

## Why and how the recommendations under the CVM are distorted

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One of the biggest deceptions in relation to the introduction of a procedure for a pre-term removal/investigation of the Presidents of the Supreme Court of Cassation /SCC/, the Supreme Administrative Court /SAC/ and the Prosecutor General /PG/ is, that this is a recommendation of the European Commission included in the Cooperation and Verification Mechanism /CVM/. In the last 10 and so days, this mantra was repeated by various representatives of the legislative and the executive powers. However, the Mechanism neither contains such text in its 6 key areas /the so called *benchmarks*/, nor such recommendations exist in any of the 17 reports published so far. Recommendations related to accountability and responsibilities have been made, but they are related solely to the figure of the prosecutor general. From the establishment of the CVM until now such recommendations have been included in **5 reports** and these are: from March 2010, July 2012, 2016, January 2017 and 2018 /see attachment/. It has to be clarified here that only the political reports on the progress are meant and not the technical ones. The latter do not contain recommendations, but mainly technical information and facts which was used during the drafting of the main report and which supports the recommendations made.

The first recommendation related to the figure of the PG dates back to 2010. Its content is: *“The lack of accountability of the Chief Public Prosecutor was criticized by the European Court of Human Rights. The ECHR's ruling called on Bulgaria to install appropriate checks and balances among institutions in the judicial system”*. The timing of the recommendation is not random, because the previous year the ECHR has issued the decision on the “Kolevi” case. In the next two years the Bulgarian legislator did not undertake anything. So the summer of 2012 comes and with it the next CVM report where we read: *„Although some limited action has been taken at the level of the prosecution, these recommendations are essentially still pending”*. There is a footnote to that comment which explicitly refers to the ECHR's decision and clearly says: *„For example, the prosecution created two new departments for combating financial crime and a department for juvenile justice. Bulgaria still has to take measures to strengthen the internal independence of prosecutors in order to ensure independent, objective and effective investigations. In particular, Bulgaria needs to address the absence in Bulgarian law of sufficient guarantees for an independent investigation into offences of which the Chief Public Prosecutor or other high-ranking officials close to him may be suspected ... ”*.

The Commission's report from 2012 is a special one for 2 reasons – 1/ it marks the first 5 years period of verification and cooperation and 2/ Bulgaria receives the possibility to reconsider the direction of the reforms in some of the key areas – justice and internal affairs. In the light of this, the EC provides a one year period in which the country can demonstrate real results. This becomes obvious from the July 2012 press release: *„The Commission will make its next assessment of progress at the end of 2013 in order to allow the Bulgarian authorities sufficient time to demonstrate a track record in implementing the relevant laws. The Commission will monitor progress closely during this period with regular missions and a frequent dialogue with the Bulgarian authorities and with other Member States.”*<sup>1</sup>.

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<sup>1</sup> [http://europa.eu/rapid/press-release\\_IP-12-798\\_en.htm](http://europa.eu/rapid/press-release_IP-12-798_en.htm)

Our country is making efforts and this should not be denied. These efforts, however, when related to the judicial power, are targeting predominantly the court. In relation to the other magistrates – prosecutors and investigators, a big reform was performed only on the latter. The investigation was moved under the prosecutorial umbrella and the director of the National Investigative Service was made deputy prosecutor general. The figure of the investigating policeman was established. That, more or less, sums up the reform and the eye of the legislator was again focused on the court.

Obviously, the one year term provided by the EC was not enough, because the Commission silently “granted” another 3 years to observe the progress made. In 2016 the CVM report talks already about an *“independent analysis of the prosecution”*. The same was performed by European prosecutors within the framework of the EC Service for structural reform support /SRSS/. The analysis is not a political document and does not have the strength and the meaning of the CVM reports. At the same time, though, it describes in a highly professional and expert manner the problems within the prosecution office which piled up for years, thus naturally reaching to the same conclusions which the EC had back in 2010. The present material does not aim at repeating the recommendations from the analysis, because they were publicly cited on numerous occasions. The desire here is to distract the deception that the European Commission puts the court and the prosecution on an equal footing in the way this is done here. The CVM reports have, at least, to adhere to the democratic principle of the checks and balances where the court is equally distant from the parties in a court procedure and the prosecution is a party which puts in practice the criminal policies of a state.

The last report which includes a recommendation related to the prosecution is in fact the one from 2018, where, despite the fact that it serves the political conjuncture, it manages to mark the important problem – *„Another sensitive point on which deliberations have not yet reached a conclusion concerns the procedures in place to hold accountable the most senior positions in the magistracy, including a serving Prosecutor-General, in the event of serious allegations of wrongdoing or criminal acts.”*. One can speculate on the plural used in the sentence, but the footnote on the same paragraph unambiguously refers to *„mechanisms for the investigation of a serving Prosecutor General”*.

Everything explained so far leads to the following conclusion – the Cooperation and verification mechanism is the political instrument of the European Commission through which it attempts to stimulate the reform processes on some key areas in the country. Independence, professionalism and efficiency of the judicial power is among them. The CVM was established by the European Commission shortly before Bulgaria joined the EU as a full-fledged member. It is also a protective instrument and as such it cannot insist on something which is not inherent and does not exist in the countries with a more developed democratic process, namely – putting a sign of equality between court and prosecution. Therefore, it cannot also recommend investigation under the same procedure of the people on the highest positions within the court and the prosecution /in the Bulgarian context these are the chiefs of the two supreme courts and the PG/.

This is well understood by the local addressees of the Mechanism, because shortly before the publication of the 2018 report, the students programme for legislative analysis under the auspices of the parliament published a broad comparative analysis named *„Comparative analysis of the legislative provisions in other countries in which the prosecution is part of the judiciary”*<sup>2</sup>. An important element

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<sup>2</sup> <http://students.parliament.bg/wp-content/uploads/2018/04/%D0%9F%D0%98-206.pdf>

in that document is the attempt made by the contracting authority /the 44<sup>th</sup> National Assembly/ to “sew on” in the analysis the presidents of the supreme courts. This is obvious from the summary of the document where next to the title in brackets we read – „what are the legal mechanisms for an effective and independent investigation of a suspected improper behavior of the Presidents of the Supreme Court of Cassation, the Supreme Administrative Court and the Prosecutor General“<sup>3</sup>. Further in the summary, however, are quoted parts from the independent analysis of the prosecution which are related to the prosecution only and the main part of the analysis encompassing 50 states is again concentrated only on the prosecution. There is also a text related to the Venice Commission Opinion № 855 from October 2017, but it again talks only about the prosecution and the key sentence in that opinion /not mentioned in the analysis/ is: **„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 members of the SJC“**. There can be only one conclusion here and it is that according to the Venice Commission there are already enough procedures for removal of the Presidents of the SCC and the SAC.

The local attempts to distort the CVM recommendations /and not only them/ can be explained solely with the fact that, essentially, there are no arguments which can defend the thesis that the court should not be an independent and impartial arbitrator, but should also take side and push through certain state policies the way this is done by the prosecution. For the prosecution this is a substantial and important characteristic, however, for the court and for a country with such courts, this is devastating.

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<sup>3</sup> P. 6 /p. 1 in the pdf document at <http://students.parliament.bg/wp-content/uploads/2018/04/%D0%9F%D0%98-206.pdf>

<b>CVM Reports</b>	<b>Recommendations related to the Presidents of the SCC and SAC</b>	<b>Recommendations related to the Prosecutor General</b>
June 2007	-	-
February 2008	-	-
July 2008	-	-
February 2009	-	-
July 2009	-	-
March 2010	-	The lack of accountability of the Chief Public Prosecutor was criticised by the European Court of Human Rights. <sup>9</sup> The ECHR's ruling called on Bulgaria to install appropriate checks and balances among institutions in the judicial system. p. 5 at <a href="https://ec.europa.eu/transparency/regdoc/rep/1/2010/EN/1-2010-112-EN-F1-1.PDF">https://ec.europa.eu/transparency/regdoc/rep/1/2010/EN/1-2010-112-EN-F1-1.PDF</a>
July 2010	-	-
February 2011	-	-
July 2011	-	-
February 2012	-	-
July 2012		The shortcomings in accountability of the judiciary and in efficiency of the judicial process must be linked to the key institutions that drive progress in this area, in particular the Supreme Judicial Council and the prosecution. For these reasons, the Commission has recommended a comprehensive reform of these institutions, assessing and improving organizational structures and professional practice regarding serious criminal cases. Although some limited action has been taken at the level of the prosecution, these recommendations are essentially still pending. <i>Footnote to the above text:</i> For example, the prosecution created two new departments for combating financial crime and a department for juvenile justice. Bulgaria still has to take measures to strengthen the internal independence of prosecutors in order to ensure independent, objective and effective investigations. In particular, Bulgaria needs to address the absence in Bulgarian law of sufficient guarantees for an independent investigation into offences of which the Chief Public Prosecutor or other high-ranking officials close to him may be suspected (ECHR 1108/02 Kolevi, judgment of 05/11/2009, final on 05/02/2010). P. 10 at <a href="https://ec.europa.eu/transparency/regdoc/rep/1/2012/EN/1-2012-411-EN-F1-1.Pdf">https://ec.europa.eu/transparency/regdoc/rep/1/2012/EN/1-2012-411-EN-F1-1.Pdf</a>
2014	-	-
2015	-	-
2016	-	Launch an independent analysis of the prosecutor's office as set out in the government's judicial reform strategy, taking into account the reform measures already implemented. p. 12 at <a href="https://ec.europa.eu/transparency/regdoc/rep/1/2016/EN/1-2016-40-EN-F1-1.PDF">https://ec.europa.eu/transparency/regdoc/rep/1/2016/EN/1-2016-40-EN-F1-1.PDF</a>
January 2017		Recommendation: Establish a roadmap for the implementation of the recommendations of the SRSS report concerning the reform of the Prosecutor's Office and its

		<p>interactions with other institutions, including a mechanism for the reporting of progress to the wider public.</p> <p>p. 10 at  <a href="https://ec.europa.eu/info/sites/info/files/com-2017-43_en.pdf">https://ec.europa.eu/info/sites/info/files/com-2017-43_en.pdf</a></p>
November 2017	-	-
2018		<p>Another sensitive point on which deliberations have not yet reached a conclusion concerns the procedures in place to hold accountable the most senior positions in the magistracy, including a serving Prosecutor-General, in the event of serious allegations of wrongdoing or criminal acts.</p> <p><i>Footnote to the above text:</i> The lack of effective mechanisms for the investigation of a serving Prosecutor General was identified by the European Court of Human Rights as one of the key shortcomings of the Bulgarian criminal justice system in a landmark case from 2009, the follow-up to which is still under monitoring by the Council of Europe. See Kolevi vs Bulgaria, <a href="https://hudoc.echr.coe.int/eng#{\" itemid\":[\"001-95607\"]})"="">https://hudoc.echr.coe.int/eng#{\"itemid\":[\"001-95607\"]})</a>.</p> <p>P. 5 at  <a href="https://ec.europa.eu/info/sites/info/files/progress-report-bulgaria-com-2018-850_en.pdf">https://ec.europa.eu/info/sites/info/files/progress-report-bulgaria-com-2018-850_en.pdf</a></p>