

ADMINISTRATIVE COMPLAINT

addressed to: Appeals and Sanctions Commission

Central Election Commission

TIRANA

COMPLAINANT: The Albanian Institute of Sciences, non-profit organization registered by a decision of Tirana Judicial District Court, no. 3048, dated 28.03.2011, represented by the Executive Director Aranita BRAHAJ, located in (address) Rruga "Asim Vokshi", Pallati 13/25, Kati 3 Tirana and by email: aranita.brahaj@ais.al

AGAINST: Decision no. 457, dated 01.10.2021 of the State Commissioner for Elections.

LEGAL BASIS: Article 21, point 1, letter "b", article 123/3, article 124/1 of law no. 10019, dated 29.12.2008, "Electoral Code of the Republic of Albania", as amended; and decision no. 3, dated 06.11.2020 of the Regulatory Commission, "On the approval of the regulation" On the manner of functioning and conduct of sessions of the Complaints and Sanctions Commission".

Honorable members of the Complaints and Sanctions Commission.

On 31.05. 2021, The Albanian Institute of Sciences has filed a complaint with the State Election Commissioner claiming there has been a violation of the law prohibiting the unfair use of central / local state administration resources / assets by the governing majority, at central and local level in Durrës, in the elections held on April 25, 2021. At the end of the administrative procedure, the Commissioner approved decision no. 457, dated 01.10.2021, which was notified to the complainant on 11 October 2021 through the official email.

Considering this decision of the State Commissioner for Elections not grounded on the law or evidence, as well as contrary to the current practice developed by the Complaints and Sanctions Commission, we present this administrative complaint.

I.

Violation of due process during the administrative procedure

1. The Albanian Institute of Sciences (*hereinafter AIS*) is a non-profit organization registered by decision of the Tirana Judicial District Court, no. 3048, dated 28.03.2011 and its activity includes, among others, the implementation of the electoral legislation in the Republic of Albania and the observance of the international standards for elections in the country. One of the main areas of AIS activity is the issue of financing of election campaigns and, more specifically, the non-use of state resources and assets in elections in an unfair manner and contrary to the law and / or the best international standards.¹

2. Pursuant to Article 92/5 of the Electoral Code and decision of the CEC no. 09, dated 09.03.2021 "On the procedures of operation and maintenance of the portal, procedures and deadlines for administrative investigation of denunciations and the decision taken at their conclusion", AIS has submitted to the CEC in a letter dated 31.05.2021, protocol No. 5613, dated 03.06.2021, an administrative denunciation, claiming that there has been a violation of the legislation in force that prohibits the use of resources / assets of the central and local state administration unfairly by the governing majority, at central and local level in Durrës, in the elections held on April 25, 2021.

3. The State Election Commissioner (*hereinafter the Commissioner*) on 16.07.2021, addressed the Council of Ministers and the Council of the Municipality of Durrës, requesting detailed information clarifying what is alleged in this denunciation.

4. Having no response from the Municipality of Durrës and the Council of Ministers and considering the requested information important for the administrative investigation, the Commissioner, by decision no. 439, dated 02.08.2021 has decided to extend the term of the administrative review of the denunciation for violations provided in the Electoral Code and decision no. 9, dated 24.12.2020 of the CEC Regulatory Commission to the Council of Ministers and the Durrës Municipal Council. This interim decision was notified to AIS by posting the official document, submitted by the courier on 19. 08. 2021.

5. Even after the extension of the term of the administrative review, the Commissioner has administered on 02.08.2021 only the response of the Municipality of Durrës by Mrs. Emeriana Sako, who performs the functions of the Mayor of Durrës. It turns out that the Council of Ministers has not given a reply to the Commissioner and the

¹ See more at <http://ais.al/new/>

latter has not asked for a reply, but again, pursuant to Article 169 of the Electoral Code², it has not imposed any punitive measures for non-cooperation with the CEC.

6. The Complaints and Sanctions Commission, by decision no. 107, dated 26 July 2021 (but also by decision no. 108, dated 26 July 2021) has decided:

“5. Article 81, point 1 of the Code of Administrative Procedures stipulates that *“the competent body requests and is acquainted with all the facts which are necessary for making a final decision, using for this purpose all the methods of proof allowed by law ”*. In this case it turns out that the State Commissioner for Elections was satisfied only with the exchange of correspondence with the Municipality of Tirana, the administrator of the administrative unit no. 10, Mrs. MA, without further investigation to gather evidence and facts that would prove whether there has been a violation of Decision no. 9/2020 of the Regulatory Commission. Therefore, the CSC finds that the investigation conducted by the SEC is not complete and comprehensive, as not all ways and legal means have been exhausted to provide the necessary evidence and facts for the case.

6. Referring to Article 93 of the Code of Administrative Procedures, *after the completion of the investigative procedure, (...) the interested parties have the right to express themselves before a final decision is taken*. As a party with an interest in the administrative proceeding, anyone who has a legitimate interest has the right, based on article 44, point 1 of the Code of Administrative Procedures, to participate in the proceedings. The CSC considers that the complainant, the Organization "Civic Resistance" shows a legitimate interest in this proceeding, being also the party which made the denunciation and therefore should have been called as an interested party in the administrative proceeding followed by the SEC.

7. The CSC considers that the observance of the procedural rights and guarantees of the parties participating in the administrative process is crucial for the observance of the due legal process.

For these reasons, the CSC, which at this stage of the process has not analyzed the legality of SEC arguments regarding the merits of the case, considers that the latter should give the parties the opportunity to get acquainted with such arguments, and challenge them. "

7. AIS:

- is not informed and has not had the opportunity to comment on any material / response submitted by the Municipality of Durrës.

² Article 169 of the Electoral Code provides that: *“ Refusal to cooperate with the CEC or to provide information provided by this Code to the CEC, by officials of local or central government bodies, is punishable by a fine of 10 thousand to 50 thousand ALL. ”*

- The Council of Ministers has not expressed itself twice regarding this denunciation, it has not offered cooperation with the Commissioner and is not punished administratively for its position.
- as the complaining subject, AIS shows a legitimate interest in this proceeding, because it is the party that made the denunciation and should have been called as an interested party in the administrative proceeding followed by the Commissioner.
- in the process of making the final decision, AIS was not given the opportunity provided by the Code of Administrative Procedures, Article 93, to finally express its claims.

Regarding the above, the administrative procedure followed by the Commissioner in relation to the denunciation of AIS has violated the due legal process.

II.

The foundation of AIS request remained unanswered

8. The Commissioner in his decision no. 457, dated 01.10.2021 stated that: *"The State Election Commissioner, after reviewing the denunciation, considers that he should consider the complainant's claims regarding the allegations that the approval of the lists of beneficiaries without verifying the status of "emergency need for housing" and the "need for help", as outside his competence and as favoritism in changing the status and level of benefit from DS1 to DS2 and DS3 for some individuals, as well as abuse by not assessing the need for help according to emergency and vulnerable situation. The CEC is not the competent body to assess the economic damage that may have been caused by the inaccurate assessment alleged by the complainant ."*

9. According to ODIHR Final Report on the elections held on April 25, 2021: *"The media reported that there was a large increase in the distribution of grants by municipalities, approved the week before the elections according to the respective reconstruction program. For many grant recipients there has also been an increase in the value of cash rewards authorized by the municipality. Some ODIHR LEOM interlocutors perceived such distribution of grants as misuse of state resources. The ODIHR LEOM received other reports, according to which attempts were made to influence the vote through the provision of incentives, such as the issuance of permits validating illegal construction. These reports also claimed that many civil servants, a group vulnerable to pressure, had been encouraged to vote for the ruling party.*

Law enforcement agencies should investigate all allegations of electoral irregularities, including the misuse of state resources, in a comprehensive, timely and transparent

manner. Voters should be systematically informed about the applicable mechanisms to report any case of pressure and feel secure that they will not face negative consequences.
”³

10. AIS, in its denunciation, did not ask the Commissioner to assess the economic damage of any illegal situation. Contrary to what is claimed, the denunciation is not about whether there is economic damage or not, but whether the procedures followed by the Council of Ministers and the Durrës Municipal Council are in accordance with applicable law, and if they specifically respect the legal principle of prohibition to use the resources / assets of the central and local state administration unfairly and / or to create an unfair electoral advantage in favor of an electoral subject. AIS has requested an administrative investigation to confirm whether there has been a correct application of the legislation in force, in all its procedural rules, whether there has been abuse from the electoral point of view, for the period of 4 months before the election date until the election date by the Council of Ministers and the Municipality of Durrës. This is exactly what the CEC was created for and has the legal duty to do it. Failure to properly implement the procedures, potential abuse in decision-making, or even a simple pre-election and post-election financing statistics should be, among other things, the object of the Commissioner's administrative investigation and the conclusion whether there has been unfair use of state resources / assets in the campaign and 4 months before the election date. No administrative investigation has been carried out for this object of denunciation, we emphasize it from the point of view of the principle of prohibition of state resources / assets 4 months before the date of the elections and in function of the fair electoral race. Consequently, this claim of the complainant remained unanswered by the CEC.

11. The Commissioner in his decision no. 457, dated 01.10.2021 stated that: “*From the available evidence and the arguments given by the complainant, the Commissioner estimates that it is not in his competence to assess the legality of the acts of the Council of Ministers or the decisions of the Durrës municipal council, issued for their implementation.*” AIS finds it impossible to find in the text of this conclusion of the Commissioner the reasoning why this conclusion was reached. AIS has not asked the Commissioner to repeal any decision of the Council of Ministers and the Durrës Municipal Council, because of course the Commissioner does not have such a competence. On the other hand, this position of the Commissioner is not in line with his legal obligation for the administrative investigation of the misuse of state resources / assets in the period of 4 months before the election date and until the election date. According to article 91 of the Electoral Code and Decision no. 09

³ <https://www.osce.org/files/f/documents/4/c/495052.pdf>

Four months before the date of the elections until the formation of the new government after the elections, the proposal, approval or issuance of laws or bylaws, which provide for the provision of benefits to certain categories of the population, such as acts that provide for increase of salaries, pensions, economic or social support, reduction of taxes or exemption thereof, introduction of fiscal amnesties, privatization or granting of assets or rewards, etc., are not allowed, unless the initiative is conditioned by a state of natural disaster.

12. If the Assembly, for example, 2 months before the election date, adopts a law that reduces the Value Added Tax, does the Commissioner have the power to investigate administratively and find that the Assembly has illegally taken a decision that constitutes abuse with state resources / assets and violated the standards of free and fair elections? The answer is of course YES. In such a case, can the Commissioner say that it is not his competence to assess the *legality of the law adopted by the Assembly* for the reduction of Value Added Tax, 2 months before the date of the elections? The answer is of course NO.

This is exactly what AIS has presented, a situation for the Commissioner to take a decision, but no decision is made.

13. Therefore, we demand from the Appeals and Sanctions Commission:

A. To repeal decision no. 457, dated 01.10.2021 of the State Commissioner for Elections and return the case for reconsideration to the Commissioner.

or

B. Pursuant to Article 137 and / or Article 138 of the Code of Administrative Procedures, amend decision no. 457, dated 01.10.2021 of the State Commissioner for Elections and conduct an additional administrative investigation of AIS denunciation by the Complaints and Sanctions Commission and take legal measures upon such investigation.

With considerations,

Aranita BRAHAJ

Executive director

Attached we present:

- Decision no. 457, dated 01.10.2021 of the State Commissioner for Elections.
- The denunciation submitted by AIS to the State Commissioner for Elections.