

# I. EXECUTIVE SUMMARY

## EXECUTIVE SUMMARY

### OBJECTIVES AND BACKGROUND

The Structural Reform and Support Service (SRSS) received a request from the Bulgarian authorities for technical assistance (TA) in the field of Justice Reform on 16 February 2016. The objective of the technical assistance request was to obtain support for an independent analysis of the structural and functional model of the Prosecutors Office (PO) and its independence, with concrete advice, including an analysis and advice regarding human resource issues, efficiency of the PO, national and international exchange of information as well as the role of expert witnesses. The terms of reference for this TA were agreed in May 2016. An expert team was formed and acquainted itself with all relevant documentation. During 7 missions between June and December 2016 the team conducted independent interviews with more than 200 participants, including prosecutors, judicial investigators, police officers, judges, lawyers, investigative journalists, experts and relevant NGO representatives.

#### Overview

This is not an inspection of the Prosecutor's Office of the Republic of Bulgaria (PORB) nor of the Prosecutor General (PG). Inevitably though, during our work issues were raised with the team which were perceived by interlocutors as both strengths and weaknesses of the PORB, which we report beneath. Throughout our discussions we were also presented with a snapshot of the perceived strengths and weaknesses of the criminal justice system (CJS) as a whole, in which the PORB operates. We noted that there is wide agreement among the Bulgarian authorities that the overly formalistic CPC needs amending, (perhaps even redesigning), and that the 1968 CC needs holistic revision rather than piecemeal amendment to fully reflect modern phenomena and trends in criminal behaviour. We too consider that revisions to both Codes would alleviate some important problems which impact on the PORB's efficiency.

The team found that responsibility for unacceptable delays in finalising criminal cases does not lie solely with the PORB. It is shared with other CJS players, including the judiciary. When indictments are returned to the prosecution, this does not necessarily mean that the prosecutor's work was of poor quality. This may also be attributed to an overly-procedural approach to detail taken by the judges in some courts.

Some think the PORB and the PG have too much power, and that there remains a need for much greater accountability in respect of their activities. In particular, many have pointed to troubling issues raised in the final judgment of the ECHR in Kolevi v. Bulgaria<sup>1</sup>, which the team has carefully considered and will return to beneath. However, in the course of our work, we have also identified areas where we think the PORB actually needs strengthening, with more powers and more internal, structural accountability. Where we advise new powers our approach has been to consider also what corresponding checks and balances are necessary for proper accountability for the use of those powers. The team considers that strengthening accountability and transparency of the PORB to the Parliament - and through this to the public - is a priority. To complement this more internal accountability and transparency of decision making needs pursuing.

**Our advice is shown in bold throughout the text. Our advice is given as a balanced package – which we think should be considered and acted upon as a package.** Taken together, our numerous proposals and individual pieces of advice have three interlinked objectives: to enhance the **effective performance of the PORB** (and the CJS), particularly in Organised Crime and corruption cases; to ensure at the same time that there are necessary procedural and other **safeguards** in place to prevent inappropriate or arbitrary action by the PORB; and to ensure proper **accountability** of the PORB to the public through Parliament; and, where we consider this is

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<sup>1</sup> Application No 1108/02 final judgment 05/02/2010

appropriate in the light of adverse ECHR judgments against Bulgaria, accountability to the courts through judicial review of prosecutorial action or inaction.

We understand that commitment of other authorities will be required to implement all of the advice contained within the report, but that should not prevent the PORB from implementing the advice that they can act on immediately.

The team understands and appreciates the importance of a strong constitutional framework in Bulgaria. However, the development of effective institutions and procedures has to be a dynamic process in all countries. The team does not think that many of its proposals have clear (or insurmountable) constitutional implications. The team therefore urges the Bulgarian authorities to consider the advice constructively and creatively to seek solutions which will improve the system.

## **ANALYSIS AND STRUCTURE OF THE PROSECUTOR'S OFFICE**

Article 126(1) of the Constitution requires that the PORB should correspond to the structure of the courts in Bulgaria<sup>2</sup>. The detailed structure of the PORB is set out in A 136 of the Judicial System Act (JSA), as most recently amended. The PORB consists of a *Prosecutor General, a Supreme Prosecution Office of Cassation, a Supreme Administrative Prosecution Office, the National Investigation Service (NIS), appellate prosecution offices, and Appellate Specialised Prosecution Office, Appellate Military Prosecution Office, district prosecution offices; a Specialised Prosecution Office, military district prosecution offices and regional prosecution offices.*

### **Hierarchy – vertical structure**

The team was given much information in relation to the hierarchical structure of the PORB and the apparent power the PG personally could assert over all other prosecutors. The team heard concerns about what is perceived to be a vertical structure in which the PG can give orders to any prosecutor or investigator (including NIS investigators).

Article 136, before the current amendments were finalised, stated that the PORB is indivisible and centralised and that all prosecutors and investigation magistrates shall be subordinated to the Prosecutor General – which might appear to have fuelled these concerns. Further, the Kolevi case indicates that, in the early 2000s at least, illegal orders may have been given by a former PG to prosecutors and investigators, which had to be followed.

The team also heard from some interlocutors external to the PORB that they understood there was (or had been in the past) a culture of telephone instructions on sensitive cases from unnamed senior officials in the PORB – with nothing put in writing, despite the terms of Article 143 of the JSA.

The issues detailed in the Kolevi case appear to be the main drivers behind a current effort to try to de-centralise the PORB. In so doing it is presumed that any perceptions of the PG micromanaging prosecution decisions across the country could be dispelled. The team was made aware of amendments to Articles 136, 140, 142 and 143 of the JSA – and the team could understand the thinking behind this approach, given Bulgaria's history.

That said, our observations actually seemed to show most prosecutors getting on with most of their cases with little or no interference from above.

In addition, and perhaps more importantly, we do not see that there is anything intrinsically wrong with a PG, who is accountable for the PORB, or other experienced senior officer becoming directly involved in casework. Information on sensitive cases needs to flow upwards so the PG is apprised of what his staff is doing in cases where he may be required to explain the PORB's actions. In some systems the act of making a senior official aware of a case before a decision is made implies that he has the opportunity of considering the papers and forming a view himself before the final decision is taken.

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<sup>2</sup> We are aware of the recent Petition by the PG requesting a binding interpretation of Article 126(1) from the Constitutional Court

In the team's experience, all prosecution offices are hierarchical to a large extent. In most, if not in all our systems, final decisions in sensitive and complex cases are taken by line managers, team leaders, or other prosecutors of experience. It is natural for prosecutors to be guided by senior colleagues.

In most of our systems it is also quite proper for the decision to be taken personally by the PG, or with his consent, in very sensitive cases of public interest involving prominent persons, including government ministers, and in other important cases where, for example, national security may be involved. In many systems prosecutors have a "levels of authority" document, so that they know when they can take a decision themselves and when the case should be referred upwards.

This is not only reserved for the very sensitive cases, but is a normal way of delegation of powers within a bureaucracy. **We suggest that local arrangements are made to reflect this approach without creating more bureaucratic procedures. We also advise that the Prosecutor General should exercise his powers under Article 126 of the Constitution and Article 138 of the JSA to issue directional policy guidance to prosecutors as described above.**

There is no problem in principle, in our view, with a senior prosecutor or even the PG giving orders or taking decisions in particularly sensitive cases, so long as he acts within the law and there is accountability for his decisions. **It is important therefore that all views on cases given by senior officials are placed on the file in writing so there is an audit trail of decision-making. The inspectorate should be alert to examining files to see how regularly oral discussions on cases are endorsed on them.**

#### Administrative Head

The same applies to decisions taken further down the line. In most systems there is internal accountability locally for prosecution decisions taken by individual prosecutors in offices, through monitoring by superiors of prosecutors' work, objective-setting and regular appraisal by local line managers, and through external inspections by inspectorates.

The team noted that, as in most countries, formal local line management arrangements for prosecutors in Bulgaria are in place.

As district level and regional level prosecutors are subordinated to their administrative heads, the team was surprised that the administrative heads currently have no role in approving, modifying or overturning prosecutorial decisions of their subordinates. So while in theory at least the PG may give orders to any prosecutor on any case, this seems not to be possible for the prosecutor's immediate line manager. This is largely because of the widely understood interpretation of A 14, para 1 CPC, which states *the court, the prosecutor and investigative bodies shall make their decisions by inner conviction, which shall be based on the objective, comprehensive and complete investigation of all circumstances relevant to the case, taking the law as guidance* (emphasis added).

The perceived inability of anyone (other than theoretically the PG) to interfere with a final decision (however illogical) taken by a junior or other prosecutor in charge of a case (even where the case is subject to supervision by an appellate prosecutor) is a feature of the Bulgarian system which we consider to be problematic. But in the context of the structure of the PORB, we advise that **the Administrative Heads should have a proactive role in casework decision-making where cases can be dealt with at local levels. This should, where necessary, involve a challenge to the inner conviction of the junior prosecutor, where the more senior prosecutor is of the view that the junior prosecutor has erred.**

Legislative amendments giving more powers and responsibilities to administrative heads to supervise and direct their subordinate junior colleagues on activities including casework under Article 140 of the JSA would appear to be in line with our thinking, and we support this amendment, although we would like to see this article more explicit on casework. **We consider that the Administrative Heads should guide their staff and be**

**accountable upwards to the PG for casework issues within their commands.** It follows from this that we do not favour a regionalised or decentralised structure.

We propose that the reform strategy embraces a clear **annual planning and control cycle, with strategic objectives developed by the PG and his senior staff for all Administrative Heads in the PORB, with regular objective setting and performance reviews within the PORB and not by a Committee of the SJC** (see below).

#### Random allocation

One of the important principles introduced in recent years is the random allocation by computer system of cases to prosecutors.

We understand the reasons for the introduction of this principle in the judiciary as a whole. While we heard allegations that the computer software could easily be tampered with, we none-the-less consider that the arguments for a random allocation system of cases to judges are very strong ones. They are less convincing in respect of prosecutors. The application of this principle in the PORB means that it is possible for the most complex cases in an office to be allocated to the most junior prosecutor, which seems to us to be undesirable.

**We consider that, in conjunction with greater responsibilities for managing casework by Administrative Heads, the random allocation principle needs modifying to ensure that casework is handled and supervised by persons of appropriate experience and competence – and to ensure that the workload is divided appropriately between staff.**

#### Specialised structures

The team welcomed the development of referral by competence for important issues. The Specialised Prosecutor's Office for Organised Crime is supposed to have 31 prosecutors. 27 prosecutors were in place when we visited, working on 360 cases - 280 of which involve organised crime groups and several involve corruption within law enforcement. It appeared to the team that this office was understaffed for the work it currently performs.

Since March 2015 there has been a separate multi-disciplinary Specialised Anti-corruption unit at the Sofia City Prosecutor's Office under the leadership of a Deputy Prosecutor General, reporting to the Prosecutor General. This Unit handles the most sensitive corruption cases involving public officials and politically exposed persons. Qualified persons were invited to consider this career opportunity and, if they accepted, they were carefully vetted for this work. Decisions on staffing of this Unit are made by the Deputy PG in consultation with the PG. The team had a favourable impression of the calibre of the unit's prosecutors. We heard that in the Specialized Prosecutor's Office on Organised Crime, and to some extent in the Sofia City Court Anti-Corruption Unit that team-working on cases was proving to be successful. **We see no reason why the team-working model should not be spread to other offices for bigger cases,** with a lead prosecutor being responsible for the case overall, consulting, as appropriate, with line management and being accountable to line management for those decisions.

#### Appointment and personal accountability of the PG

The PG is appointed by the President, on a motion by the Supreme Judicial Council, for one seven year term as stipulated in A 129 of the Constitution.

Under the Constitution the PG can be released from office before the end of his term *inter alia* after the entry into force of a sentence imposing a penal sanction of deprivation of liberty for an intentional offence. In this regard he is in no different position from his prosecutorial staff. Additionally the PG can be released from

office during his term for a grave breach or systematic dereliction of the official duties as well as actions damaging the prestige of the judiciary.

The difficulty the team sees with the safeguards currently in place so far as criminal investigation of any PG is concerned relates more to the inherent problem of investigating a PG for criminal offences. As seen, the NIS works under the PG's superintendence and theoretically the PG could refuse to allow a criminal investigation into his actions. **In this context, we consider that operational decisions in respect of the work of the NIS should clearly be the responsibility of the relevant Deputy PG responsible for the NIS. The relevant Deputy PG should remain dependent on the PG for resources, but operationally we propose that he should be independent.**

**We believe, for continued public confidence in the PORB, especially in the light of concerns raised by the Kolevi case, that there needs to be a transparent procedure developed, should any PG in the future be accused in office of acting in a seriously criminal manner.**

We suggest that, where there is credible evidence of such activity by a PG, an independent and respected senior figure in the CJS should be involved. **Our proposal is therefore that a senior and independent judicial figure outside the PORB should have responsibility for supervising an investigation into allegations of serious criminal wrongdoing by a PG, with the assistance of NIS officers (made available by the NIS Deputy PG) or senior Mol police officers. For these purposes the investigating officers, being NIS or Mol, should be answerable to the above mentioned figure responsible for conducting the investigation.** We suggest that he would make recommendations to the longest serving Deputy PG below the PG in respect of any prosecution. That Deputy PG should take the decision on prosecution. The Deputy PG would be accountable to Parliament and the public for this decision..Throughout the investigation process, we consider a PG should be suspended or otherwise obliged by law to step aside from his role as PG. If he is prosecuted and convicted, he should be subject to any ensuing criminal and disciplinary penalties.

In the case of a conviction and sentence in a serious criminal case, we consider that a PG should automatically be released from office by the President..In the case of adverse disciplinary findings, arising out of a criminal investigation where there has been an acquittal (but the conduct is still deemed incompatible with continuation in office), we consider a motion by the SJC for his release from office should be decided on a simple majority.

#### [Transparency and accountability of the PG for the work of the PORB to the SJC; Minister of Justice and the Inspectorate](#)

Under the JSA the PG is required every 6 months to provide the Prosecutors' College of the SJC, the Inspectorate with the SJC and the Minister of Justice summarised information on the institution, progress and termination of files. The team understands therefore that the SJC can, at least in theory, exert some control over the work of the PG. They can ask the PG about progress on cases. It is unclear what questions the Minister of Justice has raised with the PG as a result of his statutory reports. The Minister of Justice has no formal responsibilities for the work of the PG or accountability to Parliament for the activities of the PORB.

The team was helpfully advised by the current PG of various complaints he had received from an investigator in the Specialized Anti-Corruption Unit, reflecting on the PG's own conduct in office in respect of the work of that unit. The PG had referred these complaints to the Professional Ethics and Corruption Prevention Committee of the SJC. This Committee had considered the investigator's allegations and ultimately found no case to answer against the PG in a public hearing (in which prosecutors and investigators gave evidence). We should stress that we have no reason to criticise this finding by the Committee. The case shows that there can undoubtedly be some oversight by the SJC of the PG and PORB. But the public may be less reassured that such processes in an SJC committee provide real safeguards against abuse, given the PG's prominent role in the SJC generally and his position as the superior of many of its members (and in this case of witnesses called to testify).

The team also noted in this context that the SJC had been called on to consider aspects of the prosecution handling of the so-called “Yaneva-Gate” issue, where criminal proceedings are either suspended or still pending in relation to various persons (or persons unknown). The team is aware that this issue has aroused considerable interest in the media and public concern. Among the media allegations are claims by a judge (who has herself been under investigations) that prosecutors routinely “select” judges at Sofia City Court likely to favour their cases. There are claims of failure by the PORB to investigate the real allegations here (judicial corruption) while focusing on the alleged illegality of taped conversations. We are, of course, not in a position to comment on the truthfulness of these allegations. We note that the SJC has voted not to open an enquiry itself into these matters and that currently these issues are unresolved. **We are of the view that once all criminal proceedings are concluded in this matter there does need to be a comprehensive enquiry into these allegations, either by an independent figure or body or by an SJC inspectorate with a more reinforced mandate than it has currently.**

#### [Accountability of PORB for performance on casework](#)

Inspection of casework is undertaken by higher instance prosecutors within the PG and by the Inspectorate at the SJC.

All prosecution offices have some audit role in respect of the offices below them. Thus appellate prosecutors can perform a similar function to the SJC Inspectorate within the structure of the PORB. This audit role can focus on managerial checks which could contribute to appraisals of how Administrative Heads manage and control (particularly in their first mandates). They also may examine what may have gone wrong in particular categories of cases. On this basis we understood that different higher instance prosecutors have examined thematically various types of cases including corruption, crimes of negligence, and cases that have been delayed. The PORB shares its own findings with the Inspectorate. The findings are shared with the relevant heads of office. They are also shared upwards with the Supreme Prosecutors Office of Cassation. It is possible that methodological guidance could be issued to the service as a whole, but no examples were given of such guidance being issued in relation to these categories of cases..

While we acknowledge the real value within the PORB of internal audits, we consider independent inspection of PORB is an important safeguard or check on prosecutorial independence.

The SJC Inspectorate told us they perform comprehensive assessments periodically on all prosecution offices. We were not entirely convinced, however, that the inspections currently performed by the SJC Inspectorate go very deeply into systemic problems.

We think it is important for an external inspectorate to be able themselves to examine independently what may have gone wrong in cases, with a view to improving methodological guidance and best practice - and not simply to punish individuals for failures to meet deadlines.

We think that, going forward, it is vital for public confidence in the PORB that some **external and independent** reassurance is provided that the numerous breaches of human rights found by the ECHR are not still occurring regularly in ongoing investigations and cases.

We think that this detailed work will need to be undertaken by inspection teams that include senior and experienced prosecutors – possibly with the assistance of some experienced foreign prosecutors. **Thus overall we see the developing role of the Inspectorate of the SJC as one that is more geared to examining the quality of casework decision-making of the PO through analysis of individual cases and thematic review.**

It follows from this that a wholly independent, external inspectorate should be able, when all relevant criminal proceedings are concluded, proactively to examine sensitive cases where there has been significant public concern. This would mean that the external inspectorate would have the opportunity to examine prosecutorial actions on investigations and cases, or public petitions.

We had in mind advising a **separate and entirely independent inspectorate** outside the formal SJC structure. However we do not want to create more bodies than there are people to support them. **If the Bulgarian authorities consider that the present SJC Inspectorate has the capacity and experience to support such an expanded role, then we would propose the following amendments to its structure. We would advise that it should in future be led by a chief inspector who is a retired senior domestic judge or prosecutor of recognised experience and integrity, appointed for a term of 5 years (and not subject to election). We also consider that the Chief Inspector should, at his discretion, be able also to include in examination teams seconded experienced prosecutors from within the PORB and at least one foreign jurist with knowledge of the Bulgarian system and of recognised international prosecutorial experience. The reports of this new form of Inspectorate would be delivered to the PG, the Minister of Justice and the SJC. Summaries of the reports could be made public where the Chief Inspector considers it is important to do so in the public interest. Subject to these provisos, we would support the present Inspectorate's mandate being extended in this way.**

**Should it not be practical to graft on these new requirements to the existing SJC Inspectorate structure, then we favour the creation of an additional, small external Inspectorate, led in the same way by a former senior judicial or prosecutorial figure of recognised experience and integrity, working with a small team of experienced current prosecutors of higher instance, seconded from the PORB, and also supported as necessary by experienced foreign prosecutors familiar with the Bulgarian criminal justice system. This inspectorate should be empowered to examine casework issues as described above and to advise the PG, the Minister of Justice and the SJC. Summaries of its reports could be published where the Chief Inspector considers it is important to do so in the public interest.**

#### Parliamentary accountability

We do not advocate parliamentary control of the PORB's work but believe that the PG should be accountable to the public through Parliament for the work of his office. This is achieved currently when the PG presents his very detailed and informative Annual Reports to Parliament and can be questioned on them. The team was advised that usually there are few questions. Additionally he can, under recent amendments, be invited to Parliament at other times to answer questions but it is unclear whether this has happened, or whether any meaningful scrutiny of the work of the PORB would ensue from such *ad hoc* encounters. It is clear to us therefore that if parliamentary accountability for the work of the PORB is to be of value, then there needs to be constructive engagement by the parliamentarians themselves.

The team considers that what has been started by way of Parliamentary accountability of the PG should be built upon through more regular oversight of the work of the PORB by Parliament. **To this end, we propose that a formal Committee of Parliamentarians follows the many-faceted work of the PG's office.** It would, of course, be for the Parliament to decide the make-up of such a Committee.

We suggest that the PG, accompanied by his senior officials, should be invited to attend, at least **quarterly**, sessions which should be open to the public. These sessions could address different aspects of the PORB's performance. Naturally these meetings cannot involve discussions on live cases. However the processes by which decisions are made and the policies the PORB has in place for quality decision-making can properly be discussed. If legislative defects caused the PORB to take no action, then advising parliamentarians of legislative lacunae would be beneficial. Other issues for discussion could be: resources; performance of the Specialised Prosecutor's Office on Organised Crime and the Specialised Anti-Corruption Unit; the use of experts; the processes by which the PG's office interacts with other parts of the CJS to speed up cases and to improve the criminal justice process; quality of investigations; and training. The treatment of victims is another theme which such a Committee might explore in a more structured way. The team considers such a Committee would provide Parliament and the public also with regular and considered information on the constraints under which the PORB has to work, including where blockages exist in the system outside the PORB's remit.

The team considers that the PG's separate appearance in Parliament to present his Annual Report should continue. Our proposal for a Select Committee is an addition to the present arrangements.

For greater transparency, and to form a basis for structured parliamentary oversight, **we propose that the PG considers putting into the public domain as much of the Methodological guidance and written prosecution policies of the PORB that is compatible with national security and effective prosecution.** In giving this advice we do not envisage the disclosure of internal procedures and processes, just written policy and practice guidance of importance for the handling of cases, where it exists.

#### [Accountability to the courts for use of prosecution powers](#)

We have examined the range of powers available to the PORB to see whether there needs to be more safeguards.

**Overall we consider there is some need for further regulation and a real need for more effective judicial review procedures.**

#### [Preliminary checks](#)

The power of a prosecutor and the PG to order preliminary checks before commencing pre-trial proceedings was mentioned repeatedly to the team. Some interlocutors described this power as a "control instrument" by the PORB.

We were surprised to hear that in 2015 there were apparently 302,541 such checks.

The utility of preliminary checks is questioned, as it is understood that the data collected will have to be collected again if pre-trial proceedings are initiated. Given the number of such checks and the concern in the PGs own report on the ECHR cases, that evidence is often collected too late, **we consider that, in principle, preliminary checks by the PORB and investigative bodies should be abolished.** However the abolition of preliminary checks needs to be done in the context of an overall reconsideration of the existing legislative provisions on the collection and use of evidence.

If this advice is not accepted then, at a minimum, as we support the **clarification in law that decisions by prosecutors on whether or not to open pre-trial proceedings should not be delayed beyond 3 months, we think this should also apply to preliminary checks. In the short term (pending any fuller consideration of pre-trial procedures in the round) consideration should be given to making evidence collected during a preliminary check capable of being used in court. We also consider that that any public announcement or disclosure of preliminary checks can be prejudicial and that the only communication about their imposition should be with the subjects concerned. Public announcement of persons under checks or investigation should be delayed until the service of an indictment.**

We considered the position of a suspect in respect of which a prosecutor decides after 3 months not to proceed with pre-trial proceedings, which is followed several months later by a decision to proceed. **Where there is a decision to re-start pre-trial proceedings or preliminary checks which have already been stopped after 3 months, we consider that a defendant should be allowed a right of Judicial Review of any re-opening of pre-trial proceedings or further preliminary checks which are based on the same facts and circumstances as known when the decision to close pre-trial proceedings or preliminary checks was taken (*ne bis in idem*)<sup>3</sup>.**

It is noted that preliminary checks frequently have taken a very long time. By contrast A 234 CPC provides a two months period in principle (albeit this can be extended) for pre-trial investigation. Given that all

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<sup>3</sup> We noted in the PORB report on ECHR cases that the matter of decisions on starting and stopping pre-trial proceedings apparently will be subject to formal criteria and administrative control in the hierarchy.

investigative work done in preliminary checks will have to be redone, **we consider that the basic period fixed in the CPC is unrealistic and needs reconsideration when the CPC is reviewed in the round.**

#### [Systemic problems of ineffective investigations](#)

Ineffective investigation (and by extension the ineffective role of the prosecutor in supervising investigations) is one important aspect of the current functional model of the PORB, which has been criticised in over 45 judgments of the ECHR and has been described by the ECHR as a “systemic problem”. Some of the main issues are set out beneath. The cases referred to illustrate the issues, but this does not mean that there are not other relevant cases. It appears that some measures may have been taken arising out of some of these ECHR judgements.

#### [Arbitrary refusals of the prosecutor to institute criminal proceedings are not subject to judicial review regardless of the available evidence](#)

This issue has been raised in [Assenov v Bulgaria, judgment October 1998](#) and [Stoykov v Bulgaria, judgment 6 October 2015](#).

Both cases involve the ignoring of alleged violent conduct by police officers in the course of enquiries – the first involving a minor. In such cases the victim has a right of appeal to a prosecutor of higher instance. If the prosecutor of higher instance supports the original decision the victim apparently has no redress. **We consider that the victim or his family as interested parties should be entitled to Judicial Review of prosecutorial inaction within a reasonable time, bearing in mind statutory time limits.**

We understand that the Bulgarian system only permits private prosecutions in very limited circumstances. We have concluded that this is not an effective right. We consider that this position also needs to be reviewed. We have borne in mind Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime<sup>4</sup>. Where there has been an unsuccessful internal review of the prosecutorial decision not to act **we consider that victims should be allowed an effective right of private prosecution, as a last resort** to obtain justice.

#### [Arbitrary decisions to discontinue instituted pre-trial criminal proceedings appear to be subject to ineffective judicial review as court orders seem not to be binding](#)

We understand that the victims and parties directly affected can apply and obtain judicial review in some circumstances, but meaningful action may not follow, even when the courts uphold the challenges to prosecutorial action. In [Bisser Kostov](#), Application No. 32662/06, judgment 10 January 2012 (an ill-treatment case), there were alleged to be deliberate delays and arbitrary refusals to pursue pre-trial proceedings, despite the orders of 4 different judges, after which there was a final discontinuation of the proceedings and no disciplinary proceedings against prosecutors for failing to follow the orders of independent courts.

This shows that in practice prosecutors have simply disregarded the orders of the courts, which cannot be acceptable in a system based on the Rule of Law. **This seems to us to be an overarching CJS issue, which needs addressing in the SJC.** We have not heard of any steps being taken to tackle this issue in that forum. **There should be disciplinary procedures taken by the SJC where prosecutors disobey court rulings.**

As it appears that prosecutors may abrogate to themselves the prerogatives of the judges, the only recourse in such cases for the victims or their families would appear to be the right of private prosecution. **Ideally we consider that in the circumstances described in cases like [Bisser Kostov](#) there needs to be an effective avenue of judicial review against arbitrary decisions to discontinue pre-trial criminal proceedings that is in harmony with the current Bulgarian criminal justice framework. Additionally, we reiterate our view that the Bulgarian authorities should relax their approach to private prosecution, and such private prosecutions,**

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<sup>4</sup> See also the report of the PORB regarding the ECHR cases on the position of the victim.

**used only in exceptional cases, should not be subject to prosecutorial discontinuance. The team understands that the necessary procedures and safeguards in respect of the institution of private prosecutions would need to be defined domestically.**

#### [Failure to investigate into circumstances established by the ECHR or the domestic courts](#)

It suffices to cite 2 examples of ECHR cases that have criticised failure to investigate effectively allegations of crime, which have been established within court proceedings.

In Dimov and others v Bulgaria (application No 30086/05, judgment 6 November 2012) the ECHR established excessive use of force and failure to protect life in a police operation led by a top police officer, currently a political figure. Following the judgment the case was re-opened by the prosecution, but apparently discontinued after elections.

Lenev v Bulgaria (application No 41452/07, judgment 4 December 2012) concerns the refusal to investigate effectively acts of torture for the purposes of confession, which had been identified by the Bulgarian courts.

**The lessons from these cases and any corrective measures taken need to be included in police and prosecutorial training.**

#### [Arbitrary discretion to re-open discontinued criminal proceedings \(in the absence of new evidence or circumstances\) not subject to judicial review](#)

This issue was addressed in another adverse judgment against Bulgaria in Fileva v Bulgaria (application No 3503/6 with judgment of the ECHR on 3 April 2012).

We too consider that the possibility of stopping and re-starting cases in the absence of new evidence or circumstances also can amount to an abuse of process. **We consider that this type of action by the prosecution needs further safeguards against possible prosecutorial abuse. A mechanism for effective and meaningful judicial review, which is in harmony with Bulgarian Criminal procedure, also needs to be created to address this type of situation.** It follows from this that once decisions are made by the court those decisions should be respected by the prosecutors.

#### [Discretion of the investigator and prosecutor to follow certain aspects of an investigation while ignoring other serious aspects](#)

In the judgment in SZ v Bulgaria the Court criticised excessive delays in the criminal proceedings and the failure to investigate certain aspects of the case.

Other possible failures to investigate relevant aspects of a case were drawn to our attention. The Bashya records case arose, out of an illicit recording which entered the public domain. In the recording the then Head of the SCPO is alleged to have shared some details of the case against him with a former Minister suspected of corruption some details of the case against him. There was apparently no investigation regarding the content of the recording only the provenance of it.

In another case the team was surprised that, although there appeared to be admissions of guilt in public, they seemed not to be able to be used as evidence by the prosecutor. **If this really is an issue in practice, this would need to be considered in the revision of the CPC.** It is considered that where important allegations are made in investigations and not pursued, it is difficult for an interested party to bring any Judicial Review proceedings without some basic outline of steps taken. **This underlines the need for greater transparency and public accountability of the PG in respect of steps taken in major investigations of public interest.**

### [The response of the PORB to the adverse findings of the ECHR](#)

Several interlocutors said that they had not heard much in the way of response publicly by the PG to the numerous adverse ECHR judgements. We were told that training events had been organised on ECHR issues, and that a review of all the cases was under way, which would be ready by the end of the year.

We recently received this report. It describes in detail the findings and lessons to be learned especially in relation to the ineffective investigations of criminal cases and the position of the PORB. It also gives concrete recommendations for legislative and organizational measures, and also on acts of methodological guidance. **In line with this report we consider that the PG and his senior staff should have a clear role in providing directional methodological guidance.**

Now the PG's report is ready, the next step is to work out the measures into an action plan by the PG and his administrative heads. **This plan should provide assurance that no cases are going through the system currently, contrary to rulings of the ECHR given in cases against Bulgaria. Where there are cases which may fall into this category they should be re-reviewed. We consider there will be a need for further training of all prosecutors on the findings of the analysis of ECHR cases (and this should be mandatory for all prosecutors). We also advise that a proactive role is given to the SJC Inspectorate for random assessment of casework from an ECHR standpoint.**

### [Information to the public](#)

The PORB is conscious that it needs to develop its public relations if it is to dispel residual distrust from previous years. There is now a media relations officer within its structure, which is welcome.

**A fresh overall public relations strategy could usefully be developed to explain more how the PORB works**

**It may also be useful carefully to select some younger staff for media training** and use them to share more openly in interviews some of the difficulties the PORB faces in bringing cases (eg obtaining evidence from abroad), and for emphasising successes where they are achieved in OC and corruption prosecutions. **As with all media interviews, no public comment should be made about individual prosecution decisions.**

**Open days to POs could also be considered** so the Districts and Regions feel more connected to the work of the Prosecutors' offices.

### [Supervision](#)

We noted the extensive role that the Prosecutor's Office still plays in the supervision of non-criminal matters in Bulgaria. We heard some complaints that prosecutors had too many minor, non-criminal matters to deal with, which was demotivating. The surrender of some of these responsibilities would free up more prosecutorial resources for the prosecution of crime. **We consider that there should be a detailed review of the role the PORB plays in non-criminal matters and its compatibility with its primary mission of public prosecution. The team advises that active consideration should be given to the transfer of much, if not all, of this work to other public bodies, particularly where its present remit in supervision involves decision-making on issues involving economic and commercial interests.**

## INDEPENDENCE OF THE PROSECUTOR'S OFFICE

### Opportunities for influence and other pressures

There are significant opportunities for the corruption of prosecutors and judges. Cases show that some have succumbed to them. 12 indictments have been brought against magistrates in 2016 and prosecutors have been convicted and served effective prison sentences.

There are media reports (and assertions in some of the cases we examined) of inappropriate conversations between prosecutors and politicians about criminal cases. So there still appears work to be done by the authorities in following up rigorously with criminal investigations all signals about corrupted prosecutors. Similarly the SJC and its Ethics Committee should take appropriate disciplinary measures against prosecutors (and judges) whose behaviour is incompatible with their office, including those who put themselves in positions where their impartiality and independence as prosecutors could be compromised. We think the work of the SJC in this area is particularly important. **We encourage the authorities to follow up proactively every signal about possible criminal offences of corruption involving a prosecutor. The SJC and its Ethics Committee are also encouraged to be more proactive in investigating all allegations of unethical or other behaviour incompatible with the office of magistrate and to impose appropriate, dissuasive and transparent disciplinary measures where necessary.**

### Local level

We heard that in the smaller regions frequently there are close social networks, which may provide opportunities for influence to be brought to bear on prosecutions. The PG is conscious of this. Beneath we discuss (and support) plans for more efficient judicial mapping, involving the creation of "district hubs" from which prosecutors could service some of the regional courts without a PO in the regional centre. The introduction of such changes might also have the benefit of reducing opportunities for local influence on prosecutors.

Opportunities to exercise direct influence on prosecutors by senior prosecutors for bad motives are slowly being eroded. **The hitherto unrecorded telephone conversation on cases needs to be recorded on files and, as noted earlier, this should be the subject of legislative amendment.** The possibilities for detecting potential corruption in the PORB will be increased from 2017, when the Inspectorate with the SJC begins to perform integrity and conflict of interest checks of judges, prosecutors and investigative officers, and to carry out inspections of their property statements.

### Inner conviction and prosecutorial independence

We broadly found that, on casework issues, prosecutors generally (and young prosecutors in particular) were very independent. We noted with some surprise that consistency in prosecution decision-making was less valued by some of them than non-interference with their judgments on evidential sufficiency, based on "inner conviction".

As no external body, other than the court, really monitors the quality of casework decision-making, it cannot be guaranteed that mistakes are not made. More than one person told us of illogical decisions that can emerge from a strict application of this test.

While more team-working can go some way towards mitigating the problems that an "inner conviction test" present, it does not go far enough. **We think that the inner conviction test in its present formulation needs modifying for prosecutors.**

**The test in our view should be – is there lawful and sufficient evidence on which a court is likely to convict? Such a test would reflect a difference in approach and not mean a lower standard of proof. This, along with**

a greater level of directional policy guidance from the PG's office, would lead to a greater consistency in decision making within the PO and an increased likelihood of conviction.

Should the A 14 test remain as it is, the PG is encouraged to give clear Methodological Guidance on the interpretation of it to ensure better consistency in prosecution decision-making<sup>5</sup>.

## HUMAN RESOURCE MANAGEMENT

### Recruitment, appointment and remuneration

There are quite developed procedures in place for recruitment and appointment to the PORB. At the junior prosecutor grade there is a process of written and oral examinations. For those selected this is followed up by a rigorous and impressive induction training period lasting 9 months.

For lawyers with more than 3 years of experience there is another route into the PORB – direct application to join as an entry level prosecutor. Formerly 20% of recruits had to be external candidates but the percentage has been lowered to 10%. **We think this is unfortunate and that the PORB could benefit from more external experience in the profession before entry, and suggest that the current percentage is once more reconsidered.**

Appointment to offices of selected candidates is done centrally. There appeared to be a general desire for more consultation with Administrative Heads about the appointment and allocation of new recruits, and transfer of other staff - especially if this happens without a competition. **The team considers that wherever possible Administrative Heads should be routinely consulted on the appointment of staff to their offices whenever they have not been involved personally in the selection boards. It is also proposed that representatives of the Administrative Heads can sit on all selection Boards.**

Prosecutors at the Sofia City Court are paid at the salary levels of appellate prosecutors. Other than this, there are currently no additional salary incentives specifically for working in the Specialised Prosecutor's Office on Organised Crime or in the Special Anti-Corruption Unit in the Sofia city PO – and we heard that it can be difficult to encourage appropriate candidates to apply for these positions. **Given the volume and pressure of the work involved in these offices we consider that the grading and remuneration for these positions should be reviewed and incentivised in order to ensure a more consistent flow of high quality applicants.**

It is understood that, in the context of staff appraisal the plenum of the SJC may make recommendations on individual salary levels. This does not appear to be a transparent process. In our view remuneration policy of prosecutors should be standardised and transparent. **All issues relating to remuneration policy, performance pay or additional pay for working in sensitive casework areas should be, in our view, exclusively within the competence of the PORB and its Administrative Department.** The PORB which should be responsible, in the first instance, for a transparent system of remuneration and setting the policy on how the salary budget is best spent. At the same time we understand that particular remuneration policies would need to be in line with general government regulations.

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<sup>5</sup> Though perhaps outside our remit, we might add that, so far as the court is concerned, to establish guilt the test might be better formulated as: *are we sure that the evidence is sufficient that the crime was committed?* The present court test is set out at A 303 CPC. In English translation at least, the section reads "*guilt (is proved) where the accusation is proved "beyond doubt"*", which sounds like a very high level of evidence to us. By way of comparison, the evidential test for a conviction in the courts is slightly lower: *are you sure beyond a reasonable doubt?* We return to this in the context of efficiency. The PG, of course, will know much better than us how this works out in the courts and will make his own judgment. But, our advice would be to begin a debate in the SJC on the evidential test for proof in court as well, as it seems to us that something near certainty is required, which seems too high.

## [Appraisal](#)

After a prosecutor achieves permanence he is appraised once every 4 years, though an amendment will extend this to 5 years. There was broad agreement that the present arrangements are formalistic and not necessarily objective. Almost everyone gets a “very good” or “good” marking. Two consecutive appraisals with “very good” or “good” markings mean the whole appraisal process can be waived thereafter unless the prosecutor applies for a more senior job, or problems are identified with his work.

In our view the appraisal process is not providing useful management information as to the strengths and weaknesses of the staff. There is no incentive for staff members to improve performance if everyone ends up with broadly the same markings. We consider that in future the SJC should not play any part in the appraisal process of prosecutors, which should be undertaken in-house. **We recommend that there should be regular, objective appraisal of all PORB prosecutors (and investigative officers) at least every two years by line managers that know them. Appraisals should be conducted by the Administrative Head (who will be newly empowered to involve themselves in casework decision-making). The staff appraisals should be based on objectives set by the Administrative Heads at the start of the reporting cycle (based in part on their own objectives set by the PG or other senior staff member). There should be mid-cycle reviews carried out by Administrative Heads between formal appraisal reports for career development purposes, identification of training needs of their staff and for any necessary adjustments to staff objectives to reflect changing circumstances.** The appraisal reports could be countersigned by relevant appellate prosecutors. **Similar arrangements should be made for the appraisal of Administrative Heads and other senior staff by more senior officers or the PG. The aim should be that Administrative Heads should ultimately be accountable for the performance of their district, region or Specialised Office to the PG.** We propose that the PG himself should set objectives for his senior staff, and be involved in their appraisal process.

**It is advised that proper training is provided for managers at all levels on the aims, and procedures for such a new appraisal process before it is introduced, and that managers should cascade this training to their own staff.**

## [Training](#)

We found that training provided by the NIJ was very professional, responsive and relevant. The difficulty is that, for the most part, after induction training, attendance on training courses is largely voluntary. It is unclear whether all prosecutors regularly apply for training or just the more enthusiastic, younger ones. The Administrative Heads should have a more hands-on role in proposing training for their staff and ensuring that their attendance takes place. **The team considers there are areas where mandatory training must be provided for all prosecutors which should involve personal attendance on a course.** It is for the PG to decide on the topics for which mandatory training is necessary but we would suggest that, at the least, mandatory training courses on the prosecution of corruption and organised crime and asset recovery should be mandatory. **When the final guidance is issued on the ECHR cases, we consider that the lessons learned from the ECHR decisions need to be the subject of a training course for which attendance by all prosecutors and investigative officers should also be compulsory.**

## [Workload and staff movement](#)

Some prosecution offices, particularly specialised offices, are overloaded with work. Others may be less so. In the areas of principal concern to us, we were told there are vacancies in the Specialised Prosecutor’s Office. Similarly, the conclusions of the report of the working group on the analysis of corruption cases from 2013 to the first quarter of 2016 by the Specialised Unit at Sofia City PO reported insufficient prosecution and investigating personnel. The position seemed much the same to us in October. **It seems to the team that overall there still needs to be a robust and up-to-date assessment by the PG of the operational need for prosecutors and investigators for organised crime and corruption, based on current and projected workloads and complexity of the cases.**

**We advise that after the up-to-date analysis of operational needs in this area, sufficient new permanent posts need to be created to reflect the growing workload. Therefore, underlining the advice made above, financial incentives must be provided for this type of work, reflecting the important responsibilities involved and the commitment prosecutors would be required to give.**

#### Judicial mapping

As noted, there is a debate on the optimal number of courts and prosecution offices in Bulgaria. Each regional prosecution office has its own administration staff to support it, whatever the workload. This may not be the best use of resources. It seems to us that the physical location of prosecutors need not necessarily threaten the continuation of particular regional courts. **We consider that a more efficient solution would be the creation of District hubs, which serve not only the District Courts but provide a pool of staff which can be deployed responsively to regional courts as well, according to need.** We welcomed the PG's petition to the Constitutional Court for a ruling on the interpretation of A 126 of the Constitution which, depending on the outcome, might allow for more flexibility in this area. **In addition the team advises that also the need for the present number of Military Prosecution offices should be reconsidered.**

#### EFFICIENCY OF THE PROSECUTOR'S OFFICE

We have examined the legal, procedural and operational issues that can impede the efficiency of the prosecution, particularly in corruption and organised crime cases. In the context of corruption we noted that a public opinion survey earlier this year by the Agency for Forecasts and Analysis shows that 72% of the population consider that the inability to eradicate corruption is the major problem facing the judicial system.

#### Results in corruption cases

We consider that the Sofia City PO unit has made some progress on this issue since its creation in 2015. Of the cases they are prosecuting involving magistrates, 31 are at the pre-trial stage, and 8 cases are still within the trial stage. One judge was convicted of requesting a bribe, though the 3 year prison sentence was suspended. There have also been proceedings brought by the Unit against prosecutors. One is believed to have been sentenced to a term of immediate imprisonment for three and a half years. In another case, involving a District Prosecutor who was alleged to have received a bribe of 50 000 Levs to exercise undue influence on his staff so as not to trigger procedural provisions which would lead to a significantly increased sentence for a defendant. The District Prosecutor was acquitted and the prosecution protested this acquittal. At the time of our discussions about this case the Unit had not received the Judge's reasoning. We were told that this was not uncommon. In another corruption acquittal which was protested, the judge's reasoning was received 8 months later. We were told that the reasoning amounted to two lines. We find this unacceptable. **The Minister of Justice should promote, as necessary, fresh legislation to limit unacceptable delays by judges in providing their reasoning for acquittals after a protest by the prosecution and to ensure judges provide fully motivated reasoning to the prosecution. The SJC should take dissuasive disciplinary proceedings against judges who do not comply with these requirements.**

Of the 24 other cases of corruption not involving magistrates, 2 mid-ranking officials in the Ministry of Agriculture were convicted of receiving bribes for turning blind eyes to a fraudulent application for subsidies by a farmer.

Overall in corruption prosecutions generally brought by the PORB and not just by the Sofia City, 201 persons have been convicted and sanctioned. They included 8 mayors, 3 mayors' envoys, 1 civil servant, 1 municipal officer and 1 private bailiff. All received conditional imprisonment.

There are pre-trial proceedings under way in 2016 in respect of a Deputy Chief of Staff of the Bulgarian army, and 2 military commanders (where some significant sums are said to be involved) but high level corruption

involving politicians does not really feature. This is surprising given that we understand that two thirds of the suspicious transactions received by the Financial Intelligence Unit (FIU) from financial institutions involve domestic politically exposed persons (PEPs). It seems clear that the FIU's disseminations to law enforcement in respect of PEPs are not resulting in proceedings. **The Bulgarian authorities are advised to examine urgently what obstacles are preventing intelligence reports received by law enforcement from the FIU in possible corruption cases being turned into evidence for prosecution.**

Thus, it is difficult point to any significant terms of imprisonment that send signals that political corruption in high places is being attacked aggressively. The conclusion is that the main success in corruption prosecutions relate to what might be described as "low hanging fruit".

### [Results in Organised Crime cases](#)

The Bulgarian authorities have provided considerable information to us on OC cases. It seems clear that there are some major convictions with long sentences, but no consistency. Many cases are finalised by way of conditional terms of imprisonment, which, we suggest, have little deterrent effects. We were presented with graphic material on several "infamous" OC groups where prison sentences were reported to include ones of 17 years on charges from 2013, and 15 years on case, sentenced in February 2016 on an indictment from 2012.

The latest statistical analysis by the Supreme Prosecution Office of Cassation 2011-2016 on monitored cases that we have received is dated 29 September 2016. It shows that of the OC cases initiated prior to 2014 75 convictions were achieved. In 3 cases a punishment of more than 5 years was imposed and in 10 cases a sentence of more than 3 years was imposed. Of cases initiated in 2014 there were 20 OC convictions. In all cases the sentences were conditional imprisonment, probation or fine. Of the cases initiated in 2015 there were 10 final convictions, and conditional imprisonment or probation was imposed in all cases. So far, of those cases initiated in 2016, there are 2 OC convictions, neither of which involved an immediate term of imprisonment. While we cannot comment on the merits of the conditional sentence agreements, it is clear that the Specialised Prosecution Office is active on OC cases.

### [Legal, procedural and institutional obstacles to the effective prosecution of corruption and organised crime cases](#)

#### [Indictments](#)

Interestingly, in the survey by the Agency for Forecasts and Analysis, 42% of people are reported to believe that improvements will only be felt in the criminal justice system when prosecutors begin submitting indictments of higher quality.

We heard of many indictments being returned by judges nationally, and this appears to have fed a public perception of overall inefficiency on the part of the prosecution on drafting indictments. We do not fully share these views. **We believe the current CPC provisions on indictments not only present problems for the efficiency of prosecutors but present problems for the efficiency of the whole criminal justice system, because of their length and formalism.** By comparison with other countries, Bulgarian indictments rules require a large amount of unnecessary detail. An average indictment is never shorter than 4-5 pages in very simple cases. In complex cases we were told they can regularly be more than 1000 pages.

The general complaint made by prosecutors is that the courts expect the indictments to be drafted as if the prosecutor was an eye witness to all the circumstances of the case. This, we gather, requires "absurd" levels of detail.

Judges, even in sensitive cases (which should not be subject to unnecessary procedural delays) send back indictments for minor prosecutorial "mistakes". We noted that in 14 corruption indictments involving

magistrates, 12<sup>6</sup> of them were returned by the judges for “procedural inconsistencies”. The prosecutors raised objections in all of these cases and in 11 of them the prosecutors’ objections were upheld by the superior court.

The views expressed to the team about judicial handling of corruption cases in Sofia City Court, together with unresolved allegations about other practices in that court cause us to question whether the Sofia City Court is the best venue for dealing with top level corruption cases on a national basis. **We think there is an argument for moving this work to the Specialised Criminal Court, where there appears to be more constructive interaction between prosecutors and the judiciary and less formalism. It would be necessary though to have the same anti-corruption specialised staff currently working in the unit at the Sofia City PO involved, as it would not be helpful to build new units every two years.**

On the legislative front, we understand that, as part of the judicial reform, there are proposals to reduce the number of times indictments can be returned to the prosecution, which would be a welcome step forward, but does not address the root problem.

**We advise that A 246 CPC in connection with A 249 (2) CPC needs radical amendment to reduce the unnecessary formalism that is required in the production of indictments. The indictments should be much simpler, setting out in the briefest terms the particulars of the offence. Administrative arrangements for the trial should be dealt with separately and not within the indictment.**

**Until the Law is amended, the PG should continue to monitor the number of returned indictments in sensitive cases.**

Practice directions are a feature of some of our systems, whereby a senior judge can issue broad instructions to judges on practice issues in the conduct of cases. **We consider there is a case for introducing practice directions in the Bulgarian system.** We were advised by some judges that they would welcome such a development. The team was advised also that the President of the Supreme Court might be the appropriate senior figure to be given this responsibility. In the context of returned indictments, **the PG is advised to press in SJC and with the Minister of Justice for practice Directions to the judges curbing procedural delays caused by returning of indictments for unnecessary technical reasons. Practice directions to judges might be considered also for consistent application of the law on other issues.** In this context it is noted that we do not consider that such practice directions, which are essentially managerial/administrative directions on the handling of cases, would impact on the independence of the courts in a material way.

The delays in proceedings caused by returned indictments are compounded in the trial phase by the procedural requirement for the whole indictment to be read out to the court at the start of the trial. This is a process which in some cases takes 2 or more days of court time alone. **We also advise that the current procedural requirement to read out every indictment in court should be abolished. We advise that in the future the shorter indictments we propose should also be summarised by the prosecutor rather than read out, where there is no legal argument on them.**

#### [A 368 and 369 CPC](#)

Under A 368 and 369 CPC there is a procedure whereby after 2 years in serious cases the defendant can call for an examination of his case and if the prosecution cannot submit an indictment the judge has to terminate proceedings with no discretion. In the case of major organised crime, (and possibly corruption) proceedings this is a major obstacle. Clearly the prosecution cannot allow cases to drag on indefinitely without indictments being served, but **in complex organised crime cases we consider the prosecution needs some more leeway, and advise that A 368 and 369 should not apply to serious, complex criminality including organised crime cases.**

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<sup>6</sup> Of which 6 were Sofia City Court.

We considered whether A 368 and 369 should be abolished entirely. **If the authorities consider A 368 and 369 cause significant problems for other cases, consideration could be given to their complete removal.** This might be justified if a general procedure is introduced where delays, which could amount to an abuse of process, become subject to Judicial Review - without automatic termination by the court of the proceedings as the only outcome.

#### [Petty crimes and the formalistic CPC](#)

The team heard support for taking more minor offences either out of the system altogether or out of the cumbersome procedures required for serious offences. In most of our systems 'summary' or more minor offences are dealt with by way of streamlined procedures – and in fact some cases can be processed without ever being placed into a court setting. While we appreciate that creating such identical systems in Bulgaria may be difficult, **we advise that the careful consideration is given to creating streamlined procedures for more minor cases. We would also advise that consideration is given to providing the PP with a power either to deal with a very minor case outside the court setting or in fact to take no action at all.**

#### [Participating witnesses and defendants, plea bargaining and immunities](#)

In our experience the successful prosecution of organised crime and corruption involves the necessary use of plea bargaining and leverage to obtain necessary testimony from accomplices. This has to be accompanied by proper protection, particularly in OC cases, for such persons where they are used as witnesses.

We suggest serious consideration be given to leveraging the “smaller fish” to be used as witnesses against the kingpins in appropriate cases. Such a participating witness/defendant may be “cleaned” by entering guilty pleas first for his part. In that situation, the prosecution, when sentencing such a witness (normally after he has given his evidence) would make clear to the judge the extent of his cooperation, for which he should be given credit in sentence. In exceptional circumstances the PG could be empowered to issue an immunity to a vital participating witness. **We suggest that clear practice directions, which are publicly available (and consistently applied by judges), on the tariffs for sentencing of participating witnesses would be very helpful in persuading such witnesses to testify.**

**We therefore propose serious consideration be given in OC and corruption cases (through plea bargaining if necessary) to the greater use of accomplices and other participating defendants as witnesses against the leaders of the criminal enterprises (either having been prosecuted first or under immunities). To support this policy, practice directions should be issued to judges and made publicly available outlining the range of reductions to sentence that is permissible for cooperating witnesses. Suitable arrangements for the protection and security of such witnesses and their families need to be in place.**

#### [Prosecutor's position as \*dominus litis\*](#)

One way the prosecution could be more efficient and reduce delays is by more effective use of the prosecutor's discretion in presenting cases as *dominus litis* in criminal proceedings. In our view it is unnecessary to draft hundreds of counts on an indictment covering all offences committed by a criminal or criminal group in order to establish the totality of alleged criminality.

**We suggest, to save time and resources (particularly in OC cases with allegations of fraud), prosecutors should consider selecting a sufficient number of specimen counts covering the whole period of alleged criminality which will give the judge scope for an appropriate overall sentence, instead of listing multiple offences which will not individually attract any greater sentence overall. If specimen counts are not currently possible, we consider legislation should provide for their introduction.**

### [Suspending criminal proceedings](#)

Articles 25 and 26 and 244 CPC provide powers to 'stay' (or suspend) criminal proceedings – though for no more than 1 year. Some of the statutory grounds are perfectly understandable. However there are at least two grounds which give the prosecutor considerable room of the exercise of discretion (and possibly misuse).. We were surprised by the apparently high numbers of such stays in corruption cases. **We consider that in a future review of the CPC these grounds should at least be reconsidered. Until such time as the CPC is reviewed we also advise that both the PG in his internal audit process and the Inspectorate of the SJC examine the cases currently suspended to provide reassurance that these powers are not being used inappropriately, particularly in corruption cases.**

### [Delays and lack of Judicial control over certain cases](#)

We saw too many big cases continuing for years without resolution by the courts. What is surprising is that judges do not exercise more discipline and control over cases by setting agendas for trials soon after the indictment is first lodged. In some of our systems once the trial stage is reached there is an early “plea and directions” hearing. Pleas are then taken. If the case is contested trial dates are fixed with a view to hearing the whole case in one appointed period. What we saw often was a case with 2-3 days of court hearing followed by adjournments for months before other witnesses were called. In our view this is inefficient. **We propose a more rigid system of case management by judges**, particularly with judges being firmer on not granting adjournments for spurious reasons, and clamping down on some of the “chicanery” of which we have heard. In one case we gathered that there was a delay of some months because a defendant had become a parliamentary candidate and was thus immune from prosecution until the election. Such immunities are unknown in our jurisdictions. **In our view, the whole issue of immunities from criminal prosecution of candidates for office and of parliamentarians needs reform.** Some light form of immunity, e.g. for statements in the Parliament, is understandable to secure the freedom of speech, but we cannot support a general immunity from criminal prosecution for parliamentarians.

### [Special Investigative techniques](#)

In OC cases the extensive use of special Investigative techniques (interception, surveillance etc.) for considerable periods is often required. The current time limit for their use is 6 months, which law enforcement considers insufficient. **We think this time-limit should be relaxed in organised crime and high level corruption investigations if real results are to be achieved. However the periods cannot be unlimited, and there need to be reviews. One possible regime which may balance operational needs and privacy rights could be that after 6 months an application to the court for SITs to be continued in OC and high level corruption cases should be made only with the approval of an Administrative Head of a Prosecution Office for another 3 months. We suggest only one court in one case should have a role. An *in camera* application could then be made to a senior appeal judge of Cassation by the lead prosecutor, explaining why this measure continues to be necessary for a further 3 months, with the possibility of a going back to the judge for a second and last possible renewal for 3 months, again with the approval of the Administrative Head. This, or a variant of it, should be actively explored with law enforcement and prosecutors, and appropriate amendments to legislation should be proposed, which balance operational needs with rights to privacy.**

We heard also that the present system for applying for SITs (especially for wire taps) was in practice also problematic and potentially very ineffective where magistrates are being investigated, with the possibility of compromised security.

**We advise that statutory amendments should clarify that applications for SITs, particularly involving wire taps, should be concentrated for all suspects in a case in one court – namely the court in the area or specialised field of the prosecutor making the application. In corruption cases involving public officials and the magistracy the application should only be notified to the head of the Specialised Anti-Corruption Unit at**

the Sofia City PO or the Sofia Appellate Court. In cases of OC the application should only be notified to the Administrative Head of the Specialised Prosecutor's office. The application should be oral and *in camera*, with the prosecutor showing any evidence necessary to support the application only to the judge to whom the application is made. The prosecutor should retain control of his file at all stages. The order should take effect on issue – i.e. once it is given.

#### [Investigative powers of the State Agency for National Security \(SANS\)](#)

We noted that SANS generally has now been stripped of its investigative powers in general criminal matters and OC and corruption. Given that it operates regionally and more work is being done by it on investigations on a multi-disciplinary basis, this decision can be questioned.

**The authorities are advised to reinstate the operational investigative powers of SANS officers working in multi-disciplinary teams on Organised Crime and corruption cases.**

#### [Evidential and legal issues where amendments may improve the efficiency of the prosecution in corruption cases](#)

We had the benefit of reading the PG's report on corruption cases prosecuted by the PORB in the period 01-03-2013 until 01-03-2016. Attention is given in it to particular issues with respect to the CC, CPC and the Judiciary act which hinder the prosecution of offences of corruption. **It is clear that A. 282 CC needs reassessing if malfeasance or abuse of office cannot apply to officials in commercial companies, co-operations, etc.** Corruption offences should be just as applicable to officials in the private sector (like banks) as officials in the public sector and State institutions. **Similarly the adoption of provisions incriminating the mere action of offences, without the need to prove any actual or potential damage caused by breaching Public Procurement Awards Regulations makes sense, and should be adopted.**

It may also be possible to legislate within ECHR parameters to provide in the law that gifts of significant value given to a public official are susceptible to a presumption of corruption, which the prosecution would need to support or corroborate with other convincing evidence.

As noted, pressurising other prosecutors to act in a certain way is considered a main *modus operandi* in prosecutorial corruption cases. Given the difficulties in these cases where it is not possible to prove that money changed hands for a corrupt purpose, **we suggest that the authorities might usefully explore the merits of either a revised lesser criminal offence or a disciplinary offence (similar to bullying) for prosecutors, which simply requires proof of undue pressure being placed by a senior prosecutor on another prosecutor to act in an improper way.**

**Thus, these issues specific to the prosecution of corruption should be legislated for very quickly.**

That said, there are corruption offences within the Criminal Code that are broadly in line with international conventions which can be used by the authorities. The team noted that GRECO said in its 2010 report on the Bulgarian legal framework on corruption incriminations that 'it offers many good tools for the prosecution and adjudication of corruption offences'.

#### [Next steps in the prosecution of high level corruption cases](#)

We are not convinced that legislative problems are a complete answer as to why Bulgaria is not in a position to prosecute high level corruption cases effectively.

We understood that military prosecutors had some successes in this area before this competence was removed from them in 2009.

The annual report of the PO indicates that in 2015 49% (778/1588) of pre-trial corruption proceedings of high public interest appear to have been terminated, whereas the figure for all types of crime was 24.2% (31,678/130,660<sup>7</sup>). We were advised that the problem was the same in 2014. The reasons for the apparently higher percentage of terminated pre trial cases in corruption need carefully examining by the PORB. **We advise that in future Annual Reports it might be helpful to have some written commentary where there appears to be significant divergence in the percentage of terminations of pre trial cases in corruption, compared with the percentage of terminations in all pre trial cases.**

We are very concerned by the absence of high level corruption cases. In respect of politicians, one interlocutor commented that indictments always come when they are ex-Ministers.

The PG can only act, of course, on signals. If signals are not forthcoming in respect of allegations involving sitting Ministers or high level officials, the PG cannot be blamed for not bringing proceedings.

We applaud the move to specialisation of prosecutors in high level corruption cases and the work that has been started by the special unit at the Sofia City Prosecutors Office. However, it is possible to create many more trained specialised prosecutors in corruption and still not have real results in high level corruption if there are insufficient and/or weak investigative resources at their disposal. We understand that the PG has sought further investigative assistance for this unit from the Minister of the Interior. This has not been forthcoming. We believe that the investigative support to the special unit at the Sofia City PO is very weak. If the unit is to achieve real success in high level corruption, **we advise that there needs to be a comprehensive policy to deploy at least 50 more specialised investigative officers to the unit.** These officers should work proactively with SANS officers (with sufficient investigative powers, as we have advised) to identify high level corruption. **We advise that they should also carefully re-assess all STRs disseminated by the FIU in recent years to law enforcement involving domestic politically exposed persons which did not result in further action.**

Many new officers will need specialised training and some current ones might need retraining (perhaps drawing on the experience of corruption officers in other countries that have been involved in proactive investigations).

We were told by the PORB that there were several high level corruption cases in the pipeline. **Therefore our professional opinion is that, the injection of further investigators, in conjunction with several such investigations ongoing, within 1 year the specialised unit at the Sofia City Prosecutors Office (or wherever that unit is then located) should be able to show some significant results in high level corruption cases. We encourage the active support of all governmental departments in reinforcing this unit to this end.** In this way the public within the next year should be more reassured that high level corruption is being successfully tackled in Bulgaria within the present structure of the PORB.

**If, after a reasonable time, there are still no major high level corruption cases brought to court, then we consider that the Bulgarian authorities should move quickly to develop a structure for investigating and prosecuting high level corruption which is independent of the PORB, along the lines that have proved to be effective in neighbouring and other countries.**

## **EXCHANGE OF INFORMATION**

### **International exchange of information**

The MoJ tries to deal with mutual legal assistance requests constructively. It executes requests for international assistance where the requested assistance is not available domestically, which is very welcome. The MoJ does not always get feedback on how helpful its responses are, or feedback on the timeliness of their

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<sup>7</sup> The figures referred to are mentioned in the Annual Report of the Prosecutor's Office on page 72 and 7 respectively.

replies. **The MOJ could usefully consider how to monitor for its own purposes the quality and timeliness of its MLA replies.**

One area where concern was expressed is the handling of outgoing European arrest warrants (EAWs), where there were said to be delays on the part of some prosecutors, either through miscommunication between prosecution offices or simply because of lack of confidence in how to handle these matters. There also appeared to be some unwillingness, in the regional offices especially, to apply for EAWs when the location of one of their defendants was known. **Both of these issues point to the need for some further training on the operation of EAWs.**

We heard that Bulgaria is proactive in proposing joint investigation teams (JITs), particularly in human trafficking cases.

Police to police cooperation is usually based on formal police channels (Interpol, Europol) and works best where there is trust and a good working relationship has been developed with foreign counterparts. This, together with the good offices of the Bulgarian Eurojust representative, seems to ensure that police to police cooperation generally works satisfactorily. However one country raised some concerns about inaction by the Bulgarian authorities in connection with the conduct of controlled deliveries by their officers across Bulgarian territory. There are also concerns about timely receipt of results of requested special investigative techniques, including wire-tapping. **The Bulgarian authorities should ensure that any obstacle to effective delivery of international assistance on these issues are identified and removed.**

A major issue that does need to be addressed soon for international cooperation purposes (as well as for domestic enquiries) is the creation of a national register of beneficial ownership of legal persons. Work on this is being taken forward by the Bulgarian authorities. **Law enforcement and prosecutors must have easy access to registers of account holders and registers of beneficial owners of legal persons when they are created.**

The current lack of IT systems connecting the numerous domestic law enforcement operational and intelligence databases is a problem for both domestic cooperation and international cooperation. Connectivity between the databases of different agencies remains entirely paper-based. This makes the sharing of intelligence internationally more problematic for Bulgarian prosecutors and law enforcement. Officers infrequently write down their own intelligence and send it manually for importing into other electronic databases. Thus intelligence can remain in silos. **General electronic connectivity between operational and intelligence databases (subject to agreed confidentiality protocols) of all Bulgarian law enforcement agencies and the PG's office needs to be developed quickly for more effective international cooperation. This advice also applies in the domestic context, as detailed beneath.**

### [Domestic Exchange of Information](#)

Domestic exchange of information is based on legal agreements and bilateral agreements between agencies. As noted above, every agency has its own databases.

Progress is being made to create a unified, integrated information system for better coordination of law enforcement activities. Currently the central core of this developing system is held within the PORB, the server of which is held by the SJC. This system is broadly unified with most relevant agencies but, as noted above, it is not connected electronically. In the domestic context reliance is still placed on data being transferred manually into the system. This causes bureaucratic delays and a high error rate.

The MoI is the only agency that is currently not feeding general bulk information on their ongoing operations and intelligence into the integrated unified information system. The lack of MoI formal participation in the system causes practical problems. There is no real process for de-conflicting investigations, before something goes wrong. Without MoI data in the system, there is no quick way for the PORB or SANS or others to ascertain information which would show whether more than one preliminary check has been opened on a target, or

whether formal enquiries are being pursued by different law enforcement bodies on the same target. **This needs resolving to avoid investigations being duplicated or compromised.**

**The Mol is encouraged to join the integrated information system as soon as possible for a more effective law enforcement response to organised crime and corruption cases, given the range of actors that there are in these sensitive cases.**

There is potential for disfunctionality on asset recovery issues domestically. With the creation of the Commission for Withdrawal of Assets, there appeared to be a view in some parts of law enforcement that asset recovery was now the Commission's responsibility and not that of the police. This is unfortunate as the policy, as we understand it, is for law enforcement and the Commission to work together on asset recovery in big cases. We are not convinced that this domestic coordination is working properly yet.

We consider that early freezing of assets is vital in big cases. While law enforcement and prosecutors can still freeze assets that belong to an offender during an enquiry, they cannot freeze assets which an offender transfers to a third party. We understand that only the Commission can do that. **This means that there needs to be closer coordination between prosecutors, investigators and the Commission to ensure in big cases that someone is addressing at an early point in the enquiry the freezing of all assets which may be subject to later confiscation by the court, before they are dissipated.**

The Specialised Prosecutor's Office on Organised Crime and Corruption candidly admitted that in the past asset recovery was not their first priority. The present Head intends to make it a priority. **We advise, to ensure the early identification and freezing of relevant assets, that in OC and corruption cases especially, lead prosecutors need to supervise major investigations more proactively, by instructing suitably trained officers to conduct financial investigations to ascertain the full extent of assets of major targets. Where appropriate, this should be undertaken in conjunction with the Commission. Such financial investigations should be conducted in parallel with the investigations into the criminal offences themselves.**

There is a big gap in expertise in modern financial investigative techniques in Bulgaria by law enforcement. **The current lack of financial investigation expertise in law enforcement needs addressing as a priority, through the recruitment, training and deployment of police officers able to conduct complex financial investigations.**

#### Criminal Justice costs

There are also other more practical benefits to be had from effective confiscation policies. We understood that in Bulgaria, as well as the possibility of confiscation of criminal assets, convicted defendants are ordered to pay costs. It was unclear how much of these costs are actually collected. The same is true for confiscation orders. These need to be realised. When all such orders are realised, they could be used for the further development of national CJS measures, if budgetary arrangements can be made for the "ploughing back" of confiscated assets and other costs collected in the process of criminal prosecutions into the development of the CJS. **We encourage the Bulgarian authorities actively to consider 'ploughing back' confiscated assets and other costs awarded to the prosecution in order to support the financing of reforms proposed in this report.**

## ROLE OF EXPERTS

### The problems

The problems can be summarised as ones of supply and demand

For certain offences expert witnesses are required by law. However, in other cases, where there is no such legal requirement, there is an over-reliance on the use of expert witnesses - in part to compensate for weak police investigations, particularly in traffic accidents.

We heard that there are insufficient available experts, particularly outside of Sofia, that have the required levels of competence to handle all cases across the country where expert evidence is thought to be necessary. Across many of the disciplines where medical or forensic evidence is needed for criminal cases, there is no new generation of professionals coming up behind their senior colleagues. This problem is compounded by the reluctance of some experts to make themselves available to the authorities for what was described to the team by one interlocutor as “humiliating” levels of remuneration.

The time taken to get even one expert report, contributes to the delays in criminal proceedings.

The 100 highly professional staff of forensic scientists employed by the Ministry of Interior at the Research Institute of Forensic Science and Criminology are over-stretched and, in our view under-funded. They told us that 40% of requests by prosecutors for forensic statements were, in their view, unnecessary. They considered requests for statements in too many minor cases diverted resources from the serious cases.

The Law allows the defence to ask for a second opinion. This request is usually granted automatically. If the second report, when it arrives, differs from the first one, we were told that the judges’ frequent default position is to commission another expert – or, in some cases, panels of experts, rather than weigh the merits of the 2 reports in court.

### Supply

Each judicial district and specialised criminal courts is required to keep a list of “approved” experts. Access to the lists is governed by a recent Ordinance (No 2 of 29.6.15) on the entry, qualifications and remuneration of experts. This Ordinance is, in our view, insufficient as a legal basis for the regulation of access to quality expert witnesses. The level of educational attainment is not specified. No distinction is drawn as to the level of academic attainment of experts on lists. Thus all that needs to be provided is a certificate. There is no single authority that verifies the qualifications of the experts, which could act as an overall guarantor of competence. Equally there is no national system for assuring continuing professional development of experts<sup>8</sup> or criteria for the removal of an expert from lists for incompetence. We suggest that this whole issue needs clear codification in law. **We propose that a law should provide for the creation of a national institute of experts to set entry rules and competence requirements for all expert witnesses that practice in the courts, and to be responsible for their licensing.**

In our view a National Institute should be linked to government and ideally to a university. The Institute would set the standards and competence levels in each of the major expert specialisms. **We think that the setting of the detailed standards and the enrolling of experts should be left to the professional organisations themselves, but that Parliament should provide the legislative framework for these standards.**

### Demand

Ultimately there will have to be a fair balance struck between the supply of available quality expert witnesses in Bulgaria and the demands of prosecutors and the courts for them.

We think that the courts’ repeated demands for more expert statements will become simply unsustainable. In the immediate future, as the legislation we propose will take time, we think a conversation needs to be opened by the PG and Minister of Justice in the SJC about judicial demands in this area. The attitude of the courts on this issue further persuades us that there is a real need for consideration of Practice Directions to the Judiciary on court management. **We propose that dialogue is conducted in good faith between the prosecution and the judiciary at suitably senior levels on practical issues which drive the commitment of resources connected with the use of expert witnesses, with a view to finding practical solutions within existing resources.**

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<sup>8</sup> Some professional organisations do provide self-help on professional development but this is fragmented.

Equally we consider that the concerns of some of the experts in the Research Institute of Forensic Science and Criminology may have merit, and that **there needs to be more liaison and dialogue between the prosecution and the expert community. More flexibility on the need for, and the format of some forensic analyses seems to be necessary. The prosecution should always make it clear which requests have priority and why. We propose that there should be a structured programme of liaison meetings between the PORB and the Institute at suitably senior levels to discuss concerns and to seek workable solutions that reflect practical realities.**

#### [Financial Investigators](#)

As noted, the police do not have their own financial experts. We were told they generally use retired accountants who examine documents but do not conduct financial investigations using modern financial investigative techniques. **These arrangements need to be replaced by sufficient investigative officers properly trained in modern investigative techniques and financial profiling for effective asset recovery in OC and corruption cases. Appropriate courses must be introduced into the training programmes of the NIJ.**

#### [Television link](#)

While an expert witness can give evidence by way of television link from another country, current Bulgarian law does not allow this to take place if the expert is based in Bulgaria – regardless of the distance the expert requires to travel within Bulgaria to give evidence. This, understandably, leads to a reluctance by professionals to engage as expert witnesses – particularly in more remote areas. **We advise that this law be changed as soon as possible, to allow experts to give evidence by way of television link in all cases where travel to court is an issue.**

#### [Accident Reconstruction and preservation of crime scenes](#)

There are external experts who are employed for their expertise in reconstructing road traffic accidents. Elsewhere this activity is generally covered by trained police officers not civilians. We were advised that such solutions would be unacceptable in Bulgaria. Assuming that this is not possible now, we encourage the full participation of the Technical Expert Union in the planning of the proposed Institute of Experts.

We heard various comments about police negligence in the preservation of crime scenes of all types – from road traffic accidents to homicide cases, particularly since independent examiners no longer accompany those officers who are the first to attend crime scenes.

**More training for first responders on the preservation of crime scenes appears necessary if investigations are not to be compromised at the outset.**

**In the same context, the procedures under A 156 CPC and A 137 CPC in respect of “certifying witnesses” were consistently criticised as relics from former times that should be removed. We agree.**