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**EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW**  
**(VENICE COMMISSION)**

**ALBANIA**

**DRAFT OPINION**

**ON THE EXTENSION OF THE TERM OF OFFICE OF THE  
TRANSITIONAL BODIES IN CHARGE OF THE RE-EVALUATION OF  
JUDGES AND PROSECUTORS**

**On the basis of comments by:**

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## I. Introduction

1. By letter of 5 November 2021, the Speaker of the parliament of Albania requested an urgent opinion of the Venice Commission on the extension of the mandate of the transitional bodies in charge of the re-evaluation of judges and prosecutors in Albania (CDL-REF(2020)096).
2. Messrs Kask and Kuijer, Ms Nussberger, Mr Pinelli, Ms Suchocka and Mr Tuori acted as rapporteurs for this opinion.
3. In light of the proximity of the 129<sup>th</sup> Plenary Session, the opinion was prepared as an ordinary one. Due to the time constraints and to the follow-up character of this opinion, no visit was carried out either in person or online. The Commission has had access to information on the position of representatives of civil society, such as the Institute for Political Studies (ISP), the Albanian Helsinki Committee and the Association of Albanian anticorruption lawyers.
4. This opinion was prepared in reliance on the English translation of the draft law and of its Explanatory Note. The translation may not accurately reflect the original version on all points.
5. *This opinion was drafted on the basis of comments by the rapporteurs. It was adopted by the Commission at its ... Plenary Session ... (Venice and online).*

## II. Background and scope of the request

6. In the opinion request, the Speaker recalls that the vetting system for the re-evaluation of about 800 persons (judges, prosecutors and legal assistants/advisors) is performed in Albania by various bodies. At first instance, the vetting is carried out by the Independent Qualification Commission (IQC), while appeals against IQC decisions (either submitted by the person vetted or by the Public Commissioner – or PC) will be reviewed by the Independent Appeal College (AC) as a chamber of the Constitutional Court.
7. According to Article 179/b para. 8 of the Constitution, the mandate of the IQC members and the PC shall expire after five years from the date of commencement of their operation, while the mandate of the AC shall cease to exist after nine years of operation. After the dissolution of the Commission, pending re-evaluation cases shall be conducted by the High Judicial Council (HJC) in accordance with the law. Pending re-evaluation cases of the prosecutors shall be conducted by the High Prosecutorial Council (HPC) in accordance with the law. After the dissolution of the Public Commissioners, their competences shall be exercised by the Chief Special Prosecutor of the Special Prosecution Office. Any appeals shall be adjudicated by the Constitutional Court.
8. The 5-year mandate of the IQC and PC ends on 17 June 2022, while the AC's 9-year mandate terminates on 17 June 2026.
9. The vetting process effectively started in February 2018. According to the Speaker, it is estimated that at the end of the mandate of the IQC and PC, in June 2022, about 1/3 of the cases or about 300 cases will remain uncompleted,<sup>1</sup> which would need to be forwarded for consideration to the HJC and HPC.
10. According to the Explanatory note, the vetting process has encountered several hurdles which justify, in the eyes of the Albanian authorities, the delay in the finalisation of the vetting process.

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<sup>1</sup> According to the Explanatory note, "from the available data, until July 2021 it results that ICQ completed the vetting process for 421 subjects. By June 2022, 71 reassessment processes are expected to be completed. At the end of the 5-year mandate, it results that ICQ should have carried out a total of about 500 vetting cases and a total of about 300 other cases will remain uncompleted."

- all necessary measures that had to be taken to set up the vetting institutions and procedures such as recruitment of staff, training, establishment of procedures, application of the procedures;
- the pandemic COVID-19, which had a direct impact on the activity of the Commission, as in any other sector, causing serious delays (for 4 months the activity was stopped, while for about a year the functions slowed down on account of the lack of logistical infrastructure, the lack of electronic equipment, the difficulty of accessing confidential documents and the delay in the responses of the other authorities.

11. 39 members of parliament (out of 140) of the Socialist Party subsequently tabled the constitutional amendment under consideration, aimed at extending the mandate of the members of the IQC and of the PC for two and half more years, from 17 June 2022 to 31 December 2024.

12. The Speaker has put two questions to the Commission:

- Is the extension of the mandate of the vetting bodies (IQC and PC) until 31 December 2024 in line with European standards and general principles undermining the system of human rights protection of the European Convention on Human Rights, notably the requirement of vetting being an extraordinary and temporary measure as recommended by the prior Venice Commission opinions?
- Would the transfer of initiated but uncompleted cases to the Councils and to the Special Prosecution Office meet the standard that vetting is an extraordinary and temporary measure, taking into account:
  - i. the principle of equal treatment and consistency of procedures;
  - ii. that these three independent institutions have competencies substantially different from the vetting bodies and will have to commit significant time and administrative resources for consolidating the necessary administrative procedures and structures to guarantee the principles of due process, adding significantly to the workload and responsibilities of these nascent institutions?

### III. Analysis

#### A. The Commission's position as to the duration of the vetting process in Albania

13. In its interim opinion on the draft constitutional amendments on the judiciary of Albania, the Venice Commission addressed the question of the duration of the vetting process. The Commission, expressing concerns in respect of the first version of the provisions relating to the extension of the mandate of the vetting bodies (which did not provide that the duration of the mandate would be fixed in the constitution, but that it would be decided by parliament with simple majority), stated that if the possibility of extending the vetting process were made too easy, there was a *“risk of transforming the vetting process into a de facto permanent arrangement, parallel to the ordinary accountability mechanisms. The Draft Amendments should make it clear that once a sitting judge passes through the vetting, his/her accountability would be further regulated by the ordinary rules contained in the Constitution and in the implementing legislation”*. The Commission therefore indicated the criteria for extending the mandate of the vetting bodies: that it should be based on objective reasons; that it should have a legislative basis and that it should be adopted by a qualified majority:

*“The mandate of the IQC might be prolonged only if the vetting process has not been completed for objective reasons (i.e. not all of the sitting judges have passed through it). Second, the possibility of extending the mandate may affect the independence of the commissioners: it is well known that the eventual prolongation or reappointment makes*

*office holders more compliant vis-à-vis the authority which decides on it. So, the conditions in which the mandate of the commissioners is prolonged should be described in the law, and this decision should belong to a larger majority.”<sup>2</sup>*

14. In its final opinion on the revised amendments to the Constitution of Albania, as concerns the vetting process the Venice Commission stated:

*“54. One general critical remark, however, remains: under the revised Draft Amendments the mandate of the members of the Independent Qualification Commissions (IQC) and judges of the Specialised Qualification Chamber (SQC) responsible for the vetting process will be 9 years without the right of re-appointment (Article 179/b p.3), while the whole vetting process is supposed to last 11 years or less if Albania joins the EU on an earlier date (Article 179/b p. 4). This duration is too long. In the Interim Opinion, the Venice Commission recognized the need for the vetting under condition that “it is an extraordinary and a strictly temporary measure” (§ 100). The vetting structures should not replace ordinary constitutional bodies, such as the HJC or HPC; they may co-exist with them for some time, but should not turn into parallel quasi-permanent mechanisms.*

*55. The Venice Commission is not in a position to indicate exactly how much time will be necessary to vet all sitting judges and prosecutors. It is conceivable that in the most complex case vetting procedures may take more than three years or even longer. It is up to the legislator to ensure that the persons subject to the vetting cannot artificially delay the vetting procedures, and that the commissioners, members of the IQC and judges of the SQC have the necessary resources and powers to complete the procedures within reasonable time. In sum, the Venice Commission recommends to reconsider Articles 179/b pp. 3 and 4 and Article C p. 1 and reduce significantly the duration of the vetting process.*

*56. It would be desirable to put a fixed time-limit of about 3-5 years on the length for which the IQC and the SQC would exist. There should be a possibility, provided for by the Constitution, for the extension of that period under conditions to be established by law. Following the winding-up of the vetting bodies, ordinary institutions and courts might assume any residual function of deciding on the vetting procedures which had not been concluded.”<sup>3</sup>*

15. The Venice Commission thus added that the legislator should provide for measures to avoid that vetting procedures may be artificially delayed by the subjects of the vetting, and that sufficient resources and powers be given to the vetting bodies. At the same time, the Venice Commission was reluctant to accept a long duration of the vetting procedure, not only because it should be considered to be temporary and exceptional, but also because it might endanger the proper functioning of the judiciary.

16. In a more recent opinion, the Commission stated that *“it is obvious that the vetting process must be conducted as swiftly as possible, albeit providing a fair examination of each case. Appropriate modalities must be found, and changed if necessary, for this process not to prevent the functioning of the judicial institutions of Albania. The Commission cannot but recommend speeding up and rationalising the vetting process, it being understood that the vetting on the level*

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<sup>2</sup> Venice Commission, Interim opinion on the draft constitutional amendments on the judiciary of Albania, CDL-AD(2015)045, para. 102,

[https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2015\)045-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2015)045-e)

<sup>3</sup> Venice Commission, Opinion on the revised draft constitutional amendments on the judiciary of Albania, CDL-AD(2016)009, paras. 54-56,

[https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2016\)009-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2016)009-e).

*of the Independent Qualification Commission as well as the Special Appeal College will have to continue to be applied in a coherent manner. ...The process must not result in the continued paralysis of the judicial institutions”<sup>4</sup>*

**B. Whether the extension of the mandate of the vetting bodies is compatible with the Venice Commission’s criteria**

17. The Venice Commission has thus previously referred to the following criteria for the extension of the mandate of the transitional vetting bodies to be acceptable in the light of the European standards:

- it should be based on objective reasons.

18. In its 2015 opinion, the Commission gave as an example of an “objective reason” for the need to prolong the process that “*not all of the sitting judges have passed through it*”. Now, if the mandate of the IQC and of the PC are not extended, approximately one third of the vetting procedures will be carried out by ordinary institutions, the High Judicial Council and the High Prosecutorial Council (as far as the IQC is concerned) and the Chief Special Prosecutor of the Special Prosecution Office (as far as the PC is concerned).

19. The Venice Commission finds that the reasons for the delay in the finalisation of the vetting process constitute such ‘objective reasons’. While it may be doubtful if the necessity to put in place the vetting institutions and procedures is a valuable argument as that could be calculated from the very beginning, the difficulties encountered due to the COVID-19 are real. It is true that in 2020 the Commission expressed concerns as to the pace at which the vetting procedures were being carried out. Nevertheless, the prolongation of the extraordinary process needs to be assessed in the light of two main arguments advanced by the Albanian authorities.

20. First, the Rule of Law requires that legislation must respect the principle of equality: it must treat similar situations equally and different situations differently.<sup>5</sup> If there is no extension, as many as one third of the vetting procedures would be carried out by the ordinary disciplinary institutions in accordance with their own procedures and working methods instead of by the specific transitional bodies which have carried out the process until now. While in principle it would seem inevitable that a few outstanding cases be passed to the latter institutions in case they are not completed before the deadline, to subject one third of the process to a procedure which would inevitably be different would raise, in the Venice Commission’s opinion, an issue of equality in law. Such a difference in treatment would not appear justified.

21. Even though the vetting process carried out up to now enables the same task to be fulfilled by the ordinary (higher) judicial institutions, the prolongation of the tasks of IQC and PC would avoid inconsistency in the vetting standards and practices, as well as procedures. The risk of a lack of consistency in the decision-making would be, in the light of the number of cases, too large to imagine that it could be simply corrected on appeal.

22. Secondly, the Commission recalls that one of the main reasons for limiting the duration of any vetting process is the need to provide for foreseeability of the effects of the law, hence to preserve legal certainty. However, transferring 300 cases to the HCJ and the HCP would require that the latter institutions adopt new procedures, become acquainted with the vetting procedures and case-law and organise their work. It is to be expected that this preparation would require a

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<sup>4</sup> Venice Commission, Opinion on the appointment of judges of the Constitutional Court in Albania, CDL-AD(2020)010, para. 83,

[https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2020\)010-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2020)010-e)

<sup>5</sup> Venice Commission, Rule of Law Checklist, Benchmark D. 3,

[https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2016\)007-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2016)007-e).

significant amount of time, so that it appears unrealistic to complete the process long before 31 December 2024. There would thus be no benefit in terms of legal certainty.

23. In this connection, the Venice Commission stresses that while the vetting process must be conducted as swiftly as possible, this must not be done at the expense of the fairness of the procedures: it is essential to provide for the fair examination of each case.

24. The Venice Commission is of the view, in conclusion, that the delay of the proceedings in so far as it was caused by the pandemic is objective and justifies to extend the mandate of the transitional vetting bodies

25. Further criteria identified by the Commission are that:

- the extension should have a legislative basis
- it should be adopted by a qualified majority:

26. In this respect, the Commission notes that the extension would be made through a constitutional amendment, which requires a majority of two thirds (Article 177 of the Constitution), hence a broad support beyond the ruling parliamentary majority. These criteria would therefore be fulfilled.

27. Last, but not least, the Venice Commission deems it essential that the vetting procedure does not render the justice system dysfunctional. While the Venice Commission has received a letter from the Association of Albanian Anticorruption Lawyers expressing their concern about the length of procedure in individual cases due to the non-functioning of the courts, the Venice Commission does not have any reliable information in this respect. It is necessary to stress that the vetting procedure must not result in a continued paralysis of the judicial institutions as this would lead to manifold human rights violations under Article 6 ECtHR.

28. Therefore, it is extremely important to provide for adequate guarantees that this extended deadline will be finally met and that during the period until 31 December 2024 the courts can function. For this to be possible, it is necessary to draw lessons from the past experience; the Commission has indicated the need 1. to make sure that sufficient resources and powers be given to the vetting bodies 2. To rationalise the process and 3. to watch out that the minimum quota for decision-making in the courts at all levels are fulfilled.

29. The Commission has been informed by the European Commission that significant progress of vetting and operational capacity of the vetting bodies has been achieved. The vetting processes are being streamlined (presumably also including measures to prevent artificial delays) and additional resources (such as additional legal advisors) have been devoted to the vetting bodies.<sup>6</sup> The Commission welcomes this proactive approach.

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<sup>6</sup> According to the information received by the Commission,

- On October 8, 2021 the vetting institutions had completed 453 cases in first instance (the Independent Qualification Commission, 'IQC') out of the total 805 magistrates that have to undergo vetting.
- To date, investigations on all assessees have been initiated by the IQC.
- Overall, 63% of the vetting dossiers processed so far by the IQC have resulted in dismissals, voluntarily resignations or other form of termination of tenure by the assesses. There have been 184 dismissals through hearings, mostly for issues related to unjustified assets. Appeals are pending for 83 of such dismissal cases.
- On 21 occasions IMO recommended to the Public Commissioners appeal; each time the recommendation was followed by the Public Commissioners.
- In 2 cases, the IOs issued dissenting opinions on decisions of IQC and Appeal Chamber (AC).
- Detailed breakdown:

#### IV. Conclusion

30. The Venice Commission has been asked by the Speaker of the Albanian parliament to express its opinion as to whether the proposed extension of the mandate of two transitional vetting bodies – the Independent Qualification Commission and the Public Commissioner – from 17 June 2022 to 31 December 2024 may be considered in line with European standards and with its previous recommendations.

31. The Venice Commission has previously stressed that an extension of the mandate of the vetting bodies should be based on objective reasons, should have a legislative basis, and should be adopted by a qualified parliamentary majority.

32. The Commission is of the view that the proposed extension of the mandate of the IQC and PC meets these criteria. The extension would guarantee equality in law and contribute to legal certainty, while the results of the work thus far carried out by the vetting bodies demonstrate the need to finalise the process for the remaining assessesees. Further, the extension would be made through a constitutional amendment, which requires a majority of two thirds, hence a broad support beyond the ruling parliamentary majority.

33. It is crucial that the extension needs to be accompanied by an increase in the resources of the vetting bodies and rationalisation of their procedures. The Commission has been informed that the vetting processes are indeed being streamlined and additional resources have been devoted to the vetting bodies. This is welcome.

34. In light of these elements, the Commission concludes that the proposed extension of the mandate until 31 December 2024 may be considered to be compatible with European standards so long as the functioning of the judiciary as such is ensured.

35. The Venice Commission remains at the disposal of the Albanian authorities for further assistance in this matter.

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- 453 pronounced decisions in first instance (IQC) out of which:
    - 184 dismissals (40%).
    - 166 confirmations (37%)
    - 102 decisions on termination of the vetting proceeding, out of which 76 due to resignation (17%) and 25 due to other reasons (6%).
    - 1 decisions of suspension from office (0%)
  - Final decisions in second instance after appeal at the AC
    - 136 confirmations
    - 85 dismissals
    - 98 terminations (out of which 74 resignations)