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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

DRAFT OPINION
ON THE DRAFT LAW
AMENDING AND SUPPLEMENTING
THE LAW ON JUDICIAL POWER
OF BULGARIA

On the basis of comments by:

Mr Harry GSTÖHL (Member, Liechtenstein)
Mr James HAMILTON (Substitute Member, Ireland)

**This document has been classified restricted on the date of issue. Unless the Venice Commission decides otherwise, it will be declassified a year after its issue according to the rules set up in Resolution CM/Res(2001)6 on access to Council of Europe documents.*

Introduction

1. *By letter dated 8 January 2009, the Permanent Representative of Bulgaria to the Council of Europe, Mr Ivan Petkov, requested an opinion on the draft Law amending and supplementing the Law on Judicial Power of Bulgaria.*
2. *The present opinion was drawn up on the basis of comments by Messrs Gstöhl and Hamilton (CDL(2008)038 and 039, respectively), who were invited by the Venice Commission to act as rapporteurs.*
3. *This opinion was adopted at the ... Plenary Session of the Venice Commission (Venice, ...).*

GENERAL REMARKS

4. The Law on Judicial Power (also referred to as the Judiciary System Act, hereinafter “the Act”) was adopted in 2007 and is a lengthy, comprehensive and detailed text of 409 Articles. It covers a variety of matters, including general principles, the Supreme Judicial Council, its Inspectorate, courts and court hearings, the prosecution office, the National Investigative Service and the status, appointment, disciplining and dismissal of judges, prosecutors and investigating magistrates.
5. The draft Law amending and supplementing the Law on Judicial Power (the Act) is accompanied by a report of motives. This report sets out that changes to the Act were introduced as a result of the amendments to the Constitution of the Republic of Bulgaria made in 2006 and 2007, the accession of the Republic of Bulgaria to the European Union, the recommendations made by European bodies (monitoring reports of the European Commission and European expert reports) and magistrates’ recommendations.
6. The draft Law itself is an extensive document amending many provisions of the Act. The amendments are mostly technical in nature, many dealing with matters such as changes in time limits and the like.

DRAFT LAW AMENDING AND SUPPLEMENTING THE LAW ON JUDICIAL POWER (THE ACT)

7. The main changes brought about by the draft Law seem to be the following:
 1. changes intended to reorganise the investigative service and to strengthen the Prosecutor General’s control over it;
 2. changes relating to the Supreme Judicial Council – strengthening that body;
 3. a provision requiring the Supreme Judicial Council to adopt a Code of Ethics for all judges and prosecutors;
 4. changes to the provisions relating to discipline.
8. The Venice Commission was not requested to give an opinion on the Act, however as the amendments refer to this Act, several references to its provisions will be made, where relevant.

Investigation service

9. Article 148 of the Act, as amended, provides for a unified and centralised National Investigation Service (NIS). The district investigative services are abolished and replaced by territorial units within the NIS.

10. Under Article 141, the Prosecutor General determines the priorities of the NIS and receives reports from its Director. S/he also receives reports from the Ministers of Defence and the Interior on their police investigators. Under Article 138, specialised inter-agency investigative units can be established under the direction of a prosecutor nominated by the Prosecutor General.

11. It may be worth noting that the Act provides a **highly hierarchical structure in the prosecutor's office**, with superior prosecutors all the way up to the level of Prosecutor General entitled to give directions to and receive reports from junior prosecutors in relation to specific cases. **Given that there has long been reported to be a problem with corruption among some prosecutors in Bulgaria, this seems to be an appropriate structure to counter the problem.**

12. **However, it should be noted that the prosecutors retain elements of powers typically found in the traditional Soviet-style *prokuratura* model.** For instance, Article 145 gives prosecutors wide powers to obtain documents and information, carry out inspections, summon citizens and representatives of legal persons and to issue binding legal orders to all state bodies, legal persons and citizens. These powers appear to be exercisable without recourse to courts of law to obtain warrants or other authorisation. In addition, Article 145.5 refers to prosecutor's rights to protest illegal acts (although it is not clear whether the Prosecutor has the final say and it may be that a court can uphold the legality of the act protested against). Article 146 allows prosecutors to order immediate release from detention without court intervention.¹

Supreme Judicial Council

13. One of the main topics covered by the Act is the Supreme Judicial Council established under Article 130 of the Constitution of Bulgaria, defined as being a moral person and set up as a permanent body that represents the judiciary and ensures its independence (Article 16).

14. The Supreme Judicial Council is of crucial importance within the Bulgarian judicial system. It should be recalled that – as far as the Constitution is concerned – the Venice Commission made a number of critical comments in its *Opinion no. 444/2007 on the Constitution of Bulgaria* (CDL-AD(2008)009)². These comments concerned, in particular the following:

¹ The Venice Commission criticised such powers by prosecutors without court intervention or supervision in its previous opinions, notably its *Opinion on the draft Law on the Public Prosecutor's office and the draft Law on the Council of Public Prosecutors or "the former Yugoslav Republic of Macedonia"* (CDL-AD(2007)011, paragraphs 14-16).

² The Venice Commission has made critical comments with respect to the Supreme Judicial Council since 1999, see *Opinion on the reform of the judiciary in Bulgaria* (CDL-INF(1999)005); *Opinion on the draft Law on amendments to the Judicial System Act of Bulgaria* (CDL-AD(2002)015); *Opinion on the constitutional amendments reforming the judicial system in Bulgaria* (CDL-AD(2003)016), para. 25: "A major recommendation of the Venice Commission since 1999 - the depoliticisation of the Supreme Judicial Council by providing for a qualified majority for the election of its parliamentary component - might however have been possible even within the framework of the current amendments. The lack of such a provision may be felt even stronger after the current amendments which give substantially more powers to the Supreme Judicial Council including the possibility for one fifth of its members to request the lifting of immunity of a magistrate. In this respect it can also be regretted that other recommendations by the Commission were not included in the current draft, namely that an expert body be instituted to investigate cases and to provide its opinion on the lifting of immunity to the

- Election of the parliamentary component by simple majority: 11 members of the Supreme Judicial Council are still elected by Parliament by simple majority (paragraphs 24-26 of the Opinion) which, according to the Venice Commission, increases the risk of politicizing the Supreme Judicial Council and thereby its independence.
- Role of the Minister of Justice as chair of the Supreme Judicial Council: the function of the Minister of Justice within the Supreme Judicial Council was also criticised (paragraphs 29 to 32). This was mainly directed at the fact that the Minister of Justice chairs the Supreme Judicial Council (albeit without voting right) and also has the constitutional right to submit proposals to the Supreme Judicial Council, especially in relation to suggestions for appointing and dismissing judges; proposals for draft budgets for the judiciary; making proposals for the appointment, promotion, demotion, transfer and removal from office; to manage the property of the judiciary and to participate in the organisation of the training of judges, prosecutors and investigators – which indicates that the Minister will act as the driving force of the Council's activities. The Venice Commission suggested that this was not in line with the principle of judicial independence.
- Representation of judges, prosecutors and investigators in the Supreme Judicial Council: the Venice Commission saw a risk of compromising the independence of the judiciary by the various bodies of judicial power (judges, prosecutors and investigating magistrates) not because they were brought together within the Supreme Judicial Council, but as a consequence of this common organisation, the distinction between these three bodies could fade so that one branch might be too involved in the administration of the other groups (paragraphs 34 to 40 of the Opinion).

15. The draft Law introduced a number of changes to the powers of the Supreme Judicial Council. While the Minister remains as chair, another member can now chair the meetings in the Minister's absence. **Although it would be preferable if the Minister did not act as chair, a reduced role for the Minister would represent a step in the right direction.**

16. The draft Law foresees that the Supreme Judicial Council is to adopt **a Code of Ethics for judges, prosecutors, investigators and judicial officials, which is a welcome step. To the extent that it is formulated in a concrete enough manner, its use as a basis for disciplinary proceedings may aid legal certainty concerning what rules are applicable.**

17. The Supreme Judicial Council is also to determine the number of judicial officials other than magistrates. This was a request made by the managers, who argued that the budget was attached to the Supreme Judicial Council and for this reason, the number of judicial officials financed by this budget should be determined by the Supreme Judicial Council itself. Although the argument concerning the budget can be easily followed, the question remains whether a sufficient number of judicial officials (within the budget) will be allocated to the different bodies, which are not equally represented within the Supreme Judicial Council. This might, however, be determined by the day-to-day practice rather than by theoretical discussions.

18. The **Inspectorate** at the Supreme Judicial Council is a moral person with its seat in Sofia. The nomination of its members (the Inspector General and the inspectors) is submitted to the National Assembly (Article 49 of the Act) for election. The Inspectorate is basically in charge of controlling the organisation and functioning of the courts, the prosecution offices and investigation bodies. It has to submit an annual programme and a report on its business to the Supreme Judicial Council (Article 55.1.8 of the Act). **The proposed change will give the**

Supreme Judicial Council before the latter take a vote on this issue and to ensure that anyone who makes a proposal on the lifting on immunity cannot vote this same proposal."

power to the Supreme Judicial Council to recommend inspections of judges and prosecutors outside the annual programme. It will also have a quicker and better access to information.

19. An obligatory **insurance system** is created for the members of the Supreme Judicial Council, covered by the judiciary's budget and other rules were introduced with reference to the status of the persons belonging to the Judicial power. **This type of amendment or completion is welcomed, as it underlines the independence of the judiciary itself.**

20. The management of property (real estate and movables) is governed by Articles 387 to 390 of the Act. The **draft Law proposes that the Minister of Justice's power under the present Act to shift assets from one body to another (with the consent of the judicial bodies' administrative managers) be transferred to the Supreme Judicial Council. This proposal clearly underlines the judiciary's independence and is seen as a real improvement.**

21. Nevertheless, a number of problems identified by the Venice Commission in previous opinions, as reiterated above, have not been addressed. **The system for election of the parliamentary component of the Supreme Judicial Council still gives rise to a risk of politicization. The combination of powers in relation to judges prosecutors and investigators in a single judicial council (such as powers of appointment and discipline) remains problematical.**

Disciplinary powers

22. Changes have been introduced in relation to disciplinary powers, which generally seem positive. The **definitions of what constitute disciplinary offences in Article 307 seem more precise than heretofore and the reference to violation of the Code of Ethics is welcome, as its adoption should provide greater clarity.**

23. Where a person is suspended pending criminal proceedings, it is made clear there is to be no dismissal until the proceedings terminate. There is no mention of immunity for judges, formerly the subject of criticism by the Venice Commission.

24. The Act provides for hearings before a disciplinary panel, but **there seem to be no provisions concerning how this body is selected** (see Articles 317-320). The actual decision, except in minor cases, has to be adopted by the Supreme Judicial Council (Article 320).

25. The provision setting out that 1/5 of the members of the Supreme Judicial Council can propose a disciplinary sanction is problematic since in such a case the accusers are also the judges (Article 312.1.4). **If members of the Supreme Judicial Council bring the accusation, they should not decide on it also.**

26. The provisions concerning the right of the judge or prosecutor accused to be heard and represented before the panel seems appropriate but **there is no mention of a right to be heard and represented before the Supreme Judicial Council, which takes the actual decision** (Articles 313 and 318.2). There is provision for appeal to a court (Article 323).

Other provisions

27. In order to safeguard the judiciary, the introduction of a Security Service as a judicial entity is proposed under Article 107 of the draft Law. The main purpose of this amendment seems to be for budgetary clearness, although the Bulgarian authorities see it as a further step in the independence of the judiciary.

28. Under Article 195, judges and prosecutors may not be members of political parties or organisations with a political goal or who carry out political activity. **While this may still be justifiable at present in the actual situation of Bulgaria, it is recommended that its necessity be kept under review from time to time.**

29. Finally, Article 67.2 of the Act provides for court assessors in military courts who may be generals, admirals, officers or non-commissioned officers in permanent military service. They take part in court hearings. **There seem to be no safeguards in the legislation to ensure that serving military personnel acting as court assessors are independent and impartial** unless the requirement in Article 68.3 that they be designated by the General Assembly of the judges of the Appellate Military Court on the proposal of their commanding officers can be so regarded (see *the case of Findlay v. the United Kingdom* (1997) 24 221 97/8).

Conclusion

30. The proposed amendments do not appear to raise any particular objections and on the whole appear positive. A small number of possible improvements are possible and are listed below.

31. With regard to the Act, a number of issues that had previously been pointed out by the Venice Commission regarding the judicial system (see paragraph 14, footnote 2, above), have yet to be addressed.

32. The Venice Commission makes the following recommendations:

With respect to the investigation service:

33. The Act

- Prosecutors retain elements of powers typically found in the traditional Soviet-style *prokuratura* model (e.g. Articles 145-146). The Venice Commission recommends that these provisions be revised to allow either court intervention or supervision of the powers of the prosecutors.

With respect to the Supreme Judicial Council:

34. Previous recommendations (Opinion no.444/2007)

- The system for election of the parliamentary component of the Supreme Judicial Council still gives rise to a risk of politicization and should therefore be revised.
- The combination of powers in relation to judges prosecutors and investigators in a single judicial council (such as powers of appointment and discipline) is problematical and should also be revised.

35. The draft Law

- The Minister remains as chair, however another member can now chair the meetings in the Minister's absence – this reduced role of the Minister is a welcome step, although it would be preferable if the Minister did not act as chair.

With respect to disciplinary powers:

36. The Act

- Articles 317-320 regarding the disciplinary panel, the Venice Commission recommends that provisions be introduced to cover the selection of this panel.
- Article 312.4 setting out that 1/5 of the members of the Supreme Judicial Council can propose a disciplinary sanction is problematic as the accusers in this case are also the judges. The Venice Commission recommends that if the members of the Supreme Judicial Council bring the accusation, they should not decide on it also.

- Articles 313 and 318 concerning the right of the judge or prosecutor accused to be heard and represented before a panel the Venice Commission recommends that a provision should also mention a right to be heard and represented before the Supreme Judicial Council, which takes the actual decision.

With respect to other provisions:

37. The draft Law

- Judges and prosecutors may not be members of political parties or organisations with a political goal or who carry out political activity. Although this may be justifiable for the moment, taking into account Bulgaria's current situation, the Venice Commission recommends that its necessity be kept under review from time to time.

38. The Act

- Court assessors in military courts who may be generals, admirals, officers or non-commissioned officers in permanent military service, take part in court hearings. There seem to be no safeguards in the legislation to ensure that serving military personnel acting as court assessors are independent and impartial - unless the requirement in Article 68.3 that they be designated by the general assembly of the judges of the Appellate Military Court on the proposal of their commanding officers can be so regarded. If not, the Venice Commission recommends that such safeguards be introduced.

39. The Venice Commission remains at the disposal of the Bulgarian authorities for any further assistance.