



ALBANIAN HELSINKI COMMITTEE
KOMITETI SHQIPTAR I HELSINKIT

STUDY REPORT

ON MONITORING OF THE VETTING PROCESS FOR
JUDGES AND PROSECUTORS FOR THE PERIOD OF
JANUARY 2017 – JUNE 2018



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The thoughts expressed in this publication belong only to its authors and do not necessarily express the donor opinions.

The report was prepared by:

Av. Erida Skëndaj - AHC Executive Director

Av. Fjoralba Caka - External Expert

Prof. Asoc. Mirela Bogdani

Consultant:

Z. Niazi Jaho - *Këshilltar Ligjor*

Legal Assistance:

Av. Elton Frashëri – *KShH*

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Rr. Brigada e VIII-të, Ap. 10, K 5, Tirana, Albania

P.O BOX 1752

Tel: +355 4 2233671 Cel: +355 69 40 75 732

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E-mail: office@ahc.org.al;

www.ahc.org.al

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1. INTRODUCTION

Dear reader,

The Albanian Helsinki Committee attaches huge importance to the process of drafting and implementation of the justice system reform vis-à-vis the citizens.

The transitional re-evaluation of judges and prosecutors, otherwise known as the vetting process, is one of the most important reform measures ever embarked upon by the justice system in our country. The vetting process was considered by the Venice Commission as an extraordinary, transitory and necessary measure in the conditions of Albania. Its model is unique to Albania and represents a one-in-a-lifetime process.

The vetting process has come to the stage where it has provided the first concrete results, enabling the effects of the implementation of the justice reform to begin to be felt in practice. Taking into account the public interest in this process, but also respecting the rights of judges and prosecutors who are subject to it, the AHC has been engaged in a vetting monitoring initiative since the first steps of implementation of the legal framework related to it.

Monitoring has been carried out by local experts, of renowned experience and high professional integrity, lawyers specializing in Constitutional Law, Public Law, Administrative Law, counsel of defence, and others. The group of local experts was assisted by two international field experts and by the AHC staff.

This monitoring, the first of its kind, has not been an easy task. However, it has served us in our work, especially in terms of further improving a more effective and professional methodology for monitoring the establishment and functioning of vetting institutions.

Throughout the monitoring process, the AHC has briefed the public and the media on its key findings and conclusions, which, in some cases, have modestly contributed to more transparency and publicity of the process.

Also, the AHC has been engaged in continuous communication with the vetting

bodies and, thanks to cooperation with them, it has consulted the regulatory acts of these institutions and has received their suggestions and opinions on the findings and recommendations presented in this final monitoring report, some of which have served further enrichment and improvement of the final report.

We hope that the findings and recommendations outlined in this report will continue to modestly contribute to increased efficiency of implementation of the vetting legislation and to promoting public confidence in the process. In any case, these findings and recommendations should not be considered as mandatory or as interference with the activities of the vetting bodies, which are independent institutions and exercise their functions in accordance with the Constitution and Law No 84/2016.

By way of concluding, I would like to thank the experts and all the ones engaged in this process for their precious contribution and professionalism, the Association of Serbian Prosecutors, and the AHC staff.

Also a special thank-you goes to the Open Society Foundation for Albania, which has generously financially supported the implementation of this initiative.

Sincerely,

Erida Skëndaj

Executive Director

Albanian Helsinki Committee

2. EXECUTIVE SUMMARY

Two years from the adoption of the justice system reform, with the exception of the vetting process for judges and prosecutors, the new legal framework of the justice sector is not yet being implemented. A relatively small number of subjects have gone through the vetting process, while the pace of the process has been slow up until the end of May, slightly picking up in June this year. New institutions of justice system governance have not yet been established and, consequently, are not yet operational.

The establishment and functioning of the vetting institutions has been accompanied by some delays, which have directly or indirectly affected the functioning of a number of new institutions of the justice system. Delays in the establishment of other new justice institutions¹ have also negatively reflected the functioning of existing institutions, which have more limited powers up until the establishment of new institutions. Also, this situation **has created problems in terms of access to justice and efficiency of trial**, particularly at the High Court level, where, because of the insufficient number of judges and the backlog accumulated in years, there are currently about 23,900 cases of citizens awaiting for adjudication.

For the past two to three months, the Constitutional Court has been ineffective and there is a need to unblock the bottleneck created in filling of vacancies in this Court. Due to the unforeseeable results of the vetting process so far, with the dismissal of a considerable number of members of the highest Courts, the implementation of the justice reform has experienced an *impasse*, which needs to be unlocked in the interest of the public and of the citizens. Some of the members of the Constitutional Court and of the High Court are members of the Council of Appointments in Justice, the institution that has been entrusted with the power to select the new members of the Constitutional Court (Article 149/d, paragraph 3 of the Constitution). **The current situation dictates an immediate and priority need to vet the members of the Council of Appointments in Justice, whose mandate is limited for one year. The Council of Appointments in Justice cannot operate with members that have not been confirmed by the vetting process.** Article 221/7 of Law No.115/2016 “On the Justice Systems Governing Institutions” provides for the selection of substitute members,

¹ High Judicial Council, High Prosecutorial Council, Justice Appointments Council, High Justice Inspectorate.

who should also undergo the vetting process. According to Article 229/3 of Law 115/2016, the CAJ may function with the presence of at least five members who have passed the vetting process, and decisions are taken by a majority of their votes. **By the end of June, the KPK has confirmed in office only one candidate for the CAJ, while two candidates have been dismissed and vetting has been terminated for one of them due to his/her resignation.**

Candidates for new members of the Constitutional Court and the High Court are not subject to the vetting process. As noted above, vetting is temporary and the persons *ex-officio* (because of the law) subjected to it are those who were exercising the duty at the time of entry of the vetting law in force, while vetting does not apply to the new members to be freshly admitted to the judicial system. Those passing the vetting process shall be subjected to a permanent accountability system. The new judges and prosecutors who will be appointed to different positions within the judiciary system (at different levels) shall also be subjected to the same permanent system.

In such situation, even though the vetting effects are being felt, the justice system is strenuously working to restore its identity at the level sought by the reform in the interest of citizens and in order to meet the international standards for an independent, effective, professional, accountable and responsible judiciary.

The vetting process has had a positive echo and has gained a rising public interest. Up until May of the current year (2018), there have been 736 denunciations or complaints in total filed by the public for the vetting subjects (judges or prosecutors). Referring to the KPK's decisions so far, it turns out that these complaints have been administratively investigated and communicated to the vetting subjects. The high number of complaints by the citizen is an indicator of public confidence in the process and the vetting institutions in charge of implementing the reform. However, it is worth noting that, from the communication with some citizens who have filed complaints to the KPK, we have come to learn that they have not received any information on the follow-up of their complaints, whether or not there was an administrative investigation and if the KPK needed additional information or documentation regarding these complaints.

However, what is seen is that the citizens are not yet making use of another mechanism envisaged under the Law, that of seeking the status of a justice collaborator, although the law foresees monetary favours if they do so.

The vetting process has gone through some moments of interests seen from the AHC's observation optics, such as the hearings conducted by the **Ad-hoc** Parliamentary Committees for the verification and selection of the candidates for the vetting bodies. Some 20% of the 84 candidates for these institutions, heard initially by the Ad-Hoc Parliamentary Vetting Committee, have received preliminary negative recommendations from the International Monitoring Operation on issues related to conflict of interest and unjustified assets. However, this Parliamentary Committee acknowledged that these candidates met the formal legal requirements. Elements of formalism, or even cases of political polarization were noted in these hearing sessions. A number of candidates educated and with considerable experience abroad were disqualified because of failing to formally meet the legal criteria.

One problem yet to be overcome is the lack of transparency to the public of the vetting auxiliary bodies (CIDS and HIDAACI). Despite the positive decision-making of the Commissioner for the Right to Information, the legal mechanisms of the Law "On the Right to Information" are not effective to enable the provision of information by these auxiliary bodies. However, follow-up of the court case by AHC has been followed by some successes in terms of increased transparency of these bodies, which, in different ways, provided the required information to the public.

Transparency of the activity of the International Monitoring Operation is a controversial aspect of the process, as the public and media are limited to obtaining information only during the hearings when the IMO observers ask questions to those undergoing vetting.

Meanwhile, we can say that the transparency of the three vetting bodies has been at satisfactory levels and has constantly been improved through their official websites, where information on certain issues, hearings, complaints, and decisions has been published and where occasional notifications for the press and the public about important aspects of their activity have been published.

For some of the following findings and recommendations, the Independent Qualifications Commission and the Special Appeals Panel have submitted their observations and opinions. These observations are reflected in the relevant sections of this final report, which provides a more detailed analysis of AHC's evaluation and attitudes of the vetting bodies.

In the case of the hither-to dismissals, it has been noted in some of the decisions that the KPK has decided to end the vetting process for the vetting subjects only based on the assets criterion, not completing and not taking into consideration the investigation on the integrity of the individuals and their professional skills. Under the Constitution of the Republic of Albania the vetting process requires control of all three components underlying it. Notwithstanding the wording provided for in Article 4, paragraph 2 of Law No. 84/2016, we are of the opinion that the process would neither be complete nor transparent for the public if such subjects do not go through all the three control filters.

One of the publicly discussed issues is whether the evaluation of assets is or is not strictly done by the vetting institutions, or whether this strict standard is required or not, which can put the vetting subjects in a failing position vis-à-vis the process. The purpose of the vetting process is to remove corrupt judges/prosecutors (but not in criminal terms), where one of the indicators is the wealth accumulated in an inexplicable manner. The question raising is: to what extent shall the deficiencies in the documentation, the lack of evidence for their activities over the last 20 years ago, the violations of tax legislation, lack of bank documentation, asset registration etc. be justified? Frequent amendments in fiscal and financial laws, informal economy, especially in the early years of democracy, lack of obligation to keep the invoices when this was not expressly required by financial legislation and the fact that state institutions are obliged to retain the financial documentation only for a fixed period of time have created difficulties for those undergoing the vetting process for proving how they have gained their wealth, especially prior to the adoption of Law No. 9049, of 10th April 2003, "On the Declaration and Control of Assets, Financial Obligations of Elected Individuals and Certain Public Servants". This is an issue requiring specialized training of vetting bodies. According to Article 19 of the vetting law, such bodies should have budget allocated for training purposes, in order for them to meet their training requirements or needs.

The hearings monitored at the KPK have reflected a high level of solemnity, which was observed in logistical terms, communication by the Media and Public Coordinator, in the way the room was organised, in the way the vetting body have behaved with the vetting subjects and their defenders, etc. **For the media and the public showing an interest in attending these sessions and present in the hearing hall before the proceedings, the hearing sessions have, in all monitored cases, been public.**

The vetting institutions need additional financial support. When these institutions started working, the number of staff and their remuneration decreased. Today, given that vetting is underway, it has become clear that the most important criterion being checked is the wealth criterion. The number of qualified staff employed by the vetting institutions is not sufficient.

Up until the end of June, decisions are taken for only 3.37% of all subjects subjected to vetting, while about 800 decisions are still to be issued. For the first 57 subjects to undergo vetting with priority, the KPK decisions have been issued over a period of more than four months, for only 31.5% of them. **If hearings for priority subjects will continue at this pace, the KPK would need 6-7 months to complete the process, thus conditioning the establishment of justice governing bodies.**

The KPK has issued decisions for 27 re-evaluated subjects in total, up until the end of June 2018, where, in 12 cases the vetting process is suspended because of resignations, in 9 cases it has confirmed the subjects in office, and in 6 cases it has decided to dismiss them from office.

In our opinion, the transparency applied during the vetting process should not violate the human dignity of the vetting subjects. Any kind of prejudice against the vetting subjects, either nominally, or in a group, would be detrimental and, in certain cases, even harmful and unjustified.

The re-evaluation institutions, just as any other public body, has the duty to report to the Prosecution Office, if, during the administrative proceedings, they uncover a fact that constitutes a criminal offense that can *ex-ufficio* be prosecuted. According to the data published on the KPK's official website and those provided by the Prosecution Office so far, it turns out that there was a referral to the Prosecu-

tion Office only for one subject, a former judge of the Constitutional Court (B.I), who withdrew from the vetting process. For this reference, the First Instance Prosecution Office of Tirana has decided to not launch investigations by virtue of its Decision of 03 April 2018.

3. MAIN FINDINGS

3.1 General Conclusions

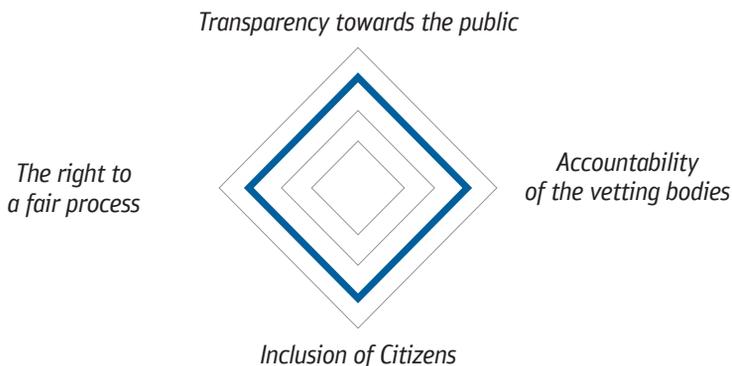
The transitional re-evaluation of judges and prosecutors, referred to as the vetting process, is an important, but also a complex process, as it is an extraordinary and transient juncture of reforming the justice system, that is one in a lifetime event, thus it is a process representing historic significance.

The Albanian Helsinki Committee (AHC) has monitored this process² with domestic and international expertise for the period July 2017 - June 2018. International experts of the vetting legislation, representatives of the Association of Serbian Prosecutors and local experts of Constitutional and Administrative Law are engaged in the monitoring process.

Due to the importance of this process, this report includes early data as monitored by the AHC from the time of drafting and adoption of the legal package (Constitutional changes and the Vetting Law) up to now, when hearings are currently being run by the Independent Qualifications Commission (KPK), respectively from the date of adoption of Law no. 84/2016 "On the Provisional Re-evaluation of Judges and Prosecutors in the Republic of Albania", up until June 2018. The AHC monitoring shall continue for the period of July 2018 - June 2019 and monitoring reports will be shared with vetting institutions, the public, media and other stakeholders interested in this process.

WHAT DOES THE AHC'S MONITORING PROCESS AIM AT?

What does the AHC's monitoring process aim at?



² With the support of the Open Society Foundation for Albania (Soros).

The AHC's³ initiative aims at encouraging transparency and accountability of the vetting bodies, at monitoring respect for the rights of subjects undergoing the vetting process, as well as at promoting a continuous engagement and information of the citizens, media and civil society in its implementation. The AHC has constantly published findings⁴, which have come out from a proactive monitoring process of implementation of the justice reform and, in particular, of the vetting legislation .

The AHC is of the opinion that the commitment of local expertise in monitoring of the vetting process is important. The reports published by domestic observers contribute to increased **transparency** and **accountability** of judges and prosecutors' vetting process, as two important components for restoring citizens' trust and confidence in the judiciary.

The basic legal package for reforming the justice system, namely the Constitutional amendments and the seven first organic laws, have been drafted, by encompassing and consulting with a number of actors, even civil society organizations, amongst others. This package was voluminous, but very important in terms of the need to reform the justice system and to address the problems faced by this system for a transitional period of almost 26 years. Under normal conditions and circumstances, this legal package would require a longer period of time to be drafted and consulted qualitatively and professionally with all stakeholders. However, the conditions and circumstances under which this legal package was drafted were exceptional due to the continuing problems faced by the justice system and the level of corruption spread across all state sectors, where the situation in the justice system was very worrying.

The Constitutional amendments on reformation of the justice system⁵ were approved by the Assembly of the Republic of Albania (hereinafter the *Assembly*) on 22 July 2016, while the first law reforming the justice system was adopted by the Assembly on 30 August 2016 was Law No. 84/2016 "On the Transitional Vetting of Judges and Prosecutors in the Republic of Albania"⁶. Although two years have gone by since the adoption of this legal package, the establishment and functioning of the Constitutional vetting institutions was accompanied by delays. In the meantime, a number of new

³ "Improving transparency, inclusiveness and accountability in the vetting process" – project realized with the financial support of the Open Society Foundation for Albania (OSFA).

⁴ <http://www.ahc.org.al/multimedia/deklarata/>

⁵ Law No. 76/2016 "On Some Supplements and Amendments to Law No. 8417, of 21 September 1998 "The Constitution of the Republic of Albania", as amended.

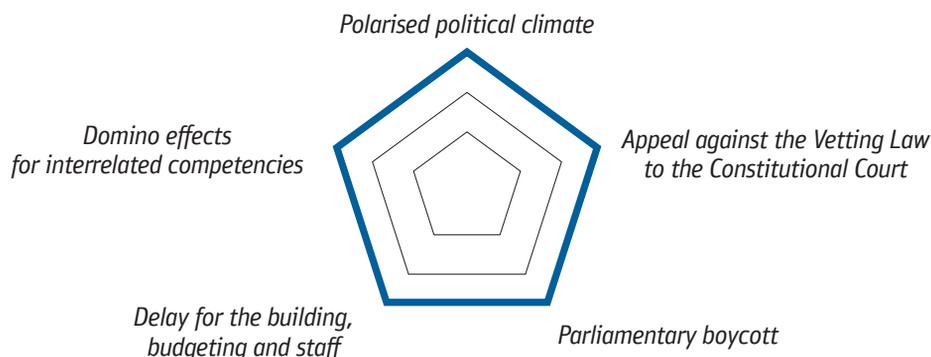
⁶ Law No. 84/2016 "On the Transitional Re-evaluation of Judges and Prosecutors in the Republic of Albania", approved by the Assembly of the Republic of Albania on 30 August 2016."

justice system institutions have not yet been established, thus not yet starting operation, such as the High Judicial Council (KLGJ), the High Prosecutorial Council (KLP), the Justice Appointments Council (KED)⁷, the High Inspectorate of Justice, specialized institutions for fighting corruption and organized crime.

3.2 Reasons causing delays in the establishment and operation of the new justice institutions

REASONS OF DELAYS IN THE ESTABLISHMENT OF NEW JUSTICE BODIES

Reasons of delays in the establishment of new justice bodies



First, reformation of the legal framework of the justice system was realised under a relatively polarised political climate, which eventually led to non-approval of the first organic laws of the justice system⁸ at the same time. For this reason, the implementation process was accompanied by non compliance of deadlines and other transitional provisions laid down in these laws on functioning of existing institutions and establishment of new institutions of the justice system, which activity is inter-twinned and, in some cases, conditioned by the establishment of this or that institution.

⁷ The members of this Council have not yet undergone the vetting process.

⁸ On October 6, 2016, the Albanian Parliament adopted the following laws: Law No. 95/2016 "On the Organization and Functioning of Institutions in the Fight against Corruption and Organized Crime", Law No. 96/2016 "On the Status of Judges and Prosecutors in Republic of Albania", Law No. 97/2016" On the Organization and Functioning of the Prosecution Office in the Republic of Albania ", Law No. 98/2016 "On the Organization of the Judicial Power in the Republic of Albania", Law No. 99/1016 "On Some Additions and Amendments to Law No. 8577, of 10 February 2000 "On the Organization and Functioning of the Constitutional Court of the Republic of Albania". On date 03 November 2016, the Assembly adopted the Law No. 115/2016 "On the Governing Bodies of the Justice System".

Second, the exercise of the (Constitutional) right to appeal to the Constitutional Court⁹ against Law no. 84/2016 "On Vetting"¹⁰, as well as the temporary suspension of the implementation of this Law by the Constitutional Court, is considered as a factor causing delays in the establishment of the Constitutional vetting institutions¹¹ and the progress of its further implementation. At the end, the Constitutional Court decided to turn down the request on the unconstitutionality of this Law by its Decision No. 2, of 18 January 2017.

Third, the interim Parliamentary boycott is considered to be another factor influencing to the delay caused in establishing the Constitutional vetting institutions and, more specifically, to failure to observe the legal deadlines provided for in Articles 8 and 9 of Law no. 84/2016 "On the Provisional Re-evaluation of Judges and Prosecutors in the Republic of Albania", on the activity of *ad hoc* Parliamentary Committees for the selection and verification of candidates for members of these bodies.

Fourth, the Assembly has adopted on 17 June 2017, its Decision No. ... "On the Approval *En-block* of the List of Selected Candidates for the Re-evaluation Institutions, according to Law no. 84/2016", however, numerous delays have been noted in accommodating the members of these institutions in buildings with appropriate infrastructure, in approving their budget and providing supporting staff.

Fifth, the aforementioned delays in the implementation of the vetting law have caused a chain effect towards fulfilment of these constitutional and legal functions of the vetting institutions, relating to the establishment and functioning of other new institutions, the justice system and in particular of the two Councils, namely of the High Judicial Council and the High Prosecutorial Council¹². In this regard, we refer specifically to vetting of candidates for judges and prosecutors, respectively in these two councils. Vetting of these candidates is a fundamental requirement of the new legislation before they are voted by the general meeting of judges and prosecutors.

⁹ From 1/5 of the MPs the Union of Judges of Albania.

¹⁰ Decision No. 2 of 18 January 2017, of the Constitutional Court of the Republic of Albania.

¹¹ The Independent Commission of Qualifications (KPK), Public Commissioners (KP) and the Special Appeal College (KPGJ)

¹² Delays in establishing these two Councils have also created difficulties in finding suitable candidacies for non-judge and non-prosecutor candidatures amongst civil society organisations.

3.3 Impact of delays vis-à-vis access of citizens in the justice system

The abovementioned delays have contributed to the non-fulfilment of vacancies at the High Court, the Constitutional Court, the Courts/Prosecution Offices of ordinary jurisdiction due to the resignations given in the context of the vetting process, as well as the appointment of the Prosecutor General¹³ with full mandate.

The vacancies created at the Constitutional Court are extremely disturbing and have completely paralyzed the activity of this institution with important constitutional functions for resolving constitutional disputes and for providing final interpretation of the Constitution, and in particular the requirements for failure of laws to comply with the Constitution and complaints of individuals against any act of public authority, or Court decision that violates constitutional rights and freedoms.

These delays may have brought consequences, or may have even undermined the efficiency of court proceedings and justice, so much demanded by the citizens, even at the High Court level. It is worth mentioning that the latter currently faces a very high overload due to the files carried over from previous years. Insufficient number of senior judges, the influx of recourse files, the backlog of 23,900 files inherited over the years waiting in queue to be judged and non-operation of the High Judicial Council, which determines the number of judges in the High Court and appoints them in office, are considered to be some of the reasons for the lack of efficiency of the High Court¹⁴.

3.4 Parliamentary procedures for selection of candidates for members in the vetting institutions

The Albanian Helsinki Committee has monitored parliamentary selection procedures of candidates for membership in the vetting's Constitutional institutions. During the period of May-June 2017, the AHC has monitored 4 public hearings and the selection process conducted by 3 special *ad hoc* Parliamentary Committees, vested with responsibility of verification and selection of candidates. 20% of the 84 candidates for these institutions heard by the first *Ad Hoc* Verification Committee received in advance negative recommendations from the ONM on issues

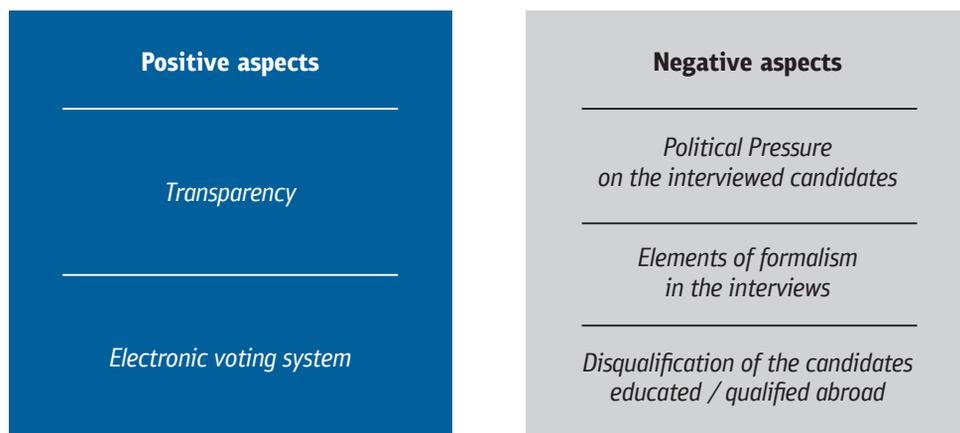
¹³ Functions of the General Prosecutor are transitionally (temporarily) exercised by the Genreal Prosecutor, voted by the Assembly of the Republic of Albania on 18 December 2017.

¹⁴ <http://top-channel.tv/2018/04/25/kaos-dhe-pushime-ne-gjykatën-e-lartë/>

related to conflict of interest and unjustified assets of these candidates. However, this *Ad Hoc* Parliamentary Committee has admitted that some candidates have met the formal legal criteria. The AHC observers noted that during hearings with the candidates for the vetting bodies, they were put under political pressure during the interview (hearing), which primary objective should in fact be testing the professional level of candidates.

Hearing sessions in the other two *Ad Hoc* Parliamentary Committees for selection of the candidates have in general respected the principle of transparency. However, certain problems have been noted, such as the few questions addressed by the members to the candidates¹⁵, the mass selection of candidates who have received an education and worked in the country, while a relatively high number of non-selected candidates were educated abroad, or had valuable experience in Western countries. Obstacles for the latter were the Constitutional and legal criteria allowing them to be chosen for the pretended positions.

MONITORING AD HOC - VETTING COMMISSIONS



■ **Positive aspects**

■ **Negative aspects**

¹⁵ Only in 12 cases from 59 interviews (only 20% of cases), members of the Ad-hoc Parliamentary Committee addressed questions to the candidates.

3.5 By-laws on the vetting institutions

The AHC has provided legal opposition for the normative acts (regulations)¹⁶ approved by the Independent Qualification Commission (KPK) and the Special Appeals Panel (KPA). The AHC's suggestions and comments have been submitted after the approval of such acts, but it turned out that none of the three vetting institutions responded in timely fashion to our official request for information, due to the lack of support staff and the Protocol Office, although several months¹⁷ after the appointment of the members of these institutions by the Assembly. The AHC noted that the regulations were sufficiently detailed and allowed for the regulation of issues that are not indispensable or already regulated in other parts of the legislation that have a higher hierarchy. In some cases, the regulations contained provisions conflicting with higher hierarchy legislation. While our first formal communication with the vetting institutions on the consultation for the Regulations was carried out in September 2017, it turns out that the protocol of these institutions has become operational only several months later. Thus, the Special Appeals Panel (KPA) has registered, by virtue of letter bearing Protocol No. 119, of 22 February 2018, the above referred-to letter by the AHC conveying the opinions of the experts on the Regulation "On the Activity of the Appeals Panel of the Constitutional Court". The KPA, through Letter with protocol No. 119/1, of 23 February 2018, has responded to AHC, informing it that when the Regulation would be reviewed, the opinions and recommendations by the AHC experts would be taken into consideration¹⁸.

3.6 Salaries, budget and staff of the vetting institutions

The KPK, the KPA and the Public Commissioners are independent constitutional institutions, which, according to Article C of the Annex of the Constitution and Law No. 841016, have sufficient budget, administration and facilities to carry out their functions and to allow for the exercise of the functions of the international observers.

¹⁶ Regulation "On the Activity of the Independent Qualifications Commission", Regulation "On the Procedures for Lot Drawing by the KPK", as well as the Regulation "On the Appeals College Activity".

¹⁷ Letter, Protocol No. 496, of 05.09.2017, addressed to three re-evaluation institutions by the Albanian Helsinki Com-miree (request for informacion on the draft Regulation).

¹⁸ From communications with the KPA, we have learned that the regulation "On the Activity of the Special Appeal College of the Constitutional Court" approved by the Decision No. 1, of 17 July 2017 of the meeting of the judges was amended by Decision No. 23, of 06 June 2018 of the meeting of judges. For more information please refer to the link: <http://www.kpa.al/wp-content/uploads/2018/07/Rregullo-re-p%C3%ABr-veprimatrin%C3%AB-e-KPA.pdf>

The proposal for the payroll classification and the organizational structure¹⁹ was accompanied by strong discussions and debates in the Parliamentary Laws²⁰ Committee, because the salary level was, by some members of this Commission²¹, considered high and the organizational structure as having too many staff. On September 29, 2017, the Assembly approved by virtue of its Decisions No. 92, 94 and 94, the organizational structure, the staff and the staff salaries' classification of the Special Appeals College, the Independent Qualification Commission and the Public Commissioners²². The proposal of the vetting institutions for a salary raise by an additional 200% because of the difficulty of work was not approved, while approving a staff cut of 40% to the initial proposals of the vetting bodies²³. On October 09, 2017, the Council of Ministers, by Decision No. 574, upon the proposal of the Minister of Justice and the Minister of Finance and Economy, decided that members of the re-evaluation institutions would receive an additional monthly payment of 50% on the initial gross salary due to the difficulty of work.

The AHC cannot assess whether the level of salaries approved by the Assembly together with the addition on difficulty of work granted by the Council of Ministers for the members of the vetting institutions is the right one or not. **However, due to the importance, nature and high difficulty of the work of these institutions, as well as due to the rigorous control such institutions should perform on the wealth and integrity of vetting subjects, the salary of members of the re-evaluation institutions is of particular importance for guaranteeing the independence and efficiency of these institutions.**

The same can be said about the organizational structure and staff of the re-evaluation institutions. **Controversial is the number of staff approved in the organigramme of each institution, as the institutions have faced a very heavy burden of work since the first months of their work and vetting of the first professionals drawn by the lot has been running at relatively slow rates. This may require a review of the organizational structure in the future, with the potential of increasing the number of staff to re-**

¹⁹ According to Article 19, items 1 and 2 of Law No. 84/2016 "1. The budget of the re-evaluation institutions is funded by the State Budget, where they appear as separate institutions. 2. The re-evaluation institutions propose their draft-budget every year to the Parliament's committee in charge of legal matters, which submits it for approval to the Assembly, as integral part of the State Budget".

²⁰ Hearing at the Laws Parliamentary Committee in the Assembly of the Republic of Albania, on 19 and 25 September 2017.

²¹ <http://www.oranews.tv/article/zbatimi-i-vettingut-prezantohen-ne-kuvend-strukturat-e-3-organeve>

²² See Official Journal No. 174, of 03.10.2017.

²³ <http://www.gazetatema.net/2017/10/09/qeveria-korrekton-pjesisisht-nivelin-e-pagesave-per-komisioneret-e-vettingut/>

spond to the real load of work of these institutions. In our opinion, review of the structure and organigramme of the staff should be argued and requested at the initiative of the vetting institutions via a document addressed to the Assembly of the Republic of Albania. When the draft of this report was consulted with the KPK, we were told that this body has sent an official request to the Assembly on 26 June 2018 for more staff, considering the huge load of cases. According to the KPK, their staff has worked long hours to avoid any delays in the process.

Delays have also been noted with regard to staff recruitment for the re-evaluation institutions, while these institutions continue to still have some vacancies for different positions under the current organizational structure²⁴. According to official or media reports²⁵, the re-evaluation institutions have been provided with some of the staff, primarily in legal and economic advisory positions, about seven months after the appointment of the members of the vetting body itself. This situation has affected the slowdown of the initial speed and the performance of the vetting process due to the importance of and support by the staff of the re-evaluation institutions.

3.7 Obstacles and delays in the work of the auxiliary institutions (HIDAA-CI, DSIC, HCJ and the General Prosecution Office)

Due to the role and importance of the four auxiliary bodies²⁶ in the vetting process, the AHC has requested to be familiarised, by means of official requests for information, with their activity in this regard, the difficulties in implementing the vetting legislation and statistical data that have resulted in these bodies in terms of controlling the integrity, property and professional skills of the vetting subjects.

24 On 29 May 2018, notification for re-opening of the vacancy for the KPK's Secretary General: <http://kpk.al/2018/05/29/rishpallje-vendi-vakant-ne-pozicionin-sekretar-i-pergjithshem/>; For the KPA, vacancies are published at: <http://www.kpa.al/vende-vakante/>, for the Public Commissioners, vacancies are published at: <http://president.al/wp-content/uploads/2018/05/NJOFTIM-SHPALLJE-VENDESH-VAKANTE-PRANE-KOMISIONERIT-PUBLIK.pdf>

25 For the Independent Qualifications Commission, announcement of vacancies for 14 legal advisers and 4 economic advisers was issued on 6 October at the President's Office website (<http://www.arberianews.com/presidenca-shpall-vende-te-lira-pune-per-keshilltare-prane-kpk-se/>), while their recruitment procedures have finished on 3 January 2018 (see <http://kpk.al/2018/01/03/njoftim-mbi-perfundimin-e-procedurave-te-rekrutimit-te-keshilltareve-ligjore-dhe-ekonomike/>); For the Public Commissioners, the procedures for announcing 7 vacancies for filling out the vacancies, have started around 17 October 2017 (<https://www.scan-tv.com/institucioni-komisionereve-publike-vende-vakante-per-6-keshilltare-dhe-1-kancelar/>); For the Special Appeals College, procedures for announcement of vacancies for 7 legal advisers and 3 economic adviser have started on 11 October 2017 http://www.gjk.gov.al/web/PUBLIKIM_1512_1.php, while it turns out that upon Decision No. 14, of 27 December 2017, relevant successful candidates have been notified (<http://www.oranews.tv/article/reforma-ne-drejtesi-konkurrentja-keshilltare-ligjore-demoncon-parregullesite>);

26 The High Council of Justice (HCJ), General Prosecution Office, High Inspectorate for Declaration and Audit of Assets and Conflict of Interests (HIDAACI), Directorate of Classified Information Security Directorate (CISD);

In some cases, the auxiliary bodies²⁷ have reported they are faced with shortages in human resources in proportion with the responsibilities vested in them by law. In some cases we have come across unjustified delays for the establishment of the working groups charged in these institutions to realise auxiliary competencies, as is the case with the General Prosecutor²⁸.

3.8 Transparency of the auxiliary bodies and confrontation of their data

The AHC has reacted publicly about the lack of transparency of auxiliary bodies to our organization and to the public and failure to provide us with full statistical gathered by these bodies in service of controlling the integrity, wealth and professional skills of the vetting subjects.

On February 5, 2018, the Commissioner for the Right to Information and Protection of Personal Data (hereinafter the Commissioner) received AHC's complaints of violation of the right to information and ordered CIDS and HIDAACI to provide full statistical information regarding integrity the as well as the lawfulness of the income and wealth within 10 days of its Decision. These institutions did not immediately observe the Commissioner's Decisions. Under these conditions, the AHC initiated or became a party in the proceedings²⁹ brought before the Tirana First Instance Administrative Court for non-enforcement or appeal of Commissioner's decisions³⁰. Initially the DSIC appealed the decision of the Commissioner to Tirana First Instance Administrative Court, while the AHC filed a lawsuit with the Administrative Court on the omission of the HIDAACI. Failure of these bodies to disclose information, in our opinion, has temporarily violated the right to information

²⁷ In particular the HCJ Inspectorate, which has referred 40% lack of staff.

²⁸ KPK and KPA were constituted in June 2017, whereas the Working Group at the General Prosecution Office, responsible for the preliminary professional evaluation of the prosecutors and legal assistants, was established on 17 October 2017, upon Order No. 801, of the General Prosecutor.

²⁹ With a different object and different litigants.

³⁰ The CIDS has exercised the right to appeal to the Tirana First Instance Administrative Court against Decision No. 04, of 05 February 2018 of the Commissioner, where the AHC has intervened as a third party in the administrative process. For HIDAACI, the AHC has exercised the right to appeal to the court on grounds of failure to enforce Decision No. 05, of 05 February 2018 of the Commissioner. The General Prosecutor's Office filed an appeal against Decision No. 06, of 05 February 2018 of the Commissioner for refusing the appeal by the AHC. So far, the Administrative Court of Tirana, with Decision No. 1966, of 22 May 2018, has upheld the Commissioner's decision regarding the dismissal of AHC's complaint against the General Prosecutor's Office. By Decision No. 2320, of 18 June 2018, the court has ruled over the dismissal of the CIDS claims for annulment of Decision No. 04, of 05 February 2018 of the Commissioner, and Decision No. 2234, of 11 June 2018, the court has dismissed AHC's claim for the execution of Decision No. 05, of 05 February 2018 of the Commissioner in the case against HIDAACI. The AHC has exercised the right to appeal to the Tirana Administrative Court of Appeal against Decision No. 2234 whereas for Decision no. 2320 we are not aware of any possible appeal to the Tirana Administrative Court of Appeal by the parties in the process, the CIDS, or the Commissioner.

of the public, as guaranteed by Article 23 of the Constitution and Article 10 of the European Convention on Human Rights (ECHR). However, the pursuit of legal channels by AHC to give life to transparency by these bodies has had a positive impact.

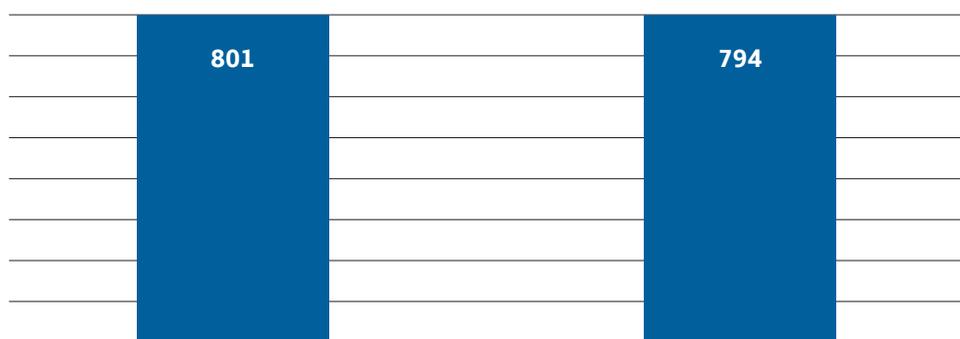
On 18 June 2018, Tirana First Instance Administrative Court ruled on objecting the CISD application by leaving the Commissioner's Decision in force, thus paving the way to transparency for the requested information. Following this Decision, it is positive that that the CISD addressed the AHC with a letter to receive information, in implementation of the decision of the Commissioner and the Administrative Court. According to the CISD's information, about 25% of the individuals going through the vetting process have had integrity problems, mainly related to corruption and organized crime, demonstrated in the form of inappropriate meetings, exchange of inappropriate electronic correspondence, or in any other form considered inappropriate under the vetting law. While the other auxiliary body, the HIDAACI, did publically disclose in a public hearing before the Legal Affairs, Public Administration and Human Rights Parliamentary Committee that about 50% of the subjects controlled by is had problems with property concealment, false disclosure, or conflict of interest.

The data of the auxiliary bodies are neither definitive, nor mandatory for the vetting bodies pursuant to the Constitutional Court case law, which has reviewed the vetting law when the law was sent for consideration to this Court. Such data, although disturbing at first sight, must be subjected to careful investigation, review and assessment of the vetting bodies in relation to all the evidence, facts and documents generated during this investigation.

The CISD and HIDAACI, as mentioned above, have possessed, as part of their reports for each of the audited subjects, issued preliminary conclusions or estimates of the two components they assist, while the High Council of Justice (HCJ) Inspectorate and the General Prosecutor's Office refer that they do cannot find conclusions regarding professional skills in the detailed and reasoned reports that are made available to the vetting bodies for the subjects under their competence. Consequently, the AHC notes that the way in which the auxiliary bodies have acted in relation to the Independent Qualification Commission, where these reports are administered, is not unified. This may also be due to the way the provisions of the Law No. 84/2016 have been formulated.

The preliminary data obtained from the CISD show that a very small number of judges or prosecutors did not accurately answer the questions in the self-declaration forms, or have had deficiencies in filling out the data on their integrity³¹. Also, the number 794 of the vetting subjects that have submitted the property declaration to HIDAACI does not match the number 801 of the subjects that have submitted the statement for controlling their integrity at the CISD. Cause of the inconsistency may also be the resignation of some vetting entities during the process of submission of self-declaration applications to these bodies.

THE RATIO BETWEEN THE NUMBER OF RE-EVALUATION ENTITIES THAT THEY HAVE SUBMITTED STATEMENT NEAR DSIK AND ILDKPKI



Nr. of the re-evaluation subjects they have submitted the statement for control of figure near DSIK / 801 subjects

Nr. of the re-evaluation subjects they have submitted the declaration of property vetting near ILDKPKI / 794 subjects

3.9 Transparency of the International Monitoring Operation

According to Annex B of the Constitution (paragraphs 1 and 3), the role of the International Monitoring Operation is expressly limited to the exercise of powers of a monitoring nature, without any decision-making role, or any role relating to the administration of the vetting process. The International Monitoring Operation can control the available files and information and recommend taking of additional evidence, or exercising of the right to appeal. The International Monitoring Operation does not exercise the right to appeal, but enjoys instead the right to recommend the right to appeal.

³¹ 3% of judges/prosecutors about their integrity.

A controversial issue is the transparency of the activity of the International Monitoring Operation, as the public and media are limited to obtaining information only during the hearing session, when the International Monitoring Operation's observers asks questions to the vetting subjects. In the decisions taken and argued thus far by the KPK, it is clear that International Monitoring Operation's suggestions on the matter are not reflected in the decision. In these decisions, what is noticed is that the Trial Panels mention the fact whether the International Monitoring Operation's observers have submitted a suggestion or not. However, this is not the case in all the decisions³² either. In those cases where suggestions are made about the issue by the IMO observers, the nature or context of the suggestions is not specified in the decision, which makes the IMO's role and contribution in this process not transparent to the public. We wish to point out that according to Annex C of the Constitution, the activity of the vetting bodies should be guided, *inter alia*, by the principle of transparency.

3.10 Lot drawing for the vetting subjects

The Independent Qualification Commission has so far realised four notifications listing the entities undergoing the lot by this institution with the purpose of being vetted. On 01 December 2017³³, it published the first notification that the vetting procedures were initiated for the first 57 priority subjects, *among others*, for members of the Constitutional Court, High Court, candidates for KLGj, KLP, KED and the High Justice Inspectorate. Some of these candidates will be vetted simultaneously due to their role as judges or prosecutors and their candidacy for the justice system governing bodies.



³² Decision No. 22, of 07 June 2018 on the account of E.I.

³³ <http://kpk.al/2017/12/12/njoftim/>

On 15 January 2018, the KPK has drawn the lot and launched the vetting procedure for 36 other vetting subjects, namely judges presiding over the Court of Appeal and some of the First Instance Courts, as well as prosecutors who run the Appeal Prosecution Offices and who exercise their duty in the General Prosecutor's Office. Four of these subjects are simultaneously candidates for the KED³⁴. On 15 March 2018, the KPK has drawn the lot and has started the vetting procedure for 36 other vetting subjects, amongst the Presidents of Judicial District Courts and Heads of Judicial District Prosecution Offices³⁵.

On 15 May 2018, a lot was drawn and the vetting procedure was launched for 36 other vetting subjects, among which first names in this list are seven candidates for the Constitutional Court who are currently judges in the judicial system, or advisers or former advisors of the Constitutional Court³⁶. Six of these subjects are *ex-officio* subjected to the vetting process only because they are judges and advisors to the Constitutional Court. However, it is unclear why in the announcement of May 15, for the lot drawing of seven of these subjects, next to the name, in brackets, is marked their candidacy for members of the Constitutional Court. The candidates running for members of the Constitutional Court are not subject to the vetting process, but, according to Law No. 115/2016 "On the Justice System Governing Bodies" these candidates, upon the request of the Council of Appointments in the Judiciary, shall be subjected to audits of their property by the High Inspectorate of Declaration and Audit of Assets and Conflict of Interest and an integrity check by the General Prosecution Office. If the outcome of the vetting process for these seven subjects would be used for the purpose of their candidacy at the Constitutional Court, this could put these seven candidates in unequal footing with other candidates for Constitutional Court judges who do not come from the judiciary/advisors' ranks, or are not former Constitutional Court advisors.

3.11 The resigned subjects

Starting from 16 February 2018 up until 25 June 2018, the KPK decided to suspend the transitional vetting for 11 subjects, based on their individual acts of resignation³⁷.

³⁴ <http://kpk.al/2018/01/16/njoftim-per-mediat/>

³⁵ <http://kpk.al/2018/03/16/njoftim-4/>

³⁶ <http://kpk.al/2018/05/16/njoftim-15/>

³⁷ <http://kpk.al/vendime/>

Three of these subjects were part of the priority list, compiled based on the lot outcomes by the KPK. Of the 12 decisions, it turns out that 7 vetting subjects have exercised the function of the judge and the prosecutor, 4 vetting subjects have exercised the function of the legal advisor and one has been serving as a magistrate (the former General Prosecutor).

CATEGORIZATION OF THE RESIGNED SUBJECTS

4		1 Judge in the Constitutional Court
2		1 Judge of the High Court
2		1 Judge from one of the Appeal Courts
1		2 Judges at one of the first instance courts
1		2 Prosecutors in the prosecution offices at the first Instance Courts
1		4 Legal assistant in the High Court
1		1 Former General Prosecutor (magistracy)

The official website of the KPK shows that four of the decisions have not yet become final. The data published in the website of the Special Appeals College show that the Public Commissioner has complained against two decisions of the CPC for the suspension of the vetting process because of the resignation of the vetting subjects³⁸.

3.12 Term of resignations

Out of 12 resignation decisions, the AHC has studied the first 11 decisions of the KPK on termination of vetting for the resigned subjects. A study on 11 discontinuation decisions shows that 8 of them have been submitted within 3 months from entry into force of Law No. 84/2016. For calculating this deadline, the KPK also considered the suspension of the implementation of Law 84/2016 by the Constitutional Court during the examination of the case at this Court. 31 March 2017 is considered as the date of expiry of the 3-month deadline for filing a resignation. The first KPK decision to discontinue the vetting process is issued on 8 February 2018. For 8 of the resignation requests within the three-month deadline, namely by 31 March 2017, it is apparent that the KPK's decision is taken almost one year later. This delayed decision may be conditioned by various factors, such as the approval of the staff structure and organization, staff recruitment, or the submission of resignation documentation from the President's Office.

³⁸ <http://www.kpa.al/njoftime-per-shtyp/>. For the subject A.LI, the Appeals College has taken a decision, which is publically available at: <http://www.kpa.al/shpallet-vendimi-pe%E2%80%8Br-subjektin-e-rivleresimit-z-adriatik-llalla/>

From the analysis of the three discontinuation decisions due to the resignation of subjects beyond the 3 month deadline, it turns out that the KPK, based on Article G of the Annex of the Constitution, as well as in the interpretation of Decision No. 78, of 12 December 2017 of the Constitutional Court³⁹ on the provisions of Law 84/2016 (Article 56), has accepted the possibility of resignation and termination of the vetting process beyond the 3 month deadline.

3.13 Resignation before the entity assigned by law

Based on the analysed Decisions, in 9 out of 11 cases, the vetting subjects have filed a request for resignation to the President of the Republic, and in two other cases the application for resignation is filed only with the appointment body, as the application has been lodged beyond the 3 month deadline required by Law for submission of the application to the President of the Republic⁴⁰. Out of 9 subjects filing their resignation to the President of the Republic, three⁴¹ have not deposited it to the appointment body. This number includes both, the subjects that have submitted an application for resignation within the three-month deadline and those who have filed the application beyond such deadline. According to the data of the official website of the Ad-Hoc Appeals College, the Public Commissioner has appealed 2 KPK decisions on discontinuation of the vetting process due to resignation of the vetting subjects⁴².

Hence, KPK's Decision No. 2, of 16 February 2018⁴³, refers that the resignation is filed beyond the 3-month deadline to the President of the Republic, not to the appointments body. The KPK's decision does not clarify whether an administrative investigation is carried out to verify whether the President of the Republic

39 Article 56 of Law 84/2016 links the filing of resignation to the President of the Republic with a 3 month deadline for resignation. This procedure should be interpreted systematically in correlation with the provisions of Articles 64 and 65 of Law No. 96/2016 "On the Status of Judges and Prosecutors in the Republic of Albania", based on which the resignation is filed with the relevant Council. Because the respective councils have not yet been established, based on the provisions of Article 160 of this Law, the competent bodies before which the claims must be filed are the High Council of Justice and the Prosecutor General.

40 Article 56 of Law No. 84/2016 relates submission of the application for resignation to the President of the Republic with the three-month request for resignation. This procedure should be interpreted in a systematic manner alongside the provisions of Article 64 and 65 of Law No. 96/2016 "On the Status of Judges and Prosecutors in the Republic of Albania", pursuant to which the resignation is deposited in the relevant Council. Because of the fact that the relevant Councils have not yet been established, pursuant to the provisions of Article 160 of this Law, the competent authorities where the applications have to be deposited are the High Council of Justice and the Prosecutor General.

41 Decisions No. 2, of 16 February 2018; No. 4, of 23 March 2018; No. 5, of 23 March 2018

42 <http://www.kpa.al/njoftime-per-shtyp/>

43 For the subject Adriatik Llalla.

has submitted the application *on grounds of competence* to the High Council of Justice, which, pursuant to Article 160 of Law No. 96/2016 “On the Status of Judges and Prosecutors in the Republic of Albania” is the competent authority exercising the functions of the High Judicial Council for the transitory period up until the establishment of such Council. Regarding the appeal addressed by the Public Commissioner on this Decision, the Special Appeals College decided, as the KPK did, to discontinue the vetting process, clarifying in the content of the Decision the prohibition of appointment of the subject in question (A.LI), as a judge or prosecutor of any instance, as a member of the High Judicial Council, or of the High Prosecutorial Council, as a High Justice Inspector, or Prosecutor General for a period of 15 years⁴⁴.

3.14 Content and form of the decision to discontinue the vetting process (resignations)

With regards to the content of the Decision, pursuant to the provisions of Article 57 of Law No. 84/2016, it turns out that the decisions contain the formal elements required by Law. All the reasoned decisions fail to refer to the cause of resignation, while there is no legal obligation for justifying the resignation. With regards to reasoning of the Decisions, in the case of Decisions No. 2, of 16 February 2018; No. 4 of 23 March 2018; No. 5 of 23 March 2018, the KPK has provided no arguments to show on whether it has conducted any administrative investigation to verify whether resignation is regular and why the letter of the President of the Republic has sufficed, but the decision of the appointments authority after termination of the mandate, or of the status, has not.

3.15 Pace of hearings by the KPK

On 21 March 2018, about four months after the publication of the list for the first subjects chosen by lot to undergo vetting, the KPK held its first vetting hearing, which started amongst the members of the Constitutional Court.

Pace of hearings with the subjects of transitional evaluation from 21 March, when the first hearing was organised, up until 31 May, is considered sluggish in proportion to the total number of subjects that have gone through the lot procedure so

⁴⁴ The KPA's decision has not yet been reasoned, but a copy of the decision is available at: [//www.kpa.al/shpalletvendimi-pe%e2%80%8br-subjektin-e-rivleresimit-z-adriatik-llalla/](http://www.kpa.al/shpalletvendimi-pe%e2%80%8br-subjektin-e-rivleresimit-z-adriatik-llalla/)

far, respectively 163 subjects awaiting to undergo vetting, as well as the KPK's⁴⁵ number, which allows for the establishment of four vetting panels simultaneously. A quick-paced process, without infringing at any time the decision-making of the vetting institutions, can help for filling out the vacancies in any key justice institutions and in the new justice institutions, and in clearing the bottlenecks in the system.

More specifically, up until 30 June 2018, the KPK has issued decisions for 18 priority subjects, who make up for only 11.04 % of the 163 subjects going through the lot procedure so far. The KPK has ruled on reconfirmation in office for nine out of the priority subjects, on dismissal of six of them and on discontinuation of the process for three of them on grounds of their resignation. The average duration of evaluation for these subjects from 31 March until 31 May 2018, from the date when the lot was drawn, has on average been 2 subjects per month. More specifically, the KPK has held 25 hearings for 13 vetting subjects, which were monitored by the local AHC's observers. The average of hearings held for priority subjects for this period was two sessions per week for the same subject, where the first one was a hearing and the second a session to announce the decision. An increase of the number of hearings has been noted during the month of June (4-8), with an average of two sessions per week for two different subjects. More specifically, a high number of hearings, namely four hearings for four different vetting subjects, is noted during the period of from 4 June to 8 June.

In total, until 30 June, 30 sessions were held at KPK for 19 vetting subjects. Up until the end of June, the AHC has monitored 15 hearings.

The KPK stance on this aspect as monitored by AHC is that vetting of the priority list is under completion and that the KPK is working with a high intensity to that end. Calling of the subject to the hearing is done by a decision of the respective trial panel. The trial panels work independently and determine the hearing as the final step of the vetting process, organising it in the shortest time possible. Consequently, no will can be dictated to the panel. The AHC respects KPK's position, although it shares an opposite assessment, based on the arguments provided above. Also, the AHC is of the opinion that, regardless of how the work of the trial panels is organized and shared, the vetting bodies, according to Article 4, paragraph 5 of Law No. 84/2016 exercise their functions, *inter alia*, based on the principle of equality of arms before the law.

⁴⁵ <http://kpk.al/rreth-nesh/komisioneret/>

DECISION OF THE IQC FOR THE PRIORITY SUBJECTS (TILL JUNE, 7TH)

9 Decisions on reconfirmation

- 1. Dritan Prenci,**
Candidate for HCP
- 2. Edmond Islamaj,**
Member of High Court
- 3. Anila Leka,**
Candidate for HCP
- 4. Marçela Shehu,**
Candidate for HCJ
- 5. Manjola Xhaxho,**
Candidate for HCJ
- 6. Fatjona Memçaj,**
Candidate for JAC
- 7. Vitore Tusha,**
Member of Constitutional Court
- 8. Bashkim Dedja,**
Chief of the Constitutional Court
- 9. Brikena Ukperaj,**
*Candidate for JAC, Judge
of Appeal Court, Vlora*

6 Decisions on dismissal

- 1. Fatmir Hoxha,**
Judge of Constitutional Court
- 2. Altina Xhoxha,**
*Judge of Constitutional Court
Member of JAC*
- 3. Besa Nikëhasani**
Candidate for HCP
- 4. Besim Trezhnjeva,**
Candidate for HCJ
- 5. Fatos Lulo,**
*Member of the Constitutional
Court*
- 6. Gentian Trenova,**
*Candidate for JAC, Prosecutor
in Appeal Prosecutor Office,
Tirana*

2 Decision on discontinuation of the process

- 1. Besnik Imeraj,**
*Member of the Constitutional
Court*
- 2. Adriatik Llalla,**
Former General Prosecutor

For 11 other vetting subjects, 3 of which belong to the priority list, no hearing is organised and the administrative investigation has neither started, nor been discontinued due to their resignation (explained above).

3.16 Transparency of the vetting bodies

The process, even though extraordinary for Albania, has been normal and transparent. The fact that the KPK and the KPA has constantly published in its website its acts (Regulations) and decisions, transparency programme and press releases related to the vetting process, is positive. Also, these institutions have issued prior notifications of the hearing date for the parties and other interested parties in advance. Monitoring of hearings has shown that the KPK has had continuous communication with the vetting subjects, in order to have a complete administrative investigation process and to enable the subjects to familiarise themselves with the file data and submit relevant explanations, evidence and assessments.

Overall, one can say that transparency of the three vetting bodies has been at satisfactory levels and has continuously improved via publication of the information in their official websites on issues, hearings, complaints, decisions and the occasional notifications addressed to the press and the public related to important aspects of their activity.

Another aspect monitored by AHC observers relates to the transparency of the trial panels during hearings with vetting subjects. The hearing, when public, should create the opportunity for all the ones present (the public) to become acquainted with the facts and circumstances that are relevant to the three vetting criteria. In some cases, the AHC observers have found that during the hearings, case reporters have stopped at the facts and circumstances earmarked during the administrative investigation only for one of the vetting components which has been problematic⁴⁶.

In other cases, the AHC observers, but also the public present at the hearing, have found it impossible to find clarity, even in summarised format, on the important aspects of the vetting process during the hearing. Thus, at the hearing of June 25, 2018 with subject V.S, it turned out that the first HIDAACI report was incompatible with the second report of the same institution, which was again contacted by KPK during the administrative investigation. While in the first report, HIDAACI claimed that the vetting subject had not committed any violation related to disclosure of assets and sources of wealth, in the second report it claimed that the asset declaration was not made in accordance with the law. No explanation was given during the hearing as to why KPK had asked HIDAACI to prepare a second report and why the KPK considered the second report as not based on evidence. To contribute to more public confidence in the process, we are of the opinion that more transparency of the trial panels would be of help in this regard. Also, for transparency to the public, during the hearing session, the rapporteur or the trial panel should relate/declare the cases when they are liable to the obligation to respect the principle of confidentiality.

⁴⁶ At the hearing of 28 June 2018, this was also identified by the counsel of the subject A. L, who declared that vetting should be done for the three criteria, not only about one of them.

3.17 Cooperation and public engagement in the course of the vetting process

It is worth mentioning that the KPK transparency, but also the positive echo of the vetting process by the institutions, civil society, representatives of diplomatic corps and international organizations have enabled an active participation of citizens for denouncing the facts or circumstances that may make up for evidence in terms of the vetting criteria (Article 53 of Law). The KPK refers that up until May 2018, the public has filed about 736 denunciations in total⁴⁷. However, despite of this figure, estimated as relatively high, the KPK observes that the nature of denunciations is mostly related to the professional skills of the judges/prosecutors and is based on misleading expectations of the citizens on the examination of the merits of the cases they have referred to.

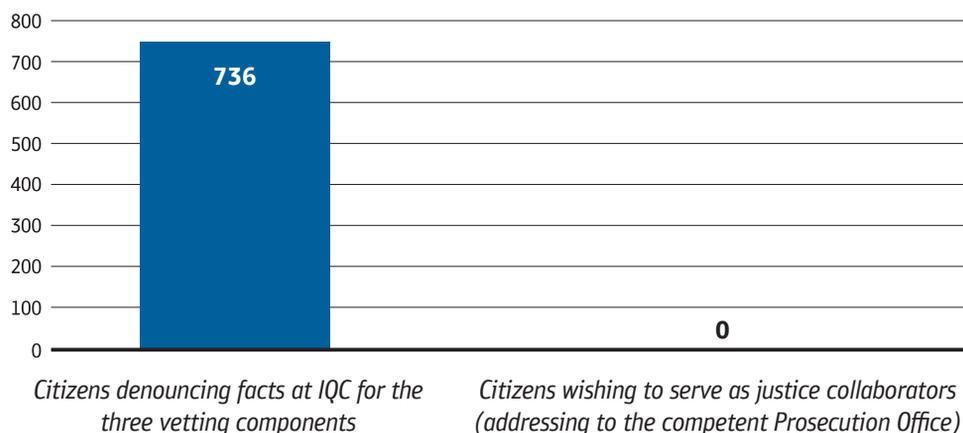
Regardless of citizens' inquiries or their allegations about the merits of the case, the AHC estimates that a proactive communication of the vetting bodies with citizens, as well as a specialized investigation of any complaint, can in such cases identify either indirectly or directly even other elements related to the aspect of professional skills, property or integrity to the vetting subjects against whom the complaint has been filed. **From the communication we had with some citizens who have filed denunciations with the KPK, we have been told that they could not obtain information about what was done with their complaint, whether or not there was an administrative investigation and whether KPK needed additional information or documentation to shed light onto their complaints.**

In the context of the consultations on the draft of this report with the KPK, it referred that the reception of citizens is allowed every day from 11:00 to 13:00 hrs. Meetings with citizens addressing this body are accompanied by relevant explanations regarding their issues and by orientation in filling out the denunciation forms made available by KPK. During this process, the supporting and accompanying documentation, based on the denunciation, is taken from them. The denunciations are submitted to the case rapporteur and become part of the file of the vetting subject against whom the denunciation is filed. Subsequently, it is the trial panel the body that evaluates this denouncement as evidence.

⁴⁷ Referring to Letter Prot. No. 4389/1, of 07 June 2018 "Response to Your Letter Prot. No. 498 prot., of 28 May 2018" of the KPK, addressed to the AHC.

Even though citizens claim that the justice system is corrupt, up to now, according to the data provided by the institutions based on official correspondence, it does not appear that these persons wish to cooperate with justice in the context of the vetting process⁴⁸. Article 54 of law 84/2016, which provides for a detailed regulation for the justice collaborators, facilitating and providing monetary favours for them, has practically been left non-applicable so far.

COOPERATION OF CITIZENS WITH THE VETTING BODIES



■ Data on public participation in the process of vetting

During monitoring of hearings, in some cases, the rapporteur has stated that citizens have filed complaints during the administrative investigation of the vetting subject, whereby showing of facts and circumstances related to the components based on which vetting of subjects (judges/prosecutor) is carried out. In all cases, the identity of the citizens has not been made public, but data are only given regarding the number of complaints/declarations and a brief description of the findings/analysis of these cases. Generally, the practice pursued so far by the KPK rapporteurs has generally been of a finding nature, containing no full justification of all the elements of the allegations related to the citizens' denunciations. The audience present in these sessions has not been given the opportunity to be acquainted with the substance of these complaints.

⁴⁸ A justice collaborator is the person who has taken part in the criminal offence of corruption with the vetting subject, who is eligible to address the competent Prosecution Office for the investigation of the criminal offence of corruption, according to criminal legislation, and be excluded from criminal responsibility for the offence committed, with the aim of contributing to the uncovering of corruption cases amongst the judges/prosecutors.

Looking at the content of the decisions for the subjects that have passed through vetting so far, it is not clear whether the complaints of all citizens to the respective subjects are reflected in these decisions. There have been cases when the KPK has concluded that the denunciation of the citizen/s for the subject relates to facts that are solved by a court of law on grounds of the right to appeal to a higher court, and that the complaint is not subject of the work of the KPK⁴⁹. However, it is not clear whether the KPK has conducted an administrative investigation regarding relevant reported denunciations and if the citizens have been informed of the KPK mission, or if the latter has strictly maintained the allegations or the subject of the denunciation made by the citizen.

In order to recover public confidence from the first stages of implementation of the vetting process, it is important to inform the citizens about the aspect of administrative investigations of their complaints, as well as about KPK's decision-making on the subjects against whom they have complained.

The fact that there has been transparency for the vetting subjects regarding these complaints or facts denounced by the public has in itself been positive. This is because, referring to the decisions that have been justified so far by the KPK, the subjects and their relevant defence counsels have been acquainted with the denounced cases before the first hearing, being given the burden of proof to prove the opposite (to file counter-arguments, new evidence, etc.).

Regarding cooperation of citizens with the other two vetting institutions, respectively with the Public Commissioner and the Special Appeals College, it turns out that the citizens' denunciation form has been published in the official website of the Public Commissioners⁵⁰. Also, the KPA has informed the AHC that it has published a denunciation model on its official website in order to facilitate the disclosure of information from the public, as well as that it administrates an electronic and a manual record of denunciations by the public. The record enlists all the denunciations filed by the citizen electronically, via postal service, or in person at the KPA. Currently the denunciations submitted to the KPA have been forwarded as appropriate:

⁴⁹ See Decision No. 19, of 14 May 2018 on subject M. Xh.

⁵⁰ <http://ikp.al/index.php/denonco/>

- a. *for treatment at the KPK, when the denunciations belong to the vetting subjects that are currently in the vetting process, or are waiting to be vetted at this institution.*
- b. *to the Public Commissioner and to the International Monitoring Operation, in cases when the issue of the vetting subject for which the denunciation has been filed has been taken care of by the KPK and is filed within the 15 day deadline for appeal.*
- c. *at the disposal of the trial panel at the College, in cases when the issue of the vetting subject for which the denunciation has been filed is under review by the Special Appeals Panel.*

The fact that, according to the KPA, in any case the denouncer has been informed about the treatment and review of their denunciations, by formally responding to the complaints/denunciations made is in itself positive. However, there is a lack of statistical data on denunciations made or reviewed by the KPA and the IKP on their official website.

Although citizens claim that the justice system is corrupt, so far, according to the data provided by relevant institutions with which official correspondence has been exchanged, there are no persons wishing to serve as justice collaborators in the context of the vetting process. Article 54 of Law 84/2016, which provides for a detailed regulation of justice collaborators, facilitating and favouring them, has virtually remained unenforceable to date.

3.18 Respect for the human dignity of judges and prosecutors (subjects)

Transparency enabled by the vetting process should not violate human dignity of the judges and prosecutors going through it. Any person, regardless of his/her official status or public status, must respect the final authority of the vetting institutions and their final decision on judges and prosecutors subjected to vetting. The AHC estimates that the forms of reaction that may be perceived as interference, be it indirect, in the activity of vetting institutions or in the activity of judges and prosecutors subject to vetting, should be avoided. Independence of judicial power lies in the foundations of its organization and functioning. Respect for this independence takes on even greater importance now as the new foundations of the justice system are being established.

Any kind of prejudice towards the vetting subject, either nominally or in group, is detrimental and, in special cases, may prejudice the dignity of the person subject to this process. **Vetting subjects have in some cases stated that publicly expressed prejudice has created unnecessary concerns in exercising of their profession and family life, even among judges or prosecutors who are perceived as having high integrity, or as real professionals by their own community.**

3.19 Access to infrastructure and documentation

a) Access to infrastructure

The room where the KPK hearings are held is located on the second floor in the premises of the Palace of Congresses. The building is in a very familiar place, very close to the centre of the capital and easily accessible by the public and the media. The hearing hall is quite adequate, with sufficient space, with a functional sound system throughout all monitored sessions and appropriate lighting from all corners of the hall. Placement of chairs allows for visual access of the public, without prejudice to the confidentiality of communication between the subject and the lawyer (in case they are present).

b) Access to documents/files/procedures during preliminary communication and hearing of the KPK with the vetting subjects

Monitoring of the hearings so far has shown that that KPK has developed prior communication with the vetting subjects, which was confirmed by the subjects themselves during the first and subsequent sessions. During this phase, the subjects have been familiarised with the file, findings and preliminary documentation, and were given the opportunity to give explanations, comments, about the file/evidence and, subsequently, bring other evidence⁵¹ as well. The subjects stated that they were given a 15-day deadline to get acquainted with the file from the administrative investigation of the KPK and to file relevant objections.

In all monitored cases, the subjects were informed of their rights regarding the administrative investigation conducted by the KPK and the information received from other institutions and the right to present additional evidence, comments,

⁵¹ Pursuant to Article 47 of the Administrative Procedure Code "The right to submit opinions and explanations".

explanations and opinions about them, leaving them a **deadline**, which the KPK has considered appropriate. The AHC finds that the deadline has been different in different cases, ranging from 5 to 10 days. The KPK evaluation bodies have not provided arguments sustaining the different deadlines given for submission of evidence. Allocation of a longer deadline for the vetting subjects, at least 10 days, in our assessment, creates realistic conditions and opportunities for a subject to present additional or complimentary documents, to allow for a full equality of arms and an effective administrative investigation process⁵². In the court hearing of 28 June 2018, the vetting subject, at the end of the administrative investigation conducted by the KPK, was given the right to have access to the court file for a period of 5 days. This deadline was considered inadequate by the defence lawyer, according to whom a more reasonable time was required to bring new evidence during the hearing due to the outcome produced by the KPK's administrative investigation.

3.20 Solemnity, Impartiality and Ethics of KPK's Evaluation Panels

The monitored hearings have reflected a high level of solemnity, in all aspects -- namely in logistical terms, communication realised between the Media Coordinator and the public, the way how the room was organized, the entry of the panel, sharpness of initiation of hearings at the appointed time, submission/presentation of the rights to the individual subjected to vetting, recognition and guarantee of the right to be represented by a lawyer, as well as the reasonable duration of each of the monitored hearings. During all the sessions monitored, the KPK panel members, as well as representatives of the IMO, have been present throughout the hearing, and have stayed in the room up until its completion.

During the monitored sessions, behaviour and communication appeared to be within ethical norms. Despite the emotional burden of the process itself, the parties behaved in a correct fashion and there were no insults, threats or communications in a high tone. The subjects were informed of the composition of the KPK panel and up until June 30, there has been only one case when the vetting subject has had claims regarding the conflict of interest of the members of the panel. This request was filed by lawyer A.L at the hearing and the conflict of interest was claimed for the presiding judge. The request was not accepted by the KPK on grounds of Article 34 of the Code of Civil Procedure and was considered belated.

⁵² The Law "On the Right to Information for Official Documents" (Article 15) provides for a maximum deadline of 10 days to the institutions to issue the requested documents (which is in many cases not observed and prolonged).

3.21 Publicity of the hearings held by the KPK and KPA

The AHC appreciates the observance of the principle of publicity in the hearings held so far by the KPK and the KPA as an essential requirement of the right to a fair hearing. In this regard, a role for this outcome was played also by the legal opinion of the international experts engaged in the monitoring process, which was made available to the KPA and the AHC through an official letter.

Right from the outset of the process, prior to launching of priority hearing sessions, the Albanian Helsinki Committee suggested that measures had to be taken for the venues where the sessions were to be held to be appropriate for giving life to the principle of publicity in practice. This suggestion was taken into account.

In all cases we have monitored, the public and journalists were allowed to stay in the room throughout all the time of the deliberations. We have in no case found out that they were required to leave the venue.

By Decision No. 18, of 03 March 2018, the KPK has adopted the Media Rules (Guidelines) for the conduct of hearings with the vetting subjects. Article 3 of the Regulation provides that '(3.1) *KPK hearings **are public** and may be attended by journalists*'. The Regulation recognizes a wide discretion to the KPK's body to decide on the behaviour of journalists and media in the hearing room, as well as in cases where the media/journalists/public can be allowed to record/film, or the time they can communicate with messages. Section 3.9 of the Rules provides that "*If a permit is granted by the KPK and when such permit is granted, journalists are allowed to foot (visual) recordings of the official entrance of the panel to the venue where the hearing is held and at the opening of the hearing session by the presiding members. The cameras and microphones are then removed and these instruments are removed from the hearing room. Afterwards the cameras and microphones are turned off and they are removed from the hearing room*'. The same regulation is more or less foreseen in the Regulation of the Special Appeal Panel "**On Media Relations**", approved by Decision No. 11/1, of 13 April 2018. Article 3, paragraph 9 of the present regulation provides that "*After obtaining a permit from the College, the media are allowed to make (visual) recordings of the entering into the room and of the opening of the hearing by the presiding judge. Following this, the cameras and microphones are switched off and taken out of the room where the court session takes place*"⁵³.

⁵³ <http://www.kpa.al/wp-content/uploads/2018/06/Rregullore-p%C3%ABr-mar%C3%ABdh%C3%ABniet-me-mediat.pdf>

The restraint on media and journalists to not record the entire session and to afterwards decide themselves on the parts that are of interest to the public are controversial in terms of respecting the requirements of freedom of expression, as long as such restrictions are not expressly provided by law, but are only regulated by a statutory act of the KPK⁵⁴. The Code of Administrative Procedures and Law No. 84/2016 does not provide for restrictions on the audio-visual recording of hearings by the media, but the latter (No. 84/2016) refers to Article 20 of the Law on Administrative Courts, which provides for expressly foreseen limitations for conducting closed-door hearings. If we refer to the Civil Procedure Code, its Article 26 provides that media participation is restricted only on a **case-by-case** basis when the Court finds it is not in the best interest of trial. In any case, according to this provision, the final decision of the court is publicly announced. No closed-door hearings have been observed in any of the vetting hearings, however, despite this fact, after the opening of the hearing, the media were asked not to shoot/film.

It would be useful to evaluate whether the KPA and the KPA would discuss the level of publicity of the vetting hearings and if they deem it worthwhile to go towards a more transparent and respectful expression of freedom of expression, in accordance with the Constitution and the ECHR.

Concerning this finding, two of the vetting bodies, respectively the KPK and the KPA, have expressed their positions, which do not fully comply with the applicability or interpretation of the almost identical provisions made in these regulations. More specifically:

The KPC estimates that the Media Regulation is drafted on the basis of Article 20 of the Law on Administrative Courts⁵⁵, taking into account the best practices after consultations with the International Monitoring Operation. Commission's hearings are public and can be attended by journalists. The Commission provides facilities and helps journalists carry out their mission. Journalists are allowed to send messages in a text format, reporting on the hearings in real time. In this way, the Commission intends to provide transparency regarding the process, while maintaining the privacy of the vetted subjects. Hence, in this Regulation, the Commission has also taken care of the rights of vetting subjects.

⁵⁴ The right to free expression is provided for in Article 22 of the Constitution and Article 10 of the ECHR, whereas the limitations of the rights provided for in the Constitution are provided for in Article 17 of the Constitution and Article 10 of the ECHR.

⁵⁵ Law "On the Organisation and Operation of the Administrative Courts and Adjudication of Administrative Disputes".

In the meantime, the KPA estimates that referring to its Regulation on Media Relations, namely its Article 3, paragraph 1, it is explicitly stipulated that: "the Court hearings at the College are open to the media and in this respect the media are allowed to make audio-visual recordings during the opening of the hearing and its continuance. It is evident that at all hearings conducted so far by the KPA, the media were allowed to make audio-visual recordings until the end of the court session. Regarding Article 3, paragraph 9 of the Regulation (cited above), the KPA estimates that, according to this provision, in cases when the Chairperson considers it reasonable for cameras to leave the room in order not to affect the progress of the hearing, journalists continue to pursue the entire hearing.

The AHC respects the position of the KPK and the KPA, although it shares an opposite opinion, based on the arguments referred above in earlier in this document. Cooperation of both vetting institutions with the media has been positive, which has made the vetting process in these two instances transparent in the eyes of the media and the public. However, the concern raised by the AHC in this part of the report is about the formulation of the regulation of these two media relations institutions, where the limits imposed by it exceed those provided for in the Law on Administrative Courts, the Civil Procedure Code and Article 10 of the European Convention on Human Rights.

3.22 The right to defence (effectiveness) and the right to be heard (adversariality)

In all the hearings monitored by AHC, the KPK judicial panel has accepted the right to defence of the vetted subjects either in person, or through a counsel of defence of their own choice. In no case has this right been denied.

The presence of the counsel of defence means that he/she can present all the evidence and objections, both when the vetting subject is present, and he/she is not present *in persona* at the hearing. Nevertheless, at the hearing of 21 March 2018, the panel stated that it could not pose questions (neither the panel, nor to the IMO observers) to the vetting subject, despite the presence of his defence at this hearing, since the subject was not personally present. In our assessment, pursuant to Article 55, item 3 of Law 84/2016, as well as to the principles of fair trial, the panel is entitled to the right to ask questions even if the vetting subject is not physically present, but is instead represented by a defence council, who always reserves the right of not answering the questions.

During our monitoring, it has generally been ascertained that the KPK has recognized the right of the parties to submit new evidence or additional evidence, as well as submissions, comments, etc. In all monitored cases, the parties have submitted their evidence and claims, and they have generally been accepted by KPK for consideration in its decision-making.

In one of the hearings⁵⁶, the defence lawyer of the subject asked for the submission of new evidence with the argument that the results of the KPK at the conclusion of the administrative investigation had dictated the need to present new evidence and that such evidence could not be filed within the deadline specified by the KPK, which was deemed unreasonable. The request was not accepted by the trial panel, with the reasoning that during the preliminary administrative investigation, the vetting subject had been acquainted with any evidence coming out from this investigation.

In another case⁵⁷, it was found that the new evidence presented by the subject at the hearing conflicted with the evidence presented by the KPK judicial panel and, because of this situation, the defence lawyer requested the presence of an independent expert to determine the authenticity of the evidence in question. The KPK decided not to accept this claim, arguing that "*the KPK possesses an evidence (the private audit report as well as the financial analysis provided by the official authorities), therefore the expert act constitutes unnecessary evidence*". The rejection of this request is controversial and could violate the principles of fair trial⁵⁸. The vetting law gives the KPK the possibility and the right to call an expert and the act of expertise can be taken as having the value of evidence (Article 49/1, letter "b", Article 49/2).

⁵⁶ Hearing of 28 June 2018, dealing with the subject A.L.

⁵⁷ During the hearing of 11 April 2018.

⁵⁸ Article 49/6 of Law 84/2016 - "The request for receiving a piece of evidence is refused by the Commission or the Appeals College if it is not allowed by law, or when: a) taking of the evidence seems to be unnecessary; b) the fact sought to be tried is trivial for the decision-making, or can be tried during trial; c) the means of evidence is entirely unsuitable, or unreachable; ç) is made for the purposes of delaying the trial; d) a fact is claimed to be tried in favour of the vetting subject, which, even if considered true, plays no role in decision-making'.

3.23 Monitoring of KPK Decisions (*from the logistical point of view*)

Monitoring of the decisions announced by the KPK shows that all the decisions are in full available on the official website of the Independent Qualifications Commission at www.kpk.al, at the Decisions section, but it is difficult to access the Decisions in full, as one should go to the option '**download more**', and, in that case, he/she would be directed to the same main page.

Regarding this aspect, for an easier access to finding and reading KPK's decisions, we would suggest that the list of KPK decisions be fully featured on a single and separate web page, enabling a practical use of the KPK by all the ones concerned, including in this section the number of the decision, the date of publication of the reasoned decision, the identity of the subject, as well as the function the person held before the vetting process. This becomes even more important because many more decisions by the KPK will follow in the future (the model of the List of Decisions on the Constitutional Court's website).

Monitoring of the reasoned decisions on the KPK website shows that only one decision has a descending opinion, namely Decision No. 18, of 08 May 2018.

3.24 Standards and Clarity of Reasoning in the KPK Decisions

By monitoring the reasoned decisions published on the KPK's official website, one comes to the realization that the decisions on confirmation in office and the decisions on dismissals are very long and fall into frequent repetitions.

The trial panels have followed different standards in the way the decisions are structured or justified. Article 57 of Law No. 84/2016 provides that the rapporteur of the case shall justify in writing the decision of the Commission, which contains three main parts -- namely the entry, the descriptive-reasoning part, and ordering part. Article 57 stipulates that the descriptive-reasoning part shall consist of: a) the circumstances of the case, as assessed during the proceedings, and the conclusions drawn by the trial panel; b) the evidence and the reasons based on which decisions are taken; c) the rapporteur's report and recommendation; ç) the legal provisions serving as the basis for the decision.

From the decisions studied so far, it is noticed that their structure does not follow the elements required under Article 57 of Law No. 84/2016 in the same way. In general, the descriptive-justification part of these decisions is not clearly structured according to the four aspects delineated under the law and is not formulated concisely or even understandably. The length of a decision is not necessarily a determining element in assessing whether the decision is properly justified or not, or whether it is clear and comprehensive.

Considering the fact that these are the first cases of the vetting case-law, which is not yet consolidated, and the fact that some KPK members do not have previous experience in the judicial system, we would recommend their participation in trainings for building their decision writing and reasoning skills. The way the decisions are reasoned, unification of decisions' structuring, elements of clarity, comprehensiveness and conciseness, are, in our opinion issues that should be the subject of on-going discussions at the meetings of the KPK members.

A big portion of the decisions are based mainly on the assessment of the property of the vetting entities. The reasoning part of these decisions focuses on the details on the administrative investigation, focusing on the truthfulness of the declarations of the assets of the vetting subject and related persons, verification of the sources of creation of the income and of expenses, as well as identification or not of cases of asset hiding, false statements or conflicts of interest.

However, with regard to the analysis made in these decisions on the property criterion, there has been some ambiguity in some of the administrative actions performed by the KPK, which indirectly affects the transparency of the vetting process towards the public. More specifically, in the Decision No.19, of 14 May 2018, for the subject M. Xh, it is not clear why the KPK has requested the revision of the final act of the asset control and CISD property declaration on the subject. For the CISD report, lack of information may be related to declassification of information, however a wider analysis of this aspect could have been made in order to lead to a reasoned conclusion. In another decision (No. 17, of 04 June 2018), the KPK asks for a legal opinion from HIDAACI, but it is not clear what issues has such an opinion been asked for.

In Decision No. 14, of 13 April 2018, the KPK states that “... upon Decision no. 4, of 11 April 2018, the Trial Panel refuses the request of the subject for assigning an expert”, but it fails to provide a summary reasoning on the grounds on which this decision-making was based, thus creating uncertainty for the reader on the merits of the Decision. The lack of reasoning of this decision was noticed even during its communication to the subject at the hearing, which was monitored by the AHC observers.

In another case, the KPC Decision No. 16, of 03 May 2018 contains inappropriate terminology as it states that “the explanations given by the vetting subject *seem compelling and sufficient*” (p. 7 of the Decision), but it is not clear to the reader which are the concrete pieces of evidence based on which this conclusion is reached.

3.25 Does decision-making on one criterion imply that the two other vetting criteria have to be avoided?

In the case of dismissal decisions, it has been noted that, in some of them, the KPK has decided to complete the vetting process for the subjects in question only on the property criterion, not completing and not taking into consideration the investigation related to the other two criteria -- namely integrity and skills professional⁵⁹. In these decisions, based on the results of the administrative asset-related investigation, the trial bodies have estimated that this criterion is sufficient for the decision-making process related to the transitional vetting of the respective subjects.

The Constitution of the Republic of Albania and Law No. 84/2016 provide that the vetting process requires control of all the three components underlying it, so the process would not be complete or transparent to the public if the subjects are not subjected to all the three filters of control.

In one of the decisions we analysed, it turns out that there were 11 complaints from the public for the subject in question, but despite of it all, the KPK did not complete the administrative investigation on the professional skills of the subject, but only investigated on the asset criterion. Failure to fully implement the vetting process for these subjects and eventual change of decision-making as a result of the right to appeal can lead to delays in the process. Also, this KPK practice is not clear and consistent, as in other cases, the KPC has analysed all the three criteria.

⁵⁹ See Decision No. 12, of 23 March 2018, Decision No. 14, of 13 April 2018, and Decision No. 15, of 20 April 2018.

What will happen if the subjects dismissed from office only on grounds of one criterion and for whom the administrative investigation for the other two criteria has not been completed, exercises the right to appeal to the KPA and the latter decides to amend the decision, or quash it altogether? How can the process be completed for these subjects, in the conditions when the administrative investigation for the other two components is not completed by the KPK? According to Article 66, paragraph 1 of Law No. 84/2016, the KPA may at the end of the process do one the followings: first, uphold the KPK decision; second, change the KPK decision; and, third, override the KPK decision. Thus, unlike ordinary courts, the KPA cannot completely or partially annul the decision and send the case back for retrial to the KPK. In other words, if the KPA has a different assessment of the criterion on which the subject has been dismissed by the KPK, then the KPA receives the attributes of the first instance vetting body and must complete the administrative investigation for the other two vetting criteria.

Regarding this issue, the KPK has submitted its observations, explaining that the realization of the vetting process is determined by Constitutional Court Decisions No. 2/2017 and No. 78/2017, the Constitutional Annex and the Law No. 84/2016. The vetting process is carried out on the basis of three criteria, asset valuation, integrity, and professional skills appraisal. The Commission and the Special Appeals Panel are the institutions that decide on the final evaluation of the vetting. A decision is made based on one or more of the criteria, on the overall assessment of the three criteria, or in the thorough evaluation of the procedure, pursuant to Article 4 of Law No. 84/2016.

The AHC respects KPK's position on this issue, although it wishes to note that Article 4 of Law No. 84/2016, systematically interpreted with other provisions of the law is again unclear and can be read differently from its application so far by the KPK. However, we are of the opinion that it is the KPA case-law about the cases analysed in this part of the report, or other analogous cases, which will clarify some of the questions raised in this part of the report. Pursuant to Article 66, paragraph 2 of the Law No. 84/2016, the Appeals' Panel, in the reasoning of its decisions, orients the Commission towards resolving similar cases.

3.26 Standard of analysis regarding the asset criterion in the KPK decisions

An issue which does not seem to be entirely clear in the decisions of the KPK to date has to do with the definition of concealment of property and the application of the principle of proportionality and objectivity when the vetting institutions find concealment of property by the subject. Thus, in the KPK's Decision No. 14, of 13 April 2018, on behalf of the subject B.T, the panel found that the subject has not disclosed in the asset declaration form the net income from his daughter's salary, employed in a public institution, in the amount of Albanian Lek 148.226. The Decision underlines that the subject and related persons have the obligation to declare the net income and bank account statements up to the declaration period, regardless of whether such income is established or not by virtue of lawful sources. Regarding this issue, it is difficult to reach a conclusion without being aware of the administrative investigation. Failure of the subject to declare this amount may also be due to an inaccuracy in the declaration. It is difficult to qualify this instance as concealment of property not only because of the not-so-high value, but even because it is a pay-roll salary and, moreover, her employer is a state authority. Concealment requires a subjective element, that is, the intention not to declare the income and, in the case in question, the purpose of hiding such income makes no sense if we consider the fact that the employer is public and the salary is paid via a bank and it is, therefore, impossible to hide. However, further consolidation of KPK's decision-making or future decisions of the KPA may provide a more clear definition of the concept of the concealment of property, which is different from inaccuracies in the declaration, or lack of disclosure.

Decision No. 17, of 04 June 2018, the KPK finds that (p. 15 of the Decision) *“in respect of income derived from “working in black”, the employee could not engage in an illegal relationship to gather huge savings, as they can only cover the daily needs. Under these circumstances, the Commission considers that the earnings claimed from the scholarship and working in the black market are not convincing sources for justifying this property”*. This finding about *“working in the black”* and engagement in it to earn cash only covering the daily needs is not clear in relation to appraisal of the property criterion of the vetted subject, or related persons, because individuals can be engaged in illegal or *“works in the black market”* even for large amounts of cash.

3.27 Incompliance of the data of the auxiliary bodies with the data of KPK's administrative investigation (based on the analysis of the KPK's decisions)

The role of auxiliary bodies in the vetting process has been followed by discussions related to the function of these organs regarding the investigation, evaluation and decision-making of the KPK or KPA on the criteria of property, integrity and professional skills.

In two out of the studied decisions it was noted that the results of the HIDAACI, as an auxiliary body, were not consistent with the results of the administrative investigation conducted by the KPK⁶⁰. In some cases, the KPK has requested the review of the reports of the auxiliary bodies, which, in their second report, have overturned the conclusions of the first report, maintaining a different attitude on the integrity of the subjects. It is also noted that the KPK has carried out an extensive administrative investigation and has not sufficed itself only with the reports of the auxiliary bodies, concluding the investigations with different conclusions from those of the auxiliary bodies. Moreover, in some cases, the data on the property declaration in the vetting context have been compared by the KPK with the data submitted in the framework of the periodic declarations filed by the entities to HIDAACI during the exercise of their function. It has on certain cases concluded that there are inaccuracies and mismatches in these declarations.

The KPK, while analysing the data of the auxiliary bodies has also referred to the position held by the Constitutional Court in its Decision No. 2/2017 (analysed above in this present report). This is a positive experience for establishing precedents regarding the status of the vetting bodies, as the likes of KPK and KPA, in relation to traditional bodies that do not have decision-making powers, but help in the vetting process of judges and prosecutors such as HIDAACI, DSIC and HCJ/General Prosecution Office.

3.28 KPK's decision-making (confirmations/dismissals)

As noted above, KPK has issued a decision for 27 vetting subjects, where in 12 cases vetting was discontinued due to resignation, in 9 cases it has ruled on a confirmation in office and in 6 cases it has ruled on dismissal from office up until the end of June 2018. By the end of June 2018, the KPK has published reasoned decisions for 21 subjects, out of 12 were decisions on termination of the vetting process, 5 were decisions of dismissals and 4 were decisions of confirmation in office.

⁶⁰ See Decision No. 15, of 20 April 2018 and Decision No.19, of 14 May 2018.

The KPK has respected the 30-day legal deadline for the reasoning of the decisions, a deadline which starts from the date of notification of the decision⁶¹. However, the AHC observers have recommended that the KPK’s official website, in the section on the publication of the decisions, besides each decision, contains the date of publication of the reasoned decision, which would enable a more strict monitoring of compliance with the deadline.

An analysis of the five reasoned decisions where the disciplinary measure of dismissal is issued shows that the concrete causes/reasons justifying the dismissal according to the KPK pursuant to Article 61 of Law No.84/2016 are as follows:

- » 2 cases⁶² – for item 1 and 3 of Article 61, respectively that **“finds that he/she has declared are more than double the lawful property during the process of property evaluation, including the persons related to him/her”** and that **“it turns out that he/she has made an insufficient declaration on the property criterion”**;
- » 2 cases⁶³ – for item 3 and 5 of Article 61, respectively that **“finds that there is an insufficient declaration for the property criteria”** and that **“the overall evaluation shows that the vetting subject has affected the public trust in the justice field and is found in the conditions of impossibility for filling out the deficiencies through the training programme”**;
- » 1 case⁶⁴ – for item 3 of Article 61, **“turns out that he/she has made an insufficient declaration for the property criteria”**.

CAUSES OF DISMISSALS IN THE KPK’S REASONED DECISIONS



⁶¹ <http://kpk.al/vendime/>

⁶² <http://kpk.al/wp-content/uploads/2018/05/Vendimi-FINAL.pdf> , file:///C:/Users/USER/Documents/Vetting/Vendimet%20e%20Shkarkimit/KPK-Vendimi-Fatos-Lulo-23032018-Njoftuar-Anonimizuar.pdf ,

⁶³ For the subject AXH, member of the Constitutional Court, Decision No. 17, of 04 June 2018.

⁶⁴ file:///C:/Users/USER/Documents/Vetting/Vendimet%20e%20Shkarkimit/vendim-Fatmir-Hoxha.pdf

In the reasoning part of the KPK's decision, it turns out that in the overwhelming majority subjects have been dismissed for the property component due to the lack of legitimate financial resources to justify the property, false or inaccurate disclosure of assets, or the declaration of more than double of the legitimate assets. Only in one case, it turns out that in parallel to the property component, the subject has resigned because public allegations have been found grounded, leading to undermining of public confidence in the justice system.

More detailed information on the justification of the KPK decisions will be published in the final monitoring report, the draft of which will be consulted in advance with interested institutions and stakeholders.

3.29 Denunciations to the Prosecution Office if data/facts/evidence making up for criminal offences are disclosed in the course of the vetting process

As it is well known, vetting is a *sui generis* process of an administrative nature, which is not intended to penalize judges and prosecutors who are subject to it, but leads at the end of the process to confirmation in office, dismissal from office or suspension from office for a one-year period. However, the vetting institutions have a duty to report to the Prosecution Office if, during the administrative proceedings, they find data, facts or evidence that constitutes an *ex-ufficio* criminal offense.

According to the data published on the KPK's official website⁶⁵, pursuant to Article 281 of the Criminal Procedure Code, it has referred to the Office of the Prosecutor General all the documentation resulting from the administrative investigation during the vetting process for a former judge of the Constitutional Court (with initials B.I). This is the only notice for referral of administrative investigation materials to the Prosecution Office. According to the communication of AHC with the Tirana First Instance Prosecutor's Office, for this referral, No. 3671, the Prosecution Office has decided on 03 April 2018 to not initiate investigations. The decision has been notified to the interested parties.

Given the number of resignations and of cases of dismissal decisions due to the property criterion, the AHC has filed a request for information to the Serious

⁶⁵ <http://kpk.al/2018/03/20/njoftim-5/>

Crimes Prosecution Office and the Judicial District Prosecutor's Office for the criminal offenses that they have in their matter and territorial jurisdiction, whether or not the KPK has in the context of the vetting process filed any criminal lawsuit pursuant to Article 281/item 1 of the Code of Criminal Procedure for those subjects for whom the process is discontinued, or for which a dismissal has been decided. Most of the Prosecution Offices have responded to the AHC's official request for information. Except for the above-referred-to case, it turns out there have been no denunciations for criminal offences.

4. RECOMMENDATIONS

Recommendation 1: We suggest that the KPK continues with the dynamic pace of hearings for the priority subjects and, later, for the other subjects, by way of engaging evaluation panels in parallel hearings, but not causing overlaps during a calendar week.

Due to the importance and volume of the vetting process, which provides for a transitional re-evaluation of about 800 subjects, the Albanian Helsinki Committee (AHC) is aware of the fact that this is a rather complex and difficult process. However, the AHC is of the opinion that this high volume of work asks for a quick paced and more dynamic activity by the Constitutional independent vetting institutions, without affecting the quality of the vetting process.

Recommendation 2: We suggest the review of the organizational structure of the vetting institutions, in order to reply to the realistic workload of these institutions.

Recommendation 3: We suggest continuation of the observation and evaluation of the vetting process by the public, but without prejudice to the human dignity of the subjects. We suggest the vetting institutions to ensure full transparency in hearings and their decision-making.

Since the International Monitoring Operation does not publish comments, and reports only within itself, we would suggest that the public becomes familiar with the recommendations of international observers in the decisions of the vetting institutions.

Recommendation 4: We suggest a review of the KPK and KPA Media Relations Regulations regarding the restriction imposed on audio-visual recording after the opening of the hearing, which, in our opinion, is not in accordance with the requirements for ensuring freedom of expression, as laid down in the European Convention on Human Rights and the Constitution of the Republic of Albania.

Recommendation 5: We suggest organization of continuous trainings on important aspects of implementation of the vetting legislation, which ask for increased capacities of the members of the vetting bodies, such as better decision writing and reasoning capacities.

Recommendation 6: We suggest the vetting institutions⁶⁶ to be engaged in proactive communications with citizens and inform them about the progress of review of their denunciations.

Since the justice system reform was initiated and implemented by taking into account the citizens' needs and their complaints over the justice system, it is understandable that most citizens have complaints about the merits of their cases and, consequently, claim unfair decisions by the Prosecution Offices and the Courts.

The AHC considers that a specialized investigation of every complaint may be required, which may identify, either indirectly or directly, elements related to the aspect of professional skills, property or integrity to the vetting subjects against whom the complaints are filed.

We suggest the IKP and the KPA to publish the number of public denunciations that have been administered and reviewed by them.

We suggest that the positive practice of the KPA be followed by the two other vetting bodies, namely disclosure of official information for every case of denunciation and their treatment and review.

Recommendation 7: We suggest the vetting bodies to publish periodic and updated statistical data on their website on the number of subjects and the (vetting) process outcomes.

Recommendation 8: Regardless of the way how the work is organised and shared amongst the trial panels, we suggest the KPK, pursuant to Article 4, paragraph 5 of Law No. 84/2016, to exercise its functions respecting the principle of equality of arms before the law.

⁶⁶ Through the staff responsible for citizens' reception/complaints.

Recommendation 9: Any person, regardless of their official position or public status, is suggested to avoid any form of reaction that may be perceived as interfering even remotely in the activity of vetting institutions, or in the activity of judges and prosecutors undergoing the vetting process.

Recommendation 10: We suggest the KPK trial bodies to make available to the vetting subject a reasonable time for submission of additional evidence, comments, explanations and opinions related to their case (for instance, in a minimum of 10 days) at the end of the administrative investigation.

Recommendation 11: We suggest the KPK trial bodies and International Monitoring Operation representatives to respect in their declarations/statements, the right of the subjects to not be present at the hearing when their legitimate interests and rights are defended by their counsel, who are present at the hearing and duly authorized for their representation even in their absence.

Recommendation 12: In order to ensure an easier access to finding and reading the KPK decisions, we would suggest featuring of the KPK's decisions on a single web page to allow for a practical use of the decisions by all interested stakeholders, including in this section the number of the decision, the date of publication of the reasoned decision, alongside the identity of the subject, as well as the office it served before the vetting process.

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