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THE ILLUSION OF THE BULGARIAN LEGISLATOR – creating a mechanism for effective investigation of the Prosecutor General

Summary

The present analysis will explain why the proposal to introduce the figure of a “**prosecutor for investigating the Prosecutor General,**” put forward by MPs of the ruling majority in Bulgaria through a bill that was hastily approved at first reading, **does not satisfy the criteria for independence from the investigated party**, and, therefore, does not ensure compliance with the judgment of the European Court of Human Rights in the case of *Kolevi v. Bulgaria*. In addition to **lacking the required guarantees for independence, the bill suffers from a number of other shortcomings**, which may lead to risks of factual or legal impediments to any potential investigative proceedings against the Prosecutor General, or, alternatively, may provide opportunities for unjust prosecution of the latter for purely political reasons.

This analysis **offers an alternative approach to the issue at hand which involves a departure from the idea of complete control of the Prosecutor’s Office over the prosecution function**. If the concept put forward in this analysis is adopted, **the Prosecutor’s Office will not lead investigations against the Prosecutor General/ other high-ranking prosecutors, nor will it decide on the outcome of such investigations**. The approach described in this analysis offers real possibilities to attain positive results, such as ensuring stronger guarantees for the independence and professionalism of the authorities carrying out/ overseeing investigations and deciding whether charges should be pressed, and eliminating the possibility for a single individual to decide all matters pertaining to the potential prosecution of the Prosecutor General. The bill presented by the ruling majority fails to achieve these outcomes.

I. Background

In its case-law related to the application of the European Convention on Human Rights and Fundamental Freedoms (ECHRFF), the European Court of Human Rights (ECHR) has accepted that the obligation of Contracting States to protect the right to life shall entail the requirement to carry out an effective investigation in cases where an individual has been murdered or has passed away under questionable circumstances. An investigation is considered effective if it could lead to ascertaining the relevant facts of the case, and to identifying and punishing the perpetrators. The investigative authorities ought to have taken all possible and necessary measures to collect evidence in support of the facts, and their conclusions have to be founded upon a comprehensive, objective, and impartial analysis. In order to meet this standard, the officials engaged in and responsible for the investigation should be independent and impartial not only by law, but also in practice. This means that the formal lack of a hierarchical or institutional dependence does not suffice, but independence should also exist in practice.

These principles are also set out in the well-known ECHR judgment on the case of *Kolevi v. Bulgaria*¹, dated 5 November 2009², in which the Court held that the investigation of the murder of Nikolay Kolev — prosecutor in the Supreme Prosecutor’s Office of Cassation (SPOC) — was in violation of the Convention, as it did not satisfy the applicable standard for effectiveness. To elaborate, the Court stated that *“given the centralised structure of the Bulgarian prosecution system, based on subordination, its exclusive power to bring charges and the procedural and institutional rules allowing full control by the Chief Public Prosecutor over every investigation in the country, in the circumstances prevailing when Mr F. was the Chief Public Prosecutor it was practically impossible to conduct an independent investigation into circumstances implicating him, even after the constitutional amendment allowing in theory the bringing of charges against him.”*³

II. The current practical issues with the theoretical possibility to effectively investigate the Prosecutor General

The apparent issues in this respect are connected, on the one hand, with the **exclusive power of the Prosecutor’s Office to decide whether, on what grounds, whom, and when to prosecute in cases of committed crimes** (this concerns crimes prosecuted by the state, as opposed to at the discretion of the victim), having in mind that this decision is not subject to any external control. On the other hand, **the hierarchical structure of the institution, with the Prosecutor General standing at the top**, is in itself problematic. The monopoly over the decision whether to press charges, coupled with the strict hierarchy established by law and solidified by the lasting institutional culture, leads to the logical conclusion that **the head of the institution will *de facto* be immune from prosecution, even if such immunity is not provided by law**.

Furthermore, **the Prosecutor General is a very influential figure in the Bulgarian public life owing to certain additional factors**, such as the function of “general review of legality” (exercised in parallel with the role of the Prosecutor’s Office in criminal proceedings), which allows the Prosecutor’s Office to have an impact on significant spheres of public life (despite the lack of constitutional grounds to perform this function).⁴ In addition, the Prosecutor General has a strong influence in the body governing all magistrates, the Supreme Judicial Council (SJC).⁵

III. A chronological overview of the actions undertaken by the Bulgarian authorities in order to comply with the *Kolevi v. Bulgaria* judgment

The ECHR judgments are binding on Contracting States under the ECHRFF and the latter have to comply with them. The body tasked with overseeing whether compliance has been achieved is the Committee of Ministers, and the scope of compliance includes not only the specific, but also the systemic problems identified by the Court.

However, the Bulgarian authorities failed to undertake institutional measures to resolve the general problem related to the lack of mechanisms for effective investigation of the Prosecutor General until 2019, i.e., 10 years after the mentioned ECHR judgment had been

1 <http://humanrights.bg/Contents/Item/Display/10904>

2 See par. 191 – 193 of the judgment

3 See par. 209 of the judgment

4 For more details on the topic, see „Защо упражняването на всеобхватен прокурорски надзор е противоконституционно“, published on 22 March 2020 in defakto.bg, and accessible online at <https://bit.ly/3ohxhqq>

5 For more information regarding the powers exercised in practice by the Prosecutor General, see Yankulov, A., *Exercising Control Over The Prosecution Function – the necessary criminal justice reform*, Sofia, Anti-corruption Fund, 2020, pp. 5-6, accessible online at: https://acf.bg/wp-content/uploads/2020/11/kontrol_nakazatelno_EN_WEB.pdf.

pronounced (it should be noted that the problem had evidently existed for a much longer period, but had not been highlighted by a reputed international institution like the ECHR). This in itself demonstrates the reluctance of the political class to amend in any way the status of the Prosecutor General which can be easily explained by referring back to section II of the present analysis.

In June 2019, the Bulgarian authorities put forward a proposal to create a common mechanism for temporary removal of the Prosecutor General and the Presidents of the two supreme courts from office, which would form the basis for initiating and successfully conducting a criminal investigation against these officials. However, this idea was abandoned following a critical statement of the Venice Commission, published on 6–7 December 2019⁶, in which it questioned the proposition that this mechanism was the only solution to the systemic shortcomings identified in the *Kolevi v. Bulgaria* judgment. Furthermore, the Commission expressed concerns with respect to the idea to also apply the mechanism to the Presidents of the supreme courts, given that their potential prosecution had never been considered problematic in view of their powers and place in the Bulgarian system of public institutions.

At the time of the publishing of the specified statement of the Venice Commission, and several days after an interim resolution of the Committee of Ministers, the Bulgarian Government held a special session on 7 December 2019, at which it proposed another bill envisaging a new mechanism for investigating the Prosecutor General and his deputies, whereby the investigation would be carried out by a prosecutor in the SPOC who would also be the Head of the SPOC Inspectorate. According to the bill, this prosecutor would have a special status, as he would be elected by the Prosecutors' College (PC) of the SJC for a term equivalent to that of the Prosecutor General, and his decisions would not be subject to oversight by the Prosecutor General if connected with the latter. However, this raised the question of whether this approach is compliant with Art. 136, par. 2 of the Constitution which stipulates that the Prosecutor General shall have the power to oversee the legality of and manage the work of all other prosecutors. In a judgment of July 2020, the Constitutional Court ruled that Art. 126, par. 2 of the Constitution does not apply in cases where a prosecutor issues decisions on cases concerning the Prosecutor General, which stems from the principle that "no one should be a judge in his own cause." In other words, the Constitution does not formally give the Prosecutor General the power to revoke decisions of other prosecutors to press charges against him.

In December 2020 — a whole year after the abovementioned bill was tabled in Parliament — MPs of the ruling majority introduced a new bill stipulating that potential investigations of the Prosecutor General shall not be conducted by the Head of the Inspectorate Department of the SPOC, but **by a special "prosecutor for investigating the Prosecutor General."** **The new proposal was that this special prosecutor would only be nominated by the PC of the SJC, but would be elected by the Plenum, and would only work on preliminary inspections and investigations against the Prosecutor General during his seven-year-long term. The bill also envisaged that investigations would be led single-handedly by the special prosecutor, and his decisions would not be subject to oversight within the institution.**

Although the MPs stated that they would once again wait for a statement from the Venice Commission, this time the bill was moved forward hastily and has already been approved at first reading by Parliament.

This sudden rush raises certain suspicions given the long period of inaction in the past, followed by an inclination to protract by seeking opinions from the Venice Commission and the Constitutional Court on relatively clear matters.

⁶ See European Commission for Democracy Through Law (Venice Commission): "Bulgaria Opinion on Draft Amendments to the Criminal Procedure Code and the Judicial System Act Concerning Criminal Investigations Against Top Magistrates" adopted by the Venice Commission at its 121st Plenary Session (Venice, 6-7 December 2019)

The desire to quickly approve the last bill is also questionable in light of the statement of the Head of the Human Rights Directorate of the Council of Europe, issued on 15 December 2020 and addressed to the Bulgarian authorities, which expresses his evaluation that the new bill does not provide for sufficient measures to meet the requirements for independence of investigations against the Prosecutor General and other high-ranking officials connected with him (specifically other prosecutors).⁷ Moreover, it should be recalled that the Prime Minister has declared on multiple occasions that Bulgaria is willing and ready to comply with all recommendations on the matter.⁸

IV. The European recommendations for ensuring compliance with the judgment of *Kolevi v. Bulgaria*

The ECHR has specified the obligation of the Contracting States under the ECHRFF to ensure effective investigations and has set out the standards that need to be satisfied for an investigation to be deemed effective. It is up to every single Contracting State to ensure compliance with the established standard, and the ECHR does not prescribe specific approaches for achieving this.

In general, this is also the practice followed by different European institutions and experts in the Council of Europe — they usually provide preliminary opinions (when requested to) on draft documents prepared at national level, or assess the adequacy of measures undertaken to resolve the identified problem.

Therefore, it is by default impractical to expect external recommendations as to what should be done at national level in order to satisfy the European standard for effective investigation, or any other standard related to the promotion of justice and public order.

Nevertheless, during the long period of expectation to achieve compliance with the mentioned ECHR judgment, the Bulgarian authorities have in fact received specific recommendations that, if followed, would help meet the standard for effective investigation of the Prosecutor General and of other senior prosecutors within his entourage, namely:⁹

- every investigation concerning the Prosecutor General should be carried out **by a body or official independent from him**; this body or official should possess a set of tools that would allow the ascertainment of all relevant facts; the prosecutors who are members of the SJC should not have the power to block the investigation; independence from the Prosecutor General could be ensured if all cases concerning the latter be taken from the control of the ordinary prosecutors and investigators, who are subordinate to the Prosecutor General, and be entrusted to a body or official that does not receive instructions from the Prosecutor General, is not appointed by him, and whose career does not depend on him even in the long run (for instance, prosecutors **or judges** at the

7 „By a letter of 15 December 2020, the Director of the “Human Rights” Directorate shared with the Bulgarian authorities preliminary comments on the above draft legislation. He noted, inter alia, that it was positive that the special prosecutor would enjoy decision-making independence. **He nevertheless indicated that these legislative proposals appeared insufficient to fulfil the requirements for independence of an investigation concerning a Chief Prosecutor and high-ranking officials**, in particular prosecutors, close to him, as re-affirmed in Interim Resolution CM/Res-DH(2019)367 and in the decisions of September 2020 of the Committee of Ministers. The Director identified as risks for the independence the fact that only six prosecutorial members of the SJC would be able to propose a candidate for a special prosecutor, that 11 prosecutorial members of SJC and a small number of other members (on whom a Chief Prosecutor may have a “de facto leverage”[3]) could have sufficient votes to decide on appointment and accountability, and that a special prosecutor would become a subordinate to a Chief Prosecutor appointed more recently than him or her after his or her mandate. He also noted the lack of arrangements for the independence of the investigation of high-ranking officials, in particular prosecutors, close to a Chief Prosecutor.” Достъпно онлайн на: <https://hudoc.exec.coe.int/eng#%7B%22EXEIdentifier%22:%5B%22004-3557%22%7D%7D>

8 See for instance the article „Бойко Борисов: Независим прокурор ще разследва обвинител №1,“ published in lex.bg on 4 December 2019, accessible online at: <https://bit.ly/3hIJX7q>

9 However, it should be borne in mind that the European institutions always propose a systemic approach for solving systemic problems, not isolated recommendations for specific situations.

end of their career, or even retired ones); the Prosecutor General should be deprived of **any opportunity to directly or indirectly affect the work** of the prosecutor investigating him;^{10, 11}

- rules should be adopted that would **make it impossible for the Prosecutor General to influence the appointment or the career of officials responsible for investigating him**;¹²
- a special mechanism should be introduced for investigating/prosecuting the Prosecutor General and his deputies; a Prosecutor General, who has been investigated and charged, should be temporarily removed from office and an independent acting prosecutor should be appointed in his place, but without having a full term and being accountable to the PC of the SJC;¹³
- **an independent figure with significant experience and external to the Prosecutor's Office** should oversee investigations against the Prosecutor General, which should be carried out with the assistance of investigators of the National Investigative Service (NIS) or of senior police officers accountable to the specified external figure;¹⁴
- **the prosecutor's refusal to initiate a criminal investigation and/or press charges should be subject to judicial control**.¹⁵

V. Why the figure of “prosecutor for investigating the Prosecutor General” does not meet the criteria for having independence from the investigated party

In December 2019, 10 years after the Kolevi v. Bulgaria judgment, the Bulgarian authorities finally reached the conclusion that they should adopt a mechanism for initiating criminal investigations against the Prosecutor General, which should involve a new figure, independent from the traditional prosecutorial hierarchy established on the basis of a pyramid organizational structure.

However, it is evident that **irrespective of whether this figure would be a special prosecutor, appointed for a particular term to perform only this function, or an ordinary prosecutor who would be selected on a case-by-case basis, that figure would not be independent from the Head of the Prosecutor's Office**, even if the latter does not have the right to revoke that figure's decisions in the course of the conducted investigation.

10 See par. 54 and 55 of or “Bulgaria - opinion on draft amendments to the criminal procedure code and the judicial system act, concerning criminal investigations against top magistrates” adopted by the European Commission for Democracy Through Law (Venice Commission) at its 121st Plenary Session (Venice, 6-7 December 2019), accessible online at [https://venice.coe.int/webforms/documents/?pdf=CDL-AD\(2019\)031-e](https://venice.coe.int/webforms/documents/?pdf=CDL-AD(2019)031-e)

11 See par. 7-8 of the Committee of Ministers' Decision of September 2020 CM/Notes/1377bis/H46-9 , accessible online at: [https://hudoc.exec.coe.int/ENG#{%22EXECIdentifier%22:\[%22CM/Del/Dec\(2020\)1377bis/H46-9E%22}](https://hudoc.exec.coe.int/ENG#{%22EXECIdentifier%22:[%22CM/Del/Dec(2020)1377bis/H46-9E%22})

12 See Interim Resolution CM/ResDH(2019)367 of the Committee of Ministers of December 2019, accessible online at: [https://hudoc.exec.coe.int/eng#{%22EXECIdentifier%22:\[%22001-199609%22}](https://hudoc.exec.coe.int/eng#{%22EXECIdentifier%22:[%22001-199609%22})

13 See par. 70 of „BULGARIA - URGENT INTERIM OPINION ON THE DRAFT NEW CONSTITUTION“; endorsed by the Venice Commission on 11 December 2020 at its 125th online Plenary Session (11-12 December 2020), accessible online at: [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2020\)035-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2020)035-e)

14 See p.5 of the Structural and Functional Analysis of the Bulgarian Prosecutor's Office, performed by European prosecutors in 2016.

15 This recommendation has been given many times, for instance in par. 71 of „BULGARIA - URGENT INTERIM OPINION ON THE DRAFT NEW CONSTITUTION“; endorsed by the Venice Commission on 11 December 2020 at its 125th online Plenary Session (11-12 December 2020), accessible online at: [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2020\)035-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2020)035-e); regarding the need to have judicial control over the refusal to instigate criminal proceedings, see the Committee of Ministers' Interim Resolution of 2019 with respect to the enforcement of the judgments in Kolevi v. Bulgaria and S.Z. v. Bulgaria, and decisions of 3 September 2020; decisions of September 2019 and Interim Resolution of 1 October 2020 on the enforcement of Velikova in 2020; p. 9 of the Structural and Functional Analysis of the Bulgarian Prosecutor's Office, performed by European prosecutors in 2016, etc.; See also Yankulov, A., Exercising Control Over The Prosecution Function – the necessary criminal justice reform, Sofia, Anti-corruption Fund, 2020, pp. 9-10, accessible online at: https://acf.bg/wp-content/uploads/2020/11/kontrol_nakazatelno_EN_WEB.pdf.

The dependence between the two is a function of several components that have not been addressed by any of the bills tabled in Parliament thus far, including the one that was recently approved at first reading:

- 1) **even after the constitutional reform of the SJC in 2015, the Prosecutor General undoubtedly has a palpable influence in the body that would ultimately nominate/elect the abovementioned figure**, irrespective of the specific role that will be awarded to the PC or the Plenum of the SJC in the final version of the legislation.
- 2) **for this exact reason, the Prosecutor General would be able to impact not only the election, but also the removal from office of the party tasked with investigating him**, as this decision would also be taken by the PC or the SJC Plenum, again regardless of the specific wording of the provision in the final draft of the legislation;
- 3) **the Prosecutor General would be able to influence the career of the official responsible for investigating him**, as the latter would have been part of the Prosecutor's Office before being given the power to investigate the Prosecutor General (which means that the Prosecutor General can initiate an inspection of the previous work of that party which could in principle lead to disciplinary sanctions and other consequences for that party). Moreover, the investigating prosecutor will remain within the structure of the Prosecutor's Office during his term, as well as thereafter, when he returns to his previous post, which will still be during the term of the last Prosecutor General he has investigated;
- 4) **the Prosecutor General will not formally possess power to exert control over specific decisions of the special prosecutor investigating him in the course of the investigation; however, the decision whether to investigate/prosecute the Prosecutor General will remain locked within the Prosecutor's Office, and under the current bill — in the hands of the special prosecutor alone.** If the latter refuses to initiate criminal proceedings or press charges against the Prosecutor General, these decisions will not be subject to any form of review under the current bill; however, even if they were, this review would be conducted by other prosecutors who would not have a special status even by law.

VI. What a workable approach to ensuring compliance with the *Kolevi v. Bulgaria* judgment can look like

As already stated in Section II, the main issues creating a factual impossibility to prosecute the Prosecutor General (since formally there are no legal obstacles to initiating such an investigation even now) are two:

- 1) **the complete monopoly of the Prosecutor's Office over the prosecution function;**
- 2) **the position of the Prosecutor General in the Bulgarian public bodies framework which results from his significant formal and informal influence within.**

The first problem of the two is the more significant one, as it is to a great extent at the root of the unique status of the Prosecutor General among the public officials in the country.

This major problem can be addressed by introducing opportunities for external procedural control over the criminal proceedings, i.e., by enabling courts to review the decisions of prosecutors to press or not press charges.¹⁶

¹⁶ See Yankulov, A., *Exercising Control Over The Prosecution Function – the necessary criminal justice reform*, Sofia, Anti-corruption Fund, 2020, pp. 9-10, accessible online at: https://acf.bg/wp-content/uploads/2020/11/kontrol_nakazatelno_EN_WEB.pdf.

At present, the prosecution function in Bulgaria can be compared to a **mysterious box, in which one inserts information concerning a particular case, and no one knows what or whether anything will ever come out of that box.** In recent years, the double standards in the exercise of criminal repression have been exposed in many cases of high public interest: it has transpired that some cases are handled swiftly, both through procedural and extra-procedural means, while others are left forgotten and no one ever finds out what happened with them.¹⁷

This state of affairs results **precisely from the lack of opportunities to exert external, procedural, independent and professional control over prosecutors' decisions to press/not press charges,** which makes the Prosecutor's Office a procedural monopolist with respect to the prosecution function.¹⁸

The factual state of affairs created by this monopoly is supplemented by the legally mandated and culturally cultivated hierarchy in the Prosecutor's Office, as well as by the fact that the pre-trial criminal proceedings, which the institution is in charge of, are by definition not of public character, and therefore the institutions' actions are not visible and easily assessed by the public.

The forms of non-procedural external oversight are also limited, but even the introduction of strong institutional control through empowering another public body — such as the parliament or the government — to keep the Prosecutor's Office in check might not lead to positive results in the Bulgarian context of façade democracy and *de facto* conflation of the branches of power (a positive change can potentially be effected in the long run and only on condition that the Bulgarian democracy naturally progresses in the right direction). On the other hand, there are no formal obstacles to exercising public control over the Prosecutor's Office through the media, as in theory Bulgaria is a country that promotes media pluralism and freedom. However, in reality the media environment is controlled and the country is plummeting in freedom of speech rankings, which makes the critics of the status quo very few and difficult to hear.

Therefore, eliminating the monopoly of the Prosecutor's Office over the decisions to press or not press charges is the first necessary step to resolving the issue with the accountability of the Prosecutor General for committed crimes, as this step will allow the opening of the mentioned "mysterious box." In this way, the Prosecutor General will naturally begin to lose his position of "high priest of the prosecution," which has full discretion to decide, in the absence of any form of external control, who, when, and for what crime to charge, and whether to charge anyone at all. Only by losing his influential status will the Prosecutor General be stripped of his formal and informal power to keep information locked in the "mysterious box" however he pleases, which is one of the factors making him practically untouchable.

Here it should be noted that another potential solution to the issues surrounding the investigation of the Prosecutor General is to completely abolish this figure. There are many arguments in support of this approach, both legal and practical.¹⁹ However, if measures are not undertaken to introduce external procedural control over the prosecution function, the risk of abusing the Prosecutor's Office's monopoly over it will remain, and the *de facto* immunity from criminal

17 The development of the 40 most significant criminal proceedings on high-level corruption crimes in the past five years and their results have been analysed in ACF's 2019 Annual Monitoring Report: Yankulov, A., Atanas Slavov, Anti-corruption institutions: activity without visible results, Sofia, Anti-corruption Fund, 2020, accessible online at: https://acf.bg/wp-content/uploads/2020/06/ACF_ENG_2020-1.pdf

18 The historical background, the European experiences, and the specific benefits for the criminal justice system that will result from introducing judicial control over the prosecution function have been discussed in detail in Yankulov, A., Exercising Control Over The Prosecution Function – the necessary criminal justice reform, Sofia, Anti-corruption Fund, 2020, accessible online at: https://acf.bg/wp-content/uploads/2020/11/kontrol_nakazatelno_EN_WEB.pdf

19 This idea was proposed by the Justice for All Initiative and is supported by other legal practitioners, for instance Petar Obretenov

investigation will extend to the new heads of the institution. Nevertheless, removing the “top of the pyramid” will undoubtedly result in some form of mutual checks and balances between the different future heads of the Prosecutor’s Office. However, the extent to which such a serious departure from the subordination model will affect the institution’s ability to prosecute is a whole other matter to discuss.²⁰

The monopoly of the Prosecutor’s Office over the prosecution function is considered a cornerstone of the Bulgarian criminal justice system. Above all, the Bulgarian people should understand that, in principle, entrusting a single, non-transparent institution (or open and transparent at its own behest) with complete control over the prosecution function is a peculiarity of the Bulgarian legal system that is uncommon in the European context, unnecessary, and even harmful. After that, it will not be that difficult to agree on an approach for overcoming the monopoly through the introduction of various opportunities for procedural control over the prosecution function. In turn, this will lead to the conclusion that **investigations against the Prosecutor General/senior official in the Prosecutor’s Office do not need to be necessarily overseen by another prosecutor, also responsible for pressing charges.**

At present, the belief that another authority besides a prosecutor could lead criminal investigations and press charges for crimes prosecuted by the state is considered “legal heresy.” This is the reason why the Bulgarian authorities completely reject the recommendations of different European experts to create “a body or official external to the Prosecutor’s Office” that will be entrusted with investigating senior prosecutors (the most natural solution with a view to ensuring independence both formally and in practice), and justify their reluctance with constitutional problems.²¹ **In fact, the real problem is that the Bulgarian politicians do not want to revisit the concept of having a monopoly over the prosecution function, as this allows a single institution (with a single head) to apply the full arsenal of repressive measures in the country to certain individuals, while remaining inactive against others.** After all, the Constitution has already been amended several times in the section related to the judiciary, which means that the need for constitutional amendments is no real obstacle at all.

This reluctance of the Bulgarian authorities puts the country in a vicious circle. On the one hand, **the Government is compelled to introduce a new figure, award it a special status, and confer on it a single function** — to decide cases concerning the Prosecutor General. On the other hand, this figure **cannot be anything else than a prosecutor which automatically means that the Prosecutor General will have a number of direct and indirect opportunities to influence** the appointment and removal, as well as the career and the control over the actions of that figure. There is no way out of this vicious circle.

20 See Yankulov, A., *Exercising Control Over The Prosecution Function – the necessary criminal justice reform*, Sofia, Anti-corruption Fund, 2020, p. 7, accessible online at: https://acf.bg/wp-content/uploads/2020/11/kontrol_nakazatelno_EN_WEB.pdf.

21 For further information on the topic of whether the Constitution prevents the demonopolization of the prosecution function, see „Пречи ли Конституцията на реформата в прокуратурата?“, published in defakto.bg on 13 December 2019, accessible online at <https://bit.ly/3rU4dY8>

VII. What the possible concrete steps can be if the authorities decide to adopt the approach for ensuring compliance with the *Kolevi v. Bulgaria* judgment outlined in the previous section

In urgent cases (Art. 212, par. 2 of the CPC) or in cases of overt criminal acts (Art. 356, par. 1 of the CPC) when the collection of evidence that a crime has been committed has to begin immediately, any investigation concerning the Prosecutor General/other senior prosecutors will be initiated by investigative authorities within the MoI system or by other executive bodies. The latter will satisfy the formal criteria for independence and will be professionally trained to perform adequately all procedural actions necessary for ascertaining the objective truth.

The Prosecutor's Office shall not lead this investigation, nor shall it make the final decision regarding its outcome. For that purpose it would be appropriate to set up an *ad hoc* body that could for instance be composed of three randomly selected appellate, supreme and/or constitutional acting and/or retired judges²² (the level of seniority is a merely technical matter) who will oversee the specific investigation and will decide whether there is sufficient evidence to press charges against the Prosecutor General, and subsequently bring the latter to court.

The complete list of magistrates satisfying the set criteria to become members of this body will be prepared in advance, and when necessary, three of the candidates will be randomly selected to handle the particular case and take charge of it from the very beginning. This special body will be responsible for conducting the criminal proceedings on the case, and when acting judges form part of its composition, they will naturally not be pressing charges in the capacity of judges, but in the capacity of members of that collective body, entrusted with prosecution functions. In other words, there will be no amalgamation of the prosecution and the court, but rather *an ad-hoc collective body akin to the historical figure of the investigating judge in France, and not to his German counterpart*. At the trial phase this specified body will fulfill the role of the prosecution party, now as a *sui generis* agent, and not as a subject analogous to the investigating judge.

It is highly unlikely that the described scenario, where an investigation is initiated urgently or upon the commission of an overt criminal act by the Prosecutor General/other senior prosecutors, will ever happen in practice, i.e., it will probably remain a purely theoretical hypothesis.

The more common scenario would be to receive reports for alleged criminal behavior on the part of the Prosecutor General, which would be submitted by citizens, non-governmental organizations, or public institutions that have, in the course of their work, identified information pointing to a crime committed by the Prosecutor General. Under the current model, such reports or information are sent to the Prosecutor's Office, which alone is competent to initiate an investigation.

It would be impractical to create an ad hoc body composed of high-ranking judges that would have to rule on the merits of every single case filed against the Prosecutor General, not least because there are no, nor should there be any, restrictions with respect to the filing of such cases. Therefore, the initial assessment whether and what investigation should be initiated on the grounds of the filed report, as well as whether there is sufficient evidence to justify the instigation of criminal proceedings, could be made by a single, randomly selected lower-court judge. At the same time, the latter's refusal to instigate investigative proceedings should be subject to judicial control. In case that a preliminary investigation is necessary to clarify the information in a submitted report, it will again be performed by executive bodies.

²² The idea that a judge in the Supreme Court of Cassation should be responsible for conducting an investigation against the Prosecutor General was proposed by Judge Emil Dechev in the course of consultations with the President in 2019

If it is decided that there is sufficient evidence that a crime has been committed and an investigation should be launched, the latter will be led and handled by the mentioned *ad hoc* body comprised of senior judges, and will be carried out by investigative authorities within the MoI system or by other executive bodies. .

VIII. What results can be expected if the authorities adopt the specific steps described in the previous section and how they compare against the expectations arising from the bill currently tabled in Parliament

The approach described above ensures a real possibility to achieve the following results that **the current bill absolutely cannot hope to provide:**

- **independence of the parties conducting/overseeing investigations and deciding whether to press charges** – it should be noted that in order to achieve this outcome, the influence of the Prosecutor General on the Plenum of the SJC should be reduced (a problem that has been discussed many times and is thus not the focus of the present analysis); at present, the Prosecutor General has a very strong *de facto* influence over the courts and over various bodies of the executive, which can only be diminished by limiting the power he holds in practice by strengthening the judicial control over the work of the Prosecutor’s Office, and by completely removing the “general review of legality” function; in this way, the Prosecutor General’s status in the framework of public institutions will be decreased significantly;²³
- **professionalism of the parties conducting/overseeing investigations and deciding whether to press charges** – one of the main practical shortcomings of the idea to have a **single prosecutor** competent to investigate the Prosecutor General **is the fact that this person will have to single-handedly conduct the entire investigation, in addition to a preliminary inspection, if such is required; the person will have to be an operative agent, an investigative authority, and a prosecutor at the same time**, which poses risks related to the work quality; for instance, what will happen if this special prosecutor falls sick when he has to be conducting an investigation; how will the prosecutor manage to carry out urgent investigative actions if he is not at the required location, and other purely operational difficulties; whereas, with the approach proposed in this analysis, investigations will be conducted by the most competent authorities within the executive, and will be overseen and its outcome will be decided by senior acting or retired judges;
- **eliminating the scenario where a single person decides all matters pertaining to the potential criminal investigation of the Prosecutor General, which can be turned either into a tool for covering criminal behavior, or into a tool for repression of opponents through charging them with inexistent crimes** – the danger stemming from the concentration of all the power related to the prosecution of the Prosecutor General in the hands of a single person who will be able to decide the fate of the Head of the Prosecutor’s Office in the absence of any form of external control is apparent (as even the mere pressing of charges will not only ruin the reputation, but may also lead to the temporary removal of the Prosecutor General from office); this arrangement can itself become an instrument for giving the Prosecutor General complete immunity or for bringing him down; an *ad hoc* body composed of randomly selected senior judges will provide a guarantee against the potential to cover up crimes, as well as against the unjust prosecution of the Prosecutor General for purely political reasons;

23 See Sections V and VIII of Yankulov, A., Exercising Control Over The Prosecution Function – the necessary criminal justice reform, Sofia, Anti-corruption Fund, 2020, accessible online at: https://acf.bg/wp-content/uploads/2020/11/kontrol_nakazatelno_EN_WEB.pdf.

- **avoiding the creation of yet another expensive administration despite the fact that the system possesses sufficient resources to deal with the issue at hand** – this aspect is of principle nature, but it is indeed astonishing how a solution is always sought in the creation of a new administration, without considering options to use the existing resources more adequately.

IX. Conclusion

The current need to establish a mechanism for effective investigation of the Prosecutor General offers a historical opportunity to rethink certain basic concepts in the Bulgarian criminal justice system, and not simply solve the specific issue related to the immunity from prosecution of one public official or another. Missing this opportunity by doing a “half job” will likely make the present state of affairs even worse, and will be yet another mistake on the part of the authorities that can lead to all sorts of negative consequences for society.

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