To

Committee of Ministers, CoE

European Commission for Democracy through Law

European Commission

Monday June 17, 2019

Dear Ladies and gentlemen,

The present letter expresses the concerns of some of the Bulgarian nongovernmental and professional organizations regarding the changes and amendments in the Criminal Procedure Code /CrimPC/[1] introduced by the Minister of Justice on June 14, 2019 and related to the establishment of a procedure for temporary removal from office and pre-term termination of the mandate of the so called "three big" in the Bulgarian judicial system – the Presidents of the supreme courts and the Prosecutor General /PG/.

Back in December 2015 the adopted changes in the Constitution were boiled down to some partial positive amendments; however, they did not guarantee a real independence of the court and accountability of the prosecution. Even the encouragement to continue the reform[2] was not followed by any particular measures. On the contrary, in the last couple of years were introduced legislative changes related to disciplinary and criminal proceedings for removal of judges from office based on proposal coming from the prosecution. These proposals were approved, without any problems, by the Judges College at the SJC with the purpose of creating an intimidating effect putting the judges into an additional dependence on the prosecution.

The necessity to introduce an independent mechanism for investigation and criminal liability in cases of crime perpetration by the PG is a mandatory general measure implementing the ECHR court decision on the "Kolevi" case from 2009. In its last report from March 2019 the Committee of Ministers states that despite the strengthened monitoring on the implementation of that court decision during the last 10 years, the Bulgarian government still hasn't introduced any concrete measures[3].

Lately, we are witnessing the promotion of an idea to introduce an additional mechanism for a prolonged removal from office of the Presidents of the two supreme courts, based on a proposal coming from a prosecutor or a minister.

[1] https://www.youtube.com/watch?time_continue=10&v=kTHZeSRJEpY
[2] https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2017)018-e
[3] https://hudoc.exec.coe.int/eng#{%22EXECIdentifier%22:[%22004-3557%22]}

Moreover, the measures introduced by the Minister of Justice[4] :

- Establish a different from the generally applicable regime for initiation of criminal proceedings against the Presidents of the supreme courts and the PG. Regarding the Presidents of the supreme courts, the need for a special regime is not grounded, because there are no obstructions to the fact that the general regime cannot be applied to them.

- The initiative for initiating of criminal proceedings against the "three big" is granted to the Minister of Justice or to three members from the respective College at the SJC. The decision is taken by a majority of 2/3 of the SJC Plenary which can be achieved with the voices of prosecutors, investigators and representatives of the parliamentary quota and isolate, in practice, the voices of the 6 judges elected by their peers. The Presidents of the supreme courts are thus imposed to external intervention and pressure coming from the Minister of Justice and the representatives of the non-judicial quota at the SJC. This creates the risk of exercising a frightening effect on the court.

- At the same time, the undisputed influence of the PG on the SJC members coming from the prosecutorial quota (both in the Prosecutors College and the Plenary) makes an independent /performed by people who are not subordinate to the PG/ and effective investigation against the Prosecutor General impossible. The amendments introduced do not secure an independent at all stages of the criminal proceedings investigation against the PG, as it is required by the ECHR and therefore, they are not relevant to the execution of the court decision on the "Kolevi" case.

Thus, the presidents of the supreme courts are exposed to additional external influence and pressure, coming from the representatives of the non-judicial quota, not only during their initial election, but also during the execution of their mandate. This violates the objective independence of the two supreme courts and performs a frightening effect on their decisions.

The issue with the accountability of the Bulgarian PG has been a subject to analysis also of the Venice Commission /VC/ and the Cooperation and Verification Mechanism /CVM/. The first conclusions of the VC about the lack independent mechanism for investigation and criminal liability in cases of crime perpetration by the PG can be dated back to 2003. A Memorandum[5] from the same year describes the rights of the PG as being too broad and the fact that each initiation of a process to remove his immunity can be initiated by him only. That is described as omission in the law which needs its legislative solution.

In 2017 the VC again describes in details the long-lasting lack of execution of its recommendations regarding the prosecution and the figure of the PG, the consequences thereof and once again suggestions for concrete actions[6].

[4] http://www.justice.government.bg/117/14917
[5] https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2003)012-e
[6] https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2017)018-e

The Venice Commission does not recommend the introduction of "no confidence vote" of the PG or his subordinance to the Executive, as this issue is delicate and creates risks for politicization. However, other effective accountability mechanisms should be introduced, because the grounds for removal are difficult to be executed. The latter exists because of the following obstacles:

- The SJC does not exercise on its own investigating and facts checking rights and has to turn to either the Inspectorate or the prosecution itself. The grounding for removal from office based on art. 129, subart. 3, p. 3 from the Constitution, namely "entry into force of a final sentence imposing imprisonment for an intentional criminal offence" presupposes the enforcement of a verdict. However, the PG having a quasi-monopoly over the investigation, could cease/terminate an investigation against himself (a direct referral to the "Kolevi" case),

- A removal based on art. 129, subart. 3, p. 5 from the Constitution[7] is also difficult to implement and remains more as a theoretical possibility. The reasons for this are again the strong position of the PG both within the prosecution and the SJC. Even if we assume that there is no need to perform a specialized investigation against the PG and that the Inspectorate possesses the necessary will and resources to collect evidence, still, there is little chance that such initiative will succeed in the SJC, because the PG has enough rights to fence off it. The Venice Commission marks that the SJC members who have been prosecutors after the end of their mandate will return back to the prosecution, thus they automatically become hierarchically dependent on the PG. At the same time nothing in the law prohibits the Prosecutor General to initiate checkups of the previous work /as prosecutors/ of current members of the SJC /unlike with members of the SJC who were judges before and who are not in the same situation in relation to the Presidents of the two Supreme courts. The internal independence of the judges is much better protected, therefore the risk for them acting in protection of the interests of their President, is much lower.

The VC concludes that the current composition of the judicial power in Bulgaria provides for a weak accountability of the Prosecutor General who in fact is immune against criminal investigation and practically irremovable. The Commission has offered certain measures to improve the situation, however, when introducing the above mentioned changes, the Bulgarian government did not take them under consideration. They are:

- Introducing an impeachment procedure and revising the procedure in art. 129, subart. 3, p. 5 of the Constitution. Investigation against the PG shall be carried out by an independent body or persons, not subordinate to the prosecution. The influence of SJC members coming from the prosecution and having a blocking voice when discussing investigations and submitting a proposal to the President for removal from office, shall be diminished.

- **„The Venice Commission reiterates that the reforming of the accountability mechanisms related to the PG does not call for a symmetrical easing of procedures related to the removal of the two chief judges or judicial**

[7] "5. serious infringement or systematic neglect of their official duties, as well as actions undermining the prestige of the Judiciary." - https://www.parliament.bg/en/const

members of the SJC". While judges should be independent, this concept does not fully apply to the prosecutors. It is more relevant to talk about "autonomy" and not complete "independence" when discussing the prosecution. These recommendations confirm once again the overall conclusions from the structural and functional analysis of the prosecution[8].

Additionally, the VC raises concerns that "the inclusion of the Prosecutor General as [an] ex officio member [of the Judicial Council] raises particular concerns, as it may have a deterren[t] effect [on] judges and be perceived as a potential threat. The Prosecutor General is a party to many cases which the judges have to decide, and his presence on a body concerned with the appointment, disciplining and removal of judges creates a risk that judges will not act impartially in such cases or that the Prosecutor General will not act impartially towards judges whose decisions he disapproves of. [...]."

Besides the VC and PACE, the CVM has also detected the lack of procedure and/or another possibility for holding the PG liable. More specifically, recommendations related to the introduction of some form of control over the figure of the PG, exist in 5 of all 17 reports. The first one can be read in the March 2010 report which came right after the court decision on the "Kolevi" case. The report refers to the case saying that "The lack of accountability of the Chief Public Prosecutor was criticised by the European Court of Human Rights"[9]. Successively the reports from July 2012, 2016 and January 2017 comment on the unrealized reforms in the prosecution part of which is also the complete lack of accountability of the PG. There is a concrete recommendation in the report from January 2017 referring to the independent analysis on the prosecution performed by prosecutor from EU member states. It is related to "Establish a roadmap for the implementation of the recommendations of the SRSS report concerning the reform of the Prosecutor's Office …"[10]. The European prosecutors, on the other hand, explixitly state that "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 officeof acting in a seriously criminal manner". That serious deficit is finally mentioned in the last CVM report from November 2018. None of the 5 reports puts a sign of equality between the PG and the Presidents of the two Supreme courts. Such interpretation exists only locally and cannot be justified with the CVM reports. The only possible conclusion to be drawn, therefore, is the lack of desire from the side of the Bulgarian authorities, to execute the recommendations coming from the "Kolevi" case as well as these reiterated in the analysis of the prosecution and following Venice Commission Opinion from October 2017.

The draft law introduced by the Ministry of Justice on June 14, 2019 resembles more the establishment of a mechanism for pressure against the Presidents of the two Supreme courts, leaving at the same time the figure of the PG literary untouchable.

[8] http://www.mjs.bg/Files/Executive%20Summary%20Final%20Report%20BG%2015122016.pdf
[9] https://ec.europa.eu/transparency/regdoc/rep/1/2010/EN/1-2010-112-EN-F1-1.PDF
[10] https://ec.europa.eu/info/sites/info/files/com-2017-43_en.pdf

The compatibility of the suggested accountability mechanism for the Presidents of the supreme courts needs to be reviewed also within the provision of art. 19, para 1, subart. 2 from the Treaty of the Functioning of the EU /TFEU/ obliging the member states to determine the legal means necessary in order to assure an effective legal protection of the areas encompassed by the EU law. Undoubtedly, the Supreme courts are jurisdictions within the meaning of art. 267 TFEU, therefore, the preservation of their independence shall be of paramount importance in order to guarantee the above mentioned protection. At the same time, art. 47, subart. 2 from the ECHR foresees the access to an "independent" court as a requirement related to the main right of effective legal tools for protection[11]. The Court of Justice of the EU consequently states that the guarantee for independence inherent to the judiciary shall be required not only at the level of the Union, the judges of the Union and the advocates general of the Court, as it is prescribed in art. 19, para 2, subart three from the TEU, but also at the level of the member states, for the national courts. The concept of independence presupposes that the respective body exercises its judicial functions fully autonomously, without any hierarchical or subordinate dependencies and without getting orders or instructions of any sort, thus being in that way protected from external influence and pressure which could infringe the independence of its members when taking decisions and influence the certain decisions[12]. The objective element of the independence of the judiciary, therefore, calls for enough guarantees, so that any legitimate doubt regarding the independence and impartiality of the body is excluded and the appearance of independence guaranteed.[13] The requirement for independence enforces also that the disciplinary proceedings against judges includes the necessary guarantees for full avoidance of the risk of using such proceedings as a system of political control over the content of the court decisions. Therefore, "… Rules which define, in particular, both conduct amounting to disciplinary offences and the penalties actually applicable, which provide for the involvement of an independent body in accordance with a procedure which fully safeguards the rights enshrined in Articles 47 and 48 of the Charter, in particular the rights of the defence, and which lay down the possibility of bringing legal proceedings challenging the disciplinary bodies' decisions constitute a set of guarantees that are essential for safeguarding the independence of the judiciary".[14] Similar conclusions can be found in the 2013 ECHR decisions on the case Oleksandr Volkov v. Ukraine (no. 21722/11).

In the light of the publicly demonstrated disagreement and negligence towards some decisions of the Supreme Court of Cassation and the zeal to "overcome" them through legislative changes, we are of the opinion that the measures introduced for holding the Presidents of the two Supreme courts responsible with a decision taken not by judges elected by their peers, but by a majority of SJC members elected by the parliament and prosecutors, could impose the two Presidents, respectively the two Supreme courts and the judges there to an unacceptable external intervention and pressure coming from the Executive, the investigative bodies and the

[11] Decision from February 27, 2018 г.,ASJP, C‑64/16, EU:C:2018:117, p. 41

[12] See Decision from September , 2006, Wilson, C‑506/04, EU:C:2006:587, p. 51 and from February 16, 2017, Margarit Panicello, C‑503/15, EU:C:2017:126, т. 37 and (Decision from February 27, 2018 г.,ASJP, C‑64/16, EU:C:2018:117, p. 44).

[13] Opinion of the advocate general Tanchev, April 11, 2019 г. on C-619/18, EU:C:2019:325, p. 88

[14] Judgement of the Court Grant Chamber, July 25, 2018 г., LM., C-216/18 PPU, ECLI:EU:C:2018:586, "p. 67

prosecution. Consequently that will lead to the violation of the objective independence of the two Supreme courts and an intention to exercise influence over their decisions.

We do hope that these concerns will be taken under serious consideration at the upcoming closed round table with representatives from the Committee of Ministers at the Council of Europe, as well as by other experts monitoring the above mentioned processes in the country.

Access to Information Program

Anticorruption Fund

Bulgarian Judges Association

Bulgarian Lawyers for Human Rights

Bulgarian Institute for Legal Initiatives

Bulgarian Helsinki Committee

Centre for Liberal Strategies

Centre for Independent Living

Institute for Market Economics

Executive Bureau Union of Bulgarian Jurists