Superior Council of Magistracy. However, the General Meeting of Judges, scheduled for 3 December 2021, did not

take place, and was postponed for an indefinite period.

Later, the Law no. 26 of 10 March 2022 on certain measures related to selection of candidates for the position of member in the self-administration bodies of judges and prosecutors, whereby an additional filter was established, and namely evaluation by the Independent Evaluation Commission for assessing the integrity of candidates for the position of member in the self-administration bodies of judges and prosecutors, a mechanism that was missing at the time of submitting the file. However, he successively submitted the answers and the requested documents to the Evaluation Commission.

He stated that on 21 December 2022, the Decision no. 7 of the Independent Evaluation Commission for assessing the integrity of candidates for the position of member in the self-administration bodies of judges and prosecutors was adopted regarding the candidacy of Holban Vladislav, whereby it was decided that the candidate does not meet the integrity criteria as serious doubts were found about compliance by the candidate with the criteria of ethical and financial integrity.

He noted that the Decision concerned was e-mailed to him only on 4 January 2023.

He invoked that the Decision no. 7 of 21 December 2022 is unfounded, superficial and issued beyond the competence of the issuing body.

As regards the doubts about the veracity of the information related to the wife's income declared by the candidate in his annual declarations for the years 2017-2021, which are claimed not to have been removed by the candidate, he explained that this conclusion was determined by the income of his wife gained in the course of the activity of entrepreneur carried out based on a work patent, which was declared in the annual declarations submitted to the National Integrity Authority.

He revealed that the legislative framework allows carrying out activity on the basis of the entrepreneur work patent, which is not subject to the obligation to keep accounting and financial records, perform cash operations and settlements. However, the legislator, by adopting the Law no. 26 of 10 March 2022, did not adjust the existing legislative framework, and since the law was not clear, the plaintiff was deprived of the possibility to pass the evaluation process, or the Commission requested an additional report on keeping tax records, which is not foreseen by the law and therefore he had no chance to pass the evaluation.

As regards the finding of the Evaluation Commission regarding the candidate's failure to explain the sources of funds and the undervaluation of the investments made to start his wife's business, he emphasized that this conclusion was determined by the fact that 'the candidate also submitted two statements of account of SRL 'xxxxx', which show banking operations/cash flows, including cash deposits, between November 2021 and October 2022, but these statements did not explain the source requested by the Commission for those 180,000 MDL. In addition, the Commission noted that SRL 'xxxxx', during the period 2011-2020, did not record any taxable income with the State Tax Service, and for the year 2021 it recorded an income of 1000 MDL.

He invoked that the Commission made the conclusion above by exceeding the

competence or due to its failure to involve financial and tax experts, which led to a confusion in examining the submitted documents and respectively a wrong conclusion.

However, the source of funds is proven by the existing tax receipts, to which the Commission had access, was reported monthly to the tax authorities and is subject to taxation.

He argued that SRL 'xxxxx' is a separate subject of law that carries out entrepreneurial activity and bears its own liability according to the law, and connecting certain doubts of this subject of law with the plaintiff is contrary to the principle of personal liability.

He also disagreed with the conclusion of the Commission that there are serious doubts regarding the compliance by the candidate with the criterion of financial integrity, regarding the sources of funds for the purchase by the close relative of the candidate's family of two apartments in 2017 and granting of a loan by the same close relative in 2018.

He explained that the Commission was provided with evidence of the income obtained by his parents, which covers the expenses found out, including the tax declaration of the mother of 20 December 2021, issued by the State Tax Service, the Central Administration Directorate, which confirms that she obtained an income for the period 2015-2020 in the amount of 995,747.89 MDL, and for the year 2018 when the loan was offered, a declared income in the amount of 386,074.75 MDL, but this fact was not taken into account by the Commission, the omission of this income was not justified, the Commission referred only to the income obtained by the father of the plaintiff.

He revealed that the groundlessness of the document appealed against is confirmed by the finding of the National Integrity Authority, which in the minutes no. 985/19 of 2 December 2022, established the lack of appearance of violation of the legal provisions on the declaration of assets and personal interests for the year 2021.

He also argued that the decision appealed against should be cancelled also in light of the violation of the procedure, as the procedure before the public authorities of the Republic of Moldova is carried out in Romanian, but in this case it was carried out in another language, without giving him the possibility to defend himself in the language he speaks; he did not know who made the translation so as to find whether the translation was impartial, was not able to establish possible conflicts of interest as well as to verify his/her competence.

He insisted that the Commission exceeded its competence in the evaluation process and ordered publication of the hearing of the candidate without his consent, after which a series of publications appeared in the media of the information obtained from the hearings.

In the opinion of the plaintiff, all conclusions of the Commission regarding the doubts about the integrity of the candidate are based on assumptions that are not documented, and therefore the decision appealed against shall be cancelled.

In the same way, he said that the case is also subject to the principle of security of legal relations, in this case security of labour relations.

He makes his claims based on the provisions of Art. 119, 166-168, 174, 177 of

the Code of Civil Procedure, Art. 20, 93, 171-172, 177, 189, 206(1)(a), 211-212 of the Administrative Code, art. 216, 219, 2191, 220 of the Civil Code, Art. 13-14 of the Law no. 26 of 10 March 2022 on certain measures related to selection of candidates for the position of member in the self-administration bodies of judges and prosecutors.

On 16 January 2023, the Independent Evaluation Commission for assessing the integrity of candidates for the position of member in the self-administration bodies of judges and prosecutors submitted a reference, whereby it requested to reject the application for appeal submitted by Vladislav Holban.

In the reasoning of the reference, the defendant invoked that it fulfilled with due diligence and in good faith all its obligations, provided for by the Law no. 26/2022. And, the burden of proof passes to the candidate during the evaluation process, however, with the appearance of some ambiguities and to make them clear, the Evaluation Commission offers the candidate the possibility to provide additional data and information.

It mentioned that the integrity assessment process, as well as the decision, do not affect the professional status of the candidate, or the legal effect of decisions of the Commission is expressly and exhaustively established by law, and the candidate can refuse publishing the decision of the Commission.

It indicated that the decision is a finding of the existence of serious doubts regarding the compliance by the plaintiff with the criteria of ethical and financial integrity, rather than a finding of non-compliance with these criteria. Therefore, the appropriateness of the decision cannot be subject to judicial review.

It invoked that the plaintiff accuses the Evaluation Commission, without evidence, stating that the decision affects the continuity of his activity as a judge, exceeds the legal framework for which it was established, the conclusions were issued by exceeding the competence and the decision was issued without taking into account certain circumstances.

As regards the declared amount of income of the candidate's wife from the activity carried out based on the entrepreneur's work patent in the last 5 years, it indicated that the Commission did not request any additional report on keeping tax records. Or, the Evaluation Commission requested any documents that confirm the amounts that the candidate declared in his annual declarations regarding his wife's income in the last five years.

It specified that the alleged imperfection and non-adjustment of the existing legislative framework invoked by the plaintiff is irrelevant in this case, or the task of the court is to apply the law in order to issue a solution, rather than to appreciate how perfect or not the applicable law is.

It pointed out that the Evaluation Commission was not obliged to involve financial and tax experts. However, the provisions of the Law no. 26 of March 10, 2022, do not oblige the Evaluation Commission to involve experts, including in the financial and fiscal fields. Moreover, the Evaluation Commission evaluates the accumulated materials according to its inner conviction and none of the submitted materials has a predetermined probative force without their assessment by the Commission.

In the same way, it stated that the plaintiff contradicts himself, so even though he

claims that no financial and tax experts were involved, the plaintiff makes his own conclusions that the source of funds was proven through the existing tax receipts.

It specified that the findings of the National Integrity Authority from the minutes no. 985/19 of 2 December 2022 are not relevant, because the Evaluation Commission does not depend on the findings of other competent bodies in the respective field.

Additionally, it noted that the documents submitted by the plaintiff regarding the findings of other bodies are irrelevant, also because they refer only to a certain period, rather than to the entire period verified by the Commission.

As regards the alleged procedural violations claimed by the plaintiff in the lawsuit, the defendant emphasized that the provisions of the Law no. 26 of 10 March 2022 do not set any requirements regarding the official language used in the evaluation process. And, the entire communication between the Evaluation Commission and the candidate Vladislav Holban took place in Romanian, as confirmed by the materials of the file.

At the same time, during the hearing of the plaintiff, he had the possibility to speak Romanian and to receive all the questions in Romanian, directly or through the translator. Moreover, the records of the plaintiff's hearing are available on www.youtube.com in both Romanian and English versions, and he could analyze them and check if there were any translation errors.

The defendant noted that the Evaluation Commission did not exceed its competence in the evaluation process by ordering the publication of the hearing of the candidate without his consent, or, the public nature of hearings is expressly provided for by the Law no. 26 of 10 March 2022 as the consent of the candidate was not required for the publication of the hearing records, however, the plaintiff could request the Evaluation Commission to hold the hearing in closed session or refuse to participate in the hearings, but he did not use this right.

At the same time, he explained that point 36 of the Opinion of the Venice Commission (Opinion no. 1069/2021) refers to the publication of the decision on passing/failure of the evaluation by the candidate, rather than to the publication of the hearing of the candidate.

On 6 February 2023, Holban Vladislav submitted a request under Art. 12¹ of the CCP, whereby he requested to remove the exception of unconstitutionality: 1) of the phrase 'if it finds existence of circumstances that could lead to the candidate passing the evaluation' from Art. 14(8)(b) of the Law no. 26 of 10 March 2022 on certain measures related to selection of candidates for the position of member in the self-administration bodies of judges and prosecutors, and 2) the phrase 'does not depend' from Art. 8(6) from the Law no. 26 of 10 March 2022 on certain measures related to selection of candidates for the position of member in the self-administration bodies of judges and prosecutors.

By the Ruling of 6 February 2023 of the Supreme Court of Justice, the request of Holban Vladislav to remove the exception of unconstitutionality was partially admitted, and the exception of unconstitutionality of the phrase 'if it finds existence of circumstances that could lead to the candidate passing the evaluation' from Art. 14(8)(b) of the Law no. 26 of 10 March 2022 on certain measures related to selection of candidates for the position of member in the self-administration

bodies of judges and prosecutors, was removed.

The notification of Holban Vladislav was submitted to the Constitutional Court of the Republic of Moldova, in order to examine the constitutionality of the phrase ‘if it finds existence of circumstances that could lead to the candidate passing the evaluation’ from Art. 14(8)(b) from the Law no. 26 of 10 March 2022 on certain measures related to selection of candidates for the position of member in the self-administration bodies of judges and prosecutors. The request was rejected.

The Constitutional Court, by the Decision of 14 February 2023, admitted the exceptions of unconstitutionality removed including by Vladislav Holban, a party in the file no. 3-4/2023, declared unconstitutional the text ‘if it finds existence of circumstances that could lead to the candidate passing the evaluation’ in Article 14(8)(b) of the Law no. 26 of 10 March 2022 on certain measures related to selection of candidates for the position of member in the self-administration bodies of judges and prosecutors. Until the amendment of the law by the Parliament, the special panel of the Supreme Court of Justice, in examining the appeals filed against the decisions of the Evaluation Commission, will be able to order the re-evaluation of failed candidates if it finds (a) that serious procedural errors were admitted in the evaluation procedure by the Evaluation Commission, which affects the fairness of the evaluation procedure, and (b) that there are circumstances that could lead to the candidate passing the evaluation.

In the court session on 4 April 2023, the plaintiff Holban Vladislav submitted a request to remove the exception of unconstitutionality of some provisions of the Law no. 26 of 10 March 2022 on certain measures related to selection of candidates for the position of member in the self-administration bodies of judges and prosecutors.

By the Ruling of 4 April 2023 of the Supreme Court of Justice, the request of Holban Vladislav regarding the removal of the exception of unconstitutionality of:

- ,- the terms ‘serious’, ‘reprehensible’ and ‘inexplicable’ in Art. 8(2)(a);
- the phrase: ‘in the last 15 years’ from Art. 8(4)(b);
- the term ‘no’ from Art. 8(6) (according to which: ‘In assessing the criteria provided for in paragraphs (2) - (5) and in making decisions regarding them, the Evaluation Commission does not depend on the findings of other bodies that have competences in the respective field’);
- Art. 12(4)(d) to the extent that it is interpreted that the person ‘has the right to provide, in written form, additional data and information that he/she considers necessary in order to remove suspicions regarding his/her integrity, if he/she was unable to provide them earlier’ until hearing by the Evaluation Commission;
- the phrase ‘serious doubts’ from Art. 13(5) (according to which ‘it is considered that a candidate does not meet the integrity criteria if it was established that there are serious doubts regarding the compliance by the candidate with the requirements provided for in Art. 8, which were not removed by the evaluated person’);
- the phrase ‘the decision regarding the failure to pass the evaluation is a legal basis for not admitting the candidate to the elections or competition’ from Art. 13(6);

- Art. 14(6) (according to which ‘the application for appeal against the decision of the Evaluation Commission is adjudicated in accordance with the procedure provided for in the Administrative Code, with the exceptions established by this law, and does not have a suspensive effect on the decisions of the Evaluation Commission, the elections or the competition in which that candidate participates’);

all of them from the Law no. 26 of 10 March 2022 on certain measures related to selection of candidates for the position of member in the self-administration bodies of judges and prosecutors.

The notification of Holban Vladislav was submitted to the Constitutional Court of the Republic of Moldova in order to examine the constitutionality of the terms ‘serious’, ‘reprehensible’ and ‘inexplicable’ from Art. 8(2)(a); the phrase: ‘in the last 15 years’ from Art. 8(4)(b); the term ‘no’ from Art. 8(6) (according to which: ‘In assessing the criteria provided for in paragraphs (2) - (5) and in making decisions regarding them, the Evaluation Commission does not depend on the findings of other bodies that have competences in the respective field’); Art. 12(4)(d) to the extent that it is interpreted that the person ‘has the right to provide, in written form, additional data and information that he/she considers necessary in order to remove suspicions regarding his/her integrity, if he/she was unable to provide them earlier’ until hearing by the Evaluation Commission; the phrase ‘serious doubts’ from Art. 13(5) (according to which ‘it is considered that a candidate does not meet the integrity criteria if it was established that there are serious doubts regarding the compliance by the candidate with the requirements provided for in Art. 8, which were not removed by the evaluated person’); the phrase ‘the decision regarding the failure to pass the evaluation is a legal basis for not admitting the candidate to the elections or competition’ from Art. 13(6); Art. 14(6) (according to which ‘the application for appeal against the decision of the Evaluation Commission is adjudicated in accordance with the procedure provided for in the Administrative Code, with the exceptions established by this law, and does not have a suspensive effect on the Decisions of the Evaluation Commission, the elections or the competition in which that candidate participates’) from the Law no. 26 of 10 March 2022 on certain measures related to selection of candidates for the position of member in the self-administration bodies of judges and prosecutors.

The Decision of the Constitutional Court no. 42 of 6 April 2023 declared inadmissible the notifications of the exceptions of unconstitutionality of the provisions of the Law no. 26 of 10 March 2022 on certain measures related to selection of candidates for the position of member in the self-administration bodies of judges and prosecutors, as follows:

- (a) of the words ‘serious’, ‘reprehensible’ and ‘inexplicable’ from Art. 8(2)(a);
- (b) of the text ‘in the last 15 years’ from Art. 8(4)(b);
- (c) of the text ‘or of the persons specified in Article 2(2)’ from Art. 8(5)(c);
- (d) of the text ‘does not depend’ from Art. 8(6);
- (e) of the text ‘to provide, in written form, additional data and information that he/she considers necessary in order to remove suspicions regarding his/her integrity, if he/she was unable to provide them earlier’ from Art. 12(4)(d);

- (f) of the text ‘serious doubts’ from Art. 13(5);
- (g) of the text ‘[de]cision regarding the failure of the evaluation is a legal basis for not admitting the candidate to the elections or competition’ from Art. 13(6);
- (h) of the text ‘[the] application for appeal against the decision of the Evaluation Commission is adjudicated in accordance with the procedure provided for in the Administrative Code, with the exceptions established by this law, and does not have a suspensive effect on the decisions of the Evaluation Commission, the elections or the competition in which that candidate participates’ from Art. 14(6);
- (i) of the text ‘admission of the application for appeal, if it finds existence of circumstances that could lead to the candidate passing the evaluation, and ordering resumption of the evaluation procedure of the candidate by the Evaluation Commission’ from Art. 14(8)(b);
- (j) of the text ‘[t]he decision of the special panel of the Supreme Court of Justice is irrevocable from the moment of its issue’ from Art. 14(9).

In the court session, the plaintiff Holban Vladislav supported the application for appeal against the Decision no. 7 of 21 December 2022 regarding the candidacy of Holban Vladislav, requesting its admission, on the factual and legal grounds invoked in the application and the explanations provided to the court.

In the court session, the representatives of the Independent Evaluation Commission for assessing the integrity of candidates for the position of member in the self-administration bodies of judges and prosecutors, the defence lawyer Roger Gladei and Cernei Valeriu supported the arguments invoked in the submitted Ruling, requesting to reject the lawsuit as being unfounded.

Assessment of the court.

After hearing the parties and their representatives, examining the documents of the administrative and judicial file, the special panel of the Supreme Court of Justice finds that the lawsuit is admissible and well-founded, for the following reasons.

Term for consideration of the lawsuit

According to Art. 14(7) of the Law no. 26/2022, by derogation from the provisions of Art. 195 of the Administrative Code no. 116/2018, the application for appeal against the decision of the Evaluation Commission is considered within 10 days.

By the Order of the interim Chair of the Supreme Court of Justice no. 29 of 29 March 2022, amended by the Order no. 35 of 14 April 2022, for the consideration of the appeals filed against the decisions of the Independent Evaluation Commission for assessing the integrity of candidates for the position of member in the self-administration bodies of judges and prosecutors, a special court panel was established consisting of: Vladimir Timofti – chair, judge; Ala Cobaneanu and Svetlana Filincova – judges, Dumitru Mardari – substitute judge.

The materials of the file certify that on 9 January 2023, the plaintiff registered this appeal (sheet of the file 1, vol. I).

By the Ruling of 10 January 2023 of the Supreme Court of Justice, the request for summons was received for examination, and the participants were summoned to

the meeting for 24 January 2023 (sheets of the file 33-35, vol. I).

On 16 January 2023, the Independent Evaluation Commission for assessing the integrity of candidates for the position of member in the self-administration bodies of judges and prosecutors submitted a reference (sheets of the file 50-65, vol. I).

By the Ruling of 16 January 2023 of the Supreme Court of Justice, the statement of abstention of a member of the special court panel was admitted (sheets of the file 46-48, vol. I).

On 23 January 2023, the plaintiff Holban Vladislav submitted a request to postpone the court hearing from 24 January 2023 in order to provide him the possibility to hire a defence lawyer, and therefore the case was postponed for 2 February 2023 (sheets of the file 70-71, vol. I) .

On 30 January 2023, the representative of the defendant became aware of the case materials (sheet of the file 80, vol. I).

On 01 February 2023, Holban Vladislav became aware of the case materials (sheet of the file 82, vol. I).

On 1 February 2023, the plaintiff Holban Vladislav submitted a request to postpone the court hearing from 2 February 2023 in order to get acquainted with the case materials, and therefore the case was postponed for 6 February 2023 (sheets of the file 83-85, vol. I).

Also, on 6 February 2023, Holban Vladislav submitted a request to remove the exception of unconstitutionality.

By the Ruling of 6 February 2023 of the Supreme Court of Justice, the request of Holban Vladislav to remove the exception of unconstitutionality was partially admitted, the exception of unconstitutionality of the phrase ‘if it finds existence of circumstances that could lead to the candidate passing the evaluation’ from Art. 14(8)(b) of the Law no. 26 of 10 March 2022 on certain measures related to selection of candidates for the position of member in the self-administration bodies of judges and prosecutors, was removed (sheets of the file 137-141, vol. I).

Thus, a suspension was announced until the Constitutional Court adopts a solution on the notification regarding the exception of unconstitutionality (sheet of the file 136, vol. I).

On 22 February 2023, the Constitutional Court sent to the Supreme Court of Justice a copy of the Decision no. 5 of 14 February 2023 regarding the exception of unconstitutionality of some provisions of the Law no. 26 of 10 March 2022 (sheets of the file 145-156, vol. I).

On 2 March 2023, in connection with the dismissal of some judges by the Order of the interim Chair of the Supreme Court of Justice no. 34 of 2 March 2023 regarding the amendment of the Order no. 33 of 2 March 2023, the composition of the special court panel was changed, and therefore this case was redistributed to another judge-rapporteur (sheets of the file 164-167, vol. I).

The court session of 6 March 2023 was postponed until 14 March 2023, as the request of the plaintiff to provide time to show where in the materials the plaintiff submitted to the Commission supporting documents regarding the income to which he refers in his explanations, was admitted.

In the court session of 14 March 2023, following the examination of the case,

according to Art. 14(9) of the Law no. 26 of 10 March 2022, the court informed that the decision will be issued on 22 March 2023, by placing it on the official web page of the Supreme Court of Justice.

By the Ruling of 22 March 2023 of the Supreme Court of Justice, the examination of this case was resumed ex officio in connection with the change of the composition of the special court panel that examined the case with an indefinite postponement (sheets of the file 229-231, vol. I).

Subsequently, the session set for 28 March 2023 was postponed in connection with the request of the plaintiff Holban Vladislav to discuss with the defendant the conclusion of a transaction, for 4 April 2023.

By the Ruling of 4 April 2023 of the Supreme Court of Justice, the examination of this case was resumed in connection with the change of the composition of the special panel that examined the case with an indefinite postponement (sheets of the file 241-244, vol. I).

Also, on 4 April 2023, Holban Vladislav submitted a lawsuit, through which he requested to remove the exception of unconstitutionality.

On 4 April 2023, the special court panel examined the merits of the case and postponed the pleadings until the Constitutional Court provided its opinion on the request to remove the exception of unconstitutionality.

The Constitutional Court, by its Decision of 6 April 2023, declared inadmissible the notifications regarding the exceptions of unconstitutionality of the provisions of the Law no. 26 of 10 March 2022 on certain measures related to selection of candidates for the position of member in the self-administration bodies of judges and prosecutors.

Due to the examination by the Constitutional Court of the motion challenging constitutionality, the Supreme Court of Justice scheduled a hearing for 10 April 2023, at 16:00, and summonsed the participants to appear in court.

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

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

By Order No 69 of 4 May 2023 Amending Order No 29 of 29 March 2022, the Acting Chief Justice of the Supreme Court of Justice appointed Judge Ion Malanciuc as an alternate in the Special Panel tasked with the examination of appeals against the decisions of the Independent Evaluation Commission for assessing the integrity of candidates for the position of member in the self-administration bodies of judges and prosecutors.

The motion to disqualify Judge Mariana Pitic was distributed electronically via the Integrated Case Management Program on 15 May 2023 and was examined at the hearing of 23 May 2023, the deliberation and outcome regarding it having been postponed until 25 May 2023.

By ruling of 25 May 2023, the Special Panel established at the Supreme Court of Justice rejected the motion to disqualify Judge Mariana Pitic, filed by the Independent Evaluation Commission for assessing the integrity of candidates for the position of member in the self-administration bodies of judges and prosecutors.

The participants in the proceedings were summonsed to the next hearing on the case on 07 July 2023, at 10.00.

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

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

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

Applicability of the Administrative Code.

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

The Special Panel notes that the application of the Administrative Code and the limits of its application are a matter of interpretation and application of the law over which the Supreme Court of Justice has jurisdiction as a court with jurisdiction to

examine administrative disputes (DCC No 163 of 1 December 2022, § 24, DCC No 2 of 18 January 2022, § 19).

It is first 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, Law No 26/2022 contains rules pertaining to substantive public law, procedural law and administrative dispute.

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

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

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

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

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

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

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

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

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

The special rules of the Law No 26/2022 do not preclude the application of

Books I and II, with the exception of certain aspects, such as, in particular, the initiation of administrative proceedings, clarification of facts on own motion, quorum and majority, the right of the candidate to be heard, and others. The wording “certain aspects” in Article 2(2) of the Administrative Code does not mean that the Administrative Code shall not apply.

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

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

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

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

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

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

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

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

judicial review.

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

Functionally and organizationally, the Independent Evaluation Commission for assessing the integrity of candidates for the position of member in the self-administration bodies of judges and prosecutors is a “public authority” within the meaning of Articles 7, 10, 203(a) and 204 of the Administrative Code, because it was established by law, it has public law tasks by virtue of its mandate as defined in Article 8 of the Law No 26/2022, and pursues a public interest. The Special Panel also emphasizes that the administrative procedure of evaluation has a clarifying and guiding purpose owing to the procedural nature of the formal action of evaluating candidates for the position of member of the Superior Council of Magistracy. Respect for the basic principles, safeguards and rules of administrative procedure is therefore a requirement directly rooted in the concept of the rule of law stipulated in Article 1(3) of the Constitution of the Republic of Moldova.

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

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

of an individual administrative act.

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

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

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

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

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

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

The Special Panel thus notes that the decision of the Commission is an individual administrative act whereby the administrative procedure is completed. The concepts of administrative procedure defined in Article 6 of the Administrative Code and of public authority defined in Article 7 of the Administrative Code have a

universal nature, being applicable to any area/sub-area of public law. These are the reasons why the Commission had and has the obligation to apply the provisions of the Administrative Code and the procedural rules laid down in Law No 26/2022 in the part related to derogations from the uniform nature of the Code.

It is therefore unacceptable that the defendant's representatives argue that the evaluation procedure is not an administrative procedure governed by the rules of the Administrative Code, such as the principle of legality (Article 21), the principle of investigation of own motion (Article 22), the principle of equal treatment (Article 23), the principle of good faith (Article 24), the principle of impartiality (Article 25), the principle of procedural language and reasonableness (Article 26, Article 27), the principle of efficiency (Art. 28), the principle of proportionality (Art. 29), the principle of legal security (Art. 3), the principle reasoning administrative acts and administrative operations (Art. 31), the principle of comprehensibility (Art. 32), the principle of protection of legitimate trust and others.

In the same vein, the special court panel reveals that the cases Turcan vs the Evaluation Commission (no. 3-5/23) and Clevadi vs the Evaluation Commission (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.

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

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

Admissibility of the lawsuit.

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

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

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

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

decision is an unfavorable individual administrative act.

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

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

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

In this context, note that the decision of the Independent Evaluation Commission for assessing the integrity of the candidates for the position of member in the self-governing bodies of judges and prosecutors No. 7 of 21 December 2022 was received by Holban Vladislav on 4 January 2023, as confirmed by the extract from the e-mail attached to the case materials (sheet of the file 42 vol. I of the administrative file).

Taking into account the provisions of Art. 14(1) of the Law no. 26 of 10 March 2022 on certain measures related to selection of candidates for the position of member in the self-administration bodies of judges and prosecutors, the application for appeal was to be submitted within 5 days from the date the candidate received the decision supported by reasons, in this case from 4 January 2023.

Accordingly, the special court panel concludes that the application for appeal filed by Holban Vladislav is admissible, because the plaintiff complied with the legal provisions, submitting this application to the Supreme Court of Justice on 9 January 2023, within the term provided by law.

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

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

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

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

Merits of the lawsuit in administrative litigation.

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

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

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

According to Article 53(1) of the Constitution of the Republic of Moldova, any

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

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

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

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

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

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

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

The Constitutional Court held that the explanatory note to the draft law does not include any argument regarding the needs to limit the judicial review of Pre-Vetting

Commission's decisions. Still, based on the opinion submitted by the authorities and the content of the challenged text, the Constitutional Court deduced that the legislator intended to avoid situations where the Pre-Vetting Commission decisions are annulled for some insignificant procedural irregularities and, on the other hand, it wanted to ensure the celerity of solving appeals, in order to have sooner an operational Superior Council of Magistracy. The Constitutional Court held that these legitimate goals can fit under the overall objectives of public order and guarantee of justice authority and impartiality, as provided for in Article 54(2) of the Constitution (DCC No 5 of 14 February 2023, §78).

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

Consequently, the Special Panel of Judges found that the Constitutional Court has established a double test that has to be met for the candidate's appeal against the decision of the Independent Evaluation Commission for assessing the integrity of candidates for the position of member in the self-administration bodies of judges and prosecutors to be accepted, namely: 1) the Pre-Vetting Commission made serious procedural errors during the evaluation procedure, affecting the fairness of evaluation, and 2) circumstances exist which could have led to the candidate passing the evaluation.

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

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

Having due regard to the stated provisions, The Commission's decision is illegal and the plaintiff would have the right to a favorable decision, because the appealed decision is vitiated, especially from the perspective of proportionality, misinterpretation of undefined legal notions and fair treatment. The Commission is

bound to follow proportionality and fair treatment when issuing decisions on the evaluation of candidates for Superior Council of Magistracy membership. Denying this would put under question not just the rule of law, but the purpose for which Law No 26/2022 was passed. The serious doubts of the Commission have to be analyzed/evaluated both in terms of proportionality and fair treatment.

The special court panel mentions that in the Decision no. 7 of 21 December 2022, in Chapter III 'Evaluation of the candidate', the Evaluation Commission indicated that Holban Vladislav does not meet the criteria of integrity, because he did not remove serious doubts regarding the following circumstances:

1. the declared amount of the wife's income from the activity carried out based on the entrepreneur's work patent in the last 5 years;
2. sources of funds and undervaluation of investments in opening the wife's business;
3. failure to explain the sources of funds for a loan and purchase of apartments by close persons.

Thus, the Independent Evaluation Commission for assessing the integrity of candidates for the position of member in the self-administration bodies of judges and prosecutors decided that the candidate Holban Vladislav does not meet the integrity criteria, because serious doubts were found regarding the compliance by the candidate with the criteria of ethical and financial integrity, pursuant to Art. 8(1), Art. 8(2)(c), Art. 8(4) (a) and b), Art. 8(5)(b, c), d) and e) and Art. 13(5) of the Law no. 26 of 10 March 2022 on certain measures related to selection of candidates for the position of member in the self-administration bodies of judges and prosecutors.

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

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

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

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

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

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

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

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

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

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

e) whether or not there are loan, credit, leasing, insurance or other contracts that can ensure financial benefits, in which the candidate, the person specified in Art. 2(2) or the legal entity in which they are effective beneficiaries, is a contracting party.

According to Art. 2(2) of the above-mentioned law, in the course of evaluation of the candidates mentioned in para.(1), the assets of persons close to the candidates are also verified, as defined in the Law no. 133/2016 regarding the declaration of assets and personal interests, as well as the persons mentioned in Art. 33(4) and (5) of the Law no. 132/2016 on the National Integrity Authority.

Respectively, according to Art. 2 of the Law no. 133 of 17 June 2016, a close person is the spouse, child, conjugal partner of the subject of the declaration, the dependent of the subject of the declaration, as well as the person related by blood or adoption to the subject of the declaration (parent, brother/sister, grandfather/grandfather, nephew/niece, uncle/aunt) and the person related by affinity to the subject of the declaration (brother-in-law/sister-in-law, father-in-law/mother-in-law, son-in-law/daughter-in-law).

In turn, Art. 5(4) of the above-mentioned Law provides that the responsibility for submitting the declaration on time, as well as for the truthfulness and completeness of the information, is borne by the person who submits it.

Art. 6(1) of the Evaluation Regulation of the Commission provides that undeclared income or expenses are relevant for financial integrity, to the extent that they are not truthfully declared, as well as for ethical integrity, including but not limited to the extent to which they refer to prohibited secondary income, tax evasion or violation of anti-money laundering provisions.

According to Art. 13(5) of the Law no. 26 of 10 March 2022, it is considered that a candidate does not meet the integrity criteria, if there are serious doubts regarding the compliance by the candidate with the requirements provided for in Art. 8, which were not removed by the evaluated person.

The special court panel mentions that in the Decision no. 7 of 21 December 2022, in Chapter III 'Evaluation of the candidate', the Evaluation Commission indicated that Holban Vladislav does not meet the integrity criteria since he did not remove serious doubts regarding the following circumstances:

1. the declared amount of the wife's income from the activity carried out based on the entrepreneur's work patent in the last 5 years;
2. sources of funds and undervaluation of investments made in starting the wife's business;
3. failure to explain the sources of funds for a loan and purchase of apartments by close persons.

As regards the declared amount of the wife's income from the activity carried out based on the entrepreneur's work patent in the last 5 years, the Evaluation Commission indicated that it has serious doubts (Art. 13(5) of the Law no. 26/2022) regarding the compliance by the candidate with the criterion of financial integrity, according to Art. 8(4)(a), Art. 8(5)(b), and the criterion of

ethical integrity according to Art. 8(2)(c) of the Law no. 26/2022 regarding the veracity of the information related to his wife's income declared by the candidate in his annual declarations for the years 2017-2021, which were not removed by the candidate.

The Evaluation Commission noticed that in the annual declarations of the judge Holban Vladislav for the year 2017-2021, he declared a total income of 882,000 MDL gained by his wife based on the entrepreneur's work patent for the manufacture and sale of handicraft items of folk art.

The doubts of the Evaluation Commission were extended considering that the candidate submitted supporting documents for the amount of 153,479.48 MDL of the total amount of 882,000 MDL that he declared as his wife's income for the years 2017-2021, and for the rest of the amount the candidate could not provide consistent notes for at least one of the reporting periods to show a reliable system ensuring that the information on his wife's income that he declared in his annual declaration is true.

Analyzing the Decision no. 7 of 21 December 2022 in the part of the first inconsistency, the special court panel considers that the Evaluation Commission unjustifiably found serious doubts concerning the declared amount of the wife's income from the activity carried out based on the entrepreneur's work patent in the last 5 years.

In support of the stated opinion, the special court panel notes that during the evaluation the Commission asked the candidate to explain the sources of this income and to submit supporting documents regarding this amount.

In the written responses to the Commission, the candidate stated the following:

'The sources of that income are the result of the production and sale of created goods, as the economic activity is carried out on the basis of a work patent, for which no tax receipts are issued for sale of goods, and he did not have the possibility to submit supporting documents for the entire amount, and only a part of produced goods was sold to legal entities that paid through bank transfers to the card account held by his wife for this purpose'.

At the hearings in public session within the Commission, the candidate confirmed the above facts, and when asked to explain how he makes the calculations to show the respective amounts, the candidate reported that, usually, his wife keeps annual notes (holographs) of her activity carried out based on the entrepreneur's work patent for the year to be declared and based on these notes both calculate the total amount at the end of the year to be declared.

The candidate also explained that this type of activity does not give them the possibility to have a cash register that the candidate wanted to buy and insisted on this, but the law does not allow using it for the activity based on the entrepreneur's work patent.

In this case, the special court panel notes that in response to the request of the Evaluation Commission after the hearings to provide the notes according to which the candidate declared the income obtained from the activity conducted based on his wife's entrepreneur's work patent in the last five years, the candidate submitted 9 documents and several copies with holographic records apparently for the sale of

various objects, some of them with dates, names, and others with prices.

The special court panel, based on the analysis of the decision appealed against, observes that the doubts of the Evaluation Commission arose concerning the declared amount of the wife's income from the activity carried out based on the entrepreneur's work patent in the last 5 years.

In accordance with Art. 3(3) of the Law on the entrepreneur's work patent no. 93 of 15 July 1998, performance of the entrepreneurial activity based on the work patent does not require state registration of its holder and a license.

The requirements regarding the submission of financial and statistical reports, keeping of accounting and financial records, performance of cash operations and settlements, as well as the provisions of Art. 90 of the Tax Code, do not apply to the holder of the work patent.

Also, according to point 8 of the Annex to the Regulation on the operation of cash and control equipment for making settlements in cash and/or through another payment instrument, Annex no. 3 to the Government Decision no. 141 of 27 February 2019, the holder of the entrepreneur's work patent is not obliged to use the cash and control equipment, because the activity carried out based on it is included in the list of types of activity, whose specifics allow cash receipts without using cash and control equipment.

Thus, the work patent holder is not obliged to keep accounting and financial records, issue the primary document, as well as use the cash and control equipment.

Therefore, the special court panel finds out that these circumstances effectively remove any serious doubt regarding the declared amount of the wife's income from the activity carried out based on the entrepreneur's work patent in the last 5 years.

Accordingly, the Special Panel concludes that the Pre-Vetting Commission failed to comply with procedural and substantive legality, in particular when it comes to the correctness of the multi-faceted investigation of its own motion of the factual situation, the reasoning of its decision, and it misinterpreted the legal concepts of 'failure to comply with the criterion of financial integrity' and 'serious doubt' regarding the declared amount of the wife's income from the activity carried out based on the entrepreneur's work patent in the last 5 years, and this fact is a reason for ordering resumption of the evaluation procedure of the candidate, because he would have the right to a decision on passing the evaluation.

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

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

be treated in favor of the candidate and this is a cornerstone principle of the rule of law.

The Special Panel holds that the plaintiff provided sufficient logical arguments and that the fact happened in the way she stated and the Commission wrongly failed to consider these arguments as relevant.

Subsequently, the court upholds the argument of the plaintiff that he submitted the declarations of assets and personal interests to the National Integrity Authority within the established time limit and according to the law, and this circumstance is confirmed by the fact that, during the entire period of activity as a judge, the National Authority of Integrity did not find any violation of the legal provisions on conflicts of interest, incompatibilities, restrictions and limitations, declaration and control of assets and personal interests.

As regards the second non-compliance, the Evaluation Commission had serious doubts (Art. 13(5) of the Law no. 26/2022) regarding the compliance by the candidate with the criterion of financial integrity under Art. 8(4)(b), Art. 8(5)(c) of the Law no. 26/2022, in relation to the failure by the candidate to explain the sources of funds and the undervaluation of the investments made in starting the wife's businesses that were not removed by the candidate.

The Evaluation Commission noticed that in December 2021, the candidate's wife, through SRL 'xxxxx', which she has owned since 2011, opened the cafe 'xxxxx' located in xxxxx sector of xxxxx municipality.

In the period 2011-2020, the company of the wife did not register any taxable income with the State Tax Service, and for the year 2021 she registered an income of 1,000 MDL.

In the written communication with the Commission and at the hearings in public session, the candidate stated that to open the cafe 'xxxxx', investments were made in the amount of approx. 80,000 MDL. This amount consisted of two loan contracts, worth 30,000 MDL each, and the own contribution of the candidate of 20,000 MDL.

The plaintiff provided copies of bank statements of account confirming the transfer of the two loans. The candidate also explained that additional manual works were performed by him and his wife.

In the period October 2021-June 2022, SRL 'Xxxxx' registered purchases based on tax invoices totalling 589,060 MDL.

The conclusion of the Evaluation Commission is based on the fact that of this amount, purchases worth approx. 180,000 MDL can be qualified as investments rather than operational expenses.

The doubts of the Evaluation Commission expanded considering that to explain the source of the 180,000 MDL the candidate submitted statements of account of SRL 'Xxxxx', in which bank operations/cash flows in the period 1 November 2021 – 20 October 2022 were specified.

In the opinion of the Evaluation Commission, the two statements of account showed that more than 90% of the amounts collected by the company were used for the commercial activity of SRL 'xxxxx' and also included cash deposited on one of the accounts through ATM. The transactions also indicated that goods and services

worth 180,000 MDL were purchased from the company's bank account, which were not related to the main activity of selling coffee and pastry products.

Thus, the Evaluation Commission noted that there is a reasonable doubt regarding the fact that the investment expenses are higher than the 80,000 MDL declared by the candidate, and the candidate did not explain the source of the purchases of goods worth 180,000 MDL as requested by the Commission.

Analyzing the Decision no. 7 of 21 December 2022 in the part related to the second non-compliance, the special court panel considers that the Evaluation Commission unjustifiably found serious doubts in relation to the failure of the candidate to explain the sources of funds and the undervaluation of investments for starting the wife's businesses.

However, the plaintiff exercised his rights with due diligence and provided to the Evaluation Commission copies of the statements of account confirming the transfer of the two loans, statements of account of SRL 'xxxxx' regarding the transactions made, the contract certifying that all the coffee-making equipment that was made available to the cafe for free temporary use, tax receipts as well as the relevant explanations regarding the monthly reporting of the activity of SRL 'xxxxx' to the tax institutions.

Although the Evaluation Commission was able to obtain this information, it did not exercise in good faith the rights and obligations established by the legislator in the special law.

Moreover, Art. 3(7) of the Law no. 26 of 10 March 2022 on certain measures related to selection of candidates for the position of member in the self-administration bodies of judges and prosecutors provides for that at the request of the chair of the Evaluation Commission and/or the head of the secretariat, public authorities and institutions are obliged to delegate/temporarily second the persons requested by the Commission to provide assistance in its activity, including by way of derogation from the laws that regulate the functioning of the respective public authorities and institutions, as well as from the laws that regulate the status of certain categories of civil servants.

At the same time, according to Art. 10(9) of the Law no. 26/2022, the Evaluation Commission had to study the accumulated information regarding the candidate Holban Vladislav comprehensively, completely and objectively.

In this case, however, in order to assess this aspect, the Evaluation Commission noted only that the expenses incurred by the candidate are investment expenses, rather than operational expenses, vaguely assessing that the amount of 180,000 MDL represents investment expenses.

In this regard, the Evaluation Commission did not comprehensively analyze the evidence and explanations provided by the candidate, invoking briefly that the two statements of bank account of the company SRL 'xxxxx' would show more than 90% of the amounts collected by the company were used for the commercial activity of SRL 'Xxxxx', and the transactions through the company's bank account in the amount of 180,000 MDL would have been used for the purchase of goods and services that were not related to the main activity of selling coffee and pastry products.

These transactions shall be examined by the Evaluation Commission in order to assess the purpose of the expenses made by SRL 'xxxxx' to clarify the investments made by the latter and the investment source and periods when they were made.

Additionally, the plaintiff's arguments are considered to be well-founded, such as that SRL 'xxxxx' is a separate legal subject that carries out the activity of entrepreneur and bears its own liability according to the law, and the transfer of doubts of this legal subject to the plaintiff is contrary to the principle of personal liability.

Finally, the Commission had serious doubts (Art. 13(5) of the Law no. 26/2022) regarding the compliance by the candidate with the criterion of financial integrity based on Art. 8(4)(b) and Art.8(5)(c), d), e) of the Law no. 26/2022, regarding the sources of funds used for the purchase by the family of the close relative of the candidate of apartments in 2017 and granting of a loan by the same close relative to the candidate in 2018, which were not removed by the candidate.

The Evaluation Commission noted that the sources presented by the candidate do not cover the purchase by the family of the close relative of the candidate of two apartments in 2017 and granting of a loan by the same close relative to the candidate in 2018.

In the reasoning of its conclusion, the Evaluation Commission noted that the candidate declared as a source only:

- a) the sale of a MTZ-82 tractor.
- b) the sale of a land plot on 27 June 2017 (a copy of the land plot sale and purchase agreement was submitted indicating the amount of 14,126 MDL); and
- c) the economic activity regarding land processing through the Peasant Farm of the close relative for the year 2017, according to which income was recorded in the amount of 106,310.55 MDL, as well as expenses in the amount of 106,611 MDL.

In this case, the special court panel notes that the Evaluation Commission did not assess other sources invoked by the candidate, or the candidate submitted to the Evaluation Commission evidence of the income obtained by his parents (sheets of the file 344-345 of the administrative file, vol. II), including the tax declaration of the mother of 20 December 2021, issued by the State Tax Service, the Central Administration Directorate, and for the year 2018 when the loan was offered by the mother of the candidate xxxxx, a declared income of 386,074.75 MDL was obtained, a fact that was not taken into account by the Commission, as the omission of these revenues was not justified.

The only argument of the Evaluation Commission was that the candidate submitted only the three sources mentioned above: the sale of the MTZ-82 tractor, the sale of the land plot on 27 June 2017, the economic activity of land processing through the Peasant Farm of a close relative for the year 2017, but all sources of income and the evidence submitted by the candidate in this regard, corresponding to the respective period, were to be analyzed.

In particular, it is not clear why when the parents of the candidate purchased

the apartments in 2017, the sources of the family of the close relative, including the mother of the candidate, were taken into account, a fact confirmed by the representative of the Evaluation Commission in the court session, but when the loan was granted for 2018, only the source of income of the father of the candidate xxxxx was indicated.

Moreover, the person who borrows money from another person cannot be responsible for the financial position of that person, unless he/she knows from the beginning the origin of funds.

At the same time, the Evaluation Commission only made a general analysis of the expenses of the family of the close relative based on the consumption expenses of the population, without any extensive study and calculations of the consumption expenses of each family member.

The plaintiff also invoked that by the Decision no. 7 of 21 December 2022, the Independent Evaluation Commission for assessing the integrity of candidates for the position of member in the self-administration bodies of judges and prosecutors violated his right of judge to run for and be a member of the Superior Council of Magistracy, which affects directly the possibility of continuing the activity as a judge, the decision appealed against being a direct impediment to access other positions, obtaining licenses where the assessment of integrity is mandatory.

The special court panel mentions that according to Art. 13(6) of the Law no. 26 of 10 March 2022 on certain measures related to selection of candidates for the position of member in the self-administration bodies of judges and prosecutors, the decision on passing of the evaluation is a legal basis for not admitting the candidate to the elections or competition. The decision is sent to the competent bodies according to the law for the examination of detected violations, but the findings in the decision have no probative value for any other procedures or processes.

At the same time, the special court panel considers relevant the fact that in point 113 of the Decision on the inadmissibility of notifications with numbers 75g/2023, 76g/2023, 77g/2023, 86g/2023, 87g/2023, 88g/2023, 89g/2023, 90g/2023, 96g/2023, 101g/2023 and 102g/2023, the Constitutional Court noted that the Decision of the Evaluation Commission on the failure to pass the evaluation may affect the professional reputation of the candidate - protected by the right to private life since it contains findings regarding the candidate who does not have ethical and financial integrity.

Thus, the court concludes that the plaintiff Holban Vladislav complied with the provisions of Art. 17 of the Administrative Code and expressly indicated the right he considers to have been violated by the administrative activity of the Evaluation Commission, and namely the right to private life, reflected by the right to professional reputation.

The panel reiterates that the Law no. 26 of 10 March 2022 on certain measures related to selection of candidates for the position of member in the self-administration bodies of judges and prosecutors does not replace the Administrative Code, as it is brief. Moreover, from its content it is clear that by adopting it, the legislator determined certain special rules for the extraordinary evaluation procedure that are not found in other regulatory acts or the Administrative Code.

Respectively, special derogatory legislative rules apply to the cases expressly provided for by the Law no. 26 of 10 March 2022, and the entire administrative procedure is carried out subject to the rules of the Administrative Code.

This conclusion also derives from the provisions of Art. 2(2) of the Administrative Code, which provides that certain aspects related to the administrative activity in specific fields of activity can be regulated by special legislative rules derogating from the provisions of this code only if this regulation is absolutely necessary and is not contrary to the principles of this code.

According to Art. 28(1) of the Administrative Code, the administrative procedure is carried out simply, adequately, quickly, efficiently and appropriately. Performance of the administrative procedure by electronic means of communication is mandatory in all situations where these means can be used, except in cases where the law provides for otherwise.

According to Art. 32(1) of the Administrative Code, the administrative procedure is structured so that the participants can understand each phase of the procedure. If the contribution of the participant is necessary, the actions to be taken are communicated to him/her without delay, in a clear and plain language.

In accordance with Art. 34 of the Administrative Code, public authorities are obliged to contribute and collaborate in order to perform their competences according to the law.

According to Art. 22 of the Administrative Code, public authorities and competent courts study the state of facts *ex officio*. They establish the type and volume of the studies and are neither related to the submissions of participants, nor to their requests to claim the evidence. The facts already known to the public authorities or the competent courts, the generally known facts and the facts presumed by virtue of the legal provisions do not need to be proven, until there is a contrary proof.

According to Art. 85(3) of the Administrative Code, the public authority shall establish *ex officio* the factual aspects of the case that is the subject of the procedure, without limiting itself to the evidence and statements of the participants. For this purpose, the public authority establishes the purpose of the necessary investigations and their type.

In this context, the special court panel emphasizes that according to Art. 10(2)-(3) of the Law no. 26 of 10 March 2022 on certain measures related to selection of candidates for the position of member in the self-administration bodies of judges and prosecutors, the Evaluation Commission and its secretariat have free access in real time to information systems that contain data necessary to perform its duties, and namely to assess the ethical and financial integrity of the candidates, under the legislation on data exchange and interoperability, except for the information that falls under the provisions of the Law no. 245/2008 on state secrets.

In the process of assessing the integrity of candidates, the Evaluation Commission has the right to request from individuals and legal entities of public or private law, including from financial institutions, documents and information necessary to carry out the evaluation. The requested information is submitted to the Evaluation Commission free of charge, including in electronic format, within no

more than 10 days from the date of the request.

At the same time, para. (7) of the aforementioned legal rule, expressly sets forth that to make clear some identified uncertainties, the Evaluation Commission may request, at any phase of the evaluation procedure, additional data and information from the evaluated candidates.

According to Art. 2(1)(d) from the Evaluation Regulation 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, pursuant to the Law no. 26/2022, adopted at the meeting of the Evaluation Commission on 2 May 2022, one of the main phases of the evaluation is questions and requests to send documents of candidates to the extent necessary to make clear issues of ethical and financial integrity. Candidates shall respond within the term set by the Commission.

The special court panel reveals that from the aforementioned legal rules it follows that if any ambiguities are detected, the Evaluation Commission can request, at any phase of the evaluation procedure, additional data and information from the candidate, only to remove serious doubts that arose before the Evaluation Commission.

Thus, in this case, on 8 July 2022 the Evaluation Commission sent to Holban Vladislav the form of declaration of assets and personal interests for the period of 5 years, which the plaintiff sent completed to the Independent Evaluation Commission for assessing the integrity of candidates for the position of member in the self-administration bodies of judges and prosecutors on 15 July 2022.

On 5 September 2022, the Evaluation Commission sent the candidate a request for clarification of information, which contained 15 questions, including 35 sub-questions and 17 additional requests for documents. On 9 September 2022 the candidate responded, within the requested term, to all questions and provided most of the requested documents.

On 27 September 2022, the Evaluation Commission sent the second round of 12 questions, including 31 sub-questions, and 17 requests for additional documents, to clarify some issues that arose during the evaluation. The candidate answered all the questions within the requested term on 30 September 2022.

On 13 October 2022, the Evaluation Commission sent the third round of 4 questions, including 10 sub-questions, and 3 requests for additional documents, to make clear some aspects that appeared within the evaluation. The candidate responded within the requested term on 15 October 2022 to all questions and provided most of the requested documents.

On 18 October 2022, the Evaluation Commission sent the fourth round of 2 questions, including 2 sub-questions and 1 request for additional documents, to make clear some issues that arose during the evaluation. The candidate answered all questions within the requested term on 20 October 2022.

On 28 October 2022, the candidate participated in hearings in public session of the Evaluation Commission, and on 31 October 2022, the Evaluation Commission sent the fifth round of 4 questions, including 3 sub-questions and 3 requests for additional documents, to make clear some issues that arose during the evaluation. The candidate responded within the requested term on 2 November 2022 to all

questions and provided most of the requested documents.

Therefore, the special court panel concludes that the Evaluation Commission ignored the provisions of Art. 22 and 85(3) of the Administrative Code, reversing the burden of proof.

However, requesting additional documents from the candidate, which he de facto did not have, can be construed as a violation of the presumption of innocence and a reversal of the burden of proof.

In this context, it is noted that from the actions 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, it is concluded that it tried to obtain relevant information exclusively from the candidate in order to make clear the issues that arose during his evaluation, without making due diligence to inquire this information from the public authorities that de facto and de jure hold this information.

According to Art. 22 of the Administrative Code, public authorities and competent courts investigate the facts ex officio. They establish the type and volume of researches and are not related to the presentations of participants or their requests for evidence. The facts already known to the public authorities or the competent courts, the generally known facts and the facts presumed by virtue of the legal provisions do not need to be proven, until the contrary is proven.

According to Art. 85(3) of the Administrative Code, the public authority shall establish ex officio the factual aspects of the case that is the subject of the procedure, without limiting itself to the evidence and statements of the participants. For this purpose, the public authority sets the purpose of the necessary investigations and their type.

It can be deduced from the aforementioned legal rules beyond any doubt that the Evaluation Commission was obliged to accumulate the documents and information necessary for the ex officio investigation of the factual situation for the evaluation of the candidate Holban Vladislav.

Likewise, the court notes that the general principle of equality is one of the constitutional principles and grants a subjective right to the person. It prohibits treating the same facts unequally or unequal things in the same way, unless a different approach would be objectively justified. This traditional formulation also defines the controversial basic structure and therefore the examination sequence. The basic question is always justification, i.e. whether the weight of (un)equal treatment is balanced by the relevant factual reasons. The required degree of justification varies depending on the serious nature of the unequal treatment and can vary from a simple arbitrary test to a test based on proportionality issues.

The elements of comparability refer specifically to those provided by Art. 8(2) and (4) of the Law no. 26/2022, which does not differ significantly. From the materials of the administrative file of the candidate and from the Decision no. 7 of 21 December 2022, it results that the Evaluation Commission did not perform an evaluation using the comparison method. However, the principle of equality prohibits treating essentially the same things unequally. The principle of equality is considered violated, if there is no plausible and objective reason for legal

differentiation or equal treatment.

The special court panel emphasizes that the so-called violations of financial and ethical integrity were assessed by the Evaluation Commission strictly subjectively and separately from the historical and social context of the Republic of Moldova, which affects the security of legal relations regarding the candidate Holban Vladislav. In general, the legal system admits the retroactive effect of the law, if it favours the legal situation of the person, but this effect cannot be projected through legal interpretation.

The special court panel notes with the value of jurisprudential principle that social realism also includes in itself the legal one, and the imputation on the candidate of some violations, which were tolerated, and sometimes even accepted, and administered by the state authorities, such as acceptance of inclusion of prices, other than the market ones, in legal documents regarding real estate or vehicles, are not likely to defeat the presumption that the candidate does not have financial or ethical integrity.

Moreover, submitting the request to run for the positions provided for in Art. 3 of the Law no. 26/2022 also implies voluntary agreement to be subjected to the integrity assessment, as well as conviction of each candidate that he/she complied with the integrity criteria in the previous period, arising specifically from reasons of legal security and the social context in which he/she lived, and related to the citizens and the authorities public.

Thus, the special court panel do not consider the circumstances upheld by the Commission as a genuine violation of financial integrity, because otherwise the rule of protection of legitimate trust in the activity of the public authorities, which had duties and powers to react to possible inadvertences on the part of the administered subjects, as well as the principle of legal security in all its complexity, would have been violated.

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.

Also, the special court panel considers well-founded the arguments of the plaintiff Holban Vladislav, such as that the Evaluation Commission adopted a groundless decision.

The special court panel notes that the circumstances found out indicate a violation of the guarantees of the administrative evaluation procedure, such as the right to a full examination of the facts, the right to a reasoned decision and the right to a decision without discretionary errors in the evaluation of the evidence.

The special court finds that only these isolated violations of the guarantees in the administrative procedure constitute serious procedural errors, which affected the fairness of the administrative evaluation procedure, and as a consequence the existence of procedural circumstances, which would have led to the candidate passing the evaluation.

The Special Panel finds that the Pre-Vetting Commission did not analyze and

reason the legitimate purpose of the issued decision. The preamble of Law No 26/2022 provides that the purpose of the Law is to increase the integrity of future members of the Superior Council of Magistracy and its specialized bodies, as well as the society's trust in the activity of the self-administration bodies of judges and overall in the justice system.

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

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

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

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

According to Article 29(2)(c)-(3) of the Administrative Code, a measure undertaken by public authorities is deemed proportionate if it is reasonable. A measure undertaken by public authorities is reasonable if the interference it causes is not disproportionate compared to its purpose. This requirement involves a balancing of the legally protected values. The more damage is caused to a right, the more it is required for the advantage resulting from the interference to be superior. Note that excluding the right of a judge to be a candidate for membership in the Superior Council of Magistracy involves not just an interference, but rather an improper annulment of the right to be elected into this position. Such a solution cannot be accepted under the rule of law, as it is incompatible with the dignity of a human being and of a judge. The goal of trust in the justice system can be achieved by

complex means, but in no way can it be done by reducing to nothing the idea of free, transparent, and competitive election for the membership of the Superior Council of Magistracy and its bodies. The judge, holding such a position, is presumed to have integrity and, should the opposite be proven, than he/she shall be dismissed from the judiciary by means of a disciplinary procedure or another procedure that would take into account the guarantees of his/her independence. The Special Panel notes that the purpose of Law No 26/2022, among other things, is to boost the trust in justice.

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

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

The plaintiff proved to the Special Panel of the Supreme Court of Justice the plausible nature of the elements invoked in his appeal, which could lead to passing the evaluation.

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

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

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

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

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

The Special Panel notes that the circumstances held by the Pre-Vetting Commission do not fit, from a proportionality perspective, the reasons of candidate Vladislav Holban failing the evaluation.

Therefore, the exclusion, not just limitation, of candidate Vladislav Holban's

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

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

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

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

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

decides:

To admit the lawsuit in administrative litigation submitted by Holban Vladislav against the Independent Evaluation Commission for assessing the integrity of candidates for the position of member in the self-administration bodies of judges and prosecutors regarding the cancellation of the Decision no. 7 of 21 December 2022 concerning the candidacy of Holban Vladislav, candidate for the position of member of the Superior Council of Magistracy and ordering the re-

evaluation of the candidate.

To cancel the Decision no. 7 of 21 December 2022 regarding the candidacy of Holban Vladislav, candidate for the position of member of the Superior Council of Magistracy.

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

The decision is irrevocable.

The chair, the judge

Tamara Chisca-Doneva

The judges

Mariana Pitic

Ion Guzun