

Case file No. 3-6/2023  
2-23013456-01-3-27012023

**DECISION**  
**In the name of the law**

**THE SUPREME COURT OF  
JUSTICE**

1 August 2023  
municipality

Chişinău

Completul de judecată special, instituit în cadrul Curții Supreme de Justiție, pentru examinarea contestațiilor declarate împotriva deciziilor Comisiei independente de evaluare a integrității candidaților la funcția de membru în organele de autoadministrare ale judecătorilor și procurorilor,

consisting of:

Hearing Chairperson, Judge  
Judges

Ion Guzun  
Mariana Pitic  
Ion Malanciuc

Clerks

Victoria Melinte  
Olesea Suduc  
Vasile Andoni

*With the participation of:*

plaintiff's representative, counsel  
defendant's representative, counsel  
in the absence of the plaintiff

Petru Balan  
Roger Gladei  
Sergiu Osoianu

having examined in public court session, under the administrative dispute procedure, the appeal brought by Sergiu Osoianu, represented by counsel Petru Balan, against the Independent Evaluation Commission for assessing the integrity of candidates for the position of member in the self-administration bodies of judges and prosecutors, seeking the annulment of the Decision No. 12 of 6 January 2023 on the candidacy of Sergiu Osoianu, candidate for the Superior Council of Magistracy, and the resumption of the candidate evaluation procedure,

## **i t e s t a b l i s h e d :**

### **Submissions of the Participants in the Proceedings**

On 27 January 2023 Sergiu Osoianu, represented by his counsel Petru Balan, filed an appeal against the Independent Evaluation Commission for assessing the integrity of candidates for the position of member in the self-administration bodies of judges and prosecutors, seeking the annulment of the Decision No. 12 of 6 January 2023 on the candidacy of Sergiu Osoianu, candidate for the Superior Council of Magistracy, and the resumption of the candidate evaluation procedure.

In support of his appeal, the plaintiff cited disagreement with 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, claiming that it constituted an illegal unfavorable individual administrative act.

In this regard, she underscored that according to Article 8 para. (4)(a) and (b) of the Law No. 26/2022, the candidate shall be deemed to meet the criterion of financial integrity if the candidate's assets have been declared in the manner established by law and if the Commission finds that his/her wealth acquired in the past 15 years corresponds to the declared revenues.

Thus, passing the evaluation is an individual administrative act that is mandatory but not discretionary, and the cumulative fulfillment of the conditions of Article 8 para. (2) and (4) of Law No. 26 of 10 March 2022 gives rise to the obligation of the Pre-Vetting Commission to make a positive decision on the passing of the candidate for the position of member of the Superior Council of the Magistracy in terms of meeting the financial and ethical integrity criteria.

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

Sergiu Osoianu argued that the Pre-Vetting Commission did not respect the principles of proportionality, equal treatment and legal certainty and that the term "serious doubts" is an undefined legal concept that is characteristic of administrative law; it does not grant discretion, but rather the possibility to establish facts from the abstract to the concrete and the most appropriate way to apply the rules.

Regarding the illegality of Decision No. 12 of 6 January 2023, concerning the candidacy of Sergiu Osoeanu, candidate for the position of member of the Superior Council of Magistracy, the plaintiff stated that it focused on the following aspects:

1. "Serious doubts" of the Pre-Vetting Commission regarding his compliance with the criterion of ethical integrity under Article 8 para. (2)(a) and the criterion of financial integrity under Article 8 para. 4(b) and para. 5(c) of Law No. 26 of 10 March 2022 regarding acceptance of compensation in lieu of housing and receipt of a free plot of land, doubts which he has not resolved.

2. "Serious doubts" of the Pre-Vetting Commission regarding his compliance with the financial integrity criterion under Article 8 para. (4), Article 8, para. 5(c), (d) and (e) of Law No. 26 of 10 March 2022, concerning the sources of funds for the purchase of an apartment in 2014, doubts that have not been resolved by him.

3. "Serious doubts" of the Pre-Vetting Commission regarding his compliance with the criterion of ethical integrity under Article 8 para. (2)(c) and the criterion of financial integrity under Article 8 para. 4(a) and (b), para. 5(b), (c) and (d) of Law No. 26 of 10 March 2022, relating to the imbalance of wealth for the years 2016, 2018, 2021 and the source of his cohabitee's cash income declared for the years 2016-2021, doubts which have not been resolved by him.

4. "Serious doubts" of the Pre-Vetting Commission about his compliance with the financial integrity criterion in accordance with Article 8 para. (4)(b), para. (5)(d) and (e) of Law No. 26 of 10 March 2022, regarding the sources of funds for two donations, doubts that have not been resolved by him.

5. "Serious doubts" of the Pre-Vetting Commission as to his compliance with the criterion of financial probity and the criterion of ethical probity under Article 8 para. 2(c), para. 4(a) and (b), para. 5(b) and (c) of Law No. 26 of 10 March 2022 due to his failure to declare a car as required by law in two annual declarations, understating the value of two cars and failure to pay capital gains tax on his cohabitee's car, doubts that have not been resolved by him.

The plaintiff claimed that the reasons and conclusions of the Pre-Vetting Commission were unfounded insofar as they related to: accepting compensation in lieu of housing and receiving a free land plot; doubts as to the sources of funds to purchase an apartment in 2014; the alleged imbalance of wealth for the years 2016, 2018, 2021 and the source of his cohabitee's cash income declared for the years 2016-2021; doubts as to the sources of financial means for two donations; failure to declare a car as required by law in the two annual declarations, understating the value of two cars and failure of the cohabitee to pay capital gains tax on a car.

As to the allegations of the Pre-Vetting Commission that in 2014 the candidate reached a reconciliation agreement with the Chişinău City Hall, as a result of which on 5 February 2015 he received compensation of MDL 1,015,880 in lieu of housing, without a court decision to change the method of execution of the 2008 court decision, contrary to the provisions of Art. 252 para. (1) of the Civil Procedure Code, the plaintiff argued that these allegations were dubious because the Commission had arrogated to itself the powers of the court, given that the reconciliation agreement had a strong presumption of legality and had not been declared illegal.

Sergiu Osoianu stated that although, according to Article 8 para. (6) of Law No. 26 of 10 March 2022, the Pre-Vetting Commission is not bound by the findings of other bodies competent in the field, these provisions do not give the Pre-Vetting Commission absolute discretion to treat facts/actions that are considered legal as illegal or questionable. The enforceability of a binding judgment against the plaintiff can no longer be questioned, nor can the method of execution. The interpretation in the contested decision of the reconciliation agreement with the Chişinău City Hall as doubtful or contrary to law does not meet the requirements of proportionality and the limit of the exercise of administrative discretion.

The plaintiff submitted that the Commission's allegations that Sergiu Osoianu had benefited from two state housing programs for judicial or prosecutorial staff, had taken advantage of different programs and had done so deliberately without notifying the authorities of each of the respective programs of the use of the other programs,

were unfounded. Since there is no finding in this case that his actions were unlawful in the exercise of the civil rights granted to him by law in connection with his position, the Commission's interpretation is biased.

In this regard, Sergiu Osoianu claimed that he did not take advantage of two, three or more state housing programs, he filed a lawsuit against the Chişinău City Hall for the provision of housing under general conditions, which was confirmed by a court decision that was subsequently enforced after 7 years.

He also noted that there is no legal document that would prohibit him from applying for a land plot in Străşeni town, even if he had previously received a compensation of MDL 1,015,880 instead of housing, and the conditions set by the Local Public Administration of Străşeni were met by Sergiu Osoianu when applying for the land plot. The allocation of building plots by local authorities within the urban area is at their discretion and is aimed at local development. Moreover, the Land Code provides that even repeated land allotment is allowed, but only if its cost is paid.

He also finds unfounded the findings of the Pre-Vetting Commission that the loan of MDL 270,000 from a relative of the candidate, which the candidate declared in his 2014 annual declaration and which he presented to the Commission as the source of funds for the purchase of his apartment in 2014, and that the donations he indicated in his annual declarations, the 5,000 EUR given in 2017 to his cohabitee and the 7,000 EUR given to the candidate in 2021, were not documented. Thus, the Pre-Vetting Commission sanctioned him and assigned him a number of odd tasks as a candidate appearing before the Commission.

According to plaintiff, these tasks are odd and exaggerated based on the fact that neither he, his relatives, nor third parties with whom he interacted anticipated or could have anticipated that there would be a vetting commission in 2022, nor that he would have to adopt such a pedantic "tax ethic" as to keep all checks, invoices, receipts and payment slips, or to strictly document in writing every legal act of lending, despite close or trusting relationships.

He contended that having been penalized by the Pre-Vetting Commission for not having a receipt for the loan given by his relative in 2014, such exercise of administrative discretion was arbitrary.

The plaintiff noted that in connection with the phrase "doubts which have not been resolved by the candidate", which is used by the Pre-Vetting Commission, it is necessary to assess whether he was in a position to resolve these 'doubts' of the Commission, starting with the authors of the transactions, the length of time that had elapsed since they were made, the size of these transactions and whether the applicant could have foreseen that in future he would be questioned about these details and evidence of these facts.

The plaintiff submitted that the findings of the Pre-Vetting Commission regarding the alleged wealth imbalance for the years 2016, 2018, 2021 and the source of his cohabitee's cash income declared for the years 2016-2021 were not true as the plaintiff challenged the Commission's calculations and qualified them as erroneous. In the 2nd round of questions and answers, he clarified all the uncertainties regarding his income in 2016, 2018 and 2021, providing the Commission with calculations that are consistent with reality and verified, according to his asset and personal interest declarations.

The plaintiff pointed out that when specific calculations are at issue, it is not enough to simply state that "there is doubt": it must be proven that one calculation is correct and the other is not. In this case, the Pre-Vetting Commission did not explain why the calculation presented by Sergiu Osoianu was incorrect.

According to the plaintiff, the Commission exercised its discretion unfairly and disproportionately with respect to the sources of his income – his cohabitee's cash from 2006 through 2021.

In this context, the conclusions of the Venice Commission are relevant, which highlighted the risk that the evaluation of candidate's assets would target persons close to the candidate within the meaning of Law No. 133 of 17 June 2016 on Declaration of Assets and Personal Interests. The definition of close persons under this law should be examined as to whether it is relevant and essential for this purpose, and whether this range of persons can realistically be covered in the limited time allotted. Do these close persons have the right not to cooperate with the evaluation? If the answer is yes, these individuals play an important role in facilitating the candidate's legitimate opportunities. An estranged family member or former business partner could use this power to thwart the candidate's legitimate aspirations. If the answer to the previous question is in the negative, the third party is put in a difficult position and their privacy is interfered with for a purpose in which they may not be interested. For these reasons, the list of close people should be limited and essential.

In the case of the plaintiff, the Pre-Vetting Commission, directly affecting his right to stand as a candidate and to be elected to the self-administration bodies, had attributed to him the fiscal conduct and diligence of a third party over a long period of time – from 2006 to 2021. This goes beyond the principle of proportionality and is an example of an arbitrary exercise of discretion.

Sergiu Osoianu noted that the bias of the Commission was also manifested in the fact that its members exceeded their powers, as the Commission had requested data about the candidate from previous jobs since 2000, having the authority to check the candidate only over a period of 15 years, i.e. since 2007. Regarding the findings of the Pre-Vetting Commission in Decision No. 12 dated 6 January 2023, that the applicant failed to declare his Mercedes Benz E220 car in his annual declarations for 2012-2013 in violation of the provisions of Article 4 para. (1)(b) of Law No. 1264 of 19 July 2002, applicable to the declarations for the years 2012 to 2015, the plaintiff clarified that in the ethics questionnaire he had given an answer to this question to the Commission, which showed that he had declared the car at the time of its purchase and was no longer obliged to do so, since in 2012 and 2013, declaration entities were required to declare the goods purchased during the declaration period and not the goods that were purchased prior to the declaration period and were already owned during the declaration period.

In this regard, he argued that the findings and conclusions of the Pre-Vetting Commission contradict Article 137 para. (3) and (4) of the Administrative Code because, having the obligation to treat identical situations (failure to declare) in the same way, the Commission exercised its discretion differently.

In connection with serious doubts of the Pre-Vetting Commission regarding the purchase price of the Honda CRV car, indicated in the annual declaration for 2014 in the amount of MDL 150,000 (estimated at 8,050 EUR) and which five years later,

according to the 2019 declaration, was sold for 177,030 MDL (estimated at 9,000 EUR), 27,030 MDL (estimated at EUR 1,300) more than what was paid, without providing any supporting documents regarding the estimated wear and tear of the car at the time of purchase and the estimated repair costs, the plaintiff noted that the Commission had given him odd tasks, as he was obliged to document the repairs carried out in 2014 on the car he sold in 2019.

In this case, the Commission had no reason to doubt that the stated sale price of the automobile was not reasonable and proportionate for the period when the sale took place and in support of this fact, the plaintiff also produced a copy of the sale and purchase agreement of the car in question.

Sergiu Osoianu argued that the Commission's assertion that at the time the models of this type of car were selling for 9,500 EUR is laughable, to say the least, and a truly independent and objective observer would not have had any doubts about the transaction.

In connection with the Commission's finding that it had serious doubts as to whether the candidate's cohabitee had fulfilled her statutory obligation to pay capital gains tax on the sale of the automobile, the petitioner contended that the Pre-Vetting Commission, directly affecting his right to stand as a candidate and to be elected to the self-administration bodies, had attributed to him the fiscal conduct and diligence of a third party three years prior to the evaluation.

The plaintiff pointed out that even if his cohabitee had erred by failing to declare the capital increase from the sale of the automobile, it was necessary to consider: a) whether this was so significant as to direct the Commission's findings against his career; b) whether or not he knew of the failure to declare or played any role in the process of his cohabitee's failure to declare the increase in capital; and c) whether or not the taxing authority had verified it.

Sergiu Osoianu considered that the superficiality with which the Commission examined this issue in the contested decision shows a violation of the principle of proportionality and that the Commission arbitrarily used its discretion in its reasoning.

The plaintiff based his claims on the provisions of Articles 5, 10, 11, 16, 17, 21, 22, 29, 85, 92, 132, 137, 206 para. (1)(a), 209 para. (1) and (2), 224 para. (1)(b) of the Administrative Code, 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, Article 14 of the Law on the Status of Judges No. 544 of 20 July 1995, Article 231 of the Law on Judiciary Organization No. 514 of 6 July 1995.

Sergiu Osoianu filed an appeal against the Independent Evaluation Commission for assessing the integrity of candidates for the position of member in the self-administration bodies of judges and prosecutors, seeking the annulment of the Decision No. 12 of 6 January 2023 on the candidacy of Sergiu Osoianu, candidate for the Superior Council of Magistracy, and the resumption of his evaluation.

Subsequently, on 7 February 2023, Sergiu Osoianu, represented by his counsel Petru Balan, filed an application to supplement/amend the appeal filed on 27 January 2023 against the Independent Evaluation Commission for assessing the integrity of candidates for the position of member in the self-administration bodies of judges and prosecutors, seeking the annulment of the Decision No. 12 of 6 January 2023 on the

candidacy of Sergiu Osoianu and the resumption of the candidate evaluation procedure.

In support of the application to supplement/amend the appeal, he stated that in addition to the arguments set out in the original administrative case, he submits to the court the following grounds relevant to the admissibility of the claim, namely that the evaluation of the plaintiff's integrity was carried out by persons unknown to him who were selected secretly/confidentially in the secretariat of the Pre-Vetting Commission. He also considered that the evaluation was carried out by people who do not meet the minimum ethical and financial integrity requirements for membership on the Commission, which purports to be independent and composed of members of integrity.

The plaintiff submitted that the fact that these persons were selected as members of the Commission does not dismiss the plaintiff's doubts, informed by public sources, that the members appointed to the Commission have neither the highest level of ethical and financial integrity, nor the highest level of independence to assess the plaintiff's level of ethical and financial integrity.

In this regard, he noted that in accordance with Article 5 para. (8) 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, a member of the Pre-Vetting Commission must meet the following requirements: a) has higher education; b) has an impeccable reputation; c) has at least 10 years of experience in one or more of the following fields: legal, economic, tax, investigation of corruption and corruption-related offenses, integrity verification; d) has not been a member of the Parliament or a member of the Government for the last 3 years; e) has not been a member of a political party for the last 3 years; f) has not been a judge or prosecutor in the Republic of Moldova for the last 3 years; g) has not been a member of the bodies referred to in Article 2 para. (1) for the last 3 years; h) has a sufficient command of English.

He therefore submitted that, without going into the qualities of the foreign-appointed members of the Pre-Vetting Commission at this stage, he would provide the court with public information showing the lack of integrity of some of the members of the Commission who had evaluated the plaintiff, who for those reasons did not meet the requirements of the law and were not entitled (at least ethically) to evaluate him.

In the statement of defence filed on 31 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 requested that the appeal filed by Sergiu Osoianu be rejected.

In its statement of defence, the Independent Evaluation Commission stated that the Decision No. 12 of 6 January 2023 is lawful and does not violate the legitimate rights and interests of the plaintiff, and that it had faithfully and in good faith fulfilled all the duties imposed on it by 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.

The Pre-Vetting Commission clarified that, at the initial stage, its duties are to collect data and information using its statutory powers under 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, and in accordance with its legal obligations. However, to clarify uncertainties as and when they arise, the Commission gives the candidate the opportunity to submit additional data and information.

In this case, the Pre-Vetting Commission, noting certain uncertainties, gave Sergiu Osoianu the opportunity to clarify them by submitting additional data and information, giving him sufficient time to do so, or else, in the evaluation process, the burden of proof shifts to the candidate.

The Commission explained that the integrity assessment and the appealed decision do not affect the professional status of the candidate, and that it assesses the integrity of the candidates, but does not replace or take over the functions of any public authority of the Republic of Moldova (including the prosecutor's office).

It argued that it strictly adhered to its mandate, with the operative part of the decision explaining that the candidate did not meet the integrity criteria as serious doubts were found as to the candidate's compliance with the criteria of ethical and financial integrity and therefore he failed the evaluation, which was issued strictly in accordance with the provisions of Article 13 para. (5) 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.

In the light of the provisions of Articles 10 para. (9), 13 para. (5) 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, it follows that the Commission establishes whether or not there are serious doubts as to a candidate's compliance with the legal integrity criteria and that the decision to pass or fail a candidate is an assessment, in the best judgment of the Commissioners, as to whether or not there are serious doubts about the candidate's compliance with the criteria of financial and ethical integrity.

The Pre-Vetting Commission stated that the appealed decision was a finding of serious doubts as to Sergiu Osoianu's compliance with the criteria of ethical and financial integrity, but not a finding of non-compliance with those criteria. The Commission's conclusion concerns the appropriateness of the decision made, which cannot be subject to judicial review.

Disagreeing with the plaintiff's arguments in the statement of claim about the politicization of the process of extraordinary evaluation of judges applying for positions in the judicial self-administration body, the Pre-Vetting Commission stressed that the allegations made in this regard are not substantiated, and in the absence of evidence, Sergiu Osoianu resorts to techniques inadmissible in the process of proof, such as sophistry, criticism of the legislation in force and misleading the examination of the appropriateness of the decision.

It argued that in the evaluation process, the Commission acted independently, diligently and in good faith, in full compliance with the evaluation procedure, the rules regarding the burden of proof, the ambit and legal limits of its mandate and within the legal margin of discretion.

As to the plaintiff's contention that the Pre-Vetting Commission was obliged to issue a positive decision on the passing of the candidate, the defendant pointed out that the Commission was not obliged to issue a positive decision on the candidate's passing. Thus, pursuant to Articles 8 para. (6) and 10 para. (9) 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.

The Pre-Vetting Commission noted that the solution proposed in Decision No. 12, dated January 6, 2023, is an assessment, in the best judgment of the Commissioners, as to whether or not there are serious doubts about the candidate's compliance with the criteria of financial and ethical integrity.

At the same time, the Commission made a finding as to whether or not there were serious doubts based on the reasons/arguments formed after analyzing the information and documents received from the candidate and from other persons. These arguments of the Commission are not required to be confirmed by a court decision, and 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 does not oblige the Commission to base its decision solely on arguments confirmed by the courts or any other bodies.

The Pre-Vetting Commission noted that it is for it to assess whether or not certain circumstances are sufficient to establish the existence or absence of serious doubts as to compliance, or whether the matter relates to the appropriateness of the decision, which is not subject to judicial review.

It also found irrelevant the plaintiff's contention that the reconciliation agreement enjoys a strong presumption of validity because it had not been found unlawful, since the Commission is not bound by the findings of other bodies and is not required to obtain an irrevocable judgment that would support its view on an issue (e.g., the unlawfulness of an action).

It also argued that the September 9, 2016 order of the Chişinău Prosecutor's Office is also irrelevant because the Commission is not bound by the findings of that act. Moreover, the order relied on by the plaintiff merely found that there was no reasonable suspicion of a criminal offense, but in no way confirmed the legality of the reconciliation transaction relied on by the plaintiff.

In the opinion of the Commission, the plaintiff refuses to recognize the reversal of the burden of proof in the pre-vetting process, although 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 clearly states that it is the candidate who can resolve the serious doubts identified by the Commission. The plaintiff argues that this reversal of the burden of proof is unjustified and that the Commission itself should have eliminated these doubts (also identified by it) by proving certain circumstances.

Thus, shifting the burden of proof to the plaintiff is legitimate, does not violate his rights and is an adequate measure in the pre-vetting process, which is also confirmed by international fora (Venice Commission and ECtHR).

In addition, the Evaluation Commission noted that in the context of the reversal of the burden of proof, the plaintiff had pleaded falsely that the Evaluation Commission's findings were not true because he had challenged the Commission's calculations and qualified them as erroneous.

In this case, the Evaluation Commission found that the plaintiff only contested the methodology for identifying assets, not the calculations presented by the Commission, a fact that was confirmed by the former both in his written questions and answers and at the hearing.

The plaintiff Sergiu Osoianu did not appear at the court hearing, the summoning procedure was carried out (case file page 209, 222, vol. II), which, according to Article 206(3) of the Civil Procedure Code, does not prevent the examination of the case in his absence.

At the court hearing, the representative of the plaintiff Sergiu Osoianu, counsel Petru Balan, authorized under the mandate series MA No. 1876274 of 27.01.2023 (case file page 2, vol. I), supported the initial appeal and the additional appeal based on the factual and legal arguments presented, requested that the appeal of Sergiu Osoianu against the Independent Evaluation Commission for assessing the integrity of candidates for the position of member in the self-administration bodies of judges and prosecutors, seeking the annulment of the Decision No. 12 of 6 January 2023 on the candidacy of Sergiu Osoianu and the resumption of the candidate evaluation procedure be accepted.

At the court hearing, the representative of the respondent – Independent Evaluation Commission for assessing the integrity of candidates for the position of member in the self-administration bodies of judges and prosecutors – counsel Roger Gladei, authorized by the mandate series MA No. 0869197, dated 31 January 2023 (case file page 205, vol. I), reiterated the criticisms made in the statement of defence and pleaded that the appeal of Sergiu Osoianu against the Independent Evaluation Commission for assessing the integrity of candidates for the position of member in the self-administration bodies of judges and prosecutors, seeking the annulment of the Decision No. 12 of 6 January 2023 on the candidacy of Sergiu Osoianu and the resumption of the candidate evaluation procedure be rejected as unfounded.

### **The Determination of the Court**

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

### **Case Examination Period**

Pursuant to Article 14 para. (7) 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, by derogation from the provisions of Article 195 of the Administrative Code No. 116/2018, an appeal against a decision of the Pre-Vetting Commission shall be considered within 10 days.

The Special Panel finds that the failure to comply with the 10-day time limit prescribed by Article 14 para. (7) of Law No. 26 of 10 March 2022 was due to circumstances beyond the control of the court and not attributable to it.

The appeal filed by Sergiu Osoianu 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 was registered on 10 February and referred to the Special Panel of Judges of the Supreme Court of Justice, composed of Judges Vladimir Timofti (Chair), Svetlana Filincova and Ala Cobăneanu (Rapporteur) (vol. I, case file page 1) on 10 February 2023.

By the decision of 28 January 2023 of the Judge-Rapporteur, member of the Special Panel of the Supreme Court of Justice, the present appeal was accepted for consideration in the administrative proceeding, and a copy of the application was sent

to the defendant with a deadline of 9.00 a.m. on February 1, 2023 for filing a statement of defence and opinions on the circumstances, presence/absence of grounds for inadmissibility, accompanied by evidence. The court hearing on the case was scheduled for February 2, 2023 at 4.00 p.m. (vol. I, case file page 179/181).

On 31 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 registered the statement of defence with annexes (vol. I, file page 185/200), which was sent to the plaintiff and to his representative, counsel Petru Balan, by e-mail on 1 February 2023 (vol. I, case file page 201).

At the hearing of 2 February 2023, the representative of the plaintiff Sergiu Osoianu, counsel Petru Balan, applied for a postponement of the proceedings in order to familiarize himself with the case file. The request for adjournment was granted and the next hearing was scheduled for 7 February 2023 (vol. I, case file page 207/210).

At the hearing of 7 February 2023, the representative of the plaintiff Sergiu Osoianu, counsel Petru Balan, filed a request that the jurisdiction of the Special Panel of Judges, established by the Order of the Acting Chief Justice of the Supreme Court No. 29 of 29 March 2022, be transferred to a panel of judges specialized in administrative disputes.

The decision of 7 February 2023 of the Supreme Court of Justice rejected the request submitted by the representative of the plaintiff Sergiu Osoianu, counsel Petru Balan, that the jurisdiction of the Special Panel of Judges, established by the Order of the Acting Chief Justice of the Supreme Court No. 29 of 29 March 2022, be transferred to a panel of judges specialized in administrative disputes (vol. II).

Also, at the court hearing of 7 February 2023, Sergiu Osoianu, represented by his counsel Petru Balan, filed a request in which he raised an objection of unconstitutionality of: 1) the phrase "serious, reprehensible and unexplained" in Article 8 para. (2)(a), as well as the phrase "in the last 15 years" in Article 8 para. (4)(b) and the wording "or persons referred to in Article 2 para. (2)" in Article 8 para. (5)(c) 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; and 2) the phrase 'if it finds that there are circumstances that could have led to candidate's passing of evaluation' in Article 14 para. (8)(b) 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 (vol. II, case file page 38/43)

The decision of 7 February 2023 of the Supreme Court of Justice partially satisfied the request of Sergiu Osoianu, represented by counsel Petru Balan, to lift the exception of unconstitutionality. The objection of unconstitutionality of the phrase 'if it finds that there are circumstances that could have led to candidate's passing of evaluation' in Article 14 para. (8)(b) 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 was upheld. The notification of Sergiu Osoianu, represented by the counsel Petru Balan, was referred to the Constitutional Court of the Republic of Moldova to verify the constitutionality of the phrase "if it finds that there are circumstances that could have led to candidate's passing of evaluation" in Article 14 para. (8)(b) 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. The rest of the request was rejected (vol. II, case file page 44/45; 46/50).

As a result, due to the issuance of the aforementioned conclusion, it was announced that the case would be adjourned pending the Constitutional Court's decision on the objection of unconstitutionality.

Subsequently, the decisions of the Superior Council of Magistracy No. 23/2, No 27/2 of 14 February 2023 granted the resignation requests of Supreme Court judges Ala Cobăneanu and Svetlana Filincova and ordered their dismissal from the position of judge as of 1 March 2023, which necessitated a change in the composition of the Special Panel of the Supreme Court of Justice.

The Supreme Court Acting Chief Justice's Order No. 33 of 2 March 2023 amended Supreme Court Acting Chief Justice's Orders No. 29 of 29 March 2022 and No. 35 of 14 April 2022 and established a special panel attached to the Supreme Court to hear 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, with the following composition: Vladimir Timofti – Chair, Judge, Dumitru Mardari – Judge, Mariana Pitic – Judge; Judge Galina Stratulat was appointed as alternate member of the Special Panel.

By Order of the Acting Chief Justice of the Supreme Court of Justice No. 34 of 2 March 2023, amending Order of the Acting Chief Justice of the Supreme Court of Justice No. 33 of 2 March 2023, the composition of the Special Panel of Judges provided for in Item 1 of the Order of the Acting Chief Justice of the Supreme Court of Justice No. 33 of 2 March 2023 was changed and a new composition of the Special Panel for considering 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: Vladimir Timofti – Chair, Judge, Dumitru Mardari – Judge, Tamara Chișca-Doneva – Judge, and Judge Ion Guzun was appointed as alternate member of the Special Panel.

According to the case assignment form, the case was randomly assigned to Judge-Rapporteur Tamara Chișca-Doneva through the Integrated Case Management Program (vol. II, case file page 72).

On 6 March 2023, Supreme Court Judge Tamara Chișca-Doneva filed an application for abstention from consideration of the present case (vol. II, case file page 73/76).

By the opinion of the Supreme Court of 7 March 2023, Judge Tamara Chișca-Doneva's application for abstention was accepted for consideration (vol. II, case file page 85, 86/88).

According to the case reassignment form, on 7 March 2023, this case was randomly assigned through the Integrated Case Management Program to Judge-Rapporteur Ion Guzun (vol. II, case file page 89).

At the court hearing of 15 March 2023, the representative of the plaintiff Sergiu Osoianu, counsel Petru Balan, filed a motion to disqualify the judges of the Special Panel Vladimir Timofti, Dumitru Mardari and Ion Guzun from examining the appeal filed by Sergiu Osoianu 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 (vol. II, case file page

95/99).

By the Supreme Court's ruling of 21 March 2023, the motion of the representative of the plaintiff Sergiu Osoianu, counsel Petru Balan, to disqualify the judges of the Special Panel of Judges Vladimir Timofti, Dumitru Mardari and Ion Guzun was rejected as unfounded (vol. II, case file page 135/140).

The decision of the Superior Council of Magistracy No. 103/4, dated 16 March 2023, amended the decision of the Superior Council of Magistracy No. 68/3, dated 23 February 2023, by changing the date of dismissal of Judge Dumitru Mardari as a Supreme Court judge from 18 April 2023 to 20 March 2023, and thus, in order to comply with the short time limit provided by law for hearing appeals, it became necessary to change the composition of the Special Panel of the Supreme Court of Justice.

The Order of the Acting Chief Justice of the Supreme Court No. 39 of 20 March 2023, amending Order No. 34 of 02 March 2023, changed the composition of the special court as follows: Vladimir Timofti – Chair, judges – Tamara Chișca-Doneva, Mariana Pitic. The remaining provisions of Order No. 34 of 2 March 2023 amending Order No. 33 of 2 March 2023 were retained.

By the Order of the Acting Chief Justice of the Supreme Court of Justice No. 53 of 4 April 2023, due to the fact that the Order of the Commission for Emergency Situations of the Republic of Moldova No. 64 of 31 March 2023, during the state of emergency, suspended, as a temporary measure for a period of 30 days, the administrative procedures for resignations submitted by Supreme Court judges until the date of entry into force of the Order of the Commission for Emergency Situations of the Republic of Moldova No. 64 of 31 March 2023, as well as due to the legal consequences of the applications already accepted, since the actual dismissal had not occurred on the date of entry into force of the Order of the Commission for Emergency Situations of the Republic of Moldova No. 64 of 31 March 2023, the composition of the Special Panel of Judges, provided for in Item No 1 of Order 2 of the Acting Chief Justice of the Supreme Court of Justice No. 46 of 28 March 2023 was changed, and a new Special Panel was established with the following composition: Tamara Chișca-Doneva – Chair, Judge, Mariana Pitic – Judge, Ion Guzun – Judge, and as an alternate member of the Special Panel, Judge Maria Ghervas.

The Special Panel noted that the Law No. 64 of 30 March 2023 on the Supreme Court of Justice and the Law No. 65 of 30 March 2023 on the External Assessment of Judges and Candidates for the Position of Judge of the Supreme Court of Justice entered into force on 6 April 2023.

According to Article 8 of the Law No. 64/2023, the Plenum of the Supreme Court of Justice is formed by all the judges of the Supreme Court of Justice and has, inter alia, the task to establish, on an annual basis, the composition of court panels.

The Special Panel, taking into account the above legal provisions and the fact that in March-April 2023 most of the Supreme Court judges resigned, notes that it was impossible for the Plenum of the Supreme Court, which was not deliberative at that time, to form the panels of the court.

The transitional provisions of Law No. 64/2023 on the Supreme Court of Justice, however, were amended by Law No. 89 of 27 April 2023, in force since 2 May 2023, to establish when the new composition of the Supreme Court of Justice,

including the Plenary, would start its work, with the effect that the Chief Justice of the Supreme Court of Justice would have the power to form the panels as was previously the case.

In accordance with Article 12 para. (8) of the Law No. 65/2023, the Superior Council of Magistracy announced – by Decision No. 120/6 of 10 April 2023 – a competition for filling, by temporary transfer, the judicial vacancies at the Supreme Court of Justice, and by Decision of the Superior Council of Magistracy No. 142/8 of 2 May 2023, it was decided to temporarily transfer 7 judges from national courts to the Supreme Court of Justice, for a period of 6 months, starting on 10 May 2023.

The Special Panel noted that the operation of the Supreme Court of Justice was halted from 30 March 2023 to 10 May 2023, which was a period of time when both the factual and legal examination of pending cases was not possible.

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

The ruling of the Special Panel of the Supreme Court of Justice of 25 May 2023 dismissed as unfounded the motion 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 recuse Judge Mariana Pitic from the administrative dispute case filed by Sergiu Osoianu, represented by counsel Petru Balan.

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 para. (1) of the Convention for the Protection of Human Rights and Fundamental Freedoms.

At the hearings on 19, 22 and 23 June 2023, the case was examined on the merits, the parties' explanations were heard, the evidence was examined, the pleadings were heard and, in accordance with Article 14 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 Article 21 para. (1) of the Administrative Code for the issuance of the individual administrative act by the Commission. Accordingly, the provisions of Article 8 para. (1)-(4) of the Law 26/2022 are rules of substantive administrative law.

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

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

The special rules of the Law No. 26/2022 do not preclude the application of Books I and II, with the exception of certain aspects, such as, in particular, the initiation of administrative proceedings, clarification of facts on own motion, quorum

and majority, the right of the candidate to be heard, and others. The wording “certain aspects” in Article 2 para. (2) of the Administrative Code does not mean that the Administrative Code shall not apply.

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

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

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

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

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

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

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

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

In this context, the Special Panel thus emphasizes that the decision of the Commission is an individual administrative act within the meaning of Article 10 para. (1) of the Administrative Code, because: 1) it is issued by a public authority; 2) it is a



decision, order or other official output; 3) it falls within the field of public law; 4) it is a regulation; 5) it relates to an individual case; 6) it has direct legal effects.

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

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

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

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

At the same time, it holds that there was no in-depth understanding of Article 2 para. (2) of the Administrative Code, which regulates conditions of derogation by legal provisions from the uniform nature of the Administrative Code for “certain aspects” of administrative activity. Accepting the argument that the Commission is

not a public authority would mean denying the legal reality that it carries out administrative activity of public law through administrative procedure and that its decision is an individual administrative act subject to judicial review under administrative litigation procedure. Thus, the public authority concept is not limited to the concept of legal entity of public law, but has its own functional meaning under Article 7 and Article 2 para. (2) of the Administrative Code and for the purposes of Law No 26/2022.

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

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

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

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

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

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

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

The Special Panel thus notes that the decision of the Commission is an individual administrative act whereby the administrative procedure is completed. The concepts of administrative procedure defined in Article 6 of the Administrative Code and of public authority defined in Article 7 of the Administrative Code have a universal nature, being applicable to any area/sub-area of public law. These are the

reasons why the Commission had and has the obligation to apply the provisions of the Administrative Code and the procedural rules laid down in Law No. 26/2022 in the part related to derogations from the uniform nature of the Code.

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

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

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

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

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

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

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

#### **Application admissibility.**

According to Article 207 para. (1) of the Administrative Code, the court shall

check of its own motion if admissibility requirements for an administrative dispute application are met.

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

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

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

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

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

The Special Panel notes that in the filed action, plaintiff Sergiu Osoianu alleges a violation of the right through administrative activity under Article 189(1) of the Administrative Code, namely that by Decision No. 21 of 24 January 2023, the Pre-Vetting Commission violated his right to be elected as a member of the Superior Council of Magistracy (Article 14 of the Law on the Status of Judges No. 544/1995), the right to self-administration of judges (Article 23<sup>1</sup> of the Law on Judiciary Organization No. 514/1995), the right to dignity and professional reputation of a judge, the fundamental right to independence and irremovability of a judge (Article 16 of the Constitution of the Republic of Moldova), as well as the fundamental right to administration (Article 39 of the Constitution of the Republic of Moldova), the right to a favorable decision on the evaluation of the candidate Sergiu Osoianu.

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

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

In this context, note that the decision of the Independent Evaluation Commission for assessing the integrity of the candidates for the position of member in the self-governing bodies of judges and prosecutors No. 12 of 6 January 2023 was received by Sergiu Osoianu on 24 January 2023, which is confirmed by an abstract from an e-mail attached to the case materials (case file page 27, vol. I).

The Special Panel concludes that the appeal application filed by Sergiu Osoianu,

represented by counsel Petru Balan, is admissible because the plaintiff complied with the provisions of Article 14 para. (1) of Law No. 26/2022 by filing it on 27 January 2023 within the statutory time limit before the Supreme Court.

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

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

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

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

**With respect to the substance of the case, the Special Panel holds the following factual and legal situation.**

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

by an independent and impartial tribunal established by law.

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

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

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

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

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

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

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

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

In accordance with Article 14 para. (8) of Law No. 26 of 10 March 2022, when examining the appeal against a decision of the Evaluation Commission, the Special Panel of the Supreme Court of Justice may adopt one of the following decisions: a) reject the appeal; b) accept the appeal, if there are circumstances that could have led to candidate's passing the evaluation, and order to resume the evaluation of the candidate by the Pre-Vetting Commission (the constitutionality of this provision was checked by Decision of the Constitutional Court No. 5 of 14 February 2023 on

unconstitutionality exceptions of some provisions of Law No. 26 of 10 March 2022 on measures related to the selection of candidates for the positions of members in the self-administration bodies of judges and prosecutors (competence of the Supreme Court of Justice in case of examining appeals filed against the decisions of the Pre-Vetting Commission)).

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

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

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

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

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

The review of the procedural legality of the Decision will be limited to whether or not the Pre-Vetting Commission committed serious procedural errors that could affect the fairness of the evaluation procedure. The review of the substantive legality

of the Decision will be limited to whether there are circumstances that could have led to the candidate Sergiu Osoianu passing the evaluation.

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

The Commission's decision is unlawful 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.

In this case, the Special Court notes that from the content of the decision No. 12 of 6 January 2023, it is evident that the Pre-Vetting Commission found a number of non-compliances with regard to the candidate Sergiu Osoianu, namely:

1. the way of acquiring the property – accepting compensation instead of housing and a land plot allocated free of charge;
2. the sources of funds to purchase an apartment in 2014;
3. the imbalance of wealth for the years 2016, 2018, 2021 and the source of his cohabitee's cash income declared for the years 2016-2021;
4. receipt of donations in 2017 and 2021;
5. failure to declare an automobile as required by law, understating the value of two cars, and failure of the cohabitee to pay capital gains tax on a car.

Having analyzed the Commission's conclusions on this circumstance in relation to the evaluation criteria, the Special Panel finds that Sergiu Osoianu, at the stage of written questions, was requested to provide additional information and documents to the Pre-Vetting Commission.

The Pre-Vetting Commission concluded that it had serious doubts (Article 13 para. (5) of Law No. 26/2022) about the candidate's compliance with the criterion of ethical integrity and the criterion of financial integrity in accordance with Article 8 para. 2(a), para. 4(b), para. 5(c) of Law No. 26/2022 in relation to accepting compensation in lieu of housing and receiving a free plot of land, which were not resolved by the candidate.

The Commission stated that its doubts arose because the candidate had applied for service housing while he was a prosecutor and challenged in court the ability of the relevant public authorities to provide him with housing. Although the law in force since 2008 obliges the local public administration authority to provide prosecutors with service housing, the 2008 court decision obliged the Chişinău local public authorities to provide the candidate and his family with permanent residence. This court order was not enforced for several years.



The Commission also noted that in 2014, the candidate reached a reconciliation agreement with the Chişinău City Hall, as a result of which, on 5 February 2015, he received compensation in the amount of 1,015,880 MDL in lieu of housing, based on the 2008 decision of the Chişinău Court of Appeal. The reconciliation agreement was concluded without a court order to change the method of execution of the 2008 judgment.

The Pre-Vetting Commission noted that the candidate benefited from two state housing programs for judicial or prosecutorial staff: in 2014, the candidate benefited from the purchase of an apartment at a preferential price, and then in 2015 from a cash compensation that compensated for the fact that he was not provided with housing in Chişinău, for which he had applied while working as a prosecutor; and in 2010-2011, the candidate applied for a 0.07 ha land plot in Străşeni, which he received in 2017.

Apart from the aspect of legality in the case of obtaining three properties, the Special Panel notes that Sergiu Osoianu was ethically questioned as to why he used such state housing programs twice, but the candidate answered only that he took advantage of the legal provisions in force at the time, i.e. it was a guarantee for civil servants.

Article 8 para. (2)(a) of Law No. 26/2022 states that a candidate shall be deemed to meet the criterion of ethical integrity if he/she has not seriously violated the rules of ethics and professional conduct of judges, prosecutors or, where applicable, other professions, and has not committed, in his/her activity, any wrongful actions or inactions, which would be inexplicable from the point of view of a legal professional and an impartial observer.

Article 8 para. (4)(b) of Law No. 26/2022 states that a candidate shall be deemed to meet the criterion of financial integrity if the Commission finds that his/her wealth acquired in the past 15 years corresponds to the declared revenues. Pursuant to Article 8 para. (5)(c) and (d) of Law No. 26/2022, in order to assess the financial integrity of a candidate, the Commission must verify the manner of acquisition of the assets owned or possessed by the candidate or the persons referred to in Article 2 para. (2), as well as the expenses related to the maintenance of these assets.

According to Article 38 of the Law No. 118/2003 on Prosecution, in force since 2008, (1) If the prosecutor does not have a home or needs to improve housing conditions, the local public administration authority is obliged, within a maximum of one year from his appointment, to provide him with housing (apartment or house) of work during the period of activity in the respective locality. (2) If the prosecutor was not provided with housing under the conditions of paragraph (1), he has the right to the repair of rent expenses until he is provided with an apartment or house purchased by the Prosecutor's Office from the means of the state budget.

Article 30 of the Law No. 544/1995 on the Status of the Judge, in force from 26 October 1995 to 18 December 2009, stipulated that, (1) if the judge has no housing or is in need of better housing conditions or has not been provided with the additional space of 15 square meters, the local public administration authority shall be obliged to provide the judge with housing (apartment or house), within a period of six months after the occurrence of these circumstances, taking into account the additional living space of 15 square meters.

In addition, according to Article 11 of the Land Code (as it stood on the relevant

date), local public administration authorities shall allocate to newly formed families land plots from the intra-settlement reserve until its exhaustion for the construction of housing, outbuildings and gardens: in cities – from 0.04 to 0.07 hectares, in rural settlements – up to 0.12 hectares. Specific sizes of land plots are determined by local public administration bodies.

The Special Panel finds this conclusion of the Pre-Vetting Commission erroneous, since the Commission assessed the reconciliation agreement with the Chişinău City Hall to be contrary to Article 252 para. (1) of the Civil Procedure Code, given that this reconciliation agreement enjoys a presumption of legality and has not been declared illegal.

Moreover, the enforceability of a binding judgment against the plaintiff can no longer be questioned, nor can the method of execution. Thus, it was the Chisinau City Hall, not the plaintiff, that initiated the reconciliation transaction. Not only the plaintiff, but also several other people from the prosecutor's office and the Ministry of Internal Affairs benefited from monetary compensation in lieu of housing allocated by court order.

The interpretation in the contested decision of this reconciliation agreement with the Chişinău City Hall as doubtful or contrary to the law cannot be upheld, and in confirmation of the legality of the deal concluded by the candidate, the Commission was presented with the prosecutor's order of 9 September 2016 on the refusal to initiate a criminal investigation.

In the absence of any finding of unlawfulness of the plaintiff's actions in exercising the civil rights granted to him by law in connection with his position, the interpretation given by the Evaluation Commission cannot be upheld. Thus, the plaintiff did not take advantage of two, three or more state housing programs and, purely for the sake of clarity, the plaintiff filed a lawsuit against the Chisinau City Hall for the provision of housing space under general conditions, which was confirmed by the operative part of the court decision, which was subsequently enforced after seven years.

In this regard, the Special Panel noted that at the time of filing the application for improvement of housing conditions in accordance with Article 38 of Law No. 118/2003 on Prosecution, the candidate did not own real estate to meet his housing needs, which, as a consequence, could have led to the rejection of the applicant's request to take advantage of the acquisition of housing.

The Commission held, unfoundedly so, that the purpose of the program for improving the candidate's living conditions was not reached by awarding him an apartment at a preferential price in 2014 in Chişinău; this finding contradicts the factual situation presented by the plaintiff, since at the time of the granting of the apartment at a preferential price the decision of the Chisinau Court of Appeal of 2008 had not been executed.

Also, the Pre-Vetting Commission did not distinguish the fact that the compensation for the allocation of living space was provided to the candidate due to the execution of a court decision during his work as a prosecutor in Chişinău, while the apartment and the land plot for the construction of a residential building, purchased at a preferential price in 2014, were provided to the candidate when he worked as a judge in Străşeni court, located in Străşeni – 2 separate localities.

The Special Panel holds that the Commission did not take into account the fact

that the plaintiff fulfilled a number of conditions in order to be eligible for participation in the housing improvement program and to receive an apartment at a preferential price, namely: at the time of application, the plaintiff worked in the judiciary, did not have any housing in Chişinău municipality, had not previously benefited from an apartment at a preferential price provided to employees of the judiciary. Sergiu Osoianu presented to the Commission all the relevant documents and information related to his application for inclusion in this program and explained the reasons why he wanted to purchase an apartment in Chişinău.

Thus, all of these facts indicate that plaintiff's conduct in this matter was not at issue.

Moreover, the Special Panel notes that the serious doubts as to the candidate's compliance with the financial integrity criterion of the Pre-Vetting Commission in this regard are based on Article 8 para. 4(b) and para. 5(c) of Law No. 26/2022, but the Commission did not take into account the fact that the candidate's wealth was declared in the manner prescribed by law and that the candidate proved with certainty the manner of acquisition of the assets owned and possessed by him and the persons referred to in Article 2 para. (2). In this regard, the Pre-Vetting Commission, as a part of the administrative procedure, did not require the presentation of expenses related to the maintenance of the land.

Thus, the established circumstances show that the plaintiff Sergiu Osoianu, pursuing the legitimate aim of *improving his housing conditions*, submitted *three applications* between 2008 and 2015, namely under the Law on Prosecution, under Article 5 of Law No. 1324/93 on the Privatization of the Housing Fund and under the program of providing housing at a preferential price for employees of the prosecutor's office and the judiciary, and the acceptance of even one of these applications did not depend on the applicant.

Obviously, it was also beyond the control of the plaintiff as to the period within which the said applications would have been disposed of, favorably or unfavorably.

Taking into account the facts established regarding the ethical standards of conduct for the office of judge, the Special Panel rejects the serious doubts raised by the Commission regarding the candidate's compliance with the criterion of ethical integrity under Article 8 para. (2)(a) of Law No. 26/2022 in relation to the acceptance of compensation in lieu of housing, the acquisition of an apartment at a preferential price and the receipt of a free plot of land, doubts that have been resolved by the candidate.

In its assessment of candidate Sergiu Osoianu, the Commission also found doubts about the sources of funds for the purchase of an apartment in 2014. When questioned in the written question round, the candidate provided the Commission with detailed information on the financial steps taken to purchase the apartment.

On this issue, the Special Panel finds that the Commission, in its assessment of the candidate, in fact sanctioned the plaintiff and assigned him a number of unclear tasks in his capacity as a candidate appearing before the Commission.

Such tasks were also given by the Commission to the third parties who interacted with the candidate at certain times. These tasks were unclear, and neither the plaintiff, his relatives, nor the third parties with whom he interacted anticipated or could have anticipated many years ago (15 years ago at the latest) that they should retain all the checks, invoices, receipts, and payment orders or that they should

strictly document in writing every legal act of borrowing despite a close or trusting relationship.

Moreover, the Commission penalized the plaintiff for the fact the plaintiff's relative failed to produce a receipt for a loan given in 2014, such an exercise of administrative discretion being arbitrary. In addition, pursuant to Article 8 para. (4)(a) of Law No. 26/2022, the plaintiff declared the loan in his annual declaration and did not conceal this fact.

In this regard, the Special Panel notes that the Pre-Vetting Commission, contrary to the provisions of Article 10 of Law No. 26/2022, did not request to hear the plaintiff's close relative to confirm or deny the information provided by the plaintiff in this matter, which it was obliged to do as part of the administrative procedure.

Subsequently, the Special Panel noticed that Chapter III, section 1 of the Decision of the Pre-Vetting Commission No. 12 of 6 January 2023 does not detail the reasons why the actions of the candidate Sergiu Osoianu were qualified by the Commission as "non-compliance with the financial integrity criterion" and "serious violation of the rules of ethics and professional conduct of judges".

The Special Panel emphasizes that the Pre-Vetting Commission imputed to the candidate Sergiu Osoianu a serious violation of the rules of ethics and professional conduct of judges due to his failure to meet the criterion of financial integrity.

Thus, given that the Pre-Vetting Commission's finding that the candidate failed to meet the financial integrity criterion is unjustified, the finding of a serious violation of the rules of ethics and professional conduct of judges is also unjustified, given the causal link between the two criteria.

Accordingly, the Special Panel concludes that the Pre-Vetting Commission failed to comply with procedural and substantive legality, in particular when it comes to the correctness of the multi-faceted investigation of its own motion of the factual situation, the reasoning of its decision, and it misinterpreted the legal concepts of "serious violation", "non-compliance with the financial integrity criterion" and "serious doubt" regarding the manner in which the assets were acquired, and that this is grounds for ordering the resumption of the candidate's evaluation procedure, as the candidate is entitled to a positive decision.

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

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

The Special Panel holds that the plaintiff provided sufficient arguments and that the fact happened in the way he stated and the Commission wrongly failed to

consider these arguments as relevant.

The Commission found serious doubts pursuant to Article 13 para. (5) of Law No. 26/220 regarding the candidate's compliance with the financial integrity criterion under Articles 8 para. (4) and (5)(c), (d) and (e) of Law No. 26/2022 regarding the sources of funds for his acquisition of the apartment in 2014, which have not been resolved by the candidate.

In this regard, the Commission noted that the loan of 270,000 MDL from the candidate's relative, which the candidate declared in his annual declaration for 2014 and submitted to the Commission as a source of funds for the purchase of his apartment, is completely undocumented: there is no loan agreement, no repayment schedule, no information about the relative's income.

It should be noted that the plaintiff Sergiu Osoianu, in his 2014 annual declaration, declared the existence of a mortgage agreement with Basconslux SRL and a debt of 253,155 MDL under the mortgage agreement (investment contract) with Basconslux SRL dated July 30, 2014 for the said apartment. In his annual declarations for 2015 and 2016, the candidate did not indicate any indebtedness on this loan. In his answers to the Commission, the candidate indicated that the total value of the apartment amounted to 552,068 MDL. He attached a copy of the investment contract, including receipts for loan repayments. The candidate explained that he was not in arrears after 2014 because "the payments for the residential investment were made in accordance with the schedule established by the construction company".

The plaintiff, in his annual declaration for 2014, declared a loan of 270,000 MDL from an unidentified individual. In his response to the Commission, the plaintiff indicated that in 2014 he had borrowed this amount from his relative in order to pay for an apartment purchased at a preferential price under the SCM program. This relative was listed as a close relative in the candidate's declaration for the last 5 years submitted to the Commission. The candidate stated that the loan agreement was not in writing, it was only a verbal agreement as he is his close relative and trusts him.

The Special Panel points out that the Commission's findings that it has serious doubts about the sources of funds for the 2014 condo purchase, which have not been mitigated by the candidate, cannot be regarded as a true violation of financial integrity, or this would be an infringement of the rule of protecting the legitimate expectation towards the activity of public authorities of the state, who have tasks and powers to act.

At the same time, during the hearing, the candidate proved that the funds for the purchase of the apartment were borrowed from a relative, these money were repaid, with these issues eliminated by presenting the 2014 annual declaration.

Therefore, the Pre-Vetting Commission was too hasty in rejecting the explanation of the plaintiff who had reasoned and evidenced the sources of funds in the purchase of the apartment.

Under these circumstances, the Special Panel holds that the plaintiff's answers on this topic did not reveal his intent to hide the source of funds, which means that this circumstance cannot be perceived as a reason to fail the candidate.

In addition, pursuant to Article 8 para. (4)(a) of Law No. 26/2022, the plaintiff declared the loan in his annual declaration and did not conceal this fact.

In this regard, the Special Panel notes that the Pre-Vetting Commission, contrary to the provisions of Article 10 of Law No. 26/2022, did not request to hear the plaintiff's close relative to confirm or deny the information provided by the plaintiff, which it was obliged to do as part of the administrative procedure.

Regarding the alleged imbalance of wealth for the years 2016, 2018 and 2021, the source of his cohabitee's cash income declared for the years 2016-2021 and the sources of funds for 2 donations in 2017 and 2021, the Commission expressed serious doubts as to whether the candidate meets the ethical integrity criterion under Article 8(2)(c) and the financial integrity criterion under Article 8 para. 4(a) and (b), para. 5(b), (c), (d) and (e) of Law No. 26/2002.

According to Article 33 para. (4) and (5) of Law No. 132 of 17 June 2016 on the National Integrity Authority, the control of assets and personal interests shall cover family members, parents/parents-in-law, and adult children of the person subject to control. If the person subject to control cohabitates with another person, then the control shall cover the assets of that person, too.

If it appears that the property of the person subject to control has been registered in the name of other persons, the control will extend to such property and persons. If the subject of the declaration reported income and assets obtained from donations or holds assets on bailment, the control will also extend to the donor and the bailor. They may be requested to provide explanations about the origin of funds used to purchase and maintain the goods in question. In order to clarify these matters, the integrity inspector may request relevant information from any natural or legal person.

According to Article 4 para. (1)(b) and (d) of Law No. 133 of 17 June 2016 on the declaration of assets and personal interests, in force in the version of the adoption date, subjects falling under the provisions of Article 3 para. (1) shall declare:

b) movable and immovable goods, including any incomplete ones, owned with right of usufruct, of use, habitation, superficies by the subject of the declaration, including as beneficial owner or by his/her family members or by his/her cohabitee or in their possession based on mandate, commission or trust agreements, as well as based on translative agreements of possession and of use;

d) the financial assets held by the subject of the declaration and his/her family members, his/her cohabitee, including as beneficial owners, namely the cash amount in the national currency or a foreign currency which exceeds the value of 15 average national salaries and which does not represent the object of a deposit in a financial institution. Bank accounts, creation units in investment funds, equivalent forms of investments and savings, investments, bonds, checks, bills of exchange, loan certificates, other documents that include personal patrimonial rights held by the subject of declaration, of his/her family members or of his/her cohabitee, including as beneficial owners, direct investments in national currency or in a foreign currency, made by him/her or by his/her family members or his/her cohabitee, including as beneficial owners, as well as other financial assets, if their combined value exceeds 15 average national salaries.

At the same time, according to Article 4 para. (1) of the Law concerning the declaration and control of income and assets of state dignitaries, judges, prosecutors, civil servants and some persons in leading positions No. 1264-XV of 19 July 2002 (the version in force until 1 August 2016), the persons referred to in Article 3 shall declare:

a) income obtained jointly with the family members during the declaration period;

b) movable and immovable assets of all types, owned, with right of usufruct, use, habitation, superficies, or in the possession of the declarant or members of his/her family based on contracts of mandate, commission, fiduciary administration, as well as of transferable ownership and use contracts (lease, rent, leasing, loan) on the date of submission of the declaration regarding income and property;

c) property acquired through an intermediary or transferred for valuable consideration to ascendants, descendants, brothers, sisters and in-laws of the same kinship degree, as well as property transferred free of charge to any person;

d) financial assets, meaning bank accounts, investment funds, equivalent forms of investments and savings, investments, bonds, checks, bills of exchange, loan certificates, other documents that include personal patrimonial rights held by the subject of declaration, of his/her family members, direct investments in national currency or in a foreign currency, made by him/her or by his/her family members, as well as other financial assets;

e) declarant's and his/her family members' stock in the share capital of companies;

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

The Special Panel finds that in this regard, the candidate in the 2nd round of questions and answers, which contained 9 questions including 28 sub-questions and 4 requests for additional documents, answered all the uncertainties relating to his income in 2016, 2018 and 2021 by providing calculations proved in accordance with the declarations of assets and personal interests submitted, among others, to the Pre-Vetting Commission.

In the appealed decision, the Commission did not provide any evidence that the plaintiff's calculations were incorrect. However, when specific calculations are at issue, it is not enough to simply state that "there is doubt": it must be proven that one calculation is correct and the other is not.

In the present case, the Pre-Vetting Commission did not provide any reason why the calculation provided by the plaintiff is incorrect, it is not clear how the Pre-Vetting Commission applied the Commission's Evaluation Rules "Annex: Unjustified Wealth" and found an imbalance in the candidate's wealth in 2016, 2018 and 2021, especially since the Commission did not seek the opinion of an expert in the field during the administrative procedure.

As to the sources of income, money of the plaintiff's cohabitee in the period 2016-2021, the Special Panel holds that here again the Pre-Vetting Commission did not take into account the plaintiff's explanations given during his hearing and that the cohabitee's close relatives, i.e. her family, have been working abroad for a number of years since the 1990's and have been transferring their income to the Republic of Moldova, presenting in this regard the identity card and a statement of this close relative. Thus, the Special Panel holds that on this point also, the Commission failed to give reasons for rejecting the candidate's arguments.

In this context, the conclusions of the Venice Commission are relevant, which highlighted the risk that the evaluation of candidates' assets would target persons close to the candidate within the meaning of Law No. 133/2016. The definition of close

persons under this law should be examined as to whether it is relevant and essential for this purpose, and whether this range of persons can realistically be covered in the limited time allotted. Do these close persons have the right not to cooperate with the evaluation? If the answer is yes, these individuals play an important role in facilitating the candidate's legitimate opportunities. An estranged family member or former business partner could use this power to thwart the candidate's legitimate aspirations. If the answer to the previous question is in the negative, the third party is put in a difficult position and their privacy is interfered with for a purpose in which they may not be interested. For these reasons, the list of close people should be limited and essential.

On this issue, the Special Panel holds that the Pre-Vetting Commission, directly affecting the plaintiff's right to stand as a candidate and to be elected to the self-administration bodies, had attributed to him the fiscal conduct and diligence of a third party over a long period of time – from 2006 to 2021.

Moreover, it is noted that the Commission had requested data on the candidate from previous jobs since 2000, having the authority to check the candidate only over a period of 15 years, i.e., since 2007.

Regarding the funds indicated in the income declarations, the Pre-Vetting Commission did not take into account the fact that in 2021 the candidate declared a donation of 7,000 EUR from a close relative, explaining to the Commission's questions that this income was derived from agricultural activities, the family of the close relative being fruit and vegetable producers and pensioners receiving old-age pensions. The candidate attached documents confirming all the explanations in this regard.

The Pre-Vetting Commission also failed to take into account the fact that in his annual report for 2017, the plaintiff indicated that his cohabitee received a donation of 5,000 EUR from a close relative, and in his answers to the Commission the plaintiff explained that this donation was received from a close relative of his cohabitee, who, since the 1990s, has been working abroad and transferring her income to the Republic of Moldova, has foreign citizenship, has a secondary job and enjoys all types of social insurance and benefits provided for by the legislation of the foreign country. The Commission did not investigate the factual situation, did not determine the type and scope of the investigation as required by Article 22 of the Administrative Code.

Regarding the failure to declare a vehicle as prescribed by law, understatement of the value of two cars and failure of the cohabitee to pay capital gains tax on a car, the Pre-Vetting Commission expressed serious doubts as to the candidate's compliance with the financial integrity criterion and the ethical integrity criterion under Article 8 para. 2(c), para. 4(a) and (b) and para. 5(b) and (c) of Law No. 26/2002.

On this issue, the Special Panel holds that the conclusions of the Commission that the candidate Sergiu Osoianu did not declare his car in the annual declarations for 2012-2013 are premature, since the candidate in his ethics questionnaire gave an answer to the Pre-Vetting Commission on this issue, which showed that he declared the car on the day of its purchase and subsequently was no longer obliged to do so, including by stating in his declaration that the car was sold in 2014.

Thus, the findings and conclusions of the Pre-Vetting Commission in this



respect are contrary to Article 137 para. (3) and (4) of the Administrative Code, which stipulates that substantially identical factual situations shall be treated in the same manner. A differentiated treatment of two identical factual situations is permissible only if there is an objective reason. If in a case a public authority has exercised its discretion in a certain way, then in similar cases it has the obligation to exercise its discretion in the same way. This rule does not apply if the public authority intends to change its practice of exercising discretion in similar cases in the future.

Thus, the Special Panel notes that other decisions of the Pre-Vetting Commission with respect to other candidates revealed financial issues that may have been questionable, such as: 1) failure to declare a loan; 2) failure to declare two bank accounts as required by law; 3) failure to declare the correct price in the sale of three plots of land; 4) receipt of an amount other than the value of the contract; and 5) failure to provide evidence of the parents' legitimate receipt of income from abroad. However, the Commission did not have serious doubts about any aspect of the candidate's ethical integrity under Article 8(1) and (2) of Law No. 26/2022. Therefore, being obliged to treat identical situations (failure to declare) in the same way, the Commission exercised its discretion differently, thus violating Article 137 of the Administrative Code.

The Special Panel finds hasty the Pre-Vetting Commission's conclusion that Sergiu Osoianu understated the value of two cars and failed to pay capital gains tax on the sale of a car, raising serious doubts about his financial and ethical integrity, as the plaintiff was given unclear tasks in his capacity as a candidate appearing before the Commission. The plaintiff was required to provide documentary evidence of repair work on the car he sold in 2019, the repair work having been carried out in 2014 after its purchase. In this case, the Pre-Vetting Commission had no reason to doubt that the stated sale price of the automobile was not reasonable and proportionate for the period when the sale took place and in support of this fact, the plaintiff also provided the Commission with a copy of the sale and purchase agreement of the car in question. Moreover, the Commission's assertion that at that time models of this type of car were being sold on the market for 9,500 EUR is a declarative one and not proved in the manner prescribed by law.

Also, the Commission raised objections about the fiscal conduct and diligence of a third party three years prior to the evaluation, which directly affected the plaintiff's right to stand as a candidate and to be elected to the self-administration bodies. The failure of the plaintiff's cohabitee to declare the capital increase from the sale of a car had to be examined as to: a) whether this was so significant as to direct the Commission's findings against his career; b) whether or not he knew of the failure to declare or played any role in the process of his cohabitee's failure to declare the increase in capital; and c) whether or not the taxing authority had verified it.

Under these circumstances, the Special Panel finds that the plaintiff's answers and position on these questions do not indicate his intent to avoid declaring the automobile in the manner prescribed by law, understating the value of the two automobiles, and failure of the cohabitee to pay capital gains tax on a car.

According to Article 23 of the Administrative Code, as a matter of principle, public authorities and competent judicial authorities shall treat persons in similar situations in the same manner. Any difference in treatment must be objectively

justified. *No one shall be privileged, disadvantaged, deprived of rights or exempted from obligations* on the grounds of race, family origin, sex, language, nationality, ethnicity, religion, political or ideological beliefs, education, material or social status, either in administrative proceedings or as a result thereof.

From this perspective, the Special Panel is to determine whether peers, judges, prosecutors and members of civil society applying for positions in self-administration bodies have been treated equally or unequally in terms of the practices formed by the Commission from the beginning of the evaluation process to the present.

In this respect, without going into the quality and legality of the decisions of the Pre-Vetting Commission with regard to other candidates, the special court will comparatively examine, from the perspective of equal treatment, both the evaluation decisions taken before Sergiu Osoianu's case, in order to establish whether or not there is different treatment in similar situations, and the evaluation decisions taken after 6 January 2023, in order to establish whether the Commission has decided to change its practice in the future, in accordance with Article 137 para. (4) of the Administrative Code.

As a result of this activity, the Special Panel identified cases in the practice of the Pre-Vetting Commission, both before and after the evaluation of Sergiu Osoianu, when it found violations of the legal regime of asset declaration in relation to other candidates, violations expressed in non-declaration of assets, differences in prices of immovable/movable property, but accepted the explanations of the candidates, considering that they made technical omissions, without any intention to circumvent the legal regime of asset declaration.

Nevertheless, in its Decision No. 12 of 06 January 2023 regarding candidate Sergiu Osoianu, the Pre-Vetting Commission did not explain the factual aspects that would show that he is appreciated as lacking integrity compared to other candidates in the same situation. Thus, as opposite to other identical cases before and after 06 January 2023, the Pre-Vetting Commission rejected the plaintiff's explanations regarding the failure to declare a vehicle as prescribed by law, understatement of the value of two cars and failure of the cohabitee to pay capital gains tax on a car, taking a selective and unfounded attitude in comparison to similar situations.

Consequently, the Special Panel of Judges concludes that the Pre-Vetting Commission, in rendering the appealed decision, did not motivate its decision and did not take into account the principle of proportionality and discretion provided for in the Administrative Code.

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

The Special Panel highlights that the terms "seriously", "wrongful", and "inexplicable" from Article 8 para. (2)(a) of Law No. 26/2022 are, in their nature, undefined legal notions (vague legal provision) 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 actually held that the candidate's actions could be considered as negligent.

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 noted by the Pre-Vetting Commission do not meet the criterion that would allow it to decide not to pass the candidate for violations of the rules of ethics and professional conduct of a high severity.

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

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

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

The Special Panel finds that the Pre-Vetting Commission did not analyze and reason the legitimate purpose of the issued decision.

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

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

According to Article 29 para. (2)(c)-(3) of the Administrative Code, a measure undertaken by public authorities is deemed proportionate if it is reasonable. A measure undertaken by public authorities is reasonable if the interference it causes is not disproportionate compared to its purpose. This requirement involves a balancing of the legally protected values. The more damage is caused to a right, the more it is required for the advantage resulting from the interference to be superior. Note that

excluding the right of a judge to be a candidate for membership in the Superior Council of Magistracy involves not just an interference, but rather an improper annulment of the right to be elected into this position. Such a solution cannot be accepted under the rule of law, as it is incompatible with the dignity of a human being and of a judge. The goal of trust in the justice system can be achieved by complex means, but in no way can it be done by reducing to nothing the idea of free, transparent, and competitive election for the membership of the Superior Council of Magistracy and its bodies. The judge, holding such a position, is presumed to have integrity and, should the opposite be proven, than he/she shall be dismissed from the judiciary by means of a disciplinary procedure or another procedure that would take into account the guarantees of his/her independence. The Special Panel notes that the purpose of Law No. 26/2022 is, among other things, to boost the trust in justice, but not to transform justice into an ineffective branch of state power susceptible to interference.

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

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

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

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

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

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

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

violation of another guarantee, i.e. the candidate's right to defense before the Pre-Vetting Commission.

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

In this respect, the Special Panel emphasizes that, according to Article 82 of the Administrative Code, (1) if the administrative procedure is to be carried out in writing as per Article 28 or is carried out in writing, the public authority, when starting the procedure, shall create a digital or hard copy folder that would include all documents and records regarding the said procedure. The digital folder shall include, as appropriate, scanned copies of paper-based documents and the authenticity of these copies shall be confirmed by the electronic signature applied by the responsible person within that public authority, electronic documents, other relevant records and information in digital format. (1<sup>1</sup>) 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. (3) 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. (4) Administrative case files shall be kept until the expiry of their term of storage, which results from the applicable legal provisions in force.

In line with Article 83 of the Administrative Code, (1) the public authority holding the administrative procedure shall grant, to the participants, access to the administrative case file. (2) Participants shall not have access to draft individual administrative acts before the completion of the procedure. (3) 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. (4) 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. (5) When accessing the case file, participants are allowed to take notes or make copies of the file. The cost of copies shall be incurred by every participant individually, which is 0.02 conventional units per page. Electronic copies of the case file, as well as electronic documents and copies thereof shall be provided free of charge.

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

matters.

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

According to the plaintiff's submissions, the head of the secretariat of the Pre-Vetting Commission refused to provide him with the entire administrative case file and only provided him with copies of certain documents, 90% of which he presented to the Commission during the rounds of questions. At the same time, it was explained to him that the Pre-Vetting Commission provides only those documents it considers necessary. This circumstance was also referred to by the candidate Sergiu Osoianu during the public hearings on 6 January 2023.

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

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

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

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

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

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

The Special Panel notes that the State has vested the Pre-Vetting Commission

with the prerogative to be guided by certain standards in order to select the candidates with highest integrity for membership, *inter alia*, in the Superior Council of Magistracy, who in turn could ensure the proper functioning of the judicial system as a whole, including through the implementation of coherent policies in line with generally accepted standards.

The plaintiff proved to the Special Panel of the Supreme Court of Justice the just nature of the elements invoked in his appeal, including the correctness of the financial transactions carried out in the management, sale and purchase of movable and immovable property, as well as the observance of ethical and professional conduct rules.

Also, the Special Panel notes that Venice Commission recommended for the final decision on assessment to be made by the competent court, but the Parliament of the Republic of Moldova chose a different legal policy in relation to this topic. Despite that, the Special Panel highlights that, for the reason of effective protection of the rights, it has the right and the obligation to conduct a full judicial legality review of the factual and legal matters.

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

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

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

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

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

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

The Special Panel reiterates that the measure undertaken by the defendant public authority is reasonable only if the interference caused by it is not disproportionate in relation to its purpose. This requirement of the legislator involves a balancing of

values protected by law, a weighing of the interests at stake. The bigger the damage caused to the right, the more it is required for the advantage resulting from integrity to be superior.

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

Taking into account the aforementioned, the Special Panel finds that in this case there are legal grounds for annulling the decision of the Independent Evaluation Commission for assessing the integrity of the candidates for the position of member in the self-governing bodies of judges and prosecutors No. 12 of 6 January 2023 regarding the candidacy of Sergiu Osoianu.

The Special Panel holds that illegality of the appealed decision leads to the annulment of the decision and ruling of a re-evaluation of the candidate. Ruling a re-evaluation is the final and implicit results that includes a loss of validity for the decision, as per Article 139 para. (1) and (2) of the Administrative Code (see DCC No. 42 of 6 April 2023 § 143; Ramos Nunes de Carvalho e Sá v. Portugal [MC], 6 November 2018, §184 and the case-law quoted therein).

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

### **d e c i d e s :**

To accept the administrative lawsuit brought by Sergiu Osoianu, represented by counsel Petru Balan, against the Independent Evaluation Commission for assessing the integrity of candidates for the position of member in the self-administration bodies of judges and prosecutors, seeking that decision No. 12 of 6 January 2023 on the candidacy of Sergiu Osoianu be annulled, and that the candidate evaluation procedure be resumed.

To annul 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. 12 of 06 January 2023 on the candidacy of Sergiu Osoianu.

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

This decision is irrevocable.

**Hearing chaired by  
Judge**

**Ion Guzun**



**Judges**

**Mariana Pitic**

**Ion Malanciuc**