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THE VETTING PROCESS IN THE CONTEXT OF OBLIGATIONS FOR INTEGRATION INTO THE EUROPEAN UNION

Policy paper

POLICY DOCUMENT

"The Vetting Process in the context of obligations for integration into the European Union"

Based on the analysis of decision-making by transitory re-evaluation institutions for judges and prosecutors, issued during the period January – December 2021, and the progress of prosecutions of subjects of the vetting process

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Introduction

The approval of the new European Union (EU) enlargement strategy and obligations deriving for Albania from it indicate the importance of strengthening the rule of law for the integration process. Two of the EU preconditions, according to the new enlargement strategy, refer to further progress of justice reform, in the context also of the vetting process, and the taking of concrete measures for the start of prosecution for former judges and prosecutors, for whom during the vetting process there was data or facts of commission of criminal offenses.

These positions are also reflected in the latest annual European Commission Report on Albania,[1] which appreciates the vetting process as one that has advanced sustainably and has continued to yield tangible results, a condition that continues to be fulfilled in the context of the first inter-governmental conference. EU's expectation is that the institutions of transitory re-evaluation (or vetting) continue to refer to the prosecution all cases when there is data about the commission of criminal offenses.

The process of the vetting of judges and prosecutors bears special significance toward strengthening accountability and responsibility of the judicial power and the prosecution office. Although the process is just one link of Justice Reform, and is of a transitory (temporary) and extraordinary nature, the expectations of experts who conceived this constitutional instrument aimed at restoring citizens' trust in the

[1] https://ec.europa.eu/neighbourhood-enlargement/albania-report-2021_en

justice system. Beside advancing in time and numbers, it is important that this process offer such decision-making that is in accordance with the Constitution, law 84/2016 "On the transitory re-evaluation of judges and prosecutors in the Republic of Albania," as well as the standards of due legal process. That is the only way for this process to clean up the system of judges and prosecutors who are found to have problems with regard to assets, integrity, and professional capabilities.

Until January 31, 2022, the Independent Qualification Commission (IQC), which conducts vetting in the first instance, issued 499 decisions, or 62.3% of the total of subjects that should be subjected to this process.

Pursuant to its mission, the Albanian Helsinki Committee (AHC) has monitored for 6 years now the establishment, functioning, and activity of the institutions of transitory re-evaluation, in the spirit of a constructive, objective, and professional approach. The monitoring aimed at informing the public about the progress of this process, encouraging citizens to address complaints toward judges and prosecutors, and to collaborate with the vetting institutions, to point out the strengths of this process, identified loopholes, and address recommendations as a function of harmonizing decision-making related to this process.

Public Commissioners (PC) and IQC members have entered the fifth year of their mandate while about 38% of the subjects are expected to go through the control filters of this process (in the first instance). The length of the process to date has made its progress in time and therefore its completion difficult, at the first instance, within the initial 5-year mandate of these bodies. On 10.02.2022, the Assembly approved constitutional amendments that enable the extension by two and a half years of the mandate of Public Commissioners (PC) and IQC members, namely until December 31 of 2024.[2] As expressed during the consultation process, AHC has considered that the established standards and the decision-making practice of the IQC and the PC complaints to date guarantee good coherence and sustainability for the subjects awaiting the vetting process in the first instance. This aspect was also underscored in the Opinion of the Venice Commission on the Constitutional Amendments, which supported the extension of the mandate of vetting bodies (IQC and PC).

[2] https://www.parlament.al/Files/ProjektLigje/20220218103020ligj%20nr.%2016,%20dt.%20%2010.2.2022.pdf

Through this Policy Paper, AHC seeks to present the progress and conduct of the vetting process, from the standpoint of the main obligations deriving from the European integration process. The analysis conducted in this document lies in two main directions:

First, it evaluates the statistical progress of the decision-making, of which 30 decisions, issued during the period January – December 2021[3] were selected. The decisions were selected by keeping in mind indicators such as the impact of the cases in public and the diversity based on the type of decision issued by the responsible body in each instance. From a methodological standpoint, the study of the selected sample was based on the evaluation of respect for the principles of the vetting process, looking at the standards of due legal process; the standard pursued in re-evaluating the three criteria to look at whether there is a unified line; the standard in terms of clarity and coherence in the reasoning of the decision also linked with the transparency that relevant decisions guarantee vis-à-vis the public.[4]

Second, it analyzes from a statistical standpoint the process of prosecution of cases referred to the prosecution offices of ordinary jurisdiction or the Special Prosecution against Corruption and Organized Crime. As is known, vetting is a *sui generis* process with an administrative nature, which does not have as a goal the criminal punishment of judges and prosecutors subjected to it. At the conclusion of this process, if the subjects have not resigned or the status is not completed for other reasons, the vetting bodies decide on confirmation in office, dismissal from office, or suspension from office for a one-year period. According to the Criminal Procedure Code, re-evaluation institutions have a duty to file referrals to the prosecution office if during the administrative process, they discover data, facts, or proof that represent a criminal offense that is prosecuted by the initiative of the prosecution office.

Based on recommendations issued by the European Commission, AHC analyzed in this document indicators that have to do with referrals to the prosecution office on judges and prosecutors who have been subjected to the vetting process, whether there were cases of the prosecution office starting cases with its own initiative, whether it was decided to start criminal proceedings on the subjects, what the results

[3] Concretely, 17 of these decisions were issued by the IQC and 13 by the Special Appeals College (SAC), as the body reviewing complaints against IQC decisions at the second level. See: Annex 1

[4] The findings and conclusions in this component may not be considered complete because neither the public hearings of the relevant processes nor the complete files of each case administered by the vettinb institutions were monitored.

were at its conclusion, whether preliminary measures were taken to sequester unjustified or illegal assets, whether charges were brought in court and, as a result, whether there was criminal punishment of these subjects by a court decision. To secure such data, AHC pursued correspondence with the Special Prosecution Office and the General Prosecution Office. During the period of the realization of this paper, it is worth emphasizing that both institutions responded to the request for information, both the Special Prosecution Office and the General Prosecution Office, but the latter provided partial data administered from Prosecution Offices at the Tirana and Durrës First Instance Courts[5]

[5] Partial information was provided by the General Prosecution Office electronically, on 28.02.2022. The General Prosecution Office addressed with concern that the reason for the delay in providing a response and providing information in a partial manner by only the two general jurisdiction Prosecution Offices was the result of manual verification of information by the representatives of the prosecution bodies.

Executive Summary

Referring to the analysis of the selected decisions, we notice with positive notes that in the majority of them, the vetting bodies respected the principle of proportionality, the principle of equality of juridical arms, the right to be heard and defend, as the main principles that should lead this process, both because of their nature and in the context of standards of due legal process.

Keeping in mind the number of subjects still awaiting to undergo vetting (38%) as well as the fact that the new constitutional amendments expect this process to be concluded by the IQC by December 2024 (for about 2 years and 10 months), we consider that the pace of the process should increase. This should happen not only due to the delays that the AHC has found in past years, but also referring to some of the studied decisions of 2021, which reefer to subjects picked by lottery for a period of time of over one year and even more than two years.

In general, the vetting bodies respected the standards of due legal process, part of which were confirmed also by the ECtHR in the case *Xhoxhaj vs. Albania.* In this case, the ECtHR found among other things that there had been no violation of article 6 § 1 of the European Convention of Human Rights (ECHR) in the process of dismissal from duty of the applicant, who held the position of former member of the Constitutional Court, as the vetting bodies had been independent and impartial, procedures had been fair, the realization of the public hearing was not a binding requirement, and the principle of juridical certainty had not been violated. According to the ECtHR, the dismissal had been proportional, and the legal permanent prohibition imposed on her to be part of the justice system structures, for serious ethical violations, had been in accordance with the principle of the integrity of the judiciary and the public trust in the justice system. As a result, there had been no

violations of article 8 of the ECHR, which guarantees the right to respect for private and family life.

As has been noted in previous research studies,[6] AHC continues to find that even the selected sample of decisions dictate the need for better transparency toward the public. Vetting is a process of high interest and attention by the public, researchers, and civil society organizations. As a result, based on the public claims of the subjects, it is in the interest of the public that these decisions feature important aspects that have to do with the arguments/justifying causes of intermediate decisions along the process (e.g.: on the requests of the subjects about the existence of conflict of interest of panels of judges, requests to restart administrative investigations into one or two criteria, requests to present new proof along the process, and especially when they are presented in the hearing session or after the conclusion of the administrative investigation).

During 2021, out of 155[7] taken decisions, about 33.55% of the vetted subjects were evaluated for all three legal criteria, although the decision-making may have come as a result of failing to pass the filter based on a single criterion. During 2021, the IQC issued dismissal decisions for 64 subjects of the re-evaluation. As in previous years, we find that the wealth criterion takes up the main weight in the decision-making of the re-evaluation bodies. Concretely, in 84.4% of the dismissal decisions or 54 cases, wealth remain the most sensitive criterion and with the greatest impact on dismissal decisions of the IQC during 2021.

AHC found that in the most part of the decisions where subjects did not submit justifying documentation to prove the legitimate source of their income, the re-evaluation bodies did not clarify in their decision which were the reasons and whether these reasons may be considered in the context of objective inability or not. Only in one instance, the panel of judges in the IQC said it admitted that the subject proved that there were conditions of inability, according to paragraph 2, article 32 of the law *"On the transitory re-evaluation of judges and prosecutors."*[8]

[6] https://ahc.org.al/wp-content/uploads/2020/09/KShH_Raport-studimor-_-Vettingu-dhe-dinamikat-e-tij-_-Nentor-2019-Korrik-2020.pdf

[7] Note: This figure refers to reasoned decisions published on the official website of the institution

[8] See: Decision of the IQC no. 393, dated 03.06.2021.

With regard to the financial analysis of the wealth criterion, AHC found in the past that there is a need to unify methodology pursued by the IQC panels of judges regarding the way of conducting it and reflecting it in the decision. For instance, confirmation decisions do not reflect in a complete manner the relevant sheets, financial analysis, and there was a lack of a chronological and unified order pursued for conducting this analysis.[9] We continue to find that in spite of the fact that the vetting bodies make clear in the decision that they conducted a financial analysis, it is effectively not reflected in the decision or there is a different methodology pursued for different subjects. Pursuant to this finding and aiming at as transparent an approach as possible, AHC recommends the taking of measures to detail as completely and clearly as possible the composing elements of the financial analysis and its reflection in a harmonized manner in all decisions.

The criterion of integrity remains to bear a small weight on decision-making compared to the other criteria. For 2021, it results that only 1 subject was dismissed because of being deemed inappropriate. AHC found that in some cases, this criterion was treated in a general and in some sporadic case non-transparent manner toward the public.

The criterion of professional capabilities results to have had a decisive role on decision-making in some of the dismissal cases during 2021. During this period, based on the criterion of professional capabilities, the IQC decided in one case suspension from duty of a prosecutor magistrate for a 1-year period, with the obligation to pursue the training program according to the curricula of the School of Magistrates.

In 4 dismissal decisions (or 6.15%), the IQC relied on 2 criteria (assets and professionalism). AHC found that indicators of evaluation of professional capabilities, unified in decision 21/2019 of the SAC are addressed in a general and not-so-clear manner for the public in IQC decisions.

The reflection and analysis in decision-making of the vetting bodies of denunciations received from citizens on the subjects (judges/prosecutors) is an important indicator of the public's trust in this process and the new justice. AHC views as positive the fact that denunciations by the public (including anonymous ones) are taken into consideration and analyzed by the vetting bodies, in independent of the fact whether

[9] https://ahc.org.al/wp-content/uploads/2020/09/KShH_Raport-studimor-_-Vettingu-dhe-dinamikat-e-tij-_-Nentor-2019-Korrik-2020.pdf

they have an impact on decision making or not. However, it has been noticed that in some cases there is a lack of transparency both in terms of the contents of the denunciation in the reasoned decisions (object of research during 2021) and in terms of selection of their review.

The monitoring indicated that in many cases *'violation of public trust in the justice system'* has been one of the motives for the dismissal of the subjects. Regarding this motive, AHC is of the opinion that it would be necessary for the vetting bodies to clarify the meaning of this notion based also on their practice that has been established by now.

In total, there have been 268 subjects that have been dismissed or resigned (referring to IQC decisions), but in the context of tasks assigned by the European Union, we find that criminal proceedings have been initiated for 8.5% of those dismissed or removed from the system, in this first 5 years of the activity of the vetting institutions. Data on criminal proceedings have been made available by the Special Prosecution Office and the General Prosecution Office. It is notable that for the most part, the criminal proceeding came as a result of criminal referrals by the public. Concretely, of 23 registered criminal decisions, 20 of them were the result of a criminal referral by citizens, 3 were initiated by the special prosecution office, and there is no referral by the re-evaluation bodies to the special prosecution office, according to article 281 of the Criminal Procedure Code. Meanwhile, based on information provided by the General Prosecution Office, it results that in 2018, the IQC exercised the right to filing a criminal referral toward the subject B.I., the vetting process on whom was interrupted due to his resignation. On this proceeding material, the prosecution office at the Tirana First Instance Court decided to not start the criminal proceedings. During the monitoring phase, we became aware that the prosecution office at the Durrës First Instance Court is in the phase of preliminary investigations based on material referred by SPAK on a subject suspected of committing criminal offenses envisaged by articles 248, 257/a of the Criminal Code.

With regard to prosecuted subjects, information from the Special Prosecution Office indicates that 10 of the cases refer to former members of the Constitutional Court and the High Court, considered special subjects investigated by SPAK, in spite of the criminal offense attributed to them. In 10 other cases, in keeping with the Criminal Procedure Code, the Special Prosecution Office found a lack of material competence because the subjects were not attributed criminal offenses in the field of corruption

and organized crime.[10] As a result, these cases were referred to the judicial district prosecution offices of general jurisdiction, in keeping with their territorial competence.

With the exception of one subject, for the other cases, the Special Prosecution Office did not register criminal proceedings for the criminal offenses under its material competence related to corruption or organized crime. SPAK prosecuted according to article 257/a of the Criminal Code only the special subjects because they are categorized as high-level officials, namely three judges of the High Court and two members of the Constitutional Court and the former General Prosecutor.

Based on the analysis of some of these cases, compared to the decision-making of the vetting bodies or the sequestered assets, question marks are created on why the Special Prosecution Office initiated criminal proceedings by confining investigation only to article 257/a/2 of the Criminal Code, which has to do with hiding or fake declaration of assets or private interests. The deadlines for investigation on special subjects are about 2 years, considerable not only vis-à-vis the deadlines envisaged in the Criminal Procedure Code, but also the criminal offense on which the criminal proceedings began.

Furthermore, based on partial information received from the General Prosecution Office, it remains unclear what the legal causes are on which the Prosecution Office of the Tirana First Instance Court based its decision-making to not initiate criminal proceedings.[11]

On some of the special subjects, in the reasoned decision of the IQC, facts and information (including those secured by IMO observers) were noticed that shed light on contacts with persons involved in organized crime and reasonable suspicions are raised that these senior justice officials could be easily pressured by individuals involved in organized crime. Comparing such data with the criminal offenses attributed to the subjects, it is unclear why the Special Prosecution Office did not investigate the criminal offenses of the exercise of illegal influence, abuse of office, facilitation of the activity of individuals suspected of involvement in organized crime of trafficking of narcotics, etc.

[10] Information conveyed by the General Prosecution Office is partial as it only refers to data referred by the Tirana First Instance Court and the Prosecution Office at the Durrës First Instance Court.
[11] This data refers to the referral no. 3671 of 2018. The decision that decided to not start criminal proceedings refers to 03.04.2018.

A considerable number of assets result to have been sequestered, owned by two former High Court judges, which dictates the need for the Special Prosecution Office to investigate these subjects in a complete and comprehensive manner and not confine itself to article 257/a/2 of the Criminal Code.

It is now the fourth year since the first decision-making of the vetting bodies, but the criminal process only concluded on one such subject, for whom the special appeals court (SCOCC) issued a final decision, upholding the decision to convict to 2 years of imprisonment and denial of the right to exercise public functions for 5 years. Even in this case, it is noticed that the investigation of the prosecution office was confined only to article 257/a/2 of the Criminal Code while the very high value of assets raises question marks on how they were created and whether they are the product of criminal offenses linked with the exercise of illegal influence, abuse of office, or corruption.

Based on statistical data on criminal proceedings, as well as based on the fact that the number of dismissals due to the criterion of assets and the number of resignations has been considerable, AHC suggests to the vetting bodies, pursuant to article 281 of the CPC, to respect the obligation to refer to the prosecution office concrete cases, if during the vetting process, they discover data, facts, or proof that represent a criminal offense on which the prosecution office acts upon its own initiative.

Furthermore, without infringing upon the standards and quality of investigations, we recommend to the Special Prosecution Office and the Prosecution Offices of ordinary jurisdiction to advance with a dynamic pace on sending cases to court, depending on the conclusions of criminal proceedings (when appropriate). The 2-year time to investigate important cases is deemed as lengthy and might weaken the process of discovering and obtaining evidence and question the efficiency of investigations.

It is recommended that the investigation of the Special Prosecution Office and the Prosecution Offices of ordinary jurisdiction, in accordance with their material competence and the subjects they investigate, extend to include criminal offenses in the fields of corruption, abuse of office, facilitation of the activity or other potential contributions to criminal organizations, etc.

In conclusion, AHC deems that justice reform should break the myth of impunity, which weakens democracy and the rule of law and decreases citizens' trust in

institutions. Equality in and before the law is the principle that, in the eyes of the public, should not be seen as declarative but also yield concrete, tangible, and provable results. This principle should be realized also in terms of the criminal prosecution of those judges or prosecutors who have been dismissed/removed in the context of vetting, for whom serious facts have been discovered on their assets or contacts with organized crime, which are criminally punishable.

I. The vetting process and obligations deriving from the EU accession process

From the moment Albania was granted the status of a candidate country, the European Commission in its reports has identified the judicial system as one of the most corrupt sectors, setting the reform of the justice system as a repeated condition, in keeping with the Copenhagen criteria. In this context, the European Union, through its (2020) enlargement policy, placed an emphasis on the fight against corruption and organized crime, promoting the application of reform in the judiciary as the first major step toward strengthening the rule of law, according to the Copenhagen Criteria.

The approval of the new enlargement methodology of the European Union showed the importance that strengthening the rule of law in aspiring Western Balkan countries, including Albania, has for in the integration process. Based on this methodology, until the First Accession Conference, Albania should have fulfilled six pre-conditions and the second among those is precisely the obligation for "*...Further implementation of judicial reform in keeping with the Opinions of the Venice Commission: in particular, in particular making the Constitutional Court and the High Court functional, following their suspension due to the implementation of judicial reform in 2016...*".[12] After Albania has fulfilled in a satisfactory manner these six pre-conditions, then, before the Second Pre-Accession Conference, it should fulfill nine other preconditions with the first on the list being *"Starting criminal proceedings on judges and prosecutors who failed in the re-evaluation process...."*.[13]

[12] European Council (2020) Press release: 'Council Conclusions on Enlargement and Stabilization and Association Process—Albania and the Republic of North Macedonia' https://www.consilium.europa.eu/en/press/press-releases/2020/03/25/council-conclusions-on-enlargement-and-stabilisation-and-association-process

[13] Ibid

Both of these pre-conditions are closely linked with the vetting process:

- *Further implementation of judicial reform in accordance with the opinions of the Venice Commission*

The main component and the first step of justice reform was the cleaning of the system from its corrupt representatives. In this aspect, the process of the transitory re-evaluation should be completed on time and in accordance with the standards envisaged by the Constitution and law 84/2016 *"On the transitory re-evaluation judges and prosecutors in the Republic of Albania,"* which materialized the opinions of the Venice Commission, made in the phase of its drafting and approval. This requires that the system first is cleaned up and also new institutions are established and start functioning, reformed, completed with professionals with integrity, thus creating the foundation for restoring public trust in the activity of the justice system.

- *Start of criminal proceedings on judges and prosecutors who failed in the re-evaluation process*

In the context of the new enlargement policy, Albania has to support the fight against corruption and organized crime, as the first major step toward strengthening the rule of law. Aside from cleaning up the judiciary, it must show a will to punish all instances where elements of criminal offenses were found. Thus, the first example of the fight against corruption should come from among the ranks of the judiciary and for this, the transitory re-evaluation institutions should refer to court the cases when they find elements of criminal offenses.

This spirit of the new enlargement methodology is also reflected in the latest European Commission reports on Albania. With regard to the vetting process, as one of the decisive factors that influences the progress of justice reform and the performance of the judiciary, it is found that *"the transitory re-evaluation of all judges and prosecutors has progressed steadily and has yielded tangible results, under the full supervision of the International Monitoring Operation (IMO), in spite of*

restrictions linked with the COVID-19 pandemic."[14] Furthermore, it is appreciated that *"some magistrates dismissed by the vetting process are being prosecuted by the Special Prosecution Office and Court, which has proceeded with sequestering the assets of part of them."*[15]

From the re-evaluation institutions it is expected: *"further advancement of the re-evaluation process of judges and prosecutors"* and *"...continue to deliver systematically to the prosecution office all cases when there are suspicions of the commission of a crime, guaranteeing appropriate investigation and adjudication..."*[16]

Further on, we will analyze the progress of the vetting process, from the standpoint of the two obligations deriving from this process, in the context of integration into the European Union.

First, we will evaluate the progress of the process both in terms of quantity and in terms of fulfilling legal standards, highlighting findings and respective recommendations.
Second, we will analyze the progress made in the context of investigating and adjudicating former judges or prosecutors referred to the prosecution bodies.

II. Progress of the vetting process, as one of the key obligations for EU integration

1. Statistical progress of the vetting process

The year 2021 marked the end of the fifth year of the application of justice reform and, meanwhile, from July, the body representing the first instance of the transitory

[14] See: Report on Albania 2020, which accompanies the Communication by the Commission for the European Parliament, European Economic and Social Committee and the Committee of Regions, Communication on 2020 Enlargement Policy, p. 18, 19 http://integrimi-ne-be.punetejashtme.gov.al/wp-content/uploads/2021/03/Raporti-KE_2020_DBE_8.03.2021_final.pdf, as well as Albania 2021 Report, Accompanying the document Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions 2021 Communication on EU Enlargement Policy, p. 19 file:///C:/Users/pc/Downloads/Albania-Report-2021%20(2).pdf
[15] Ibid
[16] Albania 2021 Report, Accompanying the document Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions 2021 Communication on EU Enlargement Policy, fq 19 file:///C:/Users/pc/Downloads/Albania-Report-2021%20(2).pdf

re-evaluation (IQC) entered the fifth year of its constitutional mandate (which was extended by the new constitutional amendments until December 2024).

The statistical evaluation of the progress of the process during this year was decisive for the continuation of fulfilling the goals of justice reform and the perspective of European integration.

From February 8, 2018, which coincides with the issuance of the first decision by the IQC until January 31, 2022, a total of 499 decisions have been issued, or 62.3% of the total of subjects that should be subjected to this process, of which:

- 195 decisions, or 39% of them, for the confirmation in office of 101 judges, 82 prosecutors, 2 subjects (former HCJ inspector/candidate for appeals court), 1 acting inspector in the HJI, and 9 legal aides/counselors;
- 184 decisions, or 36.8% of them, for dismissal from office of 115 judges, 66 prosecutors, 1 HJI inspector and 2 legal aides;
- 118 decisions, or 23.6% of them, for interruption, termination, or conclusion of the process, of which 76 cases were the result of resignation outside the 3-year deadline of thee entry into force of the law (article G of the Constitutional Annex), while in 8 cases, the resignation occurred within the 3-month deadline of the entry into force of the law (article 56 of law no. 84/2016).
- 2 decisions to suspend 2 prosecutors from office.[17]

As in previous years, AHC has monitored the progress of the decision-making process by the re-evaluation bodies for the period January – December 2021, through the official website of the re-evaluation bodies, which indicated that the IQC has 155 reasoned decisions and the SAC has 36 reasoned decisions.[18]

In 2021, compared to previous years, the pace of work of the IQC was relatively good, taking into consideration the obstacles created as a result of the spread of COVID-19 in the country. It is worth appreciating that the IQC, compared to previous years, has increased the number of decisions published during one year, namely 155 compared to 106. Meanwhile, the SAC has 36 published decisions in 2021 compared

[17] https://kpk.al/wp-content/uploads/2022/01/RAPORTI-STATISTIKOR-SHKURT-2018-Janar-2022.pdf
[18] Note: figures refer to decisions published on the official websites of the re-evaluation institutions

to 42 in 2020. These figures are an indicator of the consolidation of the practice of work and of the will demonstrated by the re-evaluation bodies to advance the transitory re-evaluation process.

It results that every month, the IQC made about 13 decisions while the SAC took an average of 3 decisions. Meanwhile, the average of hearing sessions per week is 7-8 sessions for the IQC and 2 sessions for the SAC.

The extension of the mandate of the IQC and the PC until December 2024 (with the constitutional amendments approved in the Assembly on February 10, 2022), not only goes along the same logic as the goal of the constitution maker, but it also better serves the process of re-evaluation and justice reform.

In its opinion presented to the Assembly, AHC emphasized some of the reasons that favored the extension of this mandate. The extension of the mandate, ***first***, enables preserving the same standards in the re-evaluation process; ***second,*** enables the faster completion of vetting, as long as these institutions have dedicated and specialized human resources, and a consolidated work practice; and, ***third,*** will not overburden with additional responsibility the new institutions such as the HPC, HJC, SPAK, by affecting their efficiency and fulfillment of duties vis-à-vis the judiciary, prosecution office, or delivery of justice.

As a result, the extension of the mandate of the vetting institutions, in AHC's opinion, brings advancement of justice reform and therefore progress in fulfilling the obligation deriving from the new European Union enlargement methodology.

2. Progress of the vetting process and fulfilling the standards of due legal process

Further implementation of justice reform requires more than anything else the advancement of the transitory re-evaluation process. Aside from advancing in time and in figures, it is important that this process offer such decision-making that is in accordance with the constitution, law 84/2016 "On the transitory re-evaluation of judges and prosecutors," and the standards of due legal process. Only in that way will the process make it possible for the system to have magistrates who fulfill the

criteria of integrity, cleanliness, who will contribute not only to the quality of justice, but also to increasing the citizens' trust in justice.

Therefore, it is very important that the vetting bodies create in the public the conviction that their activity is in accordance with due legal process, an obligation that also derives from article Ç, annex 1, of the Constitution, and articles 4, 49, 55, 57/1, 66/2 of law 84/2016.

Compared to previous years, we find not only an attempt of the re-evaluation bodies to respect in their work the principles of due legal process, but also to consolidate and unify the practice toward that goal. We consider positive the fact that the re-evaluation institutions have respected the principle of the equality of arms, in all of its components, and especially in the process of obtaining and evaluating evidence.[19] They respected the principle of the right to be heard and to defend oneself, according to legal provisions and constitutional standards.[20] Furthermore, we appreciate the fact that the vetting bodies have implemented the principle of proportionality in the issued conclusions and decision-making, by consolidating practice regarding the standard they apply in selecting the disciplinary measure proportionate to the significance and degree of the violation encountered during the investigation.

[19] In SAC decisions under review, it resulted that of 13 such, in 6 of them, the subjects of re-evaluation presented acts as *"new evidence."* From these decisions, AHC has found that the refusal to obtain the evidence was based on the argument that the acts that the subject of re-evaluation sought to brought in as evidence were administered by the Commission in the administrative investigation, or due to the fact that the subject did not prove that he/she was unable to present them in the phase of the administrative investigation in the commission, according to provisions of article 47 of law 49/2012.

[20] In the monitored decisions, the re-evaluation bodies, namely the IQC held a hearing session with each subject in accordance with relevant legal provisions. Based on the monitoring, it resulted that of 13 SAC decisions, 7 of them were conducted in open public hearings, and in 4 cases, the complaining subject was the subject of re-evaluation. In order to resolve all claims of the subject on claimed violations by the IQC of general principles in the context of due legal process or other aspects of a procedural nature (SAC Decision no. 14/2021 (JR), dated 15.06.2021), or when it evaluated ex officio violations, it decided to move the case for review to a public hearing, in order to give the subject the possibility to be heard and defend himself/herself on the case before the panel of judges (SAC decision no. 14/2021 (JR), dated 15.06.2021). According to provisions of article 55 of law no. 84/2016.

However, we draw attention to the following:

a) Appreciating the importance of the principle of independence and impartiality of the vetting bodies, which were analyzed in the case *Xhoxhaj vs. Albania* and found by the ECtHR as in accordance with the obligations deriving from article 6/1 of the ECHR,[21] AHC appreciates the fact that the vetting bodies have respected the legal obligations to guarantee impartiality in their decision-making, and the members of the panel resigned every time they judged that due to the potential/appearance of a conflict of interest, their impartiality might be called into question,[22] and reviewed requests received from the subjects regarding claims of conflict of interest, on the other hand, we have found that in some sporadic cases, the introduction of the reasoned decision lacks information on whether there was conflict of interest or not,[23] the fact whether there was withdrawal from adjudication by any member of the panel of judges,[24] or the reasons why the members of the panel of judges resigned.[25] **Referring to the significance of impartiality in the context of due legal process, AHC suggests that besides documentation in the file of the subject of re-evaluation that reflects procedures pursued by the re-evaluation bodies, for the sake of transparency to the public, the decision reflect more information on the declared or requested conflict of**

[21] See Xhoxhaj vs. Albania (No. 15227/19) ECHR (2021), para. 189, 190, 304.

[22] See e.g.: IQC decision no. 393, dated 03.06.2021. The panel of judges established by lottery to review the request for resignation decided to reject the request but without specifying the reason.

[23] See: IQC decision no. 420, dated 13.07.2021; IQC decision no. 363, dated 01.04.2021; IQC decision no. 358, dated 19.03.2021; IQC decision no. 363, dated 01.04.2021

[24] In some case, when there was a resignation from trial by a member of the panel of judges, this fact was not reflected in the decision (the introductory part). Thus, in the case of subject E.I. (IQC decision no.363, dated 01.04.2021), the request for resignation by one of the members of the Commission was addressed in the decision only due to the finding presented by the international observer, whereby the latter said the subject of re-evaluation influenced in this decision. In this case, the Commission maintained that *the commissioner resigned upon her free will made clear the reasons for the resignation and her request was accepted by a panel of judges established according to law, and therefore the truthfulness of her will expressed in her request to resign may not be questioned, especially since there is no evidence, indicia or data that the commissioner did not declare the exercise of influence. She interpreted her request to resign as a result of failing to fulfill one criterion in decision-making, which has to do with 'loss of being objective.'*

[25] In cases when there were requests by the subjects to exclude the panel of judges, the decision addresses such cases in such a way that the reasons why the subject raised the claims or the procedure followed to review them are unclear for the reader. For instance, in decision no. 9, dated 09.03.2021, there is a paragraph: *"The panel of judges of the Special Appeals College, consisting of those mentioned in the introduction of this decision, is the result of the lottery of 14.12.20209 and decision issued by 5 (five) different panels of the College, which rejected the claims of the subject of re-evaluation presented on 22.12.2020 for excluding members of the panel of judges assigned to hear his case." Also,* in IQC decision no. 393, dated 03.06.2021, it is noted that the panel of judges drawn by lottery for hearing the resignation request decided to reject his request but without specifying the reasons.

interest, resignation of members, and also reflect the procedure followed for verifying the conflict of interest, the decision-making, and the reasons that lead to the decision for or against being in conflict of interest.

b) Another very important principle regarding respect for the right to due legal process is that of reasoned decisions. Based on the monitoring of the decisions, it results that the re-evaluation bodies, especially the IQC, does not pursue in all decisions a unified structuring line.[26] AHC has found that some decisions are relatively long, creating in some cases a repetition of circumstances or facts.[27] There have been subjects[28] that have raised the lack of clarity, understanding and logic in the reasoning for the decision-making as a cause for complaint with the SAC, claiming that there was total lack of reasoning. **Per the above, AHC suggests that the re-evaluation bodies demonstrate greater attention toward respect for the structure of the decision and its reasoning, making their decisions as clear, concise, and reasoned logically as possible, in order for them to be understandable not only for the subjects in the process, but also for the public.**

c) The conduct of the re-evaluation process within a reasonable deadline is not only a key element of the right to due legal process, but also very important in the context of the nature of the re-evaluation process as *sui generis*, temporary process that opens the way to further application of justice reform. The temporary nature of this process and the limited mandate of the re-evaluation bodies are stressed as primary also in the Venice Commission Opinions.[29] As noted above, until the end of 2021, about 62% of the subjects

[26] Article 55 of law no. 84/2016 "On the transitory re-evaluation of judges and prosecutors in the Republic of Albania," which envisages that the rapporteur of the case presents in writing the reasoning of the Commission decision, which should contain three main parts: the introduction, the description – reasons, and the order. According to the same article, this part contains: a) circumstances of the case; b) evidence and reasons on which the decision is based; c) report and recommendation of the rapporteur of the case; ç) legal provisions on which the decision is based.

[27] For instance, in IQC Decision no. 363, dated 01.04.2021.

[28] See: IQC Decision no. 1/2021 (JR), dated 12.01.2021.

[29] See Opinion CDL-AD(2016)036-eAlbania - Amicus Curiae Brief for the Constitutional Court on the Law on the Transitional Re-evaluation of Judges and Prosecutors (The Vetting Law), adopted by the Venice Commission at its 109th Plenary Session (Venice, 9-10 December 2016), as well as Opinion no. 1068/2021 CDL(2021)046, "Albania Opinion On The Extension Of The Term Of Office Of The Transitional Bodies In Charge Of The Re-Evaluation Of

have been reviewed, while the timespan of the process is relatively long. The largest part of the reviewed decisions have had a timespan of more than one year; in fact, there are subjects whose process has lasted for over two years. The timespan often served as a cause for complaint with the SAC.[30] On the other hand, it has been noticed that the re-evaluation bodies do not reflect in the decisions the reasons for the duration of the process, thus failing to be transparent before the public.[31]

The report finds that the causes for the duration vary and refer to both sides. As such we may mention those of the investigation on 1, 2, or 3 criteria; the review of requests to exclude members of the panel of judges; the duration of stay in duty of the subjects and the complexity of evidence; the collection of evidence by other institutions; the investigation of related persons, the extension to guarantee the right to defense; requests to extend deadlines, and the consequences caused by the COVID-19 pandemic. **In this regard, it is very important that the vetting bodies, as well as the subjects of re-evaluation avoid artificial delays, which lead to unreasonable delays that may serve as grounds for complaint and would affect the performance of the judicial system. As confirmed by the Venice Commission in its opinion, only objective reasons are those that may justify the extension of the mandate of the process.[32] Adjudication deadlines, aside from being an important aspect of due process, would also be an indicator of the advancement of the vetting process and justice reform, as pre-conditions established in the context of obligations deriving from the European integration process for Albania. On the other hand, the IQC should reflect in its decisions the causes for the extension of the review, which would better serve the SAC in reviewing complaints that have to**

Judges And Prosecutors,"
https://www.venice.coe.int/webforms/documents/default.aspx?country=34&year=,2016&lang=EN

[30] See: Decision no. 14, dated 15.06.2021, whereby the subject of re-evaluation presented to the SAC that the re-evaluation process in the Commission lasted for over 12 months and the duration was not conditioned by any particular need.

[31] Such a fact has also been stated by the College, whereby in Decision no. 9, dated 23.03.2021, on subject B.M., it noted *"...the administrative investigation lasted for over two years.* This fact, in the College's opinion, *should have been addressed more extensively by the Commission in its decision, in order to argue the reasons that led to the dragging out of the administrative investigation into the subject of re-evaluation..."*

[32] See Opinion no. 1068/2021 CDL(2021)046, of the Venice Commission "Albania Opinion On The Extension Of The Term Of Office Of The Transitional Bodies In Charge Of The Re-Evaluation Of Judges And Prosecutors", para. 17.

do with the timespan of the process, and would make the causes for the duration of the process more transparent for the public.

3. Review of the subjects according to legal criteria

Compared to previous years, we find a greater tendency to investigate and evaluate the subjects based on the three criteria of evaluation recognized by law. With regard to the total of reviewed and reasoned decisions for 2021, it results that the IQC based its decision-making on evaluating and analyzing all 3 criteria in 33.54% or 52 cases. This trend of decision-making was followed by relying on only 1 criterion for 56 cases or 36.13%. In 40 cases, or about 25.81% of the total number of cases, the IQC decided to interrupt the re-evaluation process due to the submission by the subject of re-evaluation of a request to resign and the conclusion of the process without a final decision due to other reasons, such as loss of life or reaching retirement age. With regard to 7 cases or about 4.52% of the cases, for which the IQC decided to dismiss from duty of the subjects of re-evaluation, the panel of judges relied in its arguments for the decision-making on analyzing 2 criteria, such as assets and professionalism or assets and integrity.

Based on the analysis of 17 decisions of the IQC, monitored in detail due to their significance vis-à-vis public interest, AHC found that in 82% or 14 cases, decision-making was based on 3 criteria. There was no instance of the IQC relying in its analysis on 2 criteria, while only in 2 cases or 12% of them, only 1 criterion served as a reference element for decision-making. Only in 1 case, or about 6% of the total of decisions under review, the IQC decided to interrupt the re-evaluation process, not relying on any criterion.

3.1 Criterion of wealth

The criterion of wealth remains a primary decisive criterion for the most part of investigations in decision-making by the IQC/SAC. Regarding this criterion, we appreciate the fact that the IQC has conducted enhanced administrative investigations in all cases, not taking as granted the findings presented by the

HIDAACI report and reaching, in a large number of instances, conclusions that are different from it.[33]

It is also to be appreciated that the Vetting bodies take into consideration the inability to prove with justifying documentation the lawfulness of assets, without penalizing subjects when the cause for such inability is the fact that a long time has passed, or there is no data in institutions whose legal obligation it is to process and preserve such data.[34] Nevertheless, AHC has highlighted that the re-evaluation bodies have not considered as reasonable or accepted in all cases the documents presented or arguments given for not submitting them.[35] **It is suggested that the vetting bodies unify the application of this standard in an even manner, for similar instances of an inability to present evidence, and for the purpose of transparency to the public, argue why the subject is or not in the circumstances of an objective inability to prove the lawfulness of assets.**

In the studied decisions, it has been found that when a dismissal was issued toward the subject, the subject showed an insufficiency of legitimate financial resources for the creation of wealth that they possess. **Furthermore, AHC highlighted in one instance that the lack of resources was not considered a decisive element for the dismissal of the subject of re-evaluation.[36] In this sense, it is suggested that the vetting bodies maintain the same stance for similar instances, when the insufficiency of resources is a cause for dismissal or not, unifying the practice and indicators, whether of a quantitative or qualitative nature, which lead them in such decisions.**

Although efforts to hide assets or present it inaccurately have been deemed by the legislator as insufficient circumstances for dismissing the re-evaluation subject from office, it is noticed from monitored cases that in one instance,[37] the re-evaluation

[33] See: Decision 404, dated 23.06.2021, Decision no. 352, dated 01.03.2021, Decision no. 392, dated 28.05.2021
[34] Thus, in the case of subject G. H., the Commission has stated that *"the subject made all efforts to request the required information, but is really unable to prove payment of the tax at the source for such income, given that it was not his obligation to pay it, and he was not in office to care about controlling and preserving information."* See: IQC decision no. 393, dated 03.06.2021.
[35] Thus, in the case of subject I. M., the College argued: *"...the notary statement made during the re-evaluation has limited value in proving the real value of expenses by his daughter as it appears as an attempt to justify expenses due to the burden of proof."* See: SAC decision no. 8/2021 (JR), dated 09.08.2021
[36] Concretely, in the decision on subject I.P., the IQC considered that the lack of lawful resources of a small amount is not considered cause for dismissal. See: IQC decision no. 404, dated 23.06.2021.
[37] See: IQC decision no. 358, dated 19.03.2021.

bodies reached the conclusion that the subjects committed hiding of assets. Understanding the fact that the conclusion of hiding of assets requires proving also the elements of a subjective side (seeking to or the intent to hide assets), **we suggest that the IQC unify the practice by establishing the criteria or indicative indicators that lead it to the conclusion of inaccuracies noticed in the criterion of assets, which represent a cause for confirming or dismissing the subject. Establishing these serves not only transparency, but also the fair application of the principle of proportionality, as part of due legal process**. In our opinion, such clarification would bring about a unified practice also in relation to cases when the case should be referred to prosecution bodies, pursuant to fulfilling the obligation we have in the context of conditions for EU integration.

In spite of the detailed presentation of the financial analysis in the decisions of re-evaluation bodies, in part of the IQC decisions it is noticed that they not always pursue a unified and clear methodology. This lack of clarity is reflected both in not reflecting how it was realized,[38] or in the failure to reflect a summarizing table of the financial analysis, although along the decision, it is noted that the IQC or SAC did carry this out,[39] or even the way it has been structured in the reasoned decision,[40] as a separate section. **We suggest that for the purpose of transparency to the public and to avoid prejudice of subjectivity in decision-making, the IQC unify the methodology pursued by its adjudicating panels, on the way theey realize the financial analysis or reflect and structure it in the decision.**

3.2 Criterion of integrity

In the sample of decisions of this study, AHC has found that in most of the monitored cases, the subjects were evaluated on this criterion (about 82% of the cases under review), in spite of the significance and weight that it has taken up in the IQC decision-making. In some of the analyzed decisions, we have noticed a detailed treatment of this criterion, with detailed analysis by the re-evaluation bodies, reflecting also part of the DSCI information, which are elements that have a positive

[38] IQC Decision no. 363, dated 01.04.2021, in a special section clarifies the methodology pursued in conducting the financial analysis, which is not encountered in the other part of the decisions.
[39] See: IQC Decision no. 1/2021 (JR), dated , para. 27.6.
[40] See: IQC Decision no. 392, dated 29.05.2021

impact on guaranteeing transparency for the public with regard to the evaluation of this criterion.[41] It is to be appreciated that the IQC did not satisfy itself solely with the DSCI conclusions, **but it is suggested that every time that upon IQC request the DSCI updated the initial report, the decision should reflect the reasons, indicia, and circumstances that led to that request.[42] Furthermore, with regard to the evaluation of the integrity criterion, wee recommend that the re-evaluation bodies, in their reasoning and conclusions, keep in mind the of the law in checking integrity, which is the identification of whether the subject has or has had inappropriate contact with individuals involved in organized crime, by not interpreting it beyond this purpose.[43]**

3.3 Criterion of professional capabilities

Compared to previous years, it has been noticed that greater importance has been attached to the evaluation of professional capabilities.[44] In almost all analyzed decisions, the IQC administered from the HJC and HPC the reports on the evaluation of professional capabilities of the subject of re-evaluation and the Commission reflected in a complete manner the addressing of all indicators in HJC or HPC reports.[45] It is also appreciated that there is an effort that the evaluation of the criterion of the subjects' professional capabilities takes into consideration decision no. 21/2019 of the SAC, which elaborates the standards, methodology, and indicators on the basis of which the evaluation of professional capabilities of the subjects of re-evaluation should be evaluated. However, it has been noticed that the unified practice in the SAC decision has not been pursued in all instances, or the indicators

[41] See: IQC Decision no. 334, dated 14.01.2021 and SAC decision no. 11/2021 (JR), dated 14.01.2021

[42] Thus, in the initial report on subject N.P.,[42] the DSCI found inappropriateness in continuing duties. Then, upon IQC request, an updated report was submitted on integrity, according to which, information received from verifying authorities during the re-evaluation period made known that there is data on the subject of re-evaluation in the context of alerts about her involvement in unlawful activity, in the form of abuse of office. On the other hand, AHC found that in one instance, the DSCI updated the initial report on its own initiative, specifying that the first one lacked the response of one of the law enforcement bodies.

[43] See: SAC Decision no. 4/2021 9JR), dated 09.02.2021, whereby in the case of subject E. B., the College argued: *"...his failure to declare refusal of the visa, as a request of the declaration represents inaccuracy and untruthfulness in filling out the integrity declaration form, which as a result leads to untrustworthiness of this subject as well as his inappropriateness to continue duties.*

[44] See: IQC Decision no. 415, dated 07.07.2021 & IQC Decision no. 402, dated 17.06.2021, in which the subjects were dismissed explicitly due to the inappropriateness of professional capabilities, according to paragraph 5, article 6 of law no. 84/2016.

[45] See: IQC Decision no. 404, dated 23.06.2021.

of the evaluation of this criterion have been reflected in the majority of decisions in the form of a general address in the report of support bodies.[46] **To that end, it is suggested that the IQC and the SAC devote greater significance to addressing the methodology and analysis of indicators processed in the SAC decision regarding the evaluation of the criterion of professional capabilities.**

4. Denunciations from the public

AHC views as important the proactive role that the public has played in the decision-making of the vetting bodies through the large number of denunciations submitted, in spite of the weight they have carried in the evaluation conducted by the re-evaluation bodies. Likewise, there is appreciation of the importance that the re-evaluation bodies have devoted to denunciations from the public (including anonymous ones) or facts that have been made public;[47] in all IQC decisions, there is a special section about analysis of these denunciations. It is worth mentioning the importance that these institutions have devoted to protecting the anonymity of the individuals who filed the denunciations, in accordance with standards envisaged in the law *"On whistleblowing and protection of whistleblowers."* However, **it is suggested that for the purpose of transparency before the public, the decision clarifies on what basis the selection of denunciations was made against the totality of denunciations that may have been filed on a subject,[48] as well as the contents of the respective denunciation.**[49]

[46] See: IQC Decision no. 352, dated 01.03.2021.

[47] Thus, on the subject of re-evaluation I.B. (IQC Decision no. 352, dated 01.03.2021), a total of 32 denunciations were submitted by the public (whereby 5 denunciations were made public by the media and two other public facts/ circumstances), which were reviewed and addressed together with the respective materials.

[48] In the case of subject M.O. addressed in IQC Decision no. 344, dated 11.02.2021, the IQC explained that of 14 denunciations for the subject, only some of them were processed, because one of the denunciators repeatedly filed a denunciation that contained the same complaint and claims the same violations by the subject of re-evaluation. On the other hand, in many other decisions, the reason why the IQC chooses to pass the burden of proof to the subjects only on some denunciations is not reflected.

[49] In some instances, decisions do not reflect the contents of the denunciations on the subjects of re-evaluation. Concretely, on subject S.S., the Commission received two denunciations, the contents of which were not reflected in the decision. In this decision, the IQC argued that after analyzing the denunciations and the accompanying documentation, it reached the conclusion that no causes or circumstances were presented that indicate biased actions or legal violations committed by the subject of re-evaluation that might lead to disciplinary responsibility regarding the professionalism criterion.

5. Decision-making of the re-evaluation bodies

IQC decision-making on 2021 are categorized into 50 subjects confirmed in office, 64 subjects dismissed from office, 28 subjects had their re-evaluation process interrupted, 12 subjects had their process completed, and 1 subject was suspended from office.

In the meantime, the SAC decided on: 29 subjects to uphold IQC decisions; on 6 subjects to change the IQC decision; for 2 subjects, reverse the IQC decision. These figures are indicators of the good and correct work by the first instance re-evaluation body.

With regard to IQC's decision-making, it is appreciated that every time a subject was confirmed in office, there was a full and comprehensive review of all three criteria. Regarding dismissals, it was found that the declaration of subjects as insufficient on the criteria of assets and integrity is one of the motives for the dismissal mostly applied in decision-making of the re-evaluation bodies; out of 64 dismissal decisions, for 54 of them the reason was insufficient declarations on the criterion of wealth.

Likewise, it is appreciated in terms of unification of practice the position maintained by the SAC that the criteria of wealth and of integrity do not necessarily require the presence of the other in order to verify insufficient declaration, in spite of the presence of *"and,"* which in a literal reading, creates the conviction that it is cumulative.

Regarding the motive of dismissal of *"violation of public trust in the justice system,"* AHC found that this motive was taken into consideration in the review of every element of re-evaluation. Given that on this matter there were claims by the subjects who did not view the causes for their dismissal as reasons that lead to violation of public trust in the justice system, and since none of the re-evaluation bodies clarified the meaning of this notion,[50] or the evaluating indicators thereof, **AHC suggests that the vetting bodies, for every case, conduct a full evaluation and analysis of**

[50] See: IQC Decision no. 10, dated 24.03.2021. The College did not provide a meaning of this notion but considered: *"...there are a series of behaviors through which the subjects of re-evaluation undermine the integrity of justice institutions and violate public trust in our justice system, through corruption, fake relations, violation of the oath of public servants, acting in situations of conflict of interest, professional incapability, etc."*

every behavior that may lead to the presumption of violation of public trust. This definition, in our opinion, would not only serve transparency before the public, but it would also avoid any perception of subjectivity in its application.

Meanwhile, regarding decisions of interruption/termination and suspension of the re-evaluation process, **AHC emphasizes that it is very important that the re-evaluation bodies are consistent in their decision-making, pursuing the same standard, for similar cases, in order to avoid lack of clarity that might influence the public's trust on this process.**[51]

With regard to the disciplinary measure of "suspension from duty," we find that the IQC analyzes in a detailed manner the criterion of professional capabilities[52] in its decisions.

Furthermore, it is appreciated that SAC decisions remain of high quality in terms of pursued standards regarding: analysis and summary of facts, analysis of each criterion and the legal analysis of every claim raised by the subjects or the Public Commissioner (referring to the jurisprudence of the College itself, but also of the ECtHR on certain cases).

The fact that the overwhelming majority of decisions have been taken unanimously by the respective panels of judges deserves appreciation. Where there are minority opinions, in IQC decisions, those belong to cases of confirmation in office. Meanwhile the SAC has a greater number of decisions in which a member has had a minority opinion (about 30.5% of the cases), and it is to be appreciated that these opinions have been argued and reasoned in accordance with legal provisions.

[51] For instance, in the case of subject Sh.M. (IQC Decision no. 374, dated 23.04.2021), who was dismissed from office by the HJC, due to the criminal offense of *"corruption of judges, prosecutors and justice functionaries,"* the IQC decided to dismiss him from office, while in similar cases (IQC Decision no.466, dated 28.10.2021), the IQC decided to conclude the re-evaluation process without a final verdict.

[52] The Commission considers that the subject demonstrated shallow knowledge, capabilities, and judgment in professional work, and a manner of work that is incompatible with her position as a prosecutor.

6. Role of the International Monitoring Operation in the Vetting process

AHC views as very important the work and role of the IMO, as a guarantor of the vetting process and for boosting the credibility of this process in the eyes of the international and domestic opinion. We have maximal appreciation for the contribution of IMO representatives to the conduct of the process to date, the recommendations issued, and the cooperation between them and the re-evaluation bodies. However, we have found that in the contents of decisions, there have been cases when it is difficult to identify the opinion or position of IMO representatives in the review of cases. **Given that we view it as important for transparency before the public and for increasing its trust in this process, we suggest that decisions reflect the positions taken by IMO representatives during the administrative investigation on the cases under review**.

Conclusions:

AHC appreciates the work done by the vetting bodies in terms of obligations in the context of EU integration, for advancing the process of the transitory re-evaluation of magistrates. In spite of the circumstances, mainly objective ones in not concluding the process within the constitutional deadline, we appreciate the political will to extend the mandate of the IQC and the PC. Likewise, we appreciate that the advancement of this process, in spite of its workload and dynamics, has been done mainly in respect of constitutional and legal standards and provisions, as well as of the principles of due legal process, a fact confirmed also by the ECtHR in its decision issued on the case "Xhoxhaj vs. Albania."

With the purpose of an increased standard in terms of respect for principles, quality, and coherence of decision making, and increased transparency and public trust, wee recommend that the re-evaluation bodies:

- ***demonstrate increased attention to the principle of impartiality and its perception in public, reflecting in decisions, the conclusions about***

verification of conflict of interest declared or requested from the members of panels of judges;

- ***except for some extraordinary case (due to very complex character), the subjects of the process should not feel under the pressure of long deadlines of administrative investigation, which create a basis for reasonable suspicions among the public about potential influencing factors. AHC suggests an acceleration of the pace of vetting, with the goal of respect for reasonable deadlines;***
- ***during evaluation of the criterion of assets, apply in a unified manner, for similar cases, the objective inability of the subjects of re-evaluation to present evidence about the lawfulness for their assets;***
- ***unify the methodology pursued on the way the analysis of the criterion of assets is realized and reflected in reasoned decisions for the public;***
- ***during the evaluation of the integrity, keep in mind the goal that the law links the integrity of the figure,[53] not interpreting it beyond this goal, and reflect in the decision the reasons leading to an updated report by the support body of the DSCI;***
- ***during evaluation of professional capabilities, IQC panels of judges should pay added attention to reflecting in the decision making the methodology and analysis of the processed indicators for evaluating the criterion of professional capabilities (referring to SAC decision 21/2019);***
- ***conduct a clearer evaluation and analysis in decision making of every behavior that might lead to the presumption of violation of public trust;***
- ***increase transparency, reflecting in decision making the criteria for the selection of public denunciations they choose to address, or the contents of the denunciation, and reflecting the positions of international observers during the administrative investigation of the case or during the process of its review by the IQC and SAC.***

[53] Discovering the fact whether the subject has or has had inappropriate contacts with individuals involved in organized crime.

III. Prosecution for former judges and prosecutors

In order to advance with fulfilling conditions in the context of European integration, Albania should take measures on starting prosecution for judges and prosecutors who failed the re-evaluation process. In its report of last October on Albania (2021), the EU valued referrals made to this moment to prosecution offices and expects the progress of this process, leaving tasks for Albanian authorities:[54]

- guarantee that prosecutions start in a steady and systematic manner on judges and prosecutors on which there is data about criminal offenses during the vetting process;

- realize assets' investigation in parallel with the prosecution of these cases and sequester unjustified assets or wealth of the re-evaluated subjects if the conditions and criteria envisaged in the Criminal Procedure Code or the so-called 'anti-mafia' law exist.

The vetting process, in spite of its significance, would not enable achieving the major goal of restoring citizens' trust in the justice system if it would not be complemented by the activity of other justice system institutions that guarantee the investigation and prosecution of the subjects of vetting, in accordance with the new legislation of the justice system. As a result, the impact of the vetting process, which has an administrative nature and is interconnected with the role and competences of the Special Prosecution against Corruption and Organized Crime as well as the General Jurisdiction Prosecution Offices. The material competence of the Special Prosecution Office is to investigate the criminal offenses of special subjects[55] who are within the material competence of the Special Court against Corruption and Organized Crime (SCOC), in reference to article 75/a of the Criminal Procedure Code. On other criminal offenses linked with the facts and indicia discovered during the vetting process that are not attributed to the categories of the special subjects, the material competence lies with the general jurisdiction prosecution offices.

While dismissal decisions in the first instance, until the end of January 2022 total 183, resignations until this date are at 84, thus a total of 268 subjects that have been

[54]Albania 2021 Report Accompanying the document Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions 2021 Communication on EU Enlargement Policy, p. 19 file:///C:/Users/user/Downloads/Albania-Report-2021.pdf

[55] For instance, the former judge of the Constitutional Court and High Court, the General Prosecutor, etc.

dismissed or have resigned. Against this considerable number, it is notable that criminal proceedings were initiated on a relatively small number of cases, namely 8.5% of those dismissed or removed from the system. In this regard, it is worth emphasizing the fact that the Special Prosecution Office was established late, with the first 8 prosecutors appointed on December 19, 2019.[56]

Information obtained officially from the Special Prosecution Office against Corruption and Organized Crime (SPAK)[57] highlight that this body registered 23 cases for former magistrates, of which 10 refer to the former members of the Constitutional Court and the High Court.[58] Of these 23 proceedings, 10 cases, in accordance with the Criminal Procedure Code, were transferred, according to material and territorial competence, to the general jurisdiction prosecution offices of judicial districts

The General Prosecution office also provided partial official information. Based on manual verification of registers, it results that the Prosecution Office of the Tirana First Instance Court, on 03.04.2018 decided to not initiate criminal proceedings regarding the referral material of the IQC on subject B.I., whose vetting process was interrupted due to his resignation. Furthermore, the Durrës First Instance Court is currently in the phase of preliminary investigations on the criminal proceedings referred by SPAK on a subject suspected of committing criminal offenses envisaged by articles 248 and 257/a of the Criminal Code.

Of the total of cases registered by the Special Prosecution Office, it results that in the overwhelming majority of cases, namely 20 of them, the criminal referrals were filed by citizens. Their denunciations refer to articles 143 "Fraud," 143/a/6 "Hiding of ownership," 180 "Hiding of income," 181 "Failure to pay taxes and dues," 248 "Abuse of office" and 257/a of the Criminal Code "Refusal to declare, failure to declare, hiding, or fake declaration of assets, private interests of elected individuals and public officials or any other person who has the legal obligation to declare."

[56] https://spak.al/ëp-content/uploads/2021/04/Raporti-2020-perfundimtarr.pdf
[57] Letter no. 441/1 prot., dated 07.02.2022 "Provision of information" submitted by SPAK
[58] See: Albania 2021 Report Accompanying the document Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions 2021 Communication on EU Enlargement Policy, p. 19 file:///C:/Users/user/Doënloads/Albania-Report-2021.pdf

Meanwhile, on 3 cases,[59] SPAK started criminal proceedings on its own initiative. In half of the cases denunciated by citizens, the cases were transferred to ordinary jurisdiction procesution offices in the districts.[60]

Verifications conducted by SPAK highlight that in no case did the vetting institutions (IQC or SAC) refer or file criminal referrals with the Special Prosecution Office facts that were discovered during this process on the subjects of re-evaluation.

With the exception of one case, in the other cases it does not appear that SPAK registered criminal proceedings for the criminal offenses that fall under its material competence regarding corruption or organized crime. The criminal offense attributed to former magistrates is that in article 257/a, paragraph two,[61] which does not fall under the material competence of the special prosecution office but is the competence of the general jurisdiction prosecution offices. However, SPAK has material competence for all criminal offenses, including article 257/a, if they were committed by special subjects, such as the member of the Constitutional Court, of the High Court, or the General Prosecutor. Article 257/a of the Criminal Code criminally punishes refusal to declare, failure to declare, hiding or fake declaration of assets, private interests of elected individuals or public officials or any other person who has an obligation to declare. The refusal to declare or failure to declare, envisaged in the first paragraph, is punishable by a fine or up to 6 months of imprisonment, while hiding or fake declaration, envisaged in the second paragraph of article 275/a, is punishable by a fine or up to 3 years of imprisonment.

Therefore, SPAK has prosecuted for article 257/a of the Criminal Code only the special subjects due to their capacity as high-level officials, namely three former members of the High Court and two members of the Constitutional Court and the former General Prosecutor.

In two of the cases, for one former member of the Constitutional Court (F.L.) and one former member of the High Court (B.D.), the start of investigations was based on the

[59] For former judges F.L and A.TH., the judicial police has filed criminal referrals based on information published on online media.
[60] Because they referred to criminal offenses envisaged in articles 143, 143/a/6, 180, 181, 248
[61] Except for one case, whereby aside from this accusation, former magistrate S.H. is also accused of offenses referred to in articles 319, 319/ç, 245/1, 197/a of the Criminal Code.

criminal referral of the judicial police and SPAK, based on data made public in online media (a case by initiative or ex officio). The criminal proceedings on them began on May 7, 2020.[62] On July 30, 2020, the Special Prosecution Office decided to send the case of the defendants to court, under charges of the criminal offense envisaged in article 257/a/2 of the Criminal Code. However, the investigation into them is not yet complete as the judge of the preliminary hearing at the SCCOC sent the cases back for completion of investigations. SPAK states that both cases are still in the phase of completing investigations. To investigate these two subjects for about 2 years is a very long timespan, especially for a criminal offense whose discoverability, compared to criminal offenses of corruption is, in our opinion, easier. This offense is closely linked with data and facts resulting from the vetting process and the burden of proof is not equal to the discoverability of criminal offenses in the field of corruption. For the latter, the standard of proof becomes difficult as it needs to be proven that the unjustified assets were built as a result of corruption. It is worth emphasizing that these two subjects represent less than 1% of the dismissed or resigned subjects. As a result, based on these indicators of evaluation, AHC notes that the efficiency of criminal investigations of the special prosecution office on these cases is seriously questioned.

SPAK states that aside from these two cases (initiated on its initiative), there are also three other criminal proceedings on former members of the High Court, who have been indicted (SH.S, A.TH and G.Z), accused also of the criminal offense envisaged by article 257/a/2 of the Criminal Code. Investigations into the defendants continue. If we analyze each of these three cases separately, against the decision making of the vetting bodies or the sequestered assets, questions arise as to why the Special Prosecution Office initiated criminal proceedings by limiting investigations only to article 257/a/2 of the Criminal Code. Although the Special Prosecution Office has not responded to AHC's request about the duration of the investigations, it is noted that a very long time has passed since the date when IQC decisions were issued until now, when criminal investigations into these three citizens continue. Concretely:

- For the former member of the High Court SH.S, the IQC issued its dismissal decision in July 2018, i.e. about 3 years and 7 months ago.[63] In February 2019,

[62] https://spak.al/2021/04/28/njoftim-per-shtyp/
[63] https://kpk.al/wp-content/uploads/2018/09/Vendim-Shkelzen-Selimi-i-azhornuar.pdf

3 years ago, the SAC upheld the decision of the IQC.[64] In the reasoned decision, the IQC notes among others that the subject of re-evaluation has contacts with individuals involved in organized crime of narcotics trafficking. Reasonable suspicions are raised that he may be easily pressured by individuals involved in organized crime. Furthermore, there is information that raise reasonable suspicions about involvement in unlawful activity, in the form of passive corruption of the judge and the exercise of unlawful influence on persons exercising public functions. International observers report that the subject SH.S. tried to intervene on behalf of a citizen with criminal records in order to influence the result of the case under review before the Albanian court, regarding extradition to a neighboring country to face criminal charges. As a potential result of this intervention, the request for the citizen's extradition to the neighboring country was rejected and he was freed. According to announcements on its official website, the Special Prosecution Office registered criminal proceedings on the case about two years ago, on May 7, 2020, for the criminal offense envisaged in article.[65] It is unclear why this prosecution office did not investigate on the facts discovered in the IQC decision making, regarding the criminal offenses of exercise of unlawful influence, abuse of office, facilitating organized crime groups on trafficking of narcotics, etc.

- For former member of the High Court A.TH, the Independent Qualification Commission issued a dismissal decision in July 2018, about 3 years and 7 months ago.[66] The decision was upheld by the SAC[67] in April 2019, about 3 years ago. Based on the analysis of the financial criterion, it results that the subject did not declare several assets and the lawful incomes of the subject were not sufficient to afford the purchase of real estate property, savings, i.e. cash at home and in the bank, and to conduct daily living expenses and declared ones. With regard to the criterion of integrity, it resulted that the subject of re-evaluation had inappropriate contacts with individuals involved in organized crime and may be pressured by individuals involved in organized crime. The subject appears to have not declared and denied the truth before

[64] http://kpa.al/njoftim-vendimi-9/
[65] https://spak.al/2021/04/28/njoftim-per-shtyp/
[66] https://kpk.al/wp-content/uploads/2018/09/Vendim-Admir-Thanza.pdf
[67] http://kpa.al/njoftim-vendimi-16/

the IQC about receiving gifts above 500 euros, being at the same time a member of the panel of judges in the issuance of decisions with the party "C" sh.p.k. – "donor." It is unclear when the criminal proceedings on this case began and why the special prosecution office did not investigate regarding facts discovered in the IQC decision making, regarding the criminal offenses of exercise of illegal influence, abuse of office, corruption, etc.

- In July 2017, the subject of re-evaluation G.Z notified the High Court about the end of his 9-year term and the handover of duties as its member. In April 2019, the subject confirmed that since November 2018, he gave up the status of magistrate, according to eh law "On the status of judges and prosecutors in the Republic of Albania." On April 25, 2019, the HJC declared the termination of the status of the magistrate because of withdrawal from the appointment to an appeals-level post. One month before the termination of the status was declared, it results that the subject was in a lottery to undergo the vetting process on 15.3.2019 by the IQC. According to the IQC decision, the vetting process on this subject began right away with filling out and submission of asset disclosure statements, integrity, and self-evaluation of professional capabilities, within 30 days from entry into force of the vetting law no. 84/2016 (i.e. in January 2017). Based on Annex G of the Constitution, as a result of the resignation, the HJC decided to state that the vetting process on the subject was interrupted.[68] Referring to the official website of SPAK and the letter on sending information to the Special Prosecution Office,[69] it is unclear when the criminal proceeding on this special subject began. The investigation into this subject continues while it has been 2 years and seven months since the decision making of the IQC to interrupt the vetting process. Furthermore, there is no official information on whether there were facts or data in the vetting declarations that helped the conduct of investigations by the special prosecution office.

On 5 of the above subjects of re-evaluation,[70] the Special Prosecution Office informs that sequestration measures have been enacted on assets based on law no. 10 192, dated 3.12.2009 *"On the prevention and strike against organized crime, trafficking,*

[68] https://kpk.al/wp-content/uploads/2019/07/Vendim-Guxim-Zenelaj.pdf
[69] No.441/1, dated 07.02.2022
[70] Former members of the Constitutional Court and the High Court

and corruption through preventive measures on assets." These assets are of different types, such as plots of land, units, apartments, garages, basement, etc. A considerable number of assets appear to have been sequestrated from two former judges of the High Court (namely SH.S and G.Z). The areas and considerable values of these assets are also an indicator of the need for the special prosecution office to investigate in a full and comprehensive manner the subjects, without confining itself only on article 257/a/2 of the Criminal Code.

Although this is the fourth year since the first decision of the vetting bodies and 62.3% of the subjects have undergone the process, the criminal process has concluded only on one subject,[71] for whom the court has issued a final decision. On the special subject, the former General Prosecutor A.Ll the prosecution office first registered initial materials based on information published in the media/portals on unjustified expenses. Part of the verifications was also obtaining a full copy of documentation of assets verifications conducted by the IQC, in the context of the vetting process. Vetting was interrupted due to the subject's resignation, while the criminal proceedings began in March 2018. During preliminary investigations, assets worth 98.777.000 or about one hundred million lek (market value) were sequestered from the subject. The criminal investigation into this case lasted for two years while the adjudication in the first instance lasted for two months. The subject was convicted for the criminal offense envisaged in article 257/a/2 of the Criminal Code, committed in three instances, namely the episode regarding the declaration of periodical private interests for 2016, the episode on the asset disclosure statement submitted in the context of the vetting process, and the episode of the declaration of private interests after leaving office. The Special Court against Corruption and Organized Crime (SCCOC) decided to merge the convictions and ruled on a conviction of 2 years of imprisonment and the complementary conviction of denial of the right to exercise public functions for 5 years. Also, real estate property sequestered by the First Instance Serious Crimes Court in July 2017 have been confiscated and moved to state ownership. After one year and four months, the SCCOC decision was upheld by the Appeals Court against Corruption and Organized Crime in September 2021, thus taking final form. In this case too, it is noticed that the prosecution office investigation, aside from being long (2 years) was also confined only to article 257/a/2 of the Criminal Code. In this case as well, the very high value

[71] Case of the former General Prosecutor

of assets raises questions as to how they were created and whether they are the proceeds of criminal offenses linked with the exercise of unlawful influence, abuse of office, or corruption.

Although it has been two years and a half since the creation of the Special Prosecution Office, which has faced numerous challenges in terms of human resources, capacities, and the high caseload of carryover and new cases, the first criminal proceedings for criminal offenses in the field of corruption on the subjects of re-evaluation was registered last week (2021). The subject, a former prosecutor in the Saranda Judicial District Prosecution Office, was dismissed by the IQC in September 2021.[72] According to this decision, the subject showed lack of legitimate financial resources to justify assets and expenses for the period 1997 – 2016, filed inaccurate and erroneous declaration of assets and legitimate sources, and filed insufficient declarations on the criterion of wealth, in the sense of paragraph 3, article 61, of law no. 84/2016. The criminal proceedings on the case began one month before the IQC decision was issued, namely on August 6, 2021. Unlike the cases above, within a 5-month period, the Special Prosecution Office sent the proceedings to court, among others for the criminal offenses envisaged in the Criminal Code, articles 319 "Active corruption of the judge, prosecutor, and other justice functionaries," article 319/ç "Passive corruption of the judge, prosecutors and other justice functionaries," article 257/a/2, etc.

Conclusions/ Recommendations

Based strictly on data from the Special Prosecution Office, the General Prosecution Office, the official website of SPAK, decisions of the vetting bodies on some of the special subjects (high-level justice officials), we notice:

Although one of the conditions related to EU integration is the prosecution of former judges and prosecutors who failed in the vetting process, the vetting bodies only in one case referred or filed criminal referrals on the subjects that had problems in terms of assets and integrity. Even in this case, the prosecution office at the Durrës First Instance Court decided to not initiate criminal proceedings. We recommend to the transitory re-evaluation bodies to be proactive in carrying out the obligations that derive from article 281 of the

[72] https://kpk.al/wp-content/uploads/2021/10/Vendim-Sali-Hasa-1.pdf

Criminal Procedure Code, for all those cases when investigations conducted in the context of re-evaluation, discover facts that represent elements of criminal offenses.

At the same time, the number of investigations started upon the initiative of the Special Prosecution Office is very low, while even though there are many more referrals by the public, this too is low compared to the number of dismissals/resignations.

AHC suggests to the Special Prosecution Office and the prosecution offices of the ordinary jurisdiction to increase their vigilance to facts made public in the media during the re-evaluation process, to start investigations ex officio in all instances when there are indicia for the commission of a criminal offense.

For every resigned or dismissed subject, it would be recommendable for the prosecution office (the Special Prosecution Office or the ordinary jurisdiction prosecution offices) to access the decision making of the vetting institutions and materials of the cases, independently from whether there is a referral or not by the vetting institutions. The implementation of this recommendation, accompanied by the necessary measures to seek the imposition of sequestration pursuant to the anti-mafia law (when there are unjustified, hidden assets or for which there is no legal resource) would contribute also to increasing the effectiveness and pro-activeness of the prosecution office on assets investigations, in accordance with recommendations of the European Union.

Except for the subject S.H of vetting, it is noticed that the deadlines for investigations are 2 years, i.e. considerable not only compared to deadlines envisaged in the Criminal Procedure Code, but also for the criminal offense the criminal proceedings began on.

The Special Prosecution Office and ordinary jurisdiction prosecution offices should guarantee the standards of a full, effective, objective, and comprehensive investigation for the subjects of vetting, for which the process indicates data or facts about considerable assets or ties with organized crime. AHC considers that the investigation of the Special Prosecution Office and the ordinary jurisdiction prosecution offices, in accordance with their material competences and the subjects they investigate, should extend to cover the

criminal offenses in the field of corruption, abuse of office, facilitation or other potential contributions to criminal organizations, etc.

We recommend to the Special Prosecution Office and the ordinary jurisdiction prosecution offices to conduct periodical analysis about the difficulties encountered in investigating these subjects and to establish bridges of cooperation with the vetting institutions, in order to help effective, complete, and comprehensive investigations.

With regard to the above recommendations, transparency to the public in the official websites of the IQC, SAC and the Special Prosecution Office, in our opinion, should be increased, devoting a special section to cases referred by the vetting bodies to the prosecution office, pursuant to article 281 of the Criminal Procedure Code, deadlines of the prosecution office for investigating them, cooperation of the public in the criminal process, decision-making, imposition of sequestration or confiscation measures, etc.

Annex 1 - List of analyzed decisions

IQC Decisions

1. Decision no. 332, dated 12.01.2021
2. Decision no. 333, dated 13.01.2021
3. Decision no. 334, dated 14.01.2021
4. Decision no. 342, dated 02.02.2021
5. Decision no. 344, dated 11.02.2021
6. Decision no. 352, dated 01.03.2021
7. Decision no. 358, dated 19.03.2021
8. Decision no. 362, dated 31.03.2021
9. Decision no. 363, dated 01.04.2021
10. Decision no. 374, dated 23.04.2021
11. Decision no. 392, dated 28.05.2021
12. Decision no. 393, dated 03.06.2021
13. Decision no. 402, dated 17.06.2021
14. Decision no. 404, dated 23.06.2021
15. Decision no. 415, dated 07.07.2021
16. Decision no. 420, dated 13.07.2021
17. Decision no. 1, dated 14.07.2021

SAC Decisions

1. Decision no. 1/2021 (JR) dated 12.01.2021
2. Decision no. 2/2021 (JR) dated 13.01.2021
3. Decision no. 3/2021 (JR) dated 26.01.2021
4. Decision no. 4/2021 (JR) dated 09.02.2021
5. Decision no. 6/2021 (JR) dated 16.02.2021
6. Decision no. 7/2021 (JR) dated 23.02.2021
7. Decision no.8/2021 (JR) dated 09.03.2021
8. Decision no. 9/2021 (JR) dated 23.03.2021
9. Decision no. 10/2021 (JR) dated 24.03.2021
10. Decision no. 11/2021 (JR) dated 31.03.2021
11. Decision no. 12/2021 (JR) dated 12.05.2021
12. Decision no. 13/2021 (JR) dated 10.06.2021
13. Decision no. 14/2021 (JR) dated 15.06.2021