

DECISION
In the name of the Law

SUPREME COURT OF JUSTICE

01 August 2023

Chisinau municipality

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

composed of:

President of the hearing, Judge
judges

Tamara Chisca-Doneva
Ion Guzun
Mariana Pitic

clerks

Ina Pruteanu
Marcela Vitvitchi
Marianna Boico

attended by:

plaintiff
plaintiff's representative, lawyer

Veronica Cupcea
Iurie Margineanu

defendant's representatives, lawyers

Roger Gladei
Valeriu Cernei
Irina Sugoneanco

examining in open session, in administrative proceedings, the appeal filed by Veronica Cupcea against the Independent Evaluation Commission for assessing the integrity of candidates for the position of member in the self-administration bodies of judges and prosecutors, regarding the annulment of decision no. 14 of January 11, 2023 regarding the candidate Veronica Cupcea for the position of member of the Superior Council of Magistracy, the Board for Selection and Career of Judges, the Performance Evaluation Board of Judges and the order to resume the candidate's evaluation procedure,

f i n d s o u t:

Arguments of participants in the administrative case:

On February 06, 2023, Veronica Cupcea 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, regarding the annulment of decision no.14 of January 11, 2023 regarding the candidate Veronica Cupcea for the position of member of the Superior Council of Magistracy, the Board for Selection and Career of Judges, the Performance Evaluation Board of Judges and the order to resume the candidate's evaluation procedure.

In support of action, the plaintiff cited that, through this action, it claims the violation of the right in its capacity as judge, to run for office and be a member of the Superior Council of Magistracy, but also the right to dignity, honour and professional reputation of the judge.

The plaintiff specified that when the dispute is resolved, it will be assessed whether the alleged circumstances invoked by the Evaluation Commission constitute a genuine problem of

financial and ethical integrity of the plaintiff through the lens of the legal principle of proportionality, the security of legal relationships and equal treatment. Also, it is to be established whether the formal violations observed by the Evaluation Commission represent a true violation, which falls under the concept of serious doubts and whether there are circumstances that could lead to the promotion of the evaluation by the plaintiff.

The plaintiff indicated that the Evaluation Commission took an unmotivated decision, in violation of the principle of proportionality, having no plausible grounds to consider that it does not correspond to the criteria of ethical and financial integrity.

The plaintiff mentioned that, although Law No. 26 of 10 March 2022 was adopted to increase the integrity of the future members of the Superior Council of Magistracy, the Superior Council of Prosecutors and their specialized bodies, as well as in order to increase society's trust in the activity of self-administration bodies of judges and prosecutors, but also, in general, in the justice system, the contested decision does not reflect the legitimate purpose and motivation.

Additionally, the plaintiff emphasized the fact that its exclusion from the election race in judicial self-administration bodies for alleged formalistic and uncertain violations, is not a necessary measure, as precisely in the electoral race, the judges decide by voting at the General Assembly of Judges the election in these bodies.

With reference to the reasonableness of the measure, the plaintiff mentioned that the measures taken by the public authorities are considered reasonable if the interference produced by them is not disproportionate in relation to the intended purpose. From the factual elements, it is impossible to balance the pros and cons, the advantages in relation to the irremediable interference in the plaintiff's rights. In this case, the plaintiff was deprived, but not limited, of the right to be elected as a member of the judicial self-administration bodies.

The plaintiff specified that the decision of the Evaluation Commission contradicts the Opinion of the Venice Commission on the draft law regarding the Supreme Court of Justice of 17-18 June 2022, which in pt. 44 clearly indicates that the ethical evaluation focuses, in fact, on the data on the possible corruption of the candidates, that is, another aspect of the same issue that is explored by the financial assessment.

Accordingly, the plaintiff considers that all the findings of the Evaluation Commission, presented in the contested decision, regarding the lack of ethical and financial integrity of Veronica Cupcea, are not compatible with the data regarding possible corruption regarding her candidacy, and the conclusions of the Evaluation Commission are based on subjective assumptions, which in no case confirms possible corruption.

The plaintiff emphasized that the Evaluation Commission did not refer to the legal basis, correlated with the factual circumstances, on the basis of which it certified serious doubts about the candidate's integrity. However, during her activity, the plaintiff had no disciplinary sanctions and has an impeccable reputation, with no situations where the image of the judge and the image of justice in general would be affected.

In the same way, the plaintiff mentioned that she submitted the income statements and personal interests to the National Integrity Authority within the deadline and according to the law. And, throughout her activity as a judge, the National Integrity Authority found no violation of the legal regime of conflicts of interest, incompatibilities, restrictions and limitations, declaration and control of wealth and personal interests.

The plaintiff Veronica Cupcea specified that the Evaluation Commission failed to provide her with the preliminary findings resulting from the conclusion of the investigation and access to the evidence from the personal file.

She also mentioned that the rounds of questions that she was asked constitute the investigation itself and in no way the preliminary findings resulting from the conclusion of the investigation; and "access to the evidence from the case file" was granted to her only 2 days before the hearings, by handing over all paper documents that she also sent by e-mail, thus the burden of proof being placed on the plaintiff, contrary to the provisions of art. 93 of the Administrative Code and the requirements imposed by the European Court of Human Rights.

Also, the plaintiff communicated that the Evaluation Commission violated the provisions of art. 22 and art. 85 para. (3) of the Administrative Code, which requires that the public authority

investigate *ex officio* the state of facts and justify by documents the intervention in the rights provided by the law.

Moreover, the plaintiff specified that she is not aware of the case and cannot be convinced that the Evaluation Commission provided her with access to all the evidence in her file in the circumstances in which she submitted only the documents that she also submitted to the Evaluation Commission.

The plaintiff Veronica Cupcea highlighted that the Evaluation Commission also violated the principle of presumption of innocence, however, the statements of the Evaluation Commission shows that, if the candidate failed to keep for a period of 20 - 30 years documents that would prove her income and that of her relatives (deceased), and in the annual income statements she did not indicate the contribution of the parents/adult children with whom they lived together (according to the legislation they were not to be declared either), this raises serious doubts about the sources of income.

The plaintiff also noted that the promotion of the evaluation constitutes a mandatory individual administrative act, however, not discretionary, on the grounds that the cumulative meeting of the conditions in art. 8 paras. (2) and (4) of Law no. 26 of March 10, 2022 generates the obligation of the Evaluation Committee to issue a favourable decision to promote the candidate. Therefore, the Evaluation Commission only has a procedural discretion, which refers to the investigation and clarification of the state of fact *ex officio*, a fact that does not imply the attribution of the individual administrative act to the discretionary one.

Also, the plaintiff Veronica Cupcea emphasized that the notion of "*serious doubt*" represents an undefined legal concept, and does not offer discretion, it offers a margin in establishing the facts from the abstract to the concrete and, as a consequence, the application of the rules as appropriate as possible to a specific case. However, serious doubts must be the result of a prior evaluation of the evidence and the results of the research, which aims to form this conviction and must respect the principle of free assessment of the evidence.

With reference to the conclusions of the Evaluation Commission presented in decision No.14 of 11 January 2023 regarding the sources of financial means for the procurement in 2012 of the apartment in the municipality of Chisinau, of a plot of land with unfinished construction in Criuleni district, and the full payment in 2014 of the loan contracted in 2012, the plaintiff claimed that she and her family had lived in the studio apartment allocated to her by the state for 20 years and all these years they were employed, they did not purchase expensive goods, they saved up money to purchase an apartment.

Therefore, the Evaluation Commission did not in any way motivate the "*serious doubts*" it has in relation to the salary savings made during 1991 - 2012, which may have been sufficient for the procurement of the apartment, but over a period of more than 30 years, the plaintiff has failed to collect written evidence to remove the serious doubts of the Evaluation Commission.

The plaintiff also believes that the Evaluation Commission unduly sanctioned her for not remembering the exact period in which her mother alienated all the plots of agricultural land that she owned, and that she does not have the contracts by which she alienated them and does not even know for sure how many plots of land she had, but certainly more than 4. However, according to Art. 88 of the Administrative Code, the participant is not obliged to submit the documents that she does not have.

With reference to her mother's source of income, the plaintiff mentioned that she communicated these sources during the question rounds and public hearings.

The plaintiff Veronica Cupcea emphasized that the Evaluation Commission operates in the entire text of the contested decision with the phrase "*doubts that have not been removed by the candidate*", but in this aspect, the court must evaluate whether these doubts are "*serious*" and whether the plaintiff was normally able to remove them, starting from the authors of the transactions, the length of time that had elapsed since their date, the size of these transactions, and whether she would ordinarily foresee being asked years later about details and evidence of these circumstances.

With reference to the conclusions of the Evaluation Commission concerning the serious doubts regarding the sources of financial means used to pay off the loan in 2020, the plaintiff mentioned that it is not clear what kind of "*serious doubts*" can arise as long as the expenses do

not exceed the income. However, the Evaluation Commission was to motivate these serious doubts as long as the income from the income statement for the year 2020 is much higher than the debt paid. She also mentioned that all sources of income have been declared, and an elementary calculation for the year 2019 - 2020 clearly shows the possibility of paying off the loan.

Moreover, the cash has to be declared only if it exceeds the value of 15 average salaries and if it belongs to the subject of the statement at the time of drawing up the statements of income and interests, respectively, the plaintiff did not reflect the savings for 2019, because until the drawing up of the statement part of them was consumed, being below the limit of 15 average salaries per economy.

With reference to the source of the 130,000 lei, additional for their contribution and the conclusion of the Evaluation Commission, regarding the variation compared to the previous answers of the candidate, she stated that it is not clear what the "*variation*" is in this case and in relation to which "*previous answers*". However, in the rounds of questions and answers, she elucidated all the aspects related to the full repayment in 2020 of the loan contracted in 2018.

Regarding failure to declare financial contributions received from family members, failure to declare cash savings and financial contributions from her son, the plaintiff mentioned that in the rounds of questions she gave an ample answer to the Evaluation Commission and that the statement of the Evaluation Commission according to which the candidate's explanations contained a very confusing interpretation of the law is totally irrelevant.

In this context, the plaintiff noted that she disagrees with the interpretation of the legislation by the Evaluation Commission, namely that she was going to declare the financial aid from her parents and son, because, in the annual statement form, valid for the years in which it was submitted, there is no such field in which she could include these aids in order to declare them.

Also, with reference to the written answers, the plaintiff mentioned that during 2012-2015 she did not declare donations, because in the sense of Law no. 1264 of 19 July 2002 (in force until 1 August 2016), she did not even benefit from them. In fact, being a joint/extended family, no donation contracts were concluded, but they helped their parents with physical work, and they, in turn, gave them material support in various forms.

In addition, in the sense of art. 2 of Law No. 1264 of July 19, 2002, a family member is a husband/wife, minor children and dependants, therefore the parents' income or the son's aid did not have to be declared, since according to the law mentioned above, they did not fall under the jurisdiction of the plaintiff's family members.

The plaintiff noted that the material support provided by the parents cannot be interpreted as a donation in the sense of the legislation, because they were unconditional, permanent aid throughout the parents' entire lives, consisting not only of sums of money, but also food products, material goods, a situation that remained unchanged even after the plaintiff left for studies and got married.

Also, donations from her son, in the sense of Law No. 133 of 17 June 2016 (in force after 1 August 2016), she did not receive and did not declare them, however, the amount of 150,000 lei does not constitute a substantial difference within the meaning of art. 2 of the mentioned Law, on the grounds that for the year 2020 the sum of 20 average monthly salaries per economy was 159,060 lei.

In the sense of Law No. 133 of 17 June 2016 (in force after 1 August 2016), the son was not part of the family members, respectively, his income did not have to be declared, and the material support granted by him cannot be considered a donation in the meaning of the cited law, because the source had to be indicated, that is the concluded contract, which the son did not want to do, noting that he does not donate anything, he only participates with his own resources in the construction of the house that will belong to him in the future.

The plaintiff mentioned that the findings and conclusions of the Evaluation Commission contravene the provisions of art. 23 of the Administrative Code, which stipulates that public authorities and competent courts act respecting the principle of equality and non-discrimination. Thus, in other decisions, the Evaluation Commission found financial aspects that could generate doubts such as: 1) failure to declare a loan; 2) failure to declare two bank accounts in the manner provided by law; 3) failure to declare the correct price for the sale of three plots of land and 4) receipt of an amount different from the contract value. However, in a strange way, the Evaluation

Commission had no serious doubts about any aspect of the ethical integrity of the candidate according to the provisions of art. 8 paras. (1) and (2) of Law no. 26 of 10 March 2022.

With reference to the notes of the Evaluation Commission, at the hearings, in open session, the plaintiff noted that the interpretation of the law on the declaration and control of income and property may not be applicable only to the provisions related to the evaluation of assets, but the arguments presented in writing to the Evaluation Commission and repeated above, are much broader and absolutely relevant, and that if the members of the Evaluation Commission interpret the national legislation on income statement differently, it may state that she made an unintentional mistake, not that she intended to conceal income or assets. A distinction must be made between error and intent, or gross mistakes, which aim to conceal assets or income.

The plaintiff also mentioned that the decision of the Evaluation Commission does not meet the requirements of art. 31 of the Administrative Code, which establishes that individual administrative acts and written administrative operations must be motivated. However, in the absence of explicit reasoning for the decision, the possibility of contesting it becomes illusory, given that the court cannot verify the reasons that determined the competent authority to take this decision.

With reference to the provisions of art. 60 para. (1) of the Administrative Code, the plaintiff mentioned that the general term in which an administrative procedure must be completed is 30 days, unless the law provides otherwise. Thus, the plaintiff considers that the term in which the administrative procedure regarding the evaluation had to be completed was violated by the Evaluation Commission.

Also, the plaintiff mentioned that the Evaluation Commission did not take into account the fact that according to Art. 30 of the Administrative Code, public authorities cannot take measures with retroactive effect, except in cases provided by law.

In law, Veronica Cupcea founded her claims based on the provisions of art. 119, 166-168, 174, 177 of the Civil Procedure Code, arts. 20, 93, 171, 172, 177, 189, 206 para. (1) letter a), art. 211-212 of the Administrative Code, art. 216, 219, 2191, 220 of the Civil Code, art. 13-14 of Law no. 26 of 10 March 2022 concerning certain measures related to the selection of candidates for the position of member in self-administration bodies of judges and prosecutors.

On February 15, 2023, Veronica Cupcea, represented by the lawyer Iurie Margineanu, submitted a request to complete the appeal request, in which she cited that the Evaluation Commission did not investigate *ex officio* the fact that, the plaintiff, being a judge and interim president of the Court Orhei, was subjected to checks by the National Integrity Authority, which found no violation of the legal regime of the declaration of income and personal interests, conflicts of interests, incompatibilities, restrictions and/or limitations in the plaintiff's actions.

She also mentioned that the National Integrity Authority did not find a substantial difference between the income obtained and the wealth acquired during the exercise of the position of judge and president of Orhei Court, which was confirmed by the documents issued by this public authority of *res judicata*.

On February 10, 2023, the Independent Evaluation Commission for assessing the integrity of candidates for the position of member in the self-administration bodies of judges and prosecutors submitted a reference to request the rejection of the appeal submitted by Veronica Cupcea.

To motivate the reference, the defendant invoked that it executed with due diligence and in good faith all the obligations provided by Law no. 26 of March 10, 2022. And, the task of proof passes to the candidate during the evaluation process, and in case of ambiguities, to elucidate them, the Evaluation Commission offers the candidate the opportunity to present additional data and information.

It mentioned that the integrity evaluation and the decision do not affect the professional status of the candidate, however, the legal effect of the Evaluation Commission's decisions is expressly and exhaustively established by law, and the candidate can refuse the publication of the decision.

It also indicated that the decision represents a finding of the existence of serious doubts regarding the plaintiff's compliance with the criteria of ethical and financial integrity not a finding

of lack of compliance with these criteria. The appropriateness of the decision cannot be subject to judicial review.

The Evaluation Commission mentioned that it is not obliged to issue a favourable decision to promote the candidate, but it has a certain margin of discretion, which it duly respected.

It also stated that in its evaluation, it does not depend on the findings of other bodies with competences in the respective field.

With reference to the plaintiff's arguments about the fact that the promotion of the evaluation constitutes a mandatory, not discretionary, individual administrative act, the defendant state that such a conclusion is contrary to the purpose of Law no. 26 of March 10, 2022.

Also, with reference to the criticism brought by the plaintiff regarding the phrase "serious doubt", the Commission mentioned that this does not represent a margin in establishing the facts from the abstract to the concrete, but failure of the law to define this notion does not constitute a basis for erroneous interpretations of it, and it is obvious that the understanding of the notion of serious doubt can be deduced from the ordinary meaning of these words.

According to the defendant's opinion, the provisions of the Administrative Code are not applicable in the evaluation process carried out under Law no. 26 of March 10, 2022.

In addition, with reference to the alleged violation of the evaluation deadline, it communicated that Law no. 26 of March 10, 2022 does not set a specific deadline for issuing the promotion/non-promotion decision regarding a candidate. Respectively, during the public hearings, the president of the Evaluation Commission only informed the plaintiff that, as far as possible, the decision will be issued within one month from the date of the hearing.

The defendant noted that the solution offered through the decision finding the promotion or non-promotion of the evaluation, represents an evaluation, according to her own firm conviction, of whether or not there are serious doubts regarding the candidate's compliance with the criteria of financial and ethical integrity, and this solution, however, will not materialize in the detection of undeclared assets or in the detection of data regarding possible corruption.

It also mentioned that the plaintiff was offered access to the evaluation materials, and the decision expressly indicates the sources from which information was obtained regarding the evaluated candidates. Thus, the Evaluation Commission generically indicated all the sources from which, in general, information was requested in the evaluation process, but it was not indicated that information related specifically to the plaintiff was requested from all these sources.

The Evaluation Commission noted that the decision is not a finding of a person's guilt, nor a sanction. Therefore, the violation of the principle of presumption of innocence cannot be invoked since the Evaluation Commission does not make such findings.

It also emphasized that the sanctioning of the plaintiff by issuing the decision cannot be invoked either. Accordingly, no other legal effect, claimed by the candidate who did not pass the integrity test, has legal support. In this case, no impediments were created for the plaintiff to continue her professional career.

With reference to the plaintiff's arguments about the fact that the Commission did not justify the "serious doubts" in relation to the financial sources used to purchase the apartment in Chisinau, the defendant invoked that in the evaluation process the burden of proof to remove the Commission's serious doubts lies with the candidate. Therefore, it was in the plaintiff's interest to undertake, with maximum diligence, all possible measures to remove these doubts, including by identifying all possible evidence.

Also, the defendant considered irrelevant the plaintiff's objection, such as that the contested decision is not a necessary measure, with the very Law no. 26 of March 10, 2022 establishing this mechanism, and this evaluation being not a discretion of the Evaluation Commission.

In addition, the defendant considers unfounded the objection that the information from the hearings was presented incorrectly, but it is certain that the circumstances under which the Evaluation Commission formed its conclusion were expressly presented by the plaintiff in the hearings.

With reference to the plaintiff's arguments regarding failure to declare material aid, the defendant noted that during the hearing, the plaintiff did confirm that she committed some mistakes. However, she did not explain in the appeal why she changed her position, but continues to claim that she did not commit any mistakes. However, this matter only strengthened the doubts

of the Evaluation Commission regarding the sources of income used to purchase the real estate and the payment of the loan.

During hearing, the plaintiff Veronica Cupcea and her representative, lawyer Iurie Margineanu, supported the appeal against decision no.14 of January 11, 2023 regarding Veronica Cupcea's candidacy, requesting its admission, on the factual and legal grounds cited in the appeal.

During hearing, the representatives of the Independent Evaluation Commission for assessing the integrity of candidates for the position of member in the self-administration bodies of judges and prosecutors, lawyers Roger Gladei, Irina Sugoneaco and Valeriu Cernei, supported the arguments invoked in the submitted reference, requesting the dismissal of the action as unfounded.

Assessment of the court.

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

Term for consideration of the lawsuit

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

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

Note that in this case, the appeal filed by Veronica Cupcea was registered with the Supreme Court of Justice on February 6, 2023.

According to the application repartition sheet, this case was distributed through the Integrated Case Management Program on February 6, 2023 to the judge-rapporteur Svetlana Filincova (vol. I, f.d. 1).

By the conclusion of February 6, 2023 of the judge-rapporteur Svetlana Filincova, member of the special panel, set up within the Supreme Court of Justice to examine the appeals of candidates for the position of member in self-administration bodies of judges and prosecutors, the contested application submitted by Veronica Cupcea against the Evaluation Commission was received for examination, in the administrative litigation procedure, the participants in the proceedings being summoned to the court hearing set for February 16, 2023, at 10.00 a.m., room no. 4, in the premises of the Supreme Court of Justice, located at 18 Petru Rares Street, Chisinau municipality (vol. I, f.d. 42-44).

On February 10, 2023, within the deadline set by the court, the Evaluation Commission submitted a reference to the appeal filed by Veronica Cupcea regarding the annulment of decision no.14 of January 11, 2023 (vol. I, f.d. 56-76).

On February 15, 2023, Veronica Cupcea, represented by lawyer Iurie Margineanu, submitted a request to supplement the appeal.

According to the minutes of the court hearing of February 16, 2023, the special court panel admitted the request of the plaintiff Veronica Cupcea; she was granted time to get acquainted with the materials submitted by the Evaluation Commission and an interruption was announced until February 23, 2023, 14.00 (vol. I, f.d. 97).

According to the minutes of the court hearing of February 23, 2023, the special court panel admitted the request of the plaintiff Veronica Cupcea to postpone the case and the examination of the case was postponed until March 7, 2023, at 2.00 p.m. (vol. I, f.d. 98).

Through the Decisions of the Superior Council of Magistracy no. 23/2 and no. 27/2 of February 14, 2023, the Plenary of the Superior Council of the Magistracy accepted the resignation requests of judges Ala Cobaneanu and Svetlana Filincova from the Supreme Court of Justice, being released from office on March 1, 2023.

The conclusion of March 02, 2023 of the interim President of the Supreme Court of Justice ordered that the files under the procedure of judges Ala Cobaneanu and Svetlana Filincova, filed

under 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, will be sent to the procedural record section of civil, commercial and administrative litigation cases for redistribution through the Integrated File Management Program (vol. I, f.d. 156-158).

By the order of the interim President of the Supreme Court of Justice no. 33 of March 2, 2023 "Regarding the amendment of orders no. 29 of March 29, 2022 and no. 35 of April 14, 2022" the composition of the special panel was changed, as follows: Vladimir Timofti – president, judge; Dumitru Mardari and Mariana Pitic – judges, Galina Stratulat – substitute judge.

Regarding the fact that judges Mariana Pitic and Galina Stratulat were on medical leave for a period longer than 10 days, by the order of the interim President of the Supreme Court of Justice no. 34 of March 2, 2023 "Regarding the amendment of provision no. 33 of March 2, 2023" the composition of the special panel was changed, as follows: Vladimir Timofti – president, judge; Tamara Chisca-Doneva and Dumitru Mardari – judges, Ion Guzun – substitute judge.

According to the repeated repartition sheet of the file dated March 2, 2023, at 1.11 p.m., this case was assigned to judge-rapporteur Tamara Chisca-Doneva, who is part of the special panel, as follows: Vladimir Timofti - president and Dumitru Mardari - judge (vol. I, f.d. 103).

During the court hearing on March 7, 2023, the plaintiff's representative, lawyer Iurie Margineanu, submitted a request for recusal to the special court panel and the suspension of the court hearing was announced until March 16, 2023, at 3.30 p.m., in connection with the need to examine the request of recusal.

During the court hearing on March 16, 2023, the Evaluation Commission was obliged to submit the operational analysis carried out by the National Anticorruption Center regarding the income and properties owned by the candidate Cupcea Veronica, including other documents, information and papers provided by the National Anticorruption Center, the Information and Security Service and other public authorities. In addition, the request of the lawyer Iurie Margineanu, the representative of the plaintiff Veronica Cupcea, to lift the exception of unconstitutionality was accepted and the notification of the lawyer Iurie Margineanu was sent to the Constitutional Court of the Republic of Moldova and the interruption of the court hearing was announced until April 4, 2023, at 1.30 p.m.

By decision of the Superior Council of Magistracy no. 68/3 of February 23, 2023, amended by the decision of the Superior Council of Magistracy no. 103/4 of March 16, 2023, the resignation request of Judge Dumitru Mardari from the Supreme Court of Justice was accepted and he was released from office on March 20, 2023.

By the order of the interim President of the Supreme Court of Justice no. 39 of March 20, 2023 "Regarding the amendment of order no. 34 of March 2, 2023" the composition of the special panel was changed, as follows: Vladimir Timofti – president, judge; Tamara Chisca-Doneva and Mariana Pitic – judges, Ion Guzun – substitute judge.

By the order of the interim President of the Supreme Court of Justice no. 39 of March 20, 2023 "Regarding the amendment of order no. 34 of March 2, 2023" the composition of the special panel was changed, as follows: Vladimir Timofti – president, judge; Tamara Chisca-Doneva and Mariana Pitic – judges, Ion Guzun – substitute judge.

By the decision of the Superior Council of Magistracy no.66/3 of February 2023, the request for resignation of the judge of the Supreme Court of Justice, Vladimir Timofti, was accepted, his release from the position of judge of the Supreme Court of Justice being ordered on March 27, 2023.

By the order of the interim President of the Supreme Court of Justice no. 46 of March 28, 2023 "Regarding the amendment of order no. 39 of March 20, 2023" the composition of the special panel was changed, as follows: Tamara Chisca-Doneva – president, judge; Mariana Pitic and Maria Ghervas – judges. In the rest, the order of the interim President of the Supreme Court of Justice no. 39 of March 20, 2023, by which the order of the interim President of the Supreme Court of Justice no. 34 of March 2, 2023 was maintained, in the part where Ion Guzun was appointed as substitute judge.

By the decision of the Superior Council of Magistracy no. 33/2 of February 14, 2023, the resignation request of the judge of the Supreme Court of Justice, Maria Ghervas, was accepted and Mrs. Maria Ghervas was released from the position of judge as of March 31, 2023.

By the order of the Commission for Exceptional Situations of the Republic of Moldova no. 64 of March 31, 2023, during the state of emergency, as a temporary measure, for a period of 30 days, the administrative procedures regarding the resignation requests submitted by the judges of the Supreme Court of Justice were suspended until the entry into force of the order of the Commission for Exceptional Situations of the Republic of Moldova no. 64 of March 31, 2023, as well as the legal effects of already accepted requests, to the extent that the effective release from office did not occur on the date of entry into force of the order of the Commission for Exceptional Situations of the Republic of Moldova no. 64 of March 31, 2023.

By the order of the interim President of the Supreme Court of Justice no. 53 of April 4, 2023 "Regarding the amendment of orders no. 46 of March 28, 2023, no. 34 of March 2, 2023 no. 39 of March 20, 2023" the composition of the special panel was changed, provided for in point no. 1 of the order of the interim President of the Supreme Court of Justice no. 46 of March 28, 2023 and a new composition of the special court panel for the examination of appeals against the decisions of the Independent Evaluation Commission for assessing the integrity of candidates for the position of member in the self-administration bodies of judges and prosecutors was established, as follows: Tamara Chisca-Doneva – president, judge; Mariana Pitic and Ion Guzun – judges; Maria Ghervas – substitute judge.

By the conclusion of April 4, 2023, the special court panel established within the Supreme Court of Justice, composed of Tamara Chisca-Doneva - president, judge, Ion Guzun and Mariana Pitic - judges, ordered the resumption of the examination of this case (vol. II, f.d. 5-8).

During the court hearing on April 4, 2023, the merits of the case were examined, the explanations of the parties being heard, in accordance with Art. 213 of the Code of Civil Procedure, the evidence examined, in accordance with Art. 224 of the Civil Procedure Code.

In addition, the hearing of the pleas was postponed, in accordance with Art. 233 of the Civil Procedure Code, until the Constitutional Court's ruling on the exceptions of unconstitutionality of some provisions of Law no. 26 of March 10, 2022 raised in similar cases.

On April 6, 2023, by inadmissibility decision no. 42, the Constitutional Court ruled on notifications with numbers 75g/2023, 76g/2023, 77g/2023, 86g/2023, 87g/2023, 88g/2023, 89g/2023, 90g/2023, 96g/2023, 101g/2023 and 102g/2023 regarding the exceptions of unconstitutionality of some provisions of Law no. 26 of March 10, 2022.

Thus, following the ruling of the Constitutional Court on April 6, 2023, the participants were summoned for the next court hearing set for April 10, 2023, at 3.30 p.m. (vol. II, f.d. 77), which was postponed in relation to the fact that on April 10, 2023, the Evaluation Commission submitted a recusal request to judge Mariana Pitic (vol. II, f.d. 82).

By the provision of the Commission for Exceptional Situations of the Republic of Moldova no. 66 of April 10, 2022, in the context of the intervention of a prompt reaction of the state authorities to the problem of ensuring the functionality of the Supreme Court of Justice, by adjusting the normative framework and enshrining within it some mechanisms that would allow solving the difficulties related to the provisional filling of vacant judge positions at the supreme court, as well as taking note of the subsequent actions of the Superior Council of Magistracy, which, as a result of the legislative interventions carried out through Law no. 65 of March 30, 2023 regarding the external evaluation of judges and candidates for the position of judge of the Supreme Court of Justice, during the Plenary meeting of the Superior Council of the Magistracy on April 10, 2023, examined the subject of announcing the competition for the filling, by temporary transfer, of vacant positions of a judge at the Supreme Court of Justice, the specific measures in the field of justice established by the order of the Commission for Exceptional Situations of the Republic of Moldova no. 64/2023, establishing that subsection 1.2, point 1, of the mentioned order is repealed.

By order no. 69 of May 4, 2023 of the interim President of the Supreme Court of Justice "Regarding the amendment of order no. 29 of March 29, 2022" judge Ion Malanciuc was appointed as the substitute member in the special court panel for the examination of appeals against the

decisions of the Independent Evaluation Commission for assessing the integrity of candidates for the position of member in the self-administration bodies of judges and prosecutors.

The recusal request submitted to judge Mariana Pitic was assigned automatically-electronically, through the Integrated Case Management Program, on May 15, 2023 and was examined in the court hearing on May 23, 2023, at 11:20 a.m., the deliberation and ruling being postponed on the recusal request for May 25, 2023 (vol. II, f.d. 93, 100-104).

By the order of May 25, 2023 of the special panel, established within the Supreme Court of Justice, the recusal request submitted to judge Mariana Pitic, 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 (vol. II, f.d. 105-109), was rejected.

Participants in the proceedings were summoned for the next court hearing set for July 7, 2023, at 11.30 a.m., to hear the pleadings.

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

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

At the hearing on 4 April 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 para. (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 para. (1) of the Administrative Code for the issuance of the individual administrative act by the Commission. Accordingly, the provisions of art. 8 paras. (1)-(4) of the Law 26/2022 are rules of substantive administrative law.

According to art. 9 para. (2) and art. 69 para. (1) of the Administrative Code, the initiation of the evaluation procedure is the initiation of an administrative procedure, at the request of the candidate, for one of the positions of member of the bodies listed in art. 2 para. (1) of the Law No 26/2022. Pursuant to art. 189 para. (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 para. (1) of the Administrative Code. The

individual administrative act is the final output of the administrative procedure.

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

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

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

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

The Special Panel points out that the evaluation of candidates for the positions of member of the bodies listed in art. 2 para. (1) of the Law No 26/2022 is, by its nature, a specific field of activity within the meaning of art. 2 para. (2) 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 para. (2) of the Administrative Code does not mean that the Administrative Code shall not apply.

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

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

The principles governing the administrative dispute proceedings are set out in Book I of the Administrative Code, in particular art. 21-27 and art. 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. 220 para. (1), art. 87-93 of the Administrative Code, referrals under art. 223, art. 97-114 of the Administrative Code, impartiality under art. 25 of the Administrative Code, recusals under art. 202, art. 49-50 of the Administrative Code, forms of administrative activity under art. 5, art. 10-15 and art. 189 of the Administrative Code, the concept of party in an administrative dispute under art. 204 and art. 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 para. (4) of the Administrative Code, the validity, binding force and *res judicata* of the Commission decision under art. 139 paras. (2)-(4) and art. 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 para. (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. 7, 10, 203 lit. (a) and art. 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 para. (3) of the Constitution of the Republic of Moldova.

The Law No. 180 of 7 June 2023 reinforced the understanding that the Commission is a public authority specific in its own way, i.e. it is not a legal entity of public law, although 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 para. (6) of the Law No. 100 of 22 December 2017, the interpretation law does not have retroactive effect, except in cases where the interpretation of the sanctioning rules leads to a more favorable situation.

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

At the same time, it holds that there was no in-depth understanding of art. 2 para. (2) of the Administrative Code, which regulates conditions of derogation by legal provisions from the uniform nature of the Administrative Code for “*certain aspects*” of administrative activity. Accepting the argument that the Commission is not a public authority would mean denying the legal reality that it carries out administrative activity of public law through administrative procedure and that its decision is an individual administrative act subject to judicial review under administrative litigation procedure. Thus, the public authority concept is not limited to the concept of legal entity of public law, but has its own functional meaning under art. 7 and art. 2 para. (2) of the Administrative Code and for the purposes of Law No. 26 of 10 March 2022.

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

According to art. 10 para. (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 para. (3) lit. (a)-(c) of the Administrative Code.

According to art. 10 para. (1) of the Administrative Code, the Commission's decision is a "*regulation*" by means of which the defendant exercises unilaterally its substantive competence in line with 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 para. (1) of the Administrative Code, the Commission's decision relates to "*an individual case*", which consists of the concrete situation of plaintiff's evaluation. This trait of the individual administrative act has the function to delimit it from the normative administrative act, which is an abstract regulation as per art. 12 of the Administrative Code.

According to art. 10 para. (1) of the Administrative Code, the Commission's decision meets the criterion of "*with the purpose to produce direct legal effects*", which means to create, alter or terminate legal relationships under the public law. The Special Panel holds that the Commission's decision produces direct legal effects in the legal sphere of the plaintiff, in her capacity of a judge that applied for the position of member in the Superior Council of 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 of 10 March 2022 in the part related to derogations from the uniform nature of the Code.

It is therefore unacceptable that the defendant's representatives argue that the evaluation procedure is not an administrative procedure governed by the rules of the Administrative Code, such as the principle of legality (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.

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), 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, do not form unitary case-law. Or, the role of case-law is to interpret and apply the law to specific cases. Respectively, not every decision that differs from another decision represents a case-law divergence.

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

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

Admissibility of action

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

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

According to 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 para. (1) lit. (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 Veronica Cupcea is claiming an infringement of a right by administrative activity, according to art. 189 para. (1) of the Administrative Code, namely that by issuing Decision No. 14 of 11 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 the independence and immovability of the judge (art. 16 of the Constitution of the Republic of Moldova), but also the fundamental right to administration (art. 39 of the Constitution of the Republic of Moldova), the right to a favorable evaluation decision of candidate Veronica Cupcea.

By derogation from art. 209 of the Administrative Code, art. 14 paras. (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.

Note that the decision of the Independent Evaluation Commission for assessing the integrity of candidates for the position of member in the self-administration bodies of judges and prosecutors no. 14 of January 11, 2023 was communicated to the plaintiff Veronica Cupcea electronically on January 31, 2023, which is confirmed by the extract from the e-mail attached to the case materials (vol. I f.d.26-27). Taking into account the provisions of art. 14 para. (1) of Law no. 26 of March 10, 2022, the appeal request was to be submitted within 5 days from the date of receipt by the candidate of the reasoned decision, in the case of January 31, 2023.

The special panel reveals that although the term for contesting the decision expires on February 05, 2023 (Sunday), the appeal request was to be submitted by February 06, 2023 (Monday), or according to the provisions of art. 112 para. (2) of the Civil Procedure Code, if the last day of the term is a non-working day, it expires on the next working day.

Accordingly, the court concludes that the appeal filed by Veronica Cupcea is admissible, as the plaintiff complied with the legal provisions, submitting this application on February 6, 2023, within the deadline provided by law, to the Supreme Court of Justice.

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. 206 para. (1) lit. (b) and art. 224 para. (1) lit. (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 para. (3) of the Administrative Code, is not bound by the wording of the motions submitted by the parties to the proceeding, thus the appropriateness argument expressed in the statement of defense by the defendant will be appreciated in terms of admissibility. Effective judicial review involves a full check of factual and legal matters; however, it excludes the checking of appropriateness as per art. 225 para. (1) of the Administrative Code and limits the review regarding the discretionary individual administrative act when the law provides for such a reason for issuance. Appropriateness is a matter of admissibility, not a matter of substance in an administrative litigation. The defendant's argument in the submitted statement of defense that the application has to be rejected for the reason of appropriateness is unsubstantiated, as the plaintiff based the application on legality matters, not on appropriateness.

The statement of defense and the appropriateness aspects highlighted by the defendant therein deny the right to file the application for an administrative litigation in line with art. 39 and art. 189 para. (1) of the Administrative Code. Thus, neither the Administrative Code nor art. 14 para. (8) of Law No 26/2022 exclude the candidate's right to file an application to court. Accepting the solution suggested by the defendant is legally unsubstantiated and contrary to the rule of law. The Special Panel notes that provisions of art. 225 para. (1) of the Administrative Code are clear and cannot be confused, as they regulate, in functional unity with art. 36, 39, 189, 190, and art. 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 of 10 March 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 para. (2) of the Administrative Code.

Substance of the administrative action

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

right, cancellation of the act and payment of damages.

According to 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. 194 para. (1), art. 219, 22, 36, and art. 21 of the Administrative Code.

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

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

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

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

The Constitutional Court held that the explanatory note to the draft law does not include any argument regarding the needs to limit the judicial review of Pre-Vetting Commission's decisions. Still, based on the opinion submitted by the authorities and the content of the challenged text, the Constitutional Court deduced that the legislator intended to avoid situations where the Pre-Vetting Commission decisions are annulled for some insignificant procedural irregularities and, on the other hand, it wanted to ensure the celerity of solving appeals, in order to have sooner an operational Superior Council of Magistracy. The Constitutional Court held that these legitimate goals can fit under the overall objectives of public order and guarantee of justice authority and impartiality, as provided for in art. 54 para. (2) of the Constitution (DCC No 5 of 14 February 2023, §78).

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

Consequently, the Special Panel of Judges found that the Constitutional Court has established a double test that has to be met for the candidate's appeal against the decision of the Independent Evaluation Commission for assessing the integrity of candidates for the position of

member in the self-administration bodies of judges and prosecutors to be accepted, namely: 1) the Pre-Vetting Commission made serious procedural errors during the evaluation procedure, affecting the fairness of evaluation, and 2) circumstances exist which could have led to the candidate passing the evaluation.

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

The Special Panel highlights that art. 14 para. (8) of Law No. 26 of 10 March 2022 amended by Law No. 147 of 9 June 2023 design an effective judicial review, which involves the legality of the evaluation procedure and the substantive legality of the decision to fail the evaluation.

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

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 mentions that in decision no. 14 of January 11, 2023, in compartment II "Candidate evaluation", the Evaluation Commission indicated that Veronica Cupcea does not meet the integrity criteria, on the grounds that she did not remove serious doubts regarding the following circumstances:

1. source of financial means for an apartment in Chisinau, a plot of land and an unfinished building in Criuleni district and the sources for the repayment of a loan / Undeclared financial contributions in 2012;
2. the source of financial means to pay off the loan of 540,000 lei in 2018/Undeclared cash savings and the financial contribution in the annual statements.

Thus, the Independent Evaluation Commission for assessing the integrity of candidates for the position of member in the self-administration bodies of judges and prosecutors decided that the candidate Veronica Cupcea does not meet the integrity criteria, as serious doubts were found regarding the candidate's compliance with the criteria of ethical and financial integrity, pursuant to Art. 8 para. (1), para. (2) letter c), para. (4) letters a) and b), para. (5) letters b), c), d) and Art. 13 para. (5) of Law no. 26 of March 10, 2022 regarding some measures related to the selection of candidates for the position of member in self-administration bodies of judges and prosecutors.

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

A candidate is considered to meet the criterion of ethical integrity if he/she did not violate the legal regime of declaring assets and personal interests, conflicts of interests, incompatibilities, restrictions and/or limitations.

A candidate is considered to meet the criterion of financial integrity if the assets of the candidate were declared in the manner established by the legislation; the Evaluation Commission finds that the assets acquired by the candidate in the last 15 years correspond to the

declared income.

To assess the financial integrity of the candidate, the Evaluation Commission verifies the compliance by the candidate with the legal provisions of the declaration of assets and personal interests; the method of acquiring the ownership or possession of the goods the by the candidate or the persons specified in art. 2 para. (2), as well as the expenses related to the maintenance of these goods; the sources of income of he candidate and, as the case may be, of the persons specified in art. 2 para. (2).

According to art. 2 para. (2) from the above-mentioned law, in the context of the evaluation of the candidates mentioned in para. (1) the wealth of persons close to the candidates is also verified, as defined in Law No. 133/2016 regarding the declaration of wealth and personal interests, as well as the persons mentioned in art. 33 para. (4) and (5) of Law no. 132/2016 regarding the National Integrity Authority.

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

And, according to art. 33 para. (4) and (5) of Law no. 132 of June 17, 2016 regarding the National Integrity Authority, control of wealth and personal interests extends to family members, parents/in-laws and adult children of the person subject to control. If the person subject to control is cohabiting with another person, the check will also extend to this person's assets.

If it appears that the assets of the person subject to control have been registered in the name of other persons, the control will also extend to these assets and persons. If the subject of the declaration has indicated income and goods obtained from donations or holds goods in trust, the control will also extend to the donor and the trust. They may be asked for clarifications regarding the origin of the income used for the purchase and maintenance of those goods. To clarify these aspects, the integrity inspector may request relevant information from any natural or legal person.

According to art. 4 para. (1) lit. a) and d) from Law no. 133 of June 17, 2016 regarding the declaration of wealth and personal interests, the subjects provided for in art. 3 para. (1) declare the income obtained by the subject of the declaration together with the family members, the cohabitant/concubine in the previous fiscal year and the financial assets owned by the subject of the declaration and family members, his cohabitant/concubine, including as actual beneficiaries, i.e. cash in national currency or in foreign currency that exceeds the value of 15 average salaries in the economy and that is not subject to deposits in financial institutions.

According to art. 4 para. (3) from the aforementioned law in the wording until October 29, 2021, gifts received by the subject of the declaration free of charge from his family members, from his parents, brothers, sisters or children, whose individual value does not exceed 10 average salaries in the economy. By Government Decision no. 21 of January 18, 2019 regarding the approval of the amount of the average monthly salary per economy, forecast for 2019, the average salary per economy in 2019 was 6975 lei.

According to Government Decision no. 678 of December 27, 2019 regarding the approval of the amount of the average monthly salary for the economy, forecast for the year

2020, the average salary in the economy in 2020 was 7953 lei.

And, by Government Decision no. 923 of December 22, 2020 regarding the approval of the amount of the average monthly salary for the economy, forecast for 2021, the average monthly salary for the economy was 8716 lei.

Likewise, relevant to the case are presented the provisions of art. 4 of the Law on the declaration and control of income and property of persons with positions of public dignity, judges, prosecutors, civil servants and persons with management positions no. 1264 of July 19, 2002 (in force until August 1, 2016), the persons mentioned in art. 3 states:

- a) income obtained together with family members during the period of declaration;
- b) movable and immovable goods of all types, owned by right of usufruct, of use, of

housing, of surface area or in the possession of the declarant or his family members on the basis of contracts of mandate, commission, fiduciary administration, as well as transferable contracts of possession and use (lease, lease, leasing , mortgaged) on the date of submission of the declaration regarding income and property;

c) goods made through persons interposed or transmitted for a fee to ascendants, descendants, brothers, sisters and relatives of the same degree, as well as those transmitted free of charge to any person;

d) financial assets, i.e. bank accounts, investment funds, equivalent forms of savings and investment, placements, bonds, checks, bills of exchange, loan certificates, other documents that incorporate patrimonial rights of the declarant or his family members, direct investments in currency national or foreign currency made by him or his family members, as well as other financial assets;

e) share in the share capital of the declarant's commercial companies and a members of his family;

f) debts in the form of debits (including unpaid taxes), mortgages, guarantees issued for the benefit of third parties, loans and credits.

With reference to the source of financial means for an apartment in Chisinau, a plot of land and an unfinished construction in Criuleni district and sources for the repayment of a loan, the Evaluation Commission noted that according to the candidate, for many years by 2017, she and her husband had received financial support from her parents and her husband's parents and as a result of these contributions, as well as salary savings and income from the sale of an apartment, the candidate and her husband were able to buy real estate in 2012 for approximately 902,338 lei. However, the candidate did not provide estimates of the amounts received or supporting documents that would have confirmed the sources of the money received from relatives.

The Evaluation Commission pointed out that for the purchase of real estate in Criuleni, the candidate and her husband took a loan of 270,000 lei in 2012, which was repaid in 2014, from the following sources: the sale of land by her mother, the pension of her father-in-law, contributions from her mother and her husband's parents, and contributions from a close relative of her husband's, income that has been received by the family over time.

The Commission concluded that the funds allegedly used to pay off the loan were the same funds that, according to the candidate, had been used and used up for real estate purchases in 2012, actually generating the need for the loan. Therefore, the Evaluation Commission had serious doubts regarding the existence of these sources of money to pay off the loan of 270,000 lei, which were not removed by the candidate, who evoked, for the first time at the hearings, in the meeting public, that thanks to her and her husband's salary increases in 2014, they could afford to pay off the early loan.

The Evaluation Commission also concluded that the candidate's failure to declare financial contributions from family members strengthened the doubts regarding the sources of income for the purchase of real estate and the payment of the loan.

The special panel reveals that the plaintiff's argument is well-founded, such as that the Evaluation Commission unfoundedly sanctioned her because she does not remember with certainty the period in which her mother alienated all the plots of agricultural land she owned, and that she does not have the contracts through which she alienated them, and does not know for sure how many plots of land she had. However, the plaintiff exercised her rights diligently and communicated including the cadastral numbers of the lands, which were sold by her mother.

And, although the Evaluation Commission had the possibility to obtain these documents, it did not exercise its rights and obligations established by the legislator in the special law in good faith.

However, the provisions of Art. 3 paragraph (7) of Law on certain 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, establish that at the request of the president of the Evaluation Commission and/or the head of the secretariat, public authorities and institutions are obliged to delegate/temporarily second the persons requested by the Commission to assist its activity, including by way of derogation from the provisions of the laws that regulates the functioning of

the respective public authorities and institutions, as well as from the laws that regulate the status of certain categories of civil servants.

Also, the special court panel considers as justified the plaintiff's argument that in the period 2012 - 2015 she did not declare donations, although the material support provided by her parents cannot be interpreted as a donation in the sense of the legislation, on the grounds that in fact they lived together, and respectively the contributions did not take the legal form of a donation, but were used for the management of the joint household.

In addition, the special panel reveals that although Veronica Cupcea claimed at the hearings that due to her and her husband's salary increases in 2014, they could afford to pay off the advance loan, this argument was not factually analysed by the Evaluation Commission, which only indicated that this ground has a purely declarative character.

Subsequently, the special court panel notes the plaintiff's argument that Veronica Cupcea submitted the statements of income and personal interests to the National Integrity Authority within the deadline and according to the law, a circumstance that is confirmed by the fact that, throughout the period of activity as a judge, the National Integrity Authority found no violation of the legal regime of conflicts of interest, incompatibilities, restrictions and limitations, declaration and control of wealth and personal interests.

Thus, from the minutes of the National Integrity Authority no. 1254/20 of December 16, 2021 and no. 910/24 of November 22, 2022, the special court panel deduces that the mentioned public authority verified the statements of income and personal interests submitted by Veronica Cupcea and did not establish any violations.

With reference to the source of funds to pay off the loan of 540,000 lei in 2018, as well as the cash savings and the financial contribution not declared in the annual statements, the Evaluation Commission considered that Veronica Cupcea provided inconsistent explanations about the sources of the funds and the related amounts that were used to pay off the loan in 2020.

The Evaluation Commission noted that the candidate's explanations, both in writing and during the hearings, regarding failure to declare income and wealth contained a very confusing interpretation of the law on the declaration of wealth and personal interests.

In this case, the special panel notes that the Evaluation Commission did not appreciate the plaintiff's argument, such as that the parents' income or the son's aid were not to be declared, however, they did not fall under the meaning of the notion of "family member" provided by Art. 2 of Law no. 1264 of July 19, 2002, according to which a family member is a spouse, minor children and dependants.

In this context, it is noted that in the standard form of the annual statement, valid for the years in which the failure to declare these financial aids by the parents and the grown-up son is cited, there was no column/field in which these aids could be indicated.

With reference to the Evaluation Commission's argument that the plaintiff's arguments contained a very confusing interpretation of the law on the statement of wealth and personal interests, the special panel considers that they are not relevant to the case. However, the Evaluation Commission did not indicate what the misinterpretation consists of and what is actually the meaning of the legal rule whose misinterpretation is invoked. Veronica Cupcea's explanations given during the evaluation are much broader and absolutely relevant to the case in comparison to the argument invoked by the Evaluation Commission.

Also, with reference to the plaintiff's arguments regarding the admission to the evaluation procedure 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 for the evaluation of procedural errors, the special panel will note that the decision of the Evaluation Commission is issued contrary to the provisions of Art. 21 of the Administrative Code and does not meet the requirements of procedural and substantial legality, and the observed circumstances denote the candidate's right to a favourable evaluation decision from this point of view.

The Special Panel highlights that the terms "*seriously*", "*wrongful*", and "*inexplicable*" from art. 8 para. (2) lit. (a) of Law No 26/2022 are, in their nature, undefined legal notions (vague legal notions) that do not grant discretion to the Pre-Vetting Commission, but rather oblige it to conduct a complex and rigorous interpretation of the provision in the context of serious violations of rules of ethics and professional conduct, while in this case, the Commission noted briefly that

the candidate's actions were a serious violation of the rules of ethics and professional conduct of judges.

In the same respect, the Special Panel highlights that given its constitutional function to deliver justice, the court had the ultimate competence to interpret a vague legal notion in a concrete case.

Thus, the violations found by the Evaluation Commission do not satisfy the criterion that would allow it to decide not to promote the candidate for violations of the rules of ethics and professional conduct of high gravity.

In the case, the plaintiff invoked that by decision no. 14 of 11 January 2023, the Independent Evaluation Commission for assessing the integrity of candidates for the position of member in the self-administration bodies of judges and prosecutors violated her right, in her capacity as a judge, to apply and be a member of the Superior Council of Magistracy, the right to dignity, honour and professional reputation of the judge, and the exclusion from the election race in judicial self-administration bodies for some violations is not a necessary measure, on the grounds that the contested decision does not reflect the legitimate purpose and motivation of the adoption of Law no. 26 of March 10, 2022.

The special court panel mentions that according to Art. 13 para. (6) of Law on certain 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, the decision regarding the non-promotion of the evaluation constitutes a legal basis for not admitting the candidate to the elections or competition. The decision is sent to the competent bodies according to the law for the examination of detected violations, but the findings of the decision have no probative value for any other procedures or trials.

At the same time, the special panel considers relevant the fact that in point 113 of the Decision on inadmissibility of referrals numbers 75g/2023, 76g/2023, 77g/2023, 86g/2023, 87g/2023, 88g/2023, 89g/2023, 90g/2023, 96g/2023, 101g/2023 and 102g/2023, the Constitutional Court noted that the decision of the Evaluation Commission regarding the non-promotion of the evaluation may affect the professional reputation of the candidate - protected by the right to private life -, since it contains findings regarding the lack of ethical and financial integrity of the candidate.

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

The panel reiterates that 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 does not replace the Administrative Code, this being a succinct one. Moreover, from its content it is clear that by adopting it, the legislator determined certain special rules for the extraordinary evaluation procedure that are not found in other normative acts or the Administrative Code.

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

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

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.

According to art. 28 para. (1) of the Administrative Code, the administrative procedure is carried out in a simple, adequate, fast, efficient and purpose-built way. Carrying out administrative

procedures through electronic means of communication is mandatory in all situations in which the respective means can be used, except in cases where the law establishes otherwise.

According to art. 32 para. (1) of the Administrative Code, the administrative procedure is structured so that the participants can understand each stage of the procedure. If a participant's contribution is required, the actions to be taken are communicated to him without delay, in a clear and easily understandable language.

In accordance with art. 34 of the Administrative Code, public authorities have the obligation to contribute and collaborate in order to achieve the competences that belong to them according to the law.

According to art. 22 Administrative Code, public authorities and competent courts investigate the state of facts *ex officio*. These establish the type and volume of the investigations and are not related to the participants' presentations, nor to their requests to claim the evidence. The facts already known to the public authorities or the competent courts, the generally known facts and the facts presumed by virtue of the legal provisions do not need to be proven, until the contrary proof.

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

In this context, the special trial panel emphasizes that according to art. 10 para. (2) – (3) 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 10 March 2022, the Evaluation Commission and its secretariat have free and real-time access to information systems that contain data necessary to carry out its mandate, namely for the evaluation of the ethical and financial integrity of the candidates, in accordance with the legislation on the exchange of data and interoperability, with the exception of information that falls under the provisions of Law no. 245 of November 27, 2008 regarding state secrets.

In the process of evaluating the candidates' integrity, the Evaluation Commission has the right to request from individuals and legal entities under public or private law, including from financial institutions, the documents and information necessary to carry out the evaluation. The requested information is presented to the Evaluation Commission free of charge, including in electronic format, within no more than 10 days from the date of the request.

At the same time, para. (7) of the aforementioned legal norm, expressly establishes that in order to elucidate some identified uncertainties, the Evaluation Commission may request, at any stage of the evaluation procedure, additional data and information from the evaluated candidates.

And, according to art. 2 point. 1 lit. d) from the Evaluation Regulation of the Independent Commission for Evaluation of the Integrity of Candidates for the Position of Member in the Self-Administrative Bodies of Judges and Prosecutors, pursuant to Law no. 26/2022, adopted at the meeting of the Evaluation Commission on May 2, 2022, one of the main stages of the evaluation are questions and requests to send documents to candidates to the extent necessary to elucidate issues of ethical and financial integrity. Candidates must respond within the deadline set by the Commission.

The special panel of judges reveals that from the aforementioned legal norms, it follows that in the event of any ambiguities being detected, the Evaluation Commission can request, at any stage of the evaluation procedure, additional data and information from the candidate, only to remove the serious doubts that have arisen before the Evaluation Commission.

Thus, in this case, on July 8, 2022, the Evaluation Commission sent to Veronica Cupcea the form of the statement of wealth and personal interests for the period of 5 years, which the plaintiff sent to the address 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 on July 13, 2022.

On September 10, 2022, the Evaluation Commission sent the candidate the first round of questions requesting additional data and information to clarify several aspects, to which answers were to be sent by September 13, 2022, but the candidate presented the answers to the questions and additional documents on September 14, 2022.

And, on October 7, 2022, the Evaluation Commission sent questions for the second round to elucidate aspects that arose during the evaluation, setting the deadline for October 10, 2022, which was respected by the plaintiff.

On November 18, 2022, to clarify issues that arose during the evaluation, the Independent Evaluation Commission for assessing the integrity of candidates for the position of member in the self-administration bodies of judges and prosecutors requested some additional data and information to be presented by November 20, 2022. However, although the plaintiff Veronica Cupcea requested on November 19, 2022 the extension of the deadline on the grounds that she was abroad, she still submitted the requested answers on November 20, 2022.

Likewise, on November 29, 2022, in order to elucidate some aspects found during the evaluation, the Evaluation Commission requested some additional data and information to be presented by December 1, 2022, a deadline respected by the candidate.

In this context, it is noted that from the actions of the Independent Evaluation Commission for assessing the integrity of candidates for the position of member in the self-administration bodies of judges and prosecutors, it can be inferred that it tried to obtain relevant information exclusively from the candidate, in order to elucidate the issues that arose during its assessment, without making the effort to require this information from the public authorities that de facto and de jure hold this information.

Therefore, the special panel concludes that the Evaluation Commission ignored the provisions of art. 22 and art. 85 para. (3) of the Administrative Code, reversing the burden of proof. Taking into account the factual circumstances described above, the special panel considers as well-founded the argument of the plaintiff that the Evaluation Commission did not provide her with the preliminary findings resulting from the conclusion of the investigation and did not give her access to the evidence from the personal file.

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. (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 Veronica Cupcea, 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.

In the same vein, the Special Panel finds that the Commission did not respect the candidate's right of effective access to the content of the administrative file, which gives her the right to get to know and extract copies of any document and information that refers to her as a participant in the administrative evaluation procedure. Restricting access to the administrative file also violated another guarantee, such as the candidate's right to defense before the Evaluation Commission.

In this context, the special panel mentions that the plaintiff Veronica Cupcea was informed about the right to get acquainted with the materials of the administrative file, which the plaintiff exercised on December 13, 2022, in the circumstances in which the public hearings were held on December 16, 2022, but the candidate was not given all the documents accumulated during the evaluation, which were submitted to her only selectively. This was confirmed by the representatives of the Evaluation Commission, who in the court hearing, communicated that only the documents that the Commission considered relevant were made available to the candidate.

These circumstances prove that the Pre-Vetting Commission violated candidate Veronica Cupcea'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.

Through the prism of art. 22 of the Administrative Code, public authorities and competent courts investigate the facts *ex officio*. They establish the type and volume of the research and are not related to the participants' presentations or to their claims for evidence. Facts already known to public authorities or competent courts, generally known facts and facts presumed by virtue of legal provisions do not need to be proven, until proven otherwise.

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

From the aforementioned legal norms, it can be deduced beyond any doubt that the Evaluation Commission had the obligation to accumulate the necessary documents and information for the *ex officio* investigation of the factual situation to carry out the evaluation of the candidate Veronica Cupcea. And, requesting additional documents from the candidate, which

she de facto did not possess, can be interpreted as a violation of the presumption of innocence and a reversal of the burden of proof.

The special panel finds that the Evaluation Commission did not carry out an analysis and justification of the legitimate purpose of the issued decision. From the preamble of Law no. 26 of March 10, 2022, it follows that its purpose is to increase the integrity of the future members of the Superior Council of the Magistracy and their specialized bodies and to increase confidence in the activity of the judges' self-administration bodies, but also in general, in the system justice.

From the contested decision and the documents presented by the defendant, it does not appear which of these goals are pursued by the decision not to promote the evaluation. Any of these purposes would be legitimate, but none of them have been analyzed.

It should be noted, however, that the Commission is fundamentally free to choose its goals or legitimate purpose, but this fact must result from the content of the decision and confirmed from the documents of the administrative file.

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

According to 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, then he/she shall be dismissed from the judiciary by means of a disciplinary procedure or another procedure that would take into account the guarantees of his/her independence. The Special Panel notes that the purpose of Law No 26/2022, among other things, is to boost the trust in justice.

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

In the same way, the court retains the applicant's argument that the findings and conclusions of the Evaluation Commission contravene the principle of equality and non-discrimination, on the grounds that in other decisions, although the Evaluation Commission

found financial aspects that could generate doubts, it did not have serious doubts about to any aspect regarding the ethical integrity of the candidate according to the provisions of art. 8 para. (1) and (2) of Law no. 26 of March 10, 2022.

The special panel considers that according to art. 23 para. (2) of the Administrative Code, public authorities and competent courts must treat persons in similar situations equally.

The general principle of equality represents one of the constitutional principles and grants a subjective right to the person. It prohibits treating the same facts unequally or unequal things the same, unless a different approach would be objectively justified. This traditional wording also defines the underlying contentious structure and thus the sequence of examination. The basic question is always justification, i.e. whether the weight of (un)equal treatment is balanced by the relevant factual reasons. The degree of justification required varies according to the material gravity of the unequal treatment and can range from a simple arbitrary test to a test based on proportionality issues.

The elements of comparability refer specifically to those provided by art. 8 para. (2) and (4) from Law no. 26 of March 10, 2022, which does not differ significantly. From the materials of the administrative file and from decision no. 14 of January 11, 2023, it follows that the Evaluation Commission did not perform an evaluation using the comparison method. However, the principle of equality forbids treating essentially the same things unequally. The principle of equality is considered violated, if there is no plausible and objective reason for legal differentiation or equal treatment.

At the same time, the court mentions that the decisions invoked by the plaintiff that would demonstrate the different treatment refer to some similar situations, but in its assessment, the Evaluation Commission did not highlight what are the factual circumstances, retained in the contradictory decisions, distinct from those that have were mentioned in the decision adopted regarding the applicant's integrity.

Thus, examining the violations imputed to the plaintiff as serious doubts indicated in decision no. 14 of January 11, 2023 and the decisions to promote the candidates to the position of member in the Superior Council of the Magistrates and to the position of member in the Superior Council of the Prosecutor, the special panel finds that the Evaluation Commission applied double standards when establishing them. Or, for the same facts imputed to the candidate, the Evaluation Commission in the case of other candidates for the position of member of the Superior Council of Magistracy and for the position of member of the Superior Council of the Prosecutor's Office adopted promotion decisions.

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

The special panel of judges notes with the value of a jurisprudential principle that social realism also includes legal realism, and the imputation regarding the candidate of some violations, which were tolerated, and sometimes even accepted, and administered by the state authorities, are not likely to defeat the presumption that the candidate lacks financial or ethical integrity.

Moreover, submitting the request to run for the positions provided for in art. 3 of Law no. 26 of March 10, 2022 also implies the voluntary agreement to be subjected to the integrity assessment, as well as the conviction of each candidate that he/she has respected the integrity criteria in the previous period, arising specifically from reasons of legal security and the social context in which he/she lived, and interacted with the citizens and public authorities.

Thus, the circumstances retained by the Commission, the special panel of judges does not appreciate them as a genuine violation of financial integrity, because otherwise the rule of protection of legitimate trust in the activity of the public authorities of the state, which had tasks and powers to react to possible inadvertences on the part of the administered subjects, but also the principle of legal security in all its complexity.

Corroborating 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 substantial legality, and the observed

circumstances denote the candidate's right to a favorable evaluation decision from this point of view.

With reference to the claimant's argument that serious procedural errors were admitted in the evaluation procedure by the Evaluation Commission regarding the violation of the language used in the evaluation process, manifested by the lack of English translations of the documents and statements presented by the candidate to the stage of data collection and verification by the Commission members, considering that the Commission members Herman von Hebel, Victoria Henley, Nona Tsotsoria, who are English speakers and who would not have been provided with an English translation by the Commission secretariat, the special panel notes the following.

According to art. 10 para. (9) from Law no. 26/2022, the Evaluation Commission evaluates the accumulated materials according to its intimate conviction, formed following the complete and objective multi-aspect research of the information. None of the materials presented has a predetermined probative force without its assessment by the Evaluation Commission.

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

The special panel notes the fact that the state has invested the Evaluation Commission with the prerogative to be guided by certain standards in order to select the most honest candidates for the position of members, inter alia, in the Superior Council of the Magistracy, which in turn could ensure the correctness the functioning of the judicial system as a whole, including through the application of policies that are consistent and conform to generally accepted standards.

The plaintiff proved to the special panel of the Supreme Court of Justice the plausibility of the elements invoked in her appeal, including regarding the correctness of the financial operations carried out in the management, sale and purchase of movable and immovable assets as well as the early repayment of loans.

The special panel notes that the circumstances found indicate a right of the applicant 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 Veronica Cupcea.

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

Even though the special panel of the Supreme Court of Justice is limited in making a final decision, its arguments, conclusions and findings are binding and enforceable on the Evaluation Commission. This conclusion follows directly from the provisions of art. 120 of the Constitution of the Republic of Moldova, which regulates the binding nature of sentences and other final court decisions.

The special court panel bases its argument also on the jurisprudence of the Constitutional Court, which highlighted that, even if the special panel of the Supreme Court of Justice cannot oblige the Evaluation Commission to promote the evaluated candidate, the arguments and conclusions made by this court in the case resolution of appeals remain binding for the Commission (DCC no. 42 of April 6, 2023 § 143).

The special panel notes that, also for reasons of effective judicial control, but also for reasons of the quality of the law, the Evaluation Commission is not obliged, after ordering the re-evaluation of the candidate, to investigate circumstances other than those that were the basis for admitting the plaintiff's action .

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

The special panel mentions that the circumstances retained by the Evaluation Commission do not fall within the perspective of proportionality in the reasons for not promoting the evaluation of the candidate Veronica Cupcea. However, it did not carry out an analysis and justification of the legitimate purpose.

Thus, the exclusion and not only the limitation of the right of the candidate Veronica Cupcea to participate and be elected as a member of the Superior Council of the Magistracy for the minor facts retained by the Evaluation Commission is not an appropriate measure to achieve the goals set out in the law, but not specified in the contested decision. Considering the problem of the proper functioning of the judicial self-administration bodies at the time of issuing the decision and the non-promotion of the candidate for the minor facts, not only does it not fall under the reasons for non-promotion, but it constitutes an unnecessary violation of the stated rights.

The special panel reiterates that the measure taken by the defendant public authority is a reasonable one if the interference produced by it is not disproportionate in relation to the intended purpose. This requirement of the legislator implies a balancing of legally protected values, a weighting of the interests at stake. The more the right is injured, the more the advantage from integrity is required to be superior.

Therefore, the exclusion of the right of the judge to be a candidate for the position of member of the Superior Council of the Magistracy, the College for the selection and career of judges and the College for evaluating the performance of judges entails not only interference, but an improper cancellation of the right to be elected in this function. Such a solution cannot be accepted in a state of law, as it is incompatible with human dignity and that of a judge.

From the mentioned considerations, the special panel reveals that, in this case, there are legal grounds to cancel the decision of the independent Commission for evaluating the integrity of candidates for the position of member in the self-administration bodies of judges and prosecutors no. 14 of January 11, 2023 regarding the candidacy of Veronica Cupcea.

The special panel notes that the illegality of the contested decision leads to the annulment of the decision and ordering the reevaluation of the candidate. Or, ordering the reassessment is the final and implicit result that includes the loss of validity of the decision according to art. 139 para. (1) and (2) of the Administrative Code (see DCC no. 42 of April 6, 2023 § 143, the case of Ramos Nunes de Carvalho e Sá v. Portugal [MC], November 6, 2018, § 184 and the jurisprudence cited there).

In accordance with art. 224 para. (1) lit. b), 195 Administrative Code, art. 238-241 of the Civil Procedure Code, art. 14 para. (6), para. (8) lit. b), paragraph (9) from 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, the special trial panel, established within the Court

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

D E C I D E S:

to declare admissible the appeal filed by Veronica Cupcea against the Independent Evaluation Commission for assessing the integrity of candidates for the position of member in the self-administration bodies of judges and prosecutors, regarding the annulment of decision no. 14 of January 11, 2023 regarding the candidate Veronica Cupcea for the position of member of the Superior Council of Magistracy, the Board for Selection and Career of Judges, the Performance Evaluation Board of Judges and the order to resume the candidate's evaluation procedure.

to cancel the decision no. 14 of January 11, 2023 regarding the candidacy of Veronica Cupcea for the position of member of the Superior Council of Magistracy, the Board for Selection and Career of Judges, the Performance Evaluation Board of Judges.

to order the re-evaluation of the candidate Veronica Cupcea by the Independent Evaluation Commission for assessing the integrity of candidates for the position of member in the self-administration bodies of judges and prosecutors. The decision is irrevocable.

Chairman of the meeting,
judge

Tamara Chisca-Doneva

judges

Ion Guzun

Mariana Pitic