

Sofia, 26 August 2020

To:

Ms Ursula von der Leyen

President of the European Commission

Copy to:

European Parliament

Committee of Ministers

European Commission for the Efficiency of Justice

Chair, European Committee on legal Co-operation

European Commission for Democracy through Law (Venice Commission)

Consultative Council of European Prosecutors

International Association of Prosecutors

Dear Ms von der Leyen,

As a former Minister of Justice and the leader of political party “Yes, Bulgaria” and co-chair of “Democratic Bulgaria” Coalition I am writing to you in reaction to a declaration announced on August 24th, 2020, by the Bulgarian Prosecution Service (BPS) and addressed to the European Commission as well as the Venice Commission, the Parliamentary assembly of the Council of Europe (PACE) and other relevant bodies. The Declaration, following up on a similar statement by the Prosecutorial Chamber of the Bulgarian Supreme Judicial Council (SJC), refers to “unprecedented pressure against the Prosecution”, “threats to its independence” and “risk to the Rule of Law”. Importantly, SJC and BPS made a reference to art. 7 of the Treaty on European Union.

In particular, the Prosecution stated in its Declaration that:

“Political speech, however, has to have its limits and they are over wherever the substantive elements of the prosecutorial status are encroached upon. Those limits were transgressed, and without hindrance, demonstratively, in a EU member-state called upon to safeguard the European values. The calls for ‘reselection’ of Bulgarian prosecutors transgressed a dividing line beyond which it is difficult to speak of Rule of Law. These calls infringe [our] irremovability which guarantees our independence. Therefore we are obliged to react and to resist. ... Independence is a right of the prosecutors and the investigators, and the state is obliged to secure its unhindered enjoyment.”

As the reform proposals quoted in the Declaration are mine and of the political force I represent, and the pressure referenced by it are the mass protests we support, I am writing to you to provide our perspective on these important matters. Whereas the PBS has resolved to bring the issue forth to the EU and the Council of Europe arena and to even invoke art. 7, I feel obliged to also provide our position.

I ought to start by **agreeing with the BPS that there is indeed a serious and long term Rule of Law crisis in Bulgaria**, escalating recently to trigger a massive political convulsion, and that it probably indeed reaches the thresholds of potential consideration of art. 7 of the Treaty. Of course, in all other respects, our assessment and arguments will be diametrically contravening those of BPS.

1. The Protests and their Reasons

As you ought to be aware, for [47 days now there are mass protests in Sofia and other Bulgarian cities](#) as well as by the Bulgarian diaspora abroad. The protests call for the resignation of the Government, led by Mr. Boyko Borissov, the resignation of the Prosecutor General Mr. Ivan Geshev and for the radical reform of the prosecution in Bulgaria. So far, the protests led to the resignation of four cabinet ministers and multiple but inconclusive statements by Mr. Borissov that he is in general ready to step down. The latest move by him was to propose an entirely new constitution and, if the draft is not supported by enough votes in parliament, to resign.

[The immediate trigger for the protest was a beachfront incident involving my colleagues and myself](#) being attacked by National Service for Protection guards while trying to establish that the particular territory is public land against its illegal occupation by Mr. Ahmet Dogan, the honorary president of the Movement for Rights and Freedoms party and a figure of notorious behind-the-scenes political influence. The multiple infringements of the law surrounding Mr. Dogan’s estate as well as the many examples of state institutions, including the BPS, turning a

blind eye or even assisting these irregularities, were seen as emblematic for the systemic and pervasive corruption of government in Bulgaria. [The people took to the streets after PBS staged an aggressive invasion of the offices of the President of the Republic](#) seen as retaliation for his remarks on the beachfront incident and his criticism of the fact that National Service for Protection protection was afforded to Mr. Dogan, as well as his party associate and media mogul Mr. Delyan Peevski.

However, it is important to understand the deeper context of this crisis. Bulgarian political life has been infested by corruption scandals that have persistently been seen as not being prosecuted adequately or even entirely. This culminated in the last months in the leaks to the media by unknown sources of recordings of the Prime Minister Borisov raising issues of abuse of power and photographs of his bedroom showing amounts of Euros and gold that cannot be explained by his officially declared income and savings. For a long time PBS was completely silent on the matter and when only recently it was announced that there will be an inquiry, it was made clear that it is going to focus on the provenance of the material instead of its contents and claiming from the beginning that it is impossible to investigate the existence of the cash and gold.

In the same period corruption and criminalization of BPS itself was starkly illustrated by a [journalistic investigation called “The Eight Dwarfs”](#), narrating how a successful businessmen was striped by his savings and production facilities by a gang of former magistrates acting in concert with high level prosecutors under the protection of Mr. Delyan Peevsky. This material was also not subjected to an investigation by BPS with Mr. Geshev on numerous occasions attacking the authors in an extremely politicised manner.

The list of corruption scandals can be continued. However, it suffices to conclude that the protests were sparked by the perception of extreme levels of highly organised corruption, combined with inaction by the BPS which is seen as providing immunity from accountability to powerful political figures and their friends in the business. This is in stark contrast with other cases, particularly against opponents of Mr. Geshev, Mr. Borison or Mr. Peevski, where the prosecution acts extremely aggressively and in a drastic propagandist manner, inviting the media to the crime scene and publishing evidence even where this is prohibited by the criminal law. Thus, at one point all the publishers of significant opposition media outlets were prosecuted in highly questionable cases.

[BPS is not only seen as arbitrary or abusive, it is perceived to be involved in active political, media and business engineering](#) and using its ability to take political, media or business figures as “hostages” by keeping open or dormant investigations on them without referring them to the court. Such actions in an increasingly repressive manner that served no fair trial goals is widely seen as a trend towards authoritarianism and rule-by-fear.

[The election of Mr. Ivan Geshev to the position of Prosecutor General in September 2019 significantly scandalised the general public](#) and was also a very important reason for the current protests. Based on his previous actions and style, Mr. Geshev was largely seen as drastically unfit for the position and not meeting the required personal and professional qualities stipulated by the law. In particular, this concerned his handling of the case concerning the bankrupt [Bulgarian Corporate and Commercial Bank in which he never investigated the political enablers of this financial scheme](#). For example Mr. Delyan Peevski, against whom there is significant evidence to have been deeply involved with the bank, as shown by journalistic investigations, was never even interrogated. This was seen as an early indication of the relation between Geshev and Peevski. Disregarding all that the SJC in a demonstrably prejudiced appointment procedure bluntly ignored the public objections and installed Geshev.

Mr. Geshev brought to the post of Prosecutor General an explosive mixture of double standards and selectiveness in picking targets for investigation with visible bias, and unprecedented levels of repressiveness in the manner of his enforcement. [Over the past year he was able to trample over every single ethical standard or procedural fair trial guarantee](#). In his public statements he often uses language incompatible with the requirements of impartiality and the presumption of innocence, engages in conspiratorial theories and resorts to levels of populism that can be the envy of many practicing politicians. He verbally attacks his political or media opponents, as well as NGOs, activists and protesters. The entanglement between Mr. Geshev and the media outlets controlled by Mr. Peevski provides another reason to stipulate their comity of interests and interdependence. They use the same language, have the same propaganda and smear targets. Mr. Peevski's media is the first to get information from BPS and to praise Geshev. Mr. Peevski enjoys complete immunity from any inquiry or even questioning, no matter what is discovered by investigative journalists, who, together with their publishers are, of course, a prime target for attacks by Geshev, rhetorically or procedurally.

However, it is important to understand that the personal style and enforcement approach of Mr. Geshev may have galvanized the current public outcry, but the Bulgarian Rule of Law crisis has been long in the making and is predetermined by structural causes. Therefore, without finally reforming the BPS, the problem cannot be resolved.

2. The Status of the BPS

To assess the claims of the BPS and the nature of the Rule of Law crisis in Bulgaria it is important to have the following legal and institutional context in mind.

The Bulgarian Constitution of 1991 established BPS as part of the judicial branch. The constitution has the same texts covering the career and status of judges and prosecutors and established a shared Supreme Judicial Council which until the reform of 2015 was completely

integrated. Based on that, in the case law of the Constitutional Court, at the legislative level, and in practice a total equation of prosecutors and judges was maintained.

At that, unlike the necessarily decentralized courts, the BPS was established as a structurally and procedurally centralized single entity with a very strong top-down hierarchy. The pyramid of BPS is headed by the Prosecutor General who can issue general instructions and regulations on the workings of the institution and can intervene with the decisions on specific cases. The members of the Prosecutorial Chamber of the SJC are career prosecutors themselves and are completely subservient to the Prosecutor General. This allows him to exert unchallengeable career and discipline powers over individual prosecutors.

The imperial status of the Prosecutor General within the BPS is combined with the practical absence of any effective mechanisms for accountability or functioning checks and balances by any other branch or institution. The formally existing minimal forms of parliamentary oversight such as the annual report by the Prosecutor General, the possibility for him to be invited for hearings in the parliamentary Legal Committee, as well as the parliamentary procedure for approval of the joint budget of the judicial branch including that of the BPS are never used in practice. Thus, in the four years of this Parliament not a single hearing of the Prosecutor General was conducted and during his annual reports no questions were typically asked.

A particular problem with the status of the Prosecutor General is the absence of an effective mechanism for investigating crimes committed by him. This was first established by the ECHR in [the 2009 case of Kolevi](#) and has since been confirmed by the Venice Commission, the PACE and in the CVM Reports by the European Commission. In practice there have been several cases where strong suspicions of possible criminal activity by a Prosecutor General have emerged but no investigation followed.

Recent Constitutional Court decision ruled that in theory any prosecutor is allowed by law to investigate the Prosecutor General. However, the internal work culture in the BPS has evolved to a semi-totalitarian ethos making the idea of prosecutorial independence or of autonomous initiative completely irrelevant. Through the completely subjugated Prosecutorial Chamber of the SJC the Prosecutor General exerts a strong career and hierarchical dominance over individual prosecutors and their acts. This combined with the near total absence of external checks on him, have established him as a Tzar-like figure. As a practical matter, to test the Constitutional Court decision, we submitted two signals for facts meeting the minimal threshold to establish investigation against Prosecutor General Geshev, but no prosecutor initiated an inquiry.

At least two additional factors are also relevant when we speak about a Rule of Law crisis.

Firstly - the establishment of a parallel criminal judicial structure with a very strong prosecutorial bias in the Specialised Criminal Court. This has added great concern about the imposition of a new level of repressiveness in Bulgaria: multiple humiliating and highly mediatised actions were staged in these structures and the preponderance of imposition of preliminary detention without clear need and for long periods is turning these procedural measures into forms of repression. Second, the establishment of a “Bureau for Protection of Witnesses” whose heavily armed guards are used as personal security detail by the Prosecutor General appearing as a paramilitary organization and, more importantly, are granted policing and enforcement powers, reserved by the constitution only for structures belonging to the Executive.

Against this background, it is important to understand that when the BPS states that its independence is a European value and is being infringed, it is claiming to be covered by judicial standards based on its attachment to the judicial branch in the 1991 Constitution. Needless to say, prosecutors are not judges and should not be treated as judges for the simple reason that that in turn erodes the status and the independence of judges and the equality of arms in the court process – something for which Bulgaria provides ample proof. Furthermore, there is no self-standing European value of prosecutorial independence. The core value of any Rule of Law system is the independence of judges and courts proper. Professional autonomy of prosecutors, as well as attorneys, are important but are relevant to the extent they serve the needs of just process in an independent and impartial court.

The real value that BPS means to safeguard by claiming judicial levels of independence is not the professional autonomy of individual prosecutors – it doesn’t exist anyway - but the status of near-complete unaccountability of the Prosecutor General. It has to be stated clearly that this structural and practical situation has been extremely toxic for the democratic system in Bulgaria and its ability to achieve the minimal European Rule of Law standards. Because of this over the years BPS not only failed to become a guardian of the Rule of Law. It systemically breeds corruption and has become a central reason for the Rule of Law crisis in Bulgaria bringing about the political earthquake we are witnessing today.

Therefore, it is our main political goal to bring about a radical reform of the BPS. It comes as no surprise that Geshev is identifying us as his political enemy. The Declarations by BPS and the Prosecutorial Chamber of the SJC are essentially attempting to taboo discussion of reforms in a free and pluralistic debate.

3. Proposals for Reform

Under the CVM and in particular the 2016 special analysis of the prosecution Bulgaria undertook a number of specific commitments to reform the BPS. These include the introduction of mechanisms for independent investigation of the Prosecutor General and for the accountability of

the prosecution, as well as measures to introduce a modern system of internal management and an objective career process for the prosecutors. In addition to them, there exists a body of authoritative recommendations on Bulgaria by the Parliamentary Assembly of the Council of Europe, the Venice Commission, the European Court of Human Rights. These call for disjoining of the Bulgarian Courts and the BPS at all levels, starting by establishment of a Judicial Council that is only for the judges. The implementation of the sum of these recommendations would amount to no less than redrafting the structure of the Bulgarian judicial system.

Notwithstanding these clear recommendations, the Bulgarian Government has been making everything possible to preserve the status quo by series of imitations, partial steps and outright lies. After the European Commission suspended the CVM reports, without achieving the goals of the Mechanism, even the appearance of making further reforms was dropped. This has been an important factor enabling the current crisis.

Things changed only after the eruption of the protests, focused in large part on the situation in the BPS. Borisov announced his intentions to finally reform the judiciary. [He proposed an entirely new constitution](#). However, the examination of the Borisov's Draft shows two things:

- This is no new constitution, it is a hasty and extremely sloppy pastiche of rearranged texts from the current one.
- The only significantly altered part concerns the judicial branch, and here is the really bad news: while doing the inevitable by creating a separate Judicial Council only for judges, in the part on the BPS it **does the exact opposite** of the European recommendations and the calls of the protests. Instead of bringing about accountability for the Prosecutor General it eliminates even the existing, albeit minimal and dormant, checks on his appointment and actions. It, again, does not fulfil the commitment to introduce a mechanism for independent investigation of the Prosecutor General. And, it preserves the Prosecutorial SJC as dominated by career prosecutors in complete dependence on the Prosecutor General and completely unable to act as a check on him. Instead, Borisov even wants to grant this prosecutorial council a direct legislative initiative.

Thus, the proposed “new constitution” by Borisov is nothing more than another attempt at defrauding maneuvering and winning time and – on the substance – threatens to **significantly worsen** the situation with respect to the BPS.

Our proposals for reform, which caused such a great angst among the leadership of the BPS are based on the sum of the international recommendations, standards and best practices. We recognize the objective reality that BPS in its current structure, management and work culture is completely unfit to serve its purpose in a 21 century EU member state. Again, the sum of the

applicable recommendations necessitates no less than complete revamping of the BPS and we are basing our proposals on that point of departure. Therefore, we propose:

- Appointment and removal of the Prosecutor general by the Parliament with a qualified majority.
- The establishment of a clear line of accountability of the Prosecutor General before the Parliament on how the national criminal policy is being enforced. It should include in its ambit issues such as the equal application of the law in equal cases and the effectiveness of use of public resources against annually defined enforcement priorities that are discussed and accounted for in an open public process. It should also have built-in a mechanism for removal on performance grounds and for independent investigations in cases of criminal acts.
- If some sort of a board or council should exist and act as a transmission of the parliamentary oversight, it should be made of a clear majority of non-prosecutors, who are independent from the Prosecutor General and are appointed in a transparent process guaranteeing that they represent the society and not political clans and coteries.
- Complete reframing of the status of the prosecutors and establishing effective guarantees for their professional autonomy on specific cases, but also introducing meaningful responsibility for case outcomes.
- Entirely new internal management system, including case allocation, merit-based personnel selection and career development, and periodical checks of professional fitness and loyalty. The introduction of such a system is inevitable and it would lead to a significant and needed refreshing of the BPS's human-resource. Currently Bulgaria has the largest number per capita of prosecutors in the entire Council of Europe area and some of them would be clearly unfit to perform in a modern prosecution service.
- Limiting extra criminal procedure functions of the BPS in two aspects:

- Abolishing functions of general legality oversight (statutory mandated without constitutional basis) that often overstep the boundaries of the separation of powers and undermine democratically legitimate policy-making.

- Abolishing preliminary inquiries of alleged criminal behavior that do not constitute full-fledged criminal investigations with their fair trial guarantees.

These two steps will significantly limit the opportunity for the BPS for abusing its powers and competences.

This is just an outline and we have specific models and solutions in mind on any of these general goals. Clearly the final model of the reform should be a subject to a serious debate, that can only be free of any attempts of intimidation and should include the individual prosecutors outside of

staged communist style events. Also clear is that no reform of the Prosecution without equally ambitious reform of the police and other law enforcement institutions and the introduction of modern digital technology throughout can be expected to be successful. But deep change is inevitable and if we fail to understand that and act accordingly, we will pay a tragic price.

4. Future Steps

It must be stated clearly that **we are prepared to fight our own battles for our freedom and country**, however lengthy, or uneven, or costly they might be. We are the most pro EU political force in Bulgaria, but we also understand that we can no longer expect a resolution from outside.

However, since BPS has decided to bring the issue to the European arena and since clearly the stakes are not only for Bulgarians but also for the entire EU, I am happy to share our perspective and some final observations.

Firstly, Bulgaria is in a deep and long-in-the-making Rule of Law crisis and ignoring it is untenable.

Secondly, clearly the outcome in Bulgaria is relevant for the entire EU. In many respects Bulgaria and Romania were the original Rule of Law and Democracy challenges for the Union. Only later came Poland and Hungary. But whereas the Commission acted on Poland and Hungary, it chose to terminate the CVM reports for Bulgaria without objective justification and has since been passive on the events in Sofia. If the Commission does not find a way to correct its course on Bulgaria, this can be seen as questioning its overall ability to perform its most basic duty of the guardian of the legal order of the Union. A duty it owes not only to Bulgarians, but to every EU citizen and taxpayer.

Thirdly, the reaction to the situation in Bulgaria cannot be delayed until the creation of new mechanisms. Developments here are dynamic and can take an unexpectedly bad turn. If the narrow window of opportunity in Bulgaria is missed, the failure here may provide a negative background for the promotion of future new instruments. It would rather be wiser to use the active engagement with the situation in Sofia as an argument for the need for strong new instruments.

Fourthly, in light of the latter, the reaction to the events in Bulgaria would have to rely on the existing mechanisms. Hence, since the BPS appears to intend to engage the machinery under art. 7, or if the Commission were to determine to trigger it on its own initiative, we would have to agree that the facts on the ground objectively support such a decision. Also, the Commission

may need to revisit its unilateral decision to seize the performance of its obligation to provide reports to the Council and the Parliament under the CVM framework.

Lastly and on a positive note, the situation in Bulgaria can be viewed as a potential problem, but also as an opportunity. Given the fairly clear agenda of the necessary reforms supported by a significant body of recommendations and commitments, and together with the mounting public pressure for reform and the dynamic changes in the political landscape, a timely engagement by the Commission may turn out to be the key to a breakthrough.

This can produce a welcome positive example that it is possible to overturn negative trends and start a process of consolidation of the Rule of Law in one of the “problematic” member states and that the EU can be instrumental in such a positive scenario.

As these issues are complex and there are many other aspects in the situation, I remain available for further dialogue with you or your team.

Kind regards,

Hristo Ivanov

Chairman of Yes, Bulgaria

Co-chair of Democratic Bulgaria