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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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**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.*

1. The advice of the Venice Commission has been sought by the Permanent Representation of Bulgaria to the Council of Europe on behalf of the Parliament of Bulgaria regarding two draft laws which are related. The first amends the Law on Judicial Power and the second amends the Criminal Procedure Code.
2. The draft laws are intended as a response to the problem of corruption in Bulgaria. It is believed that there is corruption at the highest governmental level as well as within the judiciary and the prosecutors' office. According to the explanatory memorandum to the draft law amending the Criminal Procedure Code, the laws are put forward as a result of the unsatisfactory achievements in the fight against organized crime and corruption pointed out in the reports of the European Commission under the Cooperation and Verification Mechanism.
3. The purpose of the Law is to establish a system of specialized courts, prosecutors offices and investigators to deal with certain offences, in particular those which would typically be committed by organized criminals and by corrupt officials and servants of the state. The specialized courts will be established pursuant to Article 119.2 of the Constitution of Bulgaria which authorizes the establishment of such courts. These are "specialized" courts and not "special" or "extraordinary" courts in the sense that they apply the ordinary law of Bulgaria both in relation to the substantive law and the law of evidence.
4. The amendment to the Law on Judicial Power establishes the specialized criminal courts. It provides that their jurisdiction is to be established by law. The specialized courts are to rank as District Courts and each court is to be staffed by one judge and two lay assessors. There is also to be an appellate specialized criminal court. The prosecutors' office will contain an investigative department to investigate cases falling within its jurisdiction. The Supreme Judicial Council is to approve the numbers of judges to be appointed to the specialized criminal courts and to appoint them.
5. The amendment to the Criminal Procedure Code deals with the jurisdiction of specialized criminal courts. The principal crimes in relation to which jurisdiction will be conferred on the specialized criminal courts include the following:-
 - (1) Certain crimes carried out by organized criminal groups or in furtherance of a decision of such groups. These include armed kidnapping, kidnapping by two or more persons, kidnapping internationally protected persons, kidnappings directed against two or more persons, kidnapping by guards or persons from the Ministry of the Interior, kidnapping for mercenary purposes or for the purpose of taking a person out of the country, as well as kidnapping children and pregnant women, hostage-taking, people-trafficking, and money laundering.
 - (2) Forming or leading a criminal gang which is armed or engages in certain crimes including offences against the monetary and credit system, the financial, tax or insurance systems, people-trafficking, explosives and firearms offences, drugs offences.
 - (3) Being an official who participates in a group referred to at (2) above.
 - (4) Certain crimes committed by persons having immunity, members of the Supreme Judicial Council and its inspectorate, administrative heads of judicial bodies and their deputies, judges, prosecutors, investigators, persons having certain administrative functions, deputy ministers and secretaries generals of ministries. The crimes include misappropriation in public office, fraud, the use of

forged documents to obtain property, negligence in handling public property, deliberately concluding an unprofitable transaction, money laundering, providing untrue information to obtain credit, violation of official duties, the abuse of an official position to obtain an unlawful benefit, as well as taking or offering a bribe.

- (5) The specialized courts also have jurisdiction over crimes mandated by an organized criminal group or committed in furtherance of a decision of such a group.
6. As can be seen from the above, the specialized courts will be given a very wide jurisdiction over effectively almost every serious offence which could be committed by an organized criminal gang or in pursuance of the activities of a criminal gang, or of a public official. Where a number of offences are tried together, if any of them are in the list then the specialized criminal court will have jurisdiction to try them all.
7. I assume the intention behind the proposal is to appoint as judges of the specialized criminal courts or prosecutors only those judicial officers or prosecutors who are regarded as above suspicion. Given that there is thought to be a high degree of corruption among the existing judges and prosecutors, the appointment of such a specialized court appears to me to be a proportionate response to the problems of corruption within the Bulgarian governmental and judicial systems. Indeed, one might go further and say that this or a similar response is not merely justified in order to restore the rule of law within the state but could be considered necessary.
8. A proposed new provision of the Criminal Procedure Code (Article 411e) provides that "when there is well-founded information that a risk for the life or health of witness exists his examination before a judge shall take place according to the rules for examining of anonymous witnesses". The existing Article 123 of the Criminal Procedure Code provides that the identity of witnesses may be kept secret. However, Article 124 provides that a conviction cannot be based solely on the testimony of secret witnesses. Article 141 provides for the procedure under which secret witnesses testimony may be obtained. The pre-trial authorities in the court are to interrogate the witness and to undertake all possible measures to keep the witnesses identity secret. Transcripts of the records that do not bear the witnesses signature are to be submitted to the accused and to the defence counsel and the parties may put questions to the witness in writing.
9. It is not clear to me exactly what is meant by providing that a conviction may not be based solely on the testimony of secret witnesses. Does this mean that the other evidence must be sufficient in itself to ground a conviction? If so, then the evidence of the secret witness would be unnecessary. Does it simply mean that there must be some other evidence corroborating the testimony of the secret witness? The problem is a delicate one, because of course the opportunity for questioning a secret witness is necessarily limited. If the identity of the witness is not divulged, then opportunities to pursue a particular line of questioning may be lost. However, it is noted that the establishment of the specialized criminal courts does not in any sense amend the existing rules of procedure in Bulgaria, but merely extends them to cover the new courts.
10. In *Al-Khawaja and Tahery v UK* (Application Nos 26766/05 and 22228/06) (20 January 2009) a chamber of the European Court of Human Rights doubted

"whether any counterbalancing factors would be sufficient to justify the introduction in evidence of an untested statement which was the sole or decisive basis for the conviction of an applicant." (at para 37)

An appeal to the Grand Chamber is pending.

In my opinion there may need to be an amendment to Article 124 of the Criminal Procedure Code of Bulgaria to provide that a statement from a secret witness should not be the sole or decisive basis for an indictment or a conviction in order to align the Bulgarian Code with the jurisprudence of the European Court of Human Rights.

11. A proposed new Article 411f in the Criminal Procedure Code will require the banks and the tax and social security authorities to disclose information on the request of the administrative head of the specialized prosecutor's office.

Conclusion

Based on the information which has been provided in the explanatory memoranda to the two draft laws, it seems clear that there is a major problem at present with corruption and organized crime in Bulgaria. In particular, corruption extends to the executive and judicial branches of government in that country. In the circumstances it seems clear that it is not possible with safety to rely on the existing courts to root out this problem, since a certain proportion of the people whose function would be to administer the law are themselves corrupt. Therefore, it seems a good solution to establish specialized courts to deal with the most serious crimes involving organized crime and corruption in public office which would be staffed by persons appointed by the Supreme Judicial Council using the normal procedure for the appointment of judges, which presumably will exercise such care as it possibly can to avoid appointing any corrupt persons to these positions. The fact that the Bulgarian authorities have not followed the solution proposed in some other jurisdictions of removing existing members of the judiciary from their post and requiring them to apply again if they wish to be judges is to be welcomed. The fact that the specialized criminal courts are to operate under the normal substantive law and procedural law (including the law of evidence) which applies in Bulgaria is to be welcomed. In effect, the Bulgarian authorities seem to be adopting the solution, not of introducing special measures to ensure the law is applied, but rather of taking measures to ensure that the courts and prosecutors apply the laws properly in dealing with cases of organized crime and corruption, which it seems up to now has not always been the case.