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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

BULGARIA

OPINION

ON
DRAFT AMENDMENTS

TO THE CRIMINAL PROCEDURE CODE AND THE JUDICIAL SYSTEM ACT CONCERNING CRIMINAL INVESTIGATIONS AGAINST TOP MAGISTRATES

Adopted by the Venice Commission
at its 121st Plenary Session
(Venice, 6-7 December 2019)

on the basis of comments by

Mr Richard BARRETT (Member, Ireland)
Mr Martin KUIJER (Substitute Member, Netherlands)
Mr Qerim QERIMI (Member, Kosovo)

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I. Introduction

1. By letter of 24 September 2019, the Minister of Justice of Bulgaria, Mr Danail Kirilov, requested an opinion of the Venice Commission on the draft amendments (hereinafter – the draft) to the Criminal Procedure Code (CPC) and the Judicial System Act (JSA) introducing a new procedure to initiate and conduct criminal investigations against the Prosecutor General and the two chief judges – the President of the Supreme Court of Cassation and the President of the Supreme Administrative Court. The official translation of the proposed amendments to the CPC and the JSA was provided by the authorities (see CDL-REF(2019)032); in addition, the Venice Commission had at its disposal an unofficial translation of the current version of the CPC and the JSA (see CDL-REF(2019)034 and CDL-REF(2019)033).

2. Mr Richard Barrett (member, Ireland), Mr Martin Kuijer (substitute member, the Netherlands) and Mr Qerim Qerimi (member, Kosovo) acted as rapporteurs for this opinion.

3. On 7-8 November 2019, a delegation of the Commission composed of Mr Barrett and Mr Qerimi accompanied by Mr Grigory Dikov from the Secretariat, visited Sofia and had meetings with the President of Bulgaria, the Prime Minister, the President of the Constitutional Court, the President of the Supreme Court of Cassation, judges of the Supreme Administrative Court, the Prosecutor General, the Minister of Justice, judges, prosecutors and other members of the Supreme Council of Magistracy, as well as with the civil society and professional associations of magistrates. The Commission is grateful to the Ministry of Justice for the excellent organisation of this visit.

4. This opinion was drafted on the basis of comments by the rapporteurs and the results of the visit to Sofia. It was examined by the Sub-Commission on the Judiciary on 5 December 2019 and adopted by the Venice Commission at its 121st Plenary Session (Venice, 6-7 December 2019).

II. Background

5. The draft is primarily intended to alleviate certain shortcomings that were identified by the European Court of Human Rights (the ECtHR) in the case of *Kolevi v. Bulgaria*[1]. In this judgment the ECtHR found a violation of the European Convention on account of the impossibility of an independent investigation into a crime allegedly committed by a Prosecutor General (the PG). For the ECtHR, the organisation of the public prosecution service in Bulgaria fails to secure sufficient accountability of the PG in such cases. In particular, the ECtHR noted such elements of the Bulgarian system as the prosecutors' exclusive power to bring criminal charges against offenders, the PG's full control over each and every decision issued by a prosecutor or an investigator, and the fact that the PG could only be removed from office by a decision of the Supreme Council of Magistracy (the SCM),[2] some of whose members are his subordinates. All that makes the PG virtually untouchable.

6. The ECtHR did not determine which system best meets the requirement of independent investigation into the crimes allegedly committed by high-ranking prosecutors but noted that it may be secured by different means, "such as investigation and prosecution by a separate body outside the prosecution system, special guarantees for independent decision-making despite hierarchical dependence, public scrutiny, judicial control or other measures" (§ 208).

7. The execution of this judgment was discussed many times by the Committee of Ministers (CM) in the past few years and this file has not been closed yet by the CM, since no satisfactory solution has been found to date by the Bulgarian authorities. The issue is tabled again for

[1] ECtHR, 5 November 2009, no. 1108/02, §§ 195-215.
[2] In the previous opinions the Venice Commission used the term "Supreme Judicial Council" to describe this body.

discussion in December 2019. Finally, the EU Commission in its various CVM Progress Reports[3] noted the lack of progress in this area, and the fact that the PG remains essentially immune from criminal prosecution. In its latest report the European Commission stipulates that "it will be crucial for the maintenance of public confidence that the concerns raised [about the *de facto* immunity of the PG] are adequately addressed" (p. 9).

8. In December 2015 the SCM was reorganised, following a constitutional amendment. In particular, two separate chambers within the SCM (one for judges and one for prosecutors) were created. Creation of a separate judicial chamber, where judges elected by their peers represented 6 out of 14 members, was a positive development and effectively reduced the influence of the PG on the career and discipline of lower courts' judges. However, the PG retained an increased influence within the Prosecutorial Chamber of the SCM (having 11 members) and has an important weight in the Plenary SCM (composed of 25 members: 14 representing the Judicial Chamber and 11 representing the Prosecutorial Chamber). The Plenary SCM retained appointment/dismissal power vis-à-vis the PG and the two chief judges – the President of the Supreme Court of Cassation, and the President of the Supreme Administrative Court (those two chief judges are also affected by the reform under consideration in the present Opinion). A detailed analysis of the new arrangements is contained in the 2017 Opinion where the Venice Commission concluded that "in the current Bulgarian system […] the PG […] is essentially immune from criminal prosecution and is virtually irremovable by means of impeachment for other misconduct. […]".[4]

9. To respond to the concerns expressed by its European partners, in 2019 the Ministry of Justice developed the draft under examination in the present Opinion. The draft proposes some amendments to the CPC and the JSA. These amendments go beyond the situation identified in *Kolevi*: they introduce a new procedure whereby all three top magistrates (the PG, the President of the Supreme Court of Cassation, and the President of the Supreme Administrative Court, may be *investigated and brought to criminal liability* and *suspended* pending the criminal proceedings.[5]

10. The draft was published on the Ministry's web-site in June 2019. All interlocutors whom the rapporteurs met in Sofia were well aware of the content of the draft and of the underlying problems related to this reform. This shows that the Bulgarian authorities are open to dialogue, which certainly deserves praise.

11. Before starting the analysis, two caveats should be made. It is possible to make institutional changes which would exclude *direct* pressure on the investigators by those who are being investigated (the PG *in casu*). However, there are other, more indirect and subtle forms of pressure which are difficult to detect and almost impossible to combat (those based on friendship, family relations, common interests, corporatist solidarity, long-term career considerations, etc.). An adequate legal framework is necessary, but the professional ethos and the general political culture are not less important. In sum, even the best possible system would not be flawless and would not insulate the investigators *completely* from all sorts of pressures.

12. The second caveat relates to the constitutional context of the country. Whether the proposed amendments are in conformity with the Bulgarian Constitution – or whether any alternative model is constitutionally permissible – is not for the Venice Commission to settle. Only the Bulgarian Constitutional Court may authoritatively decide on the matter. At the same time, views expressed by bodies of international experts, such as the Venice Commission, may help this Court in its task.[6] Eventually, the constitutionality of the models discussed domestically may be tested by the

[3] Report from the Commission to the European Parliament and the Council on Progress in Bulgaria under the Cooperation and Verification Mechanism, Brussels, 22 October 2019, COM(2019)498final.
[4] CDL-AD(2017)018, § 37.
[5] Domestically, the three top magistrates are often referred to as "the big three".
[6] See *mutatis mutandis* CDL-AD(2019)018, § 8.

Government through a "request for interpretation" of the Constitution. This is a procedure which allows the Constitutional Court of Bulgaria to answer questions about the meaning of certain constitutional provisions *in abstracto*, even before the concept of the reform takes the form of a draft law.

III. Analysis

A. Current regulations and the proposed changes

13. Investigation of all criminal cases in Bulgaria is in the hands of investigators, supervised by the prosecutors.[7] The majority of the investigators are police officers, working in the Ministry of Interior. Administratively speaking, police investigators belong to the structure of the Ministry of Interior. Procedurally, i.e. as regards their work on specific cases, police investigators are supervised by the prosecutors. A smaller number of investigators have the status of magistrates, do not belong to the Ministry of Interior and work in the National Investigative Service (the NIS) or in investigative units which are part of the prosecutor's offices at the regional level.[8] *Administratively* the NIS investigators are subordinated to the Director of the NIS, who is at the same time one of the deputies of the PG. But the *procedural supervision* of the work of all investigators is exercised by the prosecutors, as in the case of police investigators, of the NIS or investigators from regional prosecutor's offices.

14. In practical terms this "procedural supervision" means that all decisions of any investigator concerning conduct of a specific case can be overturned by a supervising prosecutor, upon appeal from a party to the proceedings or *proprio motu*.[9] The supervising prosecutor is, in turn, subject to a similar supervision by a hierarchically superior prosecutor, and so on – up to the level of the PG. The supervising prosecutors may transfer cases from one investigator to another, give them binding instructions or perform investigative actions themselves.[10] Theoretically, the PG may quash any decision made by any prosecutor in the system (provided that this decision is not being reviewed by a court or was not reviewed), although, as explained to the rapporteurs in Sofia, this power is rarely, if ever, used.[11]

15. Under the current legislation, judges and prosecutors can be investigated and brought to criminal liability on an equal footing with any other suspect, no pre-authorisation being needed for that. However, in practice it may prove difficult, at least insofar as the PG is concerned, for the following reasons.

16. In the current procedure, if a judge or a prosecutor are under the investigation, the prosecutor in charge of the case may ask through the PG for a temporary suspension of the judge or the prosecutor concerned, until the completion of the criminal proceedings. The suspension is ordered by the Judicial Chamber of the SCM (for judges) or by the Prosecutorial Chamber (for the prosecutors and investigators), pursuant to Article 230 of the JSA. It is unclear to what extent the suspension procedure under Article 230 covers all the three top magistrates. It definitely does not cover the PG since, under Article 230 (5) of the JSA, it is the PG him/herself who should table a motion of suspension before the respective Chamber of the SCM, and it is highly unlikely that the PG will ask to suspend him/herself.

17. In case the judge/prosecutor is found guilty of an intentional crime, he/she is automatically dismissed. In addition, dismissal is possible for a serious disciplinary offence, by a decision of the

[7] See Article 152 of the JSA, Articles 194, 196, 197 and 199 of the CPC
[8] See Article 148 of the JSA
[9] There are small exceptions to this rule, however, they are immaterial for the present analysis.
[10] See Article 46 and Article 196 of the JSA
[11] However, if used, it would be permitted by the constitutional and legal framework currently in place.

respective chamber of the SCM, or, in the case of the PG or two chief judges – by 17 votes (out of 25) in the Plenary SCM.[12]

18. In the current system the PG may, at least in theory, effectively hinder any investigation directed against him/her. First, the PG may prevent the investigation from starting or continuing, because all the investigators and prosecutors in Bulgaria are subordinated to him/her and have to follow his/her orders. Second, in the current system there is no practical possibility of suspending the PG.[13] Dismissal of the PG for a disciplinary breach is also very unlikely: the PG enjoys considerable influence within the SCM, through prosecutorial members or through lay members with prosecutorial background, who were the PG's subordinates before obtaining their mandate and who will return to the prosecution system when their term in the SCM is over.[14] And, in any event, the SCM does not have sufficient fact-finding capacity in complex cases. If the facts are unclear (which is often the case when criminal offences or serious disciplinary breaches are involved), the SCM will depend on the investigative or prosecuting authorities, which, in turn, depend on the PG.

19. The draft provides for a new procedure before the SCM which would lead to a temporary suspension of one of the three top magistrates and will open a way for criminal proceedings against him/her. Under the draft, the Plenary of the SCM, by a majority of 17 votes (out of 25) would take this decision on a motion of at least three members of the relevant chamber of the Council (i.e. the Prosecutorial Chamber in case of the PG and the Judicial Chamber in the case of two chief judges). An appeal may be lodged against the decision of the Plenum of the SCM. This must be done within three days of the decision having been issued. The appeal will be heard by a (randomly selected) five-member panel of the Supreme Administrative Court.

B. Constitutionality of the suspension

20. Some of the interlocutors in Sofia expressed doubts as to whether the suspension of a PG, appointed for a fixed seven-years' term under the Constitution, will be constitutionally permissible. The Venice Commission does not see why a fixed-term mandate should prevent a temporary suspension of an official. Judges in Bulgaria enjoy tenure until retirement (see Article 129 (2) of the Constitution), but can be suspended under Article 230 of the JSA, which is in principle was not contrary to the Constitution.[15] A temporary suspension, ordered by the same body which decides on the selection and on the definite removal of the official in question, and based on objective and serious grounds, does not seem to run counter the very essence of the mandate of this official, even if this mandate is guaranteed at the constitutional level. This mandate is guaranteed under the premise of its proper exercise. The suspensive measure is an instrument saved for exceptional circumstances, i.e. in the face of serious grounds or allegations for acts that transcend the constitutional boundaries of the mandate. Additionally, the existence of several deputies to the PG – as explained to the rapporteurs up to five – presupposes both the possibility that the functions could be exercised at least on an interim basis by a Deputy (e.g., during vacations in ordinary circumstances) and that no institutional vacuum will be created out of the temporary absence of the PG. That being said, it belongs to the Constitutional Court to decide whether the Constitution of Bulgaria – which, indeed, does not mention explicitly the possibility of

[12] See Article 320 § 4 and § 6 of the JSA, Article 33 § 3 of the JSA and Article 129 § 2 and § 3 of the Constitution.
[13] Under Article 230 if the JSA, she/he is the only one who has the power to propose suspension. Under Article 69 of the CPC, it is theoretically possible to suspend any office holder, if the alleged offence is related to his or her official duties and there is a risk for compromising the investigation. However, for Article 69 CPC to enter into play an investigation has to be initiated and charges have to be brought by a subordinate prosecutor against the PG, which is highly unlikely.
[14] During their mandate, members of the SCM cease to perform prosecutorial functions so they are not directly subordinated to the PG
[15] On 21 February 2019 the Constitutional Court of Bulgaria declared unconstitutional Article 230 § 1 of the JSA insofar as it required *automatic* suspension of judges, prosecutors of investigating magistrates charged with an intentional crime allegedly committed in the context of their duties. However, the Constitutional Court did not argue that that the suspension is not permissible in principle (provided that certain conditions are met).

a suspension of the PG or any other magistrate – should be interpreted in a more rigid or more flexible manner.

C. Will the draft ensure an independent investigation in respect of the PG?

21. The primary reason for the proposed reform is the lack of accountability of the PG in the criminal law context. That was the essence of the *Kolevi* judgment, of the criticism in the 2017 Venice Commission Opinion, and one of the key points of concern in the CVM Progress Reports. Thus, the first question to address is whether the proposed reform will ensure independent investigation into such cases.

22. One of the ideas behind the draft is to exclude undue influence of the PG on any such investigations by temporarily suspending him. On the face of it, this is a reasonable approach, which permits to temporarily remove the PG from the "chain of command". However, from a practical point of view, efficiency of this mechanism is open to doubt, and this for three reasons. First, triggering the suspension procedure will mostly depend on the prosecutors subordinated to the PG. Second, it is unlikely that the Plenary SCM will agree to the suspension and to the opening of the proceedings. Third, even if the suspension is granted, there is no guarantee that the PG will be convicted and permanently removed from office, which will have a chilling effect on any investigator/prosecutor dealing with the case.

1. How the evidence for starting the suspension procedure is obtained?

23. During the visit the rapporteurs asked the authorities about how the three members of the Prosecutorial Chamber of the SCM would learn about the accusations against the PG, in order to be able to put the suspension procedure in motion. The rapporteurs were informed that the three members may act either *proprio motu*, on the basis of some publicly available information (for example, press reports), or on the basis of the information communicated by the investigative/prosecuting authorities.[16] In the opinion of the Venice Commission, neither of these two avenues is satisfactory.

24. In the first case (the SCM members learn about the PG's wrongdoing from open sources), it is difficult to see whether the publicly available information will be sufficient to persuade seventeen other members of the SCM that a crime has been committed and that the PG may be implicated. Indeed, there are obvious cases where solid evidence is readily available and is already in the public domain, but it is difficult to imagine that a PG would be involved in such crimes. And, as noted in the 2017 opinion, the SCM (and *a fortiori* three individual members) have no independent fact-finding capacity.

25. The alternative is that the three members of the SCM will trigger the suspension procedure following a communication from an investigator/prosecutor, accompanied by some materials of an existing investigation. But this means that the investigator/prosecutor should be ready to make such a communication, and will not fear reprisals from his or her superiors in case the SCM does not grant the permission, or the investigation does not result in a conviction of the PG. Furthermore, this act of the investigator/lower prosecutor will be subject to review as any other similar act, including by the PG him/herself, so, even if the request is made, it can be revoked.

26. Probably, it is unavoidable that in the initial phase of some urgent investigations the case implicating the PG will be for some time in hands of the "ordinary" investigators/prosecutors subordinated to the PG. The sooner the case is withdrawn from the "ordinary" investigators/prosecutors and transmitted to the investigators/prosecutors who are independent from the PG the better. In the proposed draft, independence of the investigators/prosecutors is

[16] This should be specified in the draft; in the second case, some amendments might be needed to the CPC allowing the investigators/prosecutors to share materials of the criminal investigation file with the SCM members.

achieved through the suspension of the PG. Another possible solution (discussed below) would consist of entrusting the investigation to an official independent of the PG. Whatever model is chosen, in order to reduce, if not to exclude, the risk of undue influence by the PG at those initial stages, it may be necessary to include in the CPC and the JSA an obligation of the investigators to immediately "flag" those cases to the SCM (with a corresponding sanction for not doing it), and another provision requiring the PG to withdraw from the supervision over such cases and from giving any instructions which may be reasonably interpreted as relating to those investigators.

2. Will the SCM order the suspension of the PG?

27. The next question is whether it is likely that the SCM will start a procedure and order a suspension of the PG. Out of 25 members of the Plenary SCM, in addition to the PG him/herself, there are four prosecutors and one investigator elected by their peers. This raises legitimate doubts about their independence from the PG: even if formally they do not receive orders from the PG in their capacity as members, they will become his/her subordinates once they return to their duties. Moreover, some of the "lay members", elected by the National Assembly, are former prosecutors and investigators and may also return to the work in the prosecution service at the end of their mandate (see § 34 of the 2017 opinion). Actually, in the current composition of the Prosecutorial Chamber of the SCM *all* of the lay members are former prosecutors or investigators.[17] This is not desirable – the presence of lay members should ensure pluralistic composition of this body, whereas in Bulgaria it only represents the prosecutorial corporation. In addition, the PG may have "a certain *de facto* leverage over some other members of the [SCM], even those who are not professionally linked with the prosecution system" (see § 35 of the 2017 Opinion). The Venice Commission therefore recommends to the Bulgarian authorities to modify the law in order to ensure that lay members sitting in the Prosecutorial Chamber represent other professions, and that prosecutors and investigators (who are already represented there by 5 members) cannot be appointed as "lay members".

28. Under the draft, the motion for suspension of the PG is to be lodged by at least three members of the Prosecutorial Chamber. Given that five members of the Chamber are affiliated with the PG, and some of the remaining five lay members may be affiliated (see above), it might in practice be difficult to find three members willing to lodge a motion.[18]

29. As to the vote by the Plenary, as noted in the 2017 Opinion (see § 36) it is virtually impossible to obtain the 17 votes needed to request the President to dismiss the PG. It will be similarly very difficult to obtain 17 votes for a temporary suspension of the PG. It will require, in most cases, a near-unanimity amongst judges, members elected by the National Assembly, and *ex officio* members, which will be very difficult to achieve.

30. In sum, the Venice Commission considers that, given the *rapport de force* within the SCM, the possibility of suspending the PG pending criminal investigation remains purely theoretical.[19] To improve chances of suspension, the law might provide that the three members launching the motion in respect of the PG may be from any of the two chambers of the SCM, and that the PG may be suspended with a lower majority of votes in the Plenary SCM (with the PG, naturally, not

[17] See (in Bulgarian) the CVs of the members of the SCM: http://www.vss.justice.bg/page/view/1235

[18] Assuming that three members of the Prosecutorial Chamber are ready to lodge a motion against the PG, that they collected sufficient evidence showing the PG's possible connection to the crime under investigation, it is unclear whether they would be allowed to vote in the Plenary SCM, given their role as "instigators" of this procedure. If they are excluded, the possibility of suspending the PG becomes even more ephemerous.

[19] The draft provides for judicial review by the Supreme Administrative Court (see draft Article 230a § 5) but it is unclear whether the Supreme Administrative Court will be capable to offset the unwillingness of the majority of members to vote in favour of a proposal for suspension, since it is unclear whether the Supreme Administrative Court will have this power (to annul not only the decision to suspend but also the decision not to suspend), what would be the scope of such review, etc.

voting). Arguably, a lower majority would be needed for a more lenient measure, such as a temporary suspension, than for a more serious action such as the dismissal.

3. What will happen after the suspension?

31. Even assuming that in a given case the investigators transmit evidence implicating the PG to the SCM, that three members of the Prosecutorial Chamber launch a suspension procedure, and that a sufficient number of members of the Plenary SCM vote for the suspension, the prospect of bringing the PG to criminal liability remain slender.

32. Under the draft, the Plenary SCM may only "allow" the prosecutor to start a case in respect of the PG.[20] Afterwards the file will return to the prosecutor, who will have the discretion to indict the PG and transmit the case to the court,[21] or to drop charges. Since the outcome of the criminal proceedings can never be guaranteed, it is possible that the PG will be acquitted, even if the case is transmitted to a court. The prospect of the PG returning to his/her position after acquittal (or after the expiry of the maximum term of the suspension, which is another possibility)[22] will certainly have a chilling effect on any investigator/prosecutor dealing with the case.

33. Finally, while the PG is suspended from office, prosecutors will remain answerable to the Deputies, who were appointed at the proposal of the PG by the Prosecutorial Chamber of the SCM (See Article 30 § 5 and Article 38 § 1-4). The NIS investigators will be subordinated to the heads of the departments in the NIS appointed by the PG (Article 153 (1)), and – indirectly – to the Director of the NIS, who may own his/her appointment to the PG (see Article 174 (1)). The regional investigating magistrates are subordinated to the heads of regional offices who are subordinated to the PG. In essence, even if the PG is suspended, the case against him/her will be in the hands of his/her close collaborators, who may remain loyal towards the PG.

4. Does the draft properly respond to the *Kolevi* judgment?

34. It is possible to make adjustments to the proposed model in order to reduce the risk of undue influence by the PG on investigations implicating him/or herself (see, in particular, § 26 and § 30 above). However, these adjustments risk not to solve the problem of *de facto* impunity of the PG identified by the ECtHR in the *Kolevi* judgment. The institutional structure of the SCM and the role played by the PG in the Bulgarian prosecution system remains such as to effectively shield the PG from any criminal prosecution. The Venice Commission is aware that the draft provides for an appeal to a panel of judges from the SAC against decisions of the Plenary SCM. However, the scope of the appellate review is not clear, and, in any event, it does not seem to be an efficient remedy against the decision not to continue the investigation and not to suspend the PG. Therefore, the Venice Commission invites the Bulgarian authorities to consider alternative mechanisms which would facilitate independent investigation into such cases (on this point see Sub-Section F below).

D. Will the draft improve the accountability of top magistrates?

35. Another rationale behind the proposal was to strengthen the accountability of top magistrates. The authorities claimed that the three chief magistrates have equal status under the Constitution and hence the system of suspending/bringing them to criminal liability should be the same. If only the PG is targeted by the reform, it would look like the other two top magistrates

[20] See new item 6a added to Article 30 § 2 and new Article 230a of the JSA.
[21] See Article 246 of the CPC.
[22] It is not very clear how long the suspension may last at the pre-trial stage. Draft Article 230a § 3 says that it may last "until completion of the criminal proceedings". Draft Article 230a § 4 says that it cannot exceed the term under Article 234 § 8. Normally, the maximum time-limit of 1,5 years (or 8 months for less serious offence) is applicable only to the pre-trial stage. However, if the investigation lasts more than 8 months /1.5 year at the pre-trial stage, it seems that the PG will have to be reinstated.

cannot ever be investigated. So, another stated goal for the proposed reform was to improve the accountability of the three top magistrates – the PG and the two chief judges.

36. At present, no special authorisation is needed to start an investigation against a magistrate, including a top one. Under the draft, a decision of the Plenary SCM will be required to open an investigation against one of the three top magistrates. Thus, compared to the currently existing system, the proposed mechanism seems to create an extra layer of protection (referred to by some interlocutors as a new immunity) for the three top magistrates concerned. This runs counter the stated goal of improving their accountability.

37. The draft also provides for ordering *a temporary suspension* of the three top magistrates. As shown above, as regards the PG, this mechanism will be largely inefficient, and so it will not improve accountability either. As to the two chief judges, the suspension mechanism already seems to exist in Article 230 of the JSA. The difference between the current JSA and the draft is that, in respect of the two top judges, their suspension will be ordered not by the Judicial Chamber (as in the current version of Article 230) but by the Plenary. But in this case the imperative of "accountability" may clash with the imperative of "independence" and with the European standards in this field, as will be shown below.

E. Is it necessary to extend the suspension mechanism to the two chief judges?

38. The *Kolevi* judgment was directed towards the investigation of prosecutors as opposed to judges. This is not to say that the procedures for investigating senior judges do not require amendment,[23] or that they cannot be suspended at all. The current Article 230 of the JSA provides that judges may be suspended, by a decision of the Judicial Chamber of the JSA, pending criminal proceedings targeting them. Such suspension may be justified by the need to protect the authority of the judiciary: a judge should not be allowed to continue exercising judicial functions if there is a serious risk that he or she may be found guilty of a crime.

39. That being said, the rationale behind suspending a judge and suspending the PG are different, and the draft seems to overlook this difference. Suspending the PG is needed not only in order to protect the authority of the prosecutor's office, but essentially because the PG may effectively hold back any investigation which targets him or her. As the Venice Commission noted in 2017, in Bulgaria "the PG personifies the prosecution system with all its considerable powers" (§ 32). This makes investigating a case implicating a PG particularly difficult. By contrast, any investigator/prosecutor may open an investigation into a crime allegedly perpetrated by a top judge, and to bring this judge before the court for trial, without that prosecutor risking reprisals or obstruction by this top judge.

40. Indeed, some of the decisions of the investigator/prosecutor are subject to judicial review. And, ultimately, it will be for the court to decide on the merits of the accusations. However, in Bulgaria judges are independent, and the President of the Supreme Court of Cassation and the President of the Supreme Administrative Court are not *hierarchically superior* to their colleagues from the lower courts. They cannot give them binding instructions, transfer cases at will, or take decisions in their place. In contrast, prosecutors in Bulgaria are organised into a hierarchical pyramid with the PG on the top.

41. Thus, in the context of criminal investigations it is wrong to put the PG and the two chief judges on the same footing. While it is legitimate to have a vertically structured prosecution

[23] This should not be interpreted as suggesting that the amendments are needed, but rather acknowledging a theoretical possibility of making such amendments.

system, the PG represents a more serious danger for the independence of any investigation. Perfect symmetry in these matters is not required,[24] nor desirable.

42. Furthermore, according to some interlocutors, the legal mechanism proposed by the draft would make the two chief judges more vulnerable to external pressures, as, under the draft, their suspension will be decided by the Plenary SCM, where judges are in the minority (6 out of 25). In this context, in 2017 the Venice Commission noted as follows:

> "14. In the previous opinion on the Bulgarian judiciary the Venice Commission recommended to define the quota of judicial members 'within the parameters of the Recommendation of the Committee of Ministers.' The Recommendation CM/Rec(2010)12 states that '[n]ot less than half the members of such councils should be judges chosen by their peers from all levels of the judiciary and with the respect of pluralism inside the judiciary' (§ 27). The current composition of the SCM still does not correspond to this parameter. Thus, judges elected by their peers are in a net minority at the Plenary: they have only six votes out of 25. Other votes belong to prosecutors, lay members, and two *ex officio* members who, while being judges, are not elected by their peers. Similarly, in the Judicial Chamber judges elected by their peers represent less than a half of all members: out of 14 members of the chamber 6 are elected judges, six are lay members and two are ex officio members (two chief judges). Therefore, the recommendations of the previous opinion by the Venice Commission were not fully implemented".

43. It is regrettable that the recommendation of the 2017 Opinion remains not implemented to date. Moreover, the draft goes further in the wrong direction. The decision to suspend a judge (especially considering that the suspension may last for up to 18 months, which is a maximum duration of a pre-trial stage in serious cases), is nearly as important as a decision to dismiss this judge. This important decision should not be entrusted to the Plenary, where judges elected by their peers are outnumbered by the prosecutors and lay members with the prosecutorial background. Either these matters should be decided by the Judicial Chamber (where judges elected by the peers should represent at least a half of the members, which is not the case now), or the composition of the Plenary should be altered along the lines suggested in the 2017 Opinion and the Recommendation CM/Rec(2010)12.

44. Some interlocutors in Sofia claimed that the current proposal (to suspend all three top magistrates by a decision of the Plenary SCM) is dictated by the Constitution. In their words, the Constitution of Bulgaria treats judges, prosecutors and investigators as "magistrates". Moreover, the Constitution provides for a common SCM, which has two distinct Chambers but also a Plenary which brings together the representatives of all three legal professions. In the submissions of those interlocutors, the status of all magistrates should be equal in all respects.

45. The Venice Commission is not persuaded by this argument. As such, the text of the Constitution does not contain any clear guidance on this point. As to the inner logic of the constitutional design of the SCM, the Venice Commission agrees that the symmetry of two separate "wings" in the common judicial-prosecutorial council may imply some symmetry in their functions. For example, it may concern the procedure for selecting candidates for judicial/prosecutorial positions.[25] However, as noted above, in the context of ensuring independence of criminal investigations against the PG, the PG and the top judges are not in the

[24] In the 2017 Opinion the Venice Commission noted (§ 40) that "reforming of the accountability mechanisms related to the PG does not call for a symmetrical easing of procedures related to the removal of the two chief judges or judicial members of the SCM. While judges should be independent, this concept is not fully applicable to the prosecutors; it is more accurate to speak of 'autonomy' rather than full-fledged 'independence' of the prosecution service. Certain asymmetry of institutions and procedures applicable to the two branches of the judiciary is inevitable."

[25] CDL-AD(2019)014, Romania – opinion on Government Emergency Ordinances GEO no. 7/2019 and GEO No. 12/2019 on amendments to the three laws of justice in Romania.

same position. Hence, it is justified to develop special procedures concerning the PG, but not the two other top magistrates.

46. The proposed mechanism, insofar as it concerns two chief judges, is problematic from yet another perspective. As stated above, currently any investigator may open and pursue an investigation against any judge without any special permission and request a suspension from the Judicial Chamber only when sufficient evidence implicating this judge is gathered (but see in this respect § 45 of the 2017 Opinion). The draft, by contrast, may be construed as implying that no investigative actions whatsoever potentially targeting one of the two chief judges or the PG may be taken without the decision of the Plenary SCM "allowing" such proceedings. This implies that the investigators will have to seek approval of the SCM even in those cases where the connection to the chief judges is tenuous and uncertain. The SCM will have to decide on the basis of very weak evidence and will have to make a difficult choice. It may refuse giving such approval, because the evidence is weak, but that effectively will mean that further investigative actions targeting the judge are not possible, and the case is effectively closed. Alternatively, on the basis of this weak file, the SCM may give green light to further investigative actions, but that automatically entails the suspension of the chief judge concerned. In both situations the decision of the Plenary SCM will be open to criticism.

47. In sum, the Venice Commission invites the Bulgarian authorities to abandon the idea of extending the suspension mechanism to the two chief judges. The current system which provides for the suspension of judges by the Judicial Chamber of the SCM is certainly better than the one proposed in the draft.

48. Moreover, the current system should be improved, to get it closer to the European standards in the field of judicial independence. In particular, the proportion of the judicial members elected by their peers in the Judicial Chamber should be increased, and all functions related to the judicial careers, discipline, suspensions etc.– including in relation to the chief judges – should be transferred to this Chamber. The Venice Commission refers the Bulgarian authorities to its 2017 Opinion where it recommended (§ 20) that "elected judicial members should play a more important role within the SCM. The most radical solution would be to abandon the current model of an integrated SCM and create two separate bodies – one supreme council for judges (where elected judicial members would have at least half of the votes) and another supreme council for prosecutors and investigators". Alternatively (§ 21) "if judges and prosecutors are to remain together within the same Council, the powers of the Plenary SCM should be reduced. Most importantly, the powers related to the appointment/dismissal of two chief judges, and the power to remove elected judicial members of the SCM should be transferred to the Judicial Chamber. Additionally, the composition of the Judicial Chamber of the SCM should be changed, in order to increase the proportion of judges elected by their peers." The Venice Commission invites the authorities of Bulgaria to seriously consider these changes (even if it requires a constitutional amendment).

F. Possible alternatives

49. As shown above, it is unlikely that the suspension mechanism, as proposed by the draft, will work. So, it is necessary to search for an alternative solution (or a combination of solutions) which would ensure the independence of criminal investigations targeting the PG. During the meetings in Sofia the interlocutors proposed to the rapporteurs several such solutions.

50. Before describing those alternatives, the Venice Commission would like to stress that they have not been retained by the Government, are not officially on the table and have not been matured into a specific legislative proposal. Before any such proposal is made by the Government, it is very difficult to discuss possible pros and contras of each possible solution and see how it fits to the current legislative and constitutional framework. The following analysis is therefore very preliminary; it belongs to the Bulgarian authorities to develop, on the basis of the

discussion below, a specific legislative proposal, which the Venice Commission will be ready to assess, if requested.

1. Judicial review of the decisions not to open an investigation

51. The first solution discussed in Sofia consists of introducing a review by a judge of the decision not to open a criminal case. At present, refusals to open a criminal case are appealable only to a higher prosecutor, but not to the court (contrary to the decisions to terminate criminal proceedings which are subject to the judicial review at the request of the victim).[26] An external control by a judge – not subordinated to the PG and thus independent from him/her – may ensure that arbitrary refusals to open an investigation are overturned. However, it does not guarantee the effective conduct of such investigations. The courts have no power or resources to do the work of the investigative bodies and to perform investigative actions themselves. Judicial control of such decisions will be limited to the questions of legality, or to the most basic reasonableness analysis.[27] Furthermore, introducing judicial review of the decisions not to open a case may put a strain on the judicial system, so the cost of this measure should be carefully assessed and an efficient mechanism of quick dismissal of manifestly ill-founded appeals should be put in place.

52. That being said, providing for a judicial avenue *in serious cases* where the investigation has not been opened may be a useful addition to the current system. This idea is consonant with p. 34 of the CM Recommendation Rec(2000)19 which calls on the States to give "interested parties of recognised or identifiable status" the right to challenge decisions of public prosecutors not to prosecute "by way of judicial review, or by authorising parties to engage private prosecution".[28]

2. Who may be an "independent prosecutor" in the Bulgarian system?

53. Other solutions discussed in Sofia mostly revolved around the idea of an "independent prosecutor", not subordinated to the PG. In particular, the following proposals were made:

- Entrusting such investigations to the Inspector General;
- Entrusting such investigations to the Director of the National Investigative Service (the NIS);
- Entrusting the investigation to a special *ad hoc* prosecutor.

54. There are good arguments in favor of the idea of an "independent prosecutor". In the 2017 Opinion, when discussing the mechanism of removal of the PG from office under Article 129 § 3 p. 5 of the Constitution, the Venice Commission stressed that it belongs to the Bulgarian legislator to design appropriate procedures which would ensure the accountability of the PG. Having said this, the Venice Commission nevertheless outlined certain basic features of such a procedure. It recommended that any investigation targeting the PG should be conducted by a person or a body independent from the PG; that this person or body should have its own fact-finding capacity, and that the prosecutorial members of the SCM should not have the blocking power in the process of such investigation.

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[26] Articles 200 and 213 of the CCP.

[27] As follows from the judgement of the Constitutional Court of Bulgaria No. 7 of 16 December 2004 in case No. 6/2004.

[28] See also Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA: 1. "[…] victims, in accordance with their role in the relevant criminal justice system, [should] have the right to a review of a decision not to prosecute." (Article 11 (1)), and further, in (2): "[…] at least the victims of serious crimes [should] have the right to a review of a decision not to prosecute." The Directive does not require judicial review of the decision not to prosecute, whereas the CM Recommendation seems to offer the States an alternative between a judicial review (following hierarchical appeals, where appropriate) or a private prosecution mechanism.

55. In the opinion of the Venice Commission, the ECtHR's concerns in the *Kolevi* judgement will be addressed if cases implicating the PG are withdrawn from the jurisdiction of ordinary investigators and prosecutors, subordinated to the PG, and if they are entrusted to a body or an official who does not receive instructions from the PG, who does not owe his/her appointment to the PG, and whose further career does not depend, even in the long run, on the PG (like end-of-career or even retired prosecutors or judges). However, this whole discussion will be futile if the figure of an "independent investigator", not subordinated to the PG, is constitutionally impossible, at least as the Constitution stands now.

56. Article 127 of the Constitution lists the powers of the prosecution: directing the investigations, indicting perpetrators of criminal offences, supporting accusation in courts, etc. Article 126 (2) of the Constitution proclaims that the PG "exercises supervision as to legality" of the work of all prosecutors. It may be arguably deduced that the prosecutors have a monopoly over all criminal investigations, and that all of the prosecutors should be submitted to the authority of the PG who supervises the legality of their actions. If the Constitution is construed in this manner, the figure of an "independent" prosecutor becomes impossible without some constitutional amendments.

57. However, a more flexible approach to the interpretation of the "prosecutorial monopoly" is also possible. First of all, the CPC provides for the judicial review of legality of certain actions of the prosecution, which seemingly does not perturb the "monopoly" and does not raise any constitutional question. Second, and more importantly, the Constitution must be interpreted in the light of generally accepted principles, one of them being *nemo judex in causa sua*, no one can be a judge in his own case. It is difficult to imagine that the Bulgarian constitutional order does not accommodate this principle somehow, even if it is not formulated in the Constitution.

58. Saying that the PG has the exclusive right to prosecute everyone in the country, including him- or herself, or supervise such prosecution, effectively means that this office holder cannot be held legally accountable for his/her criminal acts. Indeed, some constitutional bodies (like Parliament, the Constitutional Court, or the monarch in some countries) are often subject to political accountability, rather than legal accountability. However, it is questionable whether the PG in Bulgaria belongs to this special category of office holders, and, in any event, the *Kolevi* judgement speaks of the legal accountability of the PG.

59. There is no doubt that the constitutional mandate of the PG and of the prosecution service must be respected. It should be impossible to create a parallel institution which would assume an important part of the prosecutorial functions which now belong to the prosecution service headed by the PG. Such a reform would certainly need a constitutional amendment – even, possibly, an amendment by the Grand National Assembly.[29] However, in the opinion of the Venice Commission, the Constitution may be interpreted as leaving space for some *ad hoc* mechanism, applicable in those rare and marginal cases where there will be a need to bring the PG or somebody closely associated to the PG to criminal liability. Withdrawing that category of cases from the jurisdiction of the PG does not impair the essence of his/her constitutional mandate.

60. In sum, the idea of an independent prosecutor may be put in practice only if the Constitutional Court of Bulgaria accepts that the monopoly of the prosecution service, headed by the PG, on public prosecutions is not absolute, and that some exceptions from this general rule may be made to prevent a conflict of interests, without the need for constitutional amendments. In this case the independent prosecutor can be selected using the existing constitutional structures and procedures. Constitutionality of those solutions may be tested through a procedure of interpretation of the Constitution, mentioned in §12 above.

[29] See Judgment No. 8 of 1 September 2005 in case No. 7/2005 by the Constitutional Court of Bulgaria.

61. As noted above, two existing office holders were mentioned as candidates to the role of an "independent prosecutor" in such cases – the Inspector General and the Director of the NIS. As regards the Inspector General (IG), he/she receives a mandate from the National Assembly, and, thus, is independent from the PG (see Article 132a of the Constitution). However, functions of the IG are defined by the Constitution and do not include criminal investigations, but rather relate to the disciplinary field. Giving the IG the investigative powers vis-à-vis the PG may require changing the Constitution. Similarly, the IG will need to obtain all functions of a prosecutor, which may also require a constitutional amendment.

62. The Director of the NIS is elected by 8 votes of the members of the Prosecutorial Chamber, upon a nomination which may come from the PG (see Article 174 (1) of the JSA). Dismissal of the Director is also decided by the Prosecutorial Chamber (see Article 175 (6). It is understood that although the Director is a Deputy PG *ex officio*,[30] his/her mandate is stronger than that of other deputies. However, the Director remains institutionally linked to the PG, through the Prosecutorial Chamber where the PG plays a decisive role. Moreover, as explained to the rapporteurs in Sofia, being an investigator, the Director is *procedurally* subordinated to supervising prosecutors and – through them – to the PG. Turning the Director into a genuinely independent figure will require making amendments to the method of his/her appointment, accountability, and, most important, by giving him/her prosecutorial functions and withdrawing his/her decisions from any procedural supervision by "ordinary" prosecutors. It should be possible to change the manner of appointment of the Director to make him/her more independent from the PG without changing the Constitution. It was explained to the rapporteurs that previously, before 2009, the investigative service enjoyed a higher degree of administrative independence from the prosecution service, while the constitutional framework remained the same.[31] Thus, a reverse reform, giving the Director a more independent status, should theoretically also be possible. As regards giving the Director prosecutorial functions *stricto sensu*, this may require a constitutional amendment, if the concept of prosecutorial monopoly is interpreted strictly.

63. The last model discussed at the meetings in Sofia consisted of creating a position of a special *ad hoc* prosecutor – or even a reserve list of *ad hoc* prosecutors – who could step in and assume prosecutorial functions in cases where the PG may be implicated. The list of such *ad hoc* prosecutors may be approved by the SCM from the number of retired (or end-of-career) prosecutors, investigators, and judges, and then drawn by lot when the time comes and the SCM receives information about the case involving the PG. Other models of nominating *ad hoc* prosecutors are possible. In that event, it is important to ensure that the prosecutorial members of the SCM do not play a decisive role in their appointment. The Commission reiterates in that regard its previous recommendation concerning the current composition of the Prosecutorial Chamber of the SCM (see paragraph 27 above). In addition, it would be important to ensure that after the termination of their mandate such *ad hoc* prosecutors do not need to return to the prosecution system and to become subordinate to the PG. Again, introducing this model at the legislative level would require a more flexible interpretation of the monopoly of "prosecutors", as discussed above.

IV. Conclusion

64. In the case of *Kolevi*, the European Court of Human Rights identified a serious flaw in the Bulgarian criminal justice system: a virtual impossibility to investigate a case against the Prosecutor General (the PG). To tackle this issue the Bulgarian authorities developed a mechanism allowing to suspend three top magistrates (the PG and two chief judges) and to open

[30] Article 150 (1) of the JSA.
[31] At the same time, the prosecution service always retained the power of procedural supervision over the course of the investigation of specific cases.

an investigation against them. In their contention, this mechanism will improve the accountability of those office holders.

65. This proposal was widely discussed in Bulgaria; the Venice Commission commends the resolve of the Bulgarian authorities to address the problem identified in *Kolevi* and the authorities' openness to a serious and inclusive dialogue with all partners and stakeholders.

66. However, as regards the substance of the proposal, there is a strong risk that the proposed mechanism will fail to achieve the stated goals, due to the position of the PG within the prosecution service and his/her important influence within the SCM. Thus, to decide on the suspension of the PG, the Plenary of the Supreme Council for Magistracy (the SCM) will have to rely essentially on the information obtained by the investigators and prosecutors, who are subordinated to the PG. Given the composition of the Prosecutorial Chamber, it will be difficult to find three members willing to table a motion of suspension, and seventeen members to vote for it. Thus, although the suspension of the PG appears a reasonable solution in theory, it may not work in practice.

67. Furthermore, the suspension mechanism is extended to two chief judges. This was not required by the ECtHR and is dangerous for the judicial independence. Suspension of top judges by a Plenary SCM, where judges are in a net minority, is contrary to the European standards and is not required by the text or the logic of the Bulgarian Constitution. The Venice Commission urges the Bulgarian authorities to abandon this part of the proposal.

68. As regards the suspension of the PG, there are several ways to make this mechanism somewhat more efficient. For example, the legislation might provide for a duty of the investigators/prosecutors to report cases implicating the PG to the SCM, oblige the PG to refrain from giving any instructions in such cases, provide that the SCM members not affiliated with the prosecution may table a motion of suspension, and lower the majority threshold needed to order the suspension of the PG. However, even with those amendments, the suspension mechanism risks to be insufficient to ensure the independence of the investigation targeting the PG. So, other solutions should be explored. These solutions may involve introducing a possibility of a judicial review of the decisions not to open a criminal investigation or entrusting criminal files to some sort of an "independent prosecutor". Some of those reforms may require amendments to the Constitution, unless the Constitutional Court gives a more flexible interpretation to the concept of prosecutorial monopoly.

69. Finally, previous recommendations of the Venice Commission remain valid. In particular, "judges elected by their peers should represent at least half of the members of the Judicial Chamber of the [SCM]". "The Judicial Chamber could receive some of the powers of the Plenary in respect of judges (in particular the power to appoint/remove two chief judges […]); alternatively, these decisions could be taken by a "double majority" of the elected judicial members and all members of the [SCM]" (see § 112 of the 2017 Opinion). As to the Prosecutorial Chamber, it is important to ensure its pluralist composition: lay members elected by the National Assembly should not have a prosecutorial background but should represent other professions, and a modification to this end should be made to the law. Implementing those recommendations will reduce the influence of the PG within the Bulgarian magistracy and may improve the situation with independent investigations. Without those more general changes amendments to the investigative procedure as such, described above, risk to have a limited effect only.

70. More generally, the Venice Commission stresses that the problem identified in *Kolevi* cannot be solved by one single amendment but will rather require a combination of institutional changes, new procedural and substantive rules, and the evolution of professional ethos and political culture. The Venice Commission encourages the Bulgarian authorities to continue their cooperation with the Committee of Ministers and remains at the disposal of the authorities for further assistance in this matter.