

EXPLANATORY NOTE

Issues related to the functioning and structure of the International Monitoring Operation (IMO)

Channels of communication on the IMO

The European Commission services cannot comment on the concerns regarding the communication related to the IMO within the government of Albania, as this is an issue of internal organisation to the latter.

On whether the Council of Ministers of Albania should have provided an authorisation concerning the tasks and functioning of the IMO, the Annex to the Constitution of Albania (Art. B.2) only mentions as a formal requirement a notification of the appointment of international observers by the IMO to the Council of Ministers. Such notification has been addressed by the Chair of the IMO to the attention of the Secretary General to the Council of Ministers, since the latter was the authority that wrote to the European Commission services and requested the launch and beginning of activities by the IMO. Other Albanian authorities, having a specific formal or diplomatic role in the different procedural steps of the setting up of the IMO, were duly copied to relevant correspondence.

In addition, the EU adopted a common position for the EU-Albania Stabilisation and Association (SA) Council on 8 September 2016, which contained an endorsement to *"the establishment of an International Monitoring Operation led by the European Commission to monitor and oversee this vetting process as provided for by the constitutional amendments"*. This position was notified, as customary, to the Government of Albania through the Ministry of Foreign Affairs. Right ahead of the SA Council, the Government of Albania formally submitted its National Position Paper 2016 in which it is stated that *"[f]ollowing a request by the Albanian authorities, the European Commission has launched a monitoring operation that will exercise oversight throughout the vetting process. The external monitoring of the vetting process is considered as a key element for the credibility of the reform process"*.

At the above mentioned SA Council, attended by Prime Minister Rama, Foreign Minister Bushati and Minister for European Integration Gjosha, the main elements of the preparations to launch a monitoring operation to exercise oversight throughout the vetting process were recalled, in line with the previous written exchange, as reflected in the agreed minutes that will be formally adopted at the next SA Council. In light of the adoption of the amendments to the Constitution and the high level engagement with representatives from the Government of Albania, the Commission began coordinating internal activities to be ready for the launch of the IMO as soon as the relevant law would start to be implemented.

Legal basis for the commencement of the IMO monitoring operations

Questions were recently raised on the necessity of embedding the IMO in an internationally binding treaty between the Government of Albania, the European Commission and the U.S. Government. In particular, these claims were made flagging discrepancies between the original text of the constitution in Albanian language and the English translation exist in relation to Article B paragraph 2 of the Annex to the Albanian Constitution. Namely, the English version would make reference to international arrangements 'already in force', while

this last specification is missing in the original version in Albanian (*sipas marreveshjeve nderkombetare*).

Apart from these very recent questions, raised only once the IMO began operations, the request to conclude additional formal steps for the deployment of the IMO in the form of international treaties, was never submitted to the European Commission in any of the numerous previous written and oral formal engagements with the representatives from the government of Albania, which have been ongoing on IMO-related matters both before and after the amendments to the Constitution were adopted. This was based on the joint understanding that the Commission would have taken the lead in the establishment of the IMO according to the assumptions below.

Despite 'already in force' is missing in the original text, the choice of the legislator to use the word agreements, in plural seems to indicate that the deployment of the IMO does not require a new arrangement to be negotiated with Albania, nor does it require resorting to a formal agreement under international law, also in consideration of the fact that the IMO is a monitoring operation that does not hold decision-making powers in relation to the actual carrying out of the vetting process. The Constitution of Albania explicitly aims to establish an operation that is fully independent from the Albanian authorities, in order to guarantee external monitoring of the domestic vetting process. As already mentioned, the considerations above stemmed from engagement with relevant authorities in Albania. The European Commission does not in any manner propose its own unilateral interpretation of the relevant legislation; however, the international arrangements that already constitute the relevant legal framework for the deployment of the IMO, and can be considered as implicitly referred to in the Constitution, are the following:

- a) The Stabilisation and Association Agreement (SAA) between the European Union and Albania, in force since 2009, and in particular its Article 78, entitled "*Reinforcement of institutions and rule of law*". This Article explicitly states that cooperation between the Parties shall aim at strengthening the independence of the judiciary and improving its efficiency, and fully covers the aim of the re-evaluation system (vetting) and of the IMO envisaged in Article 179/b of the Constitution of Albania. Under the SAA, Albania and the EU hold therefore the duty to pursue in such cooperation.
- b) The Framework Agreement between the Government of Albania and the European Commission on the arrangements for the implementation of EU financial assistance to the Republic of Albania under the Instrument for Pre-Accession Assistance (IPA II) – as the international observers appointed and deployed by the IMO and their support team are funded under the IPA framework.
- c) As regards the basis for relevant bilateral cooperation between Albania and the United States of America, to the best of our knowledge, the amendment of July 2016 to the existing "Letter of agreement on narcotics control and law enforcement", including reference to "*monitoring the implementation of judicial reform and oversight for the vetting of the judiciary in coordination with the European Commission*", were ratified by the Parliament of Albania in December 2016 and published on the official gazette on 12 January 2017.
- d) The Administrative Arrangement between the European Commission, DG NEAR, and the U.S. Department of State, which foresees the establishment of the IMO within the framework of "*Euro-Atlantic cooperation*" as mentioned in the Annex to the Constitution of Albania (Art. B.2).

Furthermore, a functional and consistent interpretation of the legal texts (in particular of the law on the vetting, which from its entry into force triggered a specific chronology of implementation actions) may also clarify that there was not in the intention of the legislator to require the negotiation, approval and ratification of a new legally-binding international agreement. Such a process would require a period of several years, while the Annex to the Constitution and the Vetting Law both include stringent time constraints for the implementation of the vetting process.

IMO structure and functioning

Since the IMO is exclusively dependent on the international partners of Albania, its internal organisation and functioning cannot be regulated by Albanian sources of law. This is why the IMO Management Board, or any other reference to specific administrative design of the IMO, is not mentioned in the Annex to the Constitution of Albania. This was also recognised by the Venice Commission in its Interim Opinion, CDL-AD(2015)045, para 129 -131, according to which the IMO *"is nominated from outside the country and ... is ultimately responsible not before the democratically elected bodies within the country but before a foreign government or an international organisation [...and] will depend on the good will of foreign powers and international organisations."*

Furthermore, the Constitution of Albania clearly distinguishes between the international observers and the IMO as such, which shall be *"led by the European Commission"*. The Constitution posits that the IMO *"will appoint"* those international observers, shall *"revoke"* them in case of gross negligence (Article B paragraph 2), and shall issue recommendations to the Albanian authorities on the candidates members of the vetting bodies (Article C paragraph 8). In order to facilitate the administrative tasks associated to taking such decisions, a body – which has been denominated IMO Management Board – was set up. Its tasks could be compared to those of a Project Management Unit and aim to facilitate the joint work of the European Commission and the US government, under the lead of the former. This is in full consistency with the functional requirements foreseen in the Constitution of Albania and the vetting law. The creation of such Board cannot be intended in anyway, as an institutional step that changes the non-executive powers of the IMO. Based on the tasks entrusted upon it by the Constitution of Albania, the IMO is an operation with monitoring functions that has no decision-making powers in relation to the actual carrying out of the vetting, and whose only aim is to provide recommendations to the institutions of Albania throughout the process. The IMO has not undertaken and will never undertake any actions that can alter or go beyond the mandate provided for in the Constitution of Albania. This clearly pertains to monitoring functions only.

The role and composition of the IMO Management Board have been introduced to the Albanian authorities by the Chair of the IMO, before its first constitutive meeting, in a formal meeting held in the morning of 8 February 2017 with Prime Minister Rama, Parliament Speaker Meta, Council of Ministers Secretary-General Agaçi and Parliament Secretary-General Shtylla. On such occasion, the Chair of the IMO explained that the IMO Management Board is a technical body, of a non-political nature, composed of high-ranking civil servants representing the IMO partners, and aimed at ensuring that the IMO can perform the tasks that the Constitution of Albania entrusts it with. Albanian authorities were also informed on the same occasion about the foreseen procedures for the recruitment of international observers.

This was also clarified in the letter of 17 February 2017 to the Prime Minister of Albania, in which Commissioner Hahn stated that the IMO Management Board is not a body above the

IMO but a core part of the IMO, guaranteeing administrative continuity, coordination of the international actors involved in the IMO, and serving as interface with the relevant authorities. The monitoring activities in the field are not performed by the Board, but by senior practitioners (international observers), This is already the case for the formation of the vetting organs, which is being monitored by a short term observers' team and will continue to be the case when, following the formation of the vetting bodies, the long term international observers will be deployed in the framework of the IMO, to those vetting bodies.

However, in order to facilitate communication and avoid any confusion, as mentioned in the explanatory note of 28 February by the Chair, future official exchanges will solely refer to the IMO.

Management of IMO actions financed in the IPA framework

The deployment of international observers in the framework of the IMO is for the most financed through EU assistance, under the Instrument for Pre-Accession (IPA). The IMO short-term international observers were deployed to monitor the process for the formation of the vetting institutions through IPA funding mobilised in the framework of the Technical Assistance and Information Exchange instrument of the European Commission (TAIEX).

The financial means for the deployment and activities of the IMO long term international observers and their support team will be provided by the EU through a EUR 10 million IPA project. The readiness to allocate IPA funding to this endeavour was already notified by the EU Delegation to Albania on 24 June 2016, in official communication to the Prime Minister (duly copied to the Minister for European Integration), who acknowledged this request in his reply on 14 July 2016. The IMO long term international observers will be deployed once the vetting institutions are set up and are ready to begin operations. It is customary that a Steering Committee of an IPA project is established to carry out specific operational project-related tasks (e.g. drafting inception reports and action plans, etc...) and will be composed of representatives of EU Delegation and the representatives appointed by the Government's authorities. The IMO Management Board and the IPA project Steering Committee have very different tasks – the first related to the overall administrative coordination of the monitoring activities, the second related to the practical implementation of the support activities specific to the deployment of long-term international observers. These are reflected in their different composition. No overlap between the two bodies is foreseen in their functions.

Since any procurement under the IPA programme has to follow standard procedures that may take up to several months, the European Commission launched a call for proposals in November 2016 in order to ensure the necessary readiness for the timely implementation of the operation once the vetting law would be in force. In view of the then pending decision of the Constitutional Court, a clause was inserted in the call which read: "*The contract will only be signed and the action will only start once all necessary preconditions are in place, namely the decision of the Constitutional Court on the constitutionality of the law following the Venice Commission opinion.*" The IPA contract was signed and the IMO activities started only after the publication of the Constitutional Court's decision in the Official Gazette of 18 January 2017.