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REPORT FROM THE COMMISSION

TO THE EUROPEAN PARLIAMENT AND THE COUNCIL

On Progress in Bulgaria under the Co-operation and Verification Mechanism

{SWD(2014) 36 final}

1. INTRODUCTION

In 2012, the fifth year of the Cooperation and Verification Mechanism (CVM), the Commission decided to produce a longer-term assessment to give a full picture of progress. This assessment was published in July 2012.¹ It showed important progress in the adaptation of the basic legislative and institutional framework, but also some important remaining gaps as well as a need for effective and consistent implementation of the reforms. There were still considerable challenges to be tackled. In this context it was decided to take a longer period before the next report (18 months) see how the reforms already implemented by Bulgaria were taking root and to give time to assess the degree of sustainability before the next assessment. The 2012 report, its methodology and conclusions were also endorsed in conclusions by the Council of Ministers.²

This report assesses the progress made by Bulgaria in the core CVM areas of judicial reform, anti-corruption work, and the fight against organised crime. These are issues at the heart of the modernisation of Bulgarian society: for reform to succeed, it needs a consistent and coherent approach based on a broad consensus in Bulgarian society. The fact that the period covered by this report was characterised by three different governments has not helped to build this consensus, though events have also illustrated a widespread public aspiration for reform.

The Commission believes that the monitoring process of the CVM, the opportunities provided by EU funds and the constructive engagement of the Commission and many Member States continues to be a valuable support to reform in Bulgaria. The next formal report will come in around one year's time.

2. STATE OF THE REFORM PROCESS IN BULGARIA

2.1 *Reform of the judiciary*

Independence, Integrity and Accountability

Public confidence in the Bulgarian judiciary is not high.³ CVM reports have pointed to ways to improve this confidence, through a professional approach to managing the system to insulating judicial appointments and decisions from political influence.⁴

Some significant steps have been taken since July 2012. The procedures for nominating senior magistrates have become more public and there has been a more sustained effort to tackle some of the management issues facing the judiciary, such as workload imbalances. Some serious problems have been acknowledged as requiring action, such as the need to protect the system for allocating cases from manipulation. In the second half of 2013, there were no frontal attacks from the executive on the judiciary.⁵ Nevertheless, as also highlighted in previous reports, concerns persist about the independence of the judiciary in Bulgaria.

¹ COM(2012) 411 final

² 24 September 2012

³ See the latest figures provided by the World Economic Forum <http://reports.weforum.org/the-global-competitiveness-report-2013-2014/>

⁴ For example, COM(2012) 411, pp 6-8

⁵ For example, the practice of naming police operations after judges who had failed to impose detention measures on arrested suspects was terminated.

In July 2012, the Commission expressed a strong hope that the future management of the Supreme Judicial Council (SJC) would position it as a key institution to drive progress in the reform of the judiciary. Reforms in 2012 introduced more public election procedures for the SJC. However, the conduct of the election for the SJC in autumn 2012 did not convincingly demonstrate an open contest with professional merit and integrity to the fore. The proceedings to elect the parliamentary quota, while more open than in the past,⁶ suggested a significant party political influence on the process. The election of the judicial quota suffered from the decision not to allow for direct elections by judges.⁷ This put much influence in the hands of the existing court leadership, limiting the opportunities for a fresh start.

The SJC has identified its priorities more clearly than in the past. It has also made efforts to open up, with more outreach and with the establishment of a Civic Council to bring advice from civil society to the SJC, comprised of key NGOs as well as professional organisations. A vigorous civil society in this area was identified in the July 2012 report as an important step forward for Bulgaria.⁸ However, its real influence on policy remains unclear and a clearer procedure for consulting the Civic Council and explaining when its recommendations are not followed would increase the effectiveness of the Civic Council. In general, the SJC should take further steps in the direction of transparency.

The SJC has taken some steps towards managerial reform. On workload and reallocation of resources, a practical approach seems to be making some progress. In other areas, such as objective appraisal and promotion procedures or introducing more consistency into disciplinary proceedings, concrete steps so far are few.⁹ The ethics committee could be expected to act as a champion of integrity, but the SJC has not positioned itself to make integrity a major priority.¹⁰ As such it finds it difficult to dispel continued concerns about political influence over its decision-making.

The result is that the SJC is today not widely regarded as an autonomous and independent authority able to effectively defend the judiciary's independence vis-à-vis the executive and parliamentary branches of government. The onus for defending the independence of the judiciary, or for scrutinising whether politically-sensitive cases are handled objectively,¹¹ often seems to fall on civil society. The SJC should acknowledge this as a major priority and put in place transparent procedures for a consistent handling of issues as they arise. This also suggests the need for a more consistent policy towards the media.

One of the main areas influencing public perceptions of law enforcement and justice is appointments. These have acted as a media and political focus. Concerns about important public appointments being decided in an intransparent way and involving strong economic and political interest groups was further strengthened by several high-profile appointments in the course of the past year. Concrete examples were the failed appointments to the constitutional court and the state agency for national security (SANS).¹² In both cases, the candidates eventually had to withdraw, but both left a legacy of concern about how the system runs. These were only the most emblematic cases. In other cases the outcomes were

⁶ Technical report p. 2.

⁷ COM(2012) 411 final, ref

⁸ COM(2012) 411 final, p. 6.

⁹ Technical report pp. 13-14.

¹⁰ Technical report pp. 11-12.

¹¹ Current cases involving allegations of wiretapping and ballot rigging will provide a test in this respect

¹² Technical report pp. 4 and 25.

less contested, but the process still left a picture of intransparent decision-shaping having more influence than formal procedures, despite the improvements in transparency.¹³

Such cases illustrate that while transparent procedures are important for the proper functioning of public institutions, formal rules are not always sufficient. In order to build trust in its institutions, Bulgaria needs to develop a track record of allowing decisions concerning appointments, including to high-level offices to be based on a real competition between candidates in accordance with the clear standards of merit and integrity underlined in past CVM reports.¹⁴ An important test case will be the upcoming nomination and election of the Chief Inspector of the Judicial Inspectorate. Delays have given the impression that the key factor is an inability to agree on a candidate in advance, whilst this kind of position should be filled following an open process designed to appoint a highly skilled professional who can show and apply full objectivity. The election of the President of the Supreme Court of Cassation will also be an important appointment later in 2014.

An important element in the protection of judicial accountability and integrity is the disciplinary procedures applied to magistrates. This needs systematic criteria with the goal of consistency in disciplinary action.¹⁵ When there are no clear standards for the assessment of individual cases, the process becomes open to arbitrary decisions. The fact that the Supreme Administrative Court has frequently reversed SJC decisions also suggests either an inconsistency or a lack of common interpretation of the rules. A systematic approach to disciplinary action is a key element of judiciary independence and integrity, as arbitrary decisions in this area tend to create the basis for – real or perceived – undue pressure on magistrates.

The new unit set up to investigate crimes committed by magistrates will be responsible for a particularly sensitive area. If it can establish a track record of objectivity and effectiveness, this could be an important addition to the efforts to promote integrity. However, the abuses identified by the current prosecution leadership in the previous Prosecution Inspectorate also illustrate the risks of self-contained bodies within the prosecution.¹⁶ The implementation and application of clear, transparent and accountable procedures are essential to offset this risk.

Legal Framework

Current discussions on the reform of the Penal Code aim to bring the long-standing discussions on a first draft to a conclusion and a proposal has been presented to Parliament in January. The new code should bring important improvements. However, it should be noted that whilst a reform of the – regularly amended – 1968 Penal Code will be helpful, it needs to be part of a wider approach to criminal justice and be thoroughly discussed with practitioners and the civil society. In the areas covered by the CVM, it will be important to identify and explain provisions designed to improve the fight against corruption and organised crime, but it will also be important to see how the changes can be combined with a better managed judicial and law enforcement system. This may require changes to the Criminal Procedure Code. At the same time, the need for legislative changes should not hold

¹³ Technical report p. 5.

¹⁴ There are internationally recognised standards, such as those from the European Network of Councils for the Judiciary:

http://encj.net/images/stories/pdf/GA/Dublin/encj_dublin_declaration_def_dclaration_de_dublin_recj_def.pdf

¹⁵ In regard to appraisals and promotions disciplinary proceedings are sometimes taken into account during promotion exercises and sometimes are not.

¹⁶ Technical report p. 10.

back useful practical and organisational steps that can be taken in the short term independently of the new law. An important element in this process should be the conclusions of an analysis of unsuccessful cases recommended by the Commission,¹⁷ as well as other analyses of issues like delays in criminal proceedings (see below).

Strategic framework for judicial reform

As well as the SJC, the other key player in setting a tone of reform for the judicial system is the Ministry of Justice. With changes in Ministerial leadership and a parliamentary arithmetic which now makes legislative change difficult, it has been difficult for the Ministry to provide the perspective needed, though the championing of areas like e-justice may reap dividends in the future. If given real ownership, the current efforts to update the longer-term strategy for judicial reform could act as a useful focus.

The Minister of Justice has asked leading NGOs to help analyse the state of play of the reform of the judiciary to date. The idea is to build upon the 2010 strategy, which has only been implemented in part, and to cover a variety of issues including rebalancing resources to needs, integrity issues, harmonisation of court management practice, and the role of administrative heads. This analysis was due to be ready in the autumn 2013 but has been delayed. It is supposed to be adopted in 2014 after consultation of the relevant stakeholders and should cover a 7 year period to implement reforms, partly to align the timespan with programming of support under the EU structural funds. It is important that the strategy is subject to wide consultation, including civil society and professional organisations, but then is adopted as an agreed roadmap by the government and the SJC, to ensure a maximum of ownership.

Efficiency of the judicial and law enforcement system

The first steps are being taken to address difficult issues of workload and the redistribution of resources amongst courts and prosecution offices. This may encounter some resistance from certain concerned parties, but as long as it can be shown to be based on objective and transparent criteria, it will also act as a demonstration that the judicial leadership can address sensitive questions. Together with the launching of stalled competitions, this should now be resulting in some real improvements.¹⁸ The work undertaken in the SJC on developing methodological guidelines to address workload imbalance should also offer a good basis for the future. A fair distribution of workload will not only make for a more efficient system which better serves the Bulgarian public – it will also have consequences for disciplinary proceedings. At present, the reality of widespread delays can too easily be used for disciplinary cases – often on an inconsistent basis – whilst responsibility for the problem may rather lie with the judicial leadership and administrative heads.

On case allocation, the SJC intends to install a centralised system for keeping track of random case allocation in all courts, to address concerns that the current system can be manipulated.¹⁹ It is welcome that the existence of a problem has now been acknowledged. A permanent system should benefit from outside expertise and the involvement of stakeholders and civil society if it is to restore confidence. It is also important to have common implementing rules, so that all parties know how the system is translated into practice and can query any instances where rules seem not to have been respected.

¹⁷ COM(2012) 411 final, p. 21.

¹⁸ Technical report p. 14.

¹⁹ Technical report p. 6-7.

Another important part of the management of the judicial system is the Inspectorate attached to the Supreme Judicial Council. As noted in past CVM reports,²⁰ the Inspectorate could be a valuable tool for driving a more rigorous management approach and for targeting identified shortcomings, re-orientating its work from a formal to a qualitative approach to inspections. Currently the Inspectorate will analyse statistics on the compliance with deadlines or check the application of random case allocation, but it rarely checks the quality of case files nor does it take into account workload issues in a systematic manner. As a consequence, the conclusions reached by the inspectorate in an area like random allocation do not seem to address the issues in full. In addition, issues related to the integrity or ethical behaviour of magistrates are not dealt with by the Inspectorate, as the Inspectorate considers that they fall outside the remit of its competence. These factors limit the Inspectorate's impact in terms of addressing the wider shortcomings affecting the judicial system in Bulgaria.²¹

An example where management has taken a more systematic approach is in the prosecution.²² The audit undertaken by the Prosecutor General and the subsequent action plan provides a clear and often frank analysis of shortcomings, and seeks to identify specific remedies. If implemented successfully, it could yield significant results, while also illustrating that extra resources are not always needed to galvanise change. Whilst such a process in the prosecution cannot be automatically replicated in the judiciary, given its less hierarchical management, it provides an example in terms of willingness to address problems and be specific as to intended solutions. It would however be useful to apply more transparency to the process, to ensure that accountability for its implementation can be effective. Reform in the prosecution also needs to go forward in the context of the wider judicial reform strategy – problems like addressing difficulties with the use of expertise in court need a common approach from the prosecution and the SJC. Issues like performance assessments could also be taken forward in a way which ensures a consistent approach for judges and prosecutors.

More generally, the Ministry of Interior has undergone a number of significant reforms to focus on its core purpose of law enforcement and to redeploy staff from administrative to operational functions. The problematic practice of donations to the Ministry, which had been restricted to public authorities and companies, has reportedly been stopped. At the same time, the Ministry has to face challenges such as appropriate handling of demonstrations and pressure on the borders.

2.2 Corruption

Widespread corruption is perceived as a major problem and poses a significant challenge for the Bulgarian authorities.²³ It has clear consequences for the willingness of businesses to invest in Bulgaria.²⁴ An anti-corruption strategy was adopted by the previous government in 2010 and it is now being updated – it could usefully involve independent outside expertise in this work. Overall, the results of previous efforts have been very limited. The general image

²⁰ COM(2012) 411 final, p. 7 and 21.

²¹ Technical report p. 11.

²² Technical report p. 9.

²³ Center for the Study of Democracy, Corruption and anti-corruption in Bulgaria (2012-2013), Policy Brief No. 43, November 2013. According to the Corruption Perceptions Index 2013 published by Transparency International, Bulgaria ranks second highest among the EU Member States with regard to the perceived level of corruption. (<http://www.transparency.org/cpi2013>)

²⁴ The 2013 Global Competitiveness Report lists corruption as the most problematic factor for doing business in Bulgaria. http://www3.weforum.org/docs/WEF_GlobalCompetitivenessReport_2013-14.pdf p. 138.

is that of a weak and uncoordinated response to what is a systemic problem throughout the public administration. Shortcomings identified in previous CVM report remain.²⁵

A number of institutional changes have been made over the past years, but there is a tendency for these initiatives to run into problems or simply show no visible results. For example, the Conflict of Interest Commission, which could have played a crucial role in targeting irregular practices at all levels in the public sector, has instead been caught up in a serious scandal involving suspicions of strong political influence. The anti-corruption project BORKOR, which was promoted as a major instrument to identify and address corruption risks, still shows no concrete results, in spite of the resources which have been devoted to the project. In the area of public procurement, a complex and ever changing legislative framework has made it even more difficult to create a culture of objectivity and rigour. Some business voices are losing confidence that a tide of manipulation of tenders can be stemmed.²⁶

There are however also some positive developments. Since 2007 the internal inspectorates of the state administration working under the guidance of the Inspectorate General under the Prime Minister's Office have been strengthened. They have the potential to play an important role in detecting and preventing irregularities as well as in presenting proposals for further improvements in the anti-corruption system. The practice of establishing joint teams between the investigatory agencies and prosecution should also lead to a more effective response with regard to serious corruption offences. It remains the case that anti-corruption efforts are diffuse, with no single corruption authority given the authority, and the autonomy, to drive change. The Inspectorate General could act as a nucleus for this work, but is at present on too small a scale to have a great impact.

Experience suggests however that of central importance to the credibility of anti-corruption action is the successful pursuit of high level corruption, so that transgressions are seen to be brought to justice. The lack of a track record of success in pursuing high-level corruption cases remains an obstacle to persuading the Bulgarian public that a serious effort is under way to address the problem.

2.3 Organised crime

Similarly, the lack of overall progress on emblematic organised crime cases has inevitable consequences for perceptions about the fight against organised crime. A number of high-profile cases have been dropped, while for other serious crimes, such as contract killings, no indictments have been made after several years of investigation.

The fact that high-profile organised crime figures were able to escape from justice on the eve of a final verdict in July 2012 was a source of widespread concern:²⁷ but the fact that nobody was willing to take responsibility for this, and that no steps have been taken to guarantee that this could not happen again, is an even stronger reflection on the difficulties of the system to address the problems.²⁸

The main measure taken by the new government has been the strengthening of the state agency for national security (SANS), which will now not only be dealing with espionage and counter-intelligence, but also with organised crime and a variety of other crimes considered to be significant enough to affect state security. This includes the transfer of the special

²⁵ COM(2012) 411 final pp. 14.

²⁶ Direct contacts between the Commission and business organisations.

²⁷ The fact that an asset forfeiture case against the same group has now stalled has reinforced this concern.

²⁸ Indeed, a comparable case concerning a defendant convicted of a double murder took place in December 2013.

police units on organised crime (GDBOP) to the security services (SANS). This has caused some disturbances in the operation of the services concerned and it is important to ensure that this effect is only transitional. More significantly, the manner in which the decision was taken, with no consultation or justification at the time, caused significant reputational damage to the services as well as the new government, which can only be redressed by the services showing that the change brings improved operational results. As discussed above, in this case the general image of a reform prematurely implemented was further compounded by the controversy over the appointment of the new head of the security agency.

A key issue is also the division of labour with the Ministry of Interior. For example, SANS will deal with the production of drugs and international drugs trafficking, whereas the police will deal with other drug related crimes. SANS will deal with high-level corruption, the police with all other forms of corruption. Sometimes cases may need to be reattributed in the course of the investigation.

SANS and the Prosecution have formed specialised teams to deal with corruption, trafficking, and financial crimes.²⁹

Whilst this reorganisation could bring some positive developments, notably by having a more integrated approach given the links between corruption and organised crime, the new agency will have to establish a strong track record if it is to dispel the negative impression created by the controversial atmosphere of its creation. Particular attention needs to be given to cooperation with law enforcement services in other Member States.³⁰

More generally, CVM reports had recommended a comprehensive analysis of why cases in the past had stalled or were unsuccessful, involving all the relevant government and judicial authorities.³¹ Perceived problems like the use of expert evidence in court, insufficient witness protection and problems with evidence need to be looked at from the perspective of the police investigation, the prosecution and the trial phase if improvements are to follow. Progress on this analysis has been slow and a lack of coordination and to some extent of ownership is suggested by parallel initiatives by the Prosecution and the SJC.³² Open discussions with stakeholders and civil society, followed by a clear action plan, is needed to restore momentum to this process.

Asset forfeiture is a key tool to deprive organised crime groups of their illegal revenues. The new leadership of the asset forfeiture commission (CEPACA) seems to have delivered a modest increase in forfeited assets. However, the new law, albeit having improved some aspects, also included some parliamentary amendments which created new stumbling blocks, in particular a very high unjustified wealth threshold for the agency (CEPACA) – to intervene ex-officio. Some question marks therefore remain with regard to the new legal set-up and its impact on the ability of the CEPACA to act effectively.³³

Likewise, the specialised prosecution and courts still need to establish a track record of effectively tackling important cases. There remains a concern that some aspects of the design are hampering their effectiveness, particularly a lack of authority to prioritise which leaves the institutions burdened with minor cases. The lack of technical expertise is also often

²⁹ In addition to the unit on crimes concerning the magistracy noted above

³⁰ A particular problem concerns the admissibility in some jurisdictions of evidence gathered by security services

³¹ COM(2012) 411 final, p. 14 and 21.

³² Technical report p. 24.

³³ Technical report p. 25-26.

flagged by the specialised prosecution as a serious operational problem, and the increasing importance of financial investigation in organised crime makes this of particular importance.

3. CONCLUSION AND RECOMMENDATIONS

Since the Commission's last report in July 2012 Bulgaria has taken a few steps forward. There has been some degree of improvements in appointment procedures, some useful managerial steps by the Prosecutor General and some progress by the Supreme Judicial Council on the workload issue.

However, overall progress has been not yet sufficient, and fragile. Public confidence is conditioned largely by key moments when decisions or events are of sufficient importance to warrant more general interest. Most such events over the last 18 months – a period during which Bulgaria has had three different governments – have been the source of concern rather than reassurance, with appointments having to be aborted due to integrity issues, the escape from justice of convicted leaders of organised crime and a succession of revelations about political influence on the judicial system. There remain very few cases where crimes of corruption or organised crime have been brought to conclusion in court.

There are voices in favour of reform in Bulgaria, frustrated by the slow pace of change, which deserve encouragement. To progress more quickly towards the CVM benchmarks, the Bulgarian authorities need to work with them and to provide leadership based on a vision centred in core principles like the rule of law and the independence of the judiciary. This would imply a political commitment to a long-term strategy for reform as well as concrete and practical measures in the short term to bring the process forward.

The Commission invites Bulgaria to take action in the following areas:

1. Independence, accountability and integrity of the judiciary

The rules governing appointments should be applied with clarity and transparency. A series of cases where professionalism and integrity are clearly the main drivers in an appointment process will be needed to restore public confidence, particularly in the case of the most senior appointments. In this area Bulgaria should:

- Establish a set of objective standards for appraisals and promotions, focusing on merit, integrity and transparency, and put in place a system to monitor and evaluate the application of those standards in current practice, accounting for the specifics of the functions of judges, prosecutors and investigators. In both steps, involve the professional associations and other relevant stakeholders.
- Develop a consistent practice within the SJC of applying objective standards of merit, integrity and transparency to appointments, including for high-level offices.
- Provide guarantees for the integrity and transparency of the system of case allocation throughout the judiciary, with a system of random allocation checked by independent experts to ensure that administrative heads are fully accountable for all decisions to diverge from the system. Common rules for applying the system are needed and should apply to all courts.
- Re-direct the work of the Inspectorate of the SJC to act in a proactive manner to promote integrity and judicial efficiency.

- Establish a clear procedure for the SJC to react publicly in cases of political interference in the judiciary and prosecution.

2. *Reform of the Judicial System*

The updated strategy on judicial reform should be used to give a direction and momentum to reform. In this area Bulgaria should:

- Implement the action plan for the prosecution within the proposed timeline. Embed the action plan in the broader reform of the judiciary. In the meantime, in the SJC, take concrete measures to address the problem of uneven workload between courts and magistrates in an objective manner.
- The strategy should include an annual progress report from the SJC on judicial reform measures and goals for the coming year so as to add to the transparency of the process.
- Set a target for the completion of work on the new Penal Code, and for its implementation.
- Ensure the open involvement of all significant NGOs and professional organisations in defining and monitoring strategies for reform.

3. *Efficiency of the judicial system*

The issues of workload imbalances and distribution of resources should continue to be addressed as well as issues like appraisals and promotions taking full account of integrity. In addition, in this area Bulgaria should:

- Establish clear procedures, standards and penalties to ensure consistent disciplinary rulings. These should serve as the basis for a consistent approach by administrative heads.
- Make fully public the functional audit of the prosecution offices conducted by the Prosecutor General as well as the action plan and undertake a public consultation on the action plan.
- Close loopholes in the effective implementation of court decisions, such as absconding to evade prison sentences or failure to apply financial sanctions defined in court.
- Make concrete progress on E-justice as a means to improve the efficiency, transparency and consistency of the judicial process in the short- to medium-term as well as in the long-term perspective.

4. *Corruption*

Tackling corruption requires a sustained and consistent effort on prevention, but also on pursuing transgressions and showing that wrongdoing results in sanctions. In this area Bulgaria should:

- Entrust a single institution with the task to coordinate the fight against corruption, to assist and coordinate the efforts in different sectors.
- Review and update the national anti-corruption strategy in consultation with civil society organisations, with a standard model of public administration having internal inspectorates with independence, transparency and accountability.

- Take steps to reduce the risk of corruption in public procurement procedures by making them simpler and more transparent.
- Review the procedures on conflicts of interest so as to ensure their effectiveness and impartiality as well as the credibility of the sanctioning mechanism.

5. *Organised crime*

Successful investigation and sanctioning of organised crime will always remain the most effective way to make progress, so progress on emblematic cases remains of central importance. In this area Bulgaria should:

- Prepare and implement an action plan, drawing on the long-awaited independent and comprehensive analysis of case failures, with a timetable for concrete measures to address all aspects and all stages of the law enforcement and judicial system.
- Specifically address the problem of high-level defendants absconding before a final court decision, with a clear assignment of the responsibility for any failings.
- Develop a clear policy governing the relationship of the State Agency for National Security (SANS) with bodies dealing with organised crime in other Member States, with specific operating procedures with those bodies to ensure that cooperation is maintained and improved.
- Provide that the Specialised Court for Organised Crime and the attached Prosecutor's Office can concentrate on high-profile cases.
- Ensure the necessary cooperation between the Asset Forfeiture Commission and the relevant law enforcement institutions. Carry out an independent evaluation of the new law on asset forfeiture and its impact by summer 2014.