International Monitoring Operation
Project for the Support to the Process of Temporary Re-evaluation of Judges and Prosecutors in Albania

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To the
Public Commisioners

Bulevardi "Dëshmorët e Kombit", Nr. 6
Tirana
Albania

Case Number **HPC-TIR-1-08**

Assessee **Besnik Cani**

RECOMMENDATION TO FILE AN APPEAL
According to

Article B, par. 3, point c of the Constitution of the Republic of Albania (hereinafter "Constitution"), Annex "Transitional Qualification Assessment", and Article 65, par. 2 of Law No. 84/2016 "On the transitional re-evaluation of judges and prosecutors in the Republic of Albania" (hereinafter "Vetting Law" or VL).

1. Introduction

Mr. Besnik Cani, currently assigned to the General Prosecution Office, has been assessed by the Independent Qualification Commission (hereinafter "IQC") pursuant to Article 179/b, par. 3 of the Constitution and in accordance with the provisions of the Vetting Law.
In the capacity of candidate for the High Prosecutorial Council and pursuant to Art. 279, par. 4 of Law No. 115/2016 "On governance institutions of the Justice System" the assessee has been subject to priority re-evaluation.
The following is a summary of the process in this case.

- IQC conducted a first investigative phase for only the asset criterion. On 21 July 2018, IQC notified the assessee about the respective results;
- However, on 07 August 2018, IQC decided to re-open the investigation on all three assessment criteria which decision was notified to the assessee on the same date;
- On 15 November 2018, IQC decided to re-close the investigative phase and estimated that the re-evaluation process for Mr. Besnik Cani had to be based on the three re-evaluation criteria provided by the Vetting Law.
- On 15 November 2018 the IQC notified the assessee on:
  - (i) the results of the ex-officio investigation and the relative annexes;
  - (ii) the burden of proof under Article 52 of Law no. 84/2016 on several items, to provide possible explanations and evidence to prove the contrary;
  - (iii) his right to get acquainted with the evidence administered by the Commission;
- On 20 November 2018 the assessee presented his written explanations on the results of the ex-officio investigation, accompanied by supporting documentation;
- The hearing took place on 23 November 2018;
- The decision was publicly announced on 27 November 2018. The IQC decided to confirm the assessee in duty and to transfer four issues to the competent disciplinary body Pursuant to Art. 59 par. 4 of the Vetting Law.

2. Summary of the Recommendation

The International Observers (further: IOs) recommend the Public Commissioners (further: PCs) to file an appeal against the entire IQC decision, *including* the referral of four elements of the case to the competent disciplinary body.

The IOs believe that a correct assessment of all the issues of the case should result in a dismissal of the assessee due to the fact that he jeopardizes the public trust in the judicial system and he is under the circumstances of impossibility for remedying the deficiencies by a training.

In point of law, IOs believe that it is necessary for the PCs to file an appeal against the IQC's decision in this case, by which the assessee has been confirmed in duty due to the incorrect interpretation and subsequent incorrect application of several legal provisions of the Vetting Law, in particular:

- Art. 59, paras. 1,2, 3 and 4 as read in conjunction with and Art. 61, paras. 4 and 5 VL;
- Art. 4, par. 5 as read in conjunction with Art. 61, paras. 3 and 5 VL;
- Art. 49, par. 4 VL.

In point of facts, and considering the above, IOs recommend the PCs to request the Appeal Chamber to also consider the issue of transfer of some case files to the competent inspecting disciplinary body as the outcome of such consideration will have a substantial impact on the assessment of this assessee.
More specifically, despite of the IMO Opinion d.d. 25 October 2018, although the IQC acknowledged the existence of a *de-facto* commercial contract or the *de facto* civil partnership between the assessee and "..." Sh.p.K., the IQC failed to decide upon its compatibility with the ethic-related obligations of a prosecutor according to the applicable legal framework. The IMO believes that the contract between the assessee and "..." Sh.p.K. is inconsistent with the ethic-related obligations of a prosecutor.

It is also recommended that the Public Commissioners provide arguments as to the admissibility of the appeal as a whole, in line with paragraph 3 below.

3. Preliminary issue related to the admissibility of the appeal on all points

Although Art. 59, par. 4 of the Vetting Law reads:
"[...] Although the Commission decides to issue the decision of confirmation in duty, it has the right to transfer the file to the competent inspecting disciplinary body, if the Commission identifies reasons which constitute disciplinary misconduct in accordance with the legislation that regulates the status of judges and prosecutors, or if it identifies the reasons to be consider during the periodic evaluation. ***This decision is not appealable.*** *(emphasis added) The disciplinary body begins without delay consideration of reasons in accordance with the legislation that regulates the status of judges and prosecutors."*

Regarding the scope of the recommended appeal, IOs believe that the decision to refer four topics to the competent disciplinary body is appealable together with an appeal against the decision as such.
IOs are aware that Art. 59.4 VL states "This decision is not appealable."
However, IOs believe this provision is limited to cases in which an appellant would *exclusively* want to appeal the decision of an Art. 59.4 VL referral.

IOs point towards the nature of *lex specialis* (or special law) of the applicable provisions of the re-evaluation process (Vetting Law and relevant articles in the Constitution and Annex to it) compared to the legislation regulating the status of judges and prosecutors.
This special law is essential to the nature and the purpose of the vetting process, whose aims are highlighted in Art. 179/b, par. 1 of the Constitution and Art. 1 of the Vetting Law.
A constitutionally oriented interpretation of Art. 59, par. 4 of the Vetting Law should be based on a logical process that will prevent the transfer of issues which can or will have a substantial impact on the assessee's assessment to a disciplinary body, without conducting a proper evaluation.
In the same line, issues outside the competence of those bodies should not be transferred to them at all.
A different interpretation would prevent the IQC to consider substantial issues that might be fundamental for the outcome of a specific case.

It is the IOs opinion that IQC has erred in its interpretation of Art. 59, par. 4 of the Vetting Law (as it will be further elaborated) and that, therefore, the only way to correct this situation is that of entrusting the Appeal Chamber with an appeal covering *all issues* that should have been correctly evaluated according to a logical process.

4. Basis of the Recommendation and Legal Grounds

IQC's decision affirmed:
"[…] 1. Confirmation in duty of the assessee, Mr. Besnik Cani […]

2. Pursuant to paragraph 4, article 59, of the law no. 84/2016, to transfer some case files to the competent inspecting disciplinary body, as follows:

a. The file of legal-civil relation between the assessee and related persons with "..." Sh.p.k. company;
b. Case no. *** at Tirana District Prosecution Office;
c. Criminal proceeding file no. *** at Fier District Prosecution Office, together with the file for benefitting the status of family without a permanent place of abode, based on the Fier Municipality Council Decision, no. 14, dated 28/03/2013;
d. Case no. *** at Elbasan District Prosecution Office. […]"[1].

It is the IO's opinion:

1) the IQC erred in the interpretation of the relevant provisions of Art. 59, paras. 1, 2, 3 and 4 as read in conjunction with Art. 61, par. 5 VL, as the IQC did not follow the logical process related to the application of the said article for issues identified by aforementioned items a. and c.;
2) the IQC wrongly applied Art. 59, paras. 1, 2, 3 and 4 as read in conjunction with Art. 61, par. 4 VL to the issues identified by aforementioned items b. and d.;
The incorrect application of Art. 59, paras. 1, 2, 3 and 4 as read in conjunction with Art. 61, par. 4 and 5 VL to items a., b., c., and d., and their referral to the "competent inspecting disciplinary body" did not allow a correct assessment based on Art. 59, par. 1 as read in conjunction with Art. 58, par. 1 VL because it prevented IQC to correctly consider whether the assessee achieved "a minimally qualified score in the proficiency assessment", as per Art. 59, par. 1, letter c) VL as read in conjunction with the provisions envisaged by Art. 61, par. 4 and the need to consider several findings based on an overall assessment pursuant to the combined reading of Art. 61, par. 5 with Art. 4, par. 2 VL;
3) IQC's reference to the principle of "proportionality" to justify the non-application of Art. 61, par. 3 VL in the argumentation of the decision on the issues "1/A. Regarding the land and the house built in *** [2] and "3/A. Regarding the financial analysis results"[3] - and the use of the same

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[1] See p. 34 of the Decision:
"[...] 1. Konfirmimin në detyrë të Subjekti i rivlerësimit, z. Besnik Cani [...]
2. Në zbatim të pikës 4, nenit 59, të Ligjit nr. 84/2016, të përcjellë disa çështje/praktika pranë Organit kompetent për inspektimin e shkeljeve të mundëshme disiplinore, si më poshtë vijon:
a. Praktika e marrëdhënies juridiko-civile ndërmjet Subjektit të rivlerësimit dhe personave të lidhur me shoqërinë "...." Sh.p.k.;
*b. Çështja me nr *** të vitit *** pranë Prokurorisë së Rrethit Gjyqësor Tiranë;*
*c. Dosja e procedimit penal me nr. *** të vitit . *** pranë Prokurorisë së Rrethit Gjyqësor Fier, së bashku me praktikën për përfitimin e statusit të pa strehë, në bazë të Vendimit të Këshillit Bashkiak Fier, nr.*** *i datës*
*d. Çështja me nr *** të vitit ***, pranë Prokurorisë së Rrethit Gjyqësor Elbasan. [...]"*

[2] See, in particular, par. "1.2 Legal reasoning regarding the facts", at p. 7 of the Decision.
[3] See, in particular, par. "3.2 Legal reasoning regarding the facts", at pp. 10-11 of the Decision.

principle in other parts of the decision, e.g., the "2.2 Legal reasoning about benefitting the status of family without a permanent place abode" is based on the wrong interpretation of the Vetting Law and of the Constitution.

As a result, elements that were not considered for reasons of "proportionality" should have been considered, at least, within the framework of the overall assessment in the sense of the combined reading of Art. 61, par. 5 with Art. 4, par. 2 VL;

4) In the reasoning related to the apartment at "..." street in Tirana Art. 49, par. 4 VL was not properly applied and, therefore, several issues had to be considered within the framework of the overall assessment as foreseen in Art. 61, par. 5 jo. Art. 4, par. 2 of the Vetting Law;
5) The decision has logical gaps related to the financial analysis, not only due to due an erroneous interpretation of the law with regards to the "proportionality" principle but also due to the unclear referral in IQC's decision to unspecified precedents.

i.) As to items a. and c. of IQC's decision (listed above)

Art. 59, par. 4 of the Vetting Law reads:
"Although the Commission decides to issue the decision of confirmation in duty, it has the right to transfer the file to the competent inspecting disciplinary body, ***if the Commission identifies reasons which constitute disciplinary misconduct in accordance with the legislation that regulates the status of judges or prosecutors****, or if it identifies reasons to be consider during the periodic evaluation. This decision is not appealable."* (emphasis added).

Therefore, prior to transferring the file to the competent inspecting disciplinary body, the IQC should follow a logical process where the first step is aimed at identifying reasons which constitute disciplinary misconduct. A preliminary assessment as to the existence of reasons "which constitute disciplinary misconduct" is necessary.
The second step is to consider whether the eventual misconduct(s) and other elements which could concur to the overall assessment of the assessee "jeopardizes the public trust in the judicial system and *(the assessee)* is under the circumstances of impossibility for remedying the deficiencies by a training" as per Art. 61, par. 5 VL.
In such circumstances it is clear the provisions of Art. 59, par. 1 VL are not applicable and Art. 61, par. 5, takes precedence.
The peculiarity of such a provision is proper to the specificity of the re-evaluation process which aims are clearly highlighted in Art. 179/b, par. 1 of the Constitution (amongst them, the need to "re-establish the public trust and confidence" in the judicial institutions) and in Art. 1 of the Vetting Law.

The consequence of the interpretation is that the procedural mechanism envisaged by Art. 52 ("burden of proof") of the Vetting Law should allow the IQC to dispel the various doubts – either in favor or disfavor of the assessee - to reach its decision.
Only the aforementioned interpretation ensures that the mechanisms of the Vetting Law can effectively guarantee the purpose of the vetting process.
As a result, the file (or, better, situations) can only be transferred to the competent inspecting body after completing the aforementioned logical process. Such transfer cannot be (ab)used to absolve the re-evaluation institutions from assessing elements which can be substantially relevant for the purpose of the re-evaluation of an assessee.

In this specific case the decision does not reach any conclusion concerning the identification of the existence (or inexistence) of a disciplinary misconduct on the issue related to the "legal-civil relation between the assessee and "..." Sh.p.k. company."
The IQC remains vague and inconclusive when it

"iv. […] estimates that the existing contractual relationship between the assessee and "..." Sh.p.k., […] has produced and is producing effects of intertwined financial benefits within the family of the assessee **that might create suspicions on benefits due to the professional position of Mr. Besnik Cani;**

v. Furthermore, **the Adjudication Panel deems that the above might cause incompatibility with the function of the prosecutor** […] and **may be considered** as failure to observe the limitations described by the Law no. 96/2016, *"On the status of judges and prosecutors in the Republic of Albania", and specifically article 7, on the limitations due to office […]"*[4] (emphasis added).

The decision uses vague and unclear wording[5] to reason the transfer of the file to the competent inspecting bodies, without assessing whether the *de-facto* commercial contract or the *de facto* civil partnership contract between the assessee and "..." is or is not compatible with the ethic-related obligations of a prosecutor according to the applicable legal framework and the *Rules on Ethics and Behavior of Prosecutors* (specifically with the obligation "not to conduct any economic activity" and/or the obligation "not to be influenced by interests of certain groups" as determined by law.
As already expressed in the Opinion presented by IMO on this matter, such evaluation should have supported the IQC in reaching its decision about the proficiency assessment and/or the overall assessment.[6]
Similar expressions are used in the decision with regards to item c.[7] The decision is unable to go beyond mere hypothesis and fails to identify the "reasons which constitute the disciplinary misconduct" as per Art. 59, par. 4 of the Vetting Law.

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[4] See pp. 19-20 of the Decision: *"[…] Komisioni vlerëson se marrëdhënia kontratuale ekzistuese midis subjektit dhe "..." Sh.p.k., ., […] ka prodhuar dhe po prodhon efekte të përfitimeve financiare të ndërthurura brenda familjes së subjektit të rivlerësimit që mund të krijojë dyshime mbi një përfitim nga pozicioni funksional/profesional i z. Besnik Cani;*
*v. Gjithashtu Trupi Gjykues çmon se sa më lart, mund të jetë shkak papajtueshmërie me funksionin e prokurorit dhe/ose mund të përbëjë një konflikt interesi në sajë të Urdhërit nr. *** , të Prokurorit të Përgjithshëm, datë *** si dhe mund të kosiderohet si një mosrespektim i kufizimeve të parashikuara nga Ligji nr. 96/2016, - Për Statusin e Gjyqtareve dhe Prokurorëve në Republikën e Shqipërisë, dhe specifikisht neni 7, mbi kufizimet për shkak të funksionit; "*

[5] See p. 20 of the Decision: *"[…] Në lidhje me dy pikat e mësipërme, Trupi Gjykues vlerëson se, duke patur parasysh faktin se edhe në rast të një konkludimi mbi prezencën e shkaqeve që të çojnë në përgjegjësinë e Subjektit të rivlerësimit, jo automatikisht mund të konsiderohet i aplikueshëm neni 61 apo pika "c" e nenit 58[5] të Ligjit nr. 84/2016 dhe duke e kombinuar këtë rrethanë me mundësinë e shqyrtimit të saj nga një tjetër organ, - i cili do të ketë në dispozicion një gamë më të gjerë masash të mundëshme, të përshkallëzuara dhe të aplikueshme në një raport më të drejtë me peshën dhe me rëndësinë e rastit, deri në shkarkim nga detyra të Subjektit, - për rrjedhojë çmohet më e ekuilibruar zgjedhja për trasferimin e kësaj çështje, në bazë të pikës 4 të nenit 59 të Ligjit nr. 84/2016, pranë Organit kompetent për inspektimin e shkeljes disiplinore, dhe caktimin e një mase në përputhje me parimin e proporcionalitetit;"*

[6] Please refer to the Opinion submitted by the International Observer to the IQC on the case on *** which is attached to this Recommendation.

[7] See pp. 22-23 of the decision under "2.2 Legal reasoning about benefitting the status of family without a permanent place of abode", which read as follows:

The IQC decided to transfer the file to the "competent authority to inspect the disciplinary violation, to make an assessment in accordance with other doubts related to professional skills and to impose a possible measure, in compliance with the principle of proportionality;"[8].
In this part of the decision the IQC mentions an unspecified principle of proportionality, as well as the enduring existence of doubts that, instead, should have been dispelled by the mechanism of the burden of proof provided by the applicable legal framework.

In relation to item a. of the decision:
Assessment of the contractual relationship between the assessee and

Article 149/ç of the Constitution of the Republic of Albania establishes that: "*Being Prosecutor General, prosecutor or a member of the High Prosecutorial Council shall not be compatible with any other state or political activity, as well as with any professional activity exercised against payment, except for teaching, academic or scientific activities*".

Article 7, paragraph 4 (Limitations of Office) of the Law No. 96/2016 *On the Status of Judges and Prosecutors in the Republic of Albania* (hereinafter "Status Law") lists several prohibited activities for a magistrate, such as, e.g. "*[a]dministering, directing, or influencing on any commercial or any profit-making companies, personally or by representation*" and "*[p]assively owning shares or parts of capital in commercial companies in which the magistrate's activity would be prohibited, because it could compromise the magistrate's independence, give rise to a conflict of interest or otherwise lead to a perception of bias or partiality [...]*"

Incompatibilities with the office of prosecutor have been established by the *Rules on Ethics and Behavior of Prosecutors* (hereinafter the "Rules"), adopted by Prosecutor General Order no. *** dated ***

"i. [...] krijon dyshimin e arsyeshëm se është përdorur funksioni dhe pozicioni i bashkëshortit në atë qytet si drejtues i Prokurorisë së Rrethit, për të fituar privilegje dhe rrjedhimisht, ky veprim mund të bjeri ndesh me etikën e magjistratit dhe të ketë cënuar figurën e magjistratit si dhe besimin e publikut në sistemin gjyqësor [...]

*ii. [...] , Subjekti ka paraqitur prova të kundërta, të cilat edhe pse nuk i shuajnë dyshimet e asyeshme,[...] iii. [...] , Dyshimete Komisionit konsistojnë në besueshmërinë e argumentimit të paraqitur nga Subjekti lidhur me mos patjen dijeni dhe me mospërfshirjen (substanciale) të z. B. Cani në paraqitjen e kërkesës nga ana e *** së tij, për përfitimin e statusit të familjes së pastrehë, pa i plotësuar kriteret ligjore, me qëllim marrjen e një kreate te bute nëpërmjet një kanali procedurial dhe nga fonde të destinuara për adresimin e kërkesave të familjeve në nevojë, që mund të ishin në kushtet e parashikuara nga dispozitat ligjore në fuqi, për të mundësuar futjen e tyre në programet sociale;*

iv. "Gjithashtu, Komisioni e konsideron si një detyrim profesional dhe moral, për çdo subjekt, që të përkujdesen dhe të analizojnë paraprakisht çdo sjellje, veprim apo mosveprim, të vetin apo të personave të lidhur, që ato të mos cënojë etiken e tyre dhe besimin e publikut tek figura e magjistratit apo në sistemin e drejtësisë në Shqipëri."

*v"Në lidhje me këtë aspekt, Komisioni vëren se Subjekti i rivlerësimit, minimalisht, ka munguar në përmbushjen e detyrimit të sipërcituar, duke lënë shkas për dyshime apo humbje besimi mbi etikën e tij profesionale. Ky vlerësim përforcohet më shumë nëse mbahet parasysh edhe hipoteza mediatike sipas të cilës Subjekti i rivlerësimit ka përfituar nga pozicioni i tij , madje duke ushrtuar një ndikim të paligjshëm në aktivitetin e Këshillit Bashkiak falë funksionit të tij, nëpërmjet një trajtimi favorizues - të vendimmarrësve të VKB, nr. *** një pjesë e të cilëve, asokohe, ishin persona nën hetim pikërisht nga Prokuroria e*

[8] See p. 23 of the Decision.

2014 - in place before the entry into force of the Status Law and in force when the original contract between the assessee and "..." Sh.p.K. was signed.

Article 4, paragraph 1, letters "ç" and "d" of the Rules provides that prosecutors should *"ç) Not conduct any economic activity, including any type of work or business for gaining material or non-material benefits, which may influence their independence, or which may create the impression of abuse of office for personal interests or interests of others [...];*
d) Not be influenced by interests of certain groups [...]."[9]

It is the IO's opinion ethics do not just apply to the fulfillment of prosecutorial duties. They also cover conduct in private life and extra-prosecutorial activities. Magistrates, apart from respecting and conforming to the law like every other citizen, are expected to behave with integrity, propriety, reserve and discretion, both on duty and privately.

With regard to the principle of integrity, it further refers to probity, dignity and honor within a magistrate's private and social life. It is not simple to precise the exact content of these principles nor does such an exhaustive definition exists, despite relevant catalogues of examples that may exist. What is recommended in such cases is to apply the reasonable, fair minded and informed person test, meaning to test:
"how a particular conduct would be perceived by reasonable, fair minded and informed members of the community, and whether that perception is likely to lessen respect for the judge or the judiciary as a whole".[10]

The IOs believe that the contractual relationship between the assessee and "..." Sh.p.K. produced an intrinsic incompatibility with the office of the prosecutor and its ethical related duties. IOs believe that in the perception of reasonable, fair minded and informed members of the community such contract would lessen the respect for a magistrate and/or the judiciary as a whole.

In relation to item c. of the decision:
Assessment of the issue of benefitting the status of family without a permanent place of abode

IOs find it difficult to believe the assessee's declaration in IQC's hearing, affirming that he was not aware and he was not involved in his *** submission of the application to receive the status of family without a permanent place of abode without meeting the legal criteria. The purpose of this submission was to obtain a soft loan through a procedural channel and from funds foreseen to address requirements of families in genuine needs as described in the law.
The burden of proof placed on the assessee has not sufficiently dispelled the IQC's doubts and, as such, a negative conclusion should have been drawn with regards to the assessee's responsibilities in this matter.

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[9] Furthermore Article 11 of the same Rules, prohibits taking of benefits or preferential treatments from prosecutors and imposes on them the conflict of interest rules established by the Prevention of Conflict of Interest Law.

[10] See in the Commentary on The Bangalore Principles of Judicial Conduct, available at www.unodc.org/pdf/corruption/corruption_judicial_res_e.pdf, §102. Several provisions of The Bangalore Principles of Judicial Conduct – considered as the *Magna Charta* of judicial ethics at global stage - adopted in 2002 (and available at www.unodc.org), can be applied *mutatis mutandis* to the prosecutors.

ii.) As to items b. and d. of IQC's decision (see above)

Item b. of (paragraph E/8 in) the decision relates to the complaint against the non-initiation of criminal proceeding regarding case no. *** With regards to its assessment the decision reads:
"ix. […] after the Commission found deficiencies in the investigative activity of the assessee, but still assessing that Mr. Besnik reaches, at least, a minimally qualified score in the proficiency assessment, given the above and the causes mentioned in the above points, in relation to the other problems identified in the files subject to the complaints by the public, the Adjudication Panel deems that even the files related to this criminal proceeding no. *** – criminal lawsuit *** – criminal prosecution no. *** of *** , pursuant to paragraph 4, article 59 of the law no. 84/2016, should be transferred to the competent institution to inspect the possible disciplinary violations."[11]

Item d. of (paragraph C/2 in) the decision concerns the IQC's analysis regarding one of the cases selected by lot where
"x. […] the Commission deems that, - considering the fact that, at least, the assessee has at least achieved a minimum qualifying level in the assessment of professional skills - this decision, for the dismissal of the abovementioned investigations, - taken by the assessee, simultaneously with the repeal of the Criminal Case Acts no. *** , - must be transferred, according to point 4 of Article 59 of Law no. 84/2016, to the competent body for the inspection of the disciplinary violation, as it was given by the assessee, in the capacity of the head of Prosecutor's Office, thereby abolishing a decision taken by the prosecutor to bring the case to court, whereas it results that the investigations were not carried out in-depth and were not exhausting; the facts were not legally assessed correctly; the re-qualification of the criminal offense was wrong; the determination / citation of the legal basis applicable in the concrete case was erroneous."[12]

It is not clear why the panel transferred these issues to the competent disciplinary body.
A logical process would have implied that the IQC investigated the matter properly and considered its findings within the framework of the proficiency assessment. It would have been appropriate for the IQC to elaborate on the parameters that allowed to consider how the assessee has achieved a minimum qualifying level (or score) in the assessment of professional skills as per Art. 59, par. 1, letter c) VL.
This situation prevented the assessment of potential elements that could have been relevant according to Art. 61, par. 4 VL.

Moreover, in case the criteria expressed by Constitutional Court Decision No. 2, dated 18 January 2017 are not met to guarantee a negative evaluation to the assessee,[13] the findings could have been used within the framework of the overall assessment.

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[11] See p. 32 of the decision, under "E/8. Complaint against the decision not-initiate criminal proceeding no. - filed by citizen "..."
[12] See p. 14 of the Decision, under "C/2. Investigations conducted by the Commission on the professional skills and ethics."
[13] See, in particular, para. 54 of the Constitutional Court Decision *** dated *** where it states:
"[…] With regard to the criteria and standards for carrying out the verification of the professional skills, the Court deems to highlight the importance of guaranteeing that the legal opinions expressed by the judges and/or prosecutors, which may be considered simply 'inaccurate' by the controllers, shall not be a cause for a negative outcome. It is very important that the negative evaluation should be awarded only in the event of essential and serious mistakes and/or if there exists a clear and serious series of wrong adjudications, indicating the absence of professional skills (*see also the Opinion CDL-AD (2016)036 of the Venice Commission*)."

This logical process was not followed, due to which too many issues which should have been considered within the framework of the re-evaluation process were left aside.
The reasoning in the decision under "c- In relation to the assessment of professional skills:" is, at end, the proof of the incongruence of the decision. The decision reads:
"[…] the Commission has found several problems in relation to the professional skills of the assessee and has some reasonable doubts on ethics, which still are not sufficient to conclude that Mr. Besnik Cani does not reach a minimal qualified score in the assessment of his professional skills. For this reason, the Adjudication Panel deems that, pursuant to paragraph 4 of article 59 of the law no. 84/2016, it shall forward all the suspicious or problematic practices/files/acts to the competent institution to inspect possible disciplinary violations."[14]
It is not clear how it is "not sufficient to conclude that Mr. Besnik Cani does not reach a minimum qualified score in the assessment of his professional skills" since the decision determines several problems in relation to the assessee's professional skills and some reasonable doubts on ethics which could potentially harm the public trust (in the wording of other parts of the decisions).

In this scenario, the transfer of the file pursuant to Art. 59, par. 4 of the Vetting Law risks to be arbitrary. It has the inevitable effect of IQC relinquishing its duty to properly and correctly decide on the re-evaluation of the assessee.
Moreover, it can be questioned if there is a limit, or a limit should be set, to the number of topics to be referred to the competent inspecting disciplinary body ex Art. 59.4 VL.
In a few earlier decisions IQC referred one aspect of a case to such body, whereas in this specific case the panel decided to transfer no less than four issues to the competent disciplinary body.
It is recommended to also request The Appeal Chamber to include this topic in its assessment of this decision, in the interest of giving guidance in conformity with Art. 66, par.2 VL.

iii.) As to the reference to the principle of "proportionality"

The IQC has used the principle of proportionality to justify the non-application of Art. 61, par. 3 VL in the argumentation of the decision on the issues "1/A. Regarding the land and the house built in +++ [15] and "3/A. Regarding the financial analysis results"[16] - and partially in the "2.2 Legal reasoning about benefitting the status of family without a permanent place abode".

In human rights theory and within the framework of the jurisprudence of the European Court of Human Rights in Strasbourg, the proportionality principle is triggered in case of the interference of state bodies with the fundamental rights of a person.

[14] See p. 33 of the Decision: *"[...] Komisioni ka konstatuar disa problematika lidhur me aftësitë profesionale të subjektit të rivlerësimit, si dhe disa dyshime të arsyeshme në lidhje me etikën – të cilat gjithsesi nuk janë të mjaftueshme për të konkluduar se z. Besnik Cani nuk arrin një nivel minimal kualifikues në vlerësimin e aftësive të tij profesionale, dhe për këtë arsye trupi gjykues çmon që, në zbatim të pikës 4, nenit 59, të ligjit nr. 84/2016, të përcjellë të gjitha praktikat/dosjet/aktet me dyshime apo problematika, pranë organit kompetent për inspektimin e shkeljeve të mundshme disciplinore [...]".*
[15] See, in particular, par. "1.2 Legal reasoning regarding the facts", at p. 7 of the decision.
[16] See, in particular, par. "3.2 Legal reasoning regarding the facts", at pp. 10-11 of the decision.

This understanding is also confirmed by the Constitution of Albania[17], by the Annex to the Constitution[18] and by Art. 4, par. 5 of the Vetting Law.[19]
In IO's opinion, the proportionality principle cannot be used to assess the merit of the case outside the applicable legal framework.
Instead, the Vetting Law foresees the instrument of the overall assessment, as should have been applied in this specific case.

Considering the above, it is IO's recommendation that all issues this decision has excused or condoned based on the proportionality principle shall be considered within the framework of the overall assessment as per Art. 61, par. 5 as read in conjunction with Art. 4, par. 2 of the Vetting Law.

*iv.) The application of Art. 49, par.4 to notarial declarations in relation to the issue of the residential apartment at *** street – Tirana*

It is pointed out that "2/A Regarding the residential apartment at *** street – Tirana", the panel accepts that the assessee "1. […] has clarified and proven the lawful source of loaned amounts"[20] in view of, inter alia, notarial declarations produced on *** , *** and *** .[21]

Notarial declarations – and this applies even more to notarial declarations produced in correspondence or after the vetting declaration – are nothing more than simple evidence that something has been declared by someone before a notary and, *per se*, cannot be considered as proof that the events reported therein have indeed effectively occurred.
The provisions of Art. 49, par. 4[22] VL guide the re-evaluation institutions in the assessment of the available evidence.
The decision does not consider why the panel accepted these notarial declarations as proof of assessee's claims.
Moreover, the assessee in *** did not declare the deposit in *** in the amount of ***
This amount was only mentioned in the *** Annual Declaration.
On this point the IQC "3. […] considers that the inaccuracy in the *** declaration did not bring any consequence, since the assessee himself, a few months later, used the amount of *** thus declaring it […]".[23]
The IQC continues: "[…] There is also no doubt about the lawful source of this amount since it was deposited in the bank, and its financial reflections are reflected in the financial analysis that will be discussed below."[24]

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[17] Please see the wording in the following articles of the Constitution: Arts. 17, par.1 and Art. 170, par.4.
[18] See, e.g., Article A, par. 1 and Article Ç, par. 2 of the Annex to the Constitution.
[19] Art. 4, par. 5 of the Vetting Law states that "[t]he Commission and Appeal Chamber shall exercise their duties as independent and impartial institutions based on the principles of equality before the law, constitutionality and lawfulness, proportionality and other principles, which guarantee the rights of assessees for a due legal process."
[20] See p. 8-9 of the decision under "2.2 Legal reasoning regarding the facts".
[21] See the relevant footnote No. 6 of the decision.
[22] "4. The Commission or the Appeal Chamber shall base decisions only on documents from known sources, or evidence which is reliable, is strongly consistent with other evidence. They are entitled, based on their internal conviction, to take into account any indicia as part of the overall evaluation of evidence", Art. 49, par.2 of the VL.
[23] See p. 8-9 of the decision under "2.2 Legal reasoning regarding the facts".
[24] See p. 8-9 of the decision under "2.2 Legal reasoning regarding the facts".

Considering what has been elaborated in the previous part of this document it is IO's opinion that also the aforementioned situations had to be considered within the process related to the overall assessment.

v.) Other considerations on the financial analysis results

Besides what was considered on the use of the principle of proportionality regarding the results of the financial analysis, the decision is based on the acceptance of a lower standard of living expenses compared to official data like INSTAT.
On this point the argumentation[25] remains unclear – besides not being fully in line with Art. 49, par. 4 of the Vetting Law - and, at stance, contradictory.
Reference to concepts like "the position held in several other previous decision of the Commission"[26] are not specifically elaborated and justified and therefor remain unclear.

5. Conclusions

One of the purposes of the re-evaluation process is to restore the public trust in the institutions of the justice system.
In IO's view it is impossible to confirm an assessee in duty when several issues that could, at least potentially, harm the public trust have not been correctly assessed.
IOs believe that a proper consideration of all elements should result in a dismissal of the assessee due to the fact that he jeopardizes the public trust in the judicial system and he is under the circumstances of impossibility for remedying the deficiencies by a training.

In view of the above, the IMO recommends an appeal against IQC's decision in this case.

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ANNEX:
IMO Opinion addressed to the Independent Qualification Commission on 25 October 2018

[25] See p. 10-11 of the decision under "3.2 Legal reasoning regarding the facts".
[26] See p. 11 of the decision under "3.2 Legal reasoning regarding the facts", point 4.

International Monitoring Operation

Project for the Support to the Process of Temporary Re-evaluation of Judges and Prosecutors in Albania

International Monitoring Operation
Prot. No. 1465
Date. 25 / 10 /2018

Funded by the European Union

Tirana, 25 October 2018

To the
Independent Qualification Commission
Rruga e Kavajes No. 4
Tirana
Albania

Case Number **HPC/TIR/1/08**

Assessee **Besnik Cani**

OPINION

according to

The Constitution of the Republic of Albania, Annex "Transitional Qualification Assessment", Article B, paragraph 3, sub b. and Article 49 paragraph 11 of the Law No. 84/2016 "On the transitional re-evaluation of judges and prosecutors in the Republic of Albania'" (hereinafter "Vetting Law")

Introduction

According to the Constitution of the Republic of Albania, Annex 'Transitional Qualification Assessment', Article B, paragraph 3, sub b., "*[International Observers]...are entitled to file findings and opinions on issues examined by the Commission and the Appeal Chamber and contribute to the background assessment regulated in Article DH [...]*"

According to article 49 paragraph 11 of the Vetting Law "*A written opinion by an international observer shall be considered to be a conclusion by the latter about a concrete circumstance during the re-evaluation process or conclusions to be made from facts in individual cases. The opinion may be persuasive to the Commission or Appeal Chamber, but may not be given evidentiary value.*"

Based on the above, I herewith file an opinion about:

1) the assessment of the contractual relationship between the assessee Besnik Cani and "..." LLC "..." i), according to the information obtained during the investigation conducted by the Independent Qualification Commission (hereinafter "IQC") and

2) the relevance of the contractual relationship of the assessee and "..." for the proficiency assessment and in light of the overall assessment of the assessee,

as I believe that the contractual relationship between the assessee and "..." is a *de-facto* commercial contract or a *de facto* civil partnership contract between the parties which brought them to agree to join efforts to achieve a common commercial objective.

That relationship might not reflect all the specific legal elements required by the typical legal relationships expressly envisaged by Law No. 7850/1994, as amended, *on the Civil Code of the Republic of Albania* (hereinafter the "Civil Code") and/or in the remaining applicable legislation of the Republic of Albania. Therefore, that legal relationship could well qualify as a so-called "atypical contract" permitted under the general framework of Art. 660[1] of the Civil Code, having as predominant features those of regulating a commercial activity.

In light of the above, the IQC should assess whether this *de-facto* commercial contract or this *de facto* civil partnership is or is not compatible with ethic-related obligations of a prosecutor as per the Constitution of the Republic of Albania, Law No. 96/2016 *On the Status of Judges and Prosecutors in the Republic of Albania* (hereinafter "Status Law"), *Rules on Ethics and Behavior of Prosecutors* (specifically with the obligation "not to conduct any economic activity" and/or the obligation "not to be influenced by interests of certain groups") as well as the European and international principles on the magistrate's ethical and conduct standards.

This evaluation can ultimately support the IQC in reaching its decision with regards to the proficiency assessment and/or the overall assessment, the latter whenever the public trust in the justice system has been jeopardized by the assessee's conduct, which I do consider included in a situation of incompatibility due to a breach of the rules on prosecutorial ethics.

[1] "The parties to the contract dispose freely of its contents, within the limits set out by the legislation in effect" (Art. 660 of the Civil Code).

The elements related to the concrete circumstance of the case and facts, the legal analysis and the conclusions are included in the ANNEX to this document which is an integral part of this opinion.

International Observer

ANNEX TO THE OPINION

With reference to point 1) of the opinion

Regarding:
"The contractual relationship between the assessee Mr. Besnik Cani and "..." LLC"

Concrete circumstances and facts

In his so-called vetting declaration, the assessee declares that on *** he, together with *** as owners of plots of land entered into a "rental contract" with "..." for plots of land with surface of *** m2 (belonging to the assessee) and *** m2 (belonging to Mr. ***) and existing buildings on these plots of land.

According to the contractual provisions it was envisaged "..." would rent the plots of land and buildings for a 25-years term, with the purpose to conduct fuel and auxiliary business activities following the construction of a gas station, a car wash and a bar on that same plot of land.

Again, according to the relevant contractual provisions, the construction of the gas station, car wash and bar as well as the issuance of relevant permits had to be carried out by "..." , while the contract envisaged "..." to rent and operate the businesses for a period of 25 years. According to the rental contract, the monthly rent had to be *"equal to the amount of 5 ALL/gross for each liter of fuel sold from the gas station in the respective month."*[2] (Art. 3.1 of the contract).

Through contract of *** , *** the assessee purchased the *** m2 land from Mr. *** whereby the assessee became the only lessor.

On *** the initial contract with "..." was amended. The parties agreed that:
(1) "..." would give up the right to use/exploit the bar and the car wash;
(2) such right would remain with the assessee who would exercise the business activity (of the bar and car wash) with the "..." logo;
(3) "..." was allowed to use office premises without rent (and the lessor had to supply the shop with items traded by "...").

Also, on *** the assessee, "..." and the assessee's son *** entered into an Agreement which transferred the use of the car wash and bar from the assessee to his son who, at the time, in fact was conducting his studies in *** Austria.
With specific power of attorney of *** , *** granted his mother representation powers regarding the administration of the car wash and bar.

[2] Art. 3.2 of the contract stipulates also that "*[...] the payment of the monthly rent shall be made after the lessee has subtracted from the total amount the income at source according the tax legislation in force, [...]*", as well as "****of the net monthly amount would serve as a reimbursement of the investment made by *** LLC for the construction of the gas station, bar and car wash facilities* [...]."

Legal nature of the contractual relationships between the assessee and "..." LLC

Bearing in mind the circumstances of the case and after having considered Articles 681[3] and 801[4] of Law No. 7850/1994, as amended, *on the Civil Code of the Republic of Albania* (hereinafter the "Civil Code"), I am of the opinion that the so called "rental contract" between the assessee and "..." LLC cannot be considered to be a rental contract in the legal meaning of this notion.

The fact that parties call this a "rental contract" is not decisive for the determination of the true/actual legal qualification of this contract. Instead, the *elements* of the contract are decisive to determine its nature.

The contract rather contains elements and specifics of a commercial contract and/or of a civil partnership contract where two or more natural or legal persons agree to join their efforts to achieve a common commercial objective.

The arguments to support this opinion can be summarized as follows:

- The lessor (presently only the assessee) provides a plot of land to "..." in exchange for a percentage of the turnover from "..." commercial activity regarding the sale of fuel;

- A contract provision according to which the assessee receives ALL 5 per liter of fuel sold, implies that the lessor and the lessee are sharing/dividing the profit of the commercial activity. Moreover, Art. 3.2 of the contract provides that "..." will withhold all taxes due by the assessee from the "monthly rent", which had to be decreased further of the remaining 50%, to compensate (read: reimburse) the investor "..." for the expenses linked to the construction of the gas station, the bar and the car wash facility. This is an additional indication the assessee is investing in and contributing to the creation of the facilities of the commercial activity;[5]

- Since parties did not agree on a fixed rental fee, or at least a fixed *part* of the rent in combination with a fluctuating fee depending on the quantity of fuel sold (the rental price in the present situation consists only of an amount of money fluctuating in accordance with the course of the business) this also distinguishes this contract from an average/normal rental contract. The contract between the assessee and "..." entails a fluctuating rental fee. This is to be clearly distinguished from the Civil Code definition of the rental contract in Article 801 of this law, which requires a "certain remuneration";

- Because in this precise case the "rent" per month can vary, this type of agreement enhances the assumption that the lessor, in this case the assessee, having his own best interest in mind, has a direct interest in the profits of the company. This directly implies an interest in the business activity. It can be further argued that, for the lessor to be able to determine the "monthly rent", he

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[3] *"While interpreting a contract, there needs to be explained which was the real and joint intention of the parties, while not focusing on the literal meaning of the words, and assessing their conduct in general, prior to and following the conclusion of the contract"* (Art. 681 of the Civil Code).

[4] *"Rental is the contract where one party (landlord) is bound to make available to the other party a certain property item, to temporary enjoyment in exchange of a certain remuneration."* (Art. 801 of Civil Code).

[5] It has to be noted that, Art. 3.2 of the contract foresees that *" the reduction of 50% of the net monthly amount would serve as a reimbursement of the investment made by "..." LLC for the construction of the gas station, bar and car wash facilities, costs reflected in the financial balance sheet where the item 'undertaken investment' of "..." LLC are reflected".*

has to have regular access to the (data of the) commercial activity and needs to participate in the management, administration and control of the commercial activity to be able to determine the exact profit and to calculate the precise rent on a monthly basis. Considering the possibility of business going bad at a certain moment, the question can be raised how this would affect the monthly revenues the assessee will receive. According to the contract, the ultimate consequence will be he will not receive "rent" at all. This is contrary to the situation in any normal rental contract, since the assessee will be affected by bad business to the same extent as "..." ;

- Contrary to the provisions of Art. 814[6] of the Civil Code, via an addition to the original contract "..." literally *gave* the assessee the right to exploit the newly constructed bar-café and car wash and agreed to leave ownership of the fuel station to the assessee at the end of the 25 year's term of the rental contract. This situation appears to be inconsistent with the scope and specifics of a typical rental contract. It may even be considered as, over time, an increase of assessee's assets;

- The transfer of the right to exploit the bar and car wash to assessee's son *** who was studying in *** at the time of concluding this contract, and the specific power of attorney to the assessee's *** do not make this less of an interest of the assessee's situation, as both abovementioned persons are related persons. The fact *** due to his studies in *** could never really conduct the business in the café/bar/car wash in Tirana demonstrates even further this is a fictitious contract;

- In its letter of clarification of *** , *** with prot.nr. *** , "..." explained that *"a contract where the companies take into his account the demolition and construction of an object, its exploitation for a certain amount of time (25 years) and then the asset is returned to owner of the land, is a typical concession contract (where one of the parties is the State). ... In this context the form of the contract needed to have the Civil Code approach and our legal department proposed the form of the "Rental Contract" foreseen in articles 801 of the Civil Code" and "[o]ur legal and risk department proposed a particular relationship inviting the owner of the land **to bear the risks of failure** and **moreover to pay also the value of investment and construction** and not only the company as it usually is in the classical concessions contracts"* (emphasis added). Concepts as "investment" and "risks" are typical for a commercial activity and are not befitting a rental contract in the true sense of the word. In the same clarification letter the "..." company also explains that *"In our company strategy we encourage our **partners in business to take the risks**, we want to take advantage from this risks as well as from their obligation to trade only products of our company based on prices dictated by us and obliging them to advertise only our products without any reimbursement for the advertisement. "* (emphasis added)

It is further noted that, upon request addressed to "..." , the IQC has obtained a list of contracts in order to be able to ascertain whether there have been similarities with other contractual obligations between "..." and third parties.
A comparison of these contracts leads to the following overview.

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[6] *"The tenant shall hand the property item back to the landlord in the same situation, in compliance with the description made by parties in the contract, notwithstanding the ordinary harm or consumption due to the usage of the property item in compliance with the contract. In lieu of the description in the contract, it is assumed that the tenant has taken over the property item in a good usage situation. The tenant shall not be liable for the loss or inflicted harm as a consequence of depreciation. The chattels shall be returned back where they were taken over"* (Art. 814, Civil Code).

- In contract No. *** , dated *** , "..." LLC entered into a "Collaboration Agreement" renting from a private company an already built and functional gas station for a period of 15 years under a rent in the form of 50% of the net gain from activity of the gas station;

- In contract No. *** , dated *** , "..." LLC entered into a "Rental Contract" of a gas station already built by the owner of the land, with a fixed rent price of ALL 500.000 per month for a period of two years;

- In contract No. *** , dated *** , "..." LLC entered into a "Rental Contract" of a gas station already built and functional by the owner of the land with a fixed rent price for a period of two years paid at one installment amounting of ALL 2.400.000;

- In contract No. *** , dated *** , "..." LLC entered into a "Rental Contract" of a gas station already built by the owner of the land with a fixed rent of ALL 150.000 per month;

- In contract No. *** , dated *** , "..." LLC entered into a "Collaboration Contract" for a period of 30 years, in which "..." LLC would build and exploit the gas station (constructed by the only "..." LLC), whereas the owner of the land would be compensated by 50% of the net value gains declared in the Annual Budget of the Company.

From the contracts provided by "..." it seems only one contract has established a legal relationship similar to the one "..." concluded with the assessee, namely the contract No. *** (titled "Collaboration Contract", and not "Rental Contract" as the one with the assessee), dated *** , although there are some differences, such as:

- the investment, as well as the risks, in the contract with the assessee is on the latter, whereas in contract No. *** such investment remains on "..." ;
- at the end of the duration of the contract with the assessee, it is expected that the assessee "gains" the construction and facilities built on his land, whereas this option is not foreseen in contract No. *** .

With reference to point 2) of the opinion

Regarding:
"the relevance of the contractual relationship of the assessee, Mr. Besnik Cani, and "..." LLC, for the proficiency assessment and in light of the overall assessment of the proceeding".

On possible incompatibilities with the office of the prosecutor and ethical related issues

Article 149/ç of the Constitution of the Republic of Albania establishes that: "*Being Prosecutor General, prosecutor or a member of the High Prosecutorial Council shall not be compatible with any other state or political activity, as well as with any professional activity exercised against payment, except for teaching, academic or scientific activities*".

Article 7, paragraph 4 (Limitations of Office) of the Status Law lists several prohibited activities for a magistrate, such as, e.g. *"[a]dministering, directing, or influencing on any commercial or any profit-making companies, personally or by representation"* and *"[p]assively owning shares or parts of capital in commercial companies in which the magistrate's activity would be prohibited, because it could compromise the magistrate's independence, give rise to a conflict of interest or otherwise lead to a perception of bias or partiality [...]"*

It should be stressed that incompatibilities with the office of prosecutor have been established by the *Rules on Ethics and Behavior of Prosecutors* (hereinafter the "Rules"), adopted by Prosecutor General Order no. ***, dated *** - in place before the entry into force of the Status Law, and in force when the original contract was signed.

Article 4, paragraph 1, letters "ç" and "d" of the Rules provides that prosecutors should

"ç) Not conduct any economic activity, including any type of work or business for gaining material or non-material benefits, which may influence their independence, or which may create the impression of abuse of office for personal interests or interests of others [...];
d) Not be influenced by interests of certain groups [...]."[7]

Ethics do not just apply to the fulfillment of prosecutorial duties. They also cover conduct in private life and extra-prosecutorial activities. Magistrates, apart from respecting and conforming to the law like every other citizen, are expected to behave with integrity, propriety, reserve and discretion, both on duty and privately.

With regard to the principle of integrity, it further refers to probity, dignity and honor within a magistrate's private and social life. It is not simple to precise the exact content of these principles, nor does such an exhaustive definition exists, despite relevant catalogues of examples that may exist. What is recommended in such cases is to apply the reasonable, fair minded and informed person test, meaning to test:

"how a particular conduct would be perceived by reasonable, fair minded and informed members of the community, and whether that perception is likely to lessen respect for the judge or the judiciary as a whole".[8]

That is exactly the framework in which the assessee's conduct as well as his contractual relationship with the "..." Company should be assessed, considering on the one hand the real/actual nature of their contractual relationship and, on the other hand, the duties and obligations of a prosecutor from an ethical point of view.

Conclusions

[7] Furthermore Article 11 of the same Rules, prohibits taking of benefits or preferential treatments from prosecutors and imposes on them the conflict of interest rules established by the Prevention of Conflict of Interest Law.

[8] See in the Commentary on The Bangalore Principles of Judicial Conduct, available at www.unodc.org/pdf/corruption/corruption_judicial_res_e.pdf, §102. Several provisions of The Bangalore Principles of Judicial Conduct – considered as the *Magna Charta* of judicial ethics at global stage - adopted in 2002 (and available at www.unodc.org), can be applied *mutatis mutandis* to the prosecutors.

In my opinion, IQC should assess whether the *de-facto* commercial contract or the *de facto* civil partnership contract between the assessee and "..." , which brought them to agree to join efforts to achieve a common commercial objective, is or is not compatible with the ethic related obligations of a prosecutor as per the Constitution of the Republic of Albania, the Status Law and the *Rules on Ethics and Behavior of Prosecutors* (specifically with the obligation "not to conduct any economic activity" and/or the obligation "not to be influenced by interests of certain groups").

This evaluation can ultimately support the IQC in reaching its decision with regard to the proficiency assessment and/or the overall assessment, the latter whenever the public trust in the justice system has been jeopardized by the assessee's conduct – which I do consider included in a situation of incompatibility due to a breach of the rules on prosecutorial ethics.

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