Case No 3-30/23
2-23118676-01-3-15082023

D E C I S I O N

22 November 2023 Chișinău municipality

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

consisting of:
Hearing Chairperson, Judge Ion Malanciuc
Judges Oxana Parfeni
Aliona Donos

with the participation of the court clerk Marcela Vitviţchi

having examined in public court session the appeal lodged by Ana Tipa 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 47 of 31 July 2023 on the Candidacy of Ana Tipa, Candidate for the Superior Council of Magistracy – be annulled, and that the candidate evaluation procedure be resumed,

found:

On 15 August 2023, Ana Tipa lodged an appeal against the Independent Evaluation Commission for assessing the integrity of candidates for the position of member in the self-administration bodies of judges and prosecutors, seeking that Decision No 47 of 31 July 2023 on the Candidacy of Ana Tipa, Candidate for the Superior Council of Magistracy – be annulled, and that the candidate evaluation procedure be resumed.

In the reasoning of her action, she invoked that she started her work in 2008, when she was employed as a clerk to Teleneşti Court, a position she held until 2013. In 2013-2018, the plaintiff worked as a clerk for Botanica Court, Chişinău municipality, while in 2018-2021 she acted as a judicial assistant in the same court. Also, during 2021-2023, the plaintiff took the initial training courses for candidates to a judge position, being a graduate of Class XV.

The plaintiff mentioned that the decision of the Committee on Legal Affairs, Appointments and Immunities of the Parliament of the Republic of Moldova No CJ-06 43 of 24 March 2022 ordered to start the selection of candidates for the Superior Council of Magistracy.

On 2 May 2023, the plaintiff filed to the Committee on Legal Affairs, Appointments and Immunities of the Parliament of the Republic of Moldova an application to be accepted into the competition for the selection of candidates for the position of member in the Superior Council of Magistracy and the case file with all related documents was submitted to the Independent Evaluation Commission for assessing the integrity of candidates for the position of member in the self-administration bodies of judges and prosecutors in order to start and conduct the evaluation procedure.

The plaintiff mentioned that on 18 May 2023 the Pre-Vetting Commission sent her a request to fill out and file a five-year declaration of assets and personal interests by 25 May 2023, which she submitted to the Pre-Vetting Commission in due time. On 16 June 2023, the Commission sent the plaintiff a request for clarifying information, containing seven questions,

including 51 sub-questions and 37 requests for further documentation, to which she answered in due time. On 28 June 2023, the Commission sent the plaintiff a second round of ten questions, including 20 sub-questions and a new request for further documentation, to clarify some issues that came out during the evaluation, to which she answered on 6 July 2023. On 19 July 2023 she had a public hearing before the Pre-Vetting Commission and answered all the questions asked by the Commission members.

The plaintiff claimed that Decision of the Pre-Vetting Commission No 47 of 31 July 2023 found that Ana Tipa does not meet the integrity criteria, because serious doubts were found with respect to the candidate meeting the ethical and financial integrity criteria in relation to filing the declaration of assets and personal interests for the years of leave 2014-2016 and the annual declaration for 2019, which have not been mitigated by the candidate, thus she failed the evaluation.

The plaintiff mentioned that the Pre-Vetting Commission Decision No 47 of 31 July 2023 is an administrative act that is unfavorable for the plaintiff and, therefore, she was deprived of her right to participate in the competition for the selection of the candidate nominated by the Parliament to the Supreme Council of Magistracy.

By this action, the plaintiff claimed that she demands defense by means of judicial review of a right under Article 17 of the Administrative Code, namely the right to a career and the right to be elected a member of the Superior Council of Magistracy, as it is a type of writ of mandamus.

The plaintiff informed that she received the decision of the Pre-Vetting Commission on 10 July 2023, so that the action lodged in 15 August 2023 has been filed within the legal timeframe.

The plaintiff highlighted that the Commission's decision was groundless and the plaintiff has the right to a favorable decision, because the appealed decision was vitiated, especially from the perspective of proportionality, misinterpretation of undefined legal notions and fair treatment.

As regards the Commission's findings on the failure to submit declarations for the years of leave 2014 - 2016, the failure to submit the annual declaration for 2019 and the omissions from the annual declarations, the plaintiff specified that she disregarded those findings and conclusions, because the omissions made by the plaintiff were not of such a nature that implied the existence of "serious and severe doubts" about the plaintiff's ethical and financial integrity.

Namely, as she explained during the hearing of the Pre-Vetting Commission, on 3 April 2017, when employed back for the public position of court clerk, she was told that she was supposed to file a declaration of assets and interests within 30 days from reinstatement, however she was not told that such declaration was to be filed for the entire period when she was suspended from work. Moreover, the court employee responsible to collect the declarations of assets and personal interests did not explain to her that the declaration was supposed to cover the entire period the plaintiff was on child care leave, but after she studied the applicable legislation thoroughly, she found that upon coming back to work she was supposed to file a declaration of assets and personal interest for the entire duration of the child care leave.

The plaintiff has indicated that she considers the findings of the Commission to be erroneous, based on excerpts from statements made by the plaintiff during the public hearing. However, due to the turnover of staff, clerks and assistants received less attention from the person responsible for verifying, filling out and submitting declarations of assets and interests, although the legal provision requires the responsible person to verify the accuracy of the information stated in declarations by the declarants, in particular, the obligation to verify that the declarant included all income obtained during the reporting period. Consequently, filing the declaration of assets and personal interests for the wrong period was an unintentional mistake made by the plaintiff, not an act of which she is guilty. Thus, should the evaluated candidate submit logical arguments and explanations to the Commission, which are true to the social-economic context of the Republic of Moldova, then the likelihood of a fact being in a way or another should be weighed and any doubt

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

The plaintiff has also invoked that the Pre-Vetting Commission, by derogation from the principles of equality and legality, considered that action to be a violation and applied double standards with respect to the plaintiff. Specifically, the Pre-Vetting Commission concluded in one of its decisions that even though failure to file three annual declarations is a violation of the legal regime applicable to declaration of assets and personal interests, therefore it affects the candidate's ethical and financial integrity, that violation did not reach such a severity level as to be equivalent with candidate's non-compliance with ethical and financial integrity criteria. However, in the decision regarding the plaintiff, the Commission has not even examined this through the lens of advantages or benefits that Ana Tipa would have gotten by not filing the mentioned declarations and has not reasoned why in case of this candidate the violation reaches a level of severity that is equivalent with candidate's non-compliance with the ethical and financial integrity criteria.

The plaintiff mentioned that the law does define the significant concept of "serious doubts", which is new for the national law system, therefore, the Commission has a wide margin of appraisal of the factual situations which it can classify, in its decisions, as "serious doubts" about the integrity criteria of a candidate.

Still, the Commission's margin of appraisal cannot be absolute, and it is limited by Articles 16 and 137(1) of the Administrative Code.

The Pre-Vetting Commission held briefly that the candidate's actions are a severe violation of ethics and professional conduct rules, but these conclusions are erroneous and contradict Commission's own practice.

With regard to the Commission's finding on failure to submit the 2019 annual declaration, the plaintiff noted that in her replies to the Commission she explained that she was on sick leave between 23 March 2020 to 27 March 2020 and due to the state of emergency enacted on 17 March 2020, she did not have the possibility to access the electronic signature, because it was left at the workplace and after she returned to work on 16 May 2020, she tried repeatedly to submit the annual declaration but failed because the software was running quite slowly, it showed her that she had signed the final declaration and that it had been uploaded, but then the page closed. When she tried to fill out the declaration again, she saw that data was saved, thus she did not insist to fill it out again.

The plaintiff stated that at the hearing she reiterated before the Pre-Vetting Commission that she did not receive any electronic confirmation that her annual declaration was received, which she thought was a system error, but, still, she did not check the Register of declarations of assets and personal interests, which was also confirmed by the answer provided by the Service for Information Technology and Cyber Security. The Pre-Vetting Commission's decision invoked that this omission comprises the elements that form a contravention as provided for by Article $330^2(2)$ of the Contravention Code.

With respect to doubts about her financial integrity, the plaintiff specified that there was no prohibited secondary income in her case, no tax evasion or money laundering, because the 4,000 EUR amount that she received as a donation in 2013 is not a taxable source of income and did not have to be declared, therefore it could not be an object of tax evasion.

The plaintiff stated that the Pre-Vetting Commission had no reason to doubt the judicial transaction concluded between the plaintiff and her former husband, because that transaction was concluded by the parties in compliance with the principle of autonomy of the will and on the basis of the free consent expressed by the former spouses. Thus, of her own initiative, she submitted to the Commission the settlement agreement confirmed by the court, which shows the amounts of 10,000 EUR and 4,000 EUR, respectively. According to the donation agreement of 17 January 2013, Anton Tipa donated to the candidate the amount of 4,000 EUR, which was subsequently paid into the account of "Artur- Protect Plus" SRL construction company, in line with the contract

of investment into the construction of housing No 01-1/2012 of 12 December 2012. The settlement agreement of 7 May 2019 was concluded in order to solve the litigation regarding the division of jointly-owned property, including the division of joint debts. As per section 5, the plaintiff got the compensating balance of 10,000 EUR for her share in the joint property. As per section 6, it was found that the amount of 4,000 EUR was a personal right/obligation of the undersigned.

Thus, the plaintiff invoked that the 4,000 EUR donated by her father was paid to the construction company at that time and she believed, by interpreting the law, that she did not have to declare the money received as a donation, but only the property obtained ultimately using that money.

With respect to the alleged inconsistencies invoked by the Commission regarding the explanation of those amounts, she also mentioned that the 10,000 EUR amount was declared properly and in the public meeting she explained that she did not intend to hide the 4,000 EUR amount. The division of joint property and debts, that ended up assigning the compensation balance of 10,000 EUR to Ana Tipa, took into account the 4,000 EUR, among other things. Furthermore, the failure to declare the 4,000 EUR donation does not affect in any way the plaintiff's financial integrity, because, after receiving the donation, she did not have the obligation to pay any tax to the state.

As well, the plaintiff noted 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. For that matter, the Pre-Vetting Commission did not analyze and reason the legitimate purpose of the issued decision. The Commission is 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.

Making reference to Article 29(2)(b) of the Administrative Code, the plaintiff invoked that the Pre-Vetting Commission failed to perform such an analysis of the case, namely it failed to analyze the regulatory alternatives of the individual case, which would have achieved the regulatory purpose in the same way. A milder means for the achievement of the desired purpose would have been the participation of the plaintiff 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.

The plaintiff mentioned that excluding the right of the plaintiff to be a candidate for membership in the Superior Council of Magistracy involves not just an interference, but also an improper annulment of the right to be elected into this position. 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 plaintiff claimed that the violation of the adversarial principle by the Commission was also confirmed by the fact that she was not provided with the documents which were received *ex officio* by the Commission. What is more, the Commission did not explicitly refer in its decision to the purported documents/responses issued by other public authorities.

As regards the exercise of the Commission's discretion, the plaintiff emphasized that the decision taken in a discretionary manner must be an optimal one, must correspond to the purpose of the act, to the meaning of the legislation in force, to the general principles of domestic and international law, to human rights and fundamental freedoms, and must therefore correspond to the aim pursued, which is the essence of the "discretionary right", realized by observing the principles of legality, appropriateness and fairness.

The Commission had therefore a legal obligation to exercise its discretion and to explain how it exercised this right. As such, the Commission only has procedural discretion, which pertains to the investigation and clarification of the facts *ex officio*, which does not mean that the individual administrative act falls under the category of discretionary acts.

The plaintiff claimed that Decision No 47 of 31 July 2023 was unfounded and unsubstantiated.

On 26 September 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 filed a defense statement requiring that the appeal filed by Ana Tipa be rejected.

The defendant claimed in its defense statement that Decision No 47 of 31 July 2023 was lawful and that it did not violate the plaintiff's legal rights and interests, and that the process of evaluating a candidate follows the successive stages laid down in Articles 9 to 12 of Law No 26/2022.

As such, in the case being examined the Commission discharged its obligations diligently and in good faith. In particular, when it found certain uncertainties, the Commission gave the plaintiff the possibility to clarify them by submitting additional data and information. Neither the evaluation of integrity, nor the decision, affect the candidate's professional status.

The defendant noted that the findings of the Commission were in line with and in the spirit of Law No 26/2022. Following the assessment of the candidate's ethical and financial integrity, on the basis of data and information received from the candidate and third parties, the Commission determines whether or not there are serious doubts as to the candidate's compliance with the legal integrity criteria, but it doesn't establish the compliance or non-compliance of the candidate with the integrity criteria.

The defendant pointed out that the interpretation law expressly established that the Commission was not a public authority and, respectively, was not governed by the Administrative Code. The provisions of Articles 16, 21, 29, 43, 137 and 141 of the Administrative Code, referred to by the plaintiff, are therefore not applicable.

It stated that the appropriateness of the decision could not be subject to judicial review, and that in its evaluation, the Commission was not bound by the findings of other bodies competent in the field concerned.

The defendant also claimed that the Commission clarified that it followed Law No 26/2022 and its own Rules of procedure, that it approved, not the Administrative Code; and the examination of appeals against Commission decisions followed the procedure in Book III of the Administrative Code. Therefore, the provisions of the other Books of the Administrative Code are not applicable.

It also noted that the term "serious doubts" in no way implies a wide margin of appraisal of the factual situations that it can classify, in its decisions, as "serious doubts" about the integrity criteria of a candidate. What is more, in its Decision No 42 of 6 April 2023 (paragraphs 133 and 134), the Constitutional Court analyzed the term "serious doubt", finding it to be constitutional, as well as the terms "serious", "wrongful" and "inexplicable".

The defendant argued that although the plaintiff alleged discriminatory application of the Law No 26/2022, it did not specifically allege that the Commission applied the law in a discriminatory manner. Still, the Commission's solution for each candidate was adopted on the basis of the concrete circumstances of each case.

It also indicated that it was irrelevant that the plaintiff had not been explained/communicated that the declaration was supposed to cover the entire period of her suspension from office. The legislation of the Republic of Moldova is public and compulsory,

therefore no-one can avoid liability by not knowing the law. What is more, the plaintiff herself subsequently confirmed that she understood the content of the relevant law after studying it thoroughly. Thus, the plaintiff had the opportunity from the beginning to study the relevant law to make sure she complied with its requirements.

The defendant noted that the plaintiff's position that the provisions of Law No 133/2016 required the person responsible for collecting the declarations to verify the accuracy of the information included by declarants in their declarations was unfounded, and that the responsibility for the timely submission of the declaration and for the truthfulness and completeness of the information in it was borne by the person submitting it.

The plaintiff also specified that the law expressly and clearly provided an exhaustive list of alternatives that the Commission could follow after evaluating a candidate: pass or fail the evaluation. Other more lenient solutions, as claimed by the plaintiff, were not provided for by Law No 26/2022.

The defendant argued that the request in the plaintiff's appeal to annul Decision No 47 of 31 July 2023 on the Candidacy of Ana Tipa was inadmissible on the ground that the court had the right to order the reevaluation of the candidate if the appeal was upheld, but that it did not have the right to annul the challenged decision.

At the court hearing, plaintiff Ana Tipa and her counsels, Rodion Tocan and Marian Bucătaru supported the appeal and moved that it be allowed on the factual and legal grounds set out in the appeal. They also claimed that the Commission applied differentiated treatment, compared to what it established in Decisions Nos 39, 11, 40 or 51, adopted by the Commission at the end of the evaluation of other candidates who passed the evaluation.

At the court hearing, the representatives of the Independent Evaluation Commission for assessing the integrity of candidates for the position of member in the self-administration bodies of judges and prosecutors, counsels Roger Gladei and Valeriu Cernei, upheld the arguments put forward in the defense statement, and moved for the dismissal of the action as unfounded.

Having heard the arguments of the parties to the proceeding supporting the formulated allegations and objections, taking into account the provided evidence and the applicable legislation, the Special Panel, established at the Supreme Court of Justice to examine the appeals against the decisions of the Independent Evaluation Commission for assessing the integrity of candidates for the position of member in the self-administration bodies of judges and prosecutors established the following.

As per Decision No 47 of 31 July 2023 on the Candidacy of Ana Tipa, Candidate for the Superior Council of Magistracy, on the basis of Article 8(1), (2)(c), (4)(a), (5)(b), and Article 13(5) of Law No. 26, the Commission decided that the candidate does not meet the integrity criteria as serious doubts have been found as to the candidate's compliance with the ethical and financial integrity criteria and thus fails the evaluation.

On 15 August 2023, Ana Tipa lodged an appeal against the Independent Evaluation Commission for assessing the integrity of candidates for the position of member in the self-administration bodies of judges and prosecutors, seeking that Decision No 47 of 31 July 2023 on the Candidacy of Ana Tipa, Candidate for the Superior Council of Magistracy – be annulled, and that the candidate evaluation procedure be resumed.

According to Article 14(1) 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 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.

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 47 of 31 July 2023 was received by Ana Tipa on 10 August 2023, which is confirmed by an abstract from the e-mail, attached to case materials (case file page 24).

According to Article 14(1) 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, an appeal is supposed to be filed within 5 days from the date of candidate receiving the reasoned decision, which was 15 August 2023 in this case.

Respectively, the Special Panel concludes that the appeal filed by Ana Tipa is admissible because the plaintiff complied with the legal provisions, by filing the appeal to the Supreme Court of Justice on 15 August 2023, within the time frame laid down in the law.

With respect to the applicable legal framework, the Special Panel holds that according to Article 1 of the 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, this Law regulates the legal relations under the procedure of evaluating the integrity of candidates for members of the Superior Council of Magistracy, Superior Council of Prosecutors, as well as of candidates for members in the specialized bodies of the aforementioned councils, as a mandatory stage in the process of selecting candidates and electing or appointing them to the respective positions.

In line with Article 4 of the 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 Evaluation Commission shall have functional and decisional independence of any natural or legal persons, irrespective of the type of ownership and legal form of organization, including parliamentary factions and development partners, which have participated in the appointment of its members.

In its activity, the Evaluation Commission shall follow the Constitution of the Republic of Moldova, this law, and other regulatory acts governing the fields related to its activity. The Commission acts on the basis of its own Rules of procedure, that it approved.

According to Article 14(6) of the 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, 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.

In accordance with Article 1(1) of the Administrative Code, administrative legislation is the main legal framework that ensures the regulation of administrative relations during administrative activity and the judicial oversight over it.

In accordance with Article 2(2) of the Administrative Code, certain aspects related to administrative activity in specific fields of work may be regulated by legal provisions that derogate from the provisions of this Code, only if such regulation is absolutely necessary and does not contradict the principles set out in this Code.

Thus, the Special Panel of the Supreme Court of Justice highlights that in the preamble to Law No 26/2022, the legislator provided that it has adopted the mentioned law in order to increase the integrity of future members of the Superior Council of Magistracy, Superior Council of Prosecutors and their 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.

Therefore, the evaluation of candidates for the positions of member of the bodies listed in Article 2(1) of the Law No 26 of 10 March 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, still Article 2(2) of the Administrative Code provides that certain aspects may be governed by special legal provisions.

According to Article 10(1) of the Law No 100 of 22 December 2017 on Regulatory Acts, an organic law is the regulatory act that represents a development of constitutional norms and may intervene in the fields provided for expressly in the Constitution.

Article 7(3) of the aforementioned Law provides that if two regulatory acts with the same binding effect have a conflict of provisions, then the provisions of the regulatory act that was approved, adopted or issued last shall be applicable, except for the situations stipulated under Article 5(3) and (4).

So, both Law No 26 of 10 March 2022 and the Administrative Code are organic laws, but the former is a special law. Respectively, Law No 26 of 10 March 2022 has priority, but this does not exclude the application of the Administrative Code insofar as the special law does not include any provisions regulating a certain aspect. It is impossible to exclude entirely the application of the Administrative Code because of the central role and the organic link of the Administrative Code with the areas/sub-areas of administrative law.

Therefore, the Special Panel cannot hold the argument raised by the representatives of the Commission on the non-application of Books I and II of the Administrative Code to the examination of cases pending before the Supreme Court of Justice. At the same time, the Special Panel points out that application of the Administrative Code provisions cannot distort the regulations of the special Law No 26 of 10 March 2022, as the plaintiff's representatives tried to invoke. Therefore, provisions of the Administrative Code shall be applied to the extent that they do not contravene the special Law No 26 of 10 March 2022.

Regarding the legal consequences of the Evaluation Commission's decision, the Special Panel holds that the existence of an act finding the lack of integrity of a judge or prosecutor is incompatible with futher holding that position.

At the same time, according to Article 13(6) 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 decision on failing the evaluation represents legal ground for not accepting the candidate into election or competition. No other legal consequences are currently stipulated but the ones expressly mentioned in the law.

Also, the Opinion No 1069/2021 of the Venice Commission and the Directorate General concluded that the revised draft law makes it clear that the results of the integrity assessment will have no effect on the candidate's career.

Thus, the Special Panel rejects the plaintiff's allegation that a potential fail decision would be equivalent to a finding that the person has no integrity. Should it be so, a person would have to be dismissed immediately or subject to another severe disciplinary sanction, which is not provided for by the current regulations, as it was mentioned above.

With respect to the Commission's margin of appreciation (discretionary right), the Special Panel holds that in Opinion No 1069/2021 of 13 December 2021, under section 11, the Venice Commission and the Directorate General noted that the personal integrity of the members that constitute the Superior Councils (of judges and prosecutors) is an essential element to the nature of such bodies; it ensures the confidence of citizens in justice institutions – trust in magistrates and in their integrity.

In a society that respects the fundamental values of democracy, the trust of citizens in the action of the Superior Councils depends very much, or essentially, on the personal integrity and competence and credibility of its membership.

The Venice Commission and the Directorate General expressed their opinion previously, in other contexts, that critical situations in the field of justice, such as extremely high levels of corruption may justify equally radical solutions, such as an examination of the sitting judges. Ultimately, it is up to the Moldovan authorities to decide if the prevailing situation in the Moldovan judiciary creates a sufficient foundation to subject all judges and prosecutors, as well as SCM and SCP members, to extraordinary integrity assessments.

Besides the preamble to the Law No 26 of 10 March 2022, mentioned above, the Special Panel established at the Supreme Court of Justice, deems necessary to mention that according to Objective 1.2 of the Strategic Direction "Strengthen the integrity and accountability in the justice sector" of the Law approving the 2022-2025 Strategy on ensuring the independence and integrity of the justice sector and the Action Plan for its implementation No 211 of 6 December 2021,

"Identification of efficient leverages directed at strengthening the independence of judges and prosecutors is to be linked with an increase in their accountability and integrity. Responsibility and integrity are some of the main elements of ensuring citizens' trust in the justice system and the guarantee of conducting fair proceedings. Building and promoting a culture of judicial integrity is an important element in preventing corruption, which is one of the main threats for the society and for the functioning of the rule of law.

Currently, based on surveys conducted, corruption and lack of integrity in the judiciary are perceived by the general public as being at a high level. In the Fourth Evaluation Round Report on the Republic of Moldova, GRECO is also deeply concerned by indications that candidates presenting integrity risks are appointed as judges

The International Commision of Jurists in the 2018 Evaluation Mission Report stressed that it is important that corruption in the judiciary is fought robustly and as a priority, in full respect of the rule of law and human rights. The ICJ is concerned that the focus of many criminal investigations seems to be directed more at stifling dissend or preventing dissident voices in the judiciary rather than at really eradicating the phenomenon of corruption.

It is essential for justice stakeholders, individually and collectively, to observe and honor their offices as a public mandate and to exert efforts in order to improve and uphold public trust in the system."

Furthermore, in its recent Opinion No 24 (2021) on the evolution of the Councils for the Judiciary and their role for independent and impartial judicial systems, CCJE reminds (paragraph 34) that the selection process of Council members, including possible campaigns by candidates, should be transparent and ensure that the candidates' qualifications, especially their impartiality and integrity are ascertained.

In the opinion of the Venice Commission and of the Directorate General, a distinction should be made between the vetting of serving members and the "prevetting" of candidates to a position on these bodies. As a matter of principle, the security of the fixed term of the mandates of members of (constitutional) bodies serves the purpose of ensuring their independence from external pressure. Measures which would jeopardise the continuity in membership and interfere with the security of tenure of the members of this authority (vetting) would raise a suspicion that the intention behind those measures was to influence its decisions, and should therefore be seen as a measure of last resort. Integrity checks targeted at the candidates to the position of SCM, SCP and their specialized bodies represent a filtering process and not a judicial vetting process, and as such may be considered, if implemented properly, as striking a balance between the benefits of the measure, in terms of contributing to the confidence of judiciary, and its possible negative effects.

Also, the Special Panel deems relevant that in paragraph 50 of the Opinion of 14 March 2023, the Venice Commission and DGI are aware that draft Article 12 mirrors Article 8 of Law no. 26/2022 which regulates the pre-vetting procedure in respect of the candidates for the positions in the Superior Council of Magistracy and Superior Council of Prosecutors. However, what could

be allowed for the purposes of screening of the candidates, should not necessarily be allowed for the extraordinary vetting of the sitting judges and prosecutors, since in this second case more is at stake for them and for the stability of the legal order in general. While the criteria for the pre-vetting may be relatively loose and based on the holistic assessment of the candidates' integrity, antecedents, connections etc., the dismissal of a lawfully appointed judge or prosecutor needs to be justified with reference to more specific misbehaviour which should be more clearly defined in the law.

In the same train of thought, according to the *amicus curiae* opinion of the Venice Commission, the concept of vetting involves the implementation of a process of accountability mechanisms to ensure the highest professional standards of conduct and financial integrity in public office. In a system of prior integrity checks, the decision not to recruit a candidate can be justified in case of mere doubt, on the basis of a risk assessment. However, the decision to negatively assess a current post holder should be linked to an indication of impropriety, for instance inexplicable wealth, even if it cannot be proven beyond doubt that this wealth does come from illegal sources (see CDL- AD(2022)011, § 9-10).

In their Opinion, Venice Commission and the Directorate General noted that the Assessment Commission issues a negative report when it has "serious doubts" about the commission by the judge or the prosecutor concerned of certain offences. The standard implies that the findings of the AC do not establish the fault of the persons concerned, or do not directly entail any liability, which would most likely require a different (higher) standard of proof.

To a certain extent, this construction reduces the potential for a conflict between the findings of the Assessment Commission and of other administrative or judicial bodies, which is addressed above.

Also, the Constitutional Court found in paragraph 120 of the inadmissibility decision No 42 of 6 April 2023 that by means of the phrase "seriously", the legislator limited the discretionary margin of the Pre-Vetting Commission when assessing the ethical integrity of the candidates. This criterion allows the Commission to decide on failure of the candidate only if it finds violations of ethics and professional conduct that are of a high severity. This means that the candidate can discuss the seriousness of violations found by the Commission before the Special Panel of the Supreme Court of Justice, which could ultimately appreciate the "serious" nature of the found deviation, depending on the specific circumstances of the case. This rationale is applicable, mutatis mutandis, in case of the words "wrongful", and "inexplicable" in Article 8(2)(a) of the Law.

In paragraph 123 of the inadmissibility decision No 42 of 6 April 2023, it stated that in order for the Council to perform its constitutional duties of appointing, transferring, seconding, promoting and disciplining judges (see Article 123 of the Constitution), the legislator has established that members of this constitutional body shall be people (judges and non-judges) of a high professional reputation and personal integrity checked by the Pre-Vetting Commission for the last 15 years. Consequently, the Constitutional Court deemed reasonable the legislator's decision to establish an extensive period of checking the candidates' financial integrity.

As well, in the inadmissibility decision No 42 of 6 April 2023, paragraph 123, the Constitutional Court found, with respect to the phrase "serious doubts" from Article 13(5) of Law No 26, that the criticized wording establishes a standard of proof applicable to the assessment procedure. Thus, when the Pre-Vetting Commission has to decide on the integrity of a candidate, it has to find if there are any serious doubts regarding the candidate meeting the ethical and financial integrity criteria, as laid down in Article 8 of the Law.

The Constitutional Court held that the definition of standards of proof requires unavoidably the use of flexible texts. In this case, the standard of proof established by the legislator aims at guiding the Pre-Vetting Commission in appraising the assessment results.

Also, the law obliges the Pre-Vetting Commission to issue a reasoned decision, which is supposed to cover all relevant facts, reasons and conclusion of the Commission on pass or fail. Moreover, the law allows the candidate to discuss the existence of serious doubts regarding him/her meeting the ethical and financial integrity criteria before the Special Panel of the Supreme Court of Justice.

Thus, the Special Panel of the Supreme Court of Justice holds that, even though the Commission's margin of appreciation regarding the "serious doubts" is not unlimited (conclusions must rely on objective data), it is still quite broad. The potential risks in relation to benefits, in case if one candidate is not admitted even though he/she has integrity, but was not able to eliminate certain doubts about himself/herself, are much lower than in the situation where a candidate without integrity is admitted because any doubt should be interpreted in favour of the individual.

This status is determined by both the high overall interest towards the preselection into the SCM, and the potential low interference with the rights of subjects of the assessment, as opposite to the consequences of the vetting.

As regards the merits of the case, the Special Panel established that by Decision No 47 of 31 July 2023 on the Candidacy of Ana Tipa, Candidate for the Superior Council of Magistracy, on the basis of Article 8(1), (2)(c), (4)(a), (5)(b), and Article 13(5) of Law No 26, the Commission decided that the candidate does not meet the integrity criteria as serious doubts have been found as to the candidate's compliance with the ethical and financial integrity criteria and thus fails the evaluation, arguing that the candidate failed to comply with the legal regime for the declaration of assets and personal interests, failed to submit the 2014-2016 declarations, and allowed for omissions in her annual declarations.

According to Article 8(1), (2)(c), (4)(a), (5)(b) 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, for the purposes of this Law, the evaluation of the integrity of the candidates consists of assessing their ethical and financial integrity.

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

A candidate is deemed to meet the criterion of financial integrity if the candidate's wealth was declared as required by law.

To assess the candidate's financial integrity, the Commission verifies the candidate's compliance with the legal regime for the declaration of assets and personal interests.

Concerning the failure to comply with the legal regime for the declaration of assets and personal interests and the failure to submit declarations for the years 2014-2016, the Commission noted that according to the information provided by the National Integrity Authority, the candidate filed declarations on income and property/assets and personal interests for the years 2012, 2013, 2017, 2018 and 2020, but did not file declarations for the years 2014, 2015, 2016 and 2019.

In her answers to the Commission's written questions regarding her failure to file annual declarations for 2014, 2015 and 2016, the candidate stated that she had not filed annual declarations for those years because she was on maternity leave and subsequently on childcare leave, and that a few days after she returned to office, she asked the person in charge of this field from the human resources department of the court where she was working for the issuance of a digital key to be able to file the declaration of assets and personal interests, and that after the expiry of 30 days, when she asked again for the issuance of the digital key, she was advised to file only an annual declaration for 2017. The candidate stated that at that time annual declarations could only be filed electronically, and due to staff turnover in the courts, clerks were treated with

less attention and exigency in filing declarations of assets and personal interests compared to judges.

According to Article 5 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 of 19 July 2002, in force until 1 August 2016, the declarants mentioned in Article 3 had the obligation, under the terms of that law, to declare their income and property.

According to Article 3(1)(f) of the above-mentioned law, the subjects of the declaration of income and property are civil servants, including those with special status.

Also, according to Annex 1 of the Law No 158 of 4 July 2008 on the Civil Service and the Status of Civil Servants, court secretariats are part of the public authorities covered by the Law on the Civil Service and the Status of Civil Servants.

According to Article 6(5) of the Law on the declaration of assets and personal interests No 133 of 17 June 2016, the declarant who, in accordance with the law in force, has had his employment or work relationship suspended, shall submit the declaration within 30 days after their reinstatement, and shall disclose in the declaration the income earned jointly with the members of their family, their cohabitant during the entire undeclared period, as well as the assets they hold and the personal interests referred in Article 4(1)(b)-(m) as at the date of submission of the declaration.

Therefore, taking into account the legal provisions applicable to the situation, the Commission concluded that Ana Tipa was required to file a declaration of assets and personal interests no later than 30 days after her return from childcare leave, i.e. no later than 3 May 2017, but despite this obligation, in March 2018, the candidate filed only the 2017 annual declaration. What's more, the candidate confirmed that she did not file a declaration for 2014-2016 because she was advised to file only an annual declaration for 2017 arguing that due to staff turnover in the courts, clerks were treated with less attention and exigency in filing declarations of assets and personal interests compared to judges.

The Commission had reservations about the plaintiff's explanation that she followed the advice she was given by an employee of the court to file only an annual declaration for 2017, as Article 5(1) and (4) of the Law on the declaration of assets and personal interests No 133 of 17 June 2016 provides that the declaration of assets and personal interests is a personal and irrevocable act of the declarant, submitted in the form of an electronic document under the declarant's own responsibility, and that the responsibility for the timely submission of the declaration, as well as for the truthfulness and completeness of the information is borne by the person submitting it.

Regarding the failure to submit the 2019 annual declaration, the Commission noted that there was no record of a 2019 annual declaration submitted by Ana Tipa, who stated that between 17 March 2020 and 16 May 2020, the Republic of Moldova was placed under quarantine due to the COVID-19 pandemic, and because the memory stick with her digital signature was at work – she was not able to submit the 2019 declaration until 31 March 2020.

After 16 May 2020, when the plaintiff returned to work, she tried to submit her annual declaration several times, but was not successful, and she only found out about the absence of the 2019 annual declaration when she was asked to submit the declaration for the last five years as part of the evaluation. At the hearing, the candidate confirmed that she did not received an electronic confirmation that her annual declaration was received, which she assumed was a system error, and that she did not checked the register of declarations of assets and interests available on the platform of declarations on NIA's website to check whether her annual declaration was there.

The Commission noted that after the hearing, it received information from the Information Technology and Cybersecurity Service regarding Ana Tipa's log-in activity on the NIA platform.

According to the log-in history – in 2020 the candidate logged in one single time on 29 March 2020, and there was no log-in recorded in May 2020.

According to Article 6(1)-(3) of the Law on the declaration of assets and personal interests No 133 of 17 June 2016, declarations shall be submitted annually, by 31 March, disclosing the income earned by the declarant together with their family members, cohabitant in the previous tax year, as well as the assets they hold and the personal interests referred in Article 4(1)(b)-(m) as at the date of submission of the declaration.

Electronic declarations are to be signed by digital signature in accordance with the law. Digital signatures are issued to declarants free of charge as established by the Government.

An electronic declaration is deemed to have been received by the National Integrity Authority if the declarant receives the electronic confirmation of acceptance of the declaration, as per Annex 3.

Therefore, the Commission held that Ana Tipa did not file her 2019 annual declaration, as the electronic declaration is deemed to have been received by the National Integrity Authority if the declarant received the electronic confirmation of acceptance of the declaration – a circumstance not attested in this case. What is more, the Commission rejected the plaintiff's claim that this was impossible because her secured digital signature device was at her workplace, because the information provided by the Information Technology and Cybersecurity Service showed that the candidate had logged in to the NIA platform only once, on 29 March 2020. Also, the plaintiff's reasoning that she gave an approximate date of 16 May 2020 as the date she logged into the NIA platform is not plausible, given that Ana Tipa had the obligation to submit her 2019 declaration by 31 March 2020, and that alleged logging-in was not confirmed by the information provided by the Information Technology and Cybersecurity Service.

Regarding the omissions in her annual declarations – namely the non-disclosure of ten of her husband's bank accounts in her annual declarations for 2012 and 2013, the non-disclosure of a 4,000 EUR donation from her father in her 2013 annual declaration and the non-disclosure of three of her bank accounts in her 2020 annual declaration, the Commission noted that, in each case, the candidate had misinterpreted the relevant legal provisions, which she admitted to at the hearing. The candidate argued that the funds that were on the bank accounts that were not disclosed were declared as salary or savings and that she didn't hide anything away, and that the staff of the court told her she didn't need to declare the donation, but only the asset that she ended up purchasing with those funds. Initially, Ana Tipa said that she did not declare her husband's bank accounts or income because she did not know that he had bank accounts and that he refused to provide information about his income.

The Commission also noted that the plaintiff claimed that the 4,000 EUR donation from her father was included in the 10,000 EUR received from her husband as part of their divorce settlement and that, by declaring in her 2020 annual declaration the bank account and the balance of the bank account on which the EUR 10,000 payment was deposited, she actually declared the 4,000 EUR donation from her father.

According to Article 4(1)(a) of the Law on the declaration and control of income and assets of state dignitaries, judges, prosecutors, civil servants and some persons in leading positions No 1264 of 19 July 2002, in force until 1 August 2016, the declarants mentioned in Article 3 had the obligation to declare the income earned together with their family members during the reporting period.

According to Article 2 of the above-mentioned law, family members are: spouse, minor children and dependants.

According to Article 6 of the Law No 1264 of 19 July 2002, in force until 1 August 2016, the declaration of income is a personal and irrevocable act, drafted in writing, on the sole

responsibility of the declarant, that can be rectified only under the conditions set out in Article 10(2).

Therefore, the Commission rejected as unfounded the plaintiff's contention that she did not declare the donation of 4,000 EUR from her father in her 2013 annual declaration because the court staff told her that she did not have to declare the donation, but only the asset she purchased with the money. According to Law No 1264 of 19 July 2002 on the declaration and control of income and assets of state dignitaries, judges, prosecutors, civil servants and some persons in leading positions, Ana Tipa, by virtue of her position at that time, was to declare all the income she had during the reporting period. Article 2 of the aforementioned law, in force during the reporting period, defines income as „any increase, addition or extension of the patrimony, regardless of the source or origin, expressed in patrimonial rights or in any other patrimonial benefit, obtained by the subject of the declaration or by the members of their families during the reference period both in the country and abroad".

Subsequently, the Commission rejected the plantiff's contention that the person in charge of collecting the declarations was responsible for the incomplete declaration of Ana Tipa's income that she obtained during the reporting period, since the declaration of income and property was to be drafted in writing, under the sole responsibility of the declarant, and the persons responsible for collecting the declarations only check compliance with the format requirements of the declarations, as set out in Article 10(1) of the Law No 1264 of 19 July 2002.

Furthermore, admitting to a misinterpretation of the law, as confirmed by the candidate during the public hearing before the Commission, cannot be a passable excuse for her omissions.

The Commission also rejected the plaintiff's contention that the 4,000 EUR donation from her father was included in the 10,000 EUR received from her husband as part of their divorce settlement and that, by declaring in her 2020 annual declaration the bank account and the balance of the bank account on which the 10,000 EUR payment was deposited, she actually declared the 4,000 EUR donation from her father.

As such, the obligation to declare the aforementioned donation arose on the date the donation was received, and was to be declared for that reporting period.

As a result, the Special Panel concludes that the candidate's incongruities and inconsistent explanations regarding the issues under evaluation undermined the candidate's credibility before the Commission with respect to her explanations for not filing a declaration for 2014-2016 when she returned to work, and her 2019 annual declaration, and to the omissions in her annual declarations. These circumstances were sufficient for the Commission to determine that there were serious doubts as to the plaintiff's compliance with the requirements of Article 8 of the Law No 26 of 10 March 2022.

In the same train of thought, the Special Panel rejects Ana Tipa's contention that the non-declaration of ten bank accounts that belonged to her husband in her annual declarations for 2012 and 2013 was due to the fact that her ex-husband did not tell her about the existence of those accounts, as she had the opportunity – when she submitted her annual declarations for those periods – to specify that she had declared only the income that she was aware of, especially taking into account the fact that the form of those declarations contained a "Note" section, where the declarant was free to write anything. When asked by the court why she did not do so, given that otherwise it appeared that she knowingly stated that her husband had no income, the plaintiff was not able to explain why she acted in that way.

The Special Panel also expresses its deep concern, which only amplifies the doubts about the candidate, with regard to the copy of the confirmation certificate issued on 25 September 2023 by the administrator of the SRL "Artur-Protect Plus", that states: *"On 15 January 2013, the amount of 64,000 MDL was paid at the pay desk by a gentleman who was accompanied by Bîdru Alexandru, who introduced himself as his father-in-law"* (case file page 211, Book I). There are

doubts about the authenticity of the information on that certificate considering the long time that had passed since the moment the amount was paid and the date the copy that was submitted to court was issued on (about ten years). A person (in this case, the employee of the company that received the payment, if he or she is still working there) would not be able to remember naturally such an insignificant detail for a long period of time, unless it was connected to some extraordinary event that would make him or her remember more case-specific details.

As such, the Special Panel finds that the plaintiff did not provide any evidence during the evaluation procedure or before the court disproving the situation established by the Commission or any other circumstances which could have led to the candidate passing the evaluation. For when examining the appeal, the Special Panel does not have to re-evaluate the circumstances already evaluated by the Commission, but only to decide whether new circumstances have arisen which could have led to the candidate passing the evaluation, but which were not previously examined in the evaluation process.

The Special Panel notes that according to Article 14(8) 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, in force at the time – when examining the appeal against a decision of the 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 the re-evaluation of candidates who failed the evaluation if it finds that within the evaluation procedure, the Commission made some serious procedural errors that affected the fairness of the evaluation procedure, and that there are circumstances that could have led to the candidate passing the evaluation.

Therefore, in view of the legal provisions set out above and of the fact that the object of this action is 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 47 of 31 July 2023 on the Candidacy of Ana Tipa, the Special Panel notes that, in this case, it is to ascertain whether serious procedural errors were committed by the Commission in the evaluation procedure, that affected the fairness of the evaluation procedure, and whether there were circumstances that could have led to the candidate passing the evaluation.

In examining this appeal, the Special Panel may not exceed the limits of its remit and the powers conferred on it by the Parliament when examining the appeal against the decision of the Commission, which are laid down in Article 14(8) 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, on the basis of the Constitutional Court Decision No 5 of 14 February 223 on the unconstitutionality of certain provisions of the 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 Special Panel notes that, in paragraph 81 of the Constitutional Court Decision No 5 of 14 February 2023 on the unconstitutionality of certain provisions of the Law No 26 of 10 March 2022, the Constitutional Court held that the law must provide for remedies in cases where the candidate was not guaranteed their procedural rights in the evaluation procedure. Depending on any procedural shortcomings at the evaluation stage, on the nature of the procedural right affected and the particular circumstances of the case, the Court holds that the failure to safeguard a procedural right may be regarded as a central issue in the dispute.

Having considered whether the challenged provisions pursued a legitimate aim – in paragraph 78 of Decision No 5 of 14 February 2023 – the Constitutional Court held that the explanatory note to the draft law did not contain any argument on the need to limit the judicial

review of the decisions of the Commission. 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 appeal settlement, in order to have sooner an operational Superior Council of Magistracy. The Constitutional Court held that these legitimate goals can fit under the overall objectives of public order and guarantee of justice authority and impartiality, as provided for in Article 54(2) of the Constitution.

Having considered whether the challenged provisions allowed the Special Panel of the Supreme Court of Justice to "examine sufficiently" the central issues of any potential disputes, the Constitutional Court accepted that the challenged provisions were capable of delivering the objective pursued by the legislator, i.e. to avoid situations of annulment of the decisions of the Commission because of the violation of insignificant procedural rules.

In this context, the Special Panel notes that according to Article 12(4) of Law No 26 of 10 March 2022, the candidate has the rights to:

a) attend the meetings of the Commission and give oral explanations;

b) be assisted by an attorney or a trainee attorney during the evaluation procedure;

c) consult the evaluation materials, at least 3 days before the hearing;

d) submit in writing additional data and information, which s/he deems necessary, in order to remove suspicions about his/her integrity, if s/he was in impossibility to present them previously;

e) appeal the decision of the Evaluation Commission.

The concept of "civil rights and obligations" cannot be interpreted solely by reference to the respondent State's domestic law; it is an "autonomous" concept deriving from the Convention. Article 6 § 1 applies irrespective of the parties' status, the nature of the legislation governing the "dispute" (civil, commercial, administrative law etc.), and the nature of the authority with jurisdiction in the matter (ordinary court, administrative authority etc.) [Georgiadis v. Greece, § 34; Bochan v. Ukraine (no. 2) [GC], § 43; Naït-Liman v. Switzerland [GC], § 106;].

The applicability of Article 6 § 1 in civil matters firstly depends on the existence of a "dispute". Secondly, the dispute must relate to a "right" which can be said, at least on arguable grounds, to be recognised under domestic law, irrespective of whether it is protected under the Convention. The dispute must be genuine and serious; it may relate not only to the actual existence of a right but also to its scope and the manner of its exercise.

Lastly, the result of the proceedings must be directly decisive for the "civil" right in question, mere tenuous connections or remote consequences not being sufficient to bring Article 6 § 1 into play (Regner v. the Czech Republic [GC], § 99; Károly Nagy v. Hungary [GC], § 60; Naït-Liman v. Switzerland [GC], § 106).

Therefore, the Special Panel concludes that in the light of Article 6 § 1 of the ECHR, the Constitutional Court Decision No 5 of 14 February 2023 and Article 12(4) of Law No 26 of 10 March 2022, to determine whether the Commission committed serious procedural errors in the evaluation procedure that affected the fairness of the evaluation procedure, it must be ascertained whether the plantiff Ana Tipa's procedural rights under the special law were observed.

As such, it is ascertained that Ana Tipa participated in the meetings of the Commission and gave oral explanations; she had the possibility to submit in writing additional data and information, which s/he deemed necessary, in order to remove suspicions about his/her integrity, if s/he was in impossibility to present them previously; and she submitted documents in court as well

and had the possibility to appeal the decision of the Pre-Vetting Commission, and she was supported by two counsels in court.

Furthermore, Ana Tipa was informed of her right to acquaint herself with the administrative file, a right which the plantiff exercised on 18 July 2023, the public hearing having been held on 19 July 2023, and therefore the plaintiff's right to acquaint herself with all the material gathered by the Commission, which was taken into account in the adoption of the appealed decision, was observed.

Therefore, the Special Panel concludes that Ana Tipa was granted and exercised her rights under Article 12(4) of Law No 26 of 10 March 2022 to the full extent.

The plaintiff claimed that the Pre-Vetting Commission Decision No 47 of 31 July 2023 violated her right to participate in the competition for the selection of the candidate nominated by the Parliament to the Supreme Council of Magistracy.

The Special Panel notes that the right to participate in the competition for the selection of the candidate nominated by the Parliament to the Supreme Council of Magistracy, is not an absolute right.

According to Article 3(3) of the Law on the Superior Council of Magistracy No 947 of 19 July 1996, six non-judicial members of the Superior Council of Magistracy, are selected openly and transparently by the Committee on Legal Affairs, Appointments and Immunities, on the basis of a public competition, and are appointed by decision of Parliament by a vote of three-fifths of the elected MPs. The arrangements for the competition are determined by Parliament. The competition is organised before the expiry of the term of office of the previously appointed members and involves examination of applications and hearing of candidates in an open session.

The Committee on Legal Affairs, Appointments and Immunities then draws up reasoned opinions for each selected candidate and proposes their appointment to Parliament.

Article $3(3^1)$ of the aforementioned law provides that the candidates for the position of member in the Superior Council of Magistracy referred to in para. (3) are subject to an integrity evaluation carried out by the Independent Evaluation Commission for assessing the integrity of candidates for the position of member in the self-administration bodies of judges and prosecutors, established by law. The decision of the Commission is included in the candidate's file. Candidates who fail the evaluation cannot be included on the ballot paper.

According to Article 3^1 paras (1^1)-(2) of the Law on the Superior Council of Magistracy No 947 of 19 July 1996, a non-judicial individual may be elected to the Superior Council of Magistracy if they satisfy the following requirements: a) high professional reputation; b) personal integrity; c) at least 10 years' experience in law or political science, economics, psychology; d) not working, at the time of the application, in legislative, executive or judicial bodies; e) politically unaffiliated.

The candidate's application file contains: a) curriculum vitae; b) cover letter; c) the main objectives the applicant will pursue if elected member of the Superior Council of Magistracy; d) 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.

Therefore, the right to participate in the competition for the selection of the candidate for the position of member of the Superior Council of Magistracy is conditional on the cumulative fulfilment of specific conditions set out exhaustively in the Law on the Superior Council of Magistracy No 947 of 19 July 1996.

Furthermore, by submitting her personal file and continuing to pursue her intention to take part in the competition for election to the position of member of the Superior Council of the Magistracy, including by appearing before the Independent Evaluation Commission for assessing

the integrity of candidates for the position of member in the self-administration bodies of judges and prosecutors, the plantiff voluntarily accepted the consequences of any unfavorable decision of the Commission.

As regards the alleged violation of Article 39 of the Constitution, the Constitutional Court set out in its Inadmissibility Decision No 42 of 6 April 2023, that para. (2) of that Article guarantees every citizen, in accordance with the law, access to public office. The use of the wording "in accordance with the law" in this Article, however, implies that the legislator may lay down conditions for access to a public office. This power of the legislator must be recognised, given that the integrity of public administrators plays an essential role. Particularly in the case of public offices on which the welfare of the nation depends, those who wish to hold them must demonstrate high standards of integrity. For this reason, the Constitution allows the legislator to establish conditions for access to public office, which will ensure that recruitment and vetting procedures will seek to find those best suited to achieve this goal (CC Decision No 6 of 10 April 2018, § 70).

In the opinion of the Venice Commission, the appeal of the Pre-Vetting Commission's decision should not stop the election/appointment of Council members and will not overcome the fact that the competition went on to a result (see the Joint opinion of the Venice Commission and the Directorate General of Human Rights and Rule of Law (DGI) of the Council of Europe on some measures related to the selection of candidates for administrative positions in bodies of self-administration of judges and prosecutors and the amendment of some normative acts, CDL-AD(2021)046, § 38).

In Section 142 of the Inadmissibility Decision No 42 of 6 April 2023, the Constitutional Court pointed out that it shares the aforementioned opinion of the Commission and believes that the interest of completing the election of judge members to the Council and the interest of ensuring the functionality of the body that is a guarantor of judiciary independence weigh more that the interests of candidates that failed the evaluation.

Also, the Special Panel deems groundless the plaintiff's arguments that excluding her from the election into the judicial self-administration bodies for some violations is not a necessary measure and that the appealed decision does not reflect the legitimate purpose and reasons of adopting 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, for the reasons mentioned above.

Also, the Special Panel deems groundless the arguments of plaintiff Ana Tipa that the Pre-Vetting Commission violated the adversarial principle.

As per Article 22 of the Administrative Code, competent public authorities and courts shall investigate the facts of their own initiative. They shall establish the type and amount of investigation and shall not be bound in any way by the statements of participants or by their requests for evidence. Facts already known to the competent public authorities or courts, generally known facts and facts presumed by virtue of legal provisions do not need to be proved until proven otherwise.

According to Article 85(3) of the Administrative Code, the public authority shall find out on their own the factual aspects of the case under procedure, without limiting themselves to evidence provided and statements made by participants. To this end, the public authority shall establish the purpose of required investigations and their range.

In this context, the Special Panel emphasizes that in accordance with Article 10 (2)-(3) 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 Pre-Vetting Commission and its Secretariat shall have free and real-time access to information systems containing data necessary for the fulfilment of its mandate, in particular for the evaluation of

ethical and financial integrity of candidates, in line with the law on data exchange and interoperability, except for the information covered by Law No. 245/2008 on State Secret.

When evaluating the candidates' integrity, the Pre-Vetting Commission has the right to request from individuals and legal entities of public or private law, including financial institutions, the documents and information it needs to carry out the evaluation. The requested information shall be submitted for free to the Pre-Vetting Commission, including in electronic format, within a maximum of 10 days from the date of request.

As well, paragraph (7) of the mentioned provision establishes expressly that the Pre-Vetting Commission may request additional data and information from the evaluated candidates at any stage of the evaluation procedure.

In addition, according to Article 2(1)(d) of the Evaluation Rules of the Independent Evaluation Commission for assessing the integrity of the candidates for the position of member in the self-administration bodies of judges and prosecutors pursuant to Law No 26/2022, adopted at the meeting of the Pre-Vetting Commission of 1 May 2022, one of the main stages of evaluation is asking questions to candidates and requesting documents from them to the extent needed to clarify issues of ethical and financial integrity. The candidate is to respond within the time limit set by the Commission.

The Special Panel highlights that it results from the aforementioned legal provisions that should the Pre-Vetting Commission find any unclarity, it can request additional data and information from the candidate, at any stage of the evaluation procedure, in order to eliminate serious doubts that arose before the Pre-Vetting Commission.

The plaintiff failed to fill out the ethical integrity questionnaire sent by the Commission on 12 May 2023 and on 18 May 2023 the Pre-Vetting Commission requested to fill out and file the declaration and the plaintiff submitted it on 25 May 2023.

On 16 June 2023, the Commission sent a request for clarifying information, containing seven questions, including 51 sub-questions and 37 requests for further documentation, to which the plaintiff answered on 21 June 2023. On 28 June 2023, the Commission sent the second round of ten questions, including 20 sub-questions and 9 requests for further documentation, to clarify some issues that came out during the evaluation, to which she answered on 6 July 2023.

The public hearing of the plaintiff took place on 19 July 2023 and on 28 July 2023 the Pre-Vetting Commission sent a post-hearing request for clarifying information, which included one question and two sub-questions, to which the candidate answered on 29 July 2023.

Therefore, the Special Panel, concludes that the actions of the Independent Evaluation Commission for assessing the integrity of candidates for the position of member in the self-administration bodies of judges and prosecutors were such as to obtain relevant information including from the candidate in order to clarify the issues that arose during the evaluation of the candidate. Thus, the request for additional documents from the candidate cannot be interpreted as a violation of the adversarial principle, because, on the contrary, the Commission's actions show compliance with this principle.

In this case, it is held that the doubts that the Pre-Vetting Commission had regarding candidate's integrity were expressed in the questions and sub-questions formulated by the Independent Evaluation Commission for assessing the integrity of the candidates for the position of member in the self-administration bodies of judges and prosecutors in the question rounds, public hearing, and in the post-hearing request.

The Special Panel deems groundless the arguments invoked by plaintiff Ana Tipa claiming that the Pre-Vetting Commission adoped an unreasoned decision, without stating the legal grounds in relation to the factual circumstances, in violation of proportionality principle, invoking that passing the evaluation is a mandatory individual administrative act, not a discretionary one,

because the notion of "serious doubt" is an undefinite legal concept and does not provide for any discretion.

In this case, the Pre-Vetting Commission Decision No 47 of 31 July 2023 regarding the plaintiff includes all essential elements of the decision, as provided under Article 13(2) of the Law on measures related to the selection of candidates for the positions of members in the self-administration bodies of judges and prosecutors No. 26 of 10 March 2022, namely: relevant facts, reasons and conclusion of the Commission on passing or failing the evaluation.

As well, the Special Panel rejects the plaintiff's argument that the findings and conclusions of the Pre-Vetting Commission are in conflict with the principle of equality and non-discrimination, invoking that even though in other decisions the Pre-Vetting Commission found some financial aspects that may have generated doubts, it still did not have serious doubts regarding any aspect related to the candidate's ethical integrity as per Article 8(1) and (2) of Law 26/2022.

The Special Panel emphasizes that in line with Article 23(2) of the Administrative Code, competent public authorities and courts shall provide equal treatment to persons that are in equal conditions. Furthermore, failure to file annual declarations was a reason to reject some candidates under the extraordinary assessment of candidates for managerial positions in the self-administration bodies of judges and prosecutors, especially when declarations had not been filed for several years.

At the same time, the court holds that the decisions invoked by the plaintiff, which allegedly prove the difference in treatment, do not refer to similar situations, as every decision includes the Pre-Vetting Commission's appraisal of the factual circumstances that are different from the ones stated in the decision adopted with respect to the plaintiff's integrity.

Namely, the Commission explained how the factual situations were different:

- one candidate admitted the error and that error was not benefiting the candidate or her husband;

- one candidate managed to prove the source of funds and they way they were used;

- although one candidate failed to declare certain bank accounts, those accounts were inactive and the candidate admitted the error she made in that respect;

- the Commission found that bank accounts that were not declared by a candidate were inactive, were not related to suspicious transactions and all candidate's income had been declared, so the candidate had no intention to hide those bank accounts.

Taking into account the aforementioned, the Special Panel finds that in this litigation brought before the court there are no 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-administration bodies of judges and prosecutors No 47 of 31 July 2023 regarding the candidacy of Ana Tipa.

Namely, the administrative act subject to judicial review was issued in accordance with the law and no circumstances were found which could have led to the candidate passing the evaluation and the Pre-Vetting Commission did not commit any severe procedural errors that could affect the fairness of the evaluation, therefore the appeal lodged by Ana Tipa is found unreasoned and is to be rejected.

In line with Article 14(6), (8)(a), (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-administration bodies of judges and prosecutors

d e c i d e s :

To reject the appeal lodged by Ana Tipa 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 47 of 31 July 2023 on the Candidacy of Ana Tipa, Candidate for the Superior Council of Magistracy – be annulled, and that the candidate evaluation procedure be resumed,

This decision is irrevocable. Hearing chaired by

Judge Ion Malanciuc

Judges Oxana Parfeni

Aliona Donos