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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

BULGARIA

OPINION

ON THE DRAFT AMENDMENTS TO THE CONSTITUTION

Adopted by the Venice Commission
at its 136th Plenary Session
(Venice, 6-7 October 2023)

On the basis of comments by

Ms Marta CARTABIA (Member, Italy)
Ms James HAMILTON (Former Member, Ireland, Expert)
Mr Qerim QERIMI (Member, Kosovo)
Mr Kaarlo TUORI (Honorary President of the Venice Commission)

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I. Introduction

1. By letter of 7 August 2023, the Minister of Justice of Bulgaria, Mr Atanas Slavov, requested an opinion of the Venice Commission on the draft law on amendments and supplements to the Constitution of Bulgaria (CDL-REF(2023)033, hereinafter "the draft amendments").

2. Ms Marta Cartabia, Mr Qerim Qerimi, Mr Kaarlo Tuori and Mr James Hamilton acted as rapporteurs for this opinion.

3. On 14-15 September 2023, a delegation of the Commission composed of Mr Qerim Qerimi, Mr Kaarlo Tuori and Mr James Hamilton, accompanied by Ms Delphine Freymann from the Secretariat travelled to Sofia and had meetings with the Prime Minister, the Minister of Justice, representatives of the Office of the President, members of the Parliamentary Committee on Constitutional Affairs, the Acting Prosecutor General and Deputy Prosecutors General, representatives of the Supreme Judicial Council and representatives of certain independent regulatory and controlling bodies. The Delegation also had meetings with representatives of NGOs, professional associations and the European Union. The Commission is grateful to the Ministry of Justice for the excellent organisation of this visit.

4. This opinion was prepared in reliance on the English translation of the draft amendments to the Constitution of Bulgaria. The translation may not accurately reflect the original version on all points.

5. This opinion was drafted on the basis of comments by the rapporteurs and the results of the visit to Sofia on 14-15 September 2023. On 4 October 2023, the Bulgarian authorities submitted written comments. The draft opinion was examined at the Joint meeting of the Sub-Commissions on Democratic Institutions and Latin America on 5 October 2023. Following an exchange of views with Mr Atanas Slavov, Minister of Justice of Bulgaria, and Mr Emil Dechev, Deputy Minister of Justice of Bulgaria, it was adopted by the Venice Commission at its 136th Plenary Session (Venice, 6-7 October 2023).

A. Background and scope of the opinion

6. At the request of the Bulgarian authorities, the opinion was prepared in a short time. It therefore focuses on the most important amendments and does not contain a comprehensive analysis of all changes proposed in the Constitutional text. In particular, the Commission will not look into issues related to national holidays (article 170), or to "the inclusion of education, science, culture […] as strategic national priorities".

7. The Venice Commission will assess these draft amendments against the background of previous opinions concerning the judiciary in Bulgaria. The Venice Commission will not repeat all the analysis and the findings of its previous opinions.

8. The draft amendments cover several areas: Chapter I on the fundamental principles; Chapter III as to the elections to the National Assembly and to the election of the members of independent regulatory and controlling bodies elected by the National Assembly; Chapter IV as to the determination of the composition of the caretaker government; Chapter VI as to the system of governance of the judiciary and of the prosecution service; Chapter VII as to the introduction of the right of individual petition to the Constitutional Court, and Chapter IX as concerns transitional provisions and a provision in relation to public holidays.

9. According to the Bulgarian authorities, these draft constitutional amendments are a new, important step in the process of constitutional reform, which is the basis of the agreement between the political forces forming the majority in the Parliament. One of the main tasks – and

a longstanding challenge - of the reform process has been to provide the adequate structural and organisational mechanisms and guarantees for a fair and independent justice system. Some of the draft amendments are intended to address subsisting shortcomings in the organisation and the operation of the Supreme Judicial Council. The amendments also relate to the reform of the prosecution office in relation to the longstanding issues at stake before the Committee of Ministers in the context of the execution of the *S.Z. v. Bulgaria* and *Kolevi* v. *Bulgaria* groups of cases.[1]

10. The draft amendments also address other issues that have been discussed in Bulgaria over the years, in particular the individual complaint before the Constitutional Court, and the question of the right to stand for election for persons with dual citizenship. Other draft amendments, notably the ones in relation of the caretaker government, are motivated by the recent consecutive parliamentary crisis having led to the appointment of several successive caretaker governments.

11. The present draft amendments also find their reason in the effort to comply with the recommendations of the European Commission in the latest report of the horizontal Rule of Law Mechanism in EU member states.[2] At the same time, some of the proposals are related to the implementation of the country's commitments under the Recovery and Resilience Plan,[3] with deadlines, non-fulfilment of which will result in a delay in the agreed payments by the European Commission.

B. Amendment process

1. Process of amending the Constitution

12. Under Article 154 of the Bulgarian Constitution (Constitution of the Republic of Bulgaria, hereinafter CRB), the right to initiate legislation amending and supplementing the constitution shall vest in one quarter of the members of the National Assembly (NA) and in the President of Bulgaria. On 28 July 2023, 166 MPs[4] (out of 240 members) of the National Assembly introduced the draft amendments which are now pending before the Parliamentary Committee for Constitutional Affairs.

13. According to 153 CRB, "*The National Assembly may amend and supplement all provisions of the Constitution with the exception of such as are placed within the powers of the Grand National Assembly.*" The five prerogatives of the Grand National Assembly are listed in an exhaustive manner in Article 158 CRB[5] and they include also the power to decide "*on matters concerning changes in the form of state organisation and in the form of government*". In such cases, elections for the Grand National Assembly (composed of 400 elected members) need to be convened through a resolution of the National Assembly supported by two-thirds of the votes of all MPs, and the mandate of the National Assembly expires at the date when the elections are held (see Articles 153-163 CRB).

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[1] ECtHR, *Kolevi v. Bulgaria,* 5 November 2009, no. 1108/02 and ECtHR *S.Z. v. Bulgaria*, 3 June 2015, no 29263/12

[2] 2023 Rule of law report - Communication and country chapters (europa.eu)

[3] https://commission.europa.eu/business-economy-euro/economic-recovery/recovery-and-resilience-facility/recovery-and-resilience-plan-bulgaria_en

[4] From GERB-UDF, Continue the Change-Democratic Bulgaria, and the Movement for Rights and Freedoms (MRF)

[5] „*1. adopt a new Constitution; 2. resolve on the matter concerning a change in the territory of the Republic of Bulgaria, and ratify any international treaties providing for any such changes; 3. resolve on matters concerning changes in the form of state organization and in the form of government; 4. resolve on matters concerning an amendment of Article 5 (2) and (4) and of Article 57 (1) and (3) of the Constitution; 5. resolve on matters concerning an amendment and supplement of Chapter Nine of the Constitution.*."

14. The promoters of the reform consider that the amendments at stake remain in the competence of the National Assembly.[6] Other interlocutors argued that the proposal to amend some "hard" provisions of the Constitution would require convocation of the Grand National Assembly, based on article 153 of the Constitution and the jurisprudence of the Constitutional Court. It is recalled in this regard that the Constitutional Court of Bulgaria has already interpreted the terms used in Article 158.3 CRB ("*changes in the form of State structure or form of government*") in its Decision No. 3/2003 (Constitutional case No. 22/2002) and subsequently in its Decision No 8/2005 (Constitutional case No. 7/2005).[7]

15. The Venice Commission refrains from assessing the need to convene a Grand National Assembly or the competence of the National Assembly to adopt the draft amendments based on the Bulgarian Constitution. This is for the Constitutional Court of Bulgaria to decide if or when it is seized of the matter.

2. Procedure of adoption

16. On 28 July 2023, 166 MPs of the National Assembly[8] introduced the draft amendments that were made public. The bill is pending before the Parliamentary Committee for Constitutional Affairs. Based on the correspondence with the Bulgarian authorities and the information provided to the delegation by the Chairman of the Committee on Constitutional affairs, the vote on the first reading of the draft amendments to the Constitution is scheduled to take place at the beginning of October. The vote on the second reading is planned for the end of October or the beginning of November 2023.[9]

17. The parliamentary opposition, the members of the Supreme Judicial Council and the Acting Prosecutor General, as well as most of the representatives of the civil society the rapporteurs met argued that the process is rushed and that it is not transparent. The promoters of the draft amendments justified the urgency by the fact that the government that could obtain the necessary majority for amending the constitution was formed only a few months before. The draft has been registered and is undergoing public consultations at the moment.

18. The Venice Commission will look at the process of preparation of the constitutional amendments from the perspective of the European rule of law standards, codified in the Rule of Law Checklist.[10]

19. As already stated in previous opinions including with regard to Bulgaria,[11] the rule of law requires that the general public should have access to draft legislation and have a meaningful

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[6] As stipulated by Article 155 CRB, "the National Assembly shall pass a law to amend or supplement the Constitution by a majority of three-fourths of all National Representatives, taking three votes on three different days. Should the motion receive less than three-fourths but more than two-thirds of the votes of all National Representatives, the said motion shall be eligible for a new consideration not earlier than two months and not later than five months thereafter. To be carried upon such new consideration, any such motion shall require the affirmative vote of at least two-thirds of all National Representatives."

[7] An ordinary National Assembly needs to act within the limits of its competence, which are narrower than those of a Grand National Assembly. In decision no. 3 of 2003, the CC held that the form of government encompasses various organisational and functional aspects of the constitutional framework of State institutions; and that such broad interpretation defines the matters for which a Grand National Assembly is competent to adopt amendments. In decision no. 8 of 2005, it held that certain changes to the Constitution concentrated within the judiciary do not constitute a change in the form of government.

[8] From GERB-UDF, Continue the Change-Democratic Bulgaria, and the Movement for Rights and Freedoms (MRF)

[9] Based on article 155 of the Constitution, the National Assembly shall pass a law to amend or supplement the Constitution by 3/4 of votes, in three rounds. A bill which was supported by at least two thirds, but less than three quarters of MPs may be reintroduced within a specific time frame and be adopted by 2/3 of the votes.

[10] Venice Commission, CDL-AD(2016)007, Rule of Law Checklist.

[11] Venice Commission, CDL-AD(2020)035, Urgent interim Opinion on the draft new Constitution of Bulgaria, para. 17

opportunity to provide input.[12] These requirements apply all the more strictly when it comes to revising a Constitution. The Venice Commission previously stressed in particular that constitutional amendments should not be rushed, and "should only be made after extensive, open and free public discussions", [13] involving "various political forces, nongovernment organisations and citizens associations, the academia and the media"[14] and providing for an "adequate timeframe".[15]

20. On 28 July 2023, the parliamentary groups of "We Continue the Change-Democratic Bulgaria", GERB-SDF and the Movement for Rights and Freedoms (MRF) submitted to the Parliament's registry joint draft amendments to the Constitution. The bill was signed by 166 MPs out of 240. It appears that the political agreement for this initiative came as a surprise to the general public[16] and to the constitutional experts, and was not preceded by public debate. As stressed by the Venice Commission in the previous urgent opinion on the draft constitutional amendments in 2020,[17] constitutional amendments should be based on a "large consensus among the political forces and within the civil society".[18] To build such a consensus it is better to receive public input as early as possible, to give the society a sense of ownership.[19] Hopefully the ongoing parliamentary discussions and other public consultation will be prolonged and will be meaningful.

21. Second, as regards the legislative process, "where appropriate", impact assessments should be made before adopting the legislation.[20] The Venice Commission has also recommended providing explanatory memorandums to draft legislation.[21] Changing or adopting a Constitution is not the same as changing a law, but any proposal for change must explicitly state the reasons underlying the proposed change. It should be remembered that law-making is not only an act of political will, it is also a rational exercise. No meaningful public debate is possible if the reasons for a policy are not put forward.

22. The Venice Commission is aware that some of the elements of the proposed reform stem from the recommendations of the international partners of Bulgaria, including the Venice Commission itself. This concerns notably the amendments related to the governance of the judiciary and the prosecution office. Other proposals – such as the ones related to the eligibility of Bulgarian with dual citizenship – reflect political choices. That being said, whoever proposes a bill must at least make a sensible effort to explain the considerations behind each proposal. The Draft contains in its appendix a brief explanatory note. To a large extent, this note restates the essence of some of the amendments, without giving the reasons why those amendments are necessary or any assessment of their potential impact. For instance, it is proposed to change the competences of the Minister of Justice without an explanation as to why these changes are needed, or any analysis of its potential impact, notably on the balance of powers. Similarly, no

[12] Venice Commission, CDL-AD(2016)007, II.5.iv.
[13] Venice Commission, CDL-AD(2004)030, Opinion on the Procedure of Amending the Constitution of Ukraine, para. 28.
[14] Venice Commission, CDL-AD(2011)001, Opinion on Three Legal Questions Arising in the Process of Drafting the New Constitution of Hungary, para. 19.
[15] Ibid., para. 18.
[16] The We Continue the Change-Democratic Bulgaria coalition, the second-largest parliamentary group and the government mandate-holder, presented its proposed amendments to the constitution at a news conference on 23 July.
[17] Venice Commission, CDL-AD(2020)035, Urgent interim Opinion on the draft new Constitution of Bulgaria, para. 15
[18] Ibid para 16. See also Venice Commission, CDL-AD(2004)030, Opinion on the Procedure of Amending the Constitution of Ukraine, para. 28.
[19] The positive example of such public consultations can be found in Venice Commission CDL-AD(2013)010, Opinion on the draft New Constitution of Iceland, see para. 14.
[20] See Venice Commission, Rule of Law Checklist, CDL-AD(2016)007, II.5.v.
[21] See, for example, CDL-AD(2008)042, Opinion on the Draft Law on protection against discrimination of "the former Yugoslav Republic of Macedonia", para. 32.

explanation is given for the change of competences of the Inspectorate. There is no explanation why the duration of the mandate of two chief judges and the Prosecutor General is reduced from seven years to five, and why one single reappointment should be possible. Many amendments are not even referred to in the motives. In the Venice Commission's opinion, the existing explanatory note does not explain the considerations behind each proposal, and is thus inadequate for its purposes.[22]

23. In sum, the Venice Commission regrets that the launching of the constitutional reform was not preceded by an appropriate public debate, and that the reasons for all the amendments were not explained sufficiently. The process of the constitutional reform is still on-going, so the Venice Commission hopes that the Bulgarian authorities will elaborate on the reasons behind each proposal and ensure meaningful participation of the public, experts, representatives of the institutions concerned and of all political forces in this process. This should also lead to the drafting of a complete explanatory note explaining the general purposes of the amendments as well as rationale of each of them in detail.

II. Analysis

A. The right to stand for election for persons with dual citizenship

24. According to the proposed amendments to Articles 65[23] and 110 of the Constitution,[24] dual citizens would gain eligibility for the National Assembly and the Council of Ministers. Yet, the amendments as proposed do not include any change to article 93(2) regarding Presidential elections.[25]

25. As recalled in previous Opinions regarding Bulgaria,[26] the Code of Good Practice in Electoral Matters refers to the European Convention on Nationality, which provides in Article 17 that "Nationals of a State Party in possession of another nationality shall have, in the territory of that State party in which they reside, the same rights and duties as other nationals of that State Party".[27] Bulgaria made a reservation to Article 17 upon the ratification of the Convention.[28] Yet, the evolving jurisprudence of the European Court of Human Rights suggests that the deprivation of the right to be eligible for election for persons with dual citizenship might be contrary to Article 3 Protocol 1 of the European Convention on Human Rights.[29] According to the same case law, general restrictions on electoral rights, such as a blanket restriction for persons with dual citizenship, have to be assessed in the context of a state's specific historic and political situation

[22] Venice Commission, CDL-AD(2020)035, para. 19.

[23] The current amendment to article 65 of the Constitution provides that "eligible for election for the National Assembly shall be any Bulgarian citizen, who is above the age of 21, is not under a judicial interdiction, and is not serving a prison sentence."

[24] The amendment provides that "The word 'only' in art. 110 is deleted", the result being that double citizens can be elected.

[25] Art. 93(2) of the Constitution: Eligibility for President shall be limited to natural-born Bulgarian citizens who have attained the age of 40 years and who possess the electoral qualifications requisite for National Representatives, and who have been resident in Bulgaria during the last five years

[26] CDL-AD(2017)016 Joint Opinion on Amendments to the Electoral Code

[27] Code of Good Practice in Electoral Matters, Explanatory Report, I, 1.1 b.

[28] Reservation contained in the instrument of ratification deposited on 2 February 2006. In accordance with Article 29, paragraph 1, of the Convention, the Republic of Bulgaria reserves the right not to apply the provision of Article 17, paragraph 1, of the Convention. Under the terms of this reservation, the Republic of Bulgaria shall not apply in respect of the nationals of the Republic of Bulgaria in possession of another nationality and residing on its territory the rights and duties for which the Constitution and laws require only Bulgarian nationality. Period covered: 01/06/2006 - … Articles concerned: 17, 29.

[29] *Tănase v. Moldova*, 27 April 2010, application no. 7/08, par. 180.

and may be more difficult to justify with the passage of time.[30] In its 2017, Opinion the Commission considered that there is a risk that the restriction of electoral rights for persons with dual citizenship would be found to be in contradiction to Article 3 Protocol 1 if a case were to be filed on these grounds. The Venice Commission and the OSCE/ODIHR recommended in the 2011, 2014 and 2017 joint opinions to amend the Constitution and the Electoral Code to allow persons with dual citizenship stand as candidates for the National Assembly and president and vice president.[31]

26. Based on the above, the changes to Articles 65 and 110 are to be welcomed in so far as they address the Commission's previous recommendations.

27. Another amendment to Article 64 stipulates that the elections for a new National Assembly shall be held no earlier than two months and no later than one month before the expiry of the mandate of the incumbent Assembly, and that its powers terminate once the new elected assembly takes office.

B. Independent regulatory and controlling bodies

28. Article 91b) as amended stipulates that the National Assembly elects independent regulatory and controlling bodies subject to at least the following requirements: a reasonable period for submission of proposals, for debate and hearing of the candidates and providing for an opportunity for representatives of the public to present opinions and monitor the process, as well as limitation of the number of consecutive mandates. It adds that it may be provided for in a law that decisions on election shall be taken by a qualified majority. According to the explanatory note, the aim is to constitutionalise the existing procedure of election of the members of the regulatory and controlling bodies.

29. The Commission has been informed that there exist in Bulgaria nine controlling and regulatory bodies, including the Audit Office, the Bulgarian National Bank, the Electronic Media Council and the Central Bank. Most of them are partly elected by the National Assembly and partly appointed by other external bodies, by the President or by the Government, as regulated by the applicable laws. For example, the Electronic Media Council has three members elected by the National Assembly and two members appointed by the President.[32] However, not all of these bodies have a constitutional basis, and the Constitution of Bulgaria does not contain any definition of what is such a body.

30. It was explained to the Commission that Article 91b reflects the relevant rules of procedure of the National Assembly. Admittedly, while Article 91b appears to be a general provision, the rules contained in it do not concern the nomination of the other members of these bodies by other institutions. The question of the advisability of a constitutional provision applicable only to members elected by the National Assembly was however raised.

31. The Venice Commission is of the view that the independent regulatory and controlling bodies should have a constitutional basis, which should cover the guarantees for their independence, such as the procedure of appointment (by qualified majority in parliament, with appropriate anti-deadlock mechanisms) and security of tenure of their members, as well as the duration of their

[30] *Ždanoka v. Latvia*, 16 March 2006, application no. 58278/00, pars. 106 and 135; and *Ādamsons v. Latvia*, 24 June 2008, application no. 3669/03, par. 123. The passage of time was of relevance in the cases at stake since in both cases the applicants were denied candidature due to their communist past which proved always more difficult to justify in light of changing historic and political conditions.

[31] 2011 Joint Opinion on the Electoral Code of Bulgaria, par. 18; 2014 Joint Opinion on the Draft Electoral Code of Bulgaria, par. 30.

[32] Law Amending the Radio and TV Act.

mandate.[33] In the light of the diversity of these institutions, it would seem more appropriate, instead of having only one general provision, to introduce specific provisions for each institution. While this could be somewhat cumbersome, it would avoid the problem of a possible misuse of the provision by treating it as an open mandate to establish new independent bodies.

C. Formation of a caretaker government

32. Article 99.5 (Chapter IV: President of the Republic)[34] relates to the appointment of a caretaker government in the event of failure by the National Assembly to agree on the formation of a government. The introduction of new rules for an independent caretaker government is novel in Bulgaria's constitutional reforms. As to the caretaker Prime Minister, the draft amendments mandate the President to choose among the President of the Assembly, the President of the Constitutional Court or the President of the National Bank. The caretaker Prime Minister then has the duty to propose the other members of a caretaker Council of Ministers. In case the President fails to the appoint the Council of Ministers proposed by the appointed caretaker Prime Minister within seven days, the caretaker government shall be elected by the National Assembly. It is not clear what is to happen if the Assembly fails or refuses to do so, which given the original inability to form a government would seem to be a possible, and even likely outcome.

33. According to the explanatory note, currently the caretaker government is appointed by a decree of the President and does not bear joint political responsibility to the Parliament, the aim being solely to ensure continuity in the exercise of the functions of the executive power in a situation of Parliamentary crisis, during a short period of time. Yet, consecutive parliamentary crises in 2021-2023 have led to the appointment of several caretaker governments in a row. The drafters propose to adopt a model in which an independent caretaker government is appointed with a constitutionally determined Prime Minister chosen among the highest representatives of a state body. In addition, it is proposed to limit the period in which the Parliament is not sitting in case of early elections.

34. Concerns were expressed by some interlocutors about the limited choice of the President in appointing the caretaker Prime Minister and the fact that in case of failure by the President, the Parliament would do so, which would diminish the powers of the institution of the President.

35. A number of interlocutors met during the visit noted that the draft amendments were based on the Greek model stipulating that the Presidents of the Supreme Court, of the Supreme Administrative Court or of the Court of Audit be appointed as caretaker Primes Minister. Not all European constitutional systems have adopted the institution of a caretaker prime minister. The alternative and more common solution is to allow for the outgoing government to continue until a new government has been formed, under the tacit assumption that it refrains from politically sensitive decision-making. Yet, no established European or international standard exists. While the proposed amendments provide for limited time for the caretaker government's powers, other limits could be added as to the scope of its activity in order to avoid that in a transitional period

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[33] According to Principle 2 of the Venice Principles, "*The Ombudsman Institution, including its mandate, shall be based on a firm legal foundation, preferably at constitutional level, while its characteristics and functions may be further elaborated at the statutory level*."; Venice Commission CDL-AD(2004)041 Joint Opinion on the Law on the Ombudsman of Serbia by the Venice Commission, the Commissioner for Human Rights and the Directorate General of Human Rights of the Council of Europe para. 9 ; CDL-AD(2018)028 Opinion on Constitutional arrangements and separation of powers and the independence of the judiciary and law enforcement in Malta, para. 101

[34] "If agreement is not reached on the formation of a government, the President, after consultation with the parliamentary groups and upon a proposal by the caretaker Prime Minister, shall appoint a caretaker government. The caretaker Prime Minister shall be appointed amongst the President of the National Assembly, the President of the Constitutional Court or the Governor of the Bulgarian National Bank. In case the President fails to the appoint Council of Ministers proposed by the appointed caretaker prime minister within 7 days, the caretaker government shall be elected by the National Assembly. The President shall schedule elections for a new National Assembly within two months after the appointment of the caretaker government. In this case, the National Assembly shall not hold sessions within one month before the elections."

important and sensitive political decisions could be taken by a technical government that is not supported by a democratic mandate. In some countries in similar situations the powers of the government are limited to the "urgent affairs" and "ordinary administration". The Venice Commission has indeed previously examined the competences of an outgoing government,[35] concluding that, overall, the restrictions on the outgoing government provided in a law (and not in the Constitution) do not appear to raise any issues of compatibility with international standards.

36. If the institution of a Caretaker Prime Minister is retained, it is advisable to restrict the discretion of the President to choose between several persons, in order to prevent undue political considerations, for example by defining an order of choice and by defining in advance which independent person would be appointed. The Caretaker Prime Minister should exercise the office in a politically neutral manner. In this context, the Commission expresses doubts about the suitability of the President of the National Assembly, who is a politically engaged figure. The President of the Constitutional Court also seems an inappropriate person to act as a caretaker Prime Minister given the likelihood that the Constitutional Court might have to resolve questions arising in relation to the choice of and the conduct of a caretaker administration. The Commission also has doubts as concerns the election of a caretaker prime minister by the National Assembly which has been unable to agree on a prime minister in the first place.
37. Based on the above, the Commission would thus encourage the authorities to consider revising it based on the comments above.

D. Reform of the Judiciary

1. Creation of two independent Councils

38. The amendments propose to create a separate new Supreme Judicial Council for judges only as well as a Prosecutorial Council. The Prosecutorial Council would be composed of the Prosecutor General, two members elected by prosecutors, one member elected by the investigating magistrates and six members elected by Parliament. Parliament will not elect prosecutors or investigators.

39. Prior to the 2015 constitutional reform, the SJC was a single body, composed of the representatives of magistrates (judges, prosecutors and investigators), elected by their peers, ex officio members, and lay members elected by the National Assembly (NA).

40. In December 2015, the SJC was reorganised, following a constitutional amendment. In particular, two separate chambers within the SJC (one for judges and one for prosecutors/investigators) were created. However, the Prosecutor General (PG) retained an increased influence within the Prosecutorial Chamber of the SJC (having 11 members) and had an important weight in the Plenary SJC (composed of 25 members: 14 representing the Judicial Chamber and 11 representing the Prosecutorial Chamber). While the Plenary SJC was stripped of most of its powers regarding appointment, disciplining and removal of judges and prosecutors (these powers went to the two distinct chambers), the Plenary SJC retained the nomination/dismissal powers vis-à-vis the two chief justices (the President of the Supreme Court of Cassation and the President of the Supreme Administrative Court) and the Prosecutor General, as well as the power to remove elected judicial members, and some regulatory powers.

41. A detailed analysis of the 2015 arrangements is contained in the Venice Commission opinion of 2017.[36] When analysing the new composition of the SJC, the Commission noted both in its 2017 and 2019[37] opinions that the Prosecutor General still played an overly important role in this

[35] Venice Commission CDL-AD(2020)034 Kosovo Opinion on the draft Law on the Government, para 44-50.
[36] CDL-AD(2017)018 Opinion On The Judicial System Act of Bulgaria
[37] CDL-AD(2019)031 Opinion on Draft Amendments to the Criminal Procedure Code and the Judicial System Act concerning Criminal Investigations against top Magistrates

body – through the prosecutorial members (the Prosecutor General remained their hierarchical superior) and through those lay members who have prosecutorial background (there is no prohibition in the law to elect prosecutors as lay members of the SJC). To respond to the concerns expressed by the European Commission and Council of Europe, the Ministry of Justice of Bulgaria developed the Draft amendments in 2019 which were also assessed by the Venice Commission, and which were eventually dropped. Similarly, the draft amendments to the Constitution, assessed by the Venice Commission in 2020,[38] were dropped. A closer observation of the present Draft amendments leads to the conclusion that many of the changes pursued in 2020 can be found again in the present draft amendments, which would appear to be defined by attempts at addressing some, but not all, of the deficiencies found in the 2020 Opinion.

42. In particular, similarly to the draft amendments of 2020, the Draft proposes significant changes in the composition and working of the Supreme Judicial Council. The Venice Commission has on a number of occasions assessed institutional reforms of the Bulgarian judiciary, and in particular in its 2020 Opinion which analysis can be reiterated.[39] In this respect, it should be underscored that there is no institutional quick-fix to create an independent and impartial judiciary operating according to high professional standards.[40] Institutional reforms should go hand-in-hand with and not replace a long-term effort aiming to improve the professionalism, transparency and ethics within the judiciary as well as building a culture of respect for judicial independence among other state powers.[41]

43. The draft amendments make a further step in the right direction. Most importantly, the SJC plenary is abolished, and in effect two independent councils are created, one for judges and one for prosecutors and investigators (they will be referred to as the "Judicial Council" and the "Prosecutorial Council" respectively). Article 136 (1) proposes to confer on the two councils the function of appointing, promoting, demoting, relocating and releasing from office judges and prosecutors/investigators respectively.

44. Some of the representatives of the NGOs, the representatives of the associations of Bulgarian judges and prosecutors (who referred to a joint written opinion in this regard) and representatives of the SJC that the rapporteurs met expressed concerns over the suppression of the Plenum, as they considered that this separation could lead to an isolation of the two professional communities and related increased corporatism.

45. As stated in the 2020 Opinion, the suppression of the Plenary SJC would imply that a number of previous recommendations of the Venice Commission have been implemented. Thus, under the new system the Minister of Justice would not chair the Plenary SJC anymore;[42] the Plenary SJC would not nominate candidates for the position of two chief justices and the Prosecutor General. The suppression of the Plenary addresses the concern that the prosecutors, and the Prosecutor General in particular, are excessively involved in the governance of judges. So, dividing the SJC into two separate councils is in line with previous Venice Commission recommendations and should be welcomed.[43] It enhances judicial independence by preventing

[38] CDL-AD(2020)035 Urgent Interim Opinion on the Draft New Constitution of Bulgaria

[39] CDL-AD(2020)035 Urgent Interim Opinion on the Draft New Constitution of Bulgaria, paras 37-43

[40] This point has been stressed in recent Venice Commission opinions, see CDL-AD(2020)022, Ukraine, Joint Opinion of the Venice Commission and the Directorate General of Human Rights and the Rule of Law (DGI) of the Council of Europe on Draft Amendments to the Law 'on the Judiciary and the Status of Judges' and Certain Laws on the Activities of the Supreme Court and Judicial Authorities (Draft Law No. 3711), CDL-AD(2019)027, Ukraine, Opinion on Amendments to the Legal Framework Governing the Supreme Court and Judicial Governance Bodies, paras. 6-8; para. 13-15; Venice Commission, CDL-AD(2018)022, "The Former Yugoslav Republic of Macedonia", Opinion on the Law Amending the Law on the Judicial Council and on the Law Amending the Law on Courts, para. 12.

[41] Michal Bobek and David Kosař, "Global solution, Local Damages: A Critical Study in Judicial Councils in Central and Eastern Europe", in *German Law Journal* 2014, Vol. 15. No. 07, pp. 1257-1292.

[42] Venice Commission, CDL-AD(2015)022, para. 69;

[43] Venice Commission, CDL-AD(2015)022, para. 55; CDL-AD(2020)035 para. 42

undue influence of the prosecutorial service on the judiciary. To address the concerns raised by a number of interlocutors regarding the risk of isolation of the two professions, meetings between the two councils could be envisaged without having to be institutionalised, aimed at exchanging information and best practices.

2. Composition of the Supreme Judicial Council

46. Based on the amended article 130(1), the new SJC will have 15 members and consists ex officio of the Chair of the Supreme Court of Cassation who chairs the SJC and the Chair of the Supreme Administrative Court, as well as eight judges elected by the judges from different levels and five practising lawyers of 15 years standing elected by the National Assembly by a two-thirds majority.

47. The composition of the SJC (Art. 130(1) is in line with previous Venice Commission recommendations and with the parameters set out in Recommendation CM/Rec(2010)12, which states that "[n]ot less than half the members of such councils should be judges chosen by their peers from all levels of the judiciary and with the respect of pluralism inside the judiciary".[44]

48. As stated in previous Venice Commission opinions,[45] what is also very important is to have a well-balanced council, not only between the judicial and non-judicial members, but also among the judicial members so that they represent different types of judges and levels of the judiciary, while ensuring balance between the regions, gender balance etc. This can be difficult to achieve, particularly on a body which if it is to be effective should not have too many members. It is sufficient that the Constitution expresses the principle, while the specific procedures and criteria for a balanced representation of all levels of courts should be regulated in law.

49. According to Article 130 (2), practising lawyers of high professional and moral integrity with at least fifteen years of professional experience are eligible for election to the SJC. The requirement of high moral and professional integrity and at least 15 years of professional experience should evidently also concern the non-judicial members. With respect to these members, "professional experience" can be assumed to refer to various legal professions. This could be explicitly stated in Art 130(2). This would also emphasize that at issue are not party-political mandates. The provision that the members of the SJC, elected from the parliamentary quota, should not be members of the judiciary is welcome. A recommendable rule to be added would also be exclude active politicians (members of the National Assembly) from the "legal experts" that can be elected to the SJC.

50. The constitutional text should stipulate what to do if the 2/3 majority in the NA required to elect lay members is not reached. The Commission reiterates that without an anti-deadlock mechanism this rule entrenched in the Constitution may become an obstacle to the proper operation of the two councils. To address this, the Commission has provided in its 2020 Opinion on previous amendments to the Constitution of Bulgaria[46] an example of possible mechanism.[47] Other anti-deadlock mechanisms can be considered as well. The same provision should apply for the election of members in the Prosecutorial Council.

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[44] Venice Commission, CDL-AD(2015)022, para. 39; CDL-AD(2017)018, para. 14; CDL-AD(2019)031, para. 69. CDL-AD(2020)035 para 44

[45] CDL-AD(2020)035 para 46

[46] CDL-AD(2020)035 para 56

[47] The Commission referred to the possibility for the Constitution to provide, for example, that the power to choose a certain minimal number of lay members in this case is temporarily transferred to the President or another independent officeholder (like the Ombudsman, for example), if Parliament is uncapable on agreeing on the candidates and reaching the necessary majority

3. Common functions of the two Councils

51. The proposed new Articles 130a and 130c(5) deal with the powers and functions of the respective Councils. Some of their functions are similar. In particular, the powers related to appointments, promotion, transfer, dismissal and discipline of judges and prosecutors are concentrated within the respective Councils, which is positive. The appointment and dismissal of the Presidents of the Supreme Court of Cassation and Supreme Administrative Court are transferred from the President to the Supreme Judicial Council. This is a welcome amendment, which can be considered to strengthen judicial independence.

52. The Commission already noted in its 2020 opinion that the Constitution does not specify whether the decisions on disciplinary matters of the two councils are subject to judicial review.[48] Previously, the Venice Commission noted that there should be a possibility of an appeal to an independent court against decisions of disciplinary bodies, in conformity with the case-law of the ECtHR;[49] however, regarding the scope of such appellate review, the Venice Commission stressed that the appellate body should act with deference to the judicial council.[50] This is *a fortiori* true if the disciplinary council itself is an independent body, and if the procedure before it offers guarantees of fair trial – in this case the need to have a review by an independent court becomes less relevant.

53. In this regard, the powers of the Minister of Justice, provided for in Article 131, to make proposals for the appointment, promotion, demotion, relocation and release from office of prosecutors and investigating magistrates, and be to make proposals for releasing from office of judges should be removed.[51] These competencies could interfere with the independence of judges and the autonomy of prosecutors and investigating magistrates.

54. Secondly, the draft amendments confer administrative functions on the two councils. These include the power to adopt a draft budget (Article 130a(1)7 and 130c(5)8.), as well as to resolve organisation matters (Article 130a(1)6. and 130c(5)7.). The Commission reiterates[52] that the councils should be given the means – in particular the human resources – to deal with such issues.

55. The Commission previously noted that since the Government draws up the State budget (Article 87 (2) of the present Constitution and Article 93 (2) of the draft amendments), and since the draft amendments provide that the Minister of Justice manages the immovable property of the judiciary and participates in its organisation, it appears reasonable that he/she also proposes the budget for the judiciary. Some of the interlocutors including the Acting Prosecutor General expressed concerns that this would lead to interferences of the Ministry of Justice in the work of his institution. In terms of independence, there is no international standard that requires budgetary autonomy for courts, but the views of the judiciary should be taken into account when deciding the budget. [53] The process of approval of the draft budget by the Judicial Council/Prosecutorial Council (or the Plenary SJC in the current system), following a proposal of the Minister, is in line with this recommendation. The Commission previously suggested that in order to ensure that the position of the judiciary in budgetary matters is made known to the National Assembly, the Constitution could require that the views of the Judicial

[48] The right to lodge and appeal against a decision of the SJC before the Supreme Administrative Court is guaranteed at the legislative level, by the JSA.
[49] On the applicability of Article 6 ECHR to disciplinary proceedings against judges and therefore the right to appeal to an independent court, see ECtHR *Ramos Nunes de Carvalho e Sá v. Portugal [GC]* - 55391/13, 57728/13 and 74041/13, Judgment 6.11.2018.
[50] Venice Commission, CDL-AD(2019)008, North Macedonia - Opinion on the Draft Law on the Judicial Council, para. 35.
[51] CDL-AD(2015)022, para 68
[52] CDL-AD(2020)035 para 59
[53] Council of Ministers, Recommendation CM/Rec(2010)12, Guideline 40; CDL-AD(2010)004, Report on the Independence of the Judicial System Part I: The Independence of Judges, para. 53-55.

Council/Prosecutorial Council on the budget proposal be made public and included as an attachment to the Government's proposal for the State budget.[54]

56. As to the role played by the two councils in the "matters related to the organisation of the operation of the respective system" (Articles 130a(1)6. And130c(5)7.), the Venice Commission previously warned the legislators including in Bulgaria against overburdening the councils with administrative powers.[55] On the other hand, it is important to ensure that the administrative support functions are not abused to put pressure on judges. So, it would also be wrong to concentrate those powers exclusively in the hands of a Minister of Justice or another government official. A mechanism of "shared responsibility", involving the two judicial councils but not overburdening them with everyday administrative management of the courts and prosecution offices, may be devised.

57. The Article 131 (5) of the Constitution as amended stipulates that the Minister of Justice "manage[s] the immovable property of the judiciary". The Commission has previously stated that it should be ensured that the Minister's competence only concerns real estate management and that a court or a public prosecutor's office is not relocated to a less representative or less centrally located building, or at least not without their approval. The Commission notes in this regard that the new article 131 indeed adds that this competence should be managed "in agreement with the SJC and the Prosecutor's Council" which responds to the condition proposed by the Commission in its 2020 Opinion.[56]

58. In sum, the Constitution should clarify that the two councils give their opinion on the proposed budget of the judicial system, and that they participate in deciding organisational matters. The details may be left to the law to regulate.

4. Probationary period for judges

59. Despite the Venice Commission's former criticism based on established international standards,[57] a five years' probationary period for judges is foreseen in the draft amendments (Article 129(3)). The acquisition of tenure is decided by the SJC, which provides a certain safeguard against arbitrary or politically motivated terminations of the probationary period. However, as emphasised in the 2020 and 2017 opinions, the Venice Commission has always had reservations about the very idea of probationary periods for judges, as such status undermines their independence.[58] The same recommendation has been made by GRECO.[59]

60. The Venice Commission reiterates its position and recommends removing such probationary periods or surrounding them with all necessary guarantees. In its report on judicial appointments,[60] the Commission stated that its critical stance "should not be interpreted as

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[54] Venice Commission, CDL-AD(2015)037, First Opinion on the Draft Amendments to the Constitution (Chapters 1 to 7 and 10) of the Republic of Armenia, para. 184; CDL-AD(2020)035 para 60

[55] Venice Commission, CDL-AD(2020)035 para 61; CDL-AD(2017)019, Opinion on the Draft Judicial Code of Armenia, para. 98, 100, 102 and 103. See also CDL-AD(2015)022, Opinion on the draft Act to amend and supplement the Constitution (in the field of the Judiciary) of the Republic of Bulgaria, para. para. 66, 71 and 72; CDL-AD(2007)028, Report on Judicial Appointments by the Venice Commission, para.26; CDL-INF(1999)005, Opinion on the reform of the judiciary in Bulgaria, para. 39.

[56] CDL-AD(2020)035 Urgent Interim Opinion on the Draft New Constitution of Bulgaria, para 62.

[57] Venice Commission, CDL-AD(2020)035 para.66; CDL-AD(2002)015, Opinion on the Draft Law on Amendments to the Judicial System Act of Bulgaria, para. 34 et seq.; CDL-AD(2008)009, Opinion on the Constitution of Bulgaria, para. 48; CDL-AD(2017)018, Opinion on the Judicial System Act of Bulgaria, para. 78.

[58] Venice Commission CDL-AD(2020)035 para 66; CDL-AD(2017)018, Opinion on the Judicial System Act of Bulgaria, paras. 78, and CDL-AD(2002)015, Opinion on the Draft Law on Amendments to the Judicial System Act of Bulgaria, paras. 32-35.

[59] GRECO, Compliance report Bulgaria. Corruption prevention in respect of members of parliament, judges and prosecutors, 23 June 2017, para. 30-34.

[60] CDL-AD(2007)028 para 41

excluding all possibilities for establishing temporary judges. In countries with relatively new judicial systems there might be a practical need to first ascertain whether a judge is really able to carry out his or her functions effectively before permanent appointment. If probationary appointments are considered indispensable, permanent appointment after the probationary period should be the rule and a 'refusal to confirm the judge in office should be made according to objective criteria and with the same procedural safeguards as apply where a judge is to be removed from office'." Objective criteria for refusal of appointment to the position of tenure, with the same procedural safeguards as for removal of judges with tenure, should also be specified in the law if not in the Constitution.[61]

5. Composition of the Prosecutorial Council

61. The draft amendments to the Constitution provide for the creation of a separate prosecutorial council. There is no international standard as to the need to set up a Prosecutorial Council.[62] The Venice Commission agrees with the Consultative Council of European Prosecutors that "properly composed councils enhance the autonomy of the prosecutorial system vis-à-vis other branches of power as well the internal autonomy of the individual prosecutors. It need hardly be emphasised that the independence of prosecutorial councils and their individual members should not be a prerogative or privilege conferred in their interest, but a guarantee in the interest of a fair, impartial and effective functioning of the prosecution system".[63] The Venice Commission has acknowledged that if the prosecutorial councils are "composed in a balanced way, e.g. by prosecutors, lawyers and civil society, and when they are independent from other state bodies, such councils have the advantage of being able to provide valuable expert input in the appointment and disciplinary process and thus to shield them at least to some extent from political influence. Depending on their method of appointment, they can provide democratic legitimacy for the prosecution system. Where they exist, in addition to participating in the appointment of prosecutors, they often also play a role in discipline including the removal of prosecutors".[64]

62. The Committee of Ministers in its Recommendation Rec(2000)19 on the role of the public prosecutors in the criminal justice system makes no reference to prosecutorial councils, and, consequently, has not set any standard as the requirement to establish such councils or with respect to their functions, powers, duties, or the composition. There is an ongoing discussion among expert bodies and constitutional experts on whether prosecutorial councils should contain a majority of prosecutors elected by their peers. Unlike the judiciary, prosecution services are often organised in a hierarchical manner regarding their management as well as their professional functions, which carries the risk that the prosecutorial component of the prosecutorial council may be under the influence of the Prosecutor General. This can create tensions or even conflict between councils and senior prosecutors who are given management responsibilities, and in some circumstances could even prevent the prosecutorial council from duly exercising its supervisory and disciplinary functions and may weaken the necessary accountability of the prosecution service. It is important to design any prosecutorial council (composition, representation, methods of elections, powers) considering both the constitutional and the legal situation of the prosecution service in the country concerned, as well as the actual

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[61] Venice Commission, CDL-AD(2020)035 para 66; CDL-AD(2005)038, Opinion on the Draft Constitutional Amendments concerning the Reform of the Judicial System in "the Former Yugoslav Republic of Macedonia", para. 30. For example, in Norway, which maintains a system of temporary apprentice judges on two-year contracts, the Act on Courts para. 55 h provides the same guarantees against removal in the two-year period as for judges with tenure.

[62] Committee of Ministers' recommendation Rec(2000)19

[63] Opinion No. 16 of the Consultative Council of European Prosecutors on the "Implications of the decisions of international courts and treaty bodies as regards the practical independence of prosecutors" states that "the independence of prosecutors is not a prerogative or privilege conferred in their interest, but a guarantee in the interest of a fair, impartial and effective justice that protects both public and private interests of the persons concerned."

[64] Venice Commission, CDL-AD(2010)040, Report on European Standards as regards the Independence of the Judicial System: Part II - the Prosecution Service, para. 65

situation and practice concerning the exercise of prosecutorial functions as well as the management of the service.[65]

63. The Consultative Council of European Prosecutors has advocated that prosecutorial councils should be composed of a majority of prosecutors but has acknowledged that there is no general agreement on this point. The Venice Commission has recommended that "a substantial element or a majority of the members" of a prosecutorial council be prosecutors elected by their peers.[66]

64. The draft amendments (article 130c(2)) stipulate that the Prosecutors Council will have 10 members chaired by the Prosecutor General who is an ex officio member; two members shall be elected directly by the prosecutors, one by the investigating magistrates and six practising lawyers shall be elected by the National Assembly by a 2/3 majority of its members.

65. In the draft amendments, the composition of the Prosecutorial Council differs from the composition of the SJC. The Venice Commission has previously accepted that some differences between the composition of the bodies of governance of the judiciary and the prosecution service may be both necessary and desirable.[67] What is important is that in each case the final composition is such as to exclude the control of this institution by the political majority of the day, while, at the same time, ensuring the accountability and the effectiveness of the prosecution service.

66. In its 2020 opinion on Bulgaria,[68] the Commission stated that it is very important that lay members of the Prosecutorial Council do not have any present or future hierarchical (or de facto) subordination links to the Prosecutor General and represent other legal professions. Achieving the above outcomes would require in addition an evolution of professional ethos and political culture,[69] as well as closer examination of institutional and procedural rules so as to reduce to a certain extent the Prosecutor General's' institutional or *de facto* leverage[70] over other prosecutors or members of the Prosecutorial Council.

67. In order to limit the concentration of powers in the institution of the Prosecutor General, the draft amendments give a clear prevalence (six out of 10) to members elected by Parliament, securing very little representation to the prosecutors in the Council: only three members out of ten even if one includes the Prosecutor General. Although the reform aims at reversing the trend and reducing the powers and influence of the Prosecutor General, it should at the same time avoid the risk of a political influence on the prosecutorial offices. In addition, the composition should provide the Council with the expertise required to perform its tasks, which could be hampered by the scarce number of professionals represented in this proposed new composition.

68. One of the crucial components of the reform process is the legitimate attempt of a thorough transformation of the State Prosecution Service, for the purpose of improving its efficiency and accountability, as well as the functional autonomy of individual prosecutors. The removal of the functions and powers of the prosecution service outside of the criminal law sphere responds to Venice Commission recommendations. While the Prosecutor General should not have an exclusive competence to deal with all prosecution matters as under the current system, it is not in accordance with the principle of prosecutorial independence that the Prosecutor General

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[65] Venice Commission CDL-AD(2022)042 Opinion on two Draft Laws Implementing the Constitutional Amendments on the Prosecution Service in Serbia
[66] ibid
[67] Venice Commission, CDL-AD(2017)018, Bulgaria - Opinion on the Judicial System Act, para. 40
[68] See Venice Commission, CDL-AD(2020)035 para. 53
See Venice Commission, CDL-AD(2017)018, Opinion on the Judicial System Act of Bulgaria.
[69] See Venice Commission, CDL-AD(2019)031, Opinion on draft amendments to the Criminal Procedure Code and the Judicial System Act of Bulgaria, concerning criminal investigations against top magistrates, para. 70.
[70] See Venice Commission, CDL-AD(2017)018, Opinion on the Judicial System Act of Bulgaria, para. 35.

should be an administrator rather than a prosecutor and that he be deprived of all his/her competences.

69. In addition, the draft amendments provide that the National Assembly may not elect as members persons who hold the position of prosecutor or investigating magistrate at the time of election. Yet, article 130c(2) as amended defines practicing lawyers of high professional and moral integrity with at least fifteen years of professional experience as "eligible for election to the Prosecutor's Council besides its ex officio members". The qualification of "practicing lawyers" for the members to be elected by the National Assembly by a two-thirds majority should be clarified. While the practicing lawyers who know most about prosecutorial matters are those who do criminal defence work, there could be a conflict of interest in having them sitting in the Prosecutorial Council. In addition, the need of an anti-deadlock mechanism should be considered (Art 130c).

70. The proposed amendments stipulate that the Minister of Justice would not only have the right to attend the meetings of the Prosecutorial Council but also the power to nominate a candidate for the position of Prosecutor General (Art 130b(2)). It might be asked whether such a position of the Minister of Justice is in harmony with the option of an independent prosecutorial service otherwise adopted by the Constitution.

71. To sum up, the Commission recommends reconsidering the composition of the Prosecutorial Council, so as to ensure the accountability and the effectiveness of the prosecution service while at the same time excluding the control of this institution by the political majority of the day. This would require a fairer representation of the elected prosecutors so as to equip the Prosecutorial Council for the job it is intended to do.

6. Presence of the Minister of Justice in the Councils

72. Article 130a(2) and 130c(6) as amended, dealing with the SJC and the Prosecutor's Council respectively, provide that "the Minister of Justice and the Inspector General may attend the meetings without having the right to vote".

73. As reiterated in the 2020 Opinion on Bulgaria,[71] the presence of the Minister of Justice on the councils, even on a non-voting basis - which has been retained in the draft amendment to the Constitution - is a source of concern for the Venice Commission. While there may be occasions where the presence of the Minister of Justice in the councils is required, for example in budgetary matters, a general right for the Minister of Justice to participate on the work of the councils may be regarded by the judiciary as a form of pressure from the executive power, especially when the councils decide on disciplinary or career matters.

74. The Venice Commission has so far been cautious in its approach (while the Group of States against corruption, GRECO, has taken a stricter position in this regard). In an opinion on Montenegro, it stated that "it is wise that the Minister of Justice should not him- or herself be a member".[72] Similarly, in an opinion on the Republic of Moldova: "The self-governing nature of the Superior Council of Prosecutors might be questioned given the ex officio membership of the Minister of Justice".[73] If the participation of the Minister of Justice in the work of the SJC is maintained, the Minister should not participate in disciplinary proceedings against judges.[74] However, in light of the recent judgment of the ECtHR stating, with respect to the Minister of

[71] CDL-AD(2020)035 para. 43
[72] Venice Commission, CDL-AD(2014)042, Montenegro, Interim opinion on the draft law on the state prosecution office of Montenegro, para. 38.
[73] Venice Commission, CDL-AD(2015)005, Joint Opinion on the draft Law on the Prosecution Service of the Republic of Moldova, para. 131.
[74] Venice Commission, CDL-AD(2023)015 Joint Opinion on the Superior Council of Magistracy and the status of the judiciary as regards nominations, mutations, promotions and disciplinary procedures in France

Justice, that "the presence, even if only passive, of a member of the Government on a body empowered to impose disciplinary sanctions on members of the judiciary is, in itself, extremely problematic in the light of the requirements of Article 6 of the Convention and, in particular, the requirement that the disciplinary body be independent",[75] the Venice Commission recommends consideration of the merit of this provision in light of evolving best practices. An alternative could be to limit the possibility of the presence of the Minister of Justice to some specific issues and exclude it for others.

7. Functions within the Prosecution service

75. Based on the new draft provisions, the Prosecutor General shall be appointed by the Prosecutorial Council (article 130b(1)) and shall be the administrative head of the supreme prosecutor's office (article 126(2)). His/her current competences of methodological guidance and legality supervision of all prosecutors according to the acting Constitution are no longer mentioned, and the methodological guidance function is entrusted to the Prosecutorial Council. It is proposed to withdraw the power of the Prosecutor General to initiate constitutionality review in general, to restrict this competence to review of laws that endanger the rights of citizens. It is also proposed to limit considerably the powers of the prosecutor's office outside the criminal law sphere, by withdrawing its power to challenge the legality of administrative acts in general. In the presence of allegations of a crime committed by a Prosecutor General, the investigation is carried out by a special prosecutor, who had occupied the position of a senior judge according to a procedure determined in law. The Prosecutor General shall chair the Prosecutors' Council.

76. Based on the explanatory note, the purpose of the draft amendments is to ensure that the prosecution office be an institution protecting the public interest, publicly accountable and responsible. The establishment of an independent Prosecutor's Council, dominated by the representatives of the parliamentary (public) quota, is described as a guarantee against the concentration of power in the institution of the chief prosecutor, including and regarding career and disciplinary powers vis-à-vis prosecutors. Responsibility and accountability mechanisms for the Prosecutor General are being introduced, through the appointment procedure by the Prosecutor's Council on the initiative of three members of the Prosecutor's Council and the Minister of Justice after a public hearing. A procedure for an independent investigation of the Prosecutor General is also introduced. Focusing the prosecution only on functions in the criminal process should limit the scope for arbitrary exercise of power and increase the effectiveness of the state prosecution.

77. During their meeting with the delegation, some interlocutors argued that the draft would transform the General Prosecutor into an administrative manager, removing his/her substantial role which would lead to an unequal application of the law.

78. The Commission recalls that here is no common standard on the organisation of the prosecution service, especially about the authority required to appoint public prosecutors, or the internal organisation of the public prosecution service. However, sufficient autonomy must be ensured to shield prosecutorial authorities from undue political influence. Autonomy must also be ensured inside the prosecution service. Prosecutors must not be submitted to strict hierarchical instructions without any discretion, and should be in a position not to apply instructions contradicting the law.

79. The Commission notes that the Prosecutor General will not have an exclusive competence to deal with all prosecution matters as under the current system. Yet, in reducing the power of the Prosecutor General, care needs to be taken to ensure that the prosecutor's office as a whole remains capable of carrying out its proper and necessary functions. It would further seem to be useful to have an express provision that every prosecutor should enjoy independence in the

[75] ECtHR, *Catana v. Republic of Moldova*, 21.02.2023, application no. 43237/13, para. 75.

exercise of the prosecutorial function. Alternatively, if there is to be some power to give instructions, the Constitution should specify the scope of this power and the conditions for its exercise.

80. Until now, under the Constitution, the prosecution service has had powers outside the criminal justice system. The proposed amendments to article 127 of the Constitution replace the provision by which the prosecution office shall ensure that legality is observed, in particular, by taking part in civil and administrative proceedings whenever required to do so by law, by the possibility to participate only in civil and administrative cases for the protection of the rights and legal interests of minors and juveniles and for the protection of a significant public interest of persons in need of protection.

81. In its previous opinions, the Venice Commission criticised such broad powers of "general supervision of legality". This is a loosely defined power to intervene in the name of the State in administrative (non-criminal) cases and even in private disputes, to conduct checks and to issue binding orders even where there is no case to which to answer under the Criminal Code. In that regard the Venice Commission recommended that the functions and powers of the prosecution service outside of the criminal law sphere should be significantly curtailed at the statutory level.[76] Thus, the draft meets the long-standing recommendations of the Venice Commission, according to which functions and powers of the prosecution service outside of the criminal law sphere should be curtailed.

82. It is also proposed in the draft that the Prosecutor General should no longer provide methodological guidance regarding the work of prosecutors. Such guidance is a normal feature of prosecution systems so as to ensure that all prosecutors within the system operate in a consistent manner. Guidelines cover such matters as the manner in which prosecutions should be conducted and the legal arguments which prosecutors should put before the court. Such guidelines should be the work of experienced and senior practising prosecutors, not administrators. The Prosecutor General seems to be the appropriate person as the head of the prosecution service to issue such guidance. The absence of methodological guidance would create a situation where prosecutors behave inconsistently with one another and where different prosecutors argue for opposing interpretations of the law. During the visit, civil society representatives stated that instructions in individual cases were being issued under the guise of methodological guidance, which was denied by the prosecutors. In the hypothesis that directions in individual cases would be issued contrary to the law, they would most probably be given verbally and would not qualify as methodological guidance in any case.

83. The idea that the giving of methodological guidance would be a function of the Prosecutorial Council would be unworkable under the proposed new composition of that council which would contain very few practising prosecutors (see above). It is essential that the persons who give such guidance be aware of the reality of the job which prosecutors do and the difficulties that they face. If it were felt that there is a risk of the system of guidance being abused it could be envisaged that methodological guidance proposed by the Prosecutor General would need to be approved by the Prosecutorial Council provided that this could be done without creating any undue delay and provided that the presence of prosecutors on the Council was substantially increased from the current proposal.

8. Tenure of the Prosecutor General and the Chief Judges

84. Under the current Constitution, the Prosecutor General is appointed for a non-renewable term of seven years. The draft amendments (article 130b(1)) provide that the Prosecutor General would be appointed for a term of five years with the right to be re-appointed for a second five-

[76] Venice Commission CDL-AD(2017)018, Opinion on the Judicial System Act of Bulgaria, 9 October 2017, para. 43.

year term. Article 129 as amended provides the same conditions for the appointment of the chairpersons of the Supreme Court of Cassation and the Supreme Administrative Court.

85. The explanatory note does not give any explanation of the reason for the proposal, other than noting that the term of seven years is now reduced to five, without however mentioning the fact that the five year term can be renewed for another five.

86. In a previous opinion in relation to the Republic of Moldova, the Commission[77] considered that the proposed seven-year term of the Prosecutor General rather than the current five years was to be welcomed, and it also removes a significant threat to independence by excluding re-appointment. In the prevailing regional context, ten years might be a rather long tenure and five could be considered short. There seemed to be a great deal of support during the country visit for leaving the existing system of seven-year appointments in place without the option of a renewal.

87. The Commission recalls that "appointing court presidents with administrative functions for a limited period of time does not violate the European standards. However, there is not a single standard – in several European countries the principle is that also court presidents are irremovable."[78] The limitation of the term of office of chairpersons appears to be a guarantee of independence. Yet, on the contrary, renewable terms of office may also substantially jeopardise the independence of a chairperson, who may at some point be influenced in his/her work by the desire to be reappointed by the executive. However, a short-term appointment risks undermining courts presidents' possibilities to realise effective leadership and to ensure a solid and strong courts' organisation. Based on the above, the Commission would recommend keeping the existing system of seven-year appointments in place without the option of a renewal.

9. New mechanism of bringing the Prosecutor General to criminal responsibility

88. The draft amendment to Article 130b.(3) of the Constitution stipulates that in the presence of allegations of a crime committed by a Prosecutor General, the investigation is carried out by a special prosecutor, who had occupied the position of a senior judge according to a procedure determined in law. "

89. The proposed Article 130b(3) is meant to provide a solution for the issue of the accountability of the Prosecutor General, raised by, inter alia, the European Court of Human Rights in the case *Kolevi v. Bulgaria*.[79] The case relates primarily to the ineffectiveness of the investigation into the murder of the first applicant (a high-ranking prosecutor) committed in 2002, owing to the lack of guarantees in Bulgarian law for the independence of criminal investigations concerning the Prosecutor General (who was suspected by the relatives of the first applicant to be implicated in the murder) and "high-ranking officials close to him" (procedural violation of Article 2).

90. In 2022, the Venice Commission examined the details of the position of "special prosecutor" as set out in the draft Criminal Procedure Code of Bulgaria. In its Opinion, the Venice Commission considered that the adoption of this draft Law, with the improvements discussed in the Opinion, could enhance the accountability of the Prosecutor General and make other important contributions to the reform of the Bulgarian criminal justice system. The Venice Commission, however, believed that the goal of improving the accountability of the Prosecutor General could not be achieved by changing the rules on criminal investigations only. A more holistic approach, involving the revision of the institutional design of the Supreme Judicial Council and its

[77] CDL-AD(2015)005, Joint Opinion on the draft Law on the Prosecution Service of the Republic of Moldova, § 89
[78] CDL-AD(2014)021, Opinion on the draft law on introducing amendments and addenda to the judicial code of Armenia (term of Office of Court Presidents), §41
[79] See ECtHR, *Kolevi v. Bulgaria*, no. 1108/02, 5 November 2009; See also the Committee of Ministers materials on the execution of this judgment: https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016809e7bfc

prosecutorial chamber, and circumscribing the functions of the prosecution service outside of the criminal law sphere, may be necessary to achieve this goal. The proposed amendments need to be considered in this context.

91. The Commission notes that in June 2023,[80] the Committee of Ministers welcomed the adoption, on 26 May 2023, of the important and long awaited reforms - drafted within narrow constitutional boundaries - introducing a mechanism for the independent investigation of a Prosecutor General, which provided for key safeguards to respond within the existing constitutional framework to the *Kolevi* judgment and the Committee's indications in Interim Resolution CM/ResDH(2019)367;[81] and judicial review of refusals to open investigation for certain categories of offences. Having noted that the Parliament did not adopt certain legislative proposals concerning investigations in general, it invited the authorities to pursue their consultations and work on adopting measures in the relevant areas. The Committee moreover encouraged the authorities, inter alia, to provide their assessment whether it is necessary to further strengthen the mechanism concerning the investigation of the Prosecutor General within the existing constitutional framework or through constitutional amendments and insisted on the need to carry out the election of a new SJC in a way which would allow for an effective reduction of the Prosecutor General's influence.

92. In this context, the draft Constitutional amendments at stake create specific constitutional basis for specific rules on investigation of a Prosecutor General, with the aim of addressing the limitations stemming from the current constitutional rules and their interpretation by the Constitutional Court. The proposed constitutional amendments will thus allow for the creation of a specific mechanism of independent prosecution, overcoming the limits of the changes provided by a lower-level legislation. This provision would need to be complemented by legislative arrangements on appointment, accountability, and review of the decisions of the special prosecutor which are different from the arrangements for the ordinary prosecutors. The Commission considers that the Constitution should identify the appointing body.

10. The Inspectorate of the Judiciary

93. Article 132a. of the amended provisions stipulates that an Inspectorate of the judiciary shall be established, which shall consist of a Inspector General and ten inspectors who shall be elected by the National Assembly by a majority of two-thirds of its Members for a term of five years with the right to be re-elected for a second mandate only once.

94. The Venice Commission has examined constitutional and ordinary-law provisions on the Inspectorate in several previous opinions. The Commission has always refrained from taking a clear position on whether the establishment of such a body is in itself in accordance with European or international standards. The Inspectorate should be designed in such a manner not to put in danger the independence of the Judiciary. The first point of concern that has been reiterated in the successive Venice Commission's Opinions[82] was the manner of appointment of the Inspector General and the Inspectors by the Parliament. The competence of a political authority in this area increases the risks of political attachment, thus compromising the independence of the judiciary and minimising the chances for the Inspectorate to serve as a guarantor of judicial efficiency.[83] To neutralize these risks, the Venice Commission has previously recommended to give the Chambers of the SJC the power to nominate a certain number of

[80] https://search.coe.int/cm/pages/result_details.aspx?objectid=0900001680ab707e
[81] https://search.coe.int/cm/Pages/result_details.aspx?Reference=CM/ResDH(2019)367
[82] Venice Commission CDL-AD(2022)022 Opinion on the Draft Amendments to the Judicial System Act concerning the Inspectorate to the Supreme Judicial Council paras 21-29
[83] Venice Commission CDL-AD(2008)009, Opinion on the Constitution of Bulgaria, para. 47.

candidates for election by the Parliament.[84] As the competence of the Inspectorate covers both judges and prosecutors, in the structure now proposed both Councils should be involved.

95. The Commission notes with regret that no amendment to this effect is included in the draft law under examination (Art 132 a) despite its previous recommendations. For the same reasons, the European Commission also recommended to involve judicial bodies in the selection process of the Inspectorate members.[85]

96. The requirement of a two-thirds majority is important for guaranteeing the non-political nature of the appointment. However, the Venice Commission recommended providing for an anti-deadlock mechanism in case of failure to receive a qualified majority of the votes in the Parliament. The proposed new amendments do not foresee such mechanism.

97. The Venice Commission maintains its position that it is important to involve the SJC and the Prosecutorial Council in the selection/nomination process of the Inspectorate members and to have an anti-deadlock mechanism in case of failure to receive the required number of votes.

98. As to the functions of the Inspectorate, the Commission has stressed that a mere provision on the requirement of respect for judicial independence does not guarantee the realization of this respect. This holds especially if the functions are broad and vaguely defined. What is most important to prevent is interference with the substance of courts' decision-making. The Inspectorate cannot review the decisions taken by courts in the individual cases. The advisability of an explicit provision to this effect could be envisaged.

99. In its 2008 Opinion, the Commission recommended that the "inspection […] should only concern material issues such as the efficiency with which the judicial bodies have spent the money allocated to them. The inspectors should not have the power to investigate complaints; that power should be left to the SJC itself, since it requires knowledge of or experience with the administration of justice."[86] Not only was this recommendation not followed, but the 2016 reform of the Judicial System Act and the present draft amendments seem to result in a considerable increase in the powers and competencies of the Inspectorate. This also makes it difficult to understand the exact role of the Inspectorate vis-a vis the SJC and the Prosecutorial Council.[87]

100. The second point indeed relates to the delimitation of powers between the Inspectorate and the SCJ and the Prosecutorial Council. While the Commission refrained from assessing whether the existing powers of the Inspectorate were in line with the European principles,[88] it has previously noted that there was a danger for the independence of judiciary due to a considerable expansion of the functions of the Inspectorate, with the consequence of a possible shift of the real power from the SJC – in the proposed structure both Councils - to the Inspectorate.[89] The Commission has also been concerned about the powers of the Inspectorate overlapping those of the Supreme Judicial Council and about the shift of emphasis in the (legitimate) monitoring of judicial activities from the Council(s) to the Inspectorate. The proposed amendments seem to make clear that the Inspectorate is not a decision-making body but produces material for, primarily, the two Councils.

101. Yet, the proposed constitutional amendments provide for the extension of the constitutionally regulated powers of the Inspectorate (see paragraph 6), including (3) carrying out

[84] Venice Commission CDL-AD(2017)018, Opinion on the Judicial System Act, paras. 58-59; See also CDL-AD(2020)035, Urgent Interim Opinion on the draft new Constitution, para. 77.
[85] *Country Chapter on the rule of law situation in Bulgaria*, p. 2.
[86] Venice Commission CDL-AD(2008)009, Opinion on the Constitution of Bulgaria, para. 46.
[87] Venice Commission CDL-AD(2017)018, paras. 55 and 61.
[88] Venice Commission CDL-AD(2015)022, Opinion on the Draft Act to amend and supplement the Constitution (in the field of Judiciary) of the Republic of Bulgaria, para. 80.
[89] Venice Commission CDL-AD(2017)018, Opinion on the Judicial System Act, para. 57.

inspections based on reports of violations of the law and the rules of judicial procedure, including violations of the right to consider and resolve cases within a reasonable time (4) making motivated proposals to the relevant council for the imposition of disciplinary sanctions on judges, prosecutors or investigating magistrates in the event of establishing of systematic or gross violations of the law and of rules of judicial procedure on their part.

102. The Commission previously raised concerns in relation to the procedure and the form of the execution of the functions and powers of the Inspectorate, for example with regard to individual inspections.[90] The concerns caused by the blurred lines between the appraisals (by the SJC and Prosecutorial Council), inspections (by the Inspectorate) and disciplinary proceedings (by the SJC and Prosecutorial Council) are exacerbated by the fact that these various mechanisms are not part of one sequential procedure: sometimes they interrelate and sometimes they simply co-exist. The extensive functions of the Inspectorate, coupled with the lack of clarity concerning the role of the Inspectorate vis-a vis the SJC and the Prosecutorial Council, may create the risk of the Inspectorate encroaching on the constitutional mandate of the SJC and the Prosecutorial Council.[91]

103. The above concerns were echoed in the 2020 urgent Interim Opinion of the Venice Commission on the draft new Constitution[92] and in the 2022 Opinion on the Draft Amendments to the Judicial System Act concerning the Inspectorate to the Supreme Judicial Council. The main thrust of these concerns continued to be that (i) inspectors are competent to examine virtually every aspect of the activities of courts, prosecution offices, individual judges and individual prosecutors, and that (ii) the competences of the inspectors should therefore be more clearly specified, in order to avoid overlapping with other existing mechanisms and with the constitutional mandate of the SJC and the Prosecutorial Council.

104. While welcoming the intention of the Bulgarian authorities to strengthen the integrity of the judiciary, the Commission notes that it does not address the main deficiencies identified in its previous opinions. Consequently, it maintains its position that there should be a clear distinction between the functions of the Inspectorate and the SJC and the Prosecutorial Council, and that there should be more detailed rules in the law itself concerning the procedure of inspections. Overlapping functions, coupled with lack of clarity concerning their implementation, may lead to abuse of powers.

E. The Constitutional Court

1. Election

105. The article 147 of the Constitution as amended introduces a majority of two thirds of its members for the election of the four judges elected to the Constitutional Court by the National Assembly. The Commission has noted in previous opinions that it is necessary to ensure both the independence of the judges of the Constitutional Court and to involve different state organs and political forces into the appointment process so that the judges are seen as being more than the instrument of one or the other political force. This is the reason why, for example, the German Law on the Constitutional Court (the Bundesverfassungsgerichtsgesetz) provides for a procedure of electing the judges by a two-third majority in Parliament. [93]

106. The Venice Commission has repeatedly stressed the importance of providing for anti-deadlock mechanisms in order to ensure the functioning of the state institutions. Qualified

[90] Ibid., paras. 67-74.
[91] Ibid., paras. 62-66.
[92] Venice Commission CDL-AD(2020)035, paras. 73-80.
[93] CDL-AD(2004)043 Republic of Moldova - Opinion on the Proposal to Amend the Constitution (introduction of the individual complaint to the constitutional court), para. 18

majorities aim to ensure that a broad agreement is found in parliament, as they require the majority to seek a compromise with the minority. For this reason, qualified majorities are normally required in the most sensitive areas, notably in the elections of office-holders in state institutions. However, there is a risk that the requirement to reach a qualified majority may lead to a stalemate, which, if not addressed adequately and in time, may lead to a paralysis of the relevant institutions. An anti-deadlock mechanism aims to avoid such stalemate.[94]

2. Access to the Constitutional Court

107. The current Constitution in Article 150 follows an indirect model of access to constitutional justice. Access to the Constitutional Court requires a motion from competent bodies and officeholders. Article 150 of the Constitution as amended introduces a direct individual constitutional complaint, ensuring civil control over the activities of the Parliament, so that the adopted laws do not violate the constitutional rights of citizens. In addition, the draft creates the possibility for lower instance courts to refer directly to the Constitutional Court on the constitutionality of a law applicable to a specific case.

108. The explanatory note indicates that regarding the individual constitutional complaint, adequate filters should be provided by the law and the rules of the Constitutional Court to ensure that the Constitutional Court considers truly significant issues and no unreasonable delay due to court overload will be allowed. It adds that this reform should be accompanied by organizational, personnel and resource strengthening of the Constitutional Court as an administration. Such filters may be related to the subject (the appeals shall be admissible, when the constitutional rights and freedoms of citizens are violated by a law), as well as the lack of established case law (the Constitutional Court has not issued a decision on the relevant provisions of the law at the initiative of other entities).

109. It is recalled that, as stated by the Venice Commission in its 2010 *Study on Individual Access to Constitutional Justice*[95] "Indirect access to individual justice is a very important tool to ensure respect for individual human rights at the constitutional level. The existing choices are broad and many possibilities coexist. An advantage of indirect individual access is that the bodies filing complaints are usually well-informed and have the required legal skills to formulate a valid request. They can also serve as filters to avoid overburdening constitutional courts, selecting applications in order to leave aside abusive or repetitive requests." The increase of constitutional justice by enlarging the possibilities of getting to the Constitutional Court for individual citizens and courts is of very high importance and should remain a goal to reach.[96] In its above-mentioned report, the Venice Commission pointed out in relation to systems where only the highest courts are authorised to bring preliminary requests before the Constitutional Court, that "[w]hile this is an effective tool to reduce the number of preliminary questions and consistent with the logic of exhaustion of remedies (the individual should follow the ordinary sequence of courts), this leaves parties to proceedings in a potentially unconstitutional situation for a long period of time if lower courts are obliged to apply the law even if they have serious doubts as to its constitutionality. From the viewpoint of human rights protection, it is more expedient and efficient to give courts of all levels access to the constitutional court"[97].

110. The Bulgarian authorities seem to have chosen a system combining direct and indirect access to the Constitutional Court. A carefully designed constitutional complaint, including appropriate filter and a clear definition of constitutional matters to be decided by the Constitutional

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[94] CDL-AD(2013)028 Montenegro - Opinion on the draft amendments to three constitutional provisions relating to the Constitutional Court, the Supreme State Prosecutor and the Judicial Council, paragraphs 5-8
[95] CDL-AD(2010)039rev., para. 3
[96] CDL-AD(2015)022, para 83
[97] Idem, paragraph 62

Court, can provide a high level of protection of human rights, without overburdening the Constitutional Court. .

111. The introduction of the right of individual complaint is welcome, as it strengthens individual rights. However, the formulation used in the draft amendments would benefit from further clarification. It is indeed important to make it clear that they do not foresee an a*ctio popularis*.

F. Transitional Provisions

112. Most of the proposed amendments will be applicable from the moment of their adoption; therefore, no special transitional rules are necessary.

113. The draft stipulates that "within three months of the entry into force of this law, the election of the Supreme Judicial Council, Prosecutor's Council and Prosecutor General shall be held."

III. Conclusions

114. The Venice Commission has been asked by the Minister of Justice of Bulgaria, Mr Atanas Slavov, to evaluate the draft amendments to the Constitution of Bulgaria proposed by 166 MPs and currently pending before the National Assembly of Bulgaria.

115. This Opinion does not comment extensively on all proposed changes but focuses on the most important ones. The main recommendations are the following:

116. The process of constitutional reform is still on-going, so, while regretting that the launching of the constitutional reform was not preceded by an appropriate public debate, the Venice Commission recommends the Bulgarian authorities to explain in detail the reasons behind each proposal so that the public is aware of the impact of new legislation. It is essential to ensure meaningful participation of all the institutions concerned, all political forces, public, experts in this process.

117. The amendments allowing persons with dual citizenship to stand as candidates for the National Assembly and the Council of Ministers are welcome as they address previous Venice Commission's recommendations.

118. While acknowledging that the proposed amendment should not be interpreted as an open mandate to establish new independent bodies, the Venice Commission recommends that the independent regulatory and controlling bodies should have a constitutional basis, which should cover the guarantees for their independence, such as the procedure of appointment (by qualified majority in parliament, with appropriate anti-deadlock mechanisms) and security of tenure of their members, the duration of their mandate. In the light of the diversity of these institutions, it would seem more appropriate, instead of having only one general provision, to introduce specific provisions for each institution.

119. If the institution of a Caretaker Prime Minister is retained, it is advisable to restrict the discretion of the President to choose between several persons, in order to prevent undue political considerations, for example by defining an order of choice and by defining in advance which independent person would be appointed. The Commission however expresses doubts about the suitability of the President of the National Assembly, or about the President of the Constitutional Court as Caretaker Prime Ministers. It also has doubts as concerns the election of a Caretaker Prime Minister by the National Assembly which has been unable to agree on a prime minister in the first place. The Commission recommends reviewing the draft amendments based on these considerations.

120. The most important amendments are made to Chapter VI, concerning the Bulgarian judiciary and the prosecution service. The draft amendments make several steps in the right direction.

121. Most importantly, the plenary of the SJC is abolished, and two independent councils are created, one for judges and one for prosecutors and investigators. The abolition of the plenary SJC would imply that a number of previous recommendations of the Venice Commission have been implemented. Thus, under the new system the Minister of Justice no longer chairs the Plenary SJC and the Plenary SJC no longer nominates candidates for the position of the two chief justices and the Prosecutor General. The abolition of the plenary SJC would also address the concern that the prosecutors, and the Prosecutor General in particular, are excessively involved in the governance of judges. So, dividing the SJC into two separate councils is in line with previous Venice Commission recommendations and should be welcomed.

122. Despite the disappearance of the Plenum as an institution, it is recommended to look into possible modalities for adequate contacts between the two councils aimed at exchanging information and best practices in order to prevent the isolation of the respective professions while at the same time ensuring judicial independence.

123. The composition of the SJC is in line with the recommendations of the Venice Commission. The majority of the members would be judges (ten out of fifteen), and eight judicial members would be elected from various levels of courts. The Presidents of the Supreme Court of Cassation and Supreme Administrative Court would be members ex officio. the non-judicial members would be elected by the National Assembly with a two-thirds majority, no dead-lock mechanism is provided for. It is recommended to foresee such an anti-deadlock mechanism (for which examples can be taken from the several possibilities presented previously by the Venice Commission).

124. One of the crucial components of the reform process is the legitimate attempt of a thorough transformation of the State Prosecution Service, for the purpose of improving its efficiency and accountability, as well as the functional autonomy of individual prosecutors. The removal of the functions and powers of the prosecution service outside of the criminal law sphere responds to Venice Commission recommendations. Yet, it is not in accordance with the principle of prosecutorial independence that the Prosecutor General should be an administrator rather than a prosecutor and that he be deprived of all his/her competences, and the related draft provisions should therefore be reconsidered.

125. In order to limit the concentration of powers in the institution of the Chief prosecutor and to reinforce the independence of the prosecutors, the draft amendments give a clear prevalence to members elected by Parliament, securing very little representation to the prosecutors in the Prosecutorial Council (only three members out of ten even if one includes the Prosecutor General). Although the reform aims at reversing the trend and reducing the powers and influence of the Prosecutor General, it should at the same time avoid the risk of a political influence on the prosecutorial offices and provide the Council with the expertise required to perform its tasks.

126. It is thus recommended that the composition of the Prosecutorial Council be reviewed to allow for a balanced representation of prosecutors, thus equipping the council with the professional expertise needed to carry out its functions while at the same time excluding the control of this institution by the political majority of the day and by the prosecutor service.

127. The draft Constitutional amendments at stake create a constitutional basis for specific rules on investigation of a Prosecutor General, allowing for the creation of a specific mechanism of independent prosecution, as part of the implementation of general measures required by the Committee of Ministers following the ECtHR judgments in the case of *Kolevi and others v. Bulgaria*.

128. This constitutional provision would need to be complemented by legislative arrangements on appointment, accountability, and review of the decisions of the special prosecutor which are different from the arrangements for the ordinary prosecutors, as advised in the framework of the execution of the *Kolevi* case before the Committee of Ministers. The Commission considers that the Constitution could identify the appointing body.

129. The introduction of the right of individual complaint before the Constitutional Court and of the referral of the cases by ordinary courts to the Constitutional Court is welcome, as it strengthens individual rights.

130. Other recommendations include:

- Providing anti-deadlock mechanisms for situations where the National Assembly cannot reach the 2/3 of votes for electing the members: of the SJC, of the Prosecutorial Council, of the Inspectorate as well as of the Constitutional Court to be reviewing the powers of the Minister of Justice, notably regarding his/her presence in the Councils, the power to nominate a candidate for the position of Prosecutor General and the power to propose removal from office of judges.
- Probationary periods for judges should be removed or conditions for not confirming the tenure should be narrowly defined in the law.
- The two councils should be able to nominate candidates for the respective inspectorates to the NA, and only the two councils should be able to remove them. The law should delimit clearly the powers of the inspectors, which should not encroach on the constitutional role of the two councils regarding the career and the discipline of judges and prosecutors.
- As to the functions of the SJC and Prosecutorial Council, it is recommended that they are not overburdened with pure administrative tasks.

131. Finally, it will be important to ensure co-ordination and consistency between the present constitutional amendments and other ongoing relevant legislative processes.

132. Given the fact that the draft may still undergo further changes following debates in the National Assembly, the Venice Commission is ready to revert to the matters discussed in this Opinion at a later stage, once the text of the draft has undergone further changes and the reform process has progressed.