



United States Department of Justice
Office of the Resident Legal Advisor

Embassy of the United States of America
Tirana, Albania

November 22, 2017

Eduard Halimi,
Deputy Chairperson of the Parliamentary Committee for Legal Issues
Parliament of the Republic of Albania

Honorable Mr. Halimi,

Today you requested from our missions confirmation whether we had jointly submitted a legal opinion to the Parliament. Upon the request of the Laws Committee, we provided the attached legal analysis last week.

Sincerely,

A handwritten signature in blue ink, appearing to read "Jon Smibert".

Jon Smibert
Resident Legal Advisor
OPDAT

Enclosed: Note: *Election of a Prosecutor who is assigned the functions of Prosecutor General in the transitory period.*

Note

Election of a prosecutor who is assigned the functions of Prosecutor General in the transitory period

The mandate of the incumbent **Prosecutor General** ends in early December. The High Prosecutorial Council, which is in charge of nominating the **Prosecutor General** is not yet established.

Therefore, the **transitory regime** for the election of the temporary acting General Prosecutor applies.

Legal framework for the transitory period:

Article 179 paragraph 13 of the **Constitution** reads:

'Until the Parliamentary elections, which will be held after the entry into force of this law, but not later than 1 September 2017, the election of the High Justice Inspector and the Prosecutor General, shall be made by 2/3 of the members of the Assembly. **Other elections shall be made by 3/5 of the members of the Assembly**'.

The question arises whether the provision of other elections relate to the election of other candidates for constitutional bodies in the period until 1 September 2017, or the election of other candidates for constitutional bodies in whatever time period.

The Constitution provides for several constitutional bodies which are to be elected by the Assembly a specific quorum, so for example:

- Article 125 paragraph 2 determines a quorum of 3/5 for Constitutional Court judges who are elected by the Assembly.
- Article 147 paragraph 8 sets a quorum of 2/3 for the approval of the list for the lay members of the High Judicial Council.
- Article 147/d paragraph 3 determines a quorum of 3/5 for the election of the High Justice Inspector (HJI) from the list established by the Justice Appointment Council.
- Article 148/a sets a quorum of 3/5 for the election of the **Prosecutor General** upon the proposal of the High Prosecutorial Council.
- Article 149 paragraph 8 sets a quorum of 2/3 for the approval of the list for the lay members of the High Prosecutorial Council.

Therefore, it is clear that the transitory provision intended to increase the quorum for the election of the Prosecutor General and the HJI, from 3/5 to 2/3 in the period until 1 September 2017. This provision obviously did not intend to determine a quorum beyond the period until 1 September 2017.

Further transitory provisions can be found in the Law no. 97/2016 'On organization and functioning of the prosecution in the Republic of Albania' (**PO Law**).

Article 109 paragraph 2 PO Law provides:

2. In the event the mandate of the Prosecutor General ends prematurely, before the establishment of the High Prosecutorial Council, the functions of the Prosecutor General shall be temporarily assigned, by a decision of the Assembly, to be performed by one of the most experienced prosecutors from the ranks of the prosecutors who meets the requirements and criteria of Chapter IV, Section I of this law.

This provision intends to provide for rules in case where the mandate of the **Prosecutor General** ends at a time where the High Prosecutorial Council is not yet established. This is exactly the current situation. Article 109 paragraph 1 directs the article at the “incumbent Prosecutor General,” excluding him from the other provisions in the law (such as the seven-year mandate) and noting that he remains in office until the end of his mandate. Article 109 paragraph 2 creates the only manner to replace him when “the mandate of the Prosecutor General ends prematurely, before the establishment of the High Prosecutorial Council.” Normal rules of statutory construction would interpret the word “prematurely” to be defined by the words in commas “before the establishment of the High Prosecutorial Council.” This construction is the same in Albanian. Thus, the only permissible construction of Article 109 is that the incumbent Prosecutor General is to enjoy his existing 5-year mandate, but if that ends before the establishment of the High Prosecutorial Council, then the temporary acting Prosecutor General is selected by Parliament in accordance with Article 109 paragraph 2 PO Law.

It is clear that Article 109, paragraph 2 PO Law is the appropriate method to assign a temporary Prosecutor General in this situation. This raises several questions about how this method should occur. In particular, what criteria and voting majority should apply to the selection of a temporary acting Prosecutor General?

This provision makes clear which **criteria** have to be fulfilled by the person who temporarily is assigned the function of a temporary acting **Prosecutor General**, by determining that it needs to “one of the most senior prosecutors who fulfil the requirements and criteria laid down in Chapter IV Section I.

Chapter IV, Section I, of the PO Law has 6 Articles which determine the following:

1. Legal requirements for the appointment of a **Prosecutor General** (Article 22)
2. Evaluation criteria for the candidate (Article 23)
3. Professional criteria for the ranking of the candidate (Article 24)
4. Moral criteria for the ranking of the candidate (Article 25)
5. Organisational and managerial criteria for the ranking of the candidate (Article 26)
6. Additional evaluation elements for the ranking of the candidate (Article 27)

Therefore the transitory provision just further details the selection and ranking criteria by specifying that he/she needs to be one of the most experienced prosecutors, thus referring to the professional seniority. The procedure for the selection and election of the **Prosecutor General** are laid down in a separate section, i.e. Section II of Chapter IV. This section is not referred to in Article 109 paragraph 2 PO Law. Thus, it is not applicable.

Secondly this provision makes clear that in the transitory period there shall not be a **Prosecutor General**, but only a transitory candidate who is assigned the functions of a **Prosecutor General** (temporary acting **Prosecutor General**).

Thirdly, it appears that the legal framework for the transitory regime does not explicitly establish a quorum for the election of the temporary acting **Prosecutor General**. It seems to merely provide for a temporary solution, by a decision of the Assembly.

The fact that the PO Law foresees specific rules for the temporary acting **Prosecutor General**, who has a limited period of mandate and is not to be considered the **Prosecutor General**, but just a senior prosecutor who in the transitory period is assigned the functions of a **Prosecutor General**, suggest that this figure is rather comparable with the figure of a deputy **Prosecutor General**, which is not regulated in the Constitution.

This leads to the conclusion that neither the Constitution nor the PO Law further regulates the process of selecting the temporary acting **Prosecutor General**. The PO Law just assigns this power to a decision of the Assembly. For decisions of the Assembly the Rules of Procedure of the Assembly of the Republic of Albania apply. Article 55 paragraph 1 of these Rules reads as follows:

'The laws, decisions, declarations and resolutions are considered approved by the Assembly when the **majority of the MPs have voted in favour**, in presence of more than half of all members of the Assembly, except for the cases where the Constitution provides of a qualified majority.'

Conclusion:

In the situation that is presented here, it appears that the transitory provisions establish the right and obligation of the Assembly to elect a senior prosecutor, who fulfils the requirements of Articles 22 to 27 PO Law, as temporary acting Prosecutor General by a simple majority, in the presence of more than half of all members of the Assembly. There is no constitutional or legal authority for the Parliament to extend the incumbent Prosecutor General's mandate past the expiration of his current mandate. Rather, there is a clear provision that mandates the appointment of a temporary acting Prosecutor General.