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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

OPINION ON THE REFORM OF THE JUDICIARY IN BULGARIA

adopted by the Commission at its 38th Plenary Meeting

(Venice, 22-23 March 1999)

on the basis of comments by
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1 Introduction

1. The Monitoring Committee of the Parliamentary Assembly of the Council of Europe decided to request from the Venice Commission a legal opinion on the draft law amending and supplementing the Bulgarian Law on the Judiciary. The Commission was informed of this request by letter of 25 September 1998 by Mr Bruno Haller, Clerk of the Assembly.

2. At its 37th Plenary Meeting, on 11-12 December 1998 the Commission held an exchange of Views on the judicial reform in Bulgaria with Messrs Gotsev, Minister of Justice, and Toshev, Chairman of the Bulgarian Delegation to the Parliamentary Assembly of the Council of Europe (CDL (98) PV 37). In particular, the Commission was informed that the draft law had already entered into force and that it had been challenged before the Constitutional Court.

3. The Commission set up a working group on the reform of the judicial system in Bulgaria consisting of Messrs Hamilton, Lopez Guerra and Said Pullicino, Ms Suchocka and Mr Svoboda. In order not to interfere with the case pending before the Bulgarian Constitutional Court, the Commission asked its working group to visit Bulgaria once the Court would have handed down its decision.

4. The Constitutional Court delivered its decision on 14 January 1999 (CDL (99) 12). On 18-21 February 1999, Messrs Hamilton, Lopez Guerra and Said Pullicino made a visit to Bulgaria in order to assess the impact of the reform and to hold an exchange of views with the different interested parties, including the parliamentary opposition (see also memoranda CDL (99) 16).

5. The present opinion is based on the comments of Messrs. Hamilton, Lopez Guerra and Said Pullicino (CDL (99) 21, 11 and 10) and was adopted by the Commission at its 38th Plenary Meeting (Venice, 22-23 March 1999).

2 Constitutional and legal situation

2.1 Constitutional basis for the judicial system

6. The Constitution of the Republic of Bulgaria was adopted by the Grand National Assembly on 12 July 1991. It provides that the judicial branch of Government shall be independent (Article 117.2 of the Constitution) and that the judicial branch of Government shall have an independent budget (Article 117.3 of the Constitution). The judicial branch of Government has three parts (a) the courts (b) the prosecutor's office and (c) investigating bodies which are responsible for performing the preliminary investigation in criminal cases.

7. Justice is administered by the Supreme Court of Cassation, the Supreme Administrative Court, courts of appeal, courts of assizes, courts martial and district courts. Specialised

courts may be set up by virtue of a law, but extraordinary courts are prohibited (Article 119 of the Constitution).

8. Justices, prosecutors and investigating magistrates are elected, promoted, demoted, reassigned and dismissed by the Supreme Judicial Council which consists of 25 members. There are 3 *ex officio* members, the Chairman of the Supreme Court of Cassation, the Chairman of the Supreme Administrative Court, and the Chief Prosecutor. Eleven of the members of the Supreme Judicial Council are elected by the National Assembly, and 11 are elected by the bodies of the judicial branch. All 22 elected members must be practising lawyers of high professional and moral integrity with at least 15 years of professional experience. The elected members of the Supreme Judicial Council serve terms of 5 years. They are not eligible for immediate re-election. The meetings of the Supreme Judicial Council are chaired by the Minister for Justice, who shall not be entitled to a vote (Article 130 of the Constitution).

9. Justices, prosecutors and investigating magistrates, become unsubstitutable upon completing a third year in the respective office. They may be dismissed only upon retirement, resignation, upon the enforcement of a prison sentence for a deliberate crime, or upon lasting actual disability to perform their functions over more than one year (Article 129.3 of the Constitution). They enjoy the same immunity as the members of the National Assembly (Articles 132.1 and 70 of the Constitution). Therefore, they are immune from detention or criminal prosecution but can be detained in the course of committing a grave crime. The immunity of a justice, prosecutor or investigating magistrate may be lifted by the Supreme Judicial Council only in the circumstances established by the law (Article 132.2 of the Constitution).

10. The organisation and the activity of the Supreme Judicial Council, of the courts, the prosecution and the investigation, the status of the justices, prosecutors and investigating magistrates, the conditions and the procedure for the appointment and dismissal of justices, court assessors, prosecutors and investigating magistrates and the materialisation of their liability are to be established by a law (Article 133 of the Constitution). This law is the Judicial System Act of the Republic of Bulgaria which was enacted in 1994 and has been amended in 1994, 1996, 1997 and 1998.

2.2 The Act constituting an amendment to the Judicial System Act of the Republic of Bulgaria

11. The specific remit of the Commission was to report concerning the law on amendments of the Judicial System Act of Bulgaria which was promulgated in the State Gazette no. 133 of 11 November 1998 and entered into force on 15 November 1998 (CDL (98) 87). The text of the Act as finally enacted (see CDL (98) 93 rev.) differs from that which was introduced both because the President of the Republic of Bulgaria referred the Act to the National Assembly for further debate, as a result of which a number of provisions were not proceeded with, and because a number of the provisions of the Act were successfully challenged before the Constitutional Court of Bulgaria in an application brought by the Prosecutor General and a number of Deputies of the National Assembly. While the request from the Monitoring Committee of the Parliamentary Assembly was specifically directed

to the last amendment to this Act which in the meantime already had entered into force, the Venice Commission felt obliged to address some aspects of the Act as a whole.

12. Arising out of the Constitutional Court's verdict of 14 January 1999 (CDL (99) 12) a number of provisions of the Act as enacted were struck down as unconstitutional, including changes in procedures for the budget of the judicial system, which were held to be an interference with the autonomous budget of the Constitution; a proposal to impose disciplinary sanctions on judges and prosecutors for "breach of the Oath of Office," which was held to be impermissibly vague; a proposal to extend to the Chairman of the Supreme Court of Cassation, the Supreme Court of Appeal and the Minister for Justice and European Legal Integration the right to request the Supreme Judicial Council to divest a judge, prosecutor or investigator of immunity and temporarily remove him from Office (the Court held that only the prosecutor could make such a proposal); and the right of the Supreme Judicial Council to appoint a prosecutor in cases involving disciplinary cases against members of the Judiciary. The Constitutional Court also rejected a proposal that appeals from the disciplinary panel of the Supreme Judicial Council should be to a mixed court staffed from the Supreme Court of Cassation and the Supreme Administrative Court. As a result such appeals lie only to the Supreme Administrative Court. It is unnecessary for the Commission to give any further consideration to these aspects of the amendments to the Judicial System Act which, having been rejected by the Constitutional Court, are no longer in force.

13. The Venice Commission has absolutely no reason to doubt that the Constitutional Court reached its decision, after due deliberation, free from any undue influence. That judgment determines the constitutionality of the amendments according to the Bulgarian Constitution. Any observations on the judgment itself would not only be outside the scope of the Commission's mandate but would also be improper since the opinion sought of the Venice Commission was limited to an examination on whether the Judicial System Act, as amended, satisfied the required standard for an independent Judiciary and adequately guarantees the basic requirements of a democratic society.

14. The principal issues dealt with in this opinion are the following:
    - the election of a new Supreme Judicial Council before the five year mandate of the previous Council had elapsed (point 3.1 below);
    - the composition of the Supreme Judicial Council (point 3.2 below);
    - provisions which strengthen the powers of the Minister for Justice and European Legal Integration both generally and within the Supreme Judicial Council, and particularly in relation to the appointment, disciplining and dismissal of judges and prosecutors (point 3.3 below);
    - warnings to the courts by the Minister of Justice (point 3.4 below);
    - the disciplinary sanction of transferring a magistrate to another district (point 3.5 below);
    - the authorisation of leaves by the Minister of Justice (point 3.6 below);
    - changes in the qualifications which are required for judges (point 3.7 below);
    - a rule preventing prosecutors from withdrawing cases without the consent of the court (point 3.8 below);
    - immunity of magistrates (point 3.9 below).

2.3 The justifications advanced for the introduction of the amending Act

15. The *rapporteurs* discussed the amending Act with a wide range of interests in Bulgaria. These included the Minister for Justice and European Legal Integration, the newly appointed Prosecutor General, the *juge rapporteur* of the Constitutional Court who dealt with the constitutional case in which the Act was impugned, the President of the Supreme Administrative Court, the President of the Bulgarian Bar Association, the President of the Bulgarian Judges Association, the Chief Prosecutor, the Chairman of the Legal Affairs Committee of Parliament, representatives of political parties, including the principal governing party, the Union of Democratic Forces, and the two principal opposition parties, the Democratic Left (Bulgarian Socialist Party) and the Euro left party, and a group of judges, prosecutors and investigators based in Plovdiv, the second city of Bulgaria.

16. Supporters of the amending Act justified its enactment by reference to serious problems concerning the judicial system in Bulgaria in dealing with crime. In many cases, criminals were released shortly after their arrest and their cases never came to trial. The *rapporteurs* were informed that corruption amongst prosecutors is believed to be widespread. There have, however, been no cases where such corruption has been proved.

17. There were serious delays in cases coming to court. The large majority of the judges had been appointed under the former communist regime prior to democratisation, and whilst these judges had been de-politicised and guaranteed security of tenure inefficiencies within the judicial system remained. It was necessary, therefore, to take steps to ensure that disciplinary procedures functioned effectively in cases where improper behaviour on the part of prosecutors could be shown or where judges were incompetent.

18. In addition to this, a number of important new courts intended to be established under the Constitution adopted in 1991 had been brought into being only within the recent past, although under the Constitution they should have been established within one year of its enactment. These included the new courts of appeal which had been established only in 1998. In the view of supporters of the amending Act, the need to properly represent the judges on the Supreme Judicial Council justified interrupting the five year term of office of the Supreme Judicial Council, which is guaranteed under the Constitution, notwithstanding that less than two years of its term of office had run. This reasoning had been accepted by the Constitutional Court in its decision.

2.4 The Objections to the Act

19. The most serious objections which the *rapporteurs* heard to the amendments to the Judicial System Act were made by the two opposition political parties (see also CDL (99) 16). Their spokesmen expressed fears that the amendments would in effect result in the total control of the Judiciary by the Executive. Very often therefore, the representations of Opposition parties were directed not at the text of the law itself but at the way in which it was being or was expected to be implemented. They voiced the fear that the changes in disciplinary procedure for judges and prosecutors would lead to widespread dismissal of existing judges and would threaten and undermine judicial independence.

20. Some of the opposition spokespersons, though not all, argued that the new Supreme Judicial Council was a highly politicised body. It was pointed out that the parliamentary component of the Council had been elected only with the votes of the current majority in Parliament. (The Government side's contention was that this was because the opposition deputies had declined to participate). Opposition Deputies did not accept the *bona fides* of the decision to replace the old Supreme Judicial Council.

21. Objections were also raised to the strengthening of the Minister for Justice and European Legal Integration's powers on the grounds that they infringed on the independence of the Judiciary. While opposition representatives did not dispute that a serious problem in relation to the prosecution of crime existed, they doubted that the proposals in the amendment to the Judicial System Act were the correct way to tackle the problems.

22. The *rapporteurs* also heard a number of other objections from different sources. These included the relaxation in qualifications for appointment as a judge or prosecutor and the idea that Parliament should elect part of the Supreme Judicial Council at all.

3 Opinion of the Venice Commission

23. This opinion of the Venice Commission takes into account all views submitted to it, giving due weight to the submissions of opposition parties. It should not be construed as being critical of the Bulgarian legislator or of the judicial authorities in a negative sense. This opinion is being offered in a spirit of co-operation and is meant as an objective independent assessment of a legal document that could contribute to a better understanding of those areas which have provoked controversy and that need to be addressed to ensure a proper functioning of the Act.

24. In considering the various objections made to the Act, it is important to note at the outset it is not part of the Commission's functions to express any view in relation to the compliance of the amendments to the Judiciary System Act with the Constitution of Bulgaria. That question is one solely for the Constitutional Court of Bulgaria. The Commission's function is confined to an examination of the Bulgarian law in the light of international standards in the field of democracy, human rights and the rule of law. The criteria for the evaluation of these amendments are taken from the requirements concerning the independence of the Judiciary included in the European Convention for the Protection of Human Rights and Fundamental Freedoms, and other related international documents (including Article 6.1 ECHR, Article 10 of the Universal Declaration of Human Rights and Article 14.1 of the International Covenant on Civil and Political Rights). The comments will refer not only to the amendments' strict conformity with the international requirements concerning the independence of the Judiciary, but also to considerations on the suitability of these amendments from the standpoint of improving the conditions for guaranteeing that independence. Consequently, this opinion does not confine itself to suggest amendments to the Judiciary System Act but equally points out provisions of the Constitution itself which might be reexamined.

3.1 The suspension of the existing Supreme Judicial Council

25. The Bulgarian authorities faced a choice between replacing the existing Supreme Judicial Council with a new one, even though less than two years of its five year term of office provided for under the Constitution had elapsed, or leaving important elements of the Bulgarian Judiciary unrepresented on the Council because courts of which they are members had not been established at the time of the election of the previous Council notwithstanding the requirement that those Courts should be established within one year of coming into force of the Constitution. The Constitutional Court of Bulgaria has held that the procedures which were adopted are in conformity with the Constitution of Bulgaria and this finding must be respected by the Venice Commission. The Commission does not consider that any question of fundamental rights arises from the choice made as to which of two conflicting provisions in the Constitution of Bulgaria should have prevailed in these circumstances.

26. Obviously, transitional clause number 4 of the Constitution cannot be interpreted as allowing the dismissal of the Supreme Judicial Council and the election of a new Council every time in future when new structural and procedural laws which implement constitutional mandates are enacted. Such an interpretation would allow any new parliamentary majority to introduce new procedural laws to implement the Constitution and thus alter the composition of the Council to adapt it to the new organization of the Judiciary. Consequently, this transitional clause must not be invoked again.

27. The transitory nature of the choice made and the fact that this decision was based on the interpretation of conflicting provisions in the Constitution would not justify any further comment by the Venice Commission except the general consideration that lack of consensus between the major political forces before such a decision was taken, inevitably contributed to the aura of suspicion and mistrust surrounding the Supreme Judicial Council since its inception.

3.2 The composition of the Supreme Judicial Council

28. There is no standard model that a democratic country is bound to follow in setting up its Supreme Judicial Council so long as the function of such a Council fall within the aim to ensure the proper functioning of an independent Judiciary within a democratic State. Though models exist where the involvement of other branches of power (the legislative and the executive) is outwardly excluded or minimised, such involvement is in varying degrees recognised by most statutes and is justified by the social content of the functions of the Supreme Judicial Council and the need to have the administrative activities of the Judiciary monitored by the other branches of power of the State. It is obvious that the Judiciary has to be answerable for its actions according to law provided that proper and fair procedures are provided for and that a removal from office can take place only for reasons that are substantiated. Nevertheless, it is generally assumed that the main purpose of the very existence of a Supreme Council of the Judiciary is the protection of the independence of judges by insulating them from undue pressures from other powers of the State in matters such as the selection and appointment of judges and the exercise of disciplinary functions.

29. Given that the Bulgarian legislator has opted for a Supreme Judicial Council that includes direct participation of the legislative branch through the election of a number of its members by Parliament and of the Executive through the chairmanship of the Minister of Justice and European Legal Integration, the composition of the Council becomes an important and determining element that has to be examined. The provision that eleven of the twenty five members of the Supreme Judicial Council are elected by Parliament is contained in the Constitution itself. Under the Constitution, all the elected members of the Council, including this parliamentary component, must consist of practising lawyers of high professional and moral integrity with at least fifteen years of professional experience. Nine of the eleven members of the recently elected parliamentary component of the council are judges. The Venice Commission does not consider that there can be, in itself, any objection to the election of a substantial component of the Supreme Judicial Council by the Parliament.

30. The composition of the Council as set out in the Act is not in itself objectionable. It could work perfectly well in an established democracy where the administration of justice is by and large above the conflict of party politics and where the independence of the Judiciary is very pronounced and well established. In such a situation, one would not expect the representatives of Parliament on the Council to be elected strictly on party lines and in any event, even if that were to happen, those elected would not feel in any way committed to act under instructions or directives from the party that elected them.

31. The Venice Commission considers that even though the Supreme Judicial Council may not in fact have been politicised it is undesirable that there should even be the appearance of politicisation in the procedures for its election. In each of the two most recent elections for the parliamentary component of the Supreme Judicial Council, under two different Governments the respective opposition parties did not participate with the result that on each occasion the parliamentary component was elected exclusively by representatives of the governing parties.

32. A high degree of consensus in relation to the election of this component should be sought. The Bulgarian Parliament discusses nominations in advance of the vote in the plenary in a parliamentary committee. Such a mechanism should be capable of being used to ensure appropriate opposition involvement in elections to the Supreme Judicial Council.

3.3 The strengthened powers of the Minister for Justice and European Legal Integration

33. The presence of the Minister of Justice in the Council, in the capacity of Council President as provided for in Article 130.5 of the Constitution, does not seem, in itself, to impair the independence of the Council. Moreover, in those countries that have adopted similar institutions, the presence of members of the Executive Power in the Councils of the Judiciary is not infrequent. Thus, the Italian Constitution establishes that the President of the Republic shall preside the Council of the Judiciary and the French Constitution makes the President of the Republic President of the Council. Furthermore, in France the Minister of Justice is the *ex officio* Vice President of the Council as well as its President, in the absence of the President of the Republic.

34. The Minister for Justice has been given a new power to address proposals to the Supreme Judicial Council for the purposes of appointing and dismissing the Chairman of the Supreme Court of Cassation, the Chairman of the Supreme Administrative Court and the Chief Prosecutor, for determining the number of judges, prosecutors and investigators and for appointing, promoting, demoting, moving and dismissing all judges, prosecutors and investigators. Formerly, such proposals could only be made by the heads of the different branches of the Judiciary, the prosecution service and the investigation service. The Commission does not consider the conferring of a power to make such a proposal on a Minister of the Government is in itself objectionable as an interference with the independence of the Judiciary. Again, the doctrine of separation of powers does not require that there can be no involvement by either of the other two branches of power in a decision to appoint or dismiss a judge. The European Court of Human Rights has held that the fact that a power to appoint members of a tribunal is conferred on a Government does not, of itself, suffice to give cause to doubt its members independence and impartiality (*Sramek v Austria*, 22.10.1984, no. 84 of Series A of the Publications of the Court). In the Bulgarian system, notwithstanding the Minister's power to make proposals, the actual decision to appoint or to dismiss is made by the Supreme Judicial Council, on which the judicial branch has a majority representation. This decision follows a hearing before a disciplinary panel composed of five members drawn by lot. Furthermore, decisions of the Supreme Judicial Council, being administrative decisions, are subject to review by the Supreme Administrative Court in relation to procedural, though not substantive reasons. Under the Constitution, the Supreme Judicial Council is chaired by the Minister for Justice and European Legal Integration. He does not chair the disciplinary panel.

35. There is, however, a case to be made that when the Council is discussing proposals made by the Minister it would be preferable that some person other than the Minister ought to chair it. It might have been desirable that the increase in the Minister's powers to put proposals to the Supreme Judicial Council would have been balanced by a provision that in such cases some other person of standing (perhaps the President of the Constitutional Court) would preside over the meeting. It is appreciated, however, that any such change could not formally be made without an amendment to the Constitution of Bulgaria.

36. Given that that Parliament appoints eleven of its members by a simple majority vote it might be preferable to grant the power to advise the initiation of disciplinary proceedings to the Inspectorate in order to suppress any direct interference of the Government in disciplinary proceedings. Although appointed by the Minister of Justice and European Legal Integration, inspectors must have the approval of the Council to be appointed (Article 36.a of the Judicial System Act), and therefore, they offer a greater guarantee of impartiality.

3.4 Warnings to the courts by the Minister of Justice (Article 172 of the Judicial System Act)

37. Article 172 of the Judicial System Act (amended) grants the Minister of Justice and European Legal Integration the power to "bring to the attention of regional, district and appellate judges (...) what appear to the Minister to be irregularities in their work of initiating and processing certain cases...". In order to avoid undue influences on the courts

in taking their decisions on the cases subject to their jurisdiction, this provision has to be strictly interpreted to refer only to administrative irregularities. If there are, or seem to be, irregularities in the Court's substantive handling of a case, it is the task of the parties to the proceedings, including the prosecutor, to denounce these irregularities to the competent higher court, using the appropriate legal remedies.

3.5 Disciplinary sanction of transferring a magistrate to another district (Article 169.5 of the Judicial System Act)

38. Article 169.5 of the Judicial System Act will now permit, as a disciplinary sanction, relocation of a judge, prosecutor or investigator to another court region for up to three years. The use of relocation as a disciplinary sanction is open to objection, not least from the point of view of the citizens in the region to which a disciplined judge, prosecutor or investigator is to be transferred.

3.6 Authorization of leaves (Article 190.2 of the Judicial System Act)

39. Article 190.2 of the Act regulates the authorization of judges', prosecutors' and investigators' leaves. Its subparagraph 4 establishes that the Minister of Justice shall have the power to authorize leaves of absence of the presidents of district and appellate courts. This provision may be considered to confer on the Executive Power an administrative competence over certain judges that contravenes the principle of independence of the Judiciary. It seems that it would be more coherent with this principle to confer that competence to the Council of the Judiciary.

3.7 Qualifications for judicial officer (Article 127 of the Judicial System Act)

40. The amended Judicial System Act provides for a relaxation in the qualifications required for appointment to judicial office (Article 127). In particular, the occupations recognised as constituting a "record of service" at all levels in the Judiciary have been extended to include "government agent, subagent and judicial candidate". While the Venice Commission is conscious of the practical difficulties facing any country in transition from a communist system to democracy in finding suitable candidates for judicial office, care needs to be taken to ensure that any relaxation of necessary qualifications does not lead to a reduction in the professional calibre of the Judiciary.

3.8 Requirement of court consent to withdraw a prosecution

41. The Venice Commission considers that a rule requiring a prosecutor to have the consent of the court before withdrawing a case is a proportionate response to a perception of fraud among elements of the prosecution service since it makes it difficult for the prosecutor to make such a decision which is without objective justification.

3.9 Immunity of judges and prosecutors

42. As already noted, under the Constitution judges, prosecutors and investigators have the same immunity from detention or criminal prosecution as legislators (Article 132.1 of the Constitution). This immunity can be set aside only by the Supreme Judicial Council. The Constitution confers no immunity from criminal investigation. While no doubt immunity could be justified if it were necessary to prevent judges or prosecutors from interference from vexatious proceedings it ought not to operate to place judges and prosecutors above the law. Were it to do so it would infringe the basic principle that no person is above the law. Despite the widespread belief that there is corruption within the prosecution service, the Venice Commission notes that no cases of corruption have been proved. This could be due to lack of evidence; if there were evidence in an appropriate case the Supreme Judicial Council should not hesitate to withdraw immunity to enable court proceedings to take place. It would be important that the requirement to waive immunity before a prosecution could take place could not operate so as to prevent investigations in cases where there was a reasonable ground to suspect a crime had been committed by judges or prosecutors.

4 Conclusion

43. Taken individually it seems possible to justify most of the measures in the amended Judicial System Act which have been impugned, nevertheless the measure taken as a whole represents a significant increase in the power of the parliamentary majority and of the executive. While the justification for this development is the serious problem relating to crime and the criminal justice system in Bulgaria, and while in a democracy the democratically elected Government and the responsible Minister must in the last analysis be accountable for the proper functioning of the judicial system, it would be desirable if in the longer term Bulgaria were to be able to move towards a system where the judges themselves, and the prosecutors, would be able to assume a greater responsibility for the proper functioning of the judicial and prosecutorial system and the executive would be able to step back from it. Although the new powers assumed by the Executive by virtue of the reform of the Judicial System Act are not incompatible with European standards concerning judicial independence, a judicious and restrained use of these new powers would be highly recommended.

44. If the judicial system is to function properly, it is essential that the political culture develop in such a way that the judicial system is not the subject of party political controversy and that respect for judicial independence becomes imbued in this culture. Wide political consensus is essential if the Supreme Judicial Council is to be effective. That consensus seems unfortunately to be lacking. It is not up to the Venice Commission to find fault or identify responsibilities. While in the last analysis it may be necessary to ensure that a parliamentary minority cannot block the election of the members of the Supreme Judicial Council to be chosen by the Parliament, it would nonetheless be desirable to seek the highest degree of consensus possible in the election process.

45. The Venice Commission wishes to thank all Bulgarian interlocutors who met their *rapporteurs* for the frank and very informative discussions which enabled them to assess the situation of the Judiciary in Bulgaria in a spirit of genuine co-operation.