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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

ALBANIA

DRAFT *AMICUS CURIAE* BRIEF FOR THE CONSTITUTIONAL COURT

ON THE LAW ON THE TRANSITIONAL RE-EVALUATION OF JUDGES AND PROSECUTORS (THE VETTING LAW)

on the basis of comments by

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I. Introduction

1. By a letter of 28 October 2016, the President of the Constitutional Court of Albania, Mr Bashkim Dedja, requested an *amicus curiae* brief from the Venice Commission on the conformity of Law no. 24/2016 on the Transitional Re-Evaluation of judges and Prosecutors in the Republic of Albania[1] (hereinafter, "the Vetting Law") with international standards including the European Convention on Human Rights (hereinafter, "ECHR").

2. The context of this request is a claim before the Constitutional Court of Albania requesting the Vetting Law to be declared unconstitutional and incompatible with the ECHR.[2]

3. The four question addressed to the Venice Commission are as follows:

1) *Given the fact that all the judges of the Constitutional Court are subject of the law no. 84/2016 "On the transitional re-evaluation of judges and prosecutors in the Republic of Albania", might their participation in the examination of this case be considered as a conflict of interest?*

2) *Does this law respect the fundamental principles of the rule of law and the separation and balancing of powers? Is the independence of the judiciary endangered by the involvement in the process of re-evaluation of judges and prosecutors of the organs under the control of the executive power?*

3) *Is the law in conformity with Article 6 of the ECHR, regarding the respect of the right to fair trial? Is the denial of the right of judges and prosecutors subject to the law on re-evaluation to be addressed to domestic courts contrary to Article 6?*

4) *Are the law provisions in relation to the background assessment of the assessees contrary to Article 8 of the ECHR, as concerns the respect to private and family life of judges and prosecutors?*

4. This is an *amicus curiae* brief for the Constitutional Court of Albania. As such, it does not have the intention of taking a final stand on the issue of constitutionality of certain provisions of the Vetting Law, but merely to provide the Constitutional Court with material as to the compatibility of the relevant provisions of the Vetting Law with European standards, so as to facilitate the Court's consideration of these provisions under the Constitution of Albania. It is the Constitutional Court of Albania that has the final say on the binding interpretation of the Constitution and the compatibility of national laws with this text.

5. This *amicus curiae* brief is based on an English translation of the Vetting Law as well as of the Constitution of the Republic of Albania. Errors may occur in this amicus curiae brief as a result of an incorrect or inaccurate translation.

6. Mr Bartole, Mr Hamilton and Mr Vardzelashvili acted as rapporteurs for this *amicus curiae* brief.

7. *This amicus curiae brief was drafted on the basis of the rapporteurs' comments and adopted by the Venice Commission at its (…) Plenary Session (Venice, …).*

[1] CDL-REF(2016)062
[2] See, CDL-REF(2016)064, Constitution of Albania. See the arguments of the claimants in more detail under Title II -Background information- of the present *amicus curiae* brief.

II. Background information and Preliminary Remarks

8. In its Interim Opinion on the Draft Constitutional Amendments on the Judiciary of Albania,[3] the Venice Commission examined, among other issues, the transitional qualification assessment of judges and prosecutors which provides for the process of vetting ("qualification assessment") of all sitting judges and prosecutors by specially created Independent Qualification Commission. As indicated in the Interim Opinion, the necessity of the vetting process is explained by an assumption that the level of corruption in the Albanian judiciary is extremely high and the situation requires urgent and radical measures. After having underlined that such radical solution would be ill-advised in normal conditions, since it creates enormous tension within the judiciary and in particular, creates a risk of the capture of the judiciary by the political force which controls the process, the Venice Commission considered that a drastic remedy may be seen as appropriate in the Albanian context, as long as it remains an extraordinary and a strictly temporary measure. The Interim Opinion formulated a number of recommendations, including in particular, that the composition of the Independent Qualification Commission and status of their members should guarantee their genuine independence and impartiality and that judges should have the right to appeal to an independent body.

9. Following the recommendations by the Venice Commission in the Interim Opinion, the *Ad hoc* Committee on Justice System Reform of the Albanian Parliament revised the Draft Amendments and re-submitted them to the attention of the Venice Commission.[4] The Final Opinion on the Revised Draft Constitutional Amendments on the Judiciary[5] has been adopted by the Venice Commission during its 106th March 2016 Plenary Session. In its Final Opinion, the Venice Commission reiterated that the vetting process was not only justified but necessary for Albania to protect itself from the scourge of corruption.[6] It considered that the revised Draft Amendments have taken on board most criticism formulated in the Interim Opinion and welcomed in particular that the revised Draft Amendments created a separate appellate body (the Specialized Qualification Chamber) within the High Court, which is a sort of a specialized court (and not an *Ad hoc* extraordinary judge) as it is not created in a view of a single specific case and it is supposed to stay in activity during the whole duration of the vetting procedure.[7] The Final Opinion recommended in particular that the mandate of the vetting bodies should be reduced in length; judges of the appellate body, at the end of their mandate, should be able to integrate automatically the judiciary and that the judges and prosecutors undergoing vetting should enjoy the right to complain to the Constitutional Court about violation of their fundamental rights, with some reasonable exceptions dictated by the necessity of the vetting process.

10. After the adoption of the Final Opinion, further amendments were introduced to the Draft constitutional amendments which were finally adopted by the Parliament of Albania on 22 July 2016[8] with an overwhelming majority including the votes of the main opposition party.

11. In pursuance of Article 179 b) of the Constitution, the Parliament adopted, on 30 August 2016, Law no. 84/2016 "On the Transitional re-evaluation of judges and prosecutors in the Republic of Albania" (the Vetting Law).[9] According to Article 1 of the Vetting Law, its

[3] CDL-AD(2015)045 Interim Opinion on the Draft Constitutional Amendments on the Judiciary of Albania (Adopted by the Venice Commission at its 105th Plenary Session, Venice, 18-19 December 2015), paras. 97-135 (CDL-REF(2015)038).
[4] See, CDL-REF(2016)008, Consolidated version of the revised Draft amendments.
[5] CDL-AD(2016)009, Final Opinion on the Revised Draft Constitutional Amendments on the Judiciary of Albania (adopted by the Venice Commission at its 106th Plenary Session, Venice, 11-12 March 2016).
[6] Final Opinion, para. 52.
[7] Final Opinion, para. 63.
[8] See, CDL-REF(2016)064, Constitution of Albania.
[9] CDL-REF(2016)062, Law no. 84/2016 "On the Transitional re-evaluation of judges and prosecutors in the Republic of Albania".

purpose "*is to determine specific rules for the transitional re-evaluation of all assessees, in order to re-establish the proper function of rule of law and true independence of the judicial system, as well as the public trust and confidence in these institutions* […]" and, according to Article 2, to provide for the organisation of the re-evaluation process in particular for all judges and prosecutors (para. 1); the methodology, procedure and standards of the re-evaluation process (para. 2); the organisation and functioning of the re-evaluation institutions (para. 3); and the role of the International Monitoring Operation, other state organs and of the public in the re-evaluation process (para. 4).

12. By a request presented on 7 October 2016 to the Constitutional Court, the main opposition party asked the Court to declare the Vetting Law incompatible with the Constitution and the ECHR and requested the suspension of the Vetting Law and its implementation until the final decision of the Constitutional Court. The Constitutional Court has provided to the Venice Commission a translation of the request made by the main opposition party. The request by the President of the Constitutional Court to the Venice Commission contains also a summary of the main arguments of the main opposition party for upholding their claims of unconstitutionality.

13. The arguments of the request may be summarised as follows:

- The Vetting Law has displaced the control and investigation in the process of re-evaluation of judges and prosecutors from the independent and impartial organs created by the Constitutional Amendments (Public Commissioners, Independent Qualification Commission and the Appeal Chamber) to the existing organs allegedly under the control of the Government such as the High Inspectorate of the Declaration and Audit of Assets and Conflict of Interest (HIDAACI), the Classified Information Security Directorate (CISD), the School of Magistrates, the General Directorate for the Prevention of Money Laundering (GDPML) and the Ministry of Internal Affairs. The involvement of these governmental bodies in the re-evaluation process as foreseen in the Vetting Law, violates the principles of separation and balancing of powers and the independence of the judiciary;

- The Vetting Law does not provide for any specific procedural regulation in order to guarantee the basic elements of fair trial and respect for the fundamental rights of the assessees. Articles 53 and 54 of the Vetting Law allow obtaining information from the public, but do not meet the standard defined in Article Ç(2) of the ANNEX to the Constitution, i.e. the vetting bodies shall take into account information from the public observing the principle of proportionality between privacy and the needs of the investigation, and shall guarantee the right to a fair trial;

- The Vetting Law violates the right to appeal of the assessees. Although the Constitution provides for the constitutional authority of the Appeal Chamber, considered as a judicial organ receiving appeals against the decisions given by the Independent Qualification Commission and acting according to the rules applied by the Administrative Court of Appeal, the Appeal Chamber does not have jurisdiction on matters provided by Article 131 of the Constitution (duties and competences of the Constitutional Court) which includes the examination of complaints on violation of fundamental rights and freedoms guaranteed by the Constitution;

- The Vetting Law violates the principle of legal certainty because the wording of its provisions is unclear, ambiguous and contradictory. In particular, it is not clear in the Vetting Law which institution will conduct the proficiency assessment of the judges of the Constitutional Court, the judges of the High Court, the legal advisers of both institutions, the General Prosecutor and his/her legal assistants.

14. By decision of 25 October 2016, the Constitutional Court decided to suspend the implementation of the Vetting Law and to request an *amicus curiae* brief from the Venice Commission regarding the compatibility of the Law with the ECHR and the Constitution of Albania, including the four questions indicated in paragraph 3 of the present brief.

15. The purpose of the present brief is not to take a final stand on the issue of constitutionality of the Vetting Law and to substitute the present assessment to the future judgment of the Constitutional Court. Therefore, for instance, the Commission is not requested to make an analysis of the Vetting Law in the light of the ordinary legislation currently in force in the Republic of Albania in view of a coherent interpretation of the provisions of the Law on the basis of the actual national legislative concepts and terminology since this is the task of the Constitutional Court which is obviously well acquainted with the Albanian legislative regulations, doctrines and culture. Moreover, the request of the President of the Constitutional Court does not concern an evaluation of the Law in the light of the differences between the first draft of the Constitutional Amendments,[10] the second draft which was the subject matter of the Final Opinion of the Venice Commission[11] and the final version of those amendments as adopted on 22 July 2016.[12]

III. Assessment

A. First question

Given the fact that all the judges of the Constitutional Court are subject of the law no. 84/2016 "On the transitional re-evaluation of judges and prosecutors in the Republic of Albania", might their participation in the examination of this case be considered as a conflict of interest?

16. In the *Amicus Curiae* Opinion CDL-AD(2009)044 on the Law on the Cleanliness of the Figure of High Functionaries of the Public Administration and Elected Persons of Albania,[13] the question submitted to the Venice Commission concerned the position of the constitutional court judges who were potential subjects of the lustration law. Those judges should, in the meantime, take part in the discussion and in the decision about the constitutionality of this law. This was a similar but not identical question to the one currently under examination. In that earlier case (2009), only some judges of the Constitutional Court would potentially have been affected by the lustration law. Therefore, the possible conflict of interest concerned the position of some constitutional judges only. A solution to the problem thus created could have been found had the legislator chosen to provide for the temporary replacement of Constitutional Court judges forced to disqualify themselves since not all judges were potentially affected.

17. In the current case, however, all the constitutional judges, no matter who sits at the Constitutional Court, will be the subject of the Vetting Law which provides for the re-evaluation of every judge in Albania including the judges of the Constitutional Court (Art. 179(b)3 of the Constitution). At the same time, the Vetting Law does not provide for any specific regulation of a possible conflict of interest requiring disqualification of judges. Moreover, the Constitution of Albania states in its Article 179 that "*members of the Constitutional Court shall continue their activity as members of the Constitutional Court, in accordance with the previous mandate*". This is a transitional provision of the Constitution which provides for existing members of the Constitutional Court to serve out their existing terms, thus applicable to the current situation.

[10] See, the Interim Opinion CDL-AD(2015)045 and CDL-REF(2015)038.
[11] See, CDL-AD(2016)009 Final Opinion on the Revised Draft Constitutional Amendments on the Judiciary of Albania and CDL-REF(2016)008 Consolidated version of the revised Draft amendments.
[12] CDL-REF(2016)064 Constitution of Albania.
[13] CDL-AD(2009)044 on the Law on the Cleanliness of the Figure of High Functionaries of the Public Administration and Elected Persons of Albania, adopted by the Venice Commission at its 80th Plenary Session (Venice, 9-10 October 2009).

18. Therefore, the Constitutional Court has to choose between two alternatives, either it has to exclude the possibility of a judicial review of the vetting legislation, since a regulation of the conflict of interest is missing in the Vetting Law, or it has to recognise the basic importance of the guarantees ensured by a functioning judicial review of legislation and to deal consequently with the case submitted to its judgment.

19. Despite the differences between the situation relating to the 2009 lustration law and the current issue of conflict of interest, the following passage from the 2009 Opinion of the Commission appears to be relevant and may be of some assistance:

> "*If the Assembly does not provide for a solution by amending the CCL or the Constitution, a solution must be found by the Court itself by way of interpretation of the relevant norms. The authorization of the Court derives from the necessity to make sure that no law is exempt from constitutional review, including laws that relate to the position of judges. In search for a solution, one has to look at the rationale of excluding a biased judge. The main rationale is the following: if there is a leeway in deciding a case, the judge shall not be tempted to fill it in his/her favour. In dealing with the constitutionality of the Law there may be some parts involved where different opinions on the constitutionality are conceivable, while others are clear, without any need for a value judgment.*"[14]

20. In case the Court is asked to rule on a matter in which some of its members may have, or be perceived to have, an interest, the Court is not absolved by the existence of such an interest from its duty to rule on the issue raised. The Constitutional Court is obliged to rule on the constitutionality of every law which is challenged before it. If it were to permit a situation to arise in which it was precluded from doing so by virtue of disqualifications arising from the possibility of any one or more of its members being the subject of an adverse finding under the legislation, that obligation on the Court to make a decision could not be fulfilled.

21. The Bangalore Principles of Judicial Conduct 2002[15] envisage that such a situation may arise and provide for such an eventuality. Under the heading "Value 2, Impartiality", having stated the general principle that a judge who is not impartial or may be perceived by a reasonable observer not to be impartial should not take part in hearing a case, they go on to say that "*disqualification of a judge shall not be required if no other tribunal can be constituted to deal with the case*". The Commentary on the Bangalore Principles by the UN Office of Drugs and Crime[16] explains this provision as follows:

> "*Doctrine of necessity*
>
> *100. Extraordinary circumstances may require departure from the principle discussed above. The doctrine of necessity enables a judge who is otherwise disqualified to hear and decide a case where failure to do so may result in an injustice. This may arise where there is no other judge reasonably available who is not similarly disqualified, or if an adjournment or mistrial will cause extremely severe hardship, or if a court cannot be constituted to hear and determine the matter in issue if the judge in question does not sit. Such cases will, of course, be rare and special. However, they may arise from time to time*

[14] CDL-AD(2009)044 on the Law on the Cleanliness of the Figure of High Functionaries of the Public Administration and Elected Persons of Albania, para. 142.
[15] Bangalore Principles of Judicial Conduct: https://www.unodc.org/pdf/corruption/corruption_judicial_res_e.pdf
[16] UNODC, September 2007. https://www.unodc.org/documents/corruption/publications_unodc_commentary-e.pdf

in final courts that have few judges and important constitutional and appellate functions that cannot be delegated to another judge."[17]

22. This is certainly the case when there is only one court with constitutional jurisdiction and/or there are limited number of judges and when disqualification may actually result in denial of justice.

23. In fact, it is not that difficult to envisage circumstances where such a problem may arise. Challenges to taxation measures, for example, could have implications for the tax liability of every individual judge. Such a situation arose in the Irish case of *O'Byrne v Minister for Finance,*[18] an action by the widow of a judge who sought a finding that the deduction of income tax from the salary of judges amounted to an unconstitutional reduction in judicial remuneration. In the High Court, Dixon J referred to an earlier finding of the United States Supreme Court that "*jurisdiction could not be declined or renounced because of the individual relation of the members of the court to the question, the plaintiff being entitled by law to invoke the jurisdiction and there being no other tribunal to which under the law recourse could be had in a matter of the kind*."[19]

24. Similar situation may arise if the constitutionality of legal norms regulating constitutional court proceedings, requirements for office holders of the constitutional court, grounds for resignation or disciplinary proceedings is challenged before the Constitutional Court. In such cases, constitutional judges are not precluded from hearing the case.

25. However, if there are grounds to believe that a judge considering the constitutionality of the Vetting Law would fail the requirements established by this very law and thus appears to be unfit for the office, not only the judge has a right but, in certain circumstances, may be under the obligation to resign, for instance, if the judge concerned foresees his/her failure to satisfy the background assessment due to inappropriate contacts with the members of the organized crime. However, since there is a presumption that judges of the court are acting in good faith, the judge should be allowed to evaluate constitutionality of the requirements established by law.

26. From a political point of view, the absence of a legislative regulation in the Vetting Law of a possible conflict of interests requiring the disqualification of all the constitutional judges could be interpreted as recognition of the constitutional necessity of preserving the functionality of the judicial review of legislation. Moreover, also the parliamentary opposition, which did not vote in favour of the Vetting Law but approved the constitutional revision which remains the basis of the present transitional re-evaluation process, apparently accepts the permanence of the competence of the Constitutional Court as they submitted the mentioned request to the Court itself. As the Venice Commission considered in the 2009 Opinion, "*it must be ensured that the Constitutional Court as guarantor of the Constitution can function as a democratic institution: the possibility of excluding judges must not result in the inability of the Court to take a decision. […] it follows that the judges of the Constitutional Court of Albania are not barred from ruling on this matter.*" The Constitutional Court could also take into account the criteria used in the 2009 Opinion (see paragraph 19 of the present brief), i.e. the margin of legal interpretation of the judge concerned in his/her function of judicial review of legislation: a large margin, or a leeway in deciding the case may justify the disqualification, whereas in case the constitutionality/unconstitutionality issue is rather clear and the judicial adjudication does not involve any value judgment by the judge, then the effective functioning of the Constitutional Court as a democratic institution should prevail.

[17] Ibid., paragraph 100.
[18] *O'Byrne v Minister for Finance* [1959] IR 1, (1959)ILTR11.
[19] *Evans v Gore* (1919) 253 US 245 at 248, per Van Devanter J.

B. Second question

Does this law respect the fundamental principles of the rule of law and the separation and balancing of powers? Is the independence of the judiciary endangered by the involvement in the process of re-evaluation of judges and prosecutors of the organs under the control of the executive power?

27. The request submitted by the parliamentary opposition to the Constitutional Court claims that the Vetting Law violates the principle of separation and balancing of powers in that it has displaced the control and investigation in the process of re-evaluation of judges and prosecutors from the independent and impartial organs created by the Constitutional amendments (Public Commissioners, Independent Qualification Commission and the Appeal Chamber) to existing organs allegedly under the control of the Government such as the High Inspectorate of the Declaration and Audit of Assets and Conflict of Interest (HIDAACI), Classified Information Security Directorate (CISD), School of Magistrate, General Directorate for the Prevention of Money Laundering (GDPML) and the Ministry of Internal Affairs.

28. Those bodies are recognised as playing an active role in the process of re-evaluation by the constitutional vetting institutions. If the process of vetting is conducted or controlled by the executive, the entire process of vetting may be compromised. Therefore, it is important to ensure that the involvement of the executive, in law and in practice, is limited to the extend that is strictly necessary for the effective functioning of the vetting bodies.

29. It appears from the constitutional and legislative provisions that the re-evaluation bodies, i.e. the Independent Commission and the Appeal Chamber possess both the characteristics of judicial bodies. Under Article 179 (b)6 both bodies operate and decide independently and impartially. Under Article C of the Annex to the Constitution, during their mandate, the members of the Independent Commission and Public Commissioner shall have the status of a judge at the High Court (para. 3). Appeal Chamber shall function within the Constitutional Court (Article 197(b)5 of the Constitution) and its members have the status of judges of the Constitutional Court (Article C (3) of the Annex).

30. Members of the Commission and the Appeal Chamber are subject to an annual disclosure of assets which will be made public, as well as constant monitoring of their financial accounts and waiver of the privacy of their communications related to their work (Articles C(4) of the Constitution).[20] Article 28 of the Vetting Law provides for the monitoring of their telecommunications. Article 16 sets out detailed provisions which establish disciplinary liability for any improper or poor conduct by members of the re-evaluation institutions, including provisions aimed at ensuring the independence and impartiality of their members and Article 17 establishes procedures for their dismissal where they commit disciplinary offences.

31. The Independent Commission is divided into panels which are described in Article C as permanent. Both it and the Appeal Chamber are "*to operate with accountability, integrity and transparency and with the objective of promoting an independent and competent system of justice free from corruption*." Article 4 of the Vetting Law provides further that both institutions "*shall exercise their duties as independent and impartial institutions based on the principles of equality before the law, constitutionality and lawfulness, proportionality and*

[20] The fourth question put forth by the Constitutional Court examined below, concerns the right to respect for private and family life of judges and prosecutors undergoing the vetting process and is not related to the rights protected under Article 8 ECHR of the members of the vetting bodies. It should be noted, however, that such a waiver of rights concerning the privacy of the work related communications is possible, provided that the implementing law is carefully designed in order to define the scope of this waiver which should be in compliance with the applicable European standards (CDL-AD(2015)045, para. 124). The Law should also provide clear guidance when and to what extend it is permitted to carry out monitoring of the telecommunications of the members of the vetting bodies.

other principles which guarantee the rights of assessees for a due legal process." In addition, certain procedures established in administrative law and practice are to apply to their activities.[21] Article 27 of the Vetting Law ("Guarantees of Impartiality") deals with conflicts of interest by members of the re-evaluation institutions and decisions taken by members of the institutions who have a conflict of interest amount to serious disciplinary misconduct (para. 1).

32. The system of appointment of the Independent Commission and the Appeal Chamber are provided for in Article C of the Annex and in Article 6 of the Vetting Law. The conditions for appointment to the Independent Commission and the Appeal Chamber seem to be equivalent to those for judicial appointments and appear to be at least as rigorous as those in place for appointments to permanent judicial office. The arrangements for making the appointments appear to be designed to ensure so far as practicable the appointment of suitably qualified candidates who meet the criteria. Procedures have been put in place to allow for appointments by qualified majority in the Parliament with an anti-deadlock mechanism. Other than the fact that these are not permanent institutions, it seems that the intent of the constitutional and the legal provisions is to confer on them the essential characteristics of courts of law. On the expiry of their terms of office any pending cases will be thenceforth dealt with by the permanent judicial and prosecutorial institutions. These points could be taken into account by the Constitutional Court while examining whether the re-evaluation bodies have the characteristics of judicial bodies.

33. As regards the involvement of other bodies, the text of the Vetting Law as submitted to the Commission does not seem to allow to draw the conclusion that the opinions and reports prepared by the organs under government supervision such as HIDAACI, CISD etc. are substituted for the final decisions of the Independent Commission and the Appeal Chamber which are the institutions newly and expressly created in view of the implementation of the vetting process.

34. In accordance with the general principle of Article 4(2) of the Vetting Law which provides that "*the Commission and the Appeal Chamber are the institutions which decide on the final evaluation of the assessee",* the individual articles of the Vetting Law shows that at all times the evaluation and assessment of any information or evidence gathered by executive bodies, such as HIDAACI, CISD or GDPML, rests with the Commission and the Appeal Chamber. For instance, according to Article 33(5) of the Vetting Law, upon completion of the audit, the general inspector of HIDAACI shall prepare a reasoned detailed report for each assesse and shall rate his or her declarations. However, it appears that the task of the HIDAACI is limited to the preparation of this report and the re-evaluation process shall be conducted, on the basis of this asset assessment, by the Independent Commission and the Appeal Chamber (Art. 4(1) ad (2)). Further, according to Article 43(2) the relevant proficiency assessment body (which is, according to Article 3(10), the Inspectorate of the High Council of Justice and the relevant structure of the General Prosecutors Office) reviews legal documents issued by the assessee and prepares a detailed and reasoned report to be submitted to the Independent Commission which is in a position to draw its own conclusions independently.

35. The concern however remains that in certain circumstances, according to Article 39(2) concerning the background assessment, information collected as a result of the background check "*shall not be disclosed if it endangers the safety of a source or is a result of a condition from a foreign government*". In this case, the re-evaluation institutions may lack the possibility of independent re-evaluation and would only be able to rely on the assessment/evaluation made by the National Security Authority. Thus, the rule of prohibition of disclosure may only be possible if the information in question is favourable to the assessee. Further, from the point of view of the independence of the judiciary, the

[21] Articles 35-40 and 45-47 of the Administrative Procedure Code.

Constitutional Court could also consider the importance to ensure, during the proficiency assessment (Articles 40-44 of the Vetting Law), that the legal opinions expressed by judges and/or prosecutors, which may simply be considered as "incorrect" by the evaluators, do not become the ground for negative result. It is essential that negative evaluation follows only in cases of fundamental and serious errors and/or when there is clear and consistent pattern or erroneous judgements that indicate lack of proficiency.

36. In an overall assessment, however, it is quite normal and in line with European standards that the evidence presented to a court of law is initially obtained by executive bodies such as the police or prosecutor. Provided its evaluation, i.e. the assessment of its veracity and the weight to be attached to it is a matter for judicial determination, this does not amount to an interference with the judicial power.

37. It should also be borne in mind that Article Ç, para. 4, of the Annex expressly confers on both the Commission and the Appeal Chamber extensive powers to investigate and verify matters themselves.[22] According to paragraph 3 of the same Article, official bodies shall cooperate with and disclose requested information to the Commission and Appeal Chamber and grant direct access to their databases. Moreover, while Article 45 of the Vetting Law allows members of the Independent Commission and the Appeal Chamber to investigate autonomously on all relevant facts, Article 57(4) puts forth the principle that in the decision process of the Commission, the conclusions are drawn by the panel.

38. In the view of the Venice Commission, the other bodies such as HIDAACI or CISD which are involved in the vetting process seem to have instrumental and subservient functions aimed at helping the new institutions to carry out their difficult mandate. Decision-making power in all cases appears to remain with the Commission and Appeal Chamber, established for this purpose in accordance with the provisions of the Constitution as independent and impartial judicial bodies.

C. Third question

Is the law in conformity with Article 6 of the ECHR, regarding the respect of the right to fair trial? Is the denial of the right of judges and prosecutors subject to the law on re-evaluation to be addressed to domestic courts contrary to Article 6?

39. The answer to this question depends on the qualification of the Appeal Chamber provided for by Article F of the Annex to the Constitution. The Venice Commission has already set out in relation to the second question above details concerning the qualifications for and methods of appointment to the Commission and the Appeal Chamber. In the opinion of the Venice Commission, these rules are designed to secure that these re-evaluation institutions will be independent and impartial tribunals and suitable to reach this goal. In the Final Opinion on the constitutional amendments, the Appeal Chamber was considered by the Venice Commission as "a sort of a specialized court" (para. 63 of the Final Opinion) and its creation as an acceptable solution to the problem of the judicial guarantee to the persons affected by the vetting procedure. The Final Opinion further considered that the Specialised Qualification Commission (i.e. the Appeal Chamber) resembles a court in many regards: its

[22] The evaluation institutions may interview people named in the declaration or others, and seek cooperation with other state or foreign institutions to confirm the veracity and accuracy of the disclosure, have direct access to all relevant government databases and files, if not classified as state secret, including the assessees' personal files, statistical data, files selected for evaluation, self-evaluations, opinions of supervisors, training records and complaints, verification of complaints, disciplinary decisions against the assesse, property and land registers, bank accounts, tax offices, car registration data bases, border control documentation as well as any other relevant documents. They may order private individuals and companies to provide testimony or evidence in accordance with the law.

members are called "judges",[23] they function within the High Court[24] and they enjoy guarantees similar to those judges enjoy.

40. In addition, according to Article 4(6) of the Vetting Law, if not provided differently in the Constitution or by the Vetting Law, the re-evaluation institutions may apply also the procedures provided in the Code of Administrative Procedures, or Law "On the organization and functioning of administrative courts and adjudication of administrative disputes". Many procedural rules set out in the Vetting Law concerning the procedure before the Appeal Chamber, are written on the basis of the qualification of that process as a "judicial process" as far as they provide for the application –or not- of rules concerning the adjudication of administrative disputes (see, for instance, art. 62(3), 63(2) and 65(1) of the Vetting Law).

41. Article Ç of the Annex, in its second paragraph, expressly imposes on the Commission and the Appeal Chamber a duty to guarantee the right to a fair trial. Moreover, although in the process of re-evaluation, a presumption for the disciplinary measure of dismissal shall be established in some cases, which the assessee shall have the burden to dispel,[25] Article Ç of the Annex provides clearly that this applies only for the assessment and not for other proceedings, and in particular not for criminal proceedings.

42. Both re-evaluation institutions are required to act with transparency which clearly implies that hearings should be in public. Article 55 of the Vetting Law expressly provides for a public hearing. By virtue of Articles 57(1) and 66(2) respectively, the decisions of the Qualification Commission and the Appeal Chamber must be reasoned and in writing.

43. The Venice Commission has already pointed to the investigation powers conferred on the Qualification Commission and the Appeal Chamber. While the Constitution does not regulate the circumstances in which these powers are to be exercised, Article 49 of the Vetting Law provides a mechanism for the re-evaluation institutions in order to establish facts and circumstances in each case.

44. The constitutional text is silent as to whether an assessee may bring an individual claim before the Constitutional Court. But in the absence of a prohibition in the Constitution,[26] there seems to be no reason to exclude such a possibility although the potential scope of any such application is clearly limited as a result of Article A of the Annex to the Constitution[27] and as a result of the insertion of the re-evaluation process in the constitutional text itself.

45. Furthermore, if, according to Article F(3) of the Annex to the Constitution the Appeal Chamber is not competent to call into question the constitutionality of the principles on which the re-evaluation process as such is based and the criteria used in the law, there is no

[23] According to Article F of the Annex to the Constitution as adopted on 22 July 2016, « the Appeal Chamber shall consist of seven judges."

[24] According to Article 179 b), para. 5, of the Constitution as adopted on 22 July 2016, "Specialized Qualification Commission (Appeal Chamber) shall (…) function within the Constitutional Court."

[25] See Art. D (4) of the Annex concerning the Asset assessment; Art. DH (3) concerning the Background assessment; and Art. E (3) and (4) concerning the Proficiency Assessment.

[26] The Draft Constitution, as examined by the Venice Commission in the Final opinion on the revised Constitutional Amendments on the Judiciary of Albania (CDL-AD(2016)009) (see CDL-REF(2016)008), in para. 2 *in fine* of its Article Ç clearly states that the Constitutional Court shall not have competence to receive individual complaints from assessees dismissed as a result of the assessment. This restriction was criticised by the Venice Commission in the Final opinion (see para. 66). It appears that this restriction disappeared from the constitutional text finally adopted, which is welcome.

[27] This constitutional provision provides that "to the extent necessary to carry out the re-evaluation the application range of some articles of this Constitution, in particular provisions regarding privacy (…), provisions related to burden of proof (…) are partly limited in accordance with Article 17 of the Constitution." Article 17 concerns the proportionate limitation of fundamental rights and freedoms by law for a public interest or for the protection of the rights of others.

provision in the Constitution and the Vetting Law which excludes the possibility of application of Article 145 of the Constitution in the vetting process. This constitutional provision provides that "[w]*hen judges find that a low comes into conflict with the Constitution (…) they suspend the proceeding and send the case to the Constitutional Court*". Accordingly, in case the Appeal Chamber finds that the law it is about to apply is unconstitutional, it is competent to refer the case to the Constitutional Court. In the absence of any limitation in the Constitution and the Law, there seems to be nothing that would prevent the Constitutional Court to consider such complaint.

46. In conclusion, it appears that there are in the Constitution and the Vetting Law sufficient elements for the Constitutional Court to conclude that the Appeal Chamber may be considered as a specialised jurisdiction, whose creation by constitutional provisions could be interpreted as a specification of the scope of Article 135 of the Constitution (the Courts) and in particular, of its para. 2 (Specialised courts). The Venice Commission, which in its opinions on the constitutional amendments approved the overall approach chosen by the Albanian constituent, sees no reason to be more critical in this respect on the basis of the provisions of the law.

D. Fourth question

Are the law provisions in relation to the background assessment of the assessees contrary to Article 8 of the ECHR, as concerns the respect to private and family life of judges and prosecutors?

47. The background assessment is provided for in Article DH of the Annex to the Constitution as well as in Chapter V of the Vetting Law. The purpose of the assessment is to verify the declarations of the persons being assessed so as to determine whether they have inappropriate contacts with persons involved in organised crime (Article 34 of the Vetting Law).

48. According to Article 5 of the Constitution, "[t]*he Republic of Albania applies international law that is binding upon it*", and Article 17 states the principle that the limitations of the rights and freedoms adopted in conformity with the Constitution "*may not infringe the essence of the rights and freedoms and in no case may exceed the limitations provided for in the European Convention on Human Rights*". In its Final Opinion on the Revised Draft Constitutional Amendments on the judiciary,[28] the Venice Commission, after having observed that according to Article A of the Draft Annex, the application of some articles of the Constitution, in particular the provisions regarding privacy, is limited in accordance with Article 17 of the Constitution, considered that those limitations "*may be justified by the present situation of the Albanian judiciary, which requires special legislative interventions*."

49. As to the background assessment, it can hardly be doubted that it would be grossly improper for a judge or a prosecutor to have inappropriate contacts with persons involved in organised crime. Having regard to the permitted limitations on the exercise of the right to respect for private and family life contained in Article 8 ECHR, it seems clear that the existence of inappropriate contacts between judges and organised criminals would be contrary to the interests of national security, contrary to public safety, likely to encourage rather than prevent disorder or crime, and likely to threaten rather than protect the rights and freedoms of others. As a matter of fact, the vetting legislation is clearly aimed at ensuring the safeguards of the rights through the "*re-establishment of the proper function of the rule of law and true independence of the judicial system, as well as public trust and confidence in these institutions.*" (Article 1 of the Vetting Law).

[28] CDL-AD(2016)009, para. 57.

50. The question therefore seems to be primarily one of whether the measures provided for in Article DH and in the Vetting Law to investigate the possible existence of such inappropriate contacts are disproportionate or overly intrusive on the private life of the persons who are being assessed.

51. The primary mechanism which is used is that of a background declaration which each person assessed is required to make. The constitutional provision is silent as to what exactly this declaration should contain and the matter is provided for in detail in the Vetting Law. The form set out in Annex 3 of the Vetting Law requires each person who is assessed to declare whether they have had either inappropriate or appropriate contacts with persons involved in organised crime and to list those contacts.[29] Even a single contact is required to be declared. It would not be a particularly onerous task to complete this declaration unless one was a judge or a prosecutor whose contacts with organised criminals had been extensive.

52. It is significant and an important safeguard against breach of the privilege against self-incrimination that the background declaration may be used only for the purposes of the assessment and may not be used in criminal proceedings (Article DH(2) *in fine* of the Annex to the Constitution).

53. In addition to the Background Assessment Declaration, a background assessment is to be carried out. Although the body responsible for the carrying out of such an assessment is not specified in the Annex to the Constitution, Article 36 of the Vetting Law provides that it should be done by the re-evaluation institutions in collaboration with the National Security Authority. It further provides for a role for the State Intelligence Service and Internal Intelligence and Complaint Service near the Ministry of Internal Affairs which together with the National Security Authority will form a working group. Articles 37 and 38 of the Vetting Law appear to give the working group the main role in conducting the background assessment. Article 38 sets out detailed criteria for making an assessment.

54. The use of such assessments for the purposes of the re-evaluation should be under the supervision and control of the Commission and subject to the appellate control of the Appeal Chamber. While the Commission does not see any objection to the use of such a working group, some concerns may be formulated concerning the use of working groups consisting only of security personnel on which no representative of the Commission itself appears to be included. Moreover, there may be also concerns about Article 39(2) last sentence, that information is not to be disclosed if it endangers the safety of a source or is the result of a condition from a foreign government. This is reasonable but only on condition that the information is favourable to the assessee (see paragraph 35 of the present brief).

55. In any case, it is essential that all relevant material before the working group must be available to the re-evaluation institutions (i.e. Qualification Commission and the Appeal Chamber).

[29] The questions asked in the Background Assessment Declaration form, under the title 5 Data on Security (Annex 3 to the Vetting Law) are as follows: a. Have you been involved in activities related to the organised crime? b. Are you aware that one of family members has been involved in activities related to the organised crime? c. Have you had inappropriate contacts in the form of meeting, telecommunication, or any other type of wilful contact with one or more persons involved in the organised crime, not in compliance with the assumption of office? ç. Have you had appropriate contacts with persons involved in the organised crime during the exercise of the duties? d. Are you aware that one of family members has had inappropriate contacts with persons involved in the organised crime? e. Did you accept or exchange favours, gifts or property with persons involved in the organised crime? f. Are you aware that one of your related persons according to the Law "On re-evaluation of judges and prosecutors in the Republic of Albania" has accepted or exchanged favours, gifts or property with persons involved in the organised crime? g. During 10 recent years, have you been denied entry into any EU/NATO state? gj. Did you seek political asylum in any state?

56. The Venice Commission recalls that according to Article Ç of the Annex to the Constitution, the re-evaluation institutions may have direct access to all relevant government databases and files, if not classified as state secret, including the assessees' personal files, statistical data, files selected for evaluation, self-evaluations, opinions of supervisors, training records and complaints, verification of complaints, disciplinary decisions against the assesse, bank accounts, border control documentation, etc. as well as any other relevant documents. According to para. 3 of the same Article, official bodies shall cooperate with and disclose requested information to the Commission and Appeal Chamber and grant direct access to their databases.

57. Moreover, Article 14 of the Vetting Law specifies that the rapporteur in each case is to undertake all procedures for ensuring the evidence which is deemed necessary for the decision-making process of the panel. In addition, Article 23 seems to envisage that the legal advisers may be assigned a role in the activity of the working group through delegation. It is essential that the rapporteur should have access to all the documents and material in the possession or control of the working group and that s/he or his/her representative should be able to observe meetings of the group. It may be that the use of these provisions could secure effective control over the activities of the working group by the Commission.

58. In conclusion, whether or not the re-evaluation institutions have the power to maintain full control over the background assessments and to obtain access to all relevant material is an important element to be taken into account by the Constitutional Court in its examination of the Vetting Law. If the Court considers that the re-evaluation bodies have the power to maintain full control over the background assessment process, then the legal provisions concerning the background assessment of the persons subject to the re-evaluation process, while they are undoubtedly obtrusive, could be considered as not representing an unjustifiable interference with the private or family life of judges and prosecutors contrary to Article 8 ECHR.

IV. Conclusions

59. This is an *amicus curiae* brief for the Constitutional Court of Albania. As such, it does not have the intention of taking a final stand on the issue of the constitutionality of certain provisions of Albanian Law no. 84/2016 *"On the Transitional Re-Evaluation of Judges and Prosecutors in the Republic of Albania"*, but merely to provide the Constitutional Court of Albania with material as to the compatibility of the relevant provisions with European standards, so as to facilitate the Court's consideration of these provisions under the Constitution of Albania. It is the Constitutional Court of Albania that has the final say on the binding interpretation of the Constitution and the compatibility of national laws with this text.

60. The Constitutional Court has put four questions to the Venice Commission, related to the compatibility of Law no. 84/2016 with the Constitution and Articles 6 and 8 ECHR as well as on whether the participation of the judges of the Constitutional Court, who are themselves subject of the vetting procedure, in the examination of the constitutionality of the Vetting Law may be considered as a conflict of interest which requires their disqualification.

61. Concerning the issue of conflict of interest and the possible disqualification of constitutional judges, the Venice Commission underlines that all the constitutional judges, according to the Constitution and the Vetting Law, will be the subject of the Vetting Law which provides for the re-evaluation of every judge in Albania including the judges of the Constitutional Court. Therefore, the possible conflict of interest may affect the position, not only of one or some constitutional judges, but of all the constitutional judges sitting at the Constitutional Court. Consequently, the disqualification of the constitutional judges because of the existence of a conflict of interest would result in the total exclusion of the possibility of judicial review of the Vetting Law in view of its conformity to the Constitution. This would undermine the guarantees ensured by a functioning judicial review of legislation. This

situation could be considered by the Constitutional Court as an “extraordinary circumstance” which may require departure from the principle of disqualification in order to prevent denial of justice.

62. As to the involvement of the organs allegedly under the control of the executive power in the process of re-evaluation of judges and prosecutors with regard to the principle of independence of the judiciary, the analysis of the text of the Vetting Law shows that, despite the involvement of bodies, such as HIDAACI or CISD, in the investigation process and the initial research for evidence, the evaluation and assessment of any information or evidence gathered by those executive bodies rests with the Commission and the Appeal Chamber which possess both the characteristics of judicial bodies and have the power to verify themselves the evidence gathered by the executive organs. On this basis, it may be concluded that the system put in place by the Vetting Law does not as such seem to amount to an interference with the judicial powers.

63. As to whether the lack of possibility for judges and prosecutors undergoing the vetting process to challenge the decisions given by the re-evaluation institutions before domestic courts is in breach of Article 6 ECHR, the Venice Commission considers that the answer to this question depends on the qualification of the Appeal Chamber in the Constitution and the Vetting Law. For the Venice Commission, those legal texts provide sufficient elements in order to conclude that the Appeal Chamber may be considered as a specialised jurisdiction which presents judicial guarantees to the persons affected by the vetting procedure. The rights and safeguards contained in the legislative and constitutional scheme seem extensive.

64. As to whether the provisions of the law concerning the background assessment are contrary to Article 8 ECHR, it has to be taken into consideration that the background assessment has the purpose to verify the declarations of the judges and prosecutors being assessed with a view to determining whether they had inappropriate contacts with persons involved in organised crime. As such, this is a legitimate aim in view of the second paragraph of Article 8 ECHR (interests of national security, public safety, the prevention of disorder or crime, or the protection of the rights and freedoms of others). For the Venice Commission, the essential consideration is that the working group which has a main role in the background assessment and is composed primarily of security personnel, functions under the supervision and control of the re-evaluation bodies and that all the relevant material before the working group should be available to them. The Venice Commission is of the opinion that while the background assessment is undoubtedly obtrusive, it may not necessarily be seen as an unjustifiable interference with the private or family life of judges and prosecutors contrary to Article 8 ECHR.

65. The Venice Commission remains at the disposal of the Constitutional Court of Albania for any further assistance it may need.