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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

MEMORANDUM

REFORM OF THE JUDICIAL SYSTEM
IN BULGARIA

1. *By letter dated 8 April 2003, the Bulgarian Minister of Justice, Mr. Stankov, requested the assistance of the Venice Commission for the reform of Chapter VI of the Constitution of Bulgaria dealing with the judiciary.*

2. *On 18-20 May a delegation of the Commission composed of Mr. Bartole, Professor at the University of Trieste, and Mr. Hamilton, Director of Public Prosecutions, Dublin, accompanied by Mr. Dürr from the Secretariat, held a series of meetings with the Bulgarian authorities in order to identify possible steps in the judicial reform in Bulgaria. Mr. Afonso, Judge Counsellor at the Court of Appeal, Evora, Portugal, who was to join the delegation representing the Consultative Council of European Judges, was, unfortunately, unable to participate due air transport problems. For the US Department of Justice and USAID, Mr. Krug, Professor at the University of Oklahoma, and Mr. Ludvikovski, Professor at the Catholic University of America, Washington, joined the delegation.*

3. Following a first opinion on the reform of the Judiciary in 1999 (CDL-INF (99) 5), the Venice Commission had given an opinion on the Bulgarian Draft Law on Amendments and Addendum on the Judicial System Act (CDL-AD (2002) 15) upon request by the Minister. Following the adoption of the Act, the **Constitutional Court**, declared about 40 provisions of the revised Judicial System Act as being unconstitutional and annulled them. in its decision 13/2002 of 16 December 2002, given upon request by the Plenum of the Supreme Court of Cassation

4. On 2 April 2003, **all political parties represented in Parliament had made a common declaration** on the necessary steps to be taken in the reform of the judiciary (see Annex I). As main items of a reform of the judiciary the declaration identified a clear definition of the functions of the Supreme Judicial Council and the Minister of Justice, structural changes of the system, improvement of co-ordination between the various judicial bodies, improvement of the law enforcement capacity of the judiciary and providing it with the necessary equipment and facilities. The declaration recognised that constitutional changes were required for the improvement of the structure, powers and responsibility of the judiciary, including questions related to immunity, irremovability and the mandate of the magistrates.

5. Shortly thereafter, on 10 April 2003, upon request by the Prosecutor General, the **Constitutional Court** gave a second decision, in which it made a distinction between constitutional amendments that could be made with a two thirds majority by the ordinary Parliament and other more profound amendments which would require the election of a constituent Grand National Assembly because they would amount to a change of the "state structure or form of government" (Article 158 of the Constitution). As a consequence, the question whether certain elements of the reform could be addressed by the current National Assembly or were reserved to a Grand National Assembly had particular importance given that in the current political circumstances the election of a Grand National Assembly seemed unlikely.

6. In this context, the delegation held meetings with the Minister of Justice, the legal advisers of the President of the Republic, the Legal and Constitutional Reform Committees Parliament and the Delegation of the European Commission in Bulgaria.

7. The **Minister of Justice** presented his revised Strategy for Judicial Reform to the Delegation. As its key elements he the following points:

- the overall structure of the judiciary, particularly the place of the investigators (even though the Constitution attributed the task of instructing criminal cases to the investigators, already now about 70 per cent of investigations were performed by the police; a special criminal police service with the task to investigate crimes was currently being established);
- the depoliticisation of the Supreme Judicial Council and the question whether in the Council prosecutors and investigators should be able to decide on matters concerning the judges;
- the immunity of the magistrates (judges, prosecutors and investigators), which is the same as that of Parliamentarians (Article 132 of the Constitution) should be reduced to a functional immunity,
- an improvement of the system of disciplinary measures which makes it very difficult to take measures against magistrates even in cases of flagrant misbehaviour,
- a definition of the mandate of magistrates making a clear distinction between judicial and administrative tasks and
- the identification of the appropriate place of the prosecutors in the judicial system. The powers of the Prosecutor General were seen as too wide ranging. Any request for the lifting of his immunity could in fact only be made by himself.

8. A major point of the reform was to implement the request made by the European Union during accession negotiations to remove the investigators from the judiciary. However, following the second decision of the Constitutional Court, only amendments concerning immunity, irremovability and the mandate of judges could be addressed by the current National Assembly.

9. At meetings with the **Legal Committee and the Committee for Preparing Amendments of the Constitution of the Parliament** chaired by the Deputy Speaker of Parliament, Ms. Kassabova, the political groups pointed out that they had reached agreement to reform the mandate of magistrates, to redefine the relation between judicial and administrative tasks, to establish criteria for the replacement of a judge and to restrict the immunity of magistrates. A key problem was to make the judiciary accountable major problems being organised crime and corruption within the judiciary. The decisions of the Constitutional Court were seen as a limitation to the scope of the reform by ordinary law and by simple constitutional amendments. There seemed to exist no agreement for calling elections to a Grand National Assembly.

10. At a meeting with the **Delegation of the European Commission in Bulgaria** the assessment of the Bulgarian judiciary and requests by the Commission for reform were discussed (see Annex II). Going further than the strict or 'hard' *acquis communautaire*, the Commission insisted that the investigation service be taken out of the judiciary because this system did not exist in any of the existing member States of the Union. The Czech model could be followed where - as a consequence of the accession negotiations - a large part of the investigations had been taken over by the police and a smaller part by the prosecutors.

11. The **legal advisers of the President of Bulgaria** informed the delegation that the President had held several rounds of constitutional talks on judicial reform. Even though he had had doubts about the amendments of the Judicial System Act, the President had not vetoed it because he did not want to block judicial reform. Again, following the agreement by the political parties he had refrained from making further suggestions on judicial reform in order not to endanger the compromise reached. Following the decision of the Constitutional

Court from April constitutional amendments concerning irremovability of magistrates could be made by the current national Assembly. The issue of functional immunity could even be addressed through ordinary law. The personal financial situation of magistrates should be made transparent in order to avoid corruption and the Prosecutor General should submit an annual report to Parliament. This would enable Parliament to request information about individual cases of non-prosecution.

When shifting investigations to the executive a danger existed that corruption, especially in the executive would be even less investigated than is the case now. In the past, the judiciary had often been abused by the executive in order to put pressure on the opposition and on the media. The same was true of the prosecution. While it was true that powers of the Prosecutor General were too large, it was necessary to guarantee the independence of the prosecution in order to avoid undue influence by the executive.

Conclusions

12. There was a general perception that the judiciary had achieved insufficient results in the combat of crime, especially as concerns organised crime and corruption, including corruption in the judiciary itself. The high degree of immunity given to magistrates (judges, prosecutors and – as a unique institution in Bulgaria – the investigators) was seen as one of the reasons for this problem.

13. The main issues discussed were how to achieve accountability of the judiciary while preserving its from undue interference from the executive and legislative branches of powers.

14. Following the meetings, the delegation identified as the main results of the visit:

- a) **Magistrates (judges, prosecutors and investigators) should not benefit from a general immunity** as set out in the Bulgarian Constitution. According to general standards they indeed needed protection from civil suits for actions done in good faith in the course of their functions. They should not, however, benefit from a general immunity which protected them against prosecution for criminal acts committed by them for which they should be answerable before the courts. In the light of the distinction made in Article 132 (2) between the immunity of parliamentarians and that of magistrates, the necessary changes might even be brought about by way of ordinary law. In addition, the fact that according to the current legislation, only the Prosecutor General could request the lifting of his or her own immunity was seen as a lacuna which should be addressed.
- b) An uncontroversial, though important issue to **strengthen the administrative support for the court system**. The training for judges and the budget of the courts should remain under the control of the judiciary.
- c) Any action to remove incompetent or corrupt judges had to live up to the high standards set by the **principle of the irremovability of the judges** whose independence had to be protected. It was necessary to depoliticise any such move. A means to achieve this could be to have a small **expert body composed solely of judges giving an opinion of the capacities or behaviours of the judges** concerned before any political body or a body with a political component would make a final decision.

- d) As regards the **place of the investigating service in the judiciary**, the basic principle was that the investigations had to be effective. Without proper investigation the combat of crime was done in vain. Whether investigators were part of the judiciary or of the executive branch being attached to the police was in essence a political decision. The delegation expressed its understanding that the inclusion of the investigators in the judiciary and its attribution with a very wide ranging independence by the Constitution of 1991, was a reply to abuses by the previous regime. In most European countries investigations were however done by the police. Adequate training for investigators, be they part of the judiciary or the police, was seen as a key to the success in the combat of crime.
- e) The delegation noted that the **Supreme Judicial Council** was to be given an even greater role in the administration and functioning of the judiciary. As the Commission had already pointed out in its previous opinions, it seemed paramount to depoliticise this organ. The delegation reiterated the proposal of the Commission to **have the parliamentary component of the Council elected with a qualified majority**. This would make sure that this component reflected the composition of the political forces in Parliament and would effectively make it impossible that the majority in Parliament fills all positions with its own candidates as it had been the case in the past.
- f) As concerns the **place of the prosecutors in the judicial system**, the delegation pointed out that there was no uniform model in Europe. In some countries the prosecutors were part of the judiciary in others they were part of the executive answerable to the Minister of Justice. Furthermore, in some countries there is a centralised system under which the General Prosecutor is responsible for all prosecutions whereas other countries provide for the autonomy of the individual prosecutor. Where there is a centralised system it is important to respect paragraph 10 of [Recommendation \(2000\) 19](#) of the Council of Europe which provides that “All public prosecutors enjoy the right to request that instructions addressed to him or her be put in writing. Where he or she believes that an instruction is either illegal or runs counter to his or her conscience, an adequate internal procedure should be available which may lead to his or her eventual replacement.” In order to **improve the accountability of prosecutors** an effective system of monitoring of their income and that of members of their family would need to be put in place.

Annex I

DECLARATION
ON THE MAIN GUIDELINES FOR A REFORM
OF THE BULGARIAN JUDICIARY

We, the representatives of the Parliamentary-presented political forces in the Republic of Bulgaria,

Having regard to the need of reforming the Bulgarian judiciary in view of improving its operation,

Having considered the need of conducting this reform on the basis of consensus among the political forces,

Having regard to the spiritual and moral heritage of the Bulgarian people and our historical belonging to Europe,

Having based on the universal and eternal values: human dignity, freedom, equality, solidarity and justice,

Sharing the principles of democracy and the rule of law,

And having considered the need of involving all the judiciary authorities into the practical implementation of the reform,

DECLARE OUR CONSENSUS ON:

THE MAIN OBJECTIVES OF THE JUDICIAL REFORM, in view of achieving the high standards of jurisdiction needed for the Bulgarian public, and meeting the challenges of the European future for Bulgaria, as a full member of the EU and NATO, namely:

Fair, speedy, effective, accessible and transparent jurisdiction;

Independence, impartiality, competence and responsibility of the magistrates, effective separation of powers and mutual control;

Promoting the public confidence in the judiciary

AND THE PRINCIPLES ON WHICH THEY HAVE BEEN BASED:

- Rule of law;
- Compliance with the best international rules and European practices;
- National identity and traditions;

- Strategic vision directed to future;
- Continuity and stability;

Having considered the urgency and significance of a comprehensive and effective reform of the judiciary in the Republic of Bulgaria and expressing consent on the necessary amendments of the current Constitution in the course of the reform, we agree on the following

MAIN GUIDELINES FOR THE REFORM OF THE BULGARIAN JUDICIARY:

- Clear definition of the functions of the Supreme Judicial Council and of the Minister of Justice;
- Structural and functional changes in the judicial system;
- Improvement of the coordinating mechanisms among the Prosecutor's Office, the Investigation Service and the Executive power in the counteract against crime;
- Improvement of the law enforcement capacity of the judiciary and strengthening the activity of its administrative capacity;
- Developing the standard equipment and facilities for the judiciary;

AND THE METHODS TO ACHIEVE THEM:

- Amendments of the Constitution related to the improvement of the structure, the powers and the responsibilities of the judiciary, including immunity, irremovability, mandate;
- Amendments in the statutory, substantive and procedural legislation;
- Establishing guaranties for recruitment, training and career development of the magistrates;
- Implementation of information technologies in the operation of the judiciary, and development of an integrated information system in stages;
- Providing adequate budget for the judiciary.

The present Declaration was adopted and signed on 02.04, 2003.

Plamen Panayotov

Nadezdha Mihailova

Head of the Parliamentary Group
of the National movement Simeon the
Second

President of The Union of Democratic
Forces
Head of the Parliamentary Union of
the United Democratic Forces

Sergey Stanishev

Ahmed Dogan

President of the Supreme Council of
the Bulgarian Socialist Party

President of the Movement for rights
and freedoms

Head of the Parliamentary
Group of the Coalition for Bulgaria

Head of the Parliamentary Group of
the Movement for rights and freedoms

Nikola Nikolov

Head of the Parliamentary group
of the National Ideal
For Unity

Annex II

COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 9.10.2002
SEC (2002) 1400

2002 REGULAR REPORT ON BULGARIA'S PROGRESS TOWARDS ACCESSION {COM (2002) 700 final} (extract)

The judicial system

Since the adoption in October 2001 of the Strategy on the Reform of the Bulgarian Judicial System, **referred to in the last Regular Report**, Bulgaria has made considerable progress. An Action Plan for implementation of the strategy was approved in March 2002, and major amendments to the Law on the Judicial System to implement elements of the strategy were adopted in July 2002. The aim of the judicial reform strategy is "the development of European standards in justice". Its objectives include improvement of human resources, management, administration and the physical infrastructure of the judicial system. The Action Plan covers many of the problems in the current judicial system but not yet the overall structure of the judicial system itself (which covers judges, prosecutors and investigators), or their high level of immunity, where Constitutional change is required.

Despite good recent progress on reforms, the judicial system remains weak and there has been little concrete change in its functioning. During the work on reform, co-operation between the Ministry of Justice and the Supreme Judicial Council (SJC) has developed considerably. Also, there is now wider and more public discussion of issues related to judicial reform, which is in itself a positive development. The SJC was active in helping the Ministry of Justice to prepare the strategy and was consulted on the preparation of the Action Plan and draft amendments to the law. The SJC raised concerns where it considered reforms did not fully respect judicial independence (e.g. introduction of time-limited mandates for some appointments and establishment of the National Institute of Justice under the Minister of Justice, expressing concern that this may not be fully independent).

However, one area not yet addressed by the reforms is the structure of the Bulgarian judiciary, which consists of judges, prosecutors and investigators, as set out in the Constitution. As mentioned in previous reports, the fact that criminal investigators with the functions they exercise in Bulgaria (some of which are exercised by police elsewhere) are members of the judiciary is unusual, and reforms will be needed as regards the place where, and the responsibility under which, investigations are carried out. A second area which is not addressed by the ongoing reforms is that the Constitution and the Law on the Judicial System also give members of the judiciary (judges, prosecutors, and investigators) immunity from prosecution for all but serious crimes that carry over five years in prison. Immunity for the judiciary is being increasingly widely discussed, but there are as yet no concrete proposals for change.

Surveys indicate that the public perceives there to be a high level of corruption in the judiciary and legal professions, a claim disputed by the judiciary. The problem with the

current system of immunity and ineffective disciplinary procedures is that it is also difficult to demonstrate that corruption does not exist.

According to Bulgarian law, the judiciary should have its own budget. The budget for the judiciary remains very low. As in previous years, the basis for discussion in Parliament was not the draft prepared by the SJC, but the draft prepared by the executive, the justification being the budgetary restrictions imposed by the currency board arrangement and poor absorption capacity of the judiciary. After consultations between the SJC and the Ministry of Finance with the mediation of the Minister of Justice in the presence of the Prime Minister, the budget for the judiciary was increased (by comparison with the first proposal from the Ministry of Finance). The budget adopted by Parliament for 2002 was BGN 121.8 million (approx. €61 million), about half what the SJC proposed and around 0.3% of GDP. In EU Member States it is often around 2 to 4% of GDP. Around 73% of the budget goes on staff salaries and social contributions, with most of what remains going on day-to-day running costs, leaving little for equipment.

The SJC represents judges, prosecutors, and investigators, and its members comprise representatives of all three groups, as well as a number of members elected by Parliament. The three groups have different roles in the judicial system, and hence different interests and management structures. This makes it difficult for the SJC to play a fully effective role in the professional management of judges and of the court system. The SJC administration needs to be reinforced to ensure its effective functioning.

As required by the Bulgarian Constitution, the Bulgarian court system consists of three instances: first instance, second instance and cassation. There is also a Constitutional Court, a Supreme Administrative Court and a system of military courts.

There is little concrete change to report on court administration since the last report, and the assessment given then remains largely valid. Court administration remains weak. Court Presidents do not yet receive systematic training to carry out their administrative role. Insufficient attention is paid to the selection and training of court support personnel who could take on administrative tasks. However, with the amendments to the Law on the Judicial System in July 2002, the position of "Court Administrator" has been introduced to take on administrative tasks including financial issues. Administrative support for judges, prosecutors and investigators remains poor, so they are obliged to spend a lot of time on administrative and clerical matters. The number of magistrates is still considered insufficient, and lack of appropriate support is a contributory factor. Case management continues to lack transparent standards for assignment. The SJC has decided that a case distribution system based on objective criteria should be used throughout the court system, but this still has to be put into practice. As mentioned in previous reports, the conditions in the majority of the courts, prosecution offices and investigation services remain very poor. An issue which still needs to be addressed is the clear demarcation of the roles of the SJC and the Ministry of Justice in the management of the judicial system, again whilst respecting the independence of the judiciary.

The length of judicial proceedings still gives cause for concern. No comprehensive statistical data on the average length of civil or criminal cases is available, but there are reports of civil cases routinely taking 5-8 years and of labour disputes suffering 3-4 year delays. The problems identified include the time it takes for a case to move between different instances and the high proportion of cases returned because the quality of an investigation is considered unsatisfactory. These problems are the result of structural and administrative weaknesses in

the judicial system. As mentioned last year, a high proportion of cases are still returned from courts to the public prosecutor, and there is a lack of transparent conditions for return.

Whilst the legal framework for access to justice and legal aid is essentially adequate, there are significant problems in practice in ensuring defendants have access to a lawyer at all stages of judicial proceedings (*see section on civil and political rights*).

Uniform methods or criteria are not yet in use for the competitive selection of judges or for monitoring performance before granting tenure or promotion.

In the prosecution service, selection, appointment and promotion policies are also not transparent. The prosecution service needs to modernise management methods in order to improve the transparency and efficiency of case handling.

The Magistrates Training Centre has continued to develop its important role over the last year, providing training for newly appointed judges, and general and specialised continuing training for members of the judiciary, covering *inter alia* EC law. The Centre remains very heavily dependent on donor funding. The Law on the Judicial System establishes a National Institute for the Judiciary, which will be a public institution, which is a positive step. It will be important to ensure that it builds on the experience of the Centre and that priority is given to adequate state funding, so that it can further develop training for the judiciary.

Significant amendments to the Law on the Judicial System were adopted in July 2002. These include the establishment of a system of accountability of courts, prosecution offices and investigation services to the SJC; various anti-corruption measures for the judiciary, such as property and income declarations; adoption by the SJC of codes of ethics for magistrates and administrative staff of the judiciary; a competitive recruitment system for magistrates, and promotion according to objective criteria; and the creation of a public institution — the National Institute of Justice — to train members of the judiciary and administrative staff. The structure and status of the administrative services of the judiciary are brought in line with the Law on Administration and the Law on Civil Service. The procedure for adoption of the budget of the judiciary is also amended: the Council of Ministers will no longer be entitled to amend the budget, but only to express an opinion on it when it comes before Parliament. The amendments also put in place a structure to provide better security for the premises of the judiciary and, where necessary, for certain magistrates. If fully implemented, most of these amendments will address many of the weaknesses in the current judicial system identified in this and previous Regular Reports. It is important to ensure that these changes are implemented in a way which fully respects the independence of judges.

The progress on reform of the judiciary since the last Regular Report is a positive development. As these reforms only started recently, it is not yet possible to assess their contribution to ensuring that Bulgaria's judicial system will be able to guarantee full respect for the rule of law and human rights and play its role in the further development of the economy and future enforcement of the *acquis*. The planned changes do not yet tackle the overall structure of the judicial system, nor the high level of immunity, for which constitutional changes will be required.