

Case #. 3-14/2023
2-23020120-01-3-08022023

DECISION
In the name of the law

THE SUPREME COURT OF JUSTICE

1 August 2023

Chişinău municipality

The Special Panel, established at the Supreme Court of Justice to examine the appeals against the decisions of the Independent Evaluation Commission for assessing the integrity of candidates for the position of member in the self-administration bodies of judges and prosecutors

consisting of:

Hearing Chairperson, Judge
Judges

Tamara Chişca-Doneva
Ion Guzun
Mariana Pitic

Clerk

Cristina Cebotari

With the participation of:

Plaintiff
plaintiff's representative, counsel

Victor Sandu
Vitalie Zama

representatives of the defendant, counsels

Roger Gladei,
Valeriu Cernei

having examined in public court session, under the administrative dispute procedure, the appeal brought by Victor Sandu, against the Independent Evaluation Commission for assessing the integrity of candidates for the position of member in the self-administration bodies of judges and of prosecutors, seeking that the Decision No. 18 of 18 January 2023 be annulled and that the candidate evaluation procedure be resumed.

established:

Submissions of the Participants in the Proceedings

On 8 February 2023, Victor Sandu filed an appeal against the Independent Evaluation Commission for assessing the integrity of candidates for the position of member in the self-administration bodies of judges and prosecutors, seeking that the Decision No. 18 of 18 January 2023 be annulled and that the candidate evaluation procedure be resumed.

In the reasoning of the action, it was indicated that, while serving as a judge at the Chisinau Court, Central seat, on October 29, 2021, a request was submitted to participate in the competition for the selection for the position of member of the Superior Council of Magistracy. In this regard, the CV, the letter of motivation, the project of objectives for the activity as a member of the Council, and the certificate of the absence of disciplinary sanctions were attached.

He mentioned that on 10 March 2022, the Parliament passed in final reading the Law on measures related to the selection of candidates for the positions of members in the self-administration bodies of judges and prosecutors No 26 of 10 March 2022, effective from 16 March 2022. According to this law, a procedure for evaluating the integrity of candidates for the positions of members of the Superior Council of Magistracy, the Superior Council of Prosecutors, as well as candidates for the positions of members in their specialized bodies, has been established. This serves as a mandatory stage in the process of selecting candidates and electing or appointing them to the respective positions.

As regards the evaluation procedure, the plaintiff stated that it started for him on 6 April 2022, when the Superior Council of Magistracy sent the Commission the list of candidates to the position of member in the Superior Council of Magistracy. On 21 June 2022, the Commission sent an ethics questionnaire to the candidate to be filled in and returned to the Commission by 5 July 2022. The completed questionnaire was sent to the Commission on 4 July 2022.

He said that on 8 July 2023, the Commission sent him, a request for completing and submitting by 15 July 2022 the Declaration of assets and personal interests for the past five years as required by art. 9 para. (2) of Law No. 26/2022 on measures related to the selection of candidates for the positions of members in the self-administration bodies of the judges and prosecutors (hereinafter “Law No. 26/2022”). The completed declaration was presented to the Commission on 15 July 2022.

On 13 September 2022, the Commission sent a request for clarifying information, which included 14 questions, including 36 sub-questions and 11 requests for further documentation. Within the requested deadline, on September 16, 2022, the response was provided, and it was noted that some information would be presented later due to delayed responses from the institution that held the respective information. As a result, additional information was presented on September 19, September 30, and October 3, 2022.

On 14 November 2022, the Commission sent him a second round of 30 questions, including 68 sub-questions and 24 requests for additional documents, to clarify some issues that emerged during the evaluation. He replied within the requested deadline of 18 November 2022, but did not provide all the requested documents as he did not have the given documents, and the timeframe to collect them was limited. Later, on 25 November 2022, the Commission sent him a third round of 3 questions, including 3 requests for additional documents, to clarify some issues that came out during the evaluation. On 29 November 2022, he responded and provided some of the requested documents, indicating that he did not have the remaining requested documents.

The appellant stated that as a result of his request, on 9 December 2022, he was granted access to the evaluation materials in accordance with art. 12 para. (4) lit. c) of Law No. 26/2022.

He emphasized that on 12 December 2022, he submitted a request to conduct his hearing in a closed session without audio/video recording. He also requested that if the hearing wasn't held in a closed session, the audio/video recordings made during the hearing should not be published on the internet or other media sources. However, by Decision No. 1 of December 13, 2022, based on art. 12 para. (2) of Law No. 26/2022, the Commission rejected his request for a closed session hearing without audio/video recording. The Commission concluded that a public hearing wouldn't undermine public order, privacy, and morality interests. Similarly, his request for the audio/video recordings made during the hearing not to be published on the internet or other media sources was also rejected.

The appellant stressed that on 14 December 2022, after reviewing the evaluation materials, he submitted several documents that he had requested from various institutions to address certain inconsistencies he claimed to have detected. Following this, on 15 December 2022, the candidate participated in a public hearing before the Commission.

Regarding the communication of the decision, the appellant stated that he contacted the Pre-vetting Commission to inquire about the adoption of the decision concerning him. On 1 February 2023, at 2:41 PM, he received an email stating that the decision had not been issued and that the Commission was not responsible for any public statements made regarding candidates participating in the evaluation process.

Later, on February 3rd at 12:43 PM, the appellant received an email from the secretariat of the Evaluation Commission (secretariat@vettingmd.com), which included two documents: Decision No. 18 of the Evaluation Commission of 18 January 2023, regarding the candidacy of Victor Sandu for the position of member of the Superior Council of Magistracy, provided in two languages – Romanian and English. On the same day, 3 February 2023, at 2:34 PM, information was published in the media, specifically on TV8, stating that the appellant, along with other magistrates, did not pass the evaluation. It's noteworthy that the media reported this information first, and then the Pre-vetting Commission published the information about the failure to pass the evaluation by four candidates at 2:56 PM.

The appellant noted that, according to Decision No. 18 of 18 January 2023, regarding the candidacy of Victor Sandu, candidate for the Superior Council of Magistracy „based on art. 8 alin. (1), (2) lit. a), (4) lit. b), (5) lit. a), c), d) and art. 13 alin. (5) of Law No. 26/2022, the Commission decided that the candidate does not meet the integrity criteria as serious doubts have been found as to the candidate's compliance with the ethical and financial integrity criteria and thus fails the evaluation.”

He also invoked the dissenting opinion of the Evaluation Commission member Vitalie Miron in Decision No. 18, in which the latter expressed disagreement with the fact that the candidate did not pass the evaluation regarding subparagraph 2 "The Transaction Involving Mercedes E220 CDI." Furthermore, he mentioned that Decision No. 18 of 18 January 2023, regarding the candidacy of Victor Sandu for the position of a member of the Superior Council of Magistracy, focuses on the following financial and ethical aspects.

Regarding the aspects related to the alleged non-payment of tax related to the (hypothetical) capital increase from the sale of the "Honda Hornet" motorcycle (in 2018) and the "Suzuki Espana" motorcycle (in 2021), he stated that, according to the certificate issued by the State Tax Service on 6 February 2023, he has no outstanding debts to the national public budget.

Regarding the "Honda Hornet" motorcycle imported from Romania in 2015, purchased for 25,000 MDL in a damaged condition, he later sold it on 29 May 2018. To support this statement, he presented the commission a sales contract indicating a value of 50,000 MDL.

Regarding the "Suzuki Espana" motorcycle (model year 2003), purchased in a damaged condition and imported in 2008, he mentioned that, according to information from the Customs Service, the customs value of the motorcycle was 4,000 MDL, with taxes amounting to 1,106 MDL paid (totaling 5,106 MDL). The motorcycle was sold on 18 March 2021, for 20,000 MDL, as per the contract.

In both cases, the "Honda Hornet" and "Suzuki Espana" motorcycles were purchased in a damaged condition and required costly repairs. The tax code in effect at the time of the sale of these vehicles stated that the "the ad valorem basis for capital assets means the value of capital assets acquired and/or created by the taxpayer." The repairs and works carried out on the motorcycles resulted in him obtaining ownership rights on these improvements. Therefore, the ad valorem basis of these assets corresponded to the procurement price plus the cost of repairs and works. The approach adopted by the respondent commission, which exclusively used the purchase value of these movable assets without considering the repair costs, was deemed inadmissible.

He emphasized that the statement "the appellant has provided evidence of the absence of debts to the national public budget, and it is not admissible to assume any violations of fiscal discipline" is

valid for all the conjecture invoked by the respondent where doubts are raised regarding the appellant's compliance with fiscal discipline.

He argued that the non-payment of taxes for the alleged taxable amount of capital increase for the "Honda Hornet" and "Suzuki Espana" motorcycles, amounting to 44 EUR and 43 EUR respectively, cannot be qualified as serious doubts about the candidate's compliance with the financial integrity criterion, as it does not constitute a "serious breach". In this case, disqualifying the candidate's candidacy for the position of member of the Superior Council of Magistracy based on alleged violations that are absolutely lacking in seriousness is disproportionate.

According to the appellant's opinion, he did not realize any capital increase from the sale of these vehicles, based on the investments in spare parts and repairs, as well as the legislative changes that stipulate that no capital increase is recognized for tax purposes in the case of disposing of a vehicle that has been owned by the taxpayer for at least 3 years prior to the disposal date (art. 40 para. (51) of the Tax Code, in force as of 1 January 2023).

Regarding the aspect concerning the purchase of the "Toyota Corolla" vehicle, the appellant stated that in the appealed administrative decision, the Commission implied the circumstance that after becoming a judge and starting to submit annual declarations, "problems related to reported vehicle transactions emerged," citing as an example the "Toyota Corolla" car purchased and imported by the candidate from Romania in 2014, which was declared as sold at the same price it was purchased three years earlier, despite the market value of similar cars being 1,000-2,000 EUR higher at the time of sale.

The appellant communicated that at the time of addressing the questions, the Commission did not provide him with the opportunity to present evidence that the information regarding the price is erroneous and false. Despite this, the Commission presented a reference car from an advertisement found on the <https://piataauto.md/Anunturi-auto/viewad.php?a=32343> webpage, exhibiting a different reference car, distinct from his own, which had a 1400 cm³ gas engine and a hatchback model, while the car in the advertisement had a 1600 cm³ engine, a larger body type, and consequently a higher cost. The appellant highlighted the difference in excise taxes paid for the maintenance of his own vehicle and the vehicle presented by the Commission in the sale advertisement. As a result, the respondent's argument for their decision was based on information susceptible to substantial criticism.

Regarding the income obtained by the appellant's parents used for purchasing vehicles, he pointed out the Commission's observation that from 2007 to 2021, his mother officially declared an income of 504,281 MDL in Moldova. He also indicated a bank statement belonging to his mother, which showed total deposits of 5,950 MDL, which is incorrect; the actual amount is in EUR, for the period 2013-2014. Additionally, the Commission noted that his father was working in the European Union and withdrew amounts of 24,850 EUR in 2007-2008, 6,700 EUR in 2009, and 42,390 EUR from 2010 to 2014. However, it's not proven that these amounts were transferred to Moldova. In this regard, he specified that the amounts obtained by his father were directly brought into Moldova by him, when he returned home at least 2 times per year. According to the legislation of the European Union and the Republic of Moldova, amounts up to ten thousand EUR do not need to be declared at the state border. Therefore, using a legitimate method to bring funds into the country cannot be interpreted against the appellant, especially when the amounts do not exceed the permissible limits for legally introducing funds, considering the number of entries his parent made into Moldova. The doubts raised by the Commission concerning this matter cannot be considered admissible and proportional to the sanction applied, once these doubts were spelled out.

The appellant argued that he had provided evidence regarding his parents' income even for the period before 2008. However, for unclear reasons, the commission did not address them in the

decision issued, despite copies of bank statements being submitted to the commission.

Regarding the alleged issue related to the ownership rights of vehicles imported in 2009, the appellant explicitly stated that he does not have copies of the sale-purchase contracts for these 20 vehicles. This is because the contracts were not drawn up with his direct involvement. The vehicles were transferred from the legal and effective possession of the owner (Gheorghe Pagu) through a notarized power of attorney, which was a common procedure for selling movable assets during that time, especially considering that the appellant was not the person who received any funds from these transactions.

Similarly, the appellant specified that he did not declare any income from the sale of the vehicles imported in 2009 because he did not receive any income in this regard. The actual owner of these vehicles was Gheorghe Pagu.

He added that through the findings of the Commission in this regard, it was confirmed that the working language is English and the decision was drafted in English without the participation of commission members who are citizens of the Republic of Moldova. However, during the public hearing, the appellant stated that he did not participate in the negotiations for the purchase of motorcycles from Italy by his brother-in-law because he did not know Italian, but he did not mention that he did not understand what negotiations meant at that age (the speech being translated incorrectly).

Regarding the alleged issue of profit or income from the sale of other vehicles imported and registered in the candidate's name between 2008 and 2015, as well as the alleged issue of the obligation to pay capital increase tax from the sale of these vehicles, which were not mitigated by the candidate, he mentioned the following.

The argument presented by the Commission in this section, namely the purchase by the candidate of vehicles during 2008 - 2015, which were subsequently sold, for which it was "presumed" that no income taxes were paid, is completely unfounded. The Commission's given assessment is a subjective interpretation based on an attitude with a low degree of objectivity. The automobiles imported in the candidate's name in 2008 and in 2010-2015, a total of 9 vehicles (of which only 5 were cars), were for the personal use of the family. After their use, with the accumulation of wear and tear, their depreciation over time, they were sold without generating any income from these transactions, including being sold below their original purchase value. The candidate provided the Commission with the documents available at the time of the request, and the content of the documents presented does not indicate any doubt that would question the honesty and credibility of the candidate. Therefore, the conclusions drawn by the Commission are based solely on interpretations and doubts. However, doubts cannot arise in the absence of information but rather based on the existence of information (truthful and conclusive).

Regarding the deadline granted by the Commission for the accumulation of documents, with reference to the provisions of art. 10 para. (3) and (4) of Law No. 26 of March 10, 2022, the candidate expressed the opinion that the argument put forth by the respondent Commission that the candidate did not make any effort to obtain the documents related to the sale of the mentioned vehicles, is arbitrary. Especially given the Commission's right to accumulate necessary information from the respective holders of information, this right being unconditional. Simultaneously, there is a disregard for the legal framework regarding the retention terms by the Public Services Agency of legal documents related to the sale of vehicles, which the candidate does not possess since he did not directly participate in the subsequent sale of the vehicles. This was done through powers of attorney, which had been drawn up prior that, which included granting a right to sell to a representative. In such conditions, the doubts and, more importantly, the conclusions of the Commission are inexplicable and infringe upon the rights of the candidate being directly evaluated.

No one can defend themselves against such accusations when these accusations are put forward. Furthermore, the candidate argued that the Commission did not reference the legal basis (art. 8 para. (4) of Law No. 26/2022) in correlation with the factual circumstances upon which serious doubts about the candidate's integrity were asserted. Starting from 2015, the candidate's assets were declared as required by the legislation, and the National Integrity Authority was neither notified nor did it issue any decisions regarding this matter. Moreover, from the text of the appealed decision, the Commission's evaluation does not show any findings related to the fact that the candidate's acquired assets over the last 15 years do not correspond to the declared income. In this case, all the assets acquired by the candidate and his family were obtained within legal limits and justified through appropriate documentation.

Regarding the circumstances highlighted by the Commission regarding the alleged suspicious situations surrounding the purchase of the "Mercedes E220 CDI", the candidate emphasized that his actions cannot be deemed incompatible with the professional framework of legal proceedings. The way he learned about Mrs. Nadejda Busuioc's intention to sell her car was simple (a phone call from her to another person). Whilst, his actions of informing a potential buyer (at that time) about a car that was intended to be sold do not contradict the professional context of legal proceedings. Consequently, the Commission's findings in this regard are unsubstantiated and illusory.

Concerning the aspects related to the procurement of the vehicle and the replacement of used parts by Mr. Ion Crudu, the candidate stated that these matters were at the discretion of Mr. Ion Crudu. During that period, he was the owner of the vehicle and acted in accordance with his own interests, without the involvement of the candidate in those decisions.

The candidate considered the Commission's arguments suggesting that it might be suspicious that the purchase price of the car included payments that constituted the investment in it (repairs and expenses related to registration, as mentioned by Ion Crudu) to be unfounded. The candidate emphasized that the purchase price of the car was determined by the seller and not by him.

The appellant explained that he was influenced by factors such as Ion Crudu being a friend of the family and the "Mercedes E220 CDI" being in good technical condition and having a good price-quality ratio, which led him to decide to purchase the car from Ion Crudu. It's based on these considerations that he finds the Commission's conclusion unfounded regarding potential ethical violations during the purchase of the car. He particularly mentioned that there's no basis for doubting his adherence to the requirement for a judge to abstain from any financial transactions involving agreements with lawyers or other individuals participating in cases in the court where he works. Furthermore, he asserted that his behavior remains beyond reproach from the perspective of a reasonable observer, which ensures the public's trust in the integrity of the judicial system.

Victor Sandu contended that in the administrative act under dispute, the Commission, for reasons that are unclear, discussed the possibility of a breach of ethics in the descriptive section, but did not elaborate on the seriousness of these alleged breaches in any way.

Considering that the provisions of art. 8 para. (2), lit. a) of Law No. 26 of March 10, 2022, provide exhaustively that only serious violation does not meet the integrity criterion, the decision No. 18 of January 18, 2023 of the Commission does not contain circumstances that denote a serious violation of ethical rules and professional conduct, which could lead to failure to pass the evaluation of the appellant as a candidate for the position of member of the Superior Council of Magistracy. The non-compliance or, as the case may be, compliance by the issuing authority with the mandatory requirement to provide complete reasoning of the individual administrative act directly conditions its legality. Therefore, in the context of the lack of reasoning in line with legal requirements, the appealed decision is illegal, in this sense, it is necessary to annul it. Consequently, as a result of the appealed decision, a series of personal and professional relationships have been affected, an

interference that does not meet the requirement of legality, a legitimate purpose, and does not pass the test of proportionality.

On February 15, 2023, the independent Commission for evaluating the integrity of candidates for the position of member in the self-administration bodies of judges and prosecutors submitted a reference to the appeal submitted by Victor Sandu, whereby it requested the dismissal of the appeal as unfounded.

In the reasoning of the submission, the Commission stated that it diligently and in good faith fulfilled all its obligations as provided by Law no. 26/2022. In particular, when certain ambiguities were identified, the Commission provided the appellant with the opportunity to clarify them by presenting additional data and information (as per Art. 10 para. (7) of Law no. 26/2022), offering an ample timeframe (implicitly confirmed by the applicant's submission of additional data and information).

It mentioned that contrary to the applicant's allegation (page 11 of the action), the Commission is not obliged to issue a favorable decision for the candidate's passing the evaluation. The Commission has a certain margin of discretion, which it appropriately adhered to. It is within the remit of the Commission to assess whether certain circumstances are sufficient or not to establish the presence or absence of serious doubts regarding compliance. This is because this issue specifically relates to the appropriateness of the decision, which cannot be subject to judicial review.

The respondent further specified that, contrary to the appellant's claims, the court is not required to answer questions whether Victor Sandu meets the conditions under art. 8 para. (2) and (4) of Law no. 26 of March 10, 2022, namely, whether he is entitled to the issuance of a passing decision, and whether the Commission is obligated to issue such a decision. In fact, the Commission itself does not need to establish whether a candidate meets the conditions under art. 8 para. (2) and (4) of Law no. 26 of March 10, 2022; in fact, the Commission is obligated to determine whether there are serious doubts regarding the candidate's compliance with the legal integrity criteria, rather than whether such compliance exists or not.

Furthermore, in contrast to the appellant's claim (page 15 of the appeal), the Commission was not required to specify in the decision that the appellant had not declared his assets in accordance with the applicable legislation or that the assets acquired by the applicant's family in the last 15 years did not correspond to the declared incomes. The decision to pass or fail a candidate constitutes an assessment by the Commission, with the exercise of its legal discretion, depending on whether it finds the presence or absence of serious doubts regarding the candidate's compliance with the requirements set out in art. 8 of Law no. 26/2022, which have not been removed by the candidate. The notion of "serious doubt" does not in any way represent a margin for establishing facts from the abstract to the concrete, and consequently, it is the most suitable application of the norms to a particular case.

The respondent also added that the appellant refuses to accept the reversal of the burden of proof in the pre-vetting process, even though the legal provisions (art. 10 para. (7), art. 12 para. (4) lit. d) of Law no. 26/2022) clearly establish that it is the candidate who can remove the serious doubts identified by the Commission. The appellant claims that it was the Commission itself that should have removed these doubts, which were identified by it in the first place.

The respondent emphasized that it was in the applicant's interest to take all possible measures with utmost diligence to dispel these doubts, including by providing all possible evidence. Contrary to the legal provisions (art. 8 para. (6) of Law no. 26/2022), the appellant insists that the Commission should have taken into account the findings of other bodies, as follows: "starting from 2015, the candidate's assets have been declared in accordance with the law, and the National Integrity Authority has neither been notified nor has it issued any decision of finding/sanctioning under this

aspect."

The respondent conveyed that it is within the Commission's remit to assess whether certain circumstances are sufficient or not to determine the existence or absence of serious doubts regarding compliance with integrity criteria. This is because precisely this matter pertains to the discretion of the decision, which cannot be subject to judicial review. Other aspects invoked by the appellant are also beyond the scope of judicial review. The court is not competent to comment on the appropriateness of the decision, and its review is limited to legality aspects.

The respondent also pointed out that the certificate regarding the absence or existence of debts to the national public budget invoked by the appellant is irrelevant to the issues examined in the decision. This is because such a certificate attests to the absence of debts based on the data held by the State Tax Service, derived from the taxpayer's declarations and the fiscal documents issued by the tax authority. The findings in such a certificate are based on the data from the taxpayer's self-declarations and internal fiscal documents of the tax authority. Consequently, this certificate does not determine the creation of tax obligations based on income generated from the sale of a vehicle, unless such income is not declared by the taxpayer in his tax declaration. Therefore, since the appellant did not declare any income from the sale of vehicles, such a certificate is completely irrelevant to the examination of the present case, as it does not demonstrate whether the appellant had any obligation to pay taxes from the sale of vehicles mentioned in the decision. The tax authority, however, confirmed that the applicant was obligated to pay tax on the income derived from the sale of vehicles. Additionally, the appellant contradicts himself on this matter. Similarly, the appellant claims that his violation cannot be classified as serious doubts about non-compliance with the financial integrity criterion, yet at the same time, he insists that he did not violate anything because he did not realize any capital increase.

The appellant wrongly claims that, due to the lack of reasoning consistent with legal requirements, the appealed decision is illegal, necessitating its annulment. However, the decision issued by the Commission was appropriately justified, as it outlined (i) the factual circumstances, (ii) the applicable legal norms, and (iii) the Commission's conclusions regarding the absence or presence of serious doubts concerning the appellant's compliance with integrity criteria.

Furthermore, despite claiming a violation of the right to respect for private life, the appellant fails to explain how this right has been violated. The appellant merely makes a declarative statement that a series of personal and professional relationships were affected as a result of the appealed decision of the Pre-Vetting Commission. However, this assertion lacks specific details about how the right to respect for private life was infringed. It's essential to provide concrete evidence and explanations when asserting a violation of fundamental rights.

The respondent argued that request No. 2 in the appellant's lawsuit is inadmissible. The appellant had requested the annulment of the Commission's decision "Regarding Victor Sandu's candidacy for the position of member of the Superior Council of Magistracy." According to art. 14 para. (8) of Law No. 26/2022, 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 it finds the existence of some circumstances that could have led to candidate's passing of evaluation and order that the Evaluation Commission resumes the evaluation of the candidate.

In the court hearing, the plaintiff Victor Sandu supported the appeal against decision no. 18 of 18 January 2023 regarding his candidacy, requesting its admission for the factual and legal reasons indicated.

The representative of the appellant, lawyer Vitalie Zama, fully supported the appeal submitted by Victor Sandu.

At the court hearing, the representatives of the Independent Commission for assessing the integrity of candidates for the positions of members in the self-administration bodies of judges and prosecutors, counsels Roger Gladei and Valeriu Cernei did not recognize the appeal submitted by Victor Sandu for the reasons cited in the submitted reference, and requested its rejection as being unfounded.

The Determination of the Court

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

Case Examination Period

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

The special panel of judges acknowledges that the failure to meet the 10-day deadline, as stipulated by art. 14 para. (7) of Law no. 26 of March 10, 2022, is due to circumstances beyond the control of the court and cannot be attributed to it.

On 8 February 2023, the case in question was randomly assigned for examination at first instance to Judge-Rapporteur Vladimir Timofti through the Integrated Case Management System. The composition of the panel included the hearing's presiding judge, Vladimir Timofti, and judges Ala Cobăneanu and Svetlana Filincova.

By the decision of the Supreme Court of Justice on February 10, 2023, the case was accepted for proceedings, and a court hearing was scheduled for 20 February 2023, at 10:00 AM. In the court hearing on 20 February 2020, Victor Sandu, represented by lawyer Vitalie Zama, submitted a request for the lifting of the exception of unconstitutionality regarding the: terms „seriously”, „wrongful” and „inexplicable” from art. 8 para. (2) lit. a); phrase „in the past 15 years” from art. 8 para. (4) lit. b); term “shall not” from art. 8 para. (6); art. 12 para. (4) lit. d); phrase “serious doubts” from art. 13 para. (5); phrase “the decision on failing the integrity evaluation constitutes a legal basis not to allow the candidate to the elections or competition” from art. 13 para. (6); art. 14 para. (6) from Law no. 26/2022. Prin încheierea din 20 februarie 2023 a Curții Supreme de Justiție a fost respinsă cererea lui Victor Sandu privind ridicarea excepției de neconstituționalitate.

In the court hearing on 20 February 2020, Victor Sandu, represented by lawyer Vitalie Zama, submitted a request for the lifting of the exception of unconstitutionality regarding the: terms „seriously”, „wrongful” and „inexplicable” from art. 8 para. (2) lit. a); phrase „in the past 15 years” from art. 8 para. (4) lit. b); term “shall not” from art. 8 para. (6); art. 12 para. (4) lit. d); phrase “serious doubts” from art. 13 para. (5); phrase “the decision on failing the integrity evaluation constitutes a legal basis not to allow the candidate to the elections or competition” from art. 13 para. (6); art. 14 para. (6) from Law no. 26/2022. By the ruling of 20 February 2023, of the Supreme Court of Justice, Victor Sandu's request for the lifting of the exception of unconstitutionality was rejected.

The court hearing on 20 February 2023, was adjourned for the presentation of supplementary documents and was scheduled to resume on 21 February 2023, at 2 PM.

The court hearing on 21 February 2023, was adjourned upon request and was scheduled to resume on 27 February 2023, at 2 PM.

During the court hearing on 27 February 2023, Victor Sandu filed a request regarding the lifting of the unconstitutionality exception of Law no. 26 of March 10, 2022. Through this request, the omission of the legislator to regulate the "(excessively long) statute of limitations," the "absence”

of double jurisdiction," the "(limited) powers of the Supreme Court of Justice - insufficient judicial control," the "appropriateness/proportionality of the administrative act," the "lack of independence and impartiality of the Pre-Vetting Commission," and the "unjustified interference in the respect for private life - infringement of reputation" were challenged. However, the Supreme Court of Justice, in an order issued on the same date, rejected the request regarding the lifting of the constitutionality exception.

Subsequently, the court hearing on 27 February 2023 was interrupted due to the submission of a recusal request by Victor Sandu, represented by lawyer Vitalie Zama, against the composition of the judicial panel, consisting of Vladimir Timofti - presiding judge, Ala Cobăneanu and Svetlana Filincova - judges. The hearing was rescheduled for 28 February 2023, at 2 PM.

The court hearing on 28 February 2023 was interrupted to refer the matter to the Parliament for interpretation of Law no. 26/2022 in relation to the Civil Procedure Code and the Administrative Code.

By the decisions of the Superior Council of Magistracy no. 23/2 and no. 27/2 of February 14, 2023, the resignation requests of the judges of the Supreme Court of Justice, Ala Cobăneanu and Svetlana Filincova, were accepted, and their release from the position of judge was ordered from 1 March 2023. This change was prompted by the need to alter the composition of the special court panel within the Supreme Court of Justice.

By the decision of the interim President of the Supreme Court of Justice no. 33 of March 2, 2023, "Regarding the modification of Decisions no. 29 of March 29, 2022, and no. 35 of April 14, 2022," the composition of the special court panel, provided for in point no. 1 of the decision of the interim President of the Supreme Court of Justice no. 29 of March 29, 2022, "Regarding the establishment of the Special Court Panel," amended by the decision of the interim President of the Supreme Court of Justice no. 35 of April 14, 2022, has been changed. A new composition of the special court panel is established for the examination of appeals filed against the decisions of the Independent Commission for assessing the integrity of candidates for the positions of members in the self-administration bodies of judges and prosecutors, as follows: Vladimir Timofti – presiding judge, judges - Dumitru Mardari, Mariana Pitic, alternate member - Galina Stratulat.

Subsequently, through the decision no. 34 of March 2, 2023, "Regarding the modification of Decision no. 33 of March 2, 2023," the composition of the special panel, provided for in point no. 1 of the decision of the interim President of the Supreme Court of Justice no. 33 of March 2, 2023, has been changed. A new composition of the special court panel is established for the examination of appeals filed against the decisions of the Independent Commission for assessing the integrity of candidates for the positions of members in the self-administration bodies of judges and prosecutors, as follows: Vladimir Timofti – presiding judge, judges - Tamara Chișca-Doneva, Dumitru Mardari, alternate member - Ion Guzun.

On March 15, 2023, Victor Sandu, represented by lawyer Vitalie Zama, withdrew the request for recusal submitted to the entire court panel.

During the court hearing on March 15, 2023, the appellant Victor Sandu, represented by lawyer Vitalie Zama, submitted a request regarding the lifting of the unconstitutionality exception concerning: the terms „seriously”, „wrongful” and „inexplicable” from art. 8 para. (2) lit. a); phrase „in the past 15 years” from art. 8 para. (4) lit. b); term “*shall not*” from art. 8 para. (6); art. 12 para. (4) lit. d); phrase “serious doubts” from art. 13 para. (5); phrase “the decision on failing the integrity evaluation constitutes a legal basis not to allow the candidate to the elections or competition” from art. 13 para. (6); art. 14 para. (6) from Law no. 26/2022. By the ruling of 15 March 2023, of the Supreme Court of Justice, the request for the lifting of the exception of unconstitutionality was accepted.

Moreover, Victor Sandu, represented by the lawyer Vitalie Zama filed a request regarding

the lifting of the unconstitutionality exception of Law no. 26 of March 10, 2022. Through this request, the omission of the legislator to regulate the "(excessively long) statute of limitations," the "absence" of double jurisdiction," the "(limited) powers of the Supreme Court of Justice - insufficient judicial control," the "appropriateness/proportionality of the administrative act," the "lack of independence and impartiality of the Pre-Vetting Commission," and the "unjustified interference in the respect for private life - infringement of reputation" were challenged. The Supreme Court of Justice, in an order issued on 15 March 2023, rejected the request regarding the lifting of the constitutionality exception.

By the decision of the Superior Council of Magistracy no. 103/4 of March 16, 2023, the decision of the Superior Council of Magistracy no. 68/3 of February 23, 2023, was amended, changing the date of release of Judge Dumitru Mardari from the position of judge at the Supreme Court of Justice from April 18, 2023, to March 20, 2023. Thus, in order to comply with the tight legal deadline for reviewing appeals, there arose the necessity to change the member of the special panel established within the Supreme Court of Justice.

By the order of the Acting President of the Supreme Court of Justice no. 39 of March 20, 2023, regarding the modification of the order no. 34 of March 2, 2023, the composition of the special panel was changed as follows: Vladimir Timofti – presiding judge, Judges - Tamara Chișca-Doneva, Mariana Pitic. The provisions of the order no. 34 of March 2, 2023, "Regarding the modification of the order no. 33 of March 2, 2023," were otherwise maintained.

By the order of the Acting President of the Supreme Court of Justice no. 46 of March 28, 2023, Aliona Miron, in connection with the decision of the Superior Council of Magistracy no. 66/3 of February 23, 2023, accepting the resignation of Judge Vladimir Timofti from the Supreme Court of Justice and ordering his release from office effective March 27, 2023, the composition of the special panel was changed. This change is pursuant to the provisions of the order no. 39 of March 20, 2023, of the Acting President of the Supreme Court of Justice, and a new composition of the special panel was established for the examination of appeals against the decisions of the independent commission for assessing the integrity of candidates for the positions of members in the self-administration bodies of judges and prosecutors. The new composition is as follows: Tamara Chișca-Doneva – Presiding judge, Mariana Pitic and Maria Ghervas - Judges. The provisions of the order no. 39 of March 20, 2023, "Regarding the modification of the order no. 34 of March 2, 2023," were otherwise maintained.

As a result of the repeated case allocation process, on March 28, 2023, the administrative litigation case related to the appeal filed by Victor Sandu against the independent commission for evaluating the integrity of candidates for positions of members in the self-administration bodies of judges and prosecutors was again assigned. The appeal aimed to annul the decision and order the reevaluation procedure for the candidate. The case was reassigned through the Integrated Case Management System to Judge-Rapporteur Mariana Pitic.

On April 6, 2023, Law No. 64 of March 30, 2023, regarding the Supreme Court of Justice, as well as Law No. 65 of March 30, 2023, concerning the external evaluation of judges and candidates for the position of judge of the Supreme Court of Justice, came into effect.

According to the provisions of art. 8 of Law No. 64/2023, the Plenum of the Supreme Court of Justice is composed of all judges of the Supreme Court of Justice and has, inter alia, the responsibility to establish the composition of judicial panels annually.

The cited legal provisions and the fact that during the period of March-April 2023, the majority of magistrates from the Supreme Court of Justice resigned, made it impossible to form judicial panels by the Plenum of the Supreme Court of Justice, which was not in a deliberative state at that time.

However, through Law no. 89 of April 27, 2023, effective from May 2, 2023, the transitional provisions of Law no. 64/2023 regarding the Supreme Court of Justice were modified to establish the starting point of the Supreme Court of Justice's activity in its new composition, including the Plenum. This change reinstated the authority to form judicial panels to the President of the Supreme Court of Justice according to the previous rule.

In accordance with the provisions of art. 12 para. (8) of Law no. 65/2023, the Superior Council of Magistracy, through Decision no. 120/6 of April 10, 2023, announced the competition for temporarily filling the vacant judge positions at the Supreme Court of Justice through transfer. Further, through Decision no. 142/8 of May 2, 2023, the Superior Council of Magistracy decided to temporarily transfer 7 judges from national courts to serve as judges of the Supreme Court of Justice for a period of 6 months, starting from May 10, 2023.

Therefore, the panel of judges notes that the activity of the Supreme Court of Justice was blocked during the period from March 30, 2023, to May 10, 2023. During this time, it was not possible to proceed with the examination of cases pending before the 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 ruling of 25 May 2023, the Special Panel established at the Supreme Court of Justice rejected as unfounded 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.

In this context, considering the aforementioned, the special panel of judges acknowledges that the exceeding of the 10-day examination deadline was influenced, among other factors, by the complexity of the case, the behavior of the parties in the proceedings, including that of the respondent authority, the difficulty of the debates, the mass resignations of judges from the Supreme Court of Justice, and the inability to form the special panel for the examination of appeals. Furthermore, the duration of the pending case was also influenced by ensuring the respect for the rights of the participants in the proceedings. This aspect should not be perceived as deliberate delay of the case examination, as the adjudication of the appeal aimed to uphold the guaranteed right of the parties to a fair trial, as enshrined in Art. 38 of the Administrative Code and Art. 6 §1 of the Convention for the Protection of Human Rights and Fundamental Freedoms.

At the hearings on 23 June 2023 and 3 July 2023, the case was examined on the merits, the parties' explanations were heard, the evidence was examined, the pleadings were heard and, in accordance with Art. 14(9) of the Law No 26/2022 – the issuance and placement of the decision on the website of the Supreme Court of Justice was announced.

Applicability of the Administrative Code

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

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

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

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

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

According to Art.s 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 Art. 2(1) of the Law No 26/2022. Pursuant to Art. 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 Art. 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 Art. 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 Art. 2(1) of the Law No 26/2022 is, by its nature, a specific field of activity within the meaning of Art. 2(2) of the Administrative Code.

Although the Administrative Code establishes uniform administrative and administrative litigation proceedings, its Art. 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 Art. 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 Art. 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 Art.s 21-27 and Art.s 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 Art.s 220(1), 87-93 of the Administrative Code, referrals under Art.s 223, 97-114 of the Administrative Code, impartiality under Art. 25 of the Administrative Code, recusals under Art.s 202, 49-50 of the Administrative Code, forms of administrative activity under Art.s 5, 10-15 and 189 of the Administrative Code, the concept of party in an administrative dispute under Art.s 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 Art. 171(4) of the Administrative Code, the validity, binding force and res judicata of the Commission decision under Art.s 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 Art. 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 Art.s 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 Art. 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 Art. 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 Art. 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 Art. 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 Art. 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 Art. 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.

Furthermore, it is noted that the representatives of the respondent have not fully grasped the essence of art. 2 para. (2) of the Administrative Code, which regulates the conditions for derogation through legislative norms from the uniform character of the Administrative Code for "certain aspects" of administrative activity. Dismissing the argument that the Commission is not a public authority implies denying a legal reality that it carries out administrative activity of public law through administrative procedures, and its decision is an individual administrative act subject to judicial review in administrative litigation proceedings.

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

According to Art. 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 Art. 10 (1) of the Administrative Code, the Commission's decision fits within the concept of „*public law domain.*” According to Art. 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 Art. 2(3)(a)-(c) of the Administrative Code.

According to Art. 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 Art. 6 of Law No 26/2022.

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

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

This trait of the individual administrative act has the function to delimit it from the normative

administrative act, which is an abstract regulation as per Art. 12 of the Administrative Code.

According to Art. 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 Art. 6 of the Administrative Code and of public authority defined in Art. 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 (Art. 21), the principle of investigation of own motion (Art. 22), the principle of equal treatment (Art. 23), the principle of good faith (Art. 24), the principle of impartiality (Art. 25), the principle of procedural language and reasonableness (Art. 26, Art. 27), the principle of efficiency (Art. 28), the principle of proportionality (Art. 29), legal certainty (Art. 30), the principle of motivation of administrative acts and administrative operations (Art. 31), the principle of comprehensibility (Art. 32), the principle of protection of legitimate expectations and others.

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

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

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

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

Under these circumstances, the Special Panel rejects the argument invoked by the Commission

that when issuing a solution on a case the court must reason its opinion and issue the solution based on mentioned considerations and judicial practice examples.

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

Application admissibility.

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

According to Art. 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 Victor Sandu is claiming an infringement of a right by administrative activity, according to Art. 189(1) of the Administrative Code, namely that by issuing Decision No. 18 of 18 January 2023, the Pre-Vetting Commission violated her right to be elected to the position of a member in the Superior Council of Magistracy (Art. 14 of the Law on the status of judges No 544/1995), right to self-administration of judges (Art. 23¹ of the Law on Judiciary Organization No 514/1995), the right to the dignity and professional reputation of the judge, the fundamental right to independence and immovability of the judge (Art. 16 of the Constitution of the Republic of Moldova), as well as the fundamental right to administration (Art. 39 of the Constitution of the Republic of Moldova), and the right to a favorable evaluation decision for the candidate Victor Sandu.

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

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

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

January 2023, which is confirmed by an abstract from the e-mail, attached to case materials (page 357 of administrative file).

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

With respect to the type of application for administrative litigation, the Special Panel holds the filed application as an action for injunction of a specific nature. By means of a regular action for injunction, the plaintiff, according to Art.s 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 Art. 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 Art. 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 Art.s 39 and 189(1) of the Administrative Code. Thus, neither the Administrative Code nor Art. 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 Art. 225(1) of the Administrative Code are clear and cannot be confused, as they regulate, in functional unity with Art.s 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 Art. 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 Art. 137(2) of the Administrative Code.

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

For the purposes of Art. 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 Art. 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 Art. 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 Art. 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 Art.s 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 Art. 53 of the Constitution of the Republic of Moldova. To this end, Art. 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 Art. 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 Art. 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 Art. 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 Art. 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 Victor Sandu passing the evaluation.

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

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

The special panel of judges notes that on February 8, 2023, Victor Sandu submitted an appeal against the decision of the Independent Commission for assessing the integrity of candidates for the positions of member in the self-administration bodies of judges and prosecutors, decision no. 18 of January 18, 2023, regarding his candidacy. He requested the annulment of this decision and the

reinitiation of the candidate evaluation process.

It is noted that according to the decision of the Independent Commission for assessing the integrity of candidates for the positions of members in the self-administration bodies of judges and prosecutors, decision no. 18 of January 18, 2023, the candidate for the position of member of the Superior Council of Magistracy, Victor Sandu, did not pass the evaluation based on art. 8 para. (1), para. (2) lit. a), para. (4) lit. b), para. (5) lit. a), c), and d), and art. 13 para. (5) of Law no. 26 of March 10, 2022 on measures related to the selection of candidates for the positions of members in the self-administration bodies of judges and prosecutors. This was due to the candidate's failure to meet the criteria of ethical and financial integrity, as serious doubts were identified regarding the candidate's compliance with these integrity criteria.

According to Chapter III "Candidate's Evaluation" of decision no. 18 of January 18, 2023, the Evaluation Commission indicated that Victor Sandu, a candidate for the position of member of the Superior Council of Magistracy, does not meet the criteria of financial integrity, considering the following circumstances and the existence of serious doubts thereto:

1. The issue of not paying capital increase tax from the sale of the Honda motorcycle (in 2018) and the Suzuki Espana motorcycle (in 2021);
2. The issue of ownership rights of vehicles imported in 2009;
3. The issue of profit or income from the sale of other vehicles imported and registered in the candidate's name between 2008 and 2015, as well as the issue of the obligation to pay capital increase tax from the sale of these vehicles;
4. The method of acquiring the Mercedes car.

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 Art. 53 of the Constitution of the Republic of Moldova.

The special panel of judges notes that during the administrative procedure of issuing the appealed individual administrative act, the appellant Victor Sandu fully and without reserve complied with the requests for submitting documents and requests from the respondent within the given timeframe, without raising any objections from the Evaluation Commission regarding the completeness of the presented materials, which could have been mitigated by the appellant.

During the administrative evaluation procedure, the Evaluation Commission did not object to or mention any specific documents or information that were not provided by the appellant. The Commission's communication was limited to the wording used in the appealed administrative act, which stated that "after reviewing the evaluation materials, the candidate submitted several documents that he requested from various institutions to address certain inconsistencies."

Regarding the aspect mentioned above, the special panel of judges highlights that according to the provisions of art. 32, art. 85 para. (2), and art. 88 of the Administrative Code, if the contribution of a participant is necessary, he must be promptly communicated to in clear and understandable language about the actions he needs to undertake. During the investigation of the factual situation participants in the administrative procedure are required to cooperate during the investigation of the factual situation. They are particularly expected to provide information about facts and evidence within their knowledge and to present the documents they have. Participants in the administrative procedure are not obligated to submit documents or other written materials that are no longer in their possession if the public authority can clarify a matter by requesting information from another public authority.

In this context, the special panel of judges concludes that from the arguments presented by the

appellant, the administrative file of the candidate, as well as the documents in the judicial file, there are circumstances that could lead to the reopening of the candidate's evaluation procedure and the candidate's passing the evaluation by the Commission.

Regarding ethical integrity.

As per Art. 8(2)(a) of Law No 26/2022, the candidate shall be deemed to meet the criterion of ethical integrity if:

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

In the present case, the Evaluation Commission claims that the candidate, through a third party - his friend Ion Crudu, purchased the Mercedes E220 model car from prosecutor Nadejda Busuioc, with whom he participated in the examination of the authorization procedures for special investigative measures. This was allegedly a way to enable the candidate to purchase the car.

From the Evaluation Commission's reasoning, it follows that through his actions, Victor Sandu violated the Code of Ethics and Professional Conduct for Judges (2015), which requires judges to adhere to the highest standards of integrity and responsibility to ensure society's trust in the judiciary. Specifically, a judge must refrain from any financial transactions that could involve agreements with lawyers or other individuals who are participants in cases in the court where they practice and must conduct transactions regarding personal property in a manner that does not raise doubts, affect their independence and impartiality, or create conflicts of interest.

During the evaluation process, the candidate provided explanations and evidence, to the extent available, that would support his statements, such as that he did not have any contractual relationships with prosecutor Nadejda Busuioc and that he purchased the Mercedes E220 from Ion Crudu, as a result of the latter's decision to emigrate abroad.

In the court proceedings, during the judicial investigation, the appellant presented written statements from Ion Crudu and his partner Elena Frunză, confirming the circumstances reported by Victor Sandu regarding the purchase of the Mercedes E220 car.

The Evaluation commission did not consider the candidate's explanations but noted the possibility of a breach of ethical standards, classifying the candidate's actions under the provisions of art. 8 para. (2) lit. a) of the Law no. 26 of March 10, 2022 on measures related to the selection of candidates for the positions of members in the self-administration bodies of judges and prosecutors.

Furthermore, the Evaluation commission did not consider the provisions of point 2 of art. 5 Section II of the Evaluation Rules of the Independent Commission for assessing the integrity of candidates for positions of members in the self-administration bodies of judges and prosecutors. According to this provision, in assessing compliance with the ethical integrity criterion, the Commission may take into consideration the gravity or severity, the surrounding context, and the wilfulness, of any ethical integrity incident, and as to minor incidents, whether there has been a sufficient passage of time without further reoccurrences.

While determining the gravity, the Commission will take into account all circumstances, including but not limited to: a. whether the incident was a singular event; b. causing no or

insignificant damage to private or public interests (including public trust) – such as the occasion of an ordinary traffic violation; c. or not being perceived by an objective observer as an attitude of disrespect for the social order arising from disregard for rules and regulations

Similarly, in the Joint Opinion of the Venice Commission and the Directorate General of Human Rights and Rule of Law of the Council of Europe, it was indicated that clearer guidelines are needed regarding evaluation criteria; minor breaches of professional conduct should not provide a valid reason for rejecting a candidate.

As a result, the special panel of judges concludes that the Evaluation Commission has merely indicated serious doubts regarding the candidate's compliance with ethical integrity criteria, particularly concerning the purchase of the Mercedes automobile. However, the Commission did not establish whether the professional conduct action/breach is sufficiently serious to provide a valid reason for rejecting the candidate Victor Sandu. The special panel of judges emphasizes that, in its decision no. 42 of April 6, 2023, the Constitutional Court determined that through the term "serious," the legislator has restricted the discretionary margin of the Evaluation Commission when assessing the ethical integrity of candidates. This criterion enables the Commission to decide against a candidate's passing the evaluation only if it identifies violations of ethical and professional conduct rules of a high severity. This implies that the candidate can challenge the severity of the violations identified by the Commission before the special panel of the Supreme Court of Justice, which ultimately evaluates the "serious" nature of the observed transgressions based on the specific circumstances of the case. The Constitutional Court also highlighted that the interpreter applying art. 8 para. (2) lit. (a) can analyze it in conjunction with the provisions of art. 4, 4¹, and 6 of the Law on the Disciplinary Responsibility of Judges, which constitute common law for the assessment of all candidates for the position of a member of the Superior Council of Magistracy.

Taking into account the circumstances mentioned above, the special panel of judges concludes that the decision issued by the Evaluation Commission contrary to the provisions of art. 21 of the Administrative Code does not meet the requirements of procedural and substantive legality. Furthermore, the observed circumstances indicate the candidate's right to a favorable evaluation decision from this perspective.

The special panel of judges emphasizes that the terms "seriously," "wrongful," and "inexplicable" from art. 8 para. (2) lit. (a) of Law no. 26/2022 are by their legal nature undefined legal terms (vague legal norms) that do not grant discretion to the Evaluation Commission but require a complex and rigorous interpretation of the norm in light of acts seriously violating the rules of ethics and professional conduct. In the present case, however, the Commission virtually concluded that the candidate's actions might be considered negligent conduct.

In the same vein, the special panel of judges underscores that due to its constitutional role of dispensing justice, the court has the ultimate authority to interpret a vague legal term in a specific case. Therefore, the violations noted by the Evaluation Commission not only fail to meet the criterion that would allow it to decide on the candidate's failure to pass the evaluation for violations of ethical and professional conduct rules of high severity, but they cannot even be deemed to exist. Moreover, the Commission did not provide any justification for the alleged high severity of these violations.

Regarding financial integrity.

In accordance with the provisions of art. 8 para. (4), (5) of the Law on some measures related to the selection of candidates for the position of member in the self-administration bodies of judges and prosecutors no. 26 of March 10, 2022, a candidate is considered to meet the criterion of financial integrity if:

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

To assess the candidate's financial integrity, the Evaluation Commission shall verify:

- a) compliance by the candidate with the tax regime in the part related to the payment of taxes on using funds and income derived from the owned property, as well as taxable income and the payment of import duty and export duty;
- b) compliance by the candidate with the legal regime of declaring assets and personal interests;
- c) the method of acquiring the assets owned or possessed by the candidate or persons referred to in art. 2 para. (2), as well as the expenses for the maintenance of such assets;
- d) the sources of income of the candidate and, where appropriate, of the persons referred to in art. 2 para. (2);
- e) existence of loan, credit, leasing, insurance or other agreements that can generate financial benefits, where the candidate, the person referred to in art. 2 para. (2) thereof, or the legal entity that they are beneficial owners of, is a contracting party;
- f) existence of donations, where the candidate or the person referred to in art. 2 para. (2) has the status of donee or donor;
- g) other relevant aspects to clarify the origin and justification of the candidate's wealth.

In this case, the Evaluation Commission has raised serious doubts regarding Victor Sandu's compliance to financial integrity criteria. Specifically, these concerns relate to the non-payment of capital increase tax from the sale of the Honda motorcycle (in 2018) and the Suzuki Espana motorcycle (in 2021); the issue of ownership rights on vehicles imported in 2009; the issue of profits or income derived from the sale of other vehicles imported and registered under the candidate's name between 2008 and 2015; and the obligation to pay capital increase tax from the sale of these vehicles.

In accordance with art. 18 of the Tax Code (in effect until September 30, 2018), "taxable income sources" include in gross income: e) capital increase as defined in art. 40 para. (7). According to art. 40 para. (1) and (7) of the Tax Code (in effect until September 30, 2018), the amount of capital increase or loss arising from the sale, exchange, or other forms of disposal of capital assets is equal to the difference between the amount received (the income obtained) and the ad valorem basis of these assets. The amount of capital increase in the fiscal period is equal to 50% of the excess amount of capital increase recognized over any capital losses incurred during the fiscal period.

From the provisions of art. 40 of the Tax Code (effective as of October 1, 2018), it follows that the amount of capital increase or loss arising from the sale, exchange, or other forms of disposal of capital assets is equal to the difference between the amount received (the income obtained) and the ad valorem basis of these assets. The amount of capital increase in the fiscal period is equal to 20% of the excess amount of capital increase recognized over any capital losses incurred during the fiscal period.

The Evaluation Commission, based on the annual declarations that the candidate is obligated to submit upon his appointment as a judge, has determined that the Honda Hornet motorcycle purchased in 2015 for 25,000 MDL was sold by Victor Sandu in 2018 for 50,000 MDL. Additionally, the Suzuki Espana motorcycle purchased in 2008 at the customs-declared value of 5,106 MDL was sold in 2021 for 20,000 MDL.

In this context, the appellant Victor Sandu has explained that, during the sale of the Honda Hornet motorcycle (in 2018) and the Suzuki Espana motorcycle (in 2021), there was no capital increase involved. The Evaluation Commission, however, solely considered the purchase value of

these movable assets and did not take into account the repair costs. It should be noted that these motorcycles were actually purchases in a damaged state.

To clarify these pieces of information, the candidate responded to the provided questions and also attached photos to the file showing the condition of the motorcycles at the time of their purchase. According to the candidate's explanations, these motorcycles were repaired, with damaged parts being replaced. These spare parts were procured from specialized websites, along with a new spare part. Carburetor adjustments were also carried out, for which the candidate paid 40 EUR. Objectively, such types of work necessitate financial investment.

In the given circumstances, the special panel specifically observes that the appellant's responses on this matter did not reveal an intention to evade the payment of taxes as stipulated by the law. Instead, the panel is firmly convinced of the absence of capital increase/taxable income resulting from the sale of the mentioned motorcycles.

In line with art. 2 para. (2) 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 10.03.2022, evaluation of the candidates referred to in paragraph (1) herein includes a verification of the assets of persons close to candidates, as defined in Law no 133/2016 on Declaration of Assets and Personal Interests, as well as of the persons referred to in art. 33 para. (4) and (5) of Law no 132/2016 on the National Integrity Authority

According to art. 2 of Law no. 133/2016, close persons, are: "husband/wife, child, cohabitant of the subject of the declaration, the person supported by the subject of the declaration, as well as any person related through blood or adoption to the subject of the declaration (parent, brother/sister, grandparent, nephew/niece, uncle/aunt) and any person related by affinity with the subject of the declaration (brother-in-law/sister-in-law, father-in-law/mother-in-law, son-in-law/daughter-in-law).

Furthermore, according to art. 33, para. (4) and (5) of Law No. 132 of June 17, 2016, regarding the National Integrity Authority, the scrutiny of assets and personal interests extends to family members, parents-in-law, and adult children of the individual subject to scrutiny. If the individual subject to scrutiny is in a domestic partnership with another person, the verification will also encompass the assets of that person.

If there is an appearance that the assets of the individual under scrutiny have been registered in the name of other persons, the investigation will extend to these assets and persons as well. If the subject of declaration has indicated income and assets received from donations or holds assets in a loan agreement, the investigation will also extend to the donor and the donee. They can be asked for clarifications regarding the source of income used for the acquisition and maintenance of those assets. For the clarification of these aspects, the integrity inspector can request relevant information from any natural or legal person.

According to art. 4, para. (1), subparagraphs (b) and (d) of Law No. 133 of June 17, 2016 on the declaration of assets and personal interests, in force according to the wording at the adoption date, the subjects specified in art. 3, paragraph (1) declare: a) the income obtained by the declarant together with the family members, cohabitant in the previous tax year.

According to art. 2 of Law No. 133 of June 17, 2016, regarding the declaration of assets and personal interests, income is defined as any financial benefit, regardless of the source of origin, obtained by the declarant and his/her family members, cohabitant, both in the country and abroad.

The relevant provisions for this case are those of art. 4 of the Law concerning the declaration and control of incomes and assets of state dignitaries, judges, prosecutors, civil servants, and some persons in leadership positions, No. 1264 of July 19, 2002 (in effect until August 1, 2016). According to art. 3, the mentioned persons shall declare:

- a) the income obtained by the subject of the declaration together with the family members, the cohabitant in the previous fiscal year;
- b) movable and immovable assets, owned by usufruct right, the right of use, dwelling, superficies by the subject of the declaration and family members, his/her cohabitant, including as beneficial owners, or in their possession under mandate, commission, fiduciary administration contracts, agreements that transfer property and transfer-for-use rights (rent, lease, leasing, bailment) at the date of filing the declaration on income and property;
- c) property acquired through intermediaries or transferred for consideration to ascendants, descendants, siblings, siblings-in-law, and relatives of the same degree, as well as those transferred free of charge to any person;
- d) financial assets, including bank accounts, investment funds, equivalent forms of saving and investment, placements, bonds, checks, bills of exchange, loan certificates, other documents embodying the declarant's or family members' patrimonial rights, direct investments in national currency or foreign currency made by the declarant or family members, as well as other financial assets;
- e) the declarant's and family members' share in the share capital of commercial companies;
- f) debts in the form of liabilities (including unpaid taxes), mortgages, guarantees issued for the benefit of third parties, loans, and credits.

The conclusion of the Evaluation Commission that it has serious doubts regarding the issue of profits or income from the sale of other imported vehicles registered under the candidate's name between 2008 and 2015 and the issue of the obligation to pay capital increase tax from the sale of these vehicles is deemed unjustified by the special panel.

Indeed, on one hand, the Evaluation Commission in its decision of the candidate Victor Sandu failing the evaluation has raised serious doubts regarding the given circumstances. On the other hand, the Commission asserts that the absence of comprehensive documentation concerning the remaining vehicle transactions made it impossible for the Commission to verify the candidate's compliance with the tax regime regarding these transactions.

According to the Venice Commission's opinion, the concept of integrity assessment involves implementing mechanisms that aim to ensure the highest standards of conduct and financial integrity required for accessing public office. In a system of prior integrity control, the decision not to recruit a candidate can be justified in case of a mere doubt based on a risk assessment. However, the decision of a candidate's failing the assessment must be linked to an indication of unlawfulness, such as unexplained wealth, even if it cannot be proven beyond any doubt that this wealth comes from illegal sources (see CDL-AD(2022)011, §§ 9-10).

Furthermore, art. 6 paragraph (2) of the Evaluation Rules of the Independent Evaluation Commission for assessing the integrity of candidates for position of member in the self-administration bodies of judges and prosecutors stipulates that the Annex defines the method of calculating undeclared wealth, provisions that in this case were not complied with by the Evaluation Commission.

Regarding the issue of ownership rights of vehicles imported in 2009, the Commission has determined that the contradictions in the candidate's declarations undermined his credibility and failed to mitigate the Committee's doubts about the candidate's actual role in the import of the 20 vehicles imported and registered under his name in 2009 and whether he gained any income from this activity or from selling the vehicles.

The appellant explained that the vehicles (20) imported from Italy and Germany during that period and registered in his name were, in fact, owned by Gheorghe Pagu, his sister's former husband. In this regard, Victor Sandu presented Gheorghe Pagu's statement confirming that the vehicles imported in 2009 belonged to him and were purchased by him. Moreover, Victor Sandu did not derive any income from their sale.

These are sufficient and logical arguments that indicate the sequence of events (the purchase and registration of vehicles) occurred as explained, and the Commission ambiguously did not take them into account.

Similarly, the Commission incorrectly raised serious doubts regarding the income obtained from the sale of the "Toyota Corolla" car, based on the analysis of a reference car from a relevant advertisement found on the piataauto.md website. The market value of this reference car at the time of sale is approximately 1,000 to 2,000 EUR higher.

As per the evaluation report No. 426/02A, presented by the appellant in the case materials, the approximate market value in July 2017 for a "Toyota Corolla" car is 89,094.77 MDL, which is approximately the selling price declared by the appellant and in accordance with legal provisions.

Moreover, in this context, the special panel concludes that the Evaluation Commission did not consider the social realities in the Republic of Moldova, up until the adoption of Law No. 26/2022. Additionally, the fact that the income obtained from the sale of the "Toyota Corolla" car, amounting to 4,000 EUR as indicated in the income and personal interests declaration, was not the actual price of the car, has not been proven by any corroborating evidence.

The special panel notes that the relevant circumstances are capable of removing the Commission's suspicions regarding the income from the sale of the "Toyota Corolla" car.

Therefore, the circumstances that the Commission has considered, the special panel does not view them as a genuine violation of financial integrity. This is because, to do so, would infringe upon the rule of protection of legitimate confidence in the activities of state public authorities, which were tasked and competent to react if any violations of the law by the evaluated subject were admitted, as well as the principle of legal certainty in its entirety.

Subsequently, the special panel deems well-founded the appellant's argument that the time provided by the Commission for the presentation of information was insufficient and limited, thus not allowing for the proper accumulation of evidence to fully remove the doubts raised by the Evaluation Commission.

The special panel further states that the Commission did not fulfill its positive obligation to clarify factual and legal circumstances, as stipulated by art. 22 of the Administrative Code.

As a result, the Evaluation Commission did not fully exercise its power to investigate the factual circumstances ex officio, which is expressly provided for by art. 6 lit. f) of Law No. 26/2022. This art. states that in carrying out its functions, the Evaluation Commission has the power to request information from individuals or legal entities of public or private law, and gather any information

relevant to the fulfilment of its mandat. Even though the legislator has provided the Evaluation Commission with a wide range of tools and mechanisms for gathering all necessary information.

In order to carry out its function, the Evaluation Commission shall request information from individuals or legal entities of public or private law, and gather any information relevant to the fulfilment of its mandate;

Therefore, the failure to fulfill the obligation of ex officio investigation led to the adoption of an erroneous decision by the Commission and consequently, a violation of the candidate's right to defense.

Taking into account the circumstances stated above, the special panel concludes that the decision issued by the Evaluation Commission, contrary to the provisions of art. 21 of the Administrative Code, does not meet the requirements of procedural and substantive legality. The circumstances observed indicate the candidate's right to a favorable evaluation decision in this regard.

The special panel notes that the Evaluation Commission did not conduct an analysis and reasoning for the legitimate purpose of the issued Decision. The preamble of Law No. 26/2022 indicates that its purpose is to enhance the integrity of future members of the Superior Council of Magistracy and its specialized bodies, with the aim of increasing trust in the self-administration bodies of judges and the judicial system in general.

From the appealed decision and the documents presented by the respondent, it is not clear which of these purposes is pursued through the decision of candidate's failing the evaluation. While any of these purposes could be legitimate, none of them is analyzed in the decision. It must be noted, however, that the Commission is fundamentally free to choose its legitimate purpose or purposes, but this fact should be evident from the content of the decision.

According to Art. 29 para. (2) lit. (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 Art. 29 para. (2)lit. (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 Art. 29 para. (2) lit. (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 highlights that the purpose of Law No. 26/2022 is, among other things, to enhance trust in the judiciary, but not to transform the judiciary into an inefficient branch of state power subject to undue interference.

Summarizing this legality aspect, the special panel concludes that the Evaluation Commission's decision is contrary to the principle of proportionality. Furthermore, the panel reiterates that the so-called violations of financial and ethical integrity were assessed by the Commission in isolation from the social-economic context, which impacts the security of legal relationships. In general, the legal system allows for the retroactive effect of a law if it benefits a person's legal situation, but this effect cannot be projected through legal interpretation.

Regarding the appellant's argument that serious procedural errors were committed by the Evaluation Commission concerning the violation of the language of the evaluation process, manifested by the lack of translations into English of the documents and statements submitted by the candidate during the data collection and verification stage by the Commission members, considering that Commission members Herman von Hebel, Victoria Henley, Nona Tsotsoria are English speakers and were not provided with translations into English by the Commission's secretariat, the special panel notes the following.

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

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

Tehrefore, the Special Panel finds that the plaintiff's representatives in the court hearing confirmed that there was no written translation of documents into the language known by the foreign member of the Pre-Vetting Commission, designated by the development partners, which contradicts Art. 10 para. (9) of Law No 26/2022, as well as Art. 22 and Art. 92 of the Administrative Code.

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

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

In this respect, the Special Panel emphasizes that, according to Art. 82 of the Administrative Code, if the administrative procedure is to be carried out in writing as per Art. 28 or is carried out in writing, the public authority, when starting the procedure, shall create a digital or hard copy folder

that would include all documents and records regarding the said procedure. The digital folder shall include, as appropriate, scanned copies of paper-based documents and the authenticity of these copies shall be confirmed by the electronic signature applied by the responsible person within that public authority, electronic documents, other relevant records and information in digital format. Scanned digital copies of official documents issued on paper and digital records on which the electronic signature was not applied are used without restriction in the relationship with the public authority and may be included in the administrative case file, unless the regulatory acts require expressly the signature to be applied on these copies/records or the observance of requirements towards electronic documents. (11) Scanned digital copies of official documents issued on paper and digital records on which the electronic signature was not applied are used without restriction in the relationship with the public authority and may be included in the administrative case file, unless the regulatory acts require expressly the signature to be applied on these copies/records or the observance of requirements towards electronic documents. (2) When included in the file, a document is referenced with continuous page numbers. Should documents be retrieved from the file for a certain period, a mention shall be made in this respect, which must include: a) name of the retrieved document; b) number of retrieved pages; c) reason for retrieving the document; d) name of the person that ordered the retrieval of the document; e) date when the document is retrieved. This mention shall be included in the file instead of the retrieved document. Administrative case files shall be kept until the expiry of their term of storage, which results from the applicable legal provisions in force.

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

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

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

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

These circumstances prove that the Pre-Vetting Commission violated candidate Victor Sandu's right to defense, as it did not ensure her access to the administrative case file, which is supposed to include all materials gathered by the Pre-Vetting Commission, with at least 3 days

before the hearing, in line with art. 82 and art. 83 of the Administrative Code, in corroboration with art. 10 para. (5), art. 12 para. (4) lit. (c) of Law No 26/2022 and art. 2 para. (1)lit. (g) of the Evaluation Rules under Law No 26/2022.

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

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

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

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

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

The plaintiff proved to the Special Panel of the Supreme Court of Justice the plausible nature of the elements invoked in her appeal, including the ones related to the correctness and observance of ethical and professional conduct rules.

The special panel notes that the circumstances found indicate a right of the plaintiff to a different decision from the Evaluation Commission than the contested one, because they are of a nature that could lead to the promotion of the evaluation by the candidate Victor Sandu.

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 Art. 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 Victor Sandu failing the evaluation.

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

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

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

Taking into account the aforementioned, the Special Panel finds that in this case there are legal grounds for annulling the decision of the Independent Evaluation Commission for assessing the integrity of the candidates for the position of member in the self-governing bodies of judges and prosecutors No. 18 of 18 January 2023, regarding the candidacy of Victor Sandu.

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

d e c i d e s :

The administrative litigation action submitted by Judge Victor Sandu against the Independent Commission for assessing the integrity of candidates for the positions of members in the self-administration bodies of judges and prosecutors, requesting the annulment of Decision No. 18 of January 18, 2023, regarding Victor Sandu's candidacy, and the order for the evaluation of the candidate, is accepted.

Decision No. 18 of January 18, 2023, of the Independent Commission for assessing the

integrity of candidates for the positions of members in the self-administration bodies of judges and prosecutors, regarding the candidacy of Victor Sandu, is hereby annulled.

A reevaluation of the candidate Victor Sandu by the Independent Commission for assessing the integrity of candidates for the positions of members in the self-administration bodies of judges and prosecutors is ordered.

The decision is final and cannot be appealed.

Presiding judge,
judge

Tamara Chișca-Doneva

Judges

Ion Guzun

Mariana Pitic