PROSECUTOR'S OFFICE OF THE REPUBLIC OF BULGARIA

SPECIALISED PROSECUTOR'S OFFICE

TO
THE MINISTRY
OF JUSTICE

OPINION

on the grounds of Article 26 of the Law on Normative Acts

by Valentina Madjarova - Administrative Head
of the Specialised Prosecutor's Office

on the draft Law on the Amendment and Supplementation to the Judiciary Act (promulgated in SG, No. 64 of 2007; amended, Issue 69 and 109 of 2008, Issue 25, 33, 42, 102 and 103 of 2009, Issue 59 of 2010, Issue 1, 23, 32, 45, 81 and 82 of 2011; Decision No. 10 of the Constitutional Court of 2011 - Issue 93 of 2011; amended, Issue 20, 50 and 81 of 2012, Issue 15, 17, 30, 52, 66, 70 and 71 of 2013, Issue 19, 21, 53, 98 and 107 of 2014, Issue 14 of 2015, Issue 28, 39, 50, 62 and 76 of 2016, Issue and 13 of 2017; Decision No. 1 of the Constitutional Court of 2017 - Issue 14 of 2017; amended, Issue 63, 65, 85, 90 and 103 of 2017, Issue 7, 15, 49 and 77 of 2018, Issue and 17 of 2019; Decision No. 2 of the Constitutional Court of 2019 - Issue 19 of 2019, amended, Issue 29 of 2019, Issue 11, 86, 103, 109 and 110 of 2020, amended and supplemented, Issue 16, 41, 43 and 80 of 2021)

LADIES AND GENTLEMEN,

I hereby express my **negative** opinion on the normative act submitted for public consultation, the reasons for which can be conditionally divided into two groups:

With regard to the procedure:

Firstly: In its long-standing and uncontroversial practice, the SAC has taken a consistent position that the failure to comply with the procedure and the conditions for the issuance of a normative act determines its nullity. If the procedure for its issuance has been violated, the nullity applies to the entire normative act, since all its parts are affected. Such a flawed normative act could not produce legal effects, as it would be unconstitutional.

In the present case, neither in the reasons nor in the report of the contributor of the draft for amendment and supplementation to the Law on the Judiciary, indicate specific and/or exceptional reasons that would

require shortening of the statutory period of 30 days for holding public consultations[1]. The drastic shortening of the time limit for public consultation on the draft law, without giving reasons for the need for this, motivates me to claim that the procedure for issuing the law has been violated. The contributor of the draft law supports the serious reduction of the public consultation period by half - from 30 days to 14 days, with the following arguments: *"A Draft Law Amending and Supplementing the Judiciary Act, containing regulations related to the closure of the Specialized Criminal Court, the Appellate Specialized Criminal Court and their respective specialized prosecutor's offices, was adopted at the first reading in the 46th National Assembly. This draft has been discussed in the Committee on Constitutional and Legal Affairs, as well as in the plenary at first reading. The proposed draft of the Ministry of Justice represents a conceptual continuation of this topic, which is already widely known to the public and has gone through the above discussions. Based on the foregoing, the time limit of 14 days appears to be sufficient to continue the discussion."* The considerations set out do not meet the legal requirements and are conceptually wrong.

Chapter Three of the Law on Normative Acts (Article 26-28 of the Law on Normative Acts) regulates the procedure for the creation of the statutory acts[2]. Pursuant to Article 26, para. 2 of the Law on Normative Acts[3], public consultations with citizens and legal entities shall be held in the process of drafting a normative act. The above provision should be applied in conjunction with Article 28, para. 2 of the Law on Normative Acts, which regulates that the reasons, respectively the report to the draft legislative act, shall contain: 1. The reasons for the adoption; 2. The objectives pursued; 3. The financial and other means necessary for the implementation of the new regulation; 4. The expected results of the implementation, including financial results, if any; 5. An analysis of compliance with European Union law. According to Art. 28, para. 3 of the Law on Normative Acts, a draft normative act, which is not accompanied by a statement of reasons, respectively a report, according to the requirements under para. 2, shall not be discussed by the competent authority.[4] The provision of Article 28, para. 2 of the Law on Normative Acts is mandatory[5]. Compliance with the envisaged procedure is an imperative duty of the bodies entrusted with the rule-making powers, ensuring the lawful formation of management decisions and the adoption of legal norms regulating certain social relations in a reasonable, competent and stable manner. The law-making process is also based on the principles of reasonableness, stability, openness and coherence, as provided in Article 26, para. 1 of the Law on Normative Acts.

[1] Art. 26 LNA – para. 4 (New – State Gazette, Issue 34/2016, in force as of 4.11.2016) The period for proposals and comments on the drafts published for public consultation pursuant to paragraph 3 shall be not less than 30 days. In exceptional cases and where the reasons are explicitly stated in the explanatory memorandum or report, the draftsman may set a different time limit, but not shorter than 14 days.

[2] Chapter Three, (suspended, New - State Gazette, Issue 46/07, in force as of 1.01.2008) - PRODUCTION OF DRAFT NORMATIVE ACTS (title amended - State Gazette, Issue 46/07, in force as of 1.01.2008) – Art. 26 -28 LNA

[3] New – State Gazette, Issue 34 of 2016 in force as of 4.11.2016)

[4] Decision No. 6046/26.05.2015 of the Supreme Administrative Court under administrative case No. 5547/2012, IV division, Rapporteur Judge Diana Garbatova

[5] Decision No. 6577/14.05.2013 of the Supreme Administrative Court under administrative case No. 3622/2013, VII division, Rapporteur - Chairperson Vanya Ancheva - "The provision of Art. 28, para. 2 LNA is mandatory and states that the reasons, respectively the report, must contain exhaustively listed mandatory requisites. The LNA attaches the utmost importance to the motivation of the proposal for the adoption of a legislative act.
Pursuant to the provision of Art. 28, para. 3 LNA, a draft legislative act which is not accompanied by a statement of reasons, or a report, in accordance with the exhaustive list of requirements set out in the law, shall not be discussed by the body competent to adopt it. And according to Art. 26 para. 1 LNA, the drafting of a legislative act shall be carried out in compliance with the principles of soundness, stability, openness and coherence."

The provision of Article 26, para. 4 of the Law on Normative Acts requires that the deadline for proposals and opinions on the drafts published for public consultations should not be shorter than 30 days, while the legislator has allowed the drafter to set another deadline, not shorter than 14 days, but this is permissible **only in exceptional cases and if the reasons are explicitly stated in the statement of reasons**, respectively in the report. In the present case, it is undisputed that the publication of the statement of reasons to the proposed draft law for public consultation was made on the website of the Ministry of Justice and on the Public Consultation Portal of the Council of Ministers, with a 14-day, not a 30-day, public consultation period. It is essential that neither the statement of reasons, nor the report of the author of the project state exceptional reasons requiring a shorter term than the legal 30-day period for public consultations.

Each procedure of drafting a normative act is completely independent and is a manifestation of the autonomous will and legislative initiative of its actively legitimated drafter and proposer. The opinion of the petitioner in the reasons for the discussed draft law is incorrect and devoid of any legal basis, i.e. that the latter, having already been "discussed" in the Committee on Constitutional and Legal Affairs and "adopted at first reading" in the plenary hall of the 46th National Assembly, constitutes " ... *conceptual continuation of this topic, which is already widely known to the public and has gone through the above-mentioned discussions", which motivated the author to conclude that the established 14-days period appeared sufficient for "continuing the discussion*".

The demonstrated approach to introducing one ready-made draft law, prepared by a specific petitioner within the framework of a particular parliament in a particular parliamentary representation in another, subsequent parliament, situated in a different parliamentary representation and with different staff, with the ambition to "continue" the discussion of this same draft law, and in short terms, is fundamentally wrong. This conclusion logically follows from the notorious fact that no identity can be drawn between the type and composition of the parliamentary representation (the type and the number of the parliamentary groups) in the 46th and 47th National Assemblies, which are different (both in terms of the number of parliamentary groups, and the types of political parties represented, and the personalities of the MPs in the respective parliament). Following the logic in the reasons of the author of the discussed normative act (although it is not identical to its two previous drafts) and in the unjustified reduction of the half-term for public discussion, it is expected that the forty-seventh National Assembly will proceed to voting on its proposed draft law directly at the second reading in plenary.

The absence of **exceptional reasons**, stated in the reasons and the report, requiring a shorter term than the legal 30-days period for public consultations constitute significant violations of the statutory rules in the Law on Normative Acts for drafting of the draft normative act, which directly affect the fundamental principles such as legality, equality, accessibility, publicity and transparency, regulated in Articles 4, 8, 12 and 13 of the APC, as well as the principles introduced in Article 26, para. 1 of the Law on Normative Acts, according to which the drafting of a legislative act shall be carried out in compliance with the principles of necessity, justification, openness, predictability, coherence, proportionality and stability.[6]

The provision of Article 26, para. 4 of the Law on Normative Acts aims to give all interested organizations and persons the opportunity not only to get acquainted with the draft submitted to their attention, but also to have sufficient time to prepare possible proposals on it to be discussed at the

[6] Decision No. 8709 of 27.06.2018 of the Supreme Administrative Court under administrative case No. 2751/2017 , IV division, Rapporteur Chairperson Diana Garbatova

meetings of the Committee on Constitutional and Legal Affairs; with the opportunity to change the content of the draft, and hence the type of the voted decision on amendment and supplementation to the Law on Amendment and Supplementation to the Law on Judicial Authorities, which is an expression of their autonomously and freely formed will.

Secondly: Pursuant to Article 18a in conjunction with Article 19, para. 2 of the Law on Normative Acts, when drafting a normative act, a preliminary impact assessment shall be performed to examine the relationship between the formulated goals and the expected (achieved) results. In this case, such an assessment of the draft Law on Amendment and Supplementation to the Law on Judicial Authorities was made in a blank manner, without containing the necessary specifics, which makes it formal and unfit to achieve the goal of the legislator, referred to in Art. 20, para. 2 of the Law on Normative Acts. The lack of specificity in the examined relationship between the aim pursued by the draft law and the result sought is an independent ground for claiming that the procedure for drafting the draft law under discussion was violated.

The assessment to the draft law states: „ *Problem 2: "The failure to achieve the objectives set in 2011 for the establishment of the specialised criminal courts and the specialised prosecution offices and the lack of sufficient guarantees to respect the constitutional principle of independence of the judiciary and protection of the constitutional rights of the citizens."*

This conclusion, formulated in the form of a problem which the proposed draft law seeks to remedy by closing down specialised justice bodies, is deprived of any legal and factual basis. The conclusion that the objectives set in 2011 at the establishment of the Specialised Criminal Court and the Specialised Prosecutor's Office were not achieved, is unjustified, as it is not based on a comprehensive, complete and objective comparative analysis that would indicate what were the actual results of the fight against corruption at the highest levels of government before 2018 when it was in the competences mainly of Sofia City Court and the general district courts in the country and how the situation changed after 05.11.2017[7], when the competence for this passed under the supervision of the Specialised Criminal Court. The declarative statement in the assessment that "*For the **ten-year period** of their operation, the specialised criminal courts and their respective prosecutor's offices have not achieved the objectives set at their establishment in 2011*" is incorrect and not based on objective facts.

The competence of the specialised structures (SpCC, ASpCC, SpPO and ASpPO) to administer justice regarding crimes related to corruption at the highest levels of authorities, has as its starting point the date 05.11.2017, when a new item 4 in Article 411a, para. 1 of the Criminal Procedure Code was created by §60 of the Law on Amendment and Supplementation of the Criminal Procedure Code. With this change in the criminal procedure law, the legislator extends the competence of these bodies of the specialized justice by assigning to them the work in respect of a limited range of crimes associated with high corruption risk, which are to be committed by a limited range of officials occupying senior state positions (11 categories of officials), under the conditions of cumulation. The actual work related to the new competence of the specialised courts and prosecutor's offices practically starts in 2018, which means that currently they have been working under the new competence for only four full calendar years (2018 – 2021). In this situation,

[7] § 60 of LAS of the CPC, promulgated State Gazette 63/2017, in force as of 05.11.2017

the argument that: *"Therefore, despite the activities of the specialised justice bodies, which have been developing for more than **eight years,** there has been no tangible progress in the fight against corruption, especially at the "high levels" of power"* is categorically false.

Another example of the total ignorance of the existing justice system in Bulgaria is the following statement: *"Another criticism is that solid results have not yet been achieved in terms of the final convictions in high-level corruption cases."*

It is a well-known fact for all legal practitioners that the specialized structures (SpCC and ASpCC) do not issue final judicial acts.

The legislator has expressly forbidden the cases under the main elements of corruption crimes, such as those under Article 301 et seq. of the Criminal Code, to be resolved by agreement. Furthermore, the agreement, as a legal instrument, is inadmissible for other crimes within the functional competence of the specialised judicial authorities (SJA)[8]. It would be a different matter if this report contained information on the convictions for corruption handed down by the specialised courts, irrespective whether they have entered into force or not.

Another incorrect conclusion in the statement of reasons to the draft law states that the phased expansion of the jurisdiction of the specialized criminal justice bodies *"... was intended to compensate for the lack of sufficiently convincing and consistent results to justify the existence of the specialized criminal justice bodies."*. This conclusion of the contributor of the draft law under discussion also remains unjustified and declarative, as again it is not based on a real and comprehensive, professional and objective analysis of the results of the activity of the bodies of specialized justice concerning their competences in relation to the crimes referred to in the provision of Article 411a, para. 1, item 1 - item 3 of the CPC (crimes against the Republic and crimes committed by organized crime).

In January 2017, a comprehensive assessment of the progress made by Bulgaria over the ten years since the establishment of the Cooperation and Support Mechanism (CSM) was carried out. On this basis, the Progress Report on Bulgaria's progress under the Cooperation and Verification Mechanism[9] outlines a clear path towards the termination of the CSM. The conclusions and guidelines in the Report are based on seventeen key recommendations. In November 2018, the European Commission welcomed Bulgaria's progress towards a swift termination of the operation of the CSM and concluded that the monitoring of the first, second and sixth indicators could be considered temporarily suspended. This is reflected in the Report on Bulgaria's progress under the Cooperation and Verification Mechanism[10]. One of the indicators on which the monitoring of the country is temporarily suspended is precisely the "organised crime" indicator. This success is solely due to the work of the prosecutors from the Specialized Prosecution Office (as of 01.01.2012 only the Specialized Prosecution Office is competent to manage cases against

[8] See Art.381 para.2 CPC
[9] (COM(2017) 43)
[10] (COM(2018) 850 final).

organized criminal groups). These objectively existing factual circumstances refute in a categorical manner the petitioner's assertions in the statement of reasons to the present draft law that there is a lack of sufficiently convincing and consistent results to justify the existence of the specialized bodies of the judiciary.

It should be noted that in the motives to the Law on the Amendment and Supplementation of the Criminal Procedure Code (promulgated in SG 63/2017, in force as of 05.11.2017), the drafters of the law have motivated in detail what makes it necessary that the cases of corruption crimes committed by officials holding senior state positions to be removed from the local district courts in the country and from the busiest court at the time - the Sofia City Court and to be assigned to the bodies of specialized justice, possessing high competence and specialization in the field of serious criminal and economic crime. With the fact of the change in the procedural criminal law adopted by the legislator at that time, these reasons were apparently adopted.

It is absolutely inappropriate and incomparable to compare the results achieved by the specialised law enforcement bodies in the fight against terrorism and organised crime (Article 411a, para.1, item 1 - 3 of the Criminal Procedure Code) with the results achieved in the fight against crimes related to corruption in high places of power (Article 411a, para. 1, item. 4 of the Criminal Procedure Code), not only in terms of the time during which this activity has been carried out by the competent specialized bodies, but also taking into account the nature, severity and specificity of the cases for each of these types of crime, which is not comparable.

For the above reasons, I consider that the content of the statement of reasons of the draft Law on amendment and supplementation of the Judiciary Act does not comply with the requirements regulated in Article 28, para. 2 of the Law on Normative Acts, which is equal to a lack of grounds.

The reasons contained in the report of the Minister of Justice, aimed at justifying the sought normative change, are not based on specific factual circumstances from which to draw a categorical conclusion about the need for this change, which deprives them of content. The effect sought by the draft law's contributor, namely by closing the specialized criminal courts and the specialized prosecutor's offices, to ensure compliance with the principle of independence of the judiciary enshrined in the Constitution, protection of the constitutional rights of the citizens and the achievement of tangible progress in the fight against corruption, especially at the "high levels" of power, is stated declaratively and is not supported by arguments and has no relation to the actual factual situation of specialized justice. The approach used by the petitioner is devoid of objectivity because, on the one hand, it is not based on actually existing statistical data on the corruption cases before 2018 and after 2018, and, on the other hand, due to the fact that this approach is extremely unfair in terms of the results achieved by the specialized bodies in the fight against serious crime. In the reasons of the report, containing the motives for closing the specialised structures, there are no arguments on how the work of the specialised structures has threatened and threatens the independence of the judiciary and how exactly the author of the draft law envisages, after the abolition of these structures, this threat to disappear. The lack of objectivity in the motives to the draft law is also evident from the fact that in its decision No. 6/2018 under constitutional case No. 10/2017 the

Constitutional Court holds that the cases of corruption offences committed by persons holding high public office are of significant public interest not only in the domestic aspect, but also with regard to the fulfilment of the international obligations of the Bulgarian State arising from the UN Convention against Corruption, ratified on 03.08.2006 by a Law of the 40th National Assembly.[11] The legislative discretion to assign specified cases to the Specialized Criminal Court and the designation of that jurisdiction does not confer extraordinary jurisdiction on the Specialized Criminal Court. It is argued that there is no constitutional obstacle for the specialised criminal court to hear cases combining the two criteria - both with regard to the subject matter and the subject, because such a regulation is a matter of legislative expediency and does not contradict the permission given in the case law of the Constitutional Court.[12] In the same judgement, the court indicated that an approach that introduces or creates a presumption of bad faith on the part of the judicial authorities is counter productive and cannot be shared.

In view of the above, if the reasoning in the draft law under discussion pointing to the extraordinary nature of the SpCC were correct, then apparently the proposed legislative idea would be fully valid for the Sofia City Court in the future if the jurisdiction were changed.

Thirdly: Wirh respect of the requirement of Article 28, para. 2, item 3 of the Law on Normative Acts that the reasons, respectively the report shall indicate the financial and other resources necessary for the implementation of the new regulation, I believe that such are missing in the attached financial justification. The declaratory last sentence of the draft law's explanatory statement, stating: *"The proposed draft law has no impact on the state budget"* is fully inadequate in content in order to meet the standard set by the legislature. It does not provide the necessary information for the legislator on the amount of financial and other resources that would be needed to implement the new legal act, if adopted in its current form, for the duration of its ex nunc effect. The information relating to the amount of financial and other resources is essential for the legislator as the draft law provides for the secondment of magistrates until the conclusion of pending court proceedings. At the same time, the draft law proposed for discussion lacks any information on the number of these pending cases. There is also no data on the staffing capacity of the local judiciary in the country, which is expected to take over the investigation of the cases that will be assigned to them, if the draft law is adopted in its current form.

The statement of reasons of the draft law lacks any consideration of the expected results of the implementation of the law, including financial results, if any. The declarative statement that the adoption of the law for amendment and supplementation of the Law on the Judiciary will optimize the process of completion of the pending cases in the Specialised Criminal Court is at least false. Such a statement is manipulative. This is because, according to the provisions of the current Criminal Procedure Code, it is impossible to predict when a criminal trial will end in the trial phase. Precisely because of this, the stated objective of the draft law's contributor could not be achieved through the closure of specific judicial bodies. The optimisation of the process for the timely completion of the pending cases in any court, in

[11] promulgated State Gazette, Issue 66/15.11.2006
[12] Decision No. 10/2011 under cassation case No. 6/2011 of the CC

particular also in the SpCC, in line with the provisions of the ECHR, would be possible with a deep and comprehensive reform of the criminal law.

Fourthly: The mandatory condition of Article 28, para. 2, item 5 of the Law on Normative Acts, which imperatively requires an analysis of compliance with the EU law, has not been complied with. In the statement of reasons to the draft law, it is pointed out that the draft Law on the amendment and supplementation of the Law on Normative Acts does not contain provisions transposing acts of the European Union, therefore no table for compliance with the law of the European Union is attached.

Pursuant to Article 82 §1 of the Treaty on the Functioning of the European Union (TFEU), the European Parliament and the Council may, by means of directives in accordance with the ordinary legislative procedure, lay down minimum rules on the definition of offences and penalties in the field of particularly serious crime with a cross-border dimension arising from the nature or consequences of those acts or of particular need for general counteraction. These areas of crime are as follows: terrorism, trafficking of human beings and sexual exploitation of women and children, drug trafficking, arms trafficking, money laundering, corruption, counterfeiting of means of payment, computer crime and organised crime. Depending on the development of crime, the Council may decide to designate other areas of crime which meet the criteria set out in this paragraph. It acts unanimously after approval by the European Parliament.

Based on the above, I find that an analysis of compliance with the European Union law should be contained in the reasons for the act submitted for public discussion, as public relations, subject to the draft Law on the amendment and supplementation of the Judiciary Act, cover key aspects of detecting and punishing serious crime with a cross-border dimension. The absence of such an analysis in the reasoning is equal to a lack of reasoning.

The contributors of the draft law have not taken into account another very important circumstance - how exactly Council Regulation No. 2017/1939 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office will be applied in the future.

With regard to the subject matter:

I find that the goals of the draft law presented for discussion cannot be achieved and my arguments for this are the following:

Firstly: the automatic and mechanical transfer of the entire competence of the SpCC and the SpPO to other courts and prosecutor’s offices, without any guarantees provided for in the law and without creating the conditions for these bodies to take on this huge volume of work, and also without having the necessary specialization, for a relatively short period of time, would lead to the suspension of work on this type of cases.

At present, the Specialised Prosecutor’s Office and the Specialised Criminal Court are bodies of the judiciary that have no analogue in the Bulgarian justice system. Their territorial jurisdiction covers the entire territory of the country, and their generic jurisdiction relates to crimes committed under Chapter I of

the Criminal Code - "Crimes against the Republic", crimes committed by organized criminal groups, corruption committed by persons holding senior public positions. The subject matter jurisdiction of the Specialized Prosecutor's Office also includes cases for the above-mentioned crimes also when committed abroad.

One of the main arguments for the creation of the Specialized Prosecutor's Office in 2012 was the idea to make impossible the pressure and the attempt to influence the magistrates, who actually deal with the most serious crime. Since their establishment in 2012 by the Law on Amendment and Supplementation to the Law on the Judiciary[13], the specialised courts have gone through a long and complex process of their validation, accompanied by frequent legislative and personnel changes.

In reality, throughout its existence, the Specialized Prosecutor's Office has been working in conditions of serious and chronic staff shortage, both for magistrates and judicial officers. This problem has been partially solved through the mechanism of secondment of magistrates, but this has had a temporary and fragmentary impact on the work of the prosecution. There has never been another prosecutor's office in Bulgaria that has functioned under such a severe staff shortage. This has inevitably led to a serious workload for the prosecutors in the SpPO, to the inability to travel within the country when the investigation involves investigating the activities of organized crime groups (OCGs) outside Sofia, the loss of daily contact and interaction with the operational services of the Ministry of Interior and SANS, the loss of effective control over the investigations, etc. The lack of staff provision of the structure, leading to a high workload of magistrates and employees, under the current regulations of work in this type of cases, makes the work in them unattractive for the magistrates, due to the fact that in addition to being voluminous (sometimes in the order of hundreds of volumes), these cases are distinguished by high factual and legal complexity, a high number of defendants and witnesses, and the pay and other working conditions are like those of all other magistrates in the other judicial authorities. And if so far the SpPO has been criticised for the quality of its work and for its sometimes unjustifiably long pre-trial phase in some of the investigations, this is due solely to staff shortages and not for other reasons. Therefore, if the cases of the Specialized Prosecutor's Office are transferred to other bodies of the judiciary, as it is envisaged in the current draft law, the same effect will be achieved - understaffing in these bodies, overwork and lack of motivation of the magistrates. If we add also the long period of detachment from the subject matter, which has as its consequence the lack of specialization, then the logical conclusion has to be drawn - this transformation, for objective reasons, would not lead to the achievement of the set goal.

Over the years, a serious problem in the work of the Specialized Prosecutor's Office was caused by another reform in the security sector and the amendments to the Law on SANS and the Law on the Ministry of the Interior, which removed the Directorate for Combating Organised Crime from the State Agency for National Security (SANS) and re-designated it as the Directorate General for Combating Organised Crime of the Ministry of the Interior, which has been functioning in this form since 14 February 2015. Over the years, this office has been charged by the legislature as having sole jurisdiction to investigate cases of the Special Prosecutor's Office. Significantly later in time, the staffing of the

[13] Promulgated State Gazette, Issue1/04.01.2011, in force as of 04.01.2012

Directorate General for Combating Organised Crime (DGCOC) was actually implemented. As a result of the reform, cases were again reassigned - this time from the SANS to the DGNP, and eventually to the Directorate General for Combating Organised Crime. Once again, the new investigating authorities were still taking time to get acquainted with the cases and to acquaint themselves in the complex criminal law. This led to delays in the investigation of a number of cases and led to the implementation of procedures under Chapter 26 of the Criminal Procedure Code, as well as procedures for amending pre-trial detention measures due to irregularity in the performance of procedural investigative actions in the cases. The process of structuring the DGCOC and its personnel strengthening in 2015 caused also serious problems in the implementation of the operational work and its main activity in detecting and counteracting organized crime in Bulgaria. During these periods, the Specialized Prosecutor's Office did not receive sufficient materials. Suitable material for the initiation of investigations, in the beginning, were related to cases of neighbourhood drug distribution; money-lending; computer crimes. As a result of this restructuring, for a long period of time there was a lack of reported developments on activities such as human trafficking, corruption, drug trafficking. Developments from whole regions of the country such as Varna region, Burgas region, etc. were absent. Among the works there were missing those about the so-called "significant persons". Only in 2016 this crisis began to be overcome and the Specialized Prosecutor's Office began to receive better quality materials.

By analogy, as is entirely appropriate in this case, this will happen with the pending pre-trial proceedings overseen by the SpPO, as well as with future newly formed cases.

Secondly, those magistrates who will be assigned to work on cases within the competence of the specialised magistracies will, in addition to the lack of specialisation, also be demotivated to work on these cases, because in the absence of any valid arguments for the closure of the specialised structures, the opinions imposed in society and in the magistrates' guild are that the closure of the specialised structures is proceeding precisely because they have worked on specific criminal proceedings (some of which have long been in the judicial phase). There is a view that there is reluctance and fear of the existence of strong and independent magistracies with national and cross-border competences, tasked with countering high-level corruption and organised crime. The unprecedented closure of judicial bodies, advertised as the beginning of a judicial reform, in the absence of other arguments for this, leads to the conclusion of the magistrates in these structures that this is a way to stop them from working on specific criminal proceedings. The assignment of the work for crimes under Chapter I - "Crimes against the Republic" to the regional courts is at least causes perplexity and is devoid of any legal logic, given the fact that in view of the public danger and the specificity of these crimes, until 2015 they were subject to the district courts as the first instance.

Thirdly: the truth is that without a change in criminal legislation, which we prosecutors have long been calling for, no one is able to either optimise the evidence gathering process or speed up the trial process in its judicial phase. In addition, a number of laws should be changed - e.g. the Extradition and European Arrest Warrant Act, the European Investigation Order Act, on which the quality of the cases submitted to the court depends, and not only the cases that the SpPO monitors. For example, the judgements of the Court of Justice of the European Union in cases C-724/2019 and C-852/2019,

concerning the European Investigation Order, findings have been made that the Bulgarian legal framework does not provide for an effective remedy under Article 13 of the ECHR, both with regard to search and seizure and with regard to the questioning of a witness by video conference, and until this weakness in the national legal framework is remedied, the competent authorities in the Republic of Bulgaria should not issue EIOs. Moreover, the current Criminal Procedure Code does not contain a regulation that is relevant for the collection of suitable evidence in the commission of crimes with an object analogous to movable and immovable property, such as bitcoins. There are no rules either for inspection of such property or for attachment of the same. It would also be logically consistent, following the legislative change in the provision of Article 276, para. 2 of the CPC[14], to consider a similar legislative change in the provision of Article 246, para. 2 of the CPC.

Consideration should be given to simplifying the procedure for the correction of an obvious factual error (OFE) in the CA. It would be sufficient, in the case of a finding of OFE by the court, to record this in the court record of the dispositional hearing and at most, after hearing the parties, to indicate by order of the court how the relevant text should be read (word, figure, other). Since it is a manifest error of fact, it is not necessary to set it out in the indictment itself, also in accordance with the procedure now laid down in the Code of Criminal Procedure.

In the investigation of organised crime offences, where an undercover officer is used as a type of special intelligence resource, the statutory time limits in the Code of Criminal Procedure and the Special Intelligence Means Act are extremely insufficient. Within the 6-month maximum term, the undercover officer too often cannot infiltrate at all, and if he does, the result is unsatisfactory. In this regard, our proposal is that the time limits, specifically for the undercover officer, should start to run from the moment of deployment or from the moment of authorisation, but should be of a longer duration, as is the case in most European countries.

It is appropriate the physical evidences not to be produced on paper but only on disk. The practice so far shows that when special intelligence mean is operated even for a short period of 1 month, sometimes it takes a year of time for the preparation of the physical evidence. This inevitably delays the pre-trial phase of the trial for an unreasonably long time. For serious intentional offences under Chapter 1 of the Criminal Code, in the course of pre-trial proceedings, the maximum permissible period for the application of special intelligence means may be extended by a further 6 months.

In view of the adoption of the EIO Act[15], it is necessary that Article 25, para. 2 of the CPC[16] be brought into line with this Act so as to allow for the suspension of criminal proceedings on this ground in cases of EIO.

[14]Amended State Gazette,Issue7/2019
[15] in force as of February 2018
[16] in force as of 05.11.2017

I find it necessary to give the prosecutor the opportunity to collect evidence by request to the court under Article 159a of the Criminal Procedure Code, in addition to the disclosure of serious intentional crimes and the crimes under Article 319a - 319f of the Criminal Code.

The provision of Article 381, para. 2 of the Criminal Procedure Code should be refined so that for crimes under Article 304, 304a, 304b of the Criminal Code, it would be possible to resolve the cases by agreement. This would significantly speed up the work on cases of corruption in high places of power, especially in cases of complicated criminal activity of more than one person.

Provision should be made in the course of the judicial investigation for the possibility to read out the testimony of a witness given during the pre-trial proceedings when the witness cannot be found to be summoned or has died, by supplementing the provision of Article 281, para. 4 of the CPC.

Fourthly: it comes down to the most important thing - an objective assessment of the existing factual situation, namely:

In 2021, the prosecutors of the Specialized Prosecutor's Office supervised a total of **1478** pre-trial proceedings.[17]

Of the monitored pre-trial proceedings, **292** are for **corruption offences** or offences with a possible corruption motive.[18] The growth of this category of pre-trial proceedings is explained, on the one hand, by the improved interaction of the Specialized Prosecutor's Office with the control bodies (State Financial Inspection Agency, NRA, Customs Agency) and the operational services (SANS, Ministry of Interior, Commission for Combating Corruption and Confiscation of Illegally Acquired Property), which existed until mid-2021, on the one hand, and on the other hand, mainly due to the higher efficiency in the work of prosecutors and investigators in the Specialised Prosecutor's Office, due to the specialisation achieved and the experience gained.

In 2021, of the 292 pre-trial proceedings monitored, **114 were resolved**. **25 pre-trial proceedings** have been filed in court. The number of persons brought to trial for corruption is **66**. **16 persons** were convicted of corruption by a final court decision. The acquitted ones are **8.**

In 2020, out of the 271 pre-trial proceedings monitored, **91** were resolved. 17 of them have been submitted to court. The number of persons brought to trial for corruption was **56**. **5** persons were convicted of corruption in 2020. 1 person was acquitted.

In 2019, out of the 205 pre-trial proceedings monitored, **40** were resolved. Of them 14 pre-trial proceedings have been submitted to court. The number of persons brought to trial for corruption was **44**. **1** person was convicted of corruption by a final court decision in 2019; none were acquitted.

[17] With 1431 in 2020; 1089 in 2019 and 919 in 2018
[18] In 2020 they were 271; in 2019 were 205, and in 2018 - 130.

There is a serious increase in crimes under Article 321, with the purpose of committing **tax crimes** - 175 (Versus 80 in 2020) and money laundering -70 (versus 64 in 2020). The growth of cases of organized criminal groups for the purposes of committing crimes related to EU funds was maintained - 13 cases. (15 in 2020).

In 2021, the number of persons brought to court for tax crimes was **49**, the number of persons convicted by a final court decision was **14** (6 for 2020), one person has been justified.

15 persons were brought to court for **money laundering,** and in 2020 - 10 persons were brought to court for such crimes.

10 persons were brought to trial for **crimes related to EU funds,** while in 2020 only 1 person was brought to trial. The positive trend is the result of the effective interaction between the Prosecutor's Office of the Republic of Bulgaria and all law enforcement and controlling bodies in the prevention of this type of criminal acts.

The total number of persons convicted by a final deed in 2021 was **193**, with only **14** persons acquitted for the offence under Article 321 of the Criminal Code.

In 2020 the number of those convicted by a final act was **191**, the number of those acquitted under Article 321 of the Criminal Code was again **14**.

In the period 2010-2011, the creation of specialised magistracies, following the example of advanced European countries, was intensively discussed in society. In 2011, a compromise was reached - the specialised magistracies were established and became operational on 1 January 2012, but they were empowered only to counter organised crime, not corruption. This is how almost half of the life of these institutions lasted. The calls for the closure of these structures have been raised and intensified after the extension of their competences in relation to corruption. These calls reached their peak after the Specialized Prosecutor's Office "attacked" previously untouchable persons with significant financial resources, opportunities and influence, mayors of municipalities (nominated for office or supported by parties), heads of state agencies, members of the Council of Ministers, MPs. Here again it should be noted that the specialised judiciary does not issue final verdicts, and therefore to argue that our work threatens the rule of law is devoid of any legal logic. The facts show that the opposite is true - the work of the specialised judiciary is in the interests of the rule of law. A large part of the persons acquitted for corruption are under indictments prepared, submitted and supported by prosecutors from other judicial authorities. Assuming that the idea of the draft law is not to "deal with" specific magistrates, then a conclusion should be made that perhaps a draft law should be introduced to close down other judicial bodies as well e.g. those where magistrates who have worked on acquittals work or have worked). In any democratic society, however, acquittals are one of the real testimonies to the rule of law.

Knowing in detail the work of the prosecutors of the Specialized Prosecutor's Office, I believe that there is no such obvious reversal in the criminal legal policy of the state that would require the complete closure of the Specialized Prosecutor's Office. This is because the problems that exist and that hinder greater

effectiveness in the fight against corruption, in general, are due to the extremely formal criminal process. They are also due to the insufficient period of time in which the specialised magistracies have been competent to investigate and punish corruption at the highest levels of government (according to the above-mentioned brief statistics for four years, the number of persons convicted of corruption has increased several times).

Fifthly: The draft law submitted for discussion does not contain any rules on active European Investigation Orders and Requests for Legal Assistance accepted for execution and in the process of execution by prosecutors and investigators in the Specialised Prosecution Office. This would not only create chaos and competition between multiple, seemingly competent prosecutor's offices, but would also frustrate the collection of valid evidence under the cases of the foreign partners. There is no regulation in the draft law on who will take over the cases of the European Public Prosecutor's Office, which are currently investigated by the investigators of the Investigation Department of the Specialised Public Prosecutor's Office.

The Specialised Prosecution Office has so far played an important role in the pan-European system for countering international organised crime. IIt is the body that coordinates the work on international investigations with prosecutors and police authorities through the Bulgarian Bureau in Eurojust, and on Bulgarian territory it plans, coordinates, manages and supervises the actions of Bulgarian investigative and police authorities. Up to 1/5 of the activities of the prosecutors in the SoPO per year amounted to work in joint investigation teams and on the execution of European Investigation Orders - actions that require high competence, organisation, speed, capacity and experience. The closure of the Specialised Prosecutor's Office will certainly block Bulgarian participation in international investigations for a long time.

Sixthly: The draft law for amendment and supplementation to the Law on the Judiciary in the part concerning the closure of the specialized bodies of the judicial authority contradicts the provisions of the UN Convention on Transnational Organized Crime[19], in force since 29.09.2003 for the Republic of Bulgaria. Article 9, para. 2 of the Convention provides that *"Each State Party shall take measures to ensure effective action by its authorities in the prevention, detection and punishment of the corruption of public officials,* ***including providing such authorities with adequate independence to deter the exertion of inappropriate influence on their actions.".*** This draft law provides that in future all crimes committed by persons holding senior public positions will be investigated by investigating police officers. Investigating police officers are employees of the Ministry of Interior, i.e. they functionally belong to the executive powers. At present, the cases of corruption in the highest levels of power are by law obligatorily investigated by investigators (Article 194, para. 1, item 2a of the Criminal Procedure Code). Investigators, the same as magistrates, have the autonomy and independence required by the Convention. By ratifying the Convention, pursuant to Article 31, item. 1 the Republic of Bulgaria took over the obligation: *"States Parties shall endeavour to develop and evaluate national projects and to establish and promote best practices and policies aimed at the prevention of transnational organized crime."* With a de facto decentralisation of the competence for countering organised crime, as envisaged in the draft law under

[19] Ratified on 12.04.2001 by a law passed by the 38th National Assembly, promulgated State Gazette, Issue 42/27.04.2001 , issued by the Ministry of Interior, promulgated State Gazette, Issue 98/6.12.2005 , in force for the Republic of Bulgaria of 29.09.2003

discussion, it is impossible for Bulgaria to implement the above provision. At the very least, the draft law contains neither ideas nor proposals on how this could be achieved. The proposed draft law lacks any safeguards, so that it is assumed that the Bulgarian State will also comply with the provision of Article 34, which states: *"Implementation of the Convention item 1. Each State Party shall take the necessary measures, including legislative and administrative measures, in accordance with fundamental principles of its domestic law, to ensure the implementation of its obligations under this Convention."*. The draft law, moreover, questions the implementation of the provision of Article 6, para. 2 of the UN Convention against Corruption, in force since 20.10.2006 for the Republic of Bulgaria[20] - "*Each State Party shall, in accordance with the fundamental principles of its legal system, provide to the authority or authorities referred to in para. 1 of this Article* ***the necessary independence to perform their functions effectively and free from undue pressure.*** *The material resources and specialised personnel, and the training which such personnel may require, necessary for the performance of their functions should be duly provided"*. Article 36 of the same Convention provides that *"Specialized bodies - Each State Party shall, in accordance with the fundamental principles of its legal system, ensure the existence of a body or bodies or persons specialized in combating corruption through law enforcement.* ***Such authority or authorities or persons shall be guaranteed independence in accordance with the fundamental principles of the legal system of the State Party concerned in order to be able to perform their functions effectively and without undue influence.*** *Those persons or the staff of that body or those bodies shall be adequately trained and equipped to carry out their tasks."*.

Knowing in detail the work of the prosecutors of the Specialized Prosecutor's Office, I believe that there is no such obvious reversal in the criminal legal policy of the state that would require the complete closure of the Specialized Prosecutor's Office. This is because the problems that exist and that hinder greater effectiveness in the fight against corruption, in general, are due to the extremely formal criminal process and the irreversibly outdated Criminal Code. They are also due to the insufficient period of time during which the specialised magistracies have exercised the competence assigned to them to detect, investigate and punish corruption at the highest levels of government (according to the above-mentioned brief statistics for four years, the number of persons convicted of corruption has increased several times).

Therefore, I strongly believe that the lack of tangible progress on corruption crimes is due to the outdated criminal legislation and the extremely formalised criminal process, and the real reason for the desire to close the specialised structures could be anything but lack of effectiveness and efficiency.[21]

BEST REGARDS,

Valentina Madjarova

[20] Ratified on 3.08.2006 by a law adopted by the 40th National Assembly, promulgated in State Gazette, Issue 66/15.11.2006, issued by the Ministry of Justice, promulgated, State Gazette Issue 89/3.11.2006, in force for the Republic of Bulgaria of 20.10.2006

[21] **Effectiveness**, in the most general sense, indicates the relation of the result achieved to the objective set. Effectiveness is related to the appropriateness of actions. It answers the question of whether the 'right' things are being done. It does not take into account costs (energy, labour, financial resources) but only the achievement of the objective. The higher the rate of achievement of a goal, the more effective the actions and events.