



Legal Opinion

Non-compliance with and a regulatory gap in Law No. 8/2009 have led to discontinuity and have impacted on the work and functioning of the Anti-Corruption Commission (KAK) in preventing and combatting corruption

The Anti-Corruption Commission (KAK) was established as a legal person governed by public law and with a statute as a specialized criminal police body as set out in the provisions of Article 3 of Law No. 8/2009 with a special mission to prevent and combat corruption in accordance with the provisions of Article 4 of Law No. 8/2009 on the KAK as amended by the provisions of Article 112 of Law No. 7/2020 on Measures to Prevent and Combat Corruption.

The KAK comprises one Commissioner and Deputy Commissioners with support staff as set out in the provisions of Article 6 of Law No. 8/2009. The Commissioner is proposed by the Government and is designated or elected by the National Parliament via an absolute majority vote with the minimum attendance of three quarters of the effective Members of Parliament, with a four year mandate as set out in the provision of paragraph 1) Article 7, paragraph 1) Article 11 and paragraph 3). The appointment of Deputy Commissioners complies with the provisions Article 12 of Law No. 8/2009.

To ensure that the Commission can work and function as per normal, the process of electing a new Commissioner will take place 30 days before the mandate expires as set out in the provisions of paragraph 6) Article 11 Law No. 8/2009. This means that within a period of 30 days the National Parliament has to elect a Commissioner. Therefore, when the mandate of the Commissioner expires or ceases, the KAK can immediately proceed with the swearing in of the elected Commissioner. Therefore, the Commission will not have a power vacuum and will have the power and authority to carry out its work and functions.

The situation that is currently affecting the KAK is that the mandate of the Commissioner and the Deputy Commissioners ended on 21 January 2023 and there has not yet been an election of a new Commissioner. This situation is in breach or is a violation of the law and is caused by a regulatory gap in Law No. 8/2009 on the Statute of the KAK. According to the law, 30 days before the mandate of the Commissioner expires the Government shall propose a Commissioner to the National Parliament to hold an election. The present situation has created a power vacuum in

decision making within the KAK and this has had a direct impact on the work and functioning to prevent and combat corruption.

The KAK faces a power vacuum because there is no legal provision in Law No. 8/2009 that states that, if within 30 days before the mandate expires there has been no election of a new Commissioner, then the outgoing Commissioner and Deputy Commissioners will continue to perform their roles and functions until there is an election of a new Commissioner. Therefore, Law No. 8/2009 has a regulatory gap and cannot provide a solution or alternatives when faced with the current situation.

This situation is very serious because of an act of omission by the State organs, namely the National Parliament and the Government, to comply with the legal requirements as set out in the law and they have also ignored the advance warning from KAK itself about the end of the mandate of the Commissioner.

According to a credible source who spoke with JSMP, the outgoing Commissioner, one month before the expiry of his mandate, sent a letter to the National Parliament and the Government to inform them that the mandate of the Commissioner and the Deputy Commissioners would expire on 21 January 2023 therefore the National Parliament and Government could start the process in accordance with the provisions of paragraph 6) Article 11 of Law No. 8/2009. The National Parliament and the Government had not responded to this letter up until 19 January and the Commissioner sent another letter to the National Parliament requesting confirmation of the receipt of the first letter. On 20 January 2023, which was one day before the expiration of the mandate, in response to this letter, the National Parliament summoned the Commissioner to the parliament and then the President of the National Parliament issued a letter to authorize the Commissioner and Deputy Commissioners to continue performing their roles up until there is a new election and the swearing in of a new Commissioner.

The National Parliament only started the election of a new Commissioner on 13, 14, 20 and 21 February 2023 when the Government presented or proposed a new Commissioner. The process could not take place because a quorum to deliberate was not established based on the provisions of paragraph 1) Article 7 of Law No. 8/2009 that requires the minimum attendance of three quarters of effective members of parliament or requires a minimum of 49 MPs from a total of 65 MPs.

JSMP is very concerned with this situation because it has led to a discontinuity within the KAK because its functions as an authority have been interrupted, its decision-making powers have been affected and there is a power vacuum. This discontinuity has occurred because the State organs have not complied with the requirements set

out in the law and also because of a regulatory gap in the law itself because there is no provision that states that the Commissioner and Deputy Commissioners can continue to perform their roles and have competence if an election of the new Commissioner has not taken place in accordance with the prescribed time limit. Such a provision would establish a legal basis for the current Commissioner and Deputy Commissioners to perform their duties and be entitled to remuneration. Also, amongst the powers vested in the National Parliament by this law, the law does not include the power to extend the mandate of the Commissioner and Deputy Commissioners “via a letter” when during the 30 days prior to the end of the mandate, as set out in the provisions of paragraph 6) Article 11, a proposal and election of a new Commissioner has not taken place.

Therefore, the act of the National Parliament to extend the mandate of the current Commissioner and Deputy Commissioners with a letter, with consideration of the national interest and need to prevent and combat corruption, could be considered politically acceptable, although in a democratic State abiding by the rule of law such practices could be considered to be poor practices, because they do not adhere to the law and have no legitimacy because they do not represent the parliamentary majority. On one hand, even though the decision on the extension was made during a plenary session and represents a parliamentary majority, this act continues to lack validity, while no amendment is made to the law that gives the Parliament such powers this mandate. Therefore, the proper way and good practice according to democracy and the rule of law is to amend the law that regulates the mandate of the Commissioner in order to extend the mandate when the election of a new Commissioner has not yet taken place.

JSMP also has observed that the problem faced by the KAK in relation to Law No. 8/2009, in addition to the aforementioned regulatory gap, is that this law also creates significant political and technical challenges or barriers for the National Parliament to make a decision or hold the election of a new Commissioner to fulfil the requirement of a minimum attendance of three quarters or 49 MPs from a total of 65 MPs. Actually, the National Parliament on four occasions has set an agenda to elect the Commissioner proposed by the Government, however it has not managed to do so because of the quorum to have at least 49 MPs in attendance.

In relation to this situation and reality, JSMP concludes its thoughts and this analysis by making some recommendations for the National Parliament to consider so it can find a solution to this problem. The recommendations are as follows:

- 1) The National Parliament and the Government should not continue to commit acts of omission or non-compliance with the laws that relate to the exercise of

- their power and competence, for example Law No. 8/2009, especially in relation to the proposal and election of the KAK Commissioner;
- 2) In the future the National Parliament should not extend mandates that are based on the law by means of a simple letter, but rather should do it using a legal route, so that its decisions have legal validity;
 - 3) The National Parliament, before setting the agenda for the election of a new Commissioner, needs to first set the agenda to amend Law No. 8/2009 to allow for the outgoing Commissioner and Deputy Commissioners to continue performing their role and to have competence before there is a new Commissioner. This provision could be placed after the provision of paragraph 6) of Article 11, Law No. 8/2009 and would state that if a new Commissioner has not yet been elected during the time limit established in the preceding number, outgoing Commissioner and Deputy Commissioners can continue to exercise their mandate until there is an election and swearing in of the new Commissioner and Deputy Commissioners;
 - 4) The National Parliament should amend the provisions of paragraph 1) Article 7, Law No. 8/2009 to include more than one candidate for the position of Commissioner proposed by the Government to the National Parliament. Also, to remove the requirement to have the minimum attendance of three quarters of effective MPs and to require the minimum attendance of one half of effective MPs. This means that when a quorum of 33 or more MPs has been established, the National Parliament can engage in deliberations. If the National Parliament does not do this it will be difficult to emerge from this situation. The vote could continue to require an absolute majority, but the attendance required to engage in deliberation could change. Therefore, the contents of this provision could be as follows: “The Commissioner is elected by the National Parliament from among the candidates proposed by the Government by an absolute majority vote of more than $\frac{1}{2}$ of the effective Members of Parliament”;
 - 5) The Government should create a regulation as a guideline to regulate the mechanism for the recruitment of a KAK Commissioner in a transparent and competitive manner, to avoid a conflict of interest by creating an independent Ad-Hoc Committee comprising experts from the judicial sector and also academics. The selected candidates shall be presented to the Council of Ministers to choose the candidates (more than one person) who are competent and have merit to propose to the National Parliament to conduct an election.

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