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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

COMMENTS

**ON THE DRAFT LAW AMENDING THE LAW
ON JUDICIAL POWER AND ON THE DRAFT LAW
AMENDING THE CRIMINAL PROCEDURE CODE
OF BULGARIA**

by

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THE DRAFT LAW AMENDING THE LAW ON JUDICIAL POWER

1. Upon request of the Permanent Representation of Bulgaria to the Council of Europe – on behalf of the Parliament of Bulgaria – the following comments to the draft laws amending the Law on Judicial Power and the Criminal Procedure Code are issued in view of an opinion by the Venice Commission; both draft law amendments are strictly connected.
2. Bulgaria has the intention to introduce specialised criminal courts and specialised prosecution offices and investigative bodies. The Constitution (Article 119 point 2 of the Constitution) expressly allows to introduce Specialised Courts by law. Upon this constitutional basis, specialised juridical bodies are foreseen to be introduced by the proposed amendment of the Law on **Judicial Power**. Whilst the institution of these specialised bodies is foreseen in the draft amendment of the Law on Judicial Power, the details, especially concerning the competences and the like are to be ruled by draft **amendments to the Criminal Procedure Code**, also object of a request for an opinion by the Venice Commission. Both pieces of law are to be seen together.
3. In its Memorandum on the Reform of the Judicial System in Bulgaria (CDL-AD(2003)12), the Venice Commission, in the conclusions (13 and 14) identified the problems of the Bulgarian Judiciary System in the fact that insufficient results were achieved in combat of crime, especially as concerns organised crime and corruption, including corruption in the judiciary itself and one of the reasons for this problem was seen in the high level of immunity given to the magistrates themselves (in the wide sense) and it has been one of the discussion points, how to achieve accountability of the judiciary while preserving it from undue interference from the executive and legislative branches of power.
4. When Bulgaria acceded to the European Union on 1 January 2007, a Co-operation and Verification Mechanism was established. Under this mechanism, the European Commission has made a number of recommendations for adopting more effective measures for fighting organised crime and corruption at the highest level of government.
5. In the comments to the draft, the Bulgarian authorities report that a successful step had been the establishment of joint specialised investigative teams in September 2009 including prosecutors, police officers and agents from the State Agency for National Security. The success of these teams has proved the need of specialisation of the law enforcement and judicial bodies for effective fight against more serious types of crime and the establishment of bodies dealing with organised crime and corruption and providing justice of high quality due to their specialisation has been seen as a first step.
6. The objectives are clearly outlined and are: high quality of justice in reasonable time by operating specialised courts and specialised investigative bodies and using magistrates of higher qualification than foreseen for the ordinary courts and investigative bodies.
7. The main objective of the present draft Law is the establishment of specialised courts and prosecutor's offices and investigative bodies in view of delivering justice of high quality in reasonable time. The measure is expected to:
 - 7.1. enhance the capacity of the investigative bodies, the prosecutor's offices and the courts and
 - 7.2. lead to the appointment of magistrates with higher professional qualifications as well as
 - 7.3. special care by the state through material and technical support.

8. The Draft (§2, 3 and 4 of the draft Law) on the basis of the Constitution foresees:
 - 8.1. one specialised criminal court with the rank of a district court with seat in Sofia (§5 of the draft Law),
 - 8.2. one appellate specialised criminal court also located in Sofia (§6 of the draft Law) and
 - 8.3. the Supreme Court of Cassation acting as the third instance court.
9. Specialised prosecutor's office and appellate specialised prosecutor's offices are to be established at the respective specialised courts and it is foreseen that the specialised prosecutor's office will have an investigative department which consist of investigators (§ 7 of the draft Law).
10. The draft amendments to the Law on Judicial Power rule
 - 10.1. the structure of the specialised courts.
 - 10.1.1. The courts grade of the specialised court is that of a district court and the seat is fixed to be in Sofia. The panel is foreseen to be composed by one judge and two lay assessors; the most senior judge presides the panel. All the judges of the specialised court form the general assembly and the general rules of the law are applicable to this general assembly.
 - 10.1.2. As for the replacement of a judge who is not in the position to participate, the general rule is to replace the position taking a judge from the same court, and, if not possible, the chair person of the appellate specialised criminal court may second in his stead a judge from the appellate specialised criminal court respecting, however, the limits of the present Article 227 of the Judicial Act, especially concerning the maximum time of secondment of 3 months. In case of need the secondment is made by the chairperson of the Supreme Court of Cassation. Besides co-ordination with the administrative head of the concerned judge, the secondment must contain the reasons. The secondment for the replacement of a judge at the appellate specialised court is ruled by analogy and is in the competence of the chairperson of the Supreme Court of Cassation.
 - 10.2. prosecutor's offices
 - 10.2.1. The legislation on the prosecutor's offices is foreseen to be amended in order to widen the range also to the creation of specialised prosecutors offices at the respective specialised courts and appellate courts; further it is foreseen to join specific investigation bodies to those specialised prosecutor's offices.
 - 10.2.2. The investigative departments at the specialised prosecutor's office are inserted in the organisation of the specialised prosecutor's office; the appointment of the investigative head is made by the head of the specialised prosecutor's office. Regular reports have to be presented to the head of the prosecutor's office.
 - 10.3. appointment of the magistrates at the specialised bodies
 - 10.3.1. (§1 of the draft Law). It is foreseen that the magistrates in the specialised bodies will be appointed by the Supreme Judicial Council according to the general rules under the Law on Judicial Power (with the specifics corresponding to the specifics of these new bodies). The requirements of professional qualification follow higher standards than for ordinary magistrates and the recruitment is made exclusively

from inside the judiciary following stronger nomination criteria; the nomination proposal to the Supreme Judicial Council may be made by at least 1/5 of its members or by the administrative head of the respective specialised body. § 15 of the draft Law sets out that judges and prosecutors at the specialised criminal court require at least 10 years' professional experience and a candidate must have served at least 5 years of the 10 as a criminal judge, prosecutor or investigator. For the appellate judges or prosecutors at the appellate specialised prosecutor's office the professional minimum experience required is 12 years with at least 8 years of practice as a criminal judge or prosecutor or investigator.

10.3.2. As a consequence of the higher professional qualification the judicial rank and the remuneration (§ 22 and 23 of the draft Law) are adequate to this. In the draft Law, the specialised magistrates and prosecutors of the first degree court have the rank and remuneration of those ordinarily of the appellate court and those specialised of the appellate court have rank and remuneration of the Supreme Court of Cassation respectively, Prosecutor's Office. It is clarified that these aspects do not interfere on the nature of decision-making or the independence of the magistrates.

10.4. power of the administrative heads of these bodies

10.4.1. The work of the specialised investigative departments (and also of the ordinary investigative departments) are assigned by the administrative head of the respective prosecutor's office. It seems that the power of the administrative head of the prosecutor's office has been widened by the concentration of the power to assign the investigative work. This competence has been given not only to the administrative head of the newly specialised prosecutor's offices, but also to the ordinary prosecutor's offices at the district courts.

10.5. In addition to the magistrates, judicial assistants are foreseen for the various specialised courts and for the prosecutor's offices with at least 3 years' professional experience in addition to the other requirements.

11. Transitional provisions. It is foreseen that within 15 days of the entrance into force of the draft Law, the Supreme Judicial Council shall approve the number of the magistrates and chair persons of the specialised juridical bodies and within 45 days the chairpersons have to be appointed. The appointment of the other magistrates has to be made after 4 months. Until the approval of the lay assessors by the General Assembly within 6 months, the lay assessors of the district court of Sofia shall act in the specialised criminal court. Short terms are foreseen for all other approvals and nominations and the specialised bodies may start to function very quickly after the draft has become law.

12. Court assessors. The specialised courts are hearing the cases in a panel composed by a judge and two lay assessors. These assessors are obviously part of the Bulgarian judicial system (see. Articles 66 sq. of the Judicial Act). They have the same rights and obligations than the judges and the nomination is made by the next higher general assembly of judges. The assessors can be removed by the general assembly under specific, but still generic conditions. The procedure of nomination, the remuneration and other organisational matters are fixed in an ordinance of the Minister of Justice. Because the matters which are to be judged in the specialised criminal courts are specifically those where the criminal energy is very high and the potential influence on persons inserted in a normal day to day life, like the lay assessors, the question comes up, whether the high qualifications of the judges should not match with better defined criteria of choice for lay assessors, who are in majority in the panel; this in order to better eliminate the risks inherent to the task they are to fulfil.

13. Conclusion

13.1. Most of the other changes proposed by the draft Law are of a technical nature needed in order to adapt the Law to the introduction of the specialised courts and other bodies and do not require particular remarks. Without coming back to what the Venice Commission already had quoted in former opinions on the Law on Judicial Power, it can basically be retained that the introduction of the specialised courts and other bodies are a welcome measure in order to improve the fight against organised crime and corruption. The choice of candidates and the way of nomination as well as the requirements of qualification seem appropriate and the higher rank and financial treatment are in line with the scope of the proposed amendments. It has been experienced in other countries with a developed system of fighting organised crime that it is absolutely necessary to create independent and highly qualified bodies in order to insure the results; the adequate remuneration corresponds to the higher qualification and competence. It has to be noted that the insertion of the specialised bodies under the ordinary jurisdiction of the Supreme Court of Cassation seem to be an adequate guarantee against potential excesses inherent in the creation of a judicial elite.

13.2. As far as the lay assessors are concerned, this institution seems to be really part of the judicial system and the fact that the nomination is made by the next higher general assembly of judges is a possibility to ensure their qualification. It does not eliminate the higher exposure to potential undue influence by persons to be judged by the specialised courts. One has to recognise that the national juridical system is aware of this type of problems and is most probably capable to efficiently deal with it. Therefore, without challenging the institution of the lay assessors itself, the system has to be accepted.

13.3. The present draft Law clearly gives the impression of a sound political intention to create an efficient judiciary system capable of reaching the scopes for which it is designed. Therefore the proposed amendments are most welcome.

DRAFT LAW AMENDING THE CRIMINAL PROCEDURE CODE

1. The draft Law amending the Criminal Procedure Code is not self explanatory and has to be read by consulting the Criminal Code to which reference is made point by point. The Draft determines the competences of the specialised criminal courts and other special judicial bodies under a new Chapter 31 a. with Articles 411 a to 411 j. These special bodies are foreseen in a draft amendment to the Law on Judicial Power.
2. The following crimes fall under the jurisdiction of the specialised criminal courts:
 - a. Aggravated kidnapping (Article 142 paragraph 2 and 3 Criminal Code);
 - b. Holding hostages (Article 143 a Criminal Code)
 - c. traffic of persons (for vicious practices, involuntary servitude, seizure of body organs or to be kept under compulsory submission) in cases, where these persons are taken across the border of the country in its simple form or in the aggravated form (Article 159 b Criminal Code) or if committed as dangerous recidivism or in execution of an order of an organised criminal group (Article 159 c Criminal Code).
 - d. Money Laundering in its aggravated form (when committed by 2 or more persons, if acting in fulfilment of a decision of an organised criminal

organisation, it committed 2 times or more, if committed by an official within the scope of his or her office, if using accounts under fictitious names or using the name of a person without consent (Article 253 paragraph 3 Criminal Code) or if the property is of very high value or the case particularly serious (Article 253 paragraph 5 Criminal Code).

- e. Forming or leading an organised criminal group, in case this group is armed or formed for the purpose of committing crimes such as falsifying money and the like and crimes in relation to these matters (Article 321 paragraph 3 Criminal Code).
 - f. In general all crimes mandated by an organised criminal group
 - g. When:
 - i. committed by persons having immunity, by Members of the Supreme Judicial Council and the Inspectorate thereof or other very important civil officers or magistrates as enumerated in the draft Law, for a series of crimes such as misappropriations in public office (Article 243 Criminal Code), fraud (Article 209 sq. Criminal Code), negligence in management of entrusted property and lack in supervision (Article 219 Criminal Code) as well as the deliberate commitment of transaction creating a damage (Article 220 Criminal Code), neglecting the obligations in anti-money laundering legislation, credit fraud, fraud referring to subsidies of the EU and similar crimes (Article 253 – 254 b Criminal Code), criminal breaches of trust (Article 282 – 283 a) and Bribery (Article 301 – 307) or,
 - ii. if committed abroad
 - h. To create the competence of the specialised courts, it is enough to have one crime out of several creating the competence of the specialised courts or one out of more indicted persons to create the competence for all of them in favour of the specialised courts. Only in case that one of several cases falls into the competence of a military court, then the military court is competent also for the other cases connected. The attraction of connected cases to either the special criminal courts or to the military courts is a systematic choice. But, one may put a question mark on the general attraction clause to the military courts when having in mind the establishment of special criminal courts with very high standards courts.
3. In second degree, the appellate Special Courts are competent for the appeals against judgments of the specialised criminal courts and the appellate special court judgments may be brought to the Supreme Court of Cassation in third degree. To be noted, that at the third level, the judgments of the ordinary courts and those of the specialised courts are both submitted to the Supreme Court of Cassation, which insures then a uniformity of interpretation of the law. The fact to have one single court for cassation is most welcome.
4. Disputes of competences are resolved by the Supreme Court of Cassation. (Article 411 c of the draft Criminal Procedure Code).
5. The pre-trial investigation of crimes falling under the jurisdiction of the special criminal courts are in the competence of the prosecutors of the special prosecutor's office and the relevant investigation department; the policemen are those designated by order of the Minister of Interior.

6. The rules foreseen in the procedure concerning the hearing of an anonymous witness before a judge is already a possibility given by the existing Article 141 Criminal Procedure Code. The same is valid for the opening of the bank secrecy and the procedure.
7. After closure of the investigation, the prosecutor has to make up his decision whether to discontinue, to suspend, to file an exoneration proposal or other proposals, *inter alia* also to propose the adjudicating of the case with an agreement or to file the indictment within 15 days after closing the investigation. Article 411 h institutes stronger rules than the ordinary procedure, such as an obligation for rapporteurs to send the case to public hearing within 15 days, the exclusion of private prosecutors and civil plaintiffs, the serving of summons etc. by special persons belonging to the court, to the Ministry of Interior or the Ministry of Justice, the obligation to appear regardless to other summons to appear before other courts, witnesses or experts who did not appear unexcused to be brought for the next day of trial compulsory before the court, the time limit of 15 days for the court to deliver verdict and reasons. It looks like the procedure is drafted to follow a strict line leading to a particularly rapid procedure which does not leave room to diverting tactics.
8. The exclusion of the civil plaintiff as a participant requires some remarks: it is not a constitutional right of the civil plaintiffs to be heard at the criminal procedure and therefore the exclusion (as participant) in the criminal procedure before special courts is not blameable under that point; however, the hearing being public, one may question the reasons why they are banned. The reason given to this in the comments, is the fact that rapidity of the procedure could suffer too much. Besides that, in rapid procedures the civil plaintiff is anyhow not allowed to participate in order not to slow down the procedure. A further reason given is, that the civil plaintiff would have the possibility to file a civil claim and that it is not sure, that his or her claim will be dealt with anyhow by the criminal judge. As a matter of fact, these reasons are not totally invalid; but in most criminal procedures, the fact to be a participant as a civil plaintiff (independently of the fact that the judge will or not deal with the claim himself or herself) is the possibility to follow the evolution by having access to the files. For the civil plaintiff this is a considerable source of information in order to control the development and to incur his or her rights. Under all aspects, it seems that the limitation of the rights of the civil plaintiff could be accepted towards the expected advantages of rapidity if the access to the file could be guaranteed.
9. The specific rules before the second instance give the right of appeal to the prosecutor, the accused or his counsel; for the rest reference is made to the general rules of procedure, but the verdict or decision has to be delivered within the short period of 15 days.
10. The transitional provisions foresee technical adaptations of various special laws, which are necessary because of the changes of the criminal procedure code.
11. Conclusion.
 - a. The Venice Commission has had the opportunity to express opinions in the past on the concerned matter in general; those remarks remain valid.
 - b. The systematic choice of the draft Law to give competence to the special courts in function (a) of the type of crime and (b) of the type of person committing the crime and (c) on the territoriality is not to be criticised.
 - c. The types of crime involved are typically those where the magistrates need (a) a good basis of experience and (b) a solid character. Whilst the experience is

guaranteed by the criteria of long professional practice, the character of the persons is taken into consideration in the nomination procedure.

- d. The specific rules for a quick procedure set out in the draft Law are another requirement towards the fulfilment of a high quality justice rendered in reasonable time.

Altogether, the draft Law is to be welcomed and even if some points could be questioned, they are of minor importance compared to the huge enterprise of fighting organised crime and endemic problems, such as corruption. But the fact that the third degree court is the Supreme Court of Cassation is also a guarantee that excesses in the legislation may be tempered by the jurisprudence of this court and the Constitutional Court of Bulgaria. Finally, it will be the practical application which might bring to light the effective quality of the draft Law.