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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

BULGARIA

EXPLANATORY REPORT TO THE DRAFT LAW ON AMENDMENTS AND SUPPLEMENTS TO THE CRIMINAL PROCEDURE CODE AND OTHER LEGISLATION

Draft!

MOTIVES
TO THE DRAFT LAW AMENDING AND SUPPLEMENTING
THE CRIMINAL PROCEDURE CODE

1. **The problem of the efficiency of criminal proceedings**

The number of judgments of the European Court of Human Rights (hereinafter ECHR and the Court) against Bulgaria, which made findings of ineffective investigations, is already over 70 by 2022. The issues they reveal are grouped into two broad categories: *Velikova v. Bulgaria* (death or violence by public officials and related criminal proceedings) and *S.Z./Kolevi v. Bulgaria* (death or violence between private individuals and related criminal proceedings). These are judgments in which the ECHR has found a violation of the most important rights under the Convention on Human Rights and Fundamental Freedoms (hereinafter "the Convention") – the right to life under Article 2 and the prohibition of torture and inhuman treatment under Article 3. The applicants in these cases are victims of crime – relatives of murder victims, minor girls or women who have been victims of rape, or victims of serious violations of their physical integrity. In these cases, for various reasons related to the legal framework and its implementation in practice, the State, through the relevant authorities, has failed to fulfil its fundamental duty – to prevent and investigate such violations effectively and to impose just penalties, thereby guaranteeing the most fundamental rights recognised as crucial in a modern democratic state and embodied, in addition to the Convention and other international treaties to which the Republic of Bulgaria is a party, in the Bulgarian Constitution.

In particular, the ECHR has found that the perpetrators of the criminal offence were either not held criminally responsible at all or, although held criminally responsible, received a minimum penalty or went unpunished. In the judgment in *S.Z. v. Bulgaria,* delivered in 2015, the Court found a "*systemic problem*" with the effectiveness of criminal proceedings in Bulgaria. The judgment in *Kolevi v. Bulgaria* reveals a specific deficiency of the criminal process in Bulgaria, namely the practical impossibility of prosecuting the Prosecutor General (Glavnia prokuror) and senior prosecutors close to him/her, which stems from the special place of the Prosecutor General in the judiciary. This judgment was delivered in 2009 and established significant deficiencies in the investigation of the murder of a high-ranking prosecutor. The ECHR explicitly states that these deficiencies are due to the lack of guarantees in the Bulgarian legal system for an independent investigation against the Prosecutor General, suspected by the victim's[1] relatives of having been involved in the murder, and other high-ranking prosecutors. In enforcement of the judgments in the *Velikova* group, which includes judgments for death and violence caused by public officials (police officers and officers in places of imprisonment), and on the ineffective investigation of such acts, the Committee of Ministers recommends, in addition to the above recommendations to ensure the effectiveness of criminal proceedings, the criminalisation of torture.

[1] According to the ECHR, there was solid evidence of a conflict between the Prosecutor General and the victim, there was evidence that illegal actions against the victim and his family may have been approved by the Prosecutor General and senior prosecutors close to him, and that, given the materials in the case, investigators "*should have explored the allegation that the Chief Public Prosecutor and other high-ranking prosecutors and officials might have been implicated in Mr Kolev's murder, even if the allegation was eventually to prove unfounded*"

The issue of victims of crime is also highly topical on the legal and institutional agenda in the European Union (EU). The view that victims are the first "gatekeepers" who trigger the mechanisms of criminal justice is well known. According to the EU Agency for Fundamental Rights, a major advocate of a human rights-based approach to victims, since the 1970s their rights have been increasingly recognised both in legislation and at policy level, and guaranteed by national and international legislation, which recognises them as "persons n need of special support". According to EU data, every year, nearly 15 % of European citizens, or around 75 million people across the Union, are victims of crime.

More generally, there is a certain imbalance in the attitude of the Bulgarian legislator towards guaranteeing the rights of the accused person, the defendant and the convicted as compared to the victim of crime. The long-standing reforms in the field of criminal process, many of which are also the result of the findings of the ECHR case-law, have led to the introduction of a number of guarantees for the respect of the rights of accused and defendants. Significant reforms in criminal enforcement law in recent years have, in turn, introduced mechanisms to protect the fundamental rights of detainees in custody and especially of prisoners.

With regard to victims of crime, Bulgarian legal theory has long recognized the need for reforms, noting that "the dynamic development of victim protection policies in modern developed countries and international instruments are the basis on which the system in Bulgaria must be reformed[2]." Indeed, in legislative terms – the place of the victim in the Bulgarian criminal process is undisputedly confirmed with the entry into force of the current Penal Procedure Code (NPK), and the provisions of Interpretative Decision No 2/2002 of the General Assembly of the Criminal Chambers (OSNK) of the Supreme Court of Cassation (VKS) that the Penal Procedure Code does not recognise the procedural capacity of the victim, are definitively declared to be abolished. Legislative changes have also been made over the years to speed up the criminal process, introduce certain guarantees for victims of crime and ensure their effective participation in criminal proceedings. However, the situation of victims is still regulated in a fragmented manner and without sufficient guarantees for the protection of their rights. The measures introduced are proving to be extremely insufficient, particularly with regard to victims of crimes against the person, who in a number of cases continue not to receive the necessary and even minimum level of protection of their rights by the State. It is indicative that the ECHR continues to communicate new applications with a similar subject matter to the Bulgarian State and to deliver judgments[3] with worrying findings regarding the effectiveness of criminal investigations of crimes related to the most fundamental rights under the Convention.

2. The specific problem of the lack of a mechanism to engage the criminal responsibility of the Prosecutor General

The general issues of the reform of the criminal process and the specific problems with the lack of a mechanism to engage the responsibility of the Prosecutor General are inextricably linked. As early as 2009, the judgment in *Kolevi v Bulgaria* explicitly linked the general issue of the lack of judicial review of certain decisions of the prosecutor at the pre-trial stage with the

[2] Stankov, B. (1999) Crime in Bulgaria and its victims /"Престъпността в България и нейните жертви"/. Sofia: Paralax, p. 74

[3] See cases Stoyanova v. Bulgaria No 56070/18 of 14.06.2022 and Y.P. v. Bulgaria No 23614/20 of 17.05.2022.

specific issue of the influence of the Prosecutor General over other prosecutors and the related practical impossibility of investigating and removing him/her from office[4].

In this sense, the efficiency of the criminal process and the creation of a mechanism to hold the Prosecutor General accountable are two interrelated measures to overcome the systemic and structural problems of criminal investigation in Bulgaria, which is why the legislative reform proposed should logically be uniform. The proposed mechanism, although seemingly complex and atypical, seeks to meet the requirements of the Bulgarian Constitution as interpreted by the Constitutional Court (see Decision No 11 of 23 July 2020 of the Constitutional Court in constitutional case No 15/2019 and Judgment No 7 of 11 May 2021 in constitutional case No 4 of 2021). In this sense, the proposed provisions are perhaps the only possible compromise between the requirements of supranational bodies and the Bulgarian constitutional framework. This draft is also based on the principle that the Bulgarian Constitution does not allow for the existence of an uncontrolled body and aims to establish a mechanism for the functioning of the three branches of government, which will guarantee to the highest degree human rights, the rule of law and the functioning of a democratic, rule of law and social state.

3. Aim of the reform

The proposed Draft law amending and supplementing the Penal Procedure Code (ZID of the NPK) aims to increase the efficiency of criminal proceedings, to better protect the rights of victims of crime and to regulate an effective mechanism for holding the Prosecutor General accountable.

The draft law also responds to the following specific recommendations of various European partners, which have been taken into account in its preparation:

1. The recommendations under the Mechanism for Cooperation and Verification of the European Union are to introduce an effective and consistent with the current constitutional framework model, guaranteeing an independent investigation against the Prosecutor General and his/her deputies. The lack of such a possibility is an issue raised consistently in the 2019 and 2020 reports of the European Commission[5], which refers explicitly to the ECHR's judgment in the *Kolevi* case[6], which identified for the first time the problem of the lack of possibility of an independent investigation. In order for an investigation against the Prosecutor General to meet the requirements of the Strasbourg Court's jurisprudence, those conducting and monitoring it must enjoy institutional, hierarchical and practical (including personal) independence from the Prosecutor General. These requirements should apply from the early stages of the investigation, including the examination stage.

2. In 2017, the European Commission's Structural Reform Support Service prepared an independent technical analysis of the structural and functional model of the Prosecutor's Office

[4] See Kolevi v. Bulgaria §207 "This situation was apparently the result of a combination of factors including the impossibility of bringing charges against the Chief Public Prosecutor (Glavnia prokuror), the authoritarian style of Mr F. as Chief Public Prosecutor, the apparently unlawful working methods he resorted to and also institutional deficiencies. In particular, the prosecutors' exclusive power to bring criminal charges against offenders, combined with the Chief Public Prosecutor's full control over each and every decision issued by a prosecutor or an investigator and the fact that the Chief Public Prosecutor can only be removed from office by decision of the Supreme Judicial Council, some of whose members are his subordinates, is an institutional arrangement that has been repeatedly criticised in Bulgaria as failing to secure sufficient accountability"

[5] Report on Progress in Bulgaria 2019 [COM(2019) 498], p. 6

[6] Judgment of 5 February 2010, ECHR, Kolevi v. Bulgaria, paras 121-127, 129, 135 and 136.

and its independence and provided concrete recommendations in relation to the reform of the Prosecutor's Office[7], referring to "a transparent procedure in case a Prosecutor General is in the future accused of committing a serious criminal offence during his/her office".

3. The European Commission for Democracy through Law ("Venice Commission", VC)[8], the Council of Europe's advisory body on constitutional matters, adopted in October 2017 an opinion addressing the balance between the independence and accountability of the Bulgarian judicial system. The Venice Commission found that the Prosecutor General is "essentially immune from criminal prosecution" given the current features of the institutional framework that allow him to exert influence over the Supreme Judicial Council (SJC). According to a 2019 VC opinion, a solution within the Bulgarian constitutional model is only possible through an interpretation of the Constitution that leaves room for some form of ad hoc mechanism applicable in those rare and marginal cases where there will be a need to hold the Prosecutor General or someone closely associated with the Prosecutor General criminally liable. Withdrawing this category of cases from the Prosecutor General's jurisdiction does not encroach upon the essence of his/her constitutional mandate.

4. There are also a number of recommendations and interim resolutions of the Committee of Ministers of the Council of Europe[9], made in the framework of the ongoing process of monitoring the implementation of the judgment in the *Kolevi* case for over 10 years. The Interim Resolution (CM/ResDH(2019)367) adopted by the Committee in December 2019 and decisions of September 2020, March, November-December 2021 and June 2022 repeatedly insist on the need to introduce judicial review of refusals to initiate pre-trial proceedings and request information from the authorities on other execution measures taken[10]. With regard to the judgment in the *Kolevi* case, the Committee has examined June and December 2019 draft laws and the 2020 draft of a new Constitution and has pointed out various shortcomings of the mechanisms proposed until then. The Committee has consistently called on the authorities to adopt legislative or, in the event that insurmountable constitutional obstacles are identified, constitutional amendments that fully respond to Interim Resolution CM/ResDH(2019)367 and subsequent decisions, as well as

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[7] Independent Analysis of the Structural and Functional Model of the Prosecutor's Office of the Republic of Bulgaria https://mjs.bg/home/index/28646b0b-e3bf-4dbc-9338-369ba6a55c11 Page "We believe, for continued public confidence in the PORB, especially in the light of concerns raised by the Kolevi case, that that there needs to be a transparent procedure developed, should any PG in the future be accused in office of acting in a seriously criminal manner. We suggest that, where there is credible evidence of such activity by a PG, an independent and respected senior figure in the CJS should be involved. Our proposal is therefore that a senior and independent judicial figure outside the PORB should have responsibility for supervising an investigation into allegations of serious criminal wrongdoing by a PG"

[8] Opinion of the Venice Commission (CDL-AD(2017)018 adopted in October 2017; Opinion of the Venice Commission (CDL-AD(2019)031-e) on the amendments to the Penal Procedure Code in relation to the investigation of the Prosecutor General adopted on 6-7 December 2019; Opinion of the Venice Commission (CDL-AD(2020)035-e) on the draft new Constitution of 11-12 December 2020.

[9] The body directly tasked with monitoring the execution of ECHR decisions. This body is competent to assess the measures taken by the State to execute the judgments.

[10] The Committee of Ministers' long-standing recommendations or requests to provide an assessment of possible measures concern the following main issues: 1) introducing judicial review of the prosecutor's refusal to initiate criminal proceedings; 2) strengthening judicial review and safeguards with regard to indictments; 3) limiting the return of cases at the pre-trial stage for procedural irregularities, the possibility of splitting a case against multiple defendants at the trial stage, improving the content, examination and amendment of indictments; 4) Providing for the victim to use the means to accelerate the proceedings prior to bringing charges; 5) detailed rules for the resumption of criminal proceedings by the Prosecutor General; 6) measures related to the effective investigation of rape and crimes against children; 7) establishing a mechanism to hold the Prosecutor General accountable; 8) reducing the influence of the Prosecutor General in the new Supreme Judicial Council and its Prosecutorial Chamber which are to be elected in 2022.

measures to reduce the influence of the Prosecutor General in the new Supreme Judicial Council of 2022.

5. At its last meeting on 8-10 June 2022, the Committee of Ministers of the Council of Europe welcomed the authorities' commitment to introduce judicial review on refusals to initiate pre-trial proceedings and once again called for the necessary legislative amendments to be adopted without delay. Regarding investigations against the Prosecutor General and his/her deputies, the Committee noted that recent proposals of April 2022, in the framework of the National Recovery and Resilience Plan[11], appear to be intended to respond, as far as possible within the existing constitutional framework, to Interim Resolution CM/ResDH(2019)367 and subsequent decisions of the Committee, and that they outline several positive solutions, such as the direction of the investigation by a judge appointed as an ad hoc prosecutor, the reduction of the influence of the Prosecutor General in the Supreme Judicial Council, and the involvement of investigators who are not subordinate to the Prosecutor General. However, the Committee noted that the April 2022 programme proposals revealed some limitations, mainly due to constitutional obstacles. The Committee invited the authorities to provide, in due course, information on the specific provisions designed to implement the mechanism outlined in the April 2022 programme proposals, in order to allow for their thorough evaluation and to provide their analysis on whether the above-mentioned mechanism needs to be further refined through a constitutional amendment adopted at a later stage and after appropriate consultations. Finally, the Committee reiterated its call on the authorities to urgently adopt legislative or other appropriate measures to ensure that the influence of the Prosecutor General in the new Supreme Judicial Council, which is to be elected in the coming months of 2022, is reduced.

It should be underlined that the CM has consistently expressed doubts about all the mechanisms proposed so far, which provide for the appointment of a career prosecutor to investigate alleged crimes, regardless of what the safeguards will be for his/her independence and for himself/herself after the conclusion of the criminal process against the Prosecutor General.

[11] In the notes to the previous CM decision of December 2021 the Secretariat, which supports the work of the CM on the execution of the ECHR decisions, commented in detail on the measures envisaged in the initial version of the National Recovery and Resilience Plan of the Republic of Bulgaria ("NRRP") submitted to the European Commission on 15 October 2021, in the context of the implementation of the S.Z/Kolevi Group. It pointed out both the positive aspects of the Plan and some shortcomings of the new programme proposals for general measures, some of which related, for example, to the fact that a career prosecutor was proposed to carry out the investigation. It was pointed out that while the measures in the NRRP of 15 October 2021 were aimed at improving the existing arrangements, they did not fully respond to Interim Resolution CM/ResDHResDH(2019)367 and subsequent decisions of the Committee of Ministers and could only be seen as a first step towards a more sustainable and durable solution. It is of concern to the Secretariat that, despite the Committee of Ministers' guidance, no measures have been proposed to reduce the influence of the Prosecutor General in the new SJC, which is to be elected in 2022. The strong presence of prosecutors in the Plenary of the SJC makes it highly unlikely that this body will ever authorise the suspension of a Prosecutor General, which could render the procedure practically ineffective. It is problematic that the participation of a sufficient number of independent investigators is not guaranteed, and it is questionable whether in practice the new program proposals could adequately address the career and accountability risks of the prosecutor who will investigate the Prosecutor General. With respect to the latter concern, the Secretariat points out that if that prosecutor remains a prosecutor after the investigation is completed, he or she might fear that the SJC Prosecutorial Chamber, dominated by the Prosecutor General, will not protect his or her career development. Although the possibility of a prosecutor becoming a judge is a type of safeguard, this option should take into consideration issues such as: i) the career change may be undesirable for some prosecutors who are randomly selected, which may lead them to be hesitant to investigate the Prosecutor General; ii) if several prosecutors are reassigned to higher courts without competition, this may raise questions about the balance and good governance in the judiciary.

Similar doubts have also been expressed in the reports of the Venice Commission[12], as well as in the independent technical analysis of the structural and functional model of the Prosecutor's Office of the Republic of Bulgaria, where a proposal was made to appoint a person from outside the prosecution system to lead the investigation. In the framework of discussions with representatives of the Department for the Execution of Judgments of the European Court of Human Rights, as well as with national experts, the hypothesis of appointing an investigative magistrate as the lead investigator in cases against the Prosecutor General was also rejected as not meeting the independence requirements, even in the event that, through legislative reforms, the investigation would be placed outside the hierarchical control of the Prosecutor General, on the grounds that such a reform would not remove all risks to independence[13].

Mechanism for holding the Prosecutor General criminally liable

1. Appointment of investigating prosecutor

In order to ensure the conduct of an independent investigation against the Prosecutor General or his/her deputy, the draft law proposes that in cases where there is a legitimate reason under Article 208 of the Penal Procedure Code or in cases under Article 212, paragraph 2 of the Penal Procedure Code for initiating an investigation against the Prosecutor General or his/her deputy, the materials be sent to the Criminal Chamber of the Supreme Court of Cassation.

Upon receipt of the materials at the Supreme Court of Cassation, the case file shall be immediately assigned to a judge, randomly selected from among the judges of the Criminal Chamber of the Supreme Court of Cassation and the judges of the Criminal Divisions of the appellate and regional courts, with the rank of judge of the Supreme Court of Cassation from a list to be approved in advance by the general assembly of the Criminal Chamber of the Supreme Court of Cassation. The random selection will be carried out by means of a software, which will be subject to periodic audit. The proposed legislative solution is in line with the recommendations expressed by a number of international partners that the investigating prosecutor should not originate from the existing institutional structure of the Prosecutor's Office. At the same time, as set out below, it is proposed that he/she be appointed temporarily as a prosecutor in the Supreme Prosecutor's Office of Cassation in order to meet the constitutional requirement that prosecutions be conducted by a prosecutor.

The President of the Criminal Chamber of the Supreme Court of Cassation will be obliged to immediately notify the Prosecutorial Chamber of the Supreme Judicial Council (SJC), which should appoint the judge designated in the above-mentioned manner as a prosecutor in the Supreme Prosecutor's Office for Cassation. This procedure is in accordance with Article 133 of the Constitution of the Republic of Bulgaria (the Constitution), where it is clearly stated that the conditions and procedure for the appointment and dismissal of prosecutors shall be regulated by law, and Article 130a, paragraph 5, item 1 of the Constitution provides that the Prosecutorial Chamber of the SJC shall appoint the prosecutors. Thus, with the amendments and supplements

[12] See para 63 of the VC Opinion of 6-7 December 2019 which, insofar as it discusses the possibility of a prosecutor being appointed as lead in such cases, states that he/she should be either at the end of his/her career or retired.

[13] In September 2020, the Committee of Ministers specified that it should ensure that "*members of the Supreme Judicial Council [professionally] connected with the Prosecutor's Office (or any other possible substitute body in which the Prosecutor General has such influence) and the Prosecutor General do not play a decisive role in the appointment, accountability or career of any prosecutor or investigator, responsible for investigating the Prosecutor General or high-level officials, particularly prosecutors close to him or her, and that the Prosecutor General is excluded from any direct or indirect supervision of such prosecutor or investigator and does not supervise any of his or her activities;*"

to the Judiciary System Act proposed by the draft law, which provide that the Prosecutorial Chamber of the SJC should appoint the judge of the Supreme Court of Cassation, appellate or regional court as the investigating prosecutor against the Prosecutor General or his/her deputy, the proposed procedure fully meets the requirements of the Constitution. Nor is it unconstitutional to propose to appoint the prosecutor of investigation against the Prosecutor General or his/her deputy in a different manner from that for all other prosecutors because it is Article 133 of the Constitution which refers to a statute, i.e. the Judiciary System Act, to provide for the different ways of appointment. In addition, currently, under the Judiciary System Act, some magistrates compete for promotion and others are promoted without competition, as they become administrative heads or deputy administrative heads.

The draft law creates guarantees that every report or complaint against the Prosecutor General or his/her deputy will be investigated objectively and according to the facts found. In the event that, after the first report of a crime, other reports are received or there are other legitimate grounds under Article 208 of the Penal Procedure Code for initiating an investigation against the Prosecutor General or his/her deputy, they will fall to be examined by the already designated and appointed prosecutor investigating the Prosecutor General's or his/her deputy.

The draft law proposes that the prosecutor in charge of the investigation of the Prosecutor General or his/her deputy should lead the pre-trial proceedings and participate at all instances in the judicial proceedings, while the term of his/her functions as prosecutor in the case of pre-trial proceedings may not exceed two years, except with his/her explicit consent. In cases where the proceedings against the Prosecutor General or his/her deputy last longer than two years, the Criminal Chamber of the Supreme Court of Cassation shall designate and the Prosecutorial Chamber of the Supreme Judicial Council shall appoint another prosecutor in the same manner.

The draft law provides that the decree for refusal to initiate pre-trial proceedings may be appealed by the persons concerned within seven days before the Sofia City Court. The Court shall examine the case in a single judge formation in private deliberation and no later than one month after the receipt of the materials shall adjudicate on the reasonableness and legality of the decree for refusal to initiate pre-trial proceedings.

If the decree for refusal is revoked, the Court will return the file to the prosecutor investigating the Prosecutor General or his/her deputy with binding instructions on the application of the law.

It is proposed that the investigating authorities in these cases should be the employees of the Ministry of Interior appointed to the position of "investigating police officer", determined by order of the Minister of Interior, and the employees of the Customs Agency appointed to the position of "investigating customs inspector", determined by order of the Minister of Finance on the proposal of the Director of the Customs Agency. In these cases, the provision of Article 194, paragraph 1, item 2 of the Penal Procedure Code will not be applied. These officers have the authority and accumulated qualifications to investigate crimes without being directly subordinate to the Prosecutor General in the prosecution system, which provides a guarantee of the independence and impartiality of the investigation.

Cases for crimes of a general nature, allegedly committed by the Prosecutor General or his/her deputy, will be under the jurisdiction as a first instance of the Sofia City Court.

As a safeguard against abuse of procedural rights by the prosecutor who can investigate the Prosecutor General or his/her deputy, judicial review over his/her rulings in the pre-trial phase is envisaged, which will be carried out by a judge of the Sofia City Court.

The removal of the Prosecutor General, the reinstatement and the incompatibilities of the prosecutors in the investigation against the Prosecutor General are regulated in accordance with the existing rules for the removal, reinstatement, disqualification and self-recusal of the prosecutors respectively, in order to provide the procedure against the Prosecutor General or his/her deputy with the well-known procedural guarantees against undue interference in the personal and official sphere of high-ranking representatives of the Prosecutor's Office. The Prosecutor General proposed for removal is provided with due right of defence through the possibility to be heard or to submit a written statement, to appeal against the decision of the Plenary of the Supreme Judicial Council, and regulated time limits for removal.

The reference to Article 360 b of the Judiciary System Act in the new provision of Article 411a, paragraph 2 of the Judiciary System Act ensures that the information systems used in the judiciary meet all the quality and security requirements applicable to all public authorities in the Republic of Bulgaria.

2. Measures to limit the Prosecutor General's de facto authority

In line with long-standing recommendations of the Council of Europe's Committee of Ministers and the Venice Commission[14], Article 16 of the Judiciary System Act introduces an explicit requirement for the National Assembly not to elect active prosecutors and investigators as members of the SJC.

The measure is also foreseen in the National Recovery and Resilience Plan and constitutes a safeguard for the effectiveness of the mechanism for holding the Prosecutor General and his/her deputies accountable. The idea of overcoming the existing imbalance in the chambers of the SJC, proposed by the Venice Commission, is in line with the spirit of the Bulgarian Constitution, which provides for internal balance and control mechanisms so that the exercise of public authority is always in the public interest and arbitrariness is not allowed.

By excluding the representatives of the Prosecutor's Office and investigation from the quota of the National Assembly in the SJC, better public representation and participation of lawyers from the non-governmental sector, the legal profession, academia, etc. will be achieved. This will also lead to a fairer management of the judiciary, avoiding the risk of its encapsulation and, above all, reducing the actual influence of the Prosecutor General in the SJC.

Measures for more efficient criminal proceedings

3. Amendments and supplements to Chapter Eight of the Penal Procedure Code – proposal for amendment of Article 75 and creation of a new Article 75a

The amendments to Chapter Eight of the Penal Procedure Code aim at a more complete and precise regulation of the figure of the victim of a crime and at overcoming the fragmentation in the regulation of the figure of the legal person sustaining damages, which should take its rightful place, together with the victim, as a person who has suffered damage from the crime.

Article 75 adds a number of new rights of the victim, regulated in the relevant systematic places in the Code – the right, including by electronic means, to appeal against the prosecutor's refusal to initiate pre-trial proceedings, the right to obtain a translation of the relevant prosecutor's decree, the right to make a request to accelerate the pre-trial proceedings. The provision also reflects the long-standing view in case-law that the victim's explicit request to participate in pre-

[14] Venice Commission, Opinion on the Draft Amendments to the Penal Procedure Code for the Investigation of Senior Magistrates in Bulgaria, § 69.

trial proceedings is a prerequisite for the exercise, and not for the creation, of his/her rights, as the previous formulation stated.

With these amendments and supplements, the legal person sustaining damages (LPD) receives a comprehensive framework. This figure has long been familiar to the Bulgarian criminal procedure and positively assessed by the legal doctrine as even exceeding the standards of the EU legal framework on victims of crime – natural persons[15]. In this sense, its explicit definition, the extension of its range of rights with opportunities to participate more actively in pre-trial proceedings, as well as its clearer distinction as a subject of the criminal process is a step inextricably linked to the overall objective of the present draft law to strengthen the role of citizens and legal persons affected by criminal acts as "driver" of the process, acting in cooperation with the competent authorities. In the same way as the victim-natural person and the person who has made a report of a criminal offence, the legal person sustaining damages (LPD) is given the right to information, the right to appeal against acts, which impede the initiation or progress of pre-trial proceedings, and the right to request the acceleration of pre-trial proceedings. With regard to the exercise of the rights of the legal person sustaining damages (LPD), the solution already existing for victims and improved by the present amendments and supplements is adopted, as are the expanding possibilities of e-justice.

4. New rights of the "person who reported the crime"

The person who has made a report of a criminal offence is not in principle a new figure for the Bulgarian criminal procedure (Article 209 of the Penal Procedure Code). Currently, under Article 213 of the Penal Procedure Code, the person is notified of the prosecutor's refusal to initiate pre-trial proceedings and may appeal against it to the higher Prosecutor's Office. The present draft law grants more rights to this person. This is justified by the already mentioned main objective of the draft law, which is also enshrined in the National Recovery and Resilience Plan, namely to strengthen the civil participation in pre-trial proceedings as a kind of "engine" of its lawful and effective conduct. It is foreseen that both natural and legal persons, especially non-profit ones, which are currently actively referring various illegal acts to the competent authorities, may be constituted as such a person.

Paragraph 34 of Recommendation 19/2000 of the Committee of Ministers of the Council of Europe on the role of Prosecutor's Office in the criminal justice system recommends the introduction of the possibility of challenging the prosecutor's decision not to indict, which can be achieved either through judicial review of that decision or, alternatively, through the possibility of private prosecution.

According to the explanatory notes to the Recommendation, the right to challenge should belong not only to the victim but also to a wider range of entities, for example the person who gave information about the crime to the authorities[16]. The logic behind this solution is that even where there is no specific person harmed by the crime, there may be a seriously affected public interest and someone should still be able to initiate the external review by a court of the prosecutor's decision not to indict.

[15] See Chinova M. "Pre-trial Proceedings" („Досъдебното производство"), Ciela, 2013, p. 125

[16] "In so doing, the Committee wishes to recognize not only the rights of victims, but also the rights of "interested parties with recognized or identifiable status", for example, a person who has made a report to a judicial authority (subject to certain conditions) or authorized associations, or who is permitted in exceptional circumstances to defend an area of public interest."

The involvement of the person who made the report is limited to the situation in which no victim, respectively his/her heirs, or legal person sustaining damages can be constituted, but material and immaterial damage related to the wider public interest has been caused. There are two other hypotheses in which such persons will be able to make reports of a crime, which will lead to the appointment of an attorney as a special representative. In the first, these are the cases where, although there is a victim of a crime of a general nature, he or she is unable to defend his or her rights and legitimate interests due to a helpless condition or dependence on the perpetrator – hypotheses well developed in criminal process practice due to the analogous cases of participation of the prosecutor in proceedings of a private nature under Articles 48-49 of the Penal Procedure Code. In the second hypothesis, these are the cases where the minor victims do not have parents, guardians, custodians or close relatives and or their interests are contradictory[17]. These clearly delineated hypotheses prevent the possibility of abuse with the constitution of such a person, but at the same time they delineate him/her as an important subject of the proceedings in cases of crimes affecting the prevailing public interest in the economic and public sphere, such as various corruption crimes, in which it is not possible to single out specific victims – individuals or legal persons sustaining damages. However, in order to prevent abuse of this right and violations of fundamental rights of vulnerable persons, it is provided that in the two above-mentioned cases, a special representative – an attorney – is appointed to the victim under Article 101, who may defend his/her rights.

The person who made the report is given rights similar in part to those of the victim-natural person and the legal person sustaining damages. That person shall have the right to appeal to a court against the prosecutor's refusal to initiate pre-trial proceedings, as well as the right to appeal against acts blocking the way of pre-trial proceedings. Amendments to Article 118 explicitly allow this person to participate in the trial as a witness, in view of his/her key role in clarifying the facts of the alleged offence.

5. Judicial review against the decree for refusal to initiate criminal proceedings

The issue of enhanced judicial review in the initial phase of the proceedings and, in particular, the appeal against the decree not to initiate criminal proceedings has been discussed for years. The existence of judicial review is an important guarantee for the effective protection of victims of crime. There are two main objections to the introduction of judicial review. The first is that it would undermine the constitutional role of the prosecutor as "master of the pre-trial proceedings" and the second is that the national court would be overwhelmed with appeals.

At least two arguments can be made against the first objection. First, the Constitution refers to the power of the prosecutor to "direct the investigation and supervise its lawful conduct" and to "bring to justice persons who have committed crimes and maintain the prosecution in criminal cases of a general nature". There is no provision, which provides for the exclusive power of the prosecutor to initiate criminal proceedings. In addition, according to Article 212, paragraph 2 of the Penal Procedure Code, in certain circumstances, criminal proceedings may be initiated by

[17] The second hypothesis is important in view of the implementation of the ECHR judgment in the case of *Nencheva v. Bulgaria* – the case concerns the death of 15 children and young adults between 15.12.1996 and 14.03.1997 in a home for mentally disabled children in the village of Dzhurkovo. At that time, the conditions in the home were very bad. The ECHR found that the authorities, with the exception of the staff at the home, had failed to take prompt, concrete and sufficient measures to prevent the deaths, even though they knew that there was a real risk to the children. The ECHR also found that the investigation was not sufficiently effective and did not meet the requirement of good faith and promptness. The Court found that there had been a violation of Article 2 due to the authorities' failure to protect the children's right to life and to conduct an effective investigation.

the first investigative act, so there is no direct link or dependence between the prosecutor's internal conviction and the initiation. Secondly, in a state governed by the rule of law, judicial review is the most important safeguard of legality and observing citizens' rights. The court operates on the basis of the principles of independence, impartiality, absence of hierarchical control, publicity and adversariality. The introduction of judicial review of legality at the entrance to the criminal process is therefore a further guarantee of the lawful conduct of criminal proceedings. Given the traditional perception of constitutional texts as providing for a complete monopoly of the prosecutor over the prosecutorial function and excluding the possibility for the court to order the prosecutor to initiate an investigation[18], an effective solution appears to be the use of the wording from the judicial review of the termination of criminal proceedings: "return to the prosecutor with binding instructions on the application of the law". In this way, the limits of judicial review will also be in line with Decision No 1 of the Constitutional Court of 1999, which held that judicial review of the prosecutor's termination of cases is not incompatible with the Basic Law because it does not replace the prosecutor's key powers of criminal prosecution.

The second objection is of a more practical nature. According to the annual report of the Prosecutor's Office of the Republic of Bulgaria on the refusals to initiate pre-trial proceedings issued and appealed under the internal review procedure in the period 2019-2021, with refusals issued amounting to just over 120,000 per year, the refusal orders appealed to higher prosecutor's offices range between 7,000 – 8,000 per year. With the introduction of judicial review as a further step to the single level of internal institutional control retained, even with the expected increase in the number of appeals in view of the newly introduced access to court, it cannot reasonably be expected that the court will face an overwhelming increase in its caseload. Judicial review appears to be a supplementary safeguard to build on, not replace, internal reviews within the Prosecutor's Office of the Republic of Bulgaria. Internal review is a mandatory stage prior to an appeal to a court in order to fully implement the existing control mechanisms within the hierarchical structure of the Prosecutor's Office itself to enable the higher Prosecutor's Office to make a further assessment of the need to initiate criminal proceedings based on the arguments of the applicant. The decision is subject to appeal to the court corresponding to the public prosecutor's office, which made the initial refusal.

In order to avoid the possibility of overloading the courts of first instance with cases, the newly created paragraph 3 of Article 213 of the Penal Procedure Code postulates that only refusals to initiate pre-trial proceedings for serious offences under Article 93, item 7 of the Criminal Code (NK) are subject to judicial review.

Arranging for judicial review of the prosecutor's refusal to initiate pre-trial proceedings does not interfere with his/her constitutionally enshrined function. The purpose of the provisions is to provide a new possibility for the court, in cases where there are difficulties in gathering sufficient evidence of a crime, to return the file to the prosecutor and give him/her binding instructions on how to apply the law. As legal doctrine points out, "such a solution would not be contrary to Article 127, item 3 of the Constitution, according to which the Prosecutor's Office shall bring to justice those who have committed crimes. It cannot be denied that the refusal to initiate pre-trial proceedings is an expression of and directly related to this exclusive constitutional

[18] It should be noted that this perception is not based on constitutional text that expressly prohibits broader and more intensive judicial review of prosecutorial decisions. It should also be noted that in other legal systems, the notion of a prosecutorial monopoly on charging and sustaining charges is not perceived as precluding judicial review of the prosecutorial charging function.

power of the Prosecutor's Office to hold persons criminally liable. But no state power in a state governed by the rule of law can act as an absolute power, untouchable by anything or anyone and uncontrolled by any other state power."[19]

The court reviews both the reasonableness and the legality of the refusal decree, similar to the review of a termination decree under Article 243 of the Penal Procedure Code. This procedure is also broadly symmetrical to the procedure for appeals against orders to terminate criminal proceedings, with the exception that, in the event of an appeal against refusal, internal review within the Prosecutor's Office remains, in view of the need for a further prosecutorial review of the need to initiate criminal proceedings.

Short time limits are provided for the judicial review of the refusal decree, as well as the possibility to initiate pre-trial proceedings in case of newly discovered circumstances by the prosecutor or a prosecutor from the higher Prosecutor's Office. The purpose of this solution is to ensure that a refusal order confirmed by a court does not block the way to the initiating of pre-trial proceedings if new circumstances are discovered and without the need to carry out an explicit procedure for the annulment of the judicial act.

6. Revocation of the decree for termination of criminal proceedings by the prosecutor

It is proposed to improve the regime for the revocation of the decree to terminate criminal proceedings by the prosecutor and, in particular, to introduce clear rules for revocation by the Prosecutor General in the cases explicitly listed in the newly created Article 243a of the Penal Procedure Code.

Currently, by virtue of Art. 243, paragraph 10 of the Penal Procedure Code, the Prosecutor General may revoke the decree for termination "in exceptional cases", which is a prerequisite for ambiguities in the application of the provision and uncertainty in the legal position of the accused persons. The present amendments and supplements propose the regulation of explicit grounds for revocation, which are a refined version of the grounds for reopening criminal cases under Article 422 of the Penal Procedure Code: establishment of false evidence, criminal offence on the part of a prosecutor or investigating authority in relation to participation in criminal proceedings, circumstances or evidence unknown to the prosecutor and of material importance for the case, ECHR decision on violation of the Convention for the Protection of Human Rights and Fundamental Freedoms in relation to the relevant proceedings. Thus, the extraordinary intervention of the Prosecutor General in the legal sphere of the accused persons begins to rest on grounds, which are clearly defined, explicit and well-established in case-law, which will provide decisive safeguards for the respect of the rights of persons accused of committing crimes.

The amendments in this part satisfy the standards of the Convention; in particular, the findings in the case of *Fileva v. Bulgaria*, ECHR judgment of 03.07.2012[20]. Similar findings are also contained in the independent analysis of the structural and functional model of the Prosecutor's Office of the Republic of Bulgaria. The analysis states that "the possibility of suspending and reopening cases in the absence of new evidence or circumstances may also lead

[19] See Chinova M. "Pretrial Proceedings" („Досъдебното производство), Ciela, 2013, p. 94

[20] The case concerned a violation of the applicant's right of access to a court in the context of civil proceedings for damages against the Prosecutor's Office on the ground that the criminal proceedings against her had been discontinued by the prosecutor. Nine months later, the higher-ranking prosecutor revoked the decree for termination, with the result that the court was unable to rule on the action she had brought. The Court noted that the possibility of reopening the criminal proceedings was not in itself problematic. However, the Court considers that the Prosecutor's Office's discretionary power in the absence of procedural safeguards has enabled it, as the defendant in the damages action, to unilaterally influence the scope and outcome of the proceedings (violation of Article 6 § 1).

to abuse of process" and that "additional safeguards against such actions by the prosecution are needed to prevent possible abuse on its part, as well as "a mechanism for effective and adequate judicial review that is consistent with the legal framework of Bulgarian criminal proceedings."

7. Splitting of the case in the trial phase

The need to introduce the possibility of splitting a case in the trial phase stems from a number of findings of the ECHR in cases such as *Vasil Hristov v. Bulgaria*, where the authorities identified only some of the attackers against the applicant, and *S.Z. v. Bulgaria*, where some of the defendants were also absent from a significant number of hearings, which led to a significant length of the trial phase of the proceedings and the termination of criminal proceedings against some defendants due to the absolute limitation period.

The amendments and supplements related to the splitting of the case in the trial phase rest both on overcoming the violations of the Convention identified in the above-mentioned judgments of the ECHR and on the purely practical difficulties in the trial phase of the process shared by legal practitioners. The question of whether there are grounds for splitting of the case should be considered at the dispositional hearing, and the court should be able to deliver an order severing the material for the defendants who were not found or did not appear without good cause to whom Article 269 is not applicable, as well as for a defendant who has a short-term disorder of the mind which precludes sanity, or who has another serious illness preventing the criminal proceedings, in a separate case to be assigned to a new court panel. The latter, in turn, or at the request of one of the parties, should be able to join the cases under Article 41 of the Code on the appearance of the defendant who did not initially appear, since the ground for splitting would effectively have disappeared.

8. Amendments to Article 250

The proposed amendments and supplements to Article 250 of the Penal Procedure Code represent a return to a long-established but abandoned solution in Bulgarian criminal proceedings for the court to discontinue criminal proceedings when the act described in the indictment or complaint does not constitute a crime. The new provision does not constitute an impermissible judicial interference in the prosecutorial function, but an additional opportunity for the court to control the quality of the indictment or complaint and essentially prevent the development of a lengthy and costly criminal process for initial charges not fulfilling the elements of a crime.

The exclusive constitutional competence of the Prosecutor's Office to decide which persons it will hold criminally liable as defendants (Article 127, item 3 of the Constitution), insofar as it is not bound by any form of judicial or public scrutiny in the pre-trial phase of the criminal process, creates a risk of disproportionate interference and restrictions on fundamental human rights. By its very nature, this danger also poses another social risk – that of creating the conditions for an abuse of power, which could compromise the fairness of the criminal process and introduce an imbalance in the constitutional model of the separation of powers, because it provides the Prosecutor's Office with a resource for influence in public and political life that for a significant period of time remained outside the rule of law. Criticism of the lack of judicial review over the Prosecutor's Office's powers to indict is also contained in a number of judgments of the European Court of Human Rights (in the cases of Asenov, Ilijkov, etc.). Therefore, and in order to create effective procedural guarantees for the protection of the right guaranteed in Art. 31 paragraph 3

of the Constitution, the presumption of innocence, it is necessary at the very beginning of the trial phase of the criminal proceedings, at the stage of "Preparatory actions for hearing the case in court", for the judge-rapporteur to make sure whether the Prosecutor's Office in the indictment actually contends that the defendant has committed a crime, i.e. whether the factual allegations described in the indictment fulfil the elements of a crime under the Criminal Code. The legislative purpose of these judicial powers is to streamline the administration of justice by allowing only convictions on indictable charges, i.e. charges which, if proven, would lead to engaging the criminal liability of the defendant. The proposed power of the judge-rapporteur at the first stage in the trial phase of the criminal proceedings provides for the possibility of discontinuing the consideration of initially unfounded charges for non-indictable acts. In practice, this introduces the first power of judicial review over the prosecutor's sovereign power to bring charges, which may lead to the termination of criminal proceedings. The judge-rapporteur's review is limited to a discussion of the substantive meaning of the allegations set out in the indictment, without assessing their merits or analysing the evidence. If the factual allegations in the indictment do not point to a criminal offence, that disqualifies the prosecution from the outset and the proceedings should be terminated.

In this way, cases on charges of inherently non-indictable acts are prevented from being examined, which is in line with the aims and objectives of the criminal process, saving the state unnecessary efforts and resources, and ensuring that criminal cases are examined within a reasonable time. It also guarantees the right of citizens not to be criminally prosecuted on indictments with inherently invalid charges for non-indictable acts.

9. Amendments to Article 198 of the Penal Procedure Code

Article 198 of the Penal Procedure Code regulates the possibility of disclosure of the case materials in the pre-trial phase. This text fully reproduces the text of Article 179 of the repealed Penal Procedure Code adopted in 1974, without developing it in the light of the changed social relations over the last 30 years.

The legal framework of the possibility of disclosure of material in pre-trial proceedings focuses on the permissive regime of such disclosure, containing no requirements either on its admissibility or on the possibilities of protection of the persons concerned.

The practice of the Prosecutor's Office of the Republic of Bulgaria regarding selective disclosure of pre-trial materials shows that this regulation is insufficient and creates conditions for violation of the presumption of innocence on the one hand, and for limitation of publicity and accountability of the Prosecutor's Office's activity on the other. This also leads to significant violations of European legislation and, more specifically, of Directive (EC) 2016/343 of the European Parliament and of the Council of 09.03.2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings.

This calls for amendments to the current framework, introducing clear guarantees that the materials in pre-trial proceedings will be disclosed in full respect of the presumption of innocence; the possibility to disclose this information where there is an overriding public interest and judicial review to ensure the lawful application of this procedure. In this way, the right to a fair trial and, in particular, respect for the presumption of innocence will be effectively guaranteed. The amendments made to Article 198 of the Penal Procedure Code are in full compliance with the provisions of paragraph 18 of the preamble of Directive (EC) 2016/343 of the European Parliament and of the Council of 09.03.2016 on the strengthening of certain aspects of the

presumption of innocence and of the right to be present at the trial in criminal proceedings, as well as Article 4 of the same directive.

Legal safeguards for the protection of affected persons are strengthened. The possibility is also introduced for the person concerned to ask the court to establish the violation of the presumption of innocence by disclosing pre-trial materials or by a public statement of a pre-trial authority. A corresponding amendment to the State and Municipalities Liability for Damages Act is also proposed, which would regulate the possibility of the affected person to seek compensation when a violation of the presumption of innocence is established in the above-mentioned manner. This fulfils the obligation under Article 10 of Directive (EC) 2016/343 of the European Parliament and of the Council of 09.03.2016, on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings, for Member States of the European Union to ensure that suspects and accused persons have an effective remedy if their rights under that Directive are violated.

10. Other changes

The envisaged changes in Article 46 and Article 219 of the Penal Procedure Code, as well as in Article 143 and Article 144 of the Judiciary System Act, aim to create additional safeguards for the individual professional independence of the prosecutor in the exercise of his/her powers and to increase the efficiency and accountability in the work of the Prosecutor's Office.

These changes are related to the creation of additional safeguards for the individual professional autonomy of the prosecutor in the exercise of his/her powers.

With regard to the first task, an amendment is envisaged in Art. 143 of the Judiciary System Act, as in the new paragraphs 3-7, safeguards are created that the prosecutor can freely exercise his/her powers in carrying out the prosecutorial function in the criminal process. This is brought about by a clear distinction between the matters on which the higher-ranking prosecutor may give binding instructions and those which he/she should decide on his/her own, in order to avoid an inadmissible substitution of the internal conviction of the lower-ranking prosecutor. In cases where he/she disagrees with the assessment of the evidence and with the internal conviction of his/her subordinate prosecutors as to the manner in which the case should be decided, the higher-ranking prosecutor shall take the appropriate action himself/herself. The new rules are an essential safeguard that the prosecutor's internal conviction on the establishment of facts and the application of the law in solving the cases assigned to him/her will be formed freely, without being substituted by the higher-ranking prosecutor in the form of written instructions or by other means. The previous framework was in conflict with the basic principle of criminal procedure under Art. 14, paragraph 1 of the Penal Procedure Code, it undermined the individual independence of the lower-ranking prosecutor and created an institutional culture of vertical dependence which went beyond the fact of the execution of written instructions, because it created the preconditions for a wide unlawful factual practice of oral instructions and orders from the higher-ranking prosecutors. The existing situation – apart from the long-term damage it may cause to the development of human capacity in the Prosecutor's Office – does not even ensure the short-term effectiveness of the criminal process, because the high quality execution of instructions by the lower-ranking prosecutor on the merits of the case requires that he/she understands and agrees with them. When the prosecutor's role is reduced to being a technical expression of someone else's internal belief, the results cannot be convincing.

The present draft law attempts to align with Article 127 of the Constitution the powers of the Prosecutor's Office regulated in the law, as well as to remove from the Judiciary System Act

the provisions that regulate the functional powers of prosecutors, insofar as their place is in the relevant procedural laws. In this sense, a completely new text is proposed for Article 144 of the Judiciary System Act, which exhaustively lists the powers of the Prosecutor's Office in accordance with Article 127 of the Constitution. The respective functional powers of the Prosecutor's Office in the criminal process are subject to regulation in the Penal Procedure Code.

The legal framework for criminal proceedings for crimes prosecuted on the complaint of the victim should take into account the essential difference between them and criminal proceedings initiated by the pre-trial authorities, in view of the fact that victims do not have the institutional capacity of the Prosecutor's Office, nor do they presumably have legal knowledge. This peculiarity makes it necessary for the procedural rules for the indictment on the complaint of the victim to take into account the key principle that it is the burden of the citizens who are victims of crimes prosecuted on the complaint of those citizens to state the facts of the criminal violation, and it is the power of the court to "give" them the right, i.e. to indicate the legal qualification of the facts by its order to proceed with the complaint. An indictment is a combination of facts and law, and therefore the bringing of an indictment in this type of case is a sequence of facts, which is completed by the order of the judge-rapporteur. In order to ensure both effective access to justice for the victim and a meaningful opportunity for the defendant to defend himself/herself, the law should expressly provide for the power of the judge-rapporteur to determine the legal qualification of the criminal offence contained in the complaint. The proposal to amend Article 252, paragraph 4 of the Penal Procedure Code is to that effect. The amendment is also necessary due to the fact that there is contradictory case-law regarding the scope of the powers of the judge-rapporteur when charging a defendant for a criminal offence which is prosecuted on the complaint of the victim.

Having the procedural obligation to bring to trial only the person accused of a criminal offence prosecuted on the complaint of the victim, the judge-rapporteur is empowered, depending on the results of the verification of the regularity of the complaint in the part concerning the particulars of the criminal offence, to proceed with it or to terminate the criminal proceedings. The amendment to the Penal Procedure Code, which entered into force on 5 November 2017, repealed the provision of Article 250, paragraph 1, item 2 of the Penal Procedure Code, by which it unjustifiably ignored the difference between the indictment prepared by a professional participant in the criminal process with legal training and the complaint of private individuals. This has created a danger of case-law allowing criminal cases to be examined on complaints which do not allege any facts at all, in particular a criminal offence which is being prosecuted on the complaint of the victim. However, the nature of the examination under Article 81 of the Penal Procedure Code of the contents of the complaint undoubtedly involves an assessment on the merits of the allegations in the complaint, in so far as it presupposes a reference to the substantive law. It is only in this way that the intended result of the exercise of this type of judicial power can be achieved – to conduct a judicial investigation only on charges brought by citizens, which can lead to conviction, if proved. The proposal to amend Article 250, paragraph 1 of the Penal Procedure Code aims precisely at this – an unequivocal optimisation of the judicial activities by focusing the judicial process on the activity of proving accusations, which, if substantiated in the course of the judicial investigation, can objectively commit the criminal liability of the defendant. This provides adequate protection to citizens who allege that they are the victim of a crime that is being prosecuted on the victim's complaint – only they have a protectable legal interest in bringing and

maintaining charges for such a crime in court. The right of citizens not to be subjected to criminal prosecution by complaint on inherently invalid charges of non-indictable acts is also guaranteed.

The proposals to amend Art. 250, paragraphs 3 and 4 of the Penal Procedure Code also aim to remove an inaccuracy in the legal framework. The current wording of the law presupposes that the figure of the defendant has arisen before a proper charge has been brought and filed. The indictment for criminal offences prosecuted on the complaint of the victim is completed by the order of the judge-rapporteur, which gives a go to the complaint and determines the legal qualification of the criminal offence under consideration. In that sense, a copy of the order terminating the criminal proceedings on the ground of an irregular complaint cannot be served on a defendant, since such a subject of the proceedings has not yet arisen. The above-mentioned peculiarity also determines the order in which the complainant's appeal against the order for discontinuance of the criminal proceedings is to be examined – in accordance with Chapter Twenty-two of the Penal Procedure Code, since there are no two opposing parties in the proceedings with opposing claims, which would require them to be heard in public hearing.

A new possibility for concluding an agreement is also envisaged when the guilty party should be released from criminal liability and an administrative penalty should be imposed. In these cases, the agreement will not have the character of a final conviction, but of a decision on release from criminal liability, and the parties will agree on the administrative penalty, which shall be imposed. The aim is to encourage a quicker conclusion of these pre-trial proceedings.

Changes have also been made to the rules for cases under the jurisdiction of military courts. Currently, the positive law under which military courts hear at first and second instance charges against civilians in complicity with members of the armed forces does not create safeguards of a fair hearing, since it does not provide the civilian with a tribunal which satisfies the requirements of independence and impartiality within the meaning of Article 6 § 1 of the Convention. The extension of the jurisdiction of military courts regarding individuals who are not members of the armed forces, who are in that sense civilians may be held to violate their right to a fair hearing under Article 6 § 1 of the Convention.

The amendments to Chapter Thirty-one are in response in particular to an ECHR judgment. The case of "Mustafa v. Bulgaria" (Application No 1230/17, final judgment of 28.02.2020) concerns the conviction of the applicant, a civilian, by military courts, which raises reasonable doubts as to their independence and impartiality, in view of factors such as the subordination of military judges to military discipline, their formal affiliation to the structure of the military and the status of jurors in military courts, who are as a rule army officers. The ECHR notes that the case was heard by the military courts on the basis of the legislative provisions on jurisdiction, without consideration of the particular circumstances, apart from the fact that one of the defendants was a member of the armed forces at the time of the events and despite the fact that the case did not concern a criminal offence against the armed forces or an attack on army property.

For the purpose of precision, it is proposed to explicitly regulate the measures of remand in custody against the civilian accomplice, outside the hypothesis of Article 401, paragraph 2 of the Penal Procedure Code, and in view of possible jurisdictional disputes in pre-trial proceedings against civilians, which are conducted by the military pre-trial proceedings authorities, to designate the Sofia City Court and the Appellate Court – Sofia as the courts to exercise judicial review over the coercive measures.

The amendments to the provisions of Articles 416 and 417 of the Penal Procedure Code provide for the introduction of new forms of judicial review in the enforcement of penalties.

In one hypothesis, it is possible to challenge before a court the legality of the enforcement action, for example, when the convicted person considers that the statute of limitations has expired. The other introduces judicial review of the prosecutor's decision as to whether and for how long a period of pre-trial detention or house arrest should be deducted from the sentence. The change is in implementation of two other ECHR judgments (*Stoichkov and Svetoslav Dimitrov*).

11. Amendments to the Criminal Code

The proposals to amend the Criminal Code (CC) are related to the need to criminalize the act of "torture" in accordance with the requirements of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (ratified SG No 80 of 1986; amend. and supl. SG No 19 of 1995). Despite repeated recommendations by the Committee against Torture, "torture" has not yet been criminalized as a separate criminal offence and elements of this long-established criminal offence in international practice continue to be prosecuted under various articles of the Criminal Code. Pursuant to Article 12 of the Convention, each State Party shall ensure prompt and impartial investigation by its competent authorities of all cases where there are reasonable grounds to believe that torture has been committed within its jurisdiction.

In this regard, it is proposed to create Article 144b of the Criminal Code, which is to be separated as an independent criminal offence and includes elements specified in Article 1 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

The need to introduce torture as a separate criminal offence also stems from the ECHR's case-law (see, for example, the judgment in the case of *Myumyun v. Bulgaria*) and is a repeated recommendation of the Committee of Ministers on the implementation of the *Velikova v. Bulgaria* group of cases.

More severe punishments are provided for the offences of murder and bodily harm when they are committed for reasons related to the sexual orientation of the victim.[21]

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[21] See the judgment in the case of Stoyanova v. Bulgaria, cited above
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