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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

BULGARIA

DRAFT OPINION

**ON THE DRAFT AMENDMENTS
TO THE CRIMINAL PROCEDURE CODE
AND THE JUDICIAL SYSTEM ACT**

On the basis of comments by

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I. Introduction

1. By letter of 27 July 2022, Ms Nadezhda Yordanova, the then Minister of Justice of Bulgaria, requested an opinion of the Venice Commission on the draft amendments to the Criminal Procedure Code and the Judicial System Act (CDL-REF(2022)028, CDL-REF(2022)029, CDL-REF(2022)030).
2. Mr Richard Barrett, Mr James Hamilton, Ms Katharina Pabel, and Mr Qerim Qerimi acted as rapporteurs for this opinion.
3. On 26 and 27 September 2022, a delegation of the Venice Commission composed of Mr R. Barrett, Ms K. Pabel and Mr Q. Qerimi, accompanied by Mr T. Pashuk and Mr G. Dikov from the Secretariat visited Sofia and had meetings with the Ministry of Justice, the Supreme Judicial Council, the Prosecutor General and his Deputies, members of the Parliament, the Supreme Court of Cassation, as well as with representatives of civil society. The Commission is grateful to the Ministry of Justice for the excellent organisation of this visit.
4. This opinion was prepared in reliance on the English translation of the draft amendments. The translation may not accurately reflect the original version on all points.
5. This opinion was drafted on the basis of comments by the rapporteurs and the results of the meetings on 26 and 27 September 2022. [The draft opinion was examined at the meeting of the Sub-Commission on *** on *** 2022]. [Following an exchange of views with ***,] it was adopted by the Venice Commission at its *** Plenary Session (Venice [and online], *** 2022).

II. Background

6. The Venice Commission was invited to assess the draft Law introducing amendments to the Criminal Procedure Code (the CPC) and the Judicial System Act (the JSA). These amendments mainly aimed at (i) improving the mechanism of accountability of the Prosecutor General (“the PG”); and (ii) enhancing the position of victims of crime in the criminal proceedings.
7. The question of accountability of the PG has been at the centre of discussions between Bulgaria and the Council of Europe for many years. The European Court of Human Rights (“the ECtHR”) in its case of *Kolevi v. Bulgaria* exposed that issue in the context of the lack of effective criminal investigations in the event of arguable allegations that crime was committed by the PG.¹ The necessity of legal reforms in that area was discussed on several occasions by the Committee of Ministers in the past few years, however despite several attempts by the Bulgarian authorities to find a satisfactory solution, to-date the execution process of the *Kolevi* judgement is not yet closed.² These issues have been highlighted by the EU Commission, too, in its 2022 Rule of Law Report, insisting on the necessity to introduce effective mechanism for the accountability of the PG.³
8. The Venice Commission has been dealing with these issues in three recent opinions assessing the attempts of legislative and constitutional reforms.⁴ In view of the powerful position of the PG

¹ See ECtHR, *Kolevi v. Bulgaria*, no. 1108/02, 5 November 2009.

² For the materials regarding the execution of judgment on *Kolevi v. Bulgaria*, see <https://hudoc.exec.coe.int/eng?i=004-3557>

³ See EU Commission, 2022 Rule of Law Report – Country Chapter on the rule of law situation in Bulgaria, SWD(2022) 502 final, 13 July 2022, pp. 4 and 5.

⁴ See Venice Commission, CDL-AD(2017)018, Opinion on the Judicial System Act of Bulgaria, 9 October 2017; CDL-AD(2019)031, Opinion on draft amendments to the Criminal Procedure Code and the Judicial System Act, concerning criminal investigations against top magistrates of Bulgaria, 9 December 2019; CDL-AD(2020)035, Urgent Interim Opinion on the draft new Constitution of Bulgaria, 11 December 2020.

in the prosecutorial pyramid and of his considerable influence within the Supreme Judicial Council (“the SJC”), the Venice Commission insisted on improving the accountability mechanisms in relation to the PG, including in the disciplinary and criminal fields.

9. The lack of appropriate mechanisms of accountability of the PG was put by the Venice Commission in a larger context of significant and broadly defined powers of the prosecution service outside the criminal sphere. Under the Constitution, the prosecution service has powers outside the criminal justice system. In the previous opinions, the Venice Commission criticised such broad powers of “general supervision of legality”. This is a loosely defined power to intervene in the name of the State in administrative (non-criminal) cases and even in private disputes, to conduct checks and to issue binding orders even where there is no case to which to answer under the Criminal Code. In that regard the Venice Commission recommended that the functions and powers of the prosecution service outside of the criminal law sphere should be significantly curtailed at the statutory level.⁵

10. In 2017 the Commission recommended revising the procedures which could lead to the removal of the PG from office for misconduct under Article 129 § 3 p. 5 of the Constitution (disciplinary accountability). For the Commission, in order to ensure that possible investigations into the alleged misconduct by the PG could be effective and independent, the relevant body should have its own fact-finding capacity, the prosecutorial members of the SJC should have no blocking power in the process of such investigations, and the majority within the SJC necessary for lodging a motion for the removal of the PG should be reduced.⁶

11. In 2019 the Venice Commission applied the same approach in context of potential criminal investigations against the PG.⁷ The Commission specified in addition that the mechanism of suspension of the PG, which is a pre-condition for an independent investigation directed against the PG, should not be effectively hindered by the prosecutorial members of the SJC.⁸

12. In 2021 the Bulgarian parliament adopted amendments which provided that the PG and his or her deputies were to be investigated by a “Prosecutor for the investigation against the PG” (the “special prosecutor”). However, on 11 May 2021, the Constitutional Court declared this reform unconstitutional. It considered that the Constitution provides for a unified and pyramidal structure of the prosecution service, in which each prosecutor is subordinate to the corresponding senior prosecutor, with the PG being on top of that hierarchy. For the Constitutional Court, the exclusion of all activities of the special prosecutor from the internal institutional control and legality oversight by the PG was inconsistent with that hierarchical structure and the functions of the PG, as enshrined in the Constitution. Furthermore, while the special prosecutor was beyond the internal control system established in the prosecution service, the law did not empower any other authority to oversee the lawfulness of the special investigation. In addition, there were no rules on the replacement of a special prosecutor in case of conflict of interest. The Constitutional Court found therefore that the creation of such a special prosecutor required a constitutional amendment.

13. The current draft Law represents yet another attempt to redress the situation. The purpose of the draft amendments is well described in the Explanatory Report to the draft Law (see CDL-

⁵ See Venice Commission, CDL-AD(2017)018, Opinion on the Judicial System Act of Bulgaria, 9 October 2017, para. 43.

⁶ See Venice Commission, CDL-AD(2017)018, Opinion on the Judicial System Act of Bulgaria, 9 October 2017, paras. 36 and 38.

⁷ See Venice Commission, CDL-AD(2019)031, Opinion on draft amendments to the Criminal Procedure Code and the Judicial System Act, concerning criminal investigations against top magistrates of Bulgaria, 9 December 2019, para. 54.

⁸ See Venice Commission, CDL-AD(2019)031, Opinion on draft amendments to the Criminal Procedure Code and the Judicial System Act, concerning criminal investigations against top magistrates of Bulgaria, 9 December 2019, paras. 27-30.

REF(2022)028). It seeks not only to provide for an effective mechanism for holding the PG accountable, but also to increase the general efficiency of the criminal proceedings by better protecting the rights of the victims of crime. According to the Explanatory Report, the legislative changes have been made over the years to speed up the criminal process, introduce certain guarantees for the victims of crime and ensure their effective participation in the criminal proceedings. However, the situation of the victims is still regulated in a fragmented manner and without sufficient guarantees for the protection of their rights.

III. Analysis

A. Accountability of the Prosecutor General

14. As noted above, ensuring effective mechanisms for the accountability of the Prosecutor General is among the purposes of the current draft Law. As follows from the previous Opinions of the Venice Commission, this issue is complex and is connected with many factors among which are the dominant role of the PG in the prosecutorial system, the influential role of the PG within the SJC, the broad powers of the prosecution service outside the criminal law field, and the legacy of too powerful a prosecution system in the country. The assessment of the current draft Law therefore cannot be made purely from the perspective of criminal procedure law, which is the main focus of the proposed amendments. For the Venice Commission, the criminal law tools in isolation are not capable of providing a comprehensive response to this challenge. The assessment of the accountability of the PG will require a holistic revision of the legal framework governing the activities of the PG, including an analysis of the criminal and disciplinary mechanisms of accountability as well as parliamentary oversight that should be put in place and operate effectively to secure cumulatively the overall efficiency of the system.

1. Amendments regarding the composition of the SJC

15. The Venice Commission recalls that after the constitutional reform of 2015 the SJC was split into two chambers – one for the judges and another for the prosecutors and investigative magistrates. Each chamber includes a quota of lay members who are elected by parliament. The Plenary SJC remained, but it was stripped of most of its powers regarding the appointment, disciplining and removal of judges and prosecutors. These powers were allocated to two distinct chambers of the SJC. However, the Plenary SJC retained, among the other powers, the nomination and dismissal power vis-à-vis the PG. In practice, that arrangement created difficulties in ensuring the effective disciplinary accountability of the PG, given that under Article 33 § 3 of the JSA, the Plenary SJC needs 17 votes out of 25 to file a motion of dismissal of the PG before the President. For the Venice Commission that meant that the prosecutorial members, together with those lay members who had prosecutorial background (and it was an ordinary practice in Bulgaria to elect prosecutors as lay members) could relatively easily block any initiative. The Venice Commission therefore recommended, as one of the measures at the statutory level, to reduce the majority needed for taking such decision by the Plenary.⁹ However, that recommendation has not been followed and it is not included in the current draft Law.

16. Moreover, at the time the law did not define clearly the mechanism of triggering and conducting disciplinary proceedings against the PG. The proposed draft Law remains silent on this point and does not describe the rules on the PG's disciplinary suspension and dismissal either.

17. On the other hand, the draft Law addresses the problem of pervasiveness of the “prosecutorial lobby” in the SJC. In 2019 the Commission was concerned that the composition of

⁹ See Venice Commission, CDL-AD(2017)018, Opinion on the Judicial System Act of Bulgaria, 9 October 2017, para. 38.

the prosecutorial chamber of the SJC included lay members who all were former prosecutors or investigators. That was contrary to the very idea of a “lay member” whose presence in the SJC was supposed to ensure pluralism of perspectives within this body. In fact, in Bulgaria the members of the prosecutorial chamber, even the lay members, represented nearly exclusively the position of the prosecutorial corporation. The Venice Commission therefore recommended to the Bulgarian authorities that the law should be modified in order to ensure that the lay members sitting in the prosecutorial chamber represented other professions.¹⁰ The Commission reiterated that idea in its subsequent Opinion on the Bulgarian draft new Constitution, suggesting that the lay members should not have any present or future hierarchical (or *de facto*) subordination links to the PG and that they must represent other legal professions.¹¹

18. In that context the current draft Law introduces eligibility criteria for the lay members of the SJC elected under the quota of the Parliament. The draft provision in Article 16 of the JSA stipulates that the choice should be made from habilitated legal scholars, lawyers and other jurists of high professional and moral standing *who are not prosecutors or investigators*, according to their professional qualifications and orientation. This is in line with the earlier recommendation of the Venice Commission. For the sake of clarity and coherence, it may be advisable to include the phrase “with at least 15 years of professional experience” in the relevant article of the draft law.

19. Introducing this new ineligibility criteria has been proposed in order to reduce the “prosecutorial lobby” in the SJC and to ensure more guarantees for independence and impartiality of the SJC as well as its pluralistic composition. However, certain interlocutors argued that the draft provision at issue was formulated in a discriminating manner. They argued that the restriction targeted only those magistrates who had prosecutorial background, not the others, and that it was therefore contrary to the principle of equality among the magistrates. The other interlocutors then suggested that the restriction could be extended to remove the judicial magistrates from the list of candidates to ensure the purpose of the relevant constitutional norms.

20. When assessing this draft provision, it is important to keep in mind that the purpose of the lay member quota in the SJC is to avoid corporatism and increase social inclusiveness. Accordingly, extending the restriction further to exclude judicial magistrates would not defy the purpose of the parliamentary quotas for the lay members and would further ensure pluralistic representation in the SJC.

21. That being said, it is the presence of lay members with the prosecutorial background, who left the prosecution system to join the SJC and who would return there upon termination of their mandate, which posed particular problem to the Venice Commission. Due to the hierarchical subordination, prosecutors, unlike judges, are more likely to vote as a block. Therefore, the proposed incompatibility requirement addresses one of the main concerns of the Venice Commission.

2. Parliamentary oversight

22. A new paragraph in Article 138a of the JSA provides for the PG’s annual reporting to parliament on certain aspects of the activities of the Prosecutor’s Office. This draft provision is welcome as it serves as an instrument of democratic accountability¹² and contributes to the

¹⁰ See Venice Commission, CDL-AD(2019)031, Opinion on draft amendments to the Criminal Procedure Code and the Judicial System Act, concerning criminal investigations against top magistrates of Bulgaria, 9 December 2019, para. 27.

¹¹ See Venice Commission, CDL-AD(2020)035, Urgent Interim Opinion on the draft new Constitution of Bulgaria, 11 December 2020, para. 53.

¹² See, for example, Report from European Conference of Prosecutors, Palermo, 5-6 May 2022, Thematic session I – prosecutorial independence, autonomy and accountability: different models, common challenges in protection of human rights, CDL-PI(2022)033, para. 24.

transparency of the actions by the PG ensuring public trust in his/her performance and the service that he leads.

23. However, the regular reporting should not extent to an obligation to report to the Parliament on the details of individual cases¹³ and should not result in the vote of “no confidence” in the PG.¹⁴ The most natural consequence of annual reporting would be parliamentary debate and any ensuing policy decision within the ambit of the Parliament’s prerogatives. In the event when the application of that procedure discloses issues of legal liability of the PG, those matters would have to be examined separately within the other mechanisms ensuring a fair hearing.

3. New mechanism of bringing the PG to criminal responsibility

24. New chapter 31a of the CPC proposes a mechanism for criminal responsibility of the PG. Criminal investigations would be entrusted to a special *ad hoc* prosecutor appointed from a list of judges of the Supreme Court of Cassation (criminal chamber), appellate and regional courts (criminal divisions) (draft Article 441a § 2 of the CPC). The list of candidates would be approved beforehand by the General Assembly of the Criminal Chamber of the Supreme Court of Cassation. When there is a “legal reason” to start the investigation, the *ad hoc* prosecutor would be appointed from the list on the principle of random allocation (draft Article 441a §§ 1 and 2 of the CPC). The formal appointment of the designated candidate would be made by the prosecutorial chamber of the SJC. The term of office of the *ad hoc* prosecutor would not exceed two years, unless he/she expressly consents to the prolongation of the term.

25. Some interlocutors expressed doubts as to the constitutionality of this *ad hoc* prosecutor model, in view of the Constitutional Court’s decision of 11 May 2021 which pointed to several constitutional constraints on the previous special prosecutor model (see paragraph 12 above). Other interlocutors argued that the new *ad hoc* prosecutor model had taken into account the constitutional limits as interpreted by the Constitutional Court and the model was therefore constitutional.

26. Indeed, in its 2021 judgment the Constitutional Court referred to such principles as holistic prosecutorial supervision, hierarchy and coherency in prosecutorial subordination. This led the Constitutional Court to impose quite narrow constitutional limits to possible attempts to create an independent mechanism of accountability of the PG. It decided that the special prosecutor, despite the formal name, in fact was an official with exceptional status placed entirely outside of the prosecutorial pyramid, which was unconstitutional.

27. Naturally, it will be for the Constitutional Court of Bulgaria to determine the constitutionality of the new *ad hoc* prosecutor model, if the draft Law is adopted in its current form. A constitutional amendment (which might affect Articles 126-130a of the Constitution), allowing for the creation of a mechanism of independent prosecution which is not a part of the general prosecution system or a comparable mechanism would be the “cleanest” solution. However, the constitutional amendment is a much more complex procedure, even if a solution allowing an ordinary parliament to adopt the amendment is retained. In addition, if a solution is such as to involve a Grand National Assembly, it would be almost unworkable since it requires the parliament to dissolve itself.

¹³ See Venice Commission, CDL-AD(2013)006, Opinion on the Draft amendments to the Law on the Public Prosecution of Serbia, para. 25.

¹⁴ See Venice Commission, CDL-AD(2017)018, Opinion on the Judicial System Act of Bulgaria, para. 28. See also CDL-AD(2013)025, Joint Opinion on the Draft Law on the Public Prosecutor’s Office of Ukraine, para. 125; CDL-AD(2017)028, Poland - Opinion on the Act on the Public Prosecutor’s office, para. 37.

28. The Venice Commission is nonetheless of the view that the model proposed by the draft Law, with some necessary adjustments, could be possibly read as being consistent with the constitutional limits defined in the May 2021 judgment of the Constitutional Court, and is capable of aligning the Bulgarian system to a considerable extent with the requirements of the European Convention on Human Rights, as formulated by the European Court on Human Rights in its landmark judgments of *Kolevi* and *S. Z. v. Bulgaria*.¹⁵

a. The method of appointment/replacements of the *ad hoc* prosecutor

29. The proposed model tries to ensure the independence and impartiality of the *ad hoc* prosecutor through the formation of a list of candidates which would be composed of the judicial magistrates of higher rank (judge of the Supreme Court of Cassation of the Criminal Chamber or the rank of judge of the Supreme Court of Cassation from the Criminal Divisions of the appellate courts and regional courts) approved by the General Assembly of the Criminal Chamber of the Supreme Court of Cassation if they possess “appropriate professional qualities” (draft Article 112 § 6 of the JSA).

30. The selection of the *ad hoc* prosecutor from a pool of high-rank criminal judges is a workable solution, even though certain misgivings may arise as to whether a judge would be well suited for performing a prosecutorial function. Moreover, the current provision seems to allocate to the Supreme Court of Cassation a substantial scope of discretion in compiling the list with a risk of arbitrariness. For these reasons the eligibility criteria for the *ad hoc* prosecutor would need to be specified in more detail.

31. The proposed mechanism does not involve the consent of the candidate as a condition of his/her inclusion into the list of candidates and appointment to the position of *ad hoc* prosecutor. Under the draft Law the judges do not have to volunteer to be on the list as their inclusion is mandatory. The subsequent random choice for the appointment is also made without the candidate’s consent even though the function of *ad hoc* prosecution is not expressly mentioned among the list of duties of the high judicial magistrates to justify a judge’s mandatory appointment. Instead, consent acquires its decisive importance later, when it is required for the prolongation of *ad hoc* prosecutor’s function beyond the maximum statutory term of two years (draft Article 411a § 6 of the CPC). However, the lack of prior consent to the inclusion in the list and the appointment may bring about an issue of unwillingness of the selected candidate to act in a new role and challenge his/her appointment. These risks need to be expressly addressed in the draft Law: judges should consent to their inclusion in the list and assuming the function of *ad hoc* prosecutor if selected.

32. Draft Article 411a § 3 of the CPC provides that after the random selection of the candidate, the President of the Criminal Chamber of the Supreme Court of Cassation shall immediately notify the prosecutorial chamber of the SJC which shall make a formal appointment. The power of the chamber to make that appointment stems from Article 130a § 5 of the Constitution. The chamber does not seem to be given any discretion in deciding on the appointment. Nevertheless, given the considerable influence of the PG on the members of the SJC as discussed earlier, it cannot be excluded that even with that limited role, the chamber may be inclined to delay the procedure or completely block the relevant decision, especially if the structural issues in the composition of the SJC are not addressed in parallel.

33. Moreover the risk increases that the criminal or disciplinary instruments could be improperly used against the *ad hoc* prosecutor himself/herself, especially if the structural issues in the composition of the SJC are not addressed in parallel. In any event, whether these instruments may be used in good or bad faith, the draft Law needs to clarify the procedural consequences once the *ad hoc* prosecutor has been suspended from office or he/she has been removed

¹⁵ See ECtHR, *Kolevi v. Bulgaria*, cited above, and *S. Z. v. Bulgaria*, no. 29263/12, 3 March 2015.

following disciplinary sanction or in the event of relatively long “temporary inability”. The draft law already clarifies the procedural consequences where the *ad hoc* prosecutor is withdrawn or recused him/herself from the proceedings for conflict of interests or where he is permanently unable to carry out his functions. It might also be helpful to provide expressly that during the term as a seconded prosecutor, the judge retains the status of a judge and all the privileges, rights and emoluments of a judge.

b. Position of the *ad hoc* prosecutor vis-à-vis the prosecutorial hierarchy

34. The draft Law further determines that the *ad hoc* prosecutor would hold the position of prosecutor in the Supreme Prosecutor’s Office of Cassation (see, for example, draft Article 30 § 5 (20) of the JSA). This is a high position in the prosecutorial pyramid and that solution tries to resolve the tension between the principle of independent investigation and the imperative of hierarchical supervision and prosecutorial subordination. Nevertheless, there remains uncertainty as regards the amount of hierarchical and administrative control that can be exercised over the *ad hoc* prosecutor within the prosecutorial service. During the country visit, the delegation was informed that the drafters initially considered introducing a second *ad hoc* prosecutor (also from the judiciary) who would supervise the first one, but that idea had been dropped in the final version of the draft Law.

35. As an alternative, the draft Law seems to put an emphasis on the availability of judicial review of decisions taken by the *ad hoc* prosecutor. This might relax the risk of the latter being unduly influenced by the prosecutorial system led by the PG. Notably, draft Article 411d of the CPC provides that the decisions of the *ad hoc* prosecutor would be open to appeal before the Sofia City Court. It is relevant to note that that under Article 143 § 1 of the JSA, all instruments and actions of a prosecutor may be appealed before the immediate superior prosecutor, *unless they are subject to judicial review*. However, it is unclear what is the list of the decisions that the judicial review indicated in the draft Article 411d of the CPC would cover and whether that review would effectively reduce prosecutorial control.

36. There remains a risk that this solution may be challenged before the Constitutional Court. To mitigate this risk the legislator might try to inscribe the *ad hoc* prosecutor more affirmatively into the prosecutorial hierarchy by stipulating clearly that the *ad hoc* prosecutor is under the hierarchical subordination of higher-ranking prosecutors insofar as general instructions are concerned. As to the instructions related to the conduct of specific cases, or those new general instructions which may have a direct bearing on the specific investigation against the PG, any such instructions must be confirmed by the judicial chamber of the SJC or another judicial body not dependent on the PG.

c. Triggering criminal investigations by the *ad hoc* prosecutor

37. Under the draft Law (Article 411a (1) of the CPC and Article 173a of the JSA) it is not entirely clear who should submit the request to the Supreme Court of Cassation for triggering the procedure involving an *ad hoc* prosecutor. It would appear that any notification may trigger the *ad hoc* procedure and the designated *ad hoc* prosecutor will be required to deal with all the incoming complaints, no matter how insignificant or frivolous they are. This might be a waste of resources and it might be useful to have a reasonable sifting mechanism for disposing of clearly unfounded complaints. Evidently, such sifting mechanism should not involve the prosecutorial chamber in its current formation, in order to exclude the PG’s interference with the process.

38. In accordance with draft Article 411c of the CPC, the investigating authorities in cases of crimes committed by the Prosecutor General shall be the officials of the Ministry of the Interior appointed to the position of “investigating police officer” and determined by order of the Minister of the Interior, and the employees of the Customs Agency appointed to the position of “investigating customs inspector” and determined by order of the Minister of Finance on the

proposal of the Director of the Customs Agency. The Explanatory Report to the draft Law argues that these officers have adequate competence to investigate crimes without being directly subordinate to the PG which provides a guarantee of the independence and impartiality of the special investigation. During the country visit, the suitability of such arrangement did not raise particular concerns among the interlocutors. It is noticeable in this context that the draft Law does not provide for any participation of the *ad hoc* prosecutor in the selection of the investigators. On the other hand, the absence of any role of the *ad hoc* prosecutor in establishing his or her working team might be compensated by his or her significant powers in leading and supervising the investigation, which include the right to remove the investigator if the latter has committed a violation of the law or cannot ensure the proper conduct of the investigation (Article 196 § 1 of the CPC).

B. Other changes in the criminal procedure

1. Judicial review of the refusals to open an investigation

39. The draft Law provides for a procedure for judicial review of decisions not to open criminal investigation on serious crimes (draft Article 213 § 3 of the CPC). This question has been discussed in Bulgaria for years, and in this connection the Venice Commission has previously suggested that judicial appeal against refusals to investigate was one of the possible safeguards against the alleged blockage of such investigation by the PG.¹⁶ Eventually, these discussions materialised in the draft Law at hand.

40. The Explanatory Report to the draft Law recognises that the existence of judicial review is an important guarantee for the effective protection of victims of crime. However, two main problems arise: that such judicial review might undermine the constitutional role of the prosecutor as the “master of the pre-trial proceedings” and that the national courts could be overwhelmed with appeals. On the first point, the Explanatory Report argues that the proposed judicial review is not incompatible with the Constitution because it does not replace the constitutional powers of the criminal prosecution. Indeed, similar forms of judicial control over decisions not to start an investigation exist in many other European legal systems without undermining the autonomous institutional position of the public prosecution service.

41. On the second point, the Explanatory Report provides statistics to show that introducing judicial review in respect of allegations concerning *serious crimes* only would not impose an excessive burden on the courts. Moreover, certain interlocutors argued that the courts would not be overwhelmed even if the judicial review had been extended to *all types of criminal cases*. The current solution in the draft Law therefore seems to take a prudent step forward and find a compromise between the need to introduce judicial review for such category of decisions and the capacities of the courts. Previously, the Venice Commission examined these practical challenges and suggested focusing on serious crimes,¹⁷ which is to be understood as a minimum desirable scope, but the domestic authorities are undoubtedly in a better position to make a realistic assessment and enlarge, if possible, the class of cases in which that judicial remedy could apply – for example, by including in this list less serious cases which, by their nature, may still require judicial supervision at this very initial stage of proceedings (for example, cases involving the abuse of the official position by law enforcement officers and alike).

¹⁶ See Venice Commission, CDL-AD(2019)031, Opinion on draft amendments to the Criminal Procedure Code and the Judicial System Act, concerning criminal investigations against top magistrates of Bulgaria, 9 December 2019, para. 51.

¹⁷ See Venice Commission, CDL-AD(2019)031, Opinion on draft amendments to the Criminal Procedure Code and the Judicial System Act, concerning criminal investigations against top magistrates of Bulgaria, 9 December 2019, para. 52.

42. Another option discussed during the meetings would be to extend this remedy to all cases involving potential human rights issues. However, this may be not a very precise criterion to define when the judicial review is accessible and when it is not. If the list of crimes covered by this mechanism of judicial review is to be expanded, a more precise or measurable criterion should be chosen, in order to avoid the risk of divergent application of law.

43. It is also proposed to extend the right to challenge a refusal to investigate to persons who reported a crime, but who were not necessarily the victims of the crime (Article 75 of the CPC). The rationale behind it is that there may be a serious public interest to investigate cases which are either victimless or where the victim cannot be easily defined. This is a positive element, but this right should be qualified, possibly by requiring the applicant to meet some threshold for pursuing such a review. Moreover, for an effective judicial review the party which is affected or which has triggered the proceedings should have access to the file. The right to have access to file is provided in Article 227 § 2 of the CPC (this seems to include cases which are suspended or terminated). However, Article 227 § 2 will not apply in the event of challenging a refusal to open a criminal investigation. Accordingly, the draft Law could be improved by providing that the applicant has the right of access not only to the text of the decision (see draft Article 213 § 2 of the CPC), but also to the file which was the basis for the impugned decision.

44. The draft Law then refers to “binding instructions on the application of the law” which the judge may give to the prosecution (see draft Article 213 § 5 of the CPC). These “binding instructions” are also mentioned in the context of the judicial review of the refusal to open criminal investigation against the PG (draft Article 411b § 4 of the CPC). Likewise, “binding instructions on the application of the law” may be issued by a court in the decisions on the so-called acceleration requests (see the amendment proposed to Article 369 § 2 of the CPC) which are supposed to tackle the problem of excessive length of proceedings.

45. These provisions are called to ensure that the judicial review is a meaningful tool in practice. There is a risk, however, that the power of giving binding instructions may encourage judges to take a more pro-active attitude, which, with the lapse of time, may frustrate the neutral role of the judiciary. Therefore, the CPC should set a reasonable threshold for quashing the impugned decisions of the prosecution. The positive practical experience gained by the Bulgarian judges in the recent years on giving binding instructions on the application of the law when quashing decisions to terminate criminal investigation under Article 243 CPC could help them avoid undue judicial activism.

46. At the same time this novelty might face practical challenges as regards the compliance of the prosecutors with the binding court orders. It is not certain that the prosecutors, who traditionally take the dominant role in the Bulgarian law enforcement machinery, would easily follow the court instructions. The question arises therefore of how to ensure effective execution of such court decisions. A possible solution to this problem could be to enhance disciplinary control as well as administrative and criminal remedies against the non-compliant prosecutor and empower the judge concerned to instigate the relevant procedures.

2. Enhancing the prosecutors’ autonomy

47. The draft Law introduces additional safeguards for the internal autonomy of the prosecutors. It is proposed to amend Article 143 §§ 3-7 of the JSA by providing that where a senior prosecutor disagrees with the decision of a more junior prosecutor, he or she, rather than giving an instruction, may take the necessary action directly, instead of the junior prosecutor. This is justified by the need to respect the “inner conviction” of the junior prosecutor concerned. This system is also more transparent, since it reduces the frequency of informal instructions by a senior prosecutor which are not put on record. As the Explanatory Report to the draft Law points out, the existing situation creates preconditions for a widespread but unlawful practice of oral instructions and orders from higher ranking prosecutors. The Report also provides that due

execution of instructions by a lower ranking prosecutor requires good understanding of and genuine agreement with those instructions. Otherwise, the lower prosecutor's role could be reduced to a mechanical execution of actions which he or she does not understand or does not agree with, which is not optimal.

48. That being said, there are also arguments against this proposal: giving this new power to the higher prosecutors may have a chilling effect on them, since it risks increasing their workload, and the higher prosecutors may be inclined to tolerate questionable decisions of the lower prosecutors. This risk is even more tangible for offences for which no judicial review of refusals to start investigation is foreseen. Therefore, while the Venice Commission does not object to the introduction of this new power which may be helpful to combat the practice of oral instructions, it considers that the practical effects of this new provision should be monitored.

49. Article 144 of the Judiciary System Act which sets out the functions of the prosecutor is amended to align the text of the Act with that of the Constitution. This change is also to be welcomed.

3. Disclosure of the pre-trial material

50. Article 198 of the CPC will be amended to include a prohibition on disclosure of materials gathered using means of secret surveillance. Permitted exceptions to the prohibition would be the "national security" and "purposes of the criminal proceedings" that would allow dissemination of this information despite considerations of the presumption of innocence. The Explanatory Report to the draft Law claims that these amendments would follow the Directive (EC) 2016/343 of the European Parliament and of the Council of 09 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings.

51. As it is admitted in the Explanatory Report and discussed during the country visit, the practice of disclosing pre-trial materials by the prosecutors has been selective and it has raised concerns. In that context a question arises if the broad exceptions from the prohibition of disseminating secretly obtained data ("national security" and "purposes of criminal proceedings") provide the prosecutor with wide discretion, which in fact does not effectively remove the risk of abuse identified by the drafters. This is especially so, when dissemination of sensitive information would not be subject to pre-emptive approval by the court or/and by the independent data protection authority. The Venice Commission therefore recommends introducing an element of independent mechanism which may verify whether there exist serious reasons justifying the disclosure of the materials obtained as a result of secret surveillance, and the extent of such disclosure (to the parties in the proceedings outside situations in which they have access to the file, to other State agencies, to the general public, etc.). These matters should not remain within the discretion of the prosecuting authorities. At the same time, it is positive that the refusal of the prosecution to give media access to certain procedural decisions is subject to judicial review.

52. The draft Law must also regulate situations where the prosecution may not wish to disclose the information to the advantage of the defendant, obtained through secret surveillance, if such situations are possible under domestic law. In such cases the materials should either be disclosed to the defence or, if their disclosure jeopardises some vital public interest (for example, the identity of an informant), the prosecution should be terminated.

4. Other amendments

53. New Article 243a of the CPC introduces time-limits and grounds for reopening a criminal investigation. This draft article addresses the existing bad practice of terminating and reopening

cases in the absence of new evidence or circumstances.¹⁸ This provision aims at ensuring the legal certainty and stability as well as the rights of the accused. The PG is not bound by that time limit where there is newly discovered essential evidence, where earlier evidence is shown to be false, or where the ECtHR has intervened.

54. Amendments to Articles 250 to 252 of the CPC are proposed to give more practical effect to the right of private prosecution by a victim of the crime. The aim is to recognise that a private prosecutor is not in the same position as a public prosecutor and to make the necessary adaptations to the law to allow such prosecutions to take place. Articles 248 and 269 of the CPC are supplemented with new paragraphs to create more possibilities for “splitting” criminal cases when they involve more than one defendant. This may help ensuring the right to fair trial within a reasonable time and avoid impunity for serious offences due to prescription.

55. The Venice Commission will not provide detailed comments on other amendments to CPC expanding the procedural rights for victims of the crime and those who report the crimes. In principle, improvements in the procedural position of the victims or interested parties (like those who suffered the damage as a result of the crime) are generally welcome, provided that they do not interfere with the rights of the criminal defendant to fair trial.

IV. Conclusion

56. On 27 July 2022 the Venice Commission was requested by the Minister of Justice of Bulgaria to assess the draft amendments to the Criminal Procedure Code and the Judicial System Act. The Commission has focused on the amendments concerning the mechanism of criminal liability of the Prosecutor General. These amendments deal with the issues identified by the European Court of Human Rights in the case of *Kolevi v. Bulgaria*.

57. The Venice Commission considers that the adoption of this draft Law, with the improvements discussed in the present Opinion, could enhance the accountability of the Prosecutor General and make other important contributions to the reform of the Bulgarian criminal justice system. The Explanatory Report is evidence that, generally, the proposals made in the draft Law have been carefully considered.

58. The Venice Commission, however, believes that the goal of improving the accountability of the Prosecutor General cannot be achieved by changing the rules on criminal investigations only. A more holistic approach, involving the revision of the institutional design of the Supreme Judicial Council and its prosecutorial chamber, and circumscribing the functions of the prosecution service outside of the criminal law sphere, may be necessary to achieve this goal. The Venice Commission therefore wishes to reiterate at the outset its earlier recommendations, namely that the majority needed for taking decision on removal of the Prosecutor General by the Plenary Supreme Judicial Council for disciplinary breaches should be reduced and the disciplinary procedure in respect of the Prosecutor General should be elaborated in the legislation in more detail.

59. As to the proposed draft Law, the Venice Commission makes the following main recommendations:

- the eligibility criteria for the *ad hoc* prosecutor should be specified in more detail;
- the candidates to the position of the *ad hoc* prosecutor should consent to their inclusion in the list and their appointment;
- the draft Law should regulate situations and procedural consequences where the *ad hoc* prosecutor may be suspended or removed;
- the scope of judicial review of the procedural activities of the *ad hoc* prosecutor should be specified in greater detail;

¹⁸ See ECtHR, *Fileva v. Bulgaria*, no. 3503/06, 3 April 2012, § 44.

- the draft Law should determine the scope of general hierarchical prosecutorial control over the *ad hoc* prosecutor and specify the necessary exceptions and procedural safeguards for the latter;
- a sifting mechanism for disposing of clearly unfounded complaints against the Prosecutor General should be introduced.

60. While discussing these amendments the Bulgarian legislator will face the difficult task of finding a balance between two imperatives: on the one hand, the legislator has to align the Bulgarian system with the requirements of the European Convention on Human Rights, as interpreted by the European Court of Human Rights. On the other hand, it should respect the limits set out in the Bulgarian Constitution, as interpreted by the Constitutional Court of Bulgaria.

61. Finally, as regards other changes to the Criminal Procedure Code, the Venice Commission welcomes giving more procedural rights to the interested party, in particular the right to challenge the decision not to open an investigation in a certain category of criminal cases. This right should be accompanied by the possibility to have full access to the materials of the preliminary inquiry which led to the contested decision.

62. The Venice Commission remains at the disposal of the Bulgarian authorities for further assistance in this matter.

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