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**COMMISSION STAFF WORKING DOCUMENT**

**BULGARIA : Technical Report**

*Accompanying the document*

**REPORT FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT AND  
THE COUNCIL**

**on Progress in Bulgaria under the Co-operation and Verification Mechanism**

{COM(2017) 43 final}

Benchmarks to be addressed by Bulgaria pursuant to Commission Decision of 13/XII/2006 establishing a mechanism for cooperation and verification of progress in Bulgaria to address specific benchmarks in the areas of judicial reform and the fight against corruption and organised crime:

Benchmark 1: Adopt Constitutional amendments removing any ambiguity regarding the independence and accountability of the judicial system

Benchmark 2: Ensure a more transparent and efficient judicial process by adopting and implementing a new judicial system act and the new civil procedure code. Report on the impact of these new laws and of the penal and administrative procedure codes, notably on the pre-trial phase

Benchmark 3: Continue the reform of the judiciary in order to enhance professionalism, accountability and efficiency. Evaluate the impact of this reform and publish the results annually

Benchmark 4: Conduct and report on professional, non-partisan investigations into allegations of high-level corruption. Report on internal inspections of public institutions and on the publication of assets of high-level officials

Benchmark 5: Take further measures to prevent and fight corruption, in particular at the borders and within local government

Benchmark 6: Implement a strategy to fight organised crime, focussing on serious crime, money laundering as well as on the systematic confiscation of assets of criminals. Report on new and ongoing investigations, indictments and convictions in these areas

## I INTRODUCTION

This technical report summarises the information on which the Commission has based its assessment of the progress made by Bulgaria to up until the current date under the Cooperation and Verification Mechanism (CVM). The analysis is based on a variety of sources. First of all, the analysis relies to a large extent on information received from the Bulgarian authorities, both in written form and through ongoing contacts and meetings. In addition, the Commission is able to draw on a wealth of analysis and independent assessment from other international institutions, civil society actors, professional organisations, other EU Member States, and experts. Commission contacts with the Bulgarian administration across the full range of EU policies also help to inform this work.

As part of the preparation of the reports, the Commission has been in close contact with the relevant government institutions and the Bulgarian judicial authorities active in the fields relevant for the CVM. These contacts also involve visits to Bulgaria by the Commission services several times a year, and in addition the Commission maintains a presence on the ground in Bulgaria.<sup>1</sup> Once a year, the Commission includes independent experts from other Member States – judges, prosecutors, anti-corruption experts – in its visits. Finally, the Commission also meets with non-governmental organisations active in the area of judicial reform and anti-corruption projects, with professional organisations of judges and prosecutors, and with representatives of the business community. This report remains the responsibility of the Commission services.

The Commission supports the efforts of Bulgaria in achieving the CVM objectives through funding under the European Structural and Investment Funds. In the 2007-2013 programming period Bulgarian judicial reforms have been supported by the European Social Fund (ESF) co-funded Operational Programme "Administrative Capacity" (OPAC) which has had as an overall objective to improve the functioning of the public administration, but also to enhance the professionalism, transparency and accountability of the judiciary.<sup>2</sup> In the current programming period (2014-2020) the ESF is providing support to the Bulgarian judicial reform efforts through the Operational Programme "Good Governance" (OPGG), which has its own Priority Axis dedicated to the judiciary-related interventions for a total amount of EUR 30.2 million, which can be allocated by Bulgarian authorities to projects promoting organisational reforms, e-justice, and training.

The CVM Commission Decision of 2006 defined six benchmarks for Bulgaria. The six benchmarks were conceived in a particular context and their concrete wording reflected the specific situation at the time. However, the underlying issues that they refer to have remained relevant in subsequent years. The first three benchmarks relate to the reform of the judicial system, including the constitutional framework (benchmark 1), the legislation (benchmark 2), and the improvement of the day-to-day functioning of the judiciary (benchmark 3). The following two benchmarks concern the fight against corruption, both high-level corruption (benchmark 4) and corruption more generally including at local level and the borders (benchmark 5). The final benchmark concerns measures to address organised crime (benchmark 6).

While previous reports have tended to focus specifically on developments in the course of the year leading up to each report, the Commission decided on this occasion to take a longer time perspective. This analysis provides the basis for a more comprehensive assessment of the state of play with regard to each benchmark in a timeframe which covers the ten years which have passed since Bulgaria's accession to the EU and the establishment of the CVM. In the following chapters, this report will be

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<sup>1</sup> The Commission has a CVM resident adviser stationed at the Commission's Representation in Sofia

<sup>2</sup> Since 2007 there have been 24 calls for the amount of 51 MEUR or 28% of the OP budget. The biggest share of the committed funds went to measures for human resources management and improvement of skills (about 27 MEUR) while the rest was split between measures related to transparency and effectiveness (8 MEUR), and e-justice (16 MEUR). Due to the budgetary restrictions of courts and the changing priorities of the Prosecution Office, only some 25 MEUR have been contracted, some 16 MEUR have been disbursed and 57 projects have been implemented.

looking back at developments in relation to each benchmark as well as the many recommendations contained in the Commission's reports over the years. While all the six benchmarks are interlinked and their fulfilment partially interdependent, the presentation below goes through each benchmark separately while focussing on the most relevant developments for each one.

## 2. INDEPENDENCE AND ACCOUNTABILITY OF THE JUDICIAL SYSTEM

*Benchmark 1: Adopt Constitutional amendments removing any ambiguity regarding the independence and accountability of the judicial system*

The first benchmark reflected concerns about aspects of the judicial system in Bulgaria expressed by the Council of Europe Venice Commission<sup>3</sup> as well as by other observers and independent experts before Bulgaria's accession to the EU. Constitutional amendments adopted by the National Assembly of Bulgaria on 2 February 2007 sought to address several of these concerns and strengthen the independence and accountability of the judiciary.<sup>4</sup> The Supreme Judicial Council (SJC) was given wide-ranging powers to manage the judiciary in regard to appointments, promotions, demotions, transfer and removal from office of magistrates as well as the management of the budget. In addition, the immunity of magistrates was limited to actions carried out when performing their official duties and an independent judicial inspectorate was created, which was to be elected by a 2/3 majority of the National Assembly and charged with the inspection of judicial bodies.<sup>5</sup> The constitutional changes of 2007 were an important step towards establishing fundamental safeguards for the independence and accountability of the Bulgarian judicial system. During the following years, the focus of the CVM therefore turned to monitor their implementation and practical application. While formal constitutional rules play a key role in setting the legal parameters of the system, their implementation and practical application as well as the evolution of institutional norms and practices are equally important for the final outcome. Formal rules can never provide a complete answer to the challenges facing the judiciary, but have to be seen in the context of the actual practice.<sup>6</sup>

This chapter provides first a general overview of the progress made by Bulgaria over the past ten years towards creating a stable system of independent and accountable judicial governance (section 2.1.). This is then followed by a summary of the most recent actions taken by Bulgaria over the past year, since the last CVM report of January 2016 (section 2.2.).

### 2.1. Overview of developments under the CVM

The 2007 constitutional reform saw a strengthening of the independent role of the SJC in governing the judiciary as well as the creation of the new judicial inspectorate. While these changes were seen as having established the essential foundations for an independent and accountable judiciary in Bulgaria, they had not fully addressed all concerns raised.

#### *Supreme Judicial Council (SJC)*

The Commission's July 2012 report<sup>7</sup> recalls that the Venice Commission had expressed reservations about the prominent role of the Minister of Justice within the SJC, as well as the large number of SJC

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<sup>3</sup> The Council of Europe's Venice Commission provides legal advice to countries in order to help bring their legal and institutional structures into line with European standards and international experience in the fields of democracy, human rights and the rule of law:

[http://www.venice.coe.int/WebForms/pages/?p=01\\_Presentation&lang=EN](http://www.venice.coe.int/WebForms/pages/?p=01_Presentation&lang=EN)

<sup>4</sup> SWD(2012) 232, p. 4.

<sup>5</sup> *Constitution of Bulgaria*, Article 132a. The Inspectorate with the Supreme Judicial Council (ISJC) is an independent institution, but it reports to the SJC on its activities and the two institutions work closely together on disciplinary and other issues.

<sup>6</sup> Bulgaria consistently figures among the EU Member States with the lowest perceived independence of justice. 2016 EU Justice Scoreboard, p. 35-36.

<sup>7</sup> COM(2012) 411, p. 11.

members elected by the National Assembly.<sup>8</sup> While the reform of 2007 has limited the role of the Minister to chairing the meetings of the SJC in a non-voting capacity and the power to present motions on some matters related to the career of magistrates, it was important to see how these powers would be exercised in practice.

As noted by the Commission in 2012<sup>9</sup>, the fact that the Minister of Justice retained a number of roles within the SJC had not in practice been highlighted at the time as a matter of concern, as successive Ministers had in general tended to leave issues of management and careers to the SJC. In more recent years, one Minister of Justice was active in regard to a limited number of decisions regarding significant disciplinary cases.<sup>10</sup> However, in these cases the Minister appeared to be acting in a capacity of last resort to correct perceived failings of the SJC to act in accordance with their responsibilities.<sup>11</sup> These cases therefore rather illustrated checks and balances at work and were not the expression of a more systematic involvement in SJC decisions by the executive power.<sup>12</sup>

While the role of the Minister therefore appeared less contentious in practice, the role of the National Assembly in electing members of the SJC has been the subject of increasing tension over the years. The SJC is composed of 25 members: 11 elected by the National Assembly, 6 elected by judges, 4 elected by prosecutors, 1 elected by investigating magistrates, in addition to the chairs of the Supreme Court of Cassation and the Supreme Administrative Court as well as the Prosecutor General, all of whom are *ex officio* members. This composition has been criticised by the Venice Commission and others on the grounds that the significant parliamentary quota could create a risk of political influence within the SJC.<sup>13</sup> In addition, the procedure for electing judicial members of the SJC has in the past taken the form of indirect elections, a method which was seen as giving a prevalent role for court presidents in the selection of candidates. The July 2012 CVM report set out how the Commission had recommended the use of direct election in 2012.<sup>14</sup>

Concerns about alleged undue influence on the decisions of the SJC have been a prominent theme in successive CVM reports<sup>15</sup> and were given additional weight by separate concerns about non-transparent decision-making, an issue which was partly linked to the lack of a proper separation of competences with regard to judges and prosecutors within the Council. According to critics, there was at least a perceived risk that undue influence could be exerted on judges in a context where the quota of judges elected by their peers constituted only a small minority within the overall college of the SJC.<sup>16</sup> These concerns were nourished by a lack of transparency and in some cases perceived arbitrariness in the decisions of the SJC on appointments and disciplinary proceedings.<sup>17</sup>

In 2015 new amendments to the Constitution were brought forward by the Government to address these concerns. The objective was to further strengthen judicial independence through the creation of two separate chambers within the SJC, which would deal separately with career decisions for judges and prosecutors. Following a prolonged period of political negotiations, a compromise was reached and the amendments were adopted by the National Assembly on 16 December 2015. In addition to the establishment of two separate chambers within the SJC, the final package of amendments included provisions to abolish the rule that votes in the SJC on staff matters were to be kept secret, while also

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<sup>8</sup> Opinion no. 444/2007 on the Constitution of Bulgaria (CDL-AD(2008)009)2 See also Opinion no. 515 / 2009.

<sup>9</sup> SWD(2012) 232, p. 5.

<sup>10</sup> SWD(2016) 15, p. 8.

<sup>11</sup> In several of these cases the Minister acted in tandem with the Chair of the Supreme Court of Cassation and in some case was supported on appeal by rulings of the Supreme Administrative Court.

<sup>12</sup> This also has been confirmed by the fact that the next Minister of Justice did not take an active role in any new cases.

<sup>13</sup> SWD(2012) 232, p. 5.

<sup>14</sup> COM(2012) 411, p. 5.

<sup>15</sup> See e.g. COM(2016) 40, p. 3.

<sup>16</sup> The Bulgarian Judges Association has been particularly vocal in this regard.

<sup>17</sup> COM(2016) 40, p. 7.

introducing a 2/3 majority rule for the election of SJC members by the National Assembly and requiring direct elections of the judicial quota of the SJC on a one-magistrate one-vote basis.<sup>18</sup> The two separate chambers within the SJC are competent to deal with staff matters<sup>19</sup> pertaining to respectively judges and prosecutors as well as matters concerning the organisation and operation of the respective judicial bodies (courts and prosecutor's offices). The plenary of the SJC remains competent as regards the nomination of the Supreme Court Presidents and the Prosecutor General<sup>20</sup>, release from office of a member of the SJC itself, the draft budget of the judiciary, management of physical premises, judicial training, and organisational matters common to the judiciary as a whole.<sup>21</sup>

The separation of career matters in two separate chambers was aimed at addressing the perceived vulnerability of judges to undue pressure through the SJC. However, concerns over the possible constitutional implications of a more far reaching change meant that the overall composition of the SJC was left untouched, with the political quota elected by the National Assembly retaining its 11 members. The distribution of this political quota between the two chambers proved a contentious issue at the final stage of the parliamentary process and was eventually decided through last minute changes to the amendments before the final vote, which saw an increase of the political quota in the judges' chamber and a reduction in the prosecutorial chamber compared to what was set out in the original compromise.<sup>22</sup> The judges' chamber now consists of 14 members, including the Presidents of the two Supreme Courts, 6 judges elected by their peers, and 6 members elected by the National Assembly. The prosecutorial chamber in turn consists of the Prosecutor General, 4 prosecutors elected by their peers, an investigating magistrate elected by the peers, and 5 members elected by the National Assembly.<sup>23</sup> The two chambers are chaired by the President of the Supreme Court of Cassation and the Prosecutor General respectively, whereas the plenary continues to be chaired by the Minister of Justice in a non-voting capacity.<sup>24</sup>

The final outcome was criticised by parts of the magistracy and civil society and also by the then Minister of Justice for not sufficiently protecting the judges against political influence, while at the same time failing to provide a sufficient counterweight in the prosecutorial chamber to the Prosecutor General's role as the managerial head of the prosecution.<sup>25</sup> However, the package of Constitutional amendments as a whole was recognised, including in the Commission's 2016 report<sup>26</sup>, as an important step towards a more independent and accountable judiciary. Following the vote on the constitutional amendments in December 2015, the changes were implemented in legislation through amendments to the Judicial Systems Act, and the two chambers were established within the SJC in spring 2016.

#### *Inspectorate to the SJC (ISJC)*

The second main institutional innovation introduced with the 2007 constitutional amendments was the establishment of an independent judicial Inspectorate with the SJC (ISJC), which was granted powers to inspect all judicial bodies, including courts, prosecution offices and the investigating services attached to the prosecution offices.<sup>27</sup> The ISJC was established on 16 January 2008. It consists of an Inspector General and ten Inspectors, elected by a 2/3 majority in the National Assembly, and is

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<sup>18</sup> SWD(2016) 15, p. 6.

<sup>19</sup> These include appointments, promotions, release from office, appraisals, tenure, disciplinary matters for ordinary magistrates as well as for heads of courts and prosecutor's offices.

<sup>20</sup> The Chairs of the Supreme Court of Cassation and the Supreme Administrative Court as well as the Prosecutor General are appointed by the President of the Republic on a motion of the SJC.

<sup>21</sup> The Constitution of the Republic of Bulgaria, Article 130a.

<sup>22</sup> SWD(2016) 15, p. 5.

<sup>23</sup> *The Constitution of the Republic of Bulgaria*, Article 130a.

<sup>24</sup> *The Constitution of the Republic of Bulgaria*, Article 130b.

<sup>25</sup> The Minister of Justice resigned from office following the vote in the National Assembly.

<sup>26</sup> COM(2016) 40, p. 3.

<sup>27</sup> These are composed of investigating magistrates and form part of the judiciary.

competent to act *ex officio* as well as on alerts from citizens or public institutions.<sup>28</sup> The detailed provisions are set out in the Judicial System Act.

The ISJC is supported by an expert staff, carries out planned and ad hoc inspections, and issues recommendations to court managers and other institutions, including proposals to the SJC on the opening of disciplinary proceedings in cases where serious malpractice is identified during its inspections. It publishes an annual report on its activities. In 2010 a joint *Commission on the analysis and follow-up to the ISJC recommendations* was set up within the SJC to ensure greater visibility and to follow up on the findings of the ISJC. CVM reports have generally recognised the positive contribution of the ISJC towards improving judicial discipline and accountability, while also encouraging it to develop its activities further in the direction of addressing systemic problems within the judiciary.<sup>29</sup>

The 2/3 majority requirement for the election of the inspectors by the National Assembly should ensure that the inspectorate enjoys the support of a wide political majority. However, the election of the Inspector General proved to be a challenge when the mandate of the first incumbent ended in 2012 without there being an agreement on a successor. As highlighted in the Commission's 2015 report, for an extended period of time this deprived the ISJC of the authoritative and independent leadership with which it had been endowed by the Constitution.<sup>30</sup> Eventually, however, the impasse was overcome, resulting in the election of a new Inspector General in spring 2015, followed by a new college of Inspectors in 2016.

In the context of the constitutional reform of December 2015 it was decided to strengthen the ISJC by granting it additional competencies with regard to the performance of checks for integrity, conflicts of interest and financial disclosure of judges, prosecutors and investigating magistrates, as well as for ascertaining actions damaging the prestige of the judiciary or violating the independence of magistrates.<sup>31</sup> These new provisions entail a significant increase in the responsibilities of the ISJC. Detailed legislative provisions were inserted in the Judicial System Act during Spring 2016 and came into effect in January 2017.

## **2.2. Developments since the last CVM report of January 2016**

In its 2016 CVM report, the Commission recommended Bulgaria to implement the reform of the SJC through amendments to the Judicial Systems Act (JSA), to develop a track record within the SJC of transparent appointments based on merit and integrity, and to provide the ISJC with the authority and resources to fulfil its new role safeguarding integrity within the judicial system. These elements were taken up by the Bulgarian government in the context of a wider judicial reform, which involved two separate legislative packages of amendments to the JSA adopted by the National Assembly and promulgated in April and August 2016.

### *Reform of the SJC*

The first package of JSA amendments concerned the reform of the SJC. The amendments introduce the two chambers for judges and prosecutors in line with the new provisions of the Constitution. They also define more in detail the organisational implications of this in terms of a new structure of sub-committees, most notably in regard to personnel issues where separate committees are established in each of the two chambers respectively for appraisals and competitions and for ethics.<sup>32</sup> The JSA amendments also clarify the voting rules in relation to personnel matters, such as appointments,

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<sup>28</sup> *The Constitution of the Republic of Bulgaria*, Article 132a.

<sup>29</sup> See e.g. COM(2012) 411, p. 7.

<sup>30</sup> COM(2015) 36, p. 4. In the absence of a successor, the incumbent stayed in the post until autumn 2013, after which the post remained vacant for 1 ½ year.

<sup>31</sup> *The Constitution of the Republic of Bulgaria*, Article 132a, para 6 as amended.

<sup>32</sup> JSA, Article 37.

promotions, appraisals, granting of tenure, and disciplinary sanctions.<sup>33</sup> In such matters decisions are taken by an absolute majority of 8 votes in the judicial chamber (14 members), 6 votes in the prosecutorial chamber (11 members), and a qualified majority of 17 votes in the plenary (25 members).<sup>34</sup> Other decisions are taken by a simple majority. A new provision also specifies that, as a rule, meetings of the SJC are public and shall be streamed live on the internet.<sup>35</sup> It confirms that all decisions are to be taken by open ballot, whereas before the decisions on personnel matters were taken by secret voting.<sup>36</sup> The increased transparency of decisions and votes within the SJC allows for closer scrutiny of such decisions by the public and interested stakeholders.

Since the reorganisation, the two chambers have decided on a number of organisational matters and personnel issues. While the reform has brought more transparency in the functioning of the SJC, the changes have not been successful in significantly diminishing the level of controversy surrounding it or in dispelling allegations of undue influence on its decisions. In the judicial chamber, the decision-making process has revealed strong tensions among the members. In some cases the judicial chamber has not been able to reach the required majority to decide on key appointments. Even when successful, decisions have often been taken in the context of a strongly divided chamber, with narrow votes even in cases where there was only a single candidate for the post, and in one case the chosen candidate has been the cause of wider controversy on integrity grounds.<sup>37</sup> There have however also been examples of unanimous decisions on high-level appointments.<sup>38</sup> In the prosecutorial chamber, in turn, decisions have generally seen less overt controversy but have, on the contrary, generally been taken unanimously or nearly unanimously, often with only one candidate for the post.

On 9 December large numbers of judges took to the streets of Sofia in protest against the allegedly unbalanced approach taken by the SJC in regard to working conditions in the Sofia courts. The leadership of the Sofia Regional Court, supporting the protests, decided to resign. These protests followed an SJC decision the previous day to launch inspections of the Sofia City Court and the Sofia Regional Court, based on an alert from the Prosecutor General about delays in the processing of cases within the two courts. However, judges contend that the delays are the result of years of inactivity on the part of the SJC in dealing with excessive workload in the two courts and that the decision to launch the two inspections effectively constitutes an interference by the Prosecutor's Office into the internal affairs of the courts.<sup>39</sup> These allegations reflect continued strong concerns among judges about politicisation of the decisions of the SJC.<sup>40</sup>

The amendments to the Constitution of December 2015 also contained important changes to the way the SJC members will be elected in the future. These rules were further elaborated in amendments to the JSA in April 2016, which, in addition to specifying the detailed procedures for the direct election of the respective quota by the general assemblies of the judges, prosecutors and investigating magistrates, also introduce some additional changes to the procedure for election of the political quota

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<sup>33</sup> JSA, Article 33.

<sup>34</sup> The plenary is competent for issues related to the Presidents of the supreme courts and the Prosecutor General as well as for members of the SJC.

<sup>35</sup> Very limited exceptions exist, such as when discussions concern proposals for disciplinary sanctions.

<sup>36</sup> The SJC continues to use an electronic voting system but the votes are recorded and made accessible via a link inserted in the summary records of each meeting on the SJC website.

<sup>37</sup> In one case the Bulgarian Judges Association issued an open letter regretting the lack of scrutiny regarding corruption allegations concerning the chosen candidate, as well as the fact that "regardless of the existing legal guarantees for exercising of the powers of the Supreme Judicial Council in an open and responsible manner, this body and in particular its Judges College continue to take non-transparent and suspicious-looking decisions" (Bulgarian Judges Association, Open Letter, 7 June 2016).

<sup>38</sup> One such example was the appointment in January 2017 of the president of the Specialised Court for organised crime, where the incumbent was the only candidate and was unanimously reappointed.

<sup>39</sup> On the same day, the SJC also decided to launch disciplinary proceedings against a prominent member of the Bulgarian Judges Association working at the Sofia City Court citing delays in dealing with cases.

<sup>40</sup> The Bulgarian Judges Association has published a series of open letters in the course of 2016 highlighting allegedly problematic practices of the SJC.

by the National Assembly. The nominations are examined by a committee within the National Assembly and shall be accompanied by "detailed reasons in writing on the professional standing and moral integrity of the candidates, including opinions expressed by professional, academic and other organisations".<sup>41</sup> After hearing each candidate, the competent committee shall prepare and publish a similarly "detailed and reasoned" report and thereby present each candidate for the vote in the plenary of the National Assembly.<sup>42</sup> The plenary of the National Assembly shall elect each member of the SJC separately, by a majority of 2/3 of the National Representatives.<sup>43</sup> As for the non-parliamentary quota, the new JSA provisions adopted in April 2016 clarify in detail the procedures through which members "shall be elected directly by secret ballot by the judges, by the prosecutors and by the investigating magistrates, respectively".<sup>44</sup> The procedures for the election of the SJC will be applied for the first time in 2017, as the mandate of the current SJC ends in the early autumn.<sup>45</sup>

### *Inspectorate of the SJC (ISJC)*

The other major change that was brought about by the constitutional amendments of December 2015 concerned the role of the ISJC. The Inspectorate is responsible for examining the operation of the judicial authorities without affecting the independence of judges, jurors, prosecutors and investigating magistrates in the performance of their functions. In accordance with the new constitutional provisions, the ISJC will in future conduct checks for integrity and conflict of interest of judges, prosecutors and investigating magistrates, of the financial interest disclosure declarations, as well as for ascertaining any actions damaging the prestige of the judiciary or violating the independence of judges, prosecutors and investigating magistrates.<sup>46</sup>

The very general formulations in the Constitution gave rise to difficult discussions in the context of preparing the legislative amendments to the JSA in 2016. Eventually, the relevant provisions were included in the August package. The key provisions have entered into effect only in January 2017, so as to give time for the ISJC to adopt implementing rules and establish the necessary organisational capacity to carry out these new and complex tasks. The ISJC itself submitted several written opinions to the Ministry of Justice in the course of the negotiations, insisting in particular on the need for clear procedures and rules set out in the law, as well as allocation of sufficient resources for the task.<sup>47</sup>

The new provisions on the ISJC and its activities related to the above-mentioned tasks span several chapters of the amended JSA.<sup>48</sup> They specify that judges, prosecutors and investigating magistrates shall submit to the ISJC a declaration of personal property and interests. Within one month of the expiry of the deadline for submission of declarations, the ISJC shall upload the declarations on its website, together with a list of magistrates (if any) who failed to submit their declarations within the deadline. Within 3 months of the deadline for submission of a declaration, the ISJC shall verify the authenticity of declared facts. Broad powers were granted to ISJC for access to sources of information regarding the circumstances subject to declaration in order to ensure effective control over Bulgarian magistrates' property. The inspection is performed through comparing declared facts with the received information and ends in a report on compliance or non-compliance.

The ISJC will in future also be called upon to perform integrity checks and to establish actions undermining the prestige of the judiciary or violating the independence of magistrates so as to ensure

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<sup>41</sup> JSA, Article 19. The pre-existing procedure already required the provision of documents related to educational and professional attainment and incompatibility requirements.

<sup>42</sup> JSA, Article 19a.

<sup>43</sup> JSA, Article 19b.

<sup>44</sup> JSA, Article 20. The procedures are set out in detail in Section 1a of the JSA.

<sup>45</sup> Elections for the judicial quota will take place during spring and the members of the political quota should be elected by the National Assembly over the summer.

<sup>46</sup> Constitution, Article 132a.

<sup>47</sup> Information provided by the ISJC.

<sup>48</sup> Chapter 3, section III (ISJC powers) and Chapter 9, sections Ia (verification of financial interests) and Ib (integrity, conflicts of interest, actions damaging the prestige of the judiciary, impairment of independence).

compliance with the principles laid down in the Code of Ethics. Checks can be initiated upon an alert<sup>49</sup>, on request of the magistrate concerned or ex officio by the ISJC. Checks are performed within two months from registering the alert and result in the drawing up of a reasoned report. In the course of inspections data relevant to the subject of the inspection shall be collected, and the inspected person shall be heard. The reports are adopted by the college of the Inspectorate and can result in a proposal to the respective chamber of the SJC for a conflict of interest to be ascertained and/or disciplinary proceedings to be instituted.<sup>50</sup> The ultimate decisions for disciplinary and other consequences are therefore taken by the SJC, based on analysis prepared by the ISJC.

### 3. LEGAL FRAMEWORK

*Benchmark 2: Ensure a more transparent and efficient judicial process by adopting and implementing a new Judicial System Act and the new Civil Procedure Code. Report on the Impact of these new laws and of the Penal and Administrative Procedure Codes, notably on the pre-trial phase.*

The second benchmark focuses on the legal and procedural framework of the judicial system. The Judicial System Act (JSA) is the fundamental law governing the judiciary, setting out the institutional structures and division of competences between the various parts of the judiciary. The procedural codes in turn are crucial for the functioning of the various judicial bodies. Together these legal frameworks have an important bearing on the transparency and effectiveness of the judicial process. Stability and coherence of the legal framework is a precondition for a properly functioning judiciary.

While legislation is a crucial topic of its own, it is also necessary to consider it in context, taking into account the way it is implemented in practice. This benchmark is therefore closely linked to benchmark 3, which is discussed in the next chapter. However, the formulation of a separate benchmark on legislation underlines the importance that was attached to the need for continued attention to be paid to the legal framework at the time of the accession. This reflected concerns over the ability of courts to deal with cases in a timely and transparent manner in a context of complex procedural rules. Special emphasis was given to the procedural rules governing pre-trial investigations in criminal cases, an issue which is closely related to benchmarks 4 and 6 concerning investigations into high-level corruption and organised crime. This reflects concerns at the time that the complex procedures in these areas were hampering an effective law enforcement response.

#### 3.1. Overview of developments under the CVM

The years following Bulgaria's accession to the EU have seen a number of legislative amendments being enacted in order to address the CVM benchmarks. Some of these concerned the JSA, with amendments to implement the above mentioned constitutional changes affecting the SJC and the ISJC as well as to clarify broader issues in the functioning of the judicial system. Others have been directed towards improving the various procedural laws.

##### *Judicial System Act (JSA)*

In the immediate aftermath of accession in 2007 a new JSA was adopted in order to promote reform within the judiciary. The new law contained important improvements in addition to the strengthened independent role of the SJC and the establishment of the ISJC. The system of competitions for appointment to judicial offices was introduced, the principle of random allocation of cases in courts was prescribed in the law, and the National Institute of Justice was established as the central institution responsible for the training of magistrates. The JSA was amended several times over the following years. Amendments in 2009 clarified the rules on the establishment of disciplinary panels within the

<sup>49</sup> Anonymous alerts are not admissible, but the ISJC is required to put in place procedures to ensure strict confidentiality of both the whistle-blower and the affected magistrates in the course of the proceedings.

<sup>50</sup> After the entry into force of a decision establishing a conflict of interest, proceedings will also be launched for the inspection of the property status of the magistrate in question.

SJC and gave the ISJC powers to appeal disciplinary decisions of the SJC. Subsequent amendments in 2010 improved the framework for appraisals within the judiciary *inter alia* by establishing permanent appraisal commissions within individual courts and prosecutor's offices. The 2010 amendments also further extended the managerial powers of the SJC. As noted in the Commission's 2012 report, the SJC had by then been vested with all relevant powers to properly manage human resources and judicial structures for the benefit of judicial efficiency.<sup>51</sup> In 2012 the law was amended again to introduce further transparency in the procedures for the selection of members of the SJC.<sup>52</sup> While several improvements had therefore been made in the first years after accession, the debate continued, pointing to a need for further changes.

In 2015 preparations were launched on yet another broad legislative reform, initiated in the context of a judicial reform strategy which had been prepared by the Minister of Justice and adopted by the government at the end of 2014, and endorsed with broad majority by Parliament at the beginning of 2015. This wide-ranging reform of the JSA was adopted in the summer of 2016 after more than a year of extensive consultations with judicial bodies and other relevant stakeholders.<sup>53</sup>

### *Criminal procedure*

A new criminal procedure code entered into force in 2006, but the new law retained important elements of the previous system. As a result, what has been widely seen as an overly formalistic procedural tradition was perpetuated, with serious consequences for effective justice. Past CVM reports have referred to the challenges faced by Bulgarian prosecutorial and investigatory bodies under the existing criminal procedure code and their consequences in terms of hampering effective investigation and prosecution, notably in the context of especially complex cases related to high-level corruption or organised crime.<sup>54</sup> These concerns have increasingly come to the fore again in recent years, as reported in meetings with Bulgarian authorities. Concrete problems reported by Bulgarian pre-trial authorities include complex rules for the collection of evidence during the pre-trial stage and strict requirements for the content of indictments, which contribute to frequent referrals from the court back to the prosecution for further investigation. These challenges cause long delays in trials and complicate the pre-trial procedure, eventually leading cases to fail, partly due to statutory time-limits being reached or, more frequently, by a lack of evidence for key elements of the charges.

The new criminal procedure code of 2006 was reported to have a limited positive effect, but did not entirely address the challenges. A number of further amendments were made to the criminal procedure code during the following years. In particular, amendments in 2010 extended the investigatory powers of the police<sup>55</sup>, clarified rules on accessibility of evidence, allowing certain categories of police officers to testify in court, and introduced a provision allowing prosecutors to appeal court decisions which referred cases back for further investigation. Stricter requirements for medical certificates and a possibility for courts to assign reserve defence counsels were also introduced to deal with a widespread problem of absenteeism of defence lawyers.<sup>56</sup>

The 2010 reform also established a specialised court and prosecutor's office with jurisdiction over cases involving organised crime, which became operational in 2012. While initially, the specialised court was intended to also deal with high-level corruption cases, this element was not accepted by

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<sup>51</sup> COM(2012) 411, p. 8.

<sup>52</sup> A new membership was selected in 2012. The rules underwent a thorough reform again in 2016, as also referred to above in chapter 2.

<sup>53</sup> See section 3.2 below.

<sup>54</sup> COM(2008) 495, p. 4-5; COM(2011) 459, p. 8; COM(2012) 411, p. 9.

<sup>55</sup> Previously the investigation of many serious crimes was carried out by investigating magistrates. These still exist and continue to be responsible for certain categories of investigations. There are still around 500 such investigators, around 100 in the National Investigation Service, operating directly under the Prosecutor General, and another 400 or so within investigation departments of the 28 District Prosecutor's Offices, the Sofia City Prosecutor's office, and the Specialised Prosecutor's Office for organised crime.

<sup>56</sup> SWD(2012) 232, p. 10.

Parliament. Corruption cases therefore remained within the remit of the general courts.<sup>57</sup> The amendments of 2010 have had some positive impact but did not deal with the more fundamental aspects of the formalistic criminal procedures.<sup>58</sup>

### *Penal Code*

A closely related topic concerns the penal code, which as stated in the Commission's report of February 2008, "*does not differentiate sufficiently between different degrees of crime and appears structurally outdated*".<sup>59</sup> The Bulgarian penal code dates from 1968 and while it has been amended several times, some practitioners and experts have pointed to the need for a thorough reform, if not a complete replacement, of the code.

Among the issues raised are the existence of apparent inconsistencies in levels of sanctions between offences, the presence of offences which are less relevant in today's environment or which could be better addressed through administrative sanctions, and the formulation of offences in some areas – such as corruption related crimes – that are not well adapted to the types of crime faced by law enforcement authorities in today's Bulgarian society. Over the past ten years, there have been numerous amendments of the code, some reflecting ad hoc issues on the political agenda<sup>60</sup> and others reflecting European or international commitments by Bulgaria.<sup>61</sup> However, attempts at a more thorough and systematic reform of the penal code have proved elusive. In 2009 the Bulgarian government adopted a new concept of criminal policy, which was meant to point the way for a reform of the penal code. Preparations were launched in cooperation with technical experts and stakeholders, leading to the publication of a new draft of the general part of the code in 2012, while working groups continued working on the specific parts of the code.<sup>62</sup>

These initially promising efforts were continued over the subsequent years, leading to the publication of a complete draft for a new penal code in spring 2014. However, while the need for a new code was strongly supported by the prosecutor's office and other stakeholders, the draft received criticism from other parts of the judiciary, including the Supreme Court of Cassation, and faced opposition in the National Assembly. Due to the dissolution of the National Assembly in July 2014, the draft was never voted on, and the following government, entering into office in November of the same year, decided not to pursue the adoption of the law. Instead a new reflection process was initiated with a view to the development of a penal policy which could clarify the extent to which a root-and-branch reform of the code was needed, or whether efforts should rather focus on more targeted amendments of the existing code.<sup>63</sup>

### *Civil and Administrative procedures*

A revised civil procedure code was adopted in 2007 with the objective of speeding up proceedings and improving enforcement of court decisions. The new provisions have been monitored by the ISJC, which has been able to give recommendations to court management and refer cases of contradictory jurisprudence to the supreme courts for adjudication. The new code appears to have had a positive effect in terms of speeding up procedures. Although delays remain a significant problem in some courts this appears not primarily to be linked to problems in the procedural code.<sup>64</sup>

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<sup>57</sup> Cases related to ministers, members of parliament, magistrates and other immunity holders are within the competence of the Sofia City Court.

<sup>58</sup> See chapters 4, 6 and 7 below for further details on challenges hampering criminal investigations in Bulgaria.

<sup>59</sup> COM(2008) 63, p. 4.

<sup>60</sup> A recent example is the proposals for a dramatic increase in penalties for driving speed offences in 2016.

<sup>61</sup> Examples are the introduction of new provisions on terrorist offences in 2015 and revision of some corruption offences in light of GRECO recommendations in 2015.

<sup>62</sup> SWD(2012) 232, p. 9.

<sup>63</sup> SWD(2015) 9, p. 9-10; SWD(2016) 15, p. 11-12.

<sup>64</sup> This should be seen in the wider context of management of workload within the judiciary, see chapter 4.

Amendments of the administrative procedure code were adopted in 2007 and in 2011 in order to improve proceedings and re-organise the first-instance jurisdiction in a number of administrative cases from the Supreme Administrative Court to the district administrative courts.<sup>65</sup> Early evaluations of the impact of the reform concluded that the changes had been positive, although there were also some elements which could require further improvement.<sup>66</sup> One of the challenges raised by the Bulgarian authorities as well as by independent experts relates to the role of the Supreme Administrative Court as both first and final instance court with jurisdiction for a great number of government decisions, including not only ministerial decisions and decisions of the SJC but also decisions of a number of agencies, where jurisdiction has been set out in legislation.<sup>67</sup> This situation for example can create challenges in regard to the management of court panels within the Supreme Court to deal with the same cases both at first instance and in appeal as well as with cases appealed from the regional administrative courts, as well as in the application of random allocation of cases.

### **3.2. Developments since the last CVM report of January 2016**

In its 2016 CVM report the Commission recommended Bulgaria to adopt amendments to the Judicial System Act and a reform of criminal policy in line with the government's judicial reform strategy, and to prepare a set of targeted amendments to address problems in criminal procedures. These elements were all taken up by the government in 2016, although with varying degree of progress made in the course of the year.

#### *Judicial System Act*

In 2016 the Bulgarian Parliament adopted a broad package of amendments to the Judicial System Act. Elements have already been referred to above as they relate to the implementation of the constitutional amendments of December 2015. In addition to this, the package amounts to a broad reform of key elements of judicial management: extending the role of judges in the internal governance in courts, decentralising some aspects of the organisation of prosecutor's offices, improving the system of career development for magistrates, and clarifying the rules on secondments, appointment of lay judges, and disciplinary proceedings, among other changes.

One important aim of the reform is to provide the opportunity for individual judges to take a more active part in the governance of their courts, for example by giving them a bigger say in the process of appointing court chairs. General assemblies within each court are given the competence to formally nominate candidates for administrative head of the relevant court and to hear all candidates. While the final decision remains with the SJC, this new procedure is seen by its proponents as an important element of democratic governance within the judiciary.<sup>68</sup> It is in line with the CVM recommendation of 2016 in favour of "reforms to give more say to individual judges and prosecutors".<sup>69</sup> Furthermore, the new powers of court general assemblies include: hearing the candidates for deputy chairs, nominated by the court chair, and expressing an opinion on the nominations; determining the number and composition of the divisions within the court, if any, and their specialisation by subject matter; discussing the annual report on the court's activity; and giving opinions on matters related to the working arrangements of the court.

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<sup>65</sup> Bulgaria has 28 administrative courts covering the provinces and a single Supreme Administrative Court located in Sofia, acting as appeal instance as well as first instance in some cases.

<sup>66</sup> SWD(2012) 232, p. 12.

<sup>67</sup> For example, disciplinary decisions of the SJC, if appealed, are first heard by a three judge panel of the SAC but can subsequently be appealed further to a five-judge panel.

<sup>68</sup> In connection with the procedure for election of the chair of the Supreme Court of Cassation in 2014, judges at that court organised informal hearings of the respective candidates, a practice which became recognised and extended to other courts under internal rules enacted by the SJC at the time. However, the fact that the procedure was not recognised in law meant that the status of these hearings remained unclear (SWD(2015) 9, p. 5-6).

<sup>69</sup> COM(2016) 40, p. 11.

The JSA amendments also contained amendments to clarify the internal organisation and strengthen the external accountability of the Prosecutor's Office.<sup>70</sup> The amendments specify that prosecutors and investigating magistrates are to be directed by the administrative heads of their respective prosecutor's offices, which in turn refer to the Prosecutor General. The Prosecutor General is directly responsible for the organisation of the supreme prosecution offices and the national investigation service, including the appointment of staff in these bodies. Furthermore, he supervises and provides methodological guidance for the work of all prosecutors and investigators through written instructions, and also directs the internal control activities within the prosecution service, which includes performance evaluation, disciplinary procedures, monitoring of activity, ensuring the dissemination of best practices, and ensuring implementation of priorities.

Each year the Prosecutor General presents an annual report on the operation of his services. The report is made public and is to be the subject of a hearing at the SJC as well as a general debate at the National Assembly.<sup>71</sup> With regard to the autonomy of individual prosecutors, while prosecutors work under the supervision of their superiors and their decisions may be revoked by a reasoned decision of a superior prosecutor's office, a new provision seeks to ensure that "verbal orders and directions in connection with work on cases and case files shall be inadmissible". Furthermore, a prosecutor whose decisions are revoked by a superior may lodge an objection with a superior prosecutor's office.<sup>72</sup>

Amendments are also introduced with regard to the preparation of decisions within the SJC on appraisals and promotions, including the introduction of additional criteria for the appraisal of judges and prosecutors.<sup>73</sup> Furthermore, a centralised committee is set up in connection with each chamber of the SJC, composed of members of the respective chamber of the SJC, as well as members selected from among active magistrates, which are appointed for a one-year term by the general assemblies of the supreme courts and of the supreme prosecutor's offices and national investigation service.<sup>74</sup> The committees for appraisals and competitions, together with the committees on ethics, will play a key role in preparing decisions of the two chambers on personnel issues.<sup>75</sup>

The ethics committees are charged with conducting enquiries and with drawing up opinions regarding the moral integrity of candidates for judicial offices, including future heads and deputy heads of courts and prosecutor's offices. The committees on appraisals and competitions in turn will draft proposals for the consideration of the respective chambers of the SJC on appointments and promotions and other personnel matters. In regard to disciplinary proceedings, the ability of the members of the SJC to initiate such proceedings for ordinary magistrates is abolished. Disciplinary proceedings are instituted by a decision of the SJC at the proposal of the immediate administrative head, a superior administrative head, the ISJC or the Minister of Justice.<sup>76</sup>

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<sup>70</sup> JSA, Articles 136 ff.

<sup>71</sup> JSA, new Article 138a.

<sup>72</sup> JSA, Article 143.

<sup>73</sup> JSA, Article 199.

<sup>74</sup> The candidates need to have the rank of magistrates of these institutions, but several of the chosen members were sitting judges in lower courts. Heads and deputy heads are excluded. The external members were chosen in the course of the spring and summer. Following some discussion on the merits of part time versus full time members, it was decided that sitting magistrates elected to the committee will be relieved of other tasks during their one-year tenure.

<sup>75</sup> This will also include the development of general methodologies, for example on performance assessment of magistrates.

<sup>76</sup> JSA, Article 312. Previously, five members of the SJC could initiate a disciplinary procedure, which raised questions about the impartiality of the process, as the same members could subsequently sit on the disciplinary panels and also take part in the final vote when the decision was taken in plenary on the disciplinary sanction, something which happened often in the past. The possibility of members to initiate proceedings is retained however with regard to members of the SJC itself, in which case five members of the plenary or three members of the respective college is required. In addition, the new provisions allow 1/5 of

## *Criminal procedures and penal code reform*

In 2016 a package of draft amendments to the criminal procedure code was prepared in a working group involving experts of the Supreme Court of Cassation and the Prosecutor's Office. Among other issues, these draft amendments are intended to address the problem of frequent referrals of cases back to the prosecution on procedural grounds. It is proposed to introduce a separate preliminary hearing at the first instance court in which any procedural violations during the pre-trial phase are to be finally identified and corrected. Following the preliminary hearing, it would no longer be possible for the court to refer the case file back to the prosecution, which should discipline both the prosecution and the defence at an early stage of the procedure.

Under the current rules, cases reportedly tend to be allowed to continue to court and even to the appeal stage in spite of the presence of procedural or other flaws, although both parties know that raising the issues at a later stage can oblige the court to refer the case back to the prosecution with instructions for correction of the errors found.<sup>77</sup> Such referrals constitute one important explanation for delays in criminal cases. Moreover, besides the delay itself, this phenomenon is also seen as a possible reason for cases to fail in court, as the late discovery of flaws in the initial construction of an indictment by the prosecutor or in the conduct of the investigation can often be difficult to remedy at the time when the issue is eventually raised, which may even happen several years later during the proceedings at the appeal instance. As could be expected, the problem of cases being returned by the court is particularly serious in regard to complex cases such as those involving corruption and organised crime.<sup>78</sup>

Another significant element of the proposals concerns the inclusion within the jurisdiction of the Specialised Court and Prosecutor's Office for Organised Crime of high level corruption cases involving ministers, members of parliament, magistrates, and incumbents of certain other high level offices. The stated objective is to ensure a higher degree of specialisation of competence in high level cases<sup>79</sup>, while leaving other corruption cases with the general courts and prosecutor's offices. However, some observers were critical of the proposals which were not seen as being based on a proper prior assessment and debate.<sup>80</sup> Further amendments aim at simplifying procedures for the investigation of less serious crimes, more flexible rules for the application of expedited procedures in complex cases<sup>81</sup>, new possibilities for remote questioning of expert witnesses by phone or video

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the members of the National Assembly and 1/5 of sitting judges, prosecutors or investigating magistrates to propose the release of office of a member of the SJC from the political and judicial quota respectively.

<sup>77</sup> An analysis carried out by the Prosecutor's Office shows that in more than 60 per cent of the cases where the file was returned by the courts to the prosecution in 2015, the decision was due to errors during the pre-trial investigation or deficiencies in the preparation of the indictment, which were largely obvious, or caused problems during the trial which were to a great degree predictable, and which could have been avoided by meticulous work on the part of the investigating authorities and the supervising prosecutor. Around 10 per cent of the cases were in turn due to the court deviating from the prevailing case law, setting unjustified requirements or applying excessive formalism. Annual report of the prosecutor's office for 2015, p. 9-10 (English translation).

<sup>78</sup> Almost one-third of organised crime cases and almost one-fifth of corruption cases brought to court in 2015 were returned by the court for correction of procedural or formal errors in the indictments. *Op cit.*, p. 52.

<sup>79</sup> Most of these cases are currently with the jurisdiction of the Sofia City Court (competent for all criminal cases against government ministers and holders of immunity including MPs, magistrates, etc.) or with the general courts (all other cases), unless they involve an element of organised crime, in which case the Specialised court is competent.

<sup>80</sup> Civil society organisations criticised the timing of the proposals, without any impact assessment or further analysis, only two months prior to the finalisation of a major evaluation of the Specialised Court for organised crime by the Supreme Court of Cassation. Ultimately, the said evaluation proved to be critical of the specialised court in several respects (see also chapter 7 below).

<sup>81</sup> Under Chapter 26 of the Criminal Procedure Code, if the case is still under investigation after two years, the defence can ask for the court to set a deadline for the prosecutor to bring the case to court. Failing this, the case is closed. Currently the deadline is invariably three months and the court has no discretion on this. The amendments to this provision reportedly aim to give the court some discretion in light of an assessment of the circumstances surrounding the concrete case.

conference, more clarity about deadlines for publishing the reasoning for court decisions, stronger safeguards for the presumption of innocence during pre-trial proceedings<sup>82</sup>, and swifter execution of decisions of the Supreme Court of Cassation involving prison sentences.<sup>83</sup>

The draft amendments were published for consultation and also discussed in the Judicial Reform Council<sup>84</sup> in September 2016. The final endorsement and submission of the draft amendments to the National Assembly is however still pending, and the prospect and possible timing of their eventual adoption and entering into force therefore remains uncertain. If passed, the amendments could contribute to addressing a number of key problems identified in CVM report as affecting criminal procedures in Bulgaria. It is however likely that some of the proposals will solicit further debate. In particular, as mentioned above, concerns were raised from among stakeholders and experts about the proposed transfer of jurisdiction in high-level corruption cases from the Sofia City Court to the Specialised Court, in particular if such a transfer was carried out without a careful prior analysis of the possible impact in terms of staff resources needed and without sufficient measures taken to avoid any potential disruption or delay in ongoing cases.

Some stakeholders also considered that further amendments could be needed in order to address more directly the core issues of the very formalistic criminal proceedings in Bulgaria. Prosecutors in particular have pointed to issues such as strict requirements for the content of indictments and very complex rules on collection of evidence.<sup>85</sup> Such more fundamental reforms would call for careful analysis to assess the balance between expediency and procedural safeguards. Also, some of the challenges could be linked to an overly strict interpretation in some instances, rather than problematic rules per se. While the Bulgarian rules as such may not necessarily be fundamentally different from those in some other Member States, their application appears to be particularly cumbersome. Furthermore, some prosecutors have complained about inconsistent practices in different courts and even within the same court with regard to the interpretation of certain procedural requirements.<sup>86</sup>

Finally, with regard to the reform of the penal code, the Bulgarian government in 2015 initiated a reflection process with a view to preparing a general reform of the code in regard to the definition of offences and penalties. The government underlined its intention to ensure that the reform should be based on the best European and international practice, while avoiding decisions based on immediate political considerations, by basing the reform on a broader conception of a new penal policy prepared in cooperation with experts and stakeholders. International expert assistance was also drawn upon in

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<sup>82</sup> It is reportedly envisaged that names of suspected perpetrators would no longer be announced in the act opening the pre-trial investigation, so as to prevent press stories pre-judging the investigation result.

<sup>83</sup> The last element is related to criminals evading prison by absconding after the announcement of the sentence, an issue which has been mentioned in previous CVM reports. Amendments to the criminal procedure code in 2015 aimed to address this problem at lower courts, but some issues remained with regard to appeals at the Supreme Court. SWD(2016) 5, p. 30.

<sup>84</sup> The Judicial Reform Council was set up by the Minister of Justice at the beginning of 2016 as a forum for the finalisation of legislative proposals in consultation with the relevant stakeholders within the judiciary as well as civil society actors and experts. This strategy proved particularly successful in connection with the Judicial System Act amendments, which saw intensive negotiations before they were presented in the National Assembly.

<sup>85</sup> Concrete challenges which have been raised include issues such as heavy procedures in connection with the hearing of witnesses and collection of evidence, official documents from public authorities not being admissible as evidence, and the lack of possibilities for the prosecution and court to prioritise relevant evidential material. Such issues should be seen in combination with formalistic requirements for the content of indictments, resulting in very long documents which also need to be read out in court during trial.

<sup>86</sup> Even in simple cases (such as a simple theft) prosecutors have reported that at times, they are called upon to describe in such detail the events surrounding the crime that compliance required the prosecutors to create a story around events rather than sticking to the facts. At times, though, such excessive requirements could be reversed on appeal (prosecutors can appeal such court decisions remitting cases for further work).

this context. Given the apparent need for careful preparation, a general reform of the penal code now appears less likely to take place in the short term.<sup>87</sup>

#### 4. CONTINUED REFORM OF THE JUDICIARY

*Benchmark 3: Continue the reform of the judiciary in order to enhance professionalism, accountability and efficiency. Evaluate the impact of this reform and publish the results annually.*

Reform is a continuous process and the adoption of changes to constitutional or legislative provisions needs to be taken forward to implementation. Ultimately the assurance that the judiciary is working in a professional, accountable and efficient way requires a competent management, as well as a culture based on these values to permeate the entire structure of judicial authorities. This is the background for the third CVM benchmark, which calls for Bulgaria to continue its reform efforts, including through continuous evaluation and transparency about impacts. Bulgaria has framed its efforts in this direction in the context of broad judicial reform strategies put forward at political level. The first one was adopted in 2010, and a more recent update was adopted at the end of 2014<sup>88</sup> and endorsed by the National Assembly in January 2015. In more concrete terms, the responsibility for reform lies to a large extent with the Supreme Judicial Council (SJC) to which the Constitution has given broad powers to manage the judiciary in more operational terms, without interfering with the independence of individual judicial bodies.<sup>89</sup> In addition, the heads of the various judicial bodies carry independent managerial responsibilities, not least the Presidents of the two Supreme Courts and the Prosecutor General, who not only manage their respective institutions but also sit on the SJC as ex officio members.<sup>90</sup>

This chapter will first give a general overview of the developments over the past ten years before proceeding to the more recent developments over the past year.

##### 4.1. Overview of developments under the CVM

The evolution of the Bulgarian judiciary over ten years is evidently a vast topic and cannot be covered comprehensively in the context of this report. What follows therefore focusses on the main developments related to judicial reform in areas which have been highlighted in past CVM reports. Important topics in this regard include the general system of personnel management, disciplinary proceedings, judicial training, allocation of cases in courts, the judicial map, transparency and accessibility (e-justice), and the reform of the prosecution.

Many of these topics concern directly or indirectly the quality and transparency of work in the SJC as the main governing body of the Bulgarian judiciary.

##### *Role of the SJC*

Decisions of the SJC have continued to be a contentious issue over the years and this has led to a number of improvements in procedures. Many of the changes focussed on formal steps. In the period immediately following accession, steps were taken to improve transparency in the work of the SJC by

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<sup>87</sup> The Prosecutor's Office has however pointed to some areas where targeted amendments could make a difference in the short term, notably in corruption cases where challenges are reported in regard to providing proof of intent and purpose or the damages incurred in relation to offences such as abuse of office (Article 282) and bribery (Articles 301-307) as well as other similar corruption related offences (e.g. Article 220 on disadvantageous transactions).

<sup>88</sup> *Updated Strategy to Continue the Reform of the Judicial System*, adopted by the Council of Ministers on 17 December 2014. An English version is available at the website of the Bulgarian Ministry of Justice: [https://mjs.bg/Files/UPDATED\\_STRATEGY\\_EN\\_ADOPTED\\_EN\\_635576978036934663.pdf](https://mjs.bg/Files/UPDATED_STRATEGY_EN_ADOPTED_EN_635576978036934663.pdf)

<sup>89</sup> SWD(2016) 15, p. 12; SWD(2015) 9, p. 2.

<sup>90</sup> In addition, following the most recent reform of the SJC, the President of the Supreme Court of Cassation and the Prosecutor General chair the meetings of the two specialised chambers for judges and prosecutors.

making the meetings public and publishing its decisions on a website. This has recently been followed up by granting public access to voting records on personnel issues. Over the years there have been many changes to rules of procedure to clarify proceedings in various matters, which has also been combined with the establishment of specialised committees. Since 2011, the work of the SJC has been facilitated by specialised committees within individual judicial bodies focusing on appraisals and promotions as well as on ethics and integrity. These local committees were mirrored by specialised committees within the SJC. As mentioned in chapter 3 above, these structures saw further reforms in 2016. In 2011 the SJC also established a special committee to ensure closer cooperation with the ISJC on disciplinary issues, and the SJC adopted a set of internal rules on the conduct of disciplinary proceedings in 2014. In order to enhance transparency, the SJC set up an associated 'civic council' in 2012 gathering a number of civil society actors and professional associations to follow and deliberate on topics under consideration by the SJC. This was followed up in 2015 with a broader communication strategy aimed at increasing transparency around the work of the judiciary in general, including the SJC.

In spite of the many improvements made over the years in institutional terms, the functioning of the SJC has remained controversial in a number of areas. Notably issues such as transparency and accountability of the SJC have continued to be raised by stakeholders, further underlined by the decision of several of the relevant organisations to leave the SJC civic council over the years<sup>91</sup>, as well as the frequent public criticism by professional associations and NGOs of decisions taken. Tensions within the Council were one of the reasons for the 2015 constitutional amendments and the subsequent reform of the SJC already outlined in chapter 2 above.

#### *Personnel management within the judiciary*

A key issue in any organisation is the allocation and management of staff. In the judiciary, this includes issues such as appointments, appraisals, promotions and granting of tenure. Appointments have already been touched upon in chapter 2 above as far as high-level appointments are concerned. As for more standard appointments, Bulgaria early on introduced the principle of competitive appointments, meaning that positions within the judiciary are filled through competitive procedures. Overall, this system appears to be now well-established.<sup>92</sup> There also exists a separate path into the service for experienced lawyers. The system for obtaining tenure is also well established.

Performance assessment of magistrates is an issue which has been raised in past reports. The present system has been described as based on a rather formal exercise which does not allow for a proper dialogue or a reasoned assessment of the individual judge or prosecutor.<sup>93</sup> An additional aspect of this issue has been the indirect link with disciplinary proceedings. The latter appears to some extent to have been applied as a mechanism to address efficiency problems within courts. This issue has most commonly been associated with the problem of delays in the publication of reasons for court decisions, which has at times also been addressed through the opening of disciplinary proceedings. While the use of disciplinary proceedings can be relevant in the event that delays appear to be deliberate on the part of the magistrate concerned, decisions or proposals for disciplinary proceedings

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<sup>91</sup> SWD(2015) 9, p. 3.

<sup>92</sup> The principle has however not always been consistently followed over the years. Due to the complexity of the competitive process, there has been a tendency to fill positions through secondments, which are on the one hand a less bureaucratic alternative but also are seen as a risk due to the less stable position of magistrates appointed in this way. These problems have been sought addressed through various improvements in the system of competitions and the latest JSA amendments have introduced stricter rules on secondments.

<sup>93</sup> It has been noted in the past that the Bulgarian system tends to give similar grades to most magistrates (good or very good) and be based on rather formal criteria. According to a recent survey of Bulgarian magistrates 73% of prosecutors and 65% of judges do not find that performance evaluation provides an objective and fair evaluation of the work of magistrates in general, although they tend to have a more positive attitude towards their own personal evaluation (with ¾ considering it as fair). *Attitudes of the magistrates on the judicial system reforms in Bulgaria*, Bulgarian Institute for Legal Initiatives (BILI), 2016.

have in many cases been met by the argument that the delays in question rather reflected a problem of workload management within the respective court. Such arguments have also in some cases been given credit by rulings of the Supreme Administrative Court. In fact, the use of disciplinary proceedings for issues which should in many cases rather be addressed as a matter of performance assessment could have many reasons. In the Bulgarian context one element appears to have been the lack of effective mechanisms to appropriately assess the personal performance of magistrates.<sup>94</sup> Performance assessment is one of the areas addressed in the 2014 judicial reform strategy, which led to the introduction of new provisions in the Judicial Systems Act in 2016 and is currently the object of a process to formulate a new methodology for appraisal and promotion of magistrates.<sup>95</sup> More generally on disciplinary proceedings, as also mentioned in chapter 2 above, the use of disciplinary proceedings has been a frequent source of controversy in Bulgaria, with critics of the SJC arguing that disciplinary rules are being used in a non-transparent manner and possibly for ulterior motives. It should be noted, however, that before 2007 disciplinary proceedings against magistrates were reported to be virtually non-existent.<sup>96</sup> While the SJC has struggled to develop a transparent and consistent practice in this area, there has been a clear change since 2007 in the sense that a system now exists to hold magistrates disciplinarily accountable for flagrant misconduct in connection with the execution of their duties. The system was reinforced with the introduction of a code of ethics for magistrates in 2009.

Linked to the issue of appraisals and disciplinary proceedings is another topic of high relevance in the Bulgarian context, namely that of workload management. This issue has been identified as a major issue in successive CVM reports in relation to appraisals and disciplinary proceedings as well as the broader discussion on the overall system for allocation of staff to individual judicial organs.<sup>97</sup> A significant amount of work has taken place within the SJC over the past years in order to develop objective standards for the assessment of workload, taking into account the relative complexity of different types of cases.<sup>98</sup> By 2016 this work was completed for both prosecution offices and courts, resulting in a 'workload standard', which can provide the basis for a more objective assessment of the workload for the individual magistrates.<sup>99</sup> In parallel with the more long-term work undertaken by the SJC to establish objective workload standards, the SJC has taken measures over the years to address the most flagrant inequities in workload between judicial bodies.<sup>100</sup> In spite of these measures, however, there appears to be a continued serious problem of uneven workload in some courts. In particular, some of the larger courts appear to continue to experience serious problems in this regard. At the same time, there are judicial bodies with very low relative workload, from which resources could be reallocated to those with heavier workload. With the new workload standards it should be possible for the SJC to take informed decisions on this issue and perhaps move more quickly to address some of the most serious unevenness between courts.

### *Judicial map, e-justice and transparency*

An issue linked to that of personnel management concerns the overall structure and number of judicial bodies and their respective jurisdiction, the 'judicial map'. Another closely related subject is the introduction of new IT tools to improve the accessibility and transparency of justice. The discussions

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<sup>94</sup> This does not necessarily mean that disciplinary proceedings for delaying cases are unlawful. On the contrary, the law foresees the use of disciplinary proceedings for actions causing delays in court proceedings, which can be entirely appropriate in cases where such delays are deliberate or flagrant. The attention of the Commission has been drawn to the existence of such cases.

<sup>95</sup> See also chapter 3 above.

<sup>96</sup> SWD(2012) 232, p. 15.

<sup>97</sup> COM(2012) 411, p. 8-9; COM(2015) 36, p. 6; COM(2016) 40, p. 6.

<sup>98</sup> For the courts in particular the work involved a comprehensive process of estimating typical average workload associated with a large number of individual 'case types' based on assessments by practicing judges through surveys and focus groups.

<sup>99</sup> The result of this extensive work is now also being applied in the system for the random allocation of cases within courts, see below.

<sup>100</sup> SWD(2014) 36, p. 4-5; SWD(2015) 9, p. 14; SWD(2016) 15, p. 15-16.

on the judicial map have proven very sensitive both within the judiciary itself and in wider society. In light of the need for broader support in society as well as within the ranks of the judiciary, the SJC has taken a cautious approach to the reform of the judicial map over recent years. Nevertheless, among Bulgarian authorities both at political level and within the judiciary itself there seems to be an understanding that the current system – with more than a hundred local courts, 28 regional courts and five appellate regions for a population of 7 million<sup>101</sup> – needs a comprehensive reform.<sup>102</sup> A first careful step was taken in 2014 with a minor reform of the military courts.<sup>103</sup> A separate process to prepare a comprehensive reform of the local courts has been ongoing for several years and in 2015 reached the stage of general consultations on a number of draft criteria to be applied for the restructuring of those courts. The debate on the higher level courts in turn has only started rather recently.<sup>104</sup>

An important issue to consider in the context of a reform of the court map is how to ensure adequate access to judicial institutions for citizens throughout the national territory. Here the development of e-justice could contribute to the solution, an issue which has been on the agenda in Bulgaria over the past ten years. Already at the time of the accession to the EU rules were put in place to require courts to publish court decisions online. The implementation of this requirement took some time to ensure in all instances, but is today general practice.<sup>105</sup>

In recent years electronic case management systems have been introduced in most courts, in some cases also allowing for external communication.<sup>106</sup> However, some courts still complain about lack of efficient IT based systems for the management of case files as well as for communication. A unified electronic system for the management of criminal cases has been implemented within the prosecution already in 2014 but has not yet been extended to the courts. Communication between prosecutor's offices and police also appears to be facing problems due to the lack of a common IT system, which may be a cause of delays in pre-trial proceedings.<sup>107</sup> It is planned to address the challenges related to the introduction of electronic tools in the Bulgarian judiciary over the coming years in the context of a broader government e-justice strategy.<sup>108</sup>

#### *Allocation of cases in courts*

An area where Bulgaria has for many years had electronic systems in place concerns the allocation of cases to individual judges within courts. According to the law, the decision on which judge should be charged with a particular case should be decided in accordance with the principle of random allocation.<sup>109</sup> The system of random allocation of cases has been adopted as a mechanism for the

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<sup>101</sup> In addition, there are the separate 28 administrative courts as well as 3 military courts and a specialised court for organised crime, the latter two with additional separate appeal instances.

<sup>102</sup> The Prosecutor General in particular has been clear about the need to streamline the structure of prosecutor's offices, which generally follows the structure of courts.

<sup>103</sup> The number was reduced from five to three. More recently it is being considered to consolidate the remaining three into one. It is interesting that the reform of the military courts was proposed to the SJC by the prosecutor's office rather than being the result of a discussion within the courts.

<sup>104</sup> SWD(2016) 15, p. 16-17.

<sup>105</sup> Keyword-searchable data bases as well as a system of systematic legal commentary are however areas where further development could be useful in the Bulgarian context.

<sup>106</sup> A limited number of 'pilot' courts have experimented with online access to case files for registered users and electronic summoning of the parties to court hearings.

<sup>107</sup> Apparently it can in some instances take up to ten days for a case file to be transferred between the prosecutor and the respective investigator within the Ministry of Interior. (Meetings with Bulgarian authorities, September 2016.)

<sup>108</sup> The establishment of a common portal for the judiciary is planned in the context of a broader e-government roadmap. This should partly be financed by the European Social Fund (ESF) under the Operational Programme for Good Governance 2014-2020 (OPGG).

<sup>109</sup> "Cases and case files shall be distributed in the judicial authorities on the basis of the random selection principle through electronic assignment in the order of their receipt." (JSA, Article 9.)

prevention of undue influence and corruption in the courts, as the use of automatic, electronic systems was supposed to remove any possible human interference in the selection of the judge for any particular case. However, as noted in successive CVM reports, allegations of incorrect or manipulated application of the principle of random allocation have been a recurrent theme of debate in Bulgaria, with consistent and widespread criticism that these systems were regularly tampered with or circumvented in order to allow certain economic or political interest to predetermine the judge handling the case and by this ultimately the outcome of certain cases.

While such allegations continued for several years, the SJC was initially slow to react to these controversies, in spite of the evident damage that this did to the overall reputation and credibility of the justice system and the perceived independence of the judiciary in Bulgaria. The problem seemed to be connected to the existence of separate IT systems in different courts which seemed vulnerable to local intervention. In 2014 an interim solution was introduced by the SJC whereby the local case allocation decisions were to be reported on a daily basis to a central server at the SJC. Alongside this effort, the SJC adopted a set of common rules for the application of the local systems whenever special situations arise, such as judges withdrawing from a case or having to be excluded from the selection due to absence or high workload. The application of these rules is checked during inspections by the ISJC. Meanwhile, towards the end of 2014 a major scandal broke out in relation to the allocation of two cases at the Sofia City Court: this prompted the SJC to take further action.<sup>110</sup> The result was the development of a new software system for allocation of cases through a centralised server located at the SJC, which was eventually introduced in October 2015.<sup>111</sup> Following the introduction of this system, all courts carry out the allocation of cases directly through an online server located at the SJC, where all actions are systematically logged so that any intervention can be subsequently checked.

On the basis of the December 2014 incident in the Sofia City Court, an inspection was carried out by the SJC in spring 2015. The inspection concluded that the court had been the subject of serious mismanagement, but did not assign clear responsibility for the misconduct. Nevertheless, the incident did precipitate the replacement of the management of the Sofia City Court in spring 2015.<sup>112</sup>

### *Judicial training*

Bulgaria has a well-established institution for judicial training, the National Institute of Justice. It is responsible for the initial training of magistrates which is obligatory for all regular appointees.<sup>113</sup> In 2010 the length of the obligatory initial training was extended from 6 to 9 months<sup>114</sup>, and this is still the situation today.

The training provided by the institute is generally recognised as being of a good quality, providing an adequate basis for new entrants to the judiciary. In addition, the institute provides a broad range of further training courses for magistrates, which is continuously widened to include new subject matters. After the initial training, however, there is no obligatory training of magistrates, which is left at their

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<sup>110</sup> One case concerned the allocation of a case concerning the bankruptcy of a large bank where the reporting of the case allocation decision to the SJC server reportedly did not take place as provided for in the rules, raising questions about the procedure followed. The other case concerned a local subsidiary of a large European company, which was allegedly 'taken over' through a fraudulent insolvency procedure with a view to stripping its assets. Also in the latter case, there were allegations of irregularities in the allocation of the case to the judge concerned, who has subsequently been subject to criminal investigation.

<sup>111</sup> An EU funded project had already earlier been launched to develop such a software system to centralise the case allocation of all courts within a single IT system at national level, but the project was delayed due to a legal challenge against the tendering procedure and was eventually abandoned in December 2014. Instead the new system was financed with national funds.

<sup>112</sup> Disciplinary proceedings were eventually also launched against the former Court chair. However, as the January 2016 CVM report notes, the response of the SJC "showed a reluctance to act on allegations of serious wrongdoing" (COM(2016) 40, p. 4).

<sup>113</sup> Candidates taken on through the alternative route for experienced lawyers are exempt.

<sup>114</sup> SWD(2012) 232, p. 18.

own discretion.<sup>115</sup> Bulgarian authorities stress that training is generally available, but in some judicial bodies the existing workload can make it a challenge for some magistrates to attend courses to further develop their knowledge.

The National Institute of Justice has a formal status regulated by law and is governed by a board including five representatives of the SJC and two for the Ministry of Justice.<sup>116</sup> Its basic funding comes from the national budget. However, as mentioned in past reports, the financing from the state budget has not been increased in line with the growing activities of the institute over the years, with the result that over half of the budget is being financed through various outside grants.<sup>117</sup>

### *Reform of the prosecution services*

Under the Bulgarian Constitution, the Prosecutor's Office is part of the judicial system and as such independent of the executive power.<sup>118</sup> Over the ten years since Bulgaria's accession to the EU, there have been several reforms of the internal structure of the prosecution. Many of them have had to do with internal governance and management. Major structural reorganisations of the Prosecutor's Office have been launched several times, typically following the entering into office of a new Prosecutor General.<sup>119</sup> A number of more targeted changes have been aiming to address concerns about lack of effectiveness in the prosecution of corruption and serious organised crime. In 2008 a specialised unit was established within the Sofia City Prosecutor's Office to prosecute cases related to EU funds fraud. In 2009 a specialised unit involving the Prosecutor's Office, the Ministry of Interior and SANS<sup>120</sup> was set up to focus on cases involving organised crime. This was followed up in 2012 with the establishment of the Specialised Prosecution for organised crime, attached to the then newly-created Specialised Court. In 2012 a structure of joint teams between the same three institutions was established for the investigation of financial crimes and high-level corruption.

More recent innovations have included specialised units for crimes committed by magistrates and for corruption cases, which were in 2015 merged into a new specialised unit for high-level corruption attached to the Sofia City Prosecutor's Office. Efforts were also made to improve the supervision of cases of special public interest through special procedures and reporting requirements. These measures were further strengthened in 2014. A number of other measures have been taken over the years to improve training and general management within the prosecution service.

A key issue, which continues to be raised, concerns the degree of supervision of individual case files by superior prosecutors, which is linked to a general impression in wider society of the prosecutor's office as a very hierarchically structured and at times non-transparent organisation which is vulnerable to undue influence by politically or economically powerful interests. Some efforts have been made to

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<sup>115</sup> See 2016 EU Justice Scoreboard, p. 27.

<sup>116</sup> JSA, Chapter 11. The Minister of Justice as well as the two Supreme Court presidents and the Prosecutor General are *ex officio* members of the board. While the institute has so far been able to work in an autonomous and professional fashion, there have been concerns about attempts to micromanage aspects of its management, in particular the appointment of individual lecturers. Some individual examples of some such alleged attempts, which have been successful, have been pointed out to the Commission in meetings with civil society actors.

<sup>117</sup> The majority of this outside funding is extended through project funding under the European Social Fund programmes. The institute has in the past had a good record in managing these funds.

<sup>118</sup> At the same time, however, the prosecution is a much more politically exposed institution in the Bulgarian context than in many other countries. It is not only charged with leading the investigation and subsequent prosecution of crime in Bulgarian courts, but also plays a wider role in the control of the legality of public acts. This appears to be widely interpreted, with the consequence that the Prosecutor General is often seen to make statements on issues of wider political scope, rather than criminal justice alone.

<sup>119</sup> Major reorganisations were initiated in 2007 and in 2013. The last one followed a complete functional review of the entire organisation and was implemented through a comprehensive action plan, which was completed in spring 2015.

<sup>120</sup> State Agency for National Security, created in 2008 to fight high level corruption and threats to national security. The agency also incorporated the Directorate for Financial Investigations, the Bulgarian FIU.

address such concerns through the development of a communication strategy and legislative amendments with the objective to clarify the autonomy of individual prosecutors.<sup>121</sup> However, the fact remains that professional and civil society actors continue to express concerns about the role of the prosecution and the Prosecutor General in particular.<sup>122</sup>

Another area identified early on in CVM reports as particularly problematic concerns the interaction between the prosecution and the various investigatory agencies.<sup>123</sup> These concerns have led to the conclusion of a number of agreements between the prosecutor's office and other relevant institutions in order to clarify working relationships. Nevertheless, such issues have continued to be raised in the context of the investigation and prosecution of corruption and organised crime.<sup>124</sup>

#### **4.2. Developments since the last CVM report of January 2016**

The January 2016 report recommended Bulgaria to adopt a reform of the judicial map for the regional courts and a roadmap for a more general rationalisation of the courts at all levels to improve overall quality and efficiency, including the reallocation of resources in light of an analysis of workload, to establish a timetable for the introduction of e-justice, to develop a practice of motivating disciplinary decisions in accordance with clear and objective standards and conduct an assessment of practice since 2012, to establish a capacity to monitor the random allocation of cases in courts and provide the conditions for an impartial investigation into the allegations of high-level corruption within the Sofia City Court, and to launch an independent analysis of the prosecutor's office. These recommendations were taken up to various extents in 2016.

##### *General reform including the judicial map and e-justice*

Several developments have taken place in the course of 2016 in these areas, partly spurred by the reform of the JSA and partly by the maturation of projects already under way for some time within the SJC. The application of the new workload standards is being phased in and the experience gained so far is to be evaluated in spring 2017.<sup>125</sup> Concerning the judicial map and e-justice, the SJC foresees a longer process, with any final decisions having to involve the next SJC to be elected in the course of 2017. The SJC has presented a project proposal under Operational Programme Good Governance (OPGG) for the development of a model to optimise the judicial map at the level of regional courts and prosecutor's offices. The proposal will also cover the preparation of a unified information and case management system for the courts. It is also envisaged that a specialised information system for monitoring and analysis as well as a roadmap for the reform of the higher level courts will be prepared with the support of EU Funds.<sup>126</sup>

The reform of the judicial map will involve both the courts and the prosecutors' offices. In 2016 the Prosecutor General submitted a request to the Constitutional Court for an interpretation of a provision of the Constitution, which has so far been cited as a barrier for a separate reform of the prosecutor's offices. The Prosecutor General has explained that it is his hope that the ruling of the Court would

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<sup>121</sup> See also chapter 3 above.

<sup>122</sup> The Bulgarian Judges Association is a particularly strong critic of the role of the Prosecutor's office in the SJC (see also chapter 2 above). Other civil society observers and critical journalists have focussed on the role of the prosecution in cases involving allegations of high-level corruption.

<sup>123</sup> COM(2011) 459, p. 5-6.

<sup>124</sup> See also chapters 5 and 7 below.

<sup>125</sup> An important separate element concerns the integration of the weights for different types of case in a module within the random allocation system, which should allow for the system to automatically take account of the workload of individual judges when allocating cases. However, the calibration of this system is still ongoing.

<sup>126</sup> Information received from SJC in December 2016.

clarify the meaning of the provision in a sense which would allow for a merger of local prosecutors' offices to move ahead independently of the reform of the local courts to which they are attached.<sup>127</sup>

#### *Random allocation of cases, disciplinary proceedings, and the Sofia City Court*

On random allocation of cases, the SJC reported that no major incidents have been revealed with regard to the application of the new system. An evaluation of the centralised IT system is yet to be performed. However, the ISJC regularly checks the application of the system in the courts during inspections and the reports on these checks are submitted to the SJC for consideration.<sup>128</sup> On the follow-up to the Sofia City Court incidents of 2014, it does not appear that any broader investigation has been conducted into the allegations of more systematic corrupt practices within the court under the previous management. Neither has a broader inquiry into the events been carried out. The subject re-emerged in 2016 in the context of the publication of alleged recordings of a conversation between two of the implicated judges by an independent website for investigatory journalism.<sup>129</sup> The SJC decided not to open an enquiry into the matter. In the meantime, criminal procedures have been launched on separate charges against the directly implicated judges, who have also been subject to disciplinary proceedings.

As regards disciplinary proceedings more generally, the SJC has launched a project to develop standards ensuring clear and objective principles for disciplinary practice, as well as an analysis of the practice under the current SJC since 2012.<sup>130</sup> As part of the project, it is envisaged that, once prepared, the standards will be subject to wide public consultation and training will be provided for their subsequent application. This will however have to be followed up by the future SJC to be elected in the course of 2017.

#### *Analysis of the prosecution and improvement of criminal investigations*

In the 2016 CVM report the Commission recommended that an independent analysis be carried out of the functioning of the Bulgarian Prosecutor's Office. The Bulgarian government requested the assistance of the Structural Reform Support Service (SRSS)<sup>131</sup>, and a project involving a small team of independent and experienced prosecutors from a few other Member States was launched in spring and concluded with a final report in December 2016.<sup>132</sup> The study contains an in-depth analysis of the Bulgarian Prosecutor's Office to identify possible avenues for the improvement of its structure, independence and effectiveness. This analysis touches both upon the prosecution service in a narrow

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<sup>127</sup> Article 126 of the Constitution states that: "The structure of the prosecuting magistracy shall correspond to the structure of the courts". This Article has in the past been interpreted to mean that every single local court also needs its own prosecutor's office. However, pursuant to the interpretation now supported by the Prosecutor General the requirement would only be that the prosecution should be in a position to serve the local courts, which could be done through larger regionalised offices covering several courts at a time.

<sup>128</sup> Meeting with the SJC, December 2016. It is notable that allegations are already circulating that the system can be circumvented through manipulation of the workload balances for individual judges when carrying out the case allocation, showing the level of distrust that exists in the wider public and highlighting the relevance of the recommendation contained in the January 2016 CVM report for a capacity to exist within the ISJC and SJC to follow-up on such issues, to be able to verify them and where relevant dispel any unfounded allegations.

<sup>129</sup> Such recordings were also referred to in the January 2016 CVM report (COM(2016) 40, p. 4-5). More recently further recordings have been reported, resulting in the issue coming back on the public agenda.

<sup>130</sup> The project will be co-financed by the OPGG.

<sup>131</sup> The SRSS is a Commission service set up to coordinate and provide tailor-made technical support for structural reforms in EU Member States.

<sup>132</sup> Senior experts from DE, NL, UK and ES participated in the team. The analysis is based on an intensive process of documentary analysis and interviews with Bulgarian prosecutors and other stakeholders in the course of 2016. An English language summary of the main conclusions of the analysis, drafted by the independent experts and published by the Bulgarian authorities, can be found on the website of the Bulgarian Ministry of Justice:

<http://www.mjs.bg/Files/Executive%20Summary%20Final%20Report%20BG%2015122016.pdf>

sense and on the wider Bulgarian system for criminal justice more generally. It includes a range of observations and recommendations for immediate as well as more long-term action by Bulgarian authorities in both legislative and organisational areas.

Most of the findings have a direct bearing on CVM benchmarks, including in particular the investigation and prosecution of high-level corruption and serious organised crime. As regards overall structures, the report identifies a need for better internal supervision of cases by management in order to ensure accountability for decisions taken, especially in high level cases of public interest.<sup>133</sup> As a counterweight to this stronger involvement by the organisational hierarchy, the report recommends a number of additional mechanisms for overall accountability of the Prosecutor's Office as a whole to the public, *inter alia* via the creation of a specialised committee in the National Assembly, a system of external inspections covering the quality of prosecutorial decisions and involving an enhanced judicial inspectorate, and the introduction of special procedures allowing for an investigation into any allegations of possible wrongdoing by an incumbent Prosecutor-General. As for the conduct of criminal proceedings, the report gives recommendations concerning a wide range of topics, including the conduct of preliminary inquiries, the possibility of judicial review of decisions to start (or not) pre-trial proceedings or file an indictment, as well as of decisions to stop and restart cases, the role of the Prosecution in regard to non-criminal matters, training of prosecutors, and workload management.

In regard to the prosecution of high-level corruption and organised crime, the report recommends that additional resources be provided for the respective prosecutors' offices both in terms of prosecutors and investigators, and that steps be taken to improve the incentive for experienced prosecutors to apply for these positions, as well as for specialised training.<sup>134</sup> The low number of high-level corruption cases is noted as a matter of concern. In this regard, recommendations are made for a more proactive role in regard to suspicious transaction reports concerning politically exposed persons which are filed with the financial investigations directorate at SANS, among other measures to ensure effective financial investigations.

In terms of the efficiency of proceedings, the report contains observations on the formalism of court procedures, requirements on the content of indictments, the practices in regard to returning cases to the prosecution, authorisations for the use of special investigatory means, the use of expertise in court trials and for investigations, and the proper management of court trials in complex cases (to avoid delays). Against this background, it recommends that several provisions of the criminal procedure code be reviewed and suggests that measures could be taken by the appropriate authorities (e.g. the Supreme Court of Cassation) to issue practice guidance on certain procedural issues.

Independently of the SRSS project, the Prosecutor's Office also undertook a separate exercise to analyse a number of rulings of the European Court on Human Rights (ECtHR) concerning criminal investigations in Bulgaria and their possible implications for current practice. This was prompted by the identification in 2015 by the ECtHR of a 'systemic problem' in Bulgaria regarding the effective investigation of crime, based on numerous cases that had reached the Strasbourg court.<sup>135</sup> The analysis<sup>136</sup> covers an in-depth assessment of 54 judgements of the ECtHR concerning the lack of effective investigations in Bulgaria.<sup>137</sup> The analysis reached a number of findings. First, the report

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<sup>133</sup> It is added that this hierarchical supervision should be appropriately recorded in all instances on the case file.

<sup>134</sup> Ultimately, if results are not forthcoming, the report recommends that more drastic measure be considered, with a reference to "neighbouring and other countries" (p. 21).

<sup>135</sup> The statement of the ECtHR is also referred to in the January 2016 CVM report (COM(2016) 40, p. 6).

<sup>136</sup> *Report on the results from the study and analysis of judgements of the ECtHR finding that the Bulgarian authorities have not complied with their obligation to carry out an effective investigation, as well as of the cases, in which they are rendered, and the measures required to remedy the established omissions*, Bulgarian Prosecutor's Office, 2016 (English version).

<sup>137</sup> In the 54 cases 78 violations have been identified by the ECtHR within a time-period covering 1989-2012. In the 54 cases under review there were violations related to completeness of the investigation (51 cases), its timeliness (37 cases), expiry of the prescription period (12 cases) impartiality (28 cases), accessibility of remedies (15 cases), and supervision of the investigation by the prosecutor (29 cases).

concludes that Bulgarian procedural law as such is in compliance with the standards required by the case-law of the ECtHR and in this sense does not suffer legal shortcomings that would prevent prosecutors and pre-trial authorities from carrying out their work in such a way as to satisfy the requirements of the European Convention on Human Rights. Second, the deficiencies that have nevertheless been identified in the reviewed cases concern judicial bodies involved in the entire criminal procedure, including pre-trial and trial procedure. Third, the problems identified appear to have been rooted in a number of different factors of both subjective (incompetence, partiality) and objective nature (including the legal framework at the time). Fourth, a number of procedural challenges are still considered relevant under current conditions. These include, for example, the ineffectiveness and length of preliminary inquiries<sup>138</sup> which delay the initiation of pre-trial proceedings, the use of inadequately substantiated decisions to terminate court proceedings and refer the case back to the prosecutor, and the insufficient access of the victim to investigation in cases where the prosecutor decides to terminate the proceedings before bringing formal charges.<sup>139</sup>

The report also highlights the fact that the issues raised by ECtHR rulings have been the subject of a number of follow-up actions in recent years, including training and other measures to draw the attention of prosecutors to the problems identified. Finally, the report contains a number of concrete recommendations for further action, touching upon the need for further competence-building measures within the prosecutors' offices, improved monitoring of cases to identify problems early on, proper regulation of preliminary inquiries, a possible review of the conditions for the initiation (or not) of formal pre-trial proceedings<sup>140</sup>, and improving the work of the supervising prosecutor and investigating agencies. The recommendations relate to both legislative and organisational measures.<sup>141</sup>

Together, these two in-depth analyses carried out in the course of 2016 identify a wide range of areas for further possible measures to improve the effectiveness of Bulgarian pre-trial proceedings.

## 5. HIGH-LEVEL CORRUPTION

*Benchmark 4: Conduct and report on professional, non-partisan investigations into allegations of high-level corruption. Report on internal inspections of public institutions and on the publication of assets of high-level officials.*

Corruption has been identified as a serious systemic problem in Bulgaria. This is confirmed in international rankings by international organisations and observers<sup>142</sup> as well as in opinion surveys.<sup>143</sup> Corruption continues to be regarded as a major obstacle to business in Bulgaria<sup>144</sup> and has been

<sup>138</sup> Preliminary inquiries are not regulated as part of the criminal procedure and any information that is obtained (documents received, witnesses questioned) has to be collected again during the proper pre-trial procedure in order to be admissible as evidence in court. Nevertheless, they are extensively used by Bulgarian law enforcement in order to prepare criminal proceedings. Contrary to pre-trial proceedings, there are no deadlines for the completion of preliminary inquiries.

<sup>139</sup> In addition, a number of non-procedural problems mentioned include lack of proper investigation by the relevant authorities, lack of effective supervision by the responsible prosecutor, and unjustified extensions of deadlines.

<sup>140</sup> On the last point, the report cautions that this is a complex topic which would require careful analysis.

<sup>141</sup> Some aspects of the legislative recommendations appear to have been already included in the draft proposals on the criminal procedure code mentioned in chapter 3 above.

<sup>142</sup> The World Bank governance indicators rank Bulgaria last among EU Member States in control of corruption (World Bank governance indicators, 2015). The same picture emerges from Transparency International's corruption perceptions index 2015 which ranks Bulgaria 69 out of 168 countries worldwide, again the worst score of any EU Member State (Transparency International CPI, 2015).

<sup>143</sup> In a recent survey of Bulgarian citizens, 97 % of respondents considered that corruption remained a fairly important (9%) or very important (88%) problem in Bulgaria. (Flash Eurobarometer 445: The Cooperation and Verification Mechanism for Bulgaria and Romania, published on 25 January 2017.)

<sup>144</sup> The World Economic Forum Global Competitiveness Report 2016–2017 ranks corruption as the single most problematic factor when doing business in Bulgaria. *Global Competitiveness Report 2016–2017*, p. 130.

estimated to have a significant economic impact on the Bulgarian economy.<sup>145</sup> CVM reports have consistently pointed to the need for stronger institutions in order to respond to the problems.<sup>146</sup>

When discussing the response to corruption, it is important to distinguish between preventive and repressive steps. Criminal law measures should act as an ultimate deterrent against corrupt acts through effective investigation and a swift, efficient and fair follow-up whenever serious misconduct is found. However, experience makes it clear that an element just as essential is the existence of functioning preventive mechanisms, such as procedures for administrative investigation, as well as raising awareness about corruption and how to tackle it, and measures to tackle specific issues such as conflicts of interest and illicit enrichment. While an important focus should be to avoid opportunities for corruption to develop in the first place, preventive measures cannot entirely replace effective law enforcement. The two are complementary.

In addition, a distinction can also be made between high-level and low-level corruption. High-level corruption is related to decision-makers with links to the political system and higher offices in the public administration and the judiciary, and involves the abuse of office or trading in influence, often involving important economic or political interests. Low-level corruption tends to concern frontline personnel in direct contact with citizens and small businesses, in sectors such as healthcare, police, or local administration. Perceived impunity for senior figures can set the wrong example for rank-and-file officials. At the time of the accession of Bulgaria to the EU in 2007, both high level and low level corruption was identified as important challenges still to be addressed in Bulgaria, which was reflected respectively in benchmarks 4 and 5. The focus of the present chapter will be on benchmark 4 concerning high-level corruption.

As in previous chapters, the presentation below presents first the developments over the past ten years before focusing on the more recent developments since the last CVM report of January 2016.

## 5.1. Overview of developments under the CVM

In 2012 the Commission noted that over the previous years, some 100-200 cases of corruption had been brought to court each year and that there were very few high-level cases among them.<sup>147</sup> The overall number remains within a similar order of magnitude in more recent years.<sup>148</sup> Also, the situation remains unchanged in the sense that most of the cases concern relatively minor cases.<sup>149</sup> A number of investigations have been launched into high-level corruption over the years, some of which have been brought to court. However, in spite of the frequent announcement of significant charges, such cases often experience long delays and judicial appeals, and finally end up either in acquittals, or are dropped due to lack of sufficient evidence. Consequently, previous reports have consistently found that very few convictions for high-level corruption were confirmed by final court decisions.<sup>150</sup>

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<sup>145</sup> *The Cost of Non-Europe in the area of Organised Crime and Corruption*, Research paper by RAND Europe, 2016.

[http://www.europarl.europa.eu/RegData/etudes/STUD/2016/579319/EPRS\\_STU\(2016\)579319\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2016/579319/EPRS_STU(2016)579319_EN.pdf)

<sup>146</sup> COM(2012) 411, p. 15 ; COM(2014) 36, p. 6-7; COM(2015) 36, p. 7-8; COM(2016) 40, p. 8.

<sup>147</sup> SWD(2012) 232, p. 20.

<sup>148</sup> In 2012 the total number of pre-trial proceedings brought to court was 184 and in 2013 it was 166. The picture for more recent years is blurred by a broadening of the definition used by the prosecutor's office to identify corruption cases in 2014. However, the numbers of the key specific types of cases (abuse of office, bribery) remain broadly at the same level in 2014 and 2015 compared to the previous two years. (Statistics provided by the prosecutor's office in December 2015.)

<sup>149</sup> In 2015 six out of ten pre-trial investigations involving bribery concerned minor cases of active bribery, many of which were connected with attempts to conceal violations under the road traffic act (i.e. bribing traffic police officers). Bribery cases constitute the single largest group of corruption related cases. (Source: Annual report of the Prosecutor's Office for 2015, p. 75 (English translation).)

<sup>150</sup> COM(2012) 411, p. 16; COM(2015) 36, p. 8; COM(2016) 40, p. 9.

Over the past ten years, Bulgaria has carried out a number of measures as part of an overall attempt to step up the fight against high-level corruption. Some of these measures were taken in the context of a strategy for the fight against corruption and organised crime adopted in 2009 and implemented over the following years.<sup>151</sup> In the law enforcement area the focus during the early years was on further specialisation and better coordination among the prosecution and investigatory agencies through the establishment of specialised units, networks and teams, methodological guidance and cooperation agreements, and additional training for prosecutors and investigators. As already mentioned above, some legislative measures were also taken to streamline criminal procedures in complex cases.

In 2008 a new State Agency for National Security (SANS) was established through a merger between existing security services and the financial investigation agency and tasked with investigating high-level corruption, as well as threats to national security. SANS originally functioned as a criminal intelligence agency with powers in regard to financial investigations (incorporating the Bulgarian financial intelligence unit), but it underwent several significant reorganisations in more recent years, with the transfer from the Ministry of Interior of competences for the investigation of organised crime in 2013 and the transfer of the same competences back to the Ministry of Interior in 2015.<sup>152</sup> Recurring wiretapping controversies have revealed flaws in the system for authorisation and conduct of surveillance, with significant implications for the authorities' capacity to address corruption. The European Court of Human Rights ruled on the need for stronger guarantees against the risk of surveillance abuses.<sup>153</sup>

On the preventive side, a number of institutional mechanisms are in place. Since 2000, an increasing number of high-level public officials have been required to submit personal property declarations annually, and at the beginning and end of their careers. The declarations are filed with the National Audit Office, which has the responsibility to cross-check the information with other public registers. In case of discrepancies, further checks can be carried out as the file is forwarded to the National Revenue Agency (NRA) and SANS. While the system ensures a level of transparency around assets of high-level officials, a number of weaknesses have been identified in previous Commission reports, including the fact that the National Audit Office does not have competence to carry out a more proactive investigation or identification of suspicious cases.<sup>154</sup> Nevertheless, while a more proactive analysis of the property declarations could be a more effective deterrence against illicit enrichment, the systematic publication and verification of property declarations provides an important element of an effective anti-corruption set-up by ensuring transparency around the assets of high-level officials.

In 2009 a law on the prevention of conflicts of interest came into force and a separate agency, the Commission for the Prevention and Ascertainment of Conflicts of Interest (CPACI), was established in 2011.<sup>155</sup> This entity is competent to assess concrete cases submitted to it on alleged or potential conflicts of interest as well as to issue orders for sanctions to be imposed on transgressors, including officials who have not submitted their conflicts of interest declarations on time. However, the decisions of CPACI are subject to appeal in two instances, as are the subsequent penalty decisions, raising the prospect of each penalty issued by CPACI being subject to a total of four court rulings before becoming final. As noted by the Commission in 2012, this cumbersome decision-making process raises questions about the effectiveness of the procedure.<sup>156</sup>

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<sup>151</sup> SWD(2012) 232, p. 22.

<sup>152</sup> See also chapter 7 below.

<sup>153</sup> See Case of Association for European Integration and Human Rights and Ekimdzhiev v. Bulgaria <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-81323>. Case of Hadzhiev v. Bulgaria <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-114076>.

<sup>154</sup> SWD(2012) 232, p. 21; SWD(2015) 9, p. 21.

<sup>155</sup> The CPACI was created through separate amendments in 2010 which created the centralised system and broadened the range of issues covered. The law also abolished the need to prove that a benefit had been obtained in connection with a conflict of interest in order to impose a penalty for violation of the law (Meeting with CPACI, December 2016).

<sup>156</sup> COM(2012) 411, p. 18.

A major challenge has been the merit-based selection of senior management for anti-corruption institutions, as most clearly evidenced by the controversial nomination to the post of Director of SANS in 2013, sparking several months' of public protests even though the nomination was swiftly withdrawn.<sup>157</sup> In another example, CPACI was embroiled in a scandal in 2013 as its chairman was forced to step down amidst charges of abuse of office. He was later convicted to 3½ years in prison, although this was finally commuted on appeal to a suspended sentence. The matter has given rise to a parliamentary inquiry followed by a package of draft legislative amendments which would have streamlined procedures and improved transparency. However, these amendments, which were presented to the National Assembly in 2014, were never adopted.<sup>158</sup>

In spite of the controversy surrounding the resignation of its chair, CPACI has continued functioning in accordance with its original legal set-up and under an acting chair.<sup>159</sup> In addition to fulfilling its mandate as an arbiter of the conflicts of interest rules in concrete cases, it has also over the recent years extended its work further into the preventive area by taking up awareness raising and training as a separate line of activity. Unfortunately, the CPACI has in the main only been able to establish conflicts of interest at the lower administrative levels.

In addition to the institutions mentioned above, a network of internal inspectorates has been established within the State administration, with a General Inspectorate at the centre working under the direct authority of the Prime Minister. These agencies carry out general internal control and targeted inspections of the state administration and are also in charge of ensuring compliance with the law on conflicts of interest in the work of the respective government departments. Previous reports have noted a number of weaknesses and recommended a strengthening of the system of internal control.<sup>160</sup> In spite of the weaknesses, however, the inspectorates have been recognised as making a useful overall contribution.

A review of the first anti-corruption strategy was carried out in 2014-2015, which concluded that it had suffered from a lack of consistent follow-up and that further actions were needed.<sup>161</sup> Consequently, a new anti-corruption strategy was adopted by the government in spring 2015 which contained a number of concrete initiatives. Among the key innovations in the new anti-corruption strategy were the creation of a specialised unit within the Prosecutor's Office to lead investigations into high-level corruption cases<sup>162</sup>, amendment of the law on public administration to strengthen the independence and effectiveness of the administrative inspectorates, a proposal on sectorial anti-corruption plans to be developed in different government departments, and the establishment of an

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<sup>157</sup> As noted in the 2014 CVM report, the incident gave rise to concerns about important public appointments being decided in a non-transparent way and involving strong economic and political interest groups and further compounded the general image of a prematurely implemented reform of SANS (COM(2014) 36, p. 3-4 and 8). Integrity has since been made a key criterion for senior appointments to SANS.

<sup>158</sup> SWD(2015) 9, p. 23.

<sup>159</sup> After more than three years, the National Assembly has still not elected a new chair. Neither has it filled another vacancy in the commission, with the result that the institution is now headed by a board of three members, rather than five as provided for in the law.

<sup>160</sup> SWD(2015) 9, p. 21; COM(2015) 36, 11. Among the weaknesses identified were insufficient staff resources and attractiveness, lack of binding central coordination and methodological guidance, and risks of political influence due to weak separation from the political level.

<sup>161</sup> This was partly a follow-up to recommendations in previous CVM reports, which had recommended such an evaluation. Another recommendation was to entrust a single institution with the authority and autonomy needed to coordinate and control the enforcement of the anti-corruption activities (COM(2012) 411, p. 21).

<sup>162</sup> The specialised anti-corruption unit was established in spring 2015 in connection to the Sofia City Prosecutor's Office. It incorporates two pre-existing units established in 2013 and 2014 respectively to investigate crimes committed by magistrates and local corruption. In addition to the Prosecutor's Office and investigating magistrates, the unit also has participation from SANS and the Ministry of Interior.

anti-corruption council and a post of Anti-corruption Coordinator at ministerial level to ensure follow-up to the strategy.<sup>163</sup>

The main initiative of the new anti-corruption strategy was the proposal to create a new unified Anti-Corruption Agency to ensure a coordinated and coherent approach to the checking of property and conflicts of interest of high-level officials, as well as to carry out administrative investigations into allegations of misconduct among such officials. This last proposal led to the presentation of a draft law in spring 2015, which included the legal basis for the new agency as well as a thorough reform of the rules on property declarations and conflicts of interest. According to this draft law, the new unified Anti-corruption Agency would merge several institutions, including CPACI and the part of the National Audit Office dealing with property declarations, within one single institution, while leaving responsibility for conflicts of interest for other public officials to the relevant public institutions, including the administrative inspectorates.

This new draft law envisaged a major overhaul of the entire institutional landscape to deal with corruption prevention in Bulgaria. However, the proposal failed to receive the required endorsement of the National Assembly during its first reading vote in September 2015.<sup>164</sup> Even though the government immediately announced its intention to resubmit the law in a revised form in order to ensure its adoption, the 2016 CVM report noted that the failure of the National Assembly to support the government's main anti-corruption initiative underlined a lack of consensus behind the reform process.<sup>165</sup> The government presented a revised version in spring 2016, but has not been successful in securing its adoption. Several other elements of the national Anti-Corruption Strategy are also still outstanding. As a result, while the strategy heralded a new more comprehensive and effective response to the challenges facing Bulgaria in regard to high-level corruption, Bulgaria has so far not been able to deliver on that commitment.

## **5.2. Developments since the last CVM report of January 2016**

In its last report the Commission recommended to Bulgaria to adopt a new anti-corruption law in line with the government's anti-corruption strategy, including the establishment of a unified anti-corruption agency with a strong independent mandate to fight high-level corruption, to adopt amendments to the law on public administration to enhance the powers and independence of the internal inspectorates, to monitor the progress of criminal cases involving allegations of high-level corruption, including the pre-trial and trial phase, and to implement measures to address the problems identified.

### *High-level investigations by law enforcement*

The prosecutor's office reports that a number of high-level investigations were launched or were ongoing in 2016, a number of which have been presented at the courts.<sup>166</sup> The picture remained largely unchanged from previous years regarding the limited number of convictions in high-level corruption cases.<sup>167</sup> Where convictions are handed down by lower courts, past experience shows a systematic

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<sup>163</sup> SWD(2016) 15, p. 19.

<sup>164</sup> SWD(2016) 15, p. 20-21.

<sup>165</sup> COM(2016) 40, p. 10.

<sup>166</sup> The cases reportedly involve former ministers, mayors, magistrates as well as officials in customs and other state agencies.

<sup>167</sup> During 2016 a number of convictions in high-level corruption cases have been reported by the Bulgarian authorities, including for example two municipal councillors sentenced to 4 ½ years prison each for embezzlement, two judges convicted to 4 years firm and 3 years suspended respectively for receiving bribes, a former director in the ministry of defence sentenced to 3 ½ years for embezzlement, an inspector in the road transport administration given a 2 years and 8 months suspended prison sentence for abuse of office and embezzlement, a director of a regional inspectorate for environment sentenced to 3 years suspended for abuse of office and extortion, a regional governor given a 1 year suspended prison sentence for misappropriation of funds, a mayor given a suspended sentence of 1 year for misappropriation of funds, a former head of customs office sentenced to 7 years prison for abuse of office aiding in the activities of an organised crime group, and

pattern of cases being overturned on appeal and ending up in acquittals or being dropped.<sup>168</sup> Consequently, very few final convictions have been reported in relation to high-level corruption cases.<sup>169</sup> The final report of the technical assistance project to the Prosecutor's Office coordinated by the Commission's Structural Reform Support Service also notes with concern the lack of high-level corruption cases.<sup>170</sup> Regarding EU funds fraud cases, the EU anti-fraud service OLAF continues to experience an apparent lack of proactive approach to cases with a potential corruption element brought to the attention of the Bulgarian authorities.

The track record on high-level corruption has therefore so far been very limited, given the apparent scale of the problem. While apparent reasons can be found in a combination of legal or procedural hurdles, an important part of the picture also seems to be a lack of capacity or motivation among investigatory and prosecutorial authorities to handle complex cases in an effective manner. According to the Bulgarian authorities, there are a number of reasons why corruption is a particularly complex crime to solve. Often corruption concerns decisions taken by collective bodies, which makes it difficult to assign responsibility for the decisions made and prove the link to any particular decision-maker. Witnesses may often be working closely with the corrupt officials, often in an inferior position, or they themselves have been involved in the scheme. Relevant documentary evidence is normally stored within the organisations with a direct interest in the case, which can lead to attempts to destroy or withhold such evidence when the existence of an investigation is revealed. Corruption schemes often concern complex decisions as a result of which external expertise is required to assess the economic benefits or damages accruing to one part or the other as a result of corrupt decisions. Such expertise may be expensive or simply unavailable in some areas.<sup>171</sup> While such factors may complicate the prosecution of corruption in any country, Bulgaria faces particular challenges. For these reasons, successful corruption investigations generally require exceptional perseverance on the part of the investigatory authorities, and this again requires an environment which motivates investigators and prosecutors to pursue such cases with the necessary vigour and determination.

In 2016 the Prosecutor's Office carried out an analysis of a broad sample of corruption cases processed since 2013, with a view to identifying common challenges and problematic practices to which failings in such cases could be attributed.<sup>172</sup> The analysis is a follow-up to a similar analysis conducted in 2013

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a former head of a national security agency sentenced to 10 years prison for embezzlement (although this sentence has recently been annulled at the Supreme Court of Cassation and the case referred back to the military appeal court for review). Most of these are not final sentences, however, and may be appealed.

<sup>168</sup> This pattern continued in 2016. Some recent cases include the annulment of a conviction concerning a former head of a national security agency charged with embezzlement (see also above; in the meantime, the same person was reportedly indicted again on a new set of charges), abandonment of a money laundering case against a former deputy speaker of the National assembly which fell due to the two year deadline for the completion of the investigation (another case for the same person concerning tax fraud ended in acquittal at the Supreme Court of Cassation later in the year), the acquittal of a former head of the road infrastructure agency charged with abuse of office in connection with allegedly fraudulent tendering procedures, the acquittal of a former prime minister in a case involving the disappearance of confidential documents, the acquittal of a former social affairs minister and several high level officials in an embezzlement case from 2009, and the final acquittal of all defendants in an nine-year old emblematic EU funds fraud case. In 2015 there were several cases of high public interest against former ministers which ended in acquittal after several years of court proceedings. It should be underlined that it is not objectionable per se that individual cases result in acquittals, notably if the evidence is insufficient. What is relevant here is the wider pattern of a high number of cases concerning serious charges being overturned in court.

<sup>169</sup> In 2016 Bulgaria has for example reported final convictions concerning a judge who was sentenced to 4 years in prison for bribery, a former mayor given a 2 years suspended sentence for abuse of office, a former executive director of a state agency given a suspended 3 year sentence for embezzlement, and a regional governor given a 1 year suspended sentence for misappropriation of funds (see also footnote above).

<sup>170</sup> See chapter 4 above.

<sup>171</sup> Annual report of the prosecutor's office for 2015, p. 75 (English translation).

<sup>172</sup> Report on the *Analysis of corruption cases prosecuted by the prosecutor's office in the period 01.03.2013-01.03.2016*, Supreme Prosecutor's Office of Cassation of Bulgaria, 2016 (English translation).

on similar cases over the period since the beginning of the CVM in 2007. It shows that, while some of the issues identified in the previous analysis had in the meantime been addressed through legislation or various organisational efforts, other problems remain and new additional ones have appeared which also require attention. The analysis confirms the frequent prolongation of pre-trial proceedings<sup>173</sup> and provides a number of insights into problems hindering effective corruption investigations in the Bulgarian context.<sup>174</sup>

Problems highlighted in the study include a range of managerial issues such as cost restrictions leading to a lack of access to necessary external expertise, the complexity of high-level corruption investigations not being taken properly into account in the assessment of workload of magistrates, and a need for training in various specialised fields<sup>175</sup> and joint training between prosecutors and investigators.<sup>176</sup> Sometimes, supervision of investigations has not been proactive enough, resulting in late discovery of errors or delays in the investigation. There has also been a tendency in some cases to automatically grant prolongation of investigations without sufficient justification, sometimes leading to expiry of the limitation period and cases being dropped.

The study recommends some organisational changes in the direction of further specialisation and better cooperation with investigatory agencies, for example through the establishment of specialised departments within appellate regions to deal with corruption cases. The establishment of the specialised anti-corruption unit in the Sofia City Prosecutor's Office is seen by the Bulgarian Prosecutor's Office as a step forward in this respect, in particular the close cooperation with SANS and the Ministry of Interior.<sup>177</sup>

Lack of effective cooperation between the prosecution and investigatory services appears to be a major issue in corruption investigations. A number of challenges are highlighted by the study in this regard. Often preliminary steps are taken in order to provide or confirm indications of a crime before the pre-trial stage is launched, which can jeopardise subsequent collection of evidence further on in the formal investigation. Sometimes an incorrect or overly-broad definition of the crime in the decision to open the pre-trial investigation leads to unnecessary investigatory efforts to collect irrelevant evidence. One possible result of this can be the superficial interrogation of an excessive number of witnesses due to a lack of clarity about the objectives of the investigation. Important documentary evidence is not always collected, which sometimes leads to surprises later on in the trial phase when it is presented to court as new evidence. Important investigatory possibilities such as search and seizures are not utilised to the full, or are delayed unnecessarily, leading to a risk of useful evidence being concealed or destroyed.<sup>178</sup> When this is combined with hasty decisions to press charges without collecting all the necessary evidence, the predictable result is chaotic and prolonged investigations often ending in the termination of the proceedings because the evidence collected, despite its volume, is inadequate to substantiate the

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<sup>173</sup> Only about 30 per cent of the reviewed pre-trial investigations were concluded within one year. Most were completed within two years, whereas nine of the 156 reviewed pre-trial investigations took more than five years.

<sup>174</sup> Many of the conclusions echo the ones arrived at in separate analyses of ECtHR cases and by the SRSS mission referred to in chapter 4 above.

<sup>175</sup> Corruption cases can touch upon diverse fields of law such as public procurement, concessions, forestry and agriculture, state and municipal property law, local administration, financial management and control in the public sector, rules regulating EU funds, etc.

<sup>176</sup> An issue often noted by interlocutors in the past has been the need for better communication between prosecutors and investigators.

<sup>177</sup> It is unclear how the proposed transfer of jurisdiction regarding certain high-level corruption cases from the Sofia City Court to the Specialised Court on organised crime would fit into this picture (see chapter 3 above), as the proposal has not been discussed in this analysis. What is clear is that the transfer would also apply to the relevant prosecutors' offices with the Sofia City Court and the Specialised Court and hence have an impact on the work of the specialised anti-corruption unit.

<sup>178</sup> Often the pre-trial bodies choose, at least initially, to request the relevant authorities or other entities to hand over relevant documentation under Article 159 of the criminal procedure code rather than performing – procedurally more cumbersome – search and seizure operations under Article 160 of the code.

theory of the prosecution. As a general organisational point, the study points out that better use could be made of the expertise in higher-level prosecution offices to provide methodological guidance.

The study also concludes that cooperation with the asset forfeiture commission (CIAF) could be improved. While cases are automatically notified to the commission, prosecutors make far too little use of the possibilities for assistance through joint teams, resulting in useful information on the property status of suspects not being utilised for the investigation. Finally, the analysis cites a number of problems in the criminal code, such as the difficulty of establishing proof of subjective elements of corruption crimes and other issues in the formulation of corruption offences in the criminal code.<sup>179</sup>

The report concludes with a number of concrete recommendations which – in combination with elements discussed in chapters 3 and 4 above – cover a series of important issues to improve the prosecution of high-level corruption cases.

#### *Prevention of high-level corruption*

In April 2016 the government adopted and submitted a revised version of its draft anti-corruption law to the National Assembly. The assembly endorsed the draft at first reading at the end of June, allowing it to proceed to more detailed negotiations at the committee stage. The new draft proposal incorporated several changes compared to the first version, including a stronger role for the National Assembly in electing the leadership of the new proposed anti-corruption agency<sup>180</sup> and revised provisions on the handling of anonymous alerts. The latter element had been quoted as an important reason for the rejection of the first legislative proposal in 2015, and reportedly it remains a highly contentious issue among Bulgarian parliamentarians.<sup>181</sup> Another significant change from the first proposal was the inclusion of asset forfeiture within the law, envisaging the merger of the Commission on Illegal Asset Forfeiture and the new Anti-corruption agency. This element of the new proposal was the subject of criticism from various sides focusing partly on the very different scope of action of the two types of institution (high-level corruption versus broader issues or organised crime, tax fraud etc.) as well as the risks inherent in a major organisational change involving the asset forfeiture commission, an institution which is seen as showing a stable track record within its existing remit of operations.<sup>182</sup>

After the first reading vote, a very large number of proposals for amendments of the draft proposal were submitted by members of the various parliamentary groups, setting the stage for complex negotiations in the autumn. Eventually, however, the dossier was instead put on hold due to the uncertain political situation from November.<sup>183</sup> The debate on the draft law and proposed agency is therefore now expected to continue only after general elections expected in spring. Since the draft law touches upon a wide range of elements in the current anti-corruption set-up, merging several institutions and changing the content and scope of the underlying substantive law on conflicts of interest and property verifications, the practical follow-up will be of crucial importance should the draft law finally be adopted.

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<sup>179</sup> See also chapter 3 above.

<sup>180</sup> Under the previous proposal the director and deputies would be appointed by the President of the Republic on the proposal of the Government. The new proposal provides that they are elected by the National Assembly.

<sup>181</sup> The ability of anti-corruption authorities to handle well-substantiated anonymous alerts is generally accepted practice internationally (see e.g. standards adopted by the European Partners against Corruption / European contact-point network against corruption (EPAC / EACN) in 2011: [http://www.epac-eacn.org/downloads/recommendations/doc\\_view/1-anti-corruption-authority-standards](http://www.epac-eacn.org/downloads/recommendations/doc_view/1-anti-corruption-authority-standards)) but became a contentious in the parliamentary debate, perhaps due to a confusion between the separate issues of standards for opening administrative investigations and admissibility of evidence in courts.

<sup>182</sup> Concerns have been raised with the Commission by both civil society actors and independent experts about this particular element of the new proposal.

<sup>183</sup> In December the Legal Affairs Committee of the National Assembly decided to postpone deliberations on the draft law amidst expectations of early elections being called for spring 2017. Nevertheless, efforts have reportedly been made within the committee to reach compromises on several points in the draft text.

Among its many consequences, the draft law would have an impact on the institutional set up for the verification of conflicts of interest, a subject which has been raised with some concern by CPACI<sup>184</sup>, which is currently responsible for the enforcement of a coherent approach at all levels in the entire public administration. With the draft law, this responsibility would be distributed among a multitude of public institutions and administrations, reverting to the situation before the establishment of CPACI in 2011. While the new proposed agency would be responsible for around 8,000 high level officials, new responsibilities would have to be borne in particular by the municipalities and by the inspectorates in the different departments and bodies of the State administration.

In 2015, in continuation of the national anti-corruption strategy, the government started preparations on a legislative initiative to strengthen the internal inspectorates in the state administration. The objective of the reform reportedly is to enhance the independence and powers of the inspectorates as administrative tools for corruption prevention, by entrusting them with the review of asset declarations of officials (those not covered by the new anticorruption agency) and work on corruption signals and by reviewing the legislative framework with regard to appointment of staff in the inspectorates, transparency and accountability, and the definition and planning of tasks. An important element of the reform would be to further strengthen the role of the General Inspectorate with the Council of Ministers, by empowering it to coordinate and exercise oversight over the activities of the sectorial inspectorates.<sup>185</sup> Draft proposals for necessary changes to the law on public administration were discussed at the National Anti-corruption Council already in the summer of 2015. However, by the end of 2016 these proposals had still not been adopted by the Council of Ministers and submitted to the National Assembly.<sup>186</sup>

In 2016 the inspectorates have continued carrying out their functions under their existing mandate and rules. The inspections cover the entire state administration including regional bodies. Inspections have led to several referrals of cases to the Conflict of Interest Commission (CPACI) or dismissals due to verified cases of conflict of interest. At the order of the Prime Minister a broad inspection of public procurement procedures carried out since January 2013 was performed by the inspectorates in spring 2016 partly based on work of the National Audit Office. The analysis revealed a wide range of irregularities on the basis of which recommendations were made in a number of cases.<sup>187</sup>

While the inspectorates are responsible for internal control within the executive branch, working under the authority of the government, the National Audit Office (NAO) is the corresponding external control agency. The NAO does not have independent sanctioning powers, but its analyses and reports can provide valuable input not only to the public at large but also to the work of the administrative inspectorates, as well as other bodies such as the State Financial Inspections Agency (SFIA), and in this way it plays a crucial role as an external watchdog.<sup>188</sup> The NAO also plays another crucial role in respect of verifying the personal property declarations submitted by high-level officials under the law on transparency of property of public officials. In the second quarter of 2016 the NAO verified almost 7,000 annual declarations, in addition to around 400 initial and final declarations for high-level officials starting or leaving service, and almost 1,000 declarations for newly elected or outgoing

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<sup>184</sup> The opinion of CPACI on the draft law on corruption prevention and forfeiture of illegally acquired assets was conveyed to the Government in a letter of 7 March 2016.

<sup>185</sup> *National Strategy for Prevention and Combating Corruption in the Republic of Bulgaria 2015-2020*, Government of Bulgaria, April 2015, p. 7 (English translation).

<sup>186</sup> Bulgarian authorities explained to the Commission services in December that any changes to the law on public administration need to go through a very thorough vetting process and that the proposals had been subject to two committee stages within the government apparatus in spring and autumn 2016 respectively and were now in principle ready to move ahead to a government decision, following which they could be submitted for consideration by the legislator. Reportedly, no significant changes had been made to the original proposals during the preparative process.

<sup>187</sup> Information provided by the General Inspectorate.

<sup>188</sup> The NAO management board is elected by the National Assembly and hence independent of the executive. This has not prevented controversy at the time of the election of the board however, with opposition politicians alleging that the respective parliamentary majorities place their own people in the board.

members of municipal councils following local elections in the autumn of 2015.<sup>189</sup> The verified declarations are made public on the website of the NAO.<sup>190</sup>

## 6. CORRUPTION AT LOWER LEVELS

*Benchmark 5: Take further measures to prevent and fight corruption, in particular at the borders and within local government.*

Corruption is often used as a catch-all concept but in fact it is useful to distinguish between different types of corruption. Whereas the discussion in chapter 5 above concerned high-level corruption within state institutions, another type of corruption, which, where present, is often much more directly visible and familiar to most people, is the 'everyday' corruption which meets citizens and business when they come into contact with public authorities at various levels. Most commonly identified with the act of bribery, this kind of corruption has been identified as prevalent in a number of areas in Bulgaria, covering sectors such as the police, customs, healthcare, education, and the administration of licenses and permits of various sorts. Low-level corruption affecting public licensing or control agencies<sup>191</sup> can be damaging for the economy as it creates uncertainty for businesses. Another sector in which corruption can have high economic costs is public procurement, where corruption tends to raise costs and lower the quality of public services while diverting tax revenues towards corrupt officials and private individuals who may at the same time be involved in other types of organised crime.<sup>192</sup> Finally, the question of corruption at the borders, already of high importance, has become even more sensitive in the context of the current migration and refugee crisis and heightened security risks. It is crucial from the perspective of mutual trust amongst Member States that there is confidence that the borders are properly protected, which implies that the benchmark's emphasis on possible corruption among border guards and customs officials remains a particular priority.

Low-level corruption can in some sectors or societies become so widespread that it takes on a status of general social norm or expectation. Under such circumstances of 'endemic' corruption, law enforcement is often not very effective in addressing the problem.<sup>193</sup> A change of culture is needed which needs preventive measures to make corruption more difficult, combined with broader awareness-raising efforts to challenge the normative basis of entrenched practices. On the other hand, even when it comes to such situations, law enforcement action is still necessary whenever more serious cases of corruption are discovered. Avoiding any impression of impunity for gross violations is a necessity if efforts to change broader attitudes towards corruption are to be successful.

At the time of Bulgaria's accession to the EU in 2007, low level corruption was identified as a widespread problem in Bulgaria. This was the background for the fifth benchmark. As for the benchmarks above, this chapter will first provide a general impression of the developments over the past ten years since accession and then take a more close-up look at the year that has passed since the last CVM report in January 2016.

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<sup>189</sup> The verification is carried out automatically using a specialised IT system. Further checks can be carried out in case of discrepancies, including a full tax audit where relevant. The NAO itself carries out no further proactive assessment of the information contained in the declarations and does not have access to bank account data.

<sup>190</sup> See <http://register.bulnao.government.bg/2016/index.html>

<sup>191</sup> Including tax authorities.

<sup>192</sup> One strand of revenue for organised crime is the fraudulent acquisition of public funds through public procurement or other contracts. In such schemes, corruption often plays a role in facilitating the criminal activities. Collusion between organised criminal groups and public officials is also a risk in other sectors.

<sup>193</sup> Based on survey figures from Bulgaria, the Centre for the Study of Democracy has estimated that the share of bribery transactions which lead to a judicial process is equal to around 0.0115 per cent (120-150 pre-trial cases compared to an estimated 1,300,000 persons having engaged in a bribing transaction at least once during the year). *State Capture Unplugged: Countering Administrative and Political Corruption in Bulgaria*, Centre for the Study of Democracy (CSD), 2016, p. 17.

## 6.1. Overview of developments under the CVM

While high-level corruption can be very difficult to quantify, it is easier to put at least a rough estimate on the degree to which a society is affected by low-level corruption. A particularly useful tool in that respect is the survey of concrete experiences of bribery among citizens. Available surveys in this respect indicate that low-level corruption remains a widespread problem in Bulgaria.<sup>194</sup> It also appears, however, that Bulgarians are not per se very tolerant of the practice, in spite of its prevalence.<sup>195</sup> While there was clear progress towards diminishing the problem in the years leading up to EU accession as well as in the years immediately following accession, there is evidence that the last few years have seen a reversal of these earlier trends, with levels of concrete experience of bribery moving back up to levels last seen before the EU accession ten years ago.<sup>196</sup>

At different times over the past ten years, the Bulgarian authorities have taken steps to address the problem of low level corruption in various sectors. Some of these have already been touched upon in the last chapter, such as the establishment of the Commission for Prevention and Ascertainment of Conflicts of Interests (CPACI) in 2011 and the internal inspectorates in the State administration. Indeed, these institutions have played an important role in terms of prevention and awareness-raising actions on corruption risks. Steps were taken already in the early years after accession to strengthen corruption prevention within the police and customs authorities, through such measures as rotation of police officers, abolishing private donations to law enforcement authorities, and awareness-raising campaigns. Ethics codes and local mediators were set up in local authorities, alongside a number of other measures launched under the first anti-corruption strategy adopted in 2009.<sup>197</sup> Some of these measures had a positive impact at the time. However, for results to be durable over time, a continued effort is needed. The figures cited above suggest that this pressure did not succeed in triggering the fundamental culture change required.

More recently, the renewed anti-corruption strategy adopted in 2015 set out a number of further strands of work aiming to address low-level corruption. The measures envisaged include the above-mentioned strengthening of the internal control bodies in the state administration as well as measures to limit corruption risks in administrative services through the use of IT tools, enhanced structures to check conflict of interest and property declarations within administrative bodies, standard methods for signals on corruption to be received by public institutions including anonymous signals, developing a methodology for the use of integrity tests, and the elaboration of sectorial anti-corruption plans for high-risk sectors.<sup>198</sup> The sectorial anti-corruption plans would consist of a mixture of organisational and managerial measures, including all of the above in different combinations depending on the specific characteristics of the policy sector concerned. The development of these plans was envisaged in a number of policy sectors including education, healthcare, agriculture, transport, energy, customs and taxation. In the end, however, it was in the Ministry of Interior that these efforts first took hold with a broad range of specific and general measures implemented within the broader context of a

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<sup>194</sup> The level of reported involvement in bribery in Bulgaria for 2015 appears to be comparable to that of Western Balkan countries such as Serbia, Kosovo, Bosnia-Herzegovina and Macedonia and higher than in Croatia or Turkey, but lower than in Albania. *Shadow power: assessment of corruption and hidden economy in southeast Europe*, Centre for the Study of Democracy (CSD), 2016, p.18.

<sup>195</sup> In a recent study, 88 per cent of Bulgarians considered it likely or very likely that they would meet corruption pressure in their contacts with public officials, which is the highest percentage among the South-East European countries covered by the survey (just ahead of Serbia). However, Bulgarians were also found to be the least tolerant of such pressure among the countries covered. Only 20 per cent of Bulgarians found such pressure acceptable. *Shadow power*, p. 19 and 21.

<sup>196</sup> In 2016 more than one out of five Bulgarians surveyed had personally paid a bribe in the previous year and one out of four had been asked for one. Similar but declining figures were seen in the years leading up to EU accession. In 2010-2011 the levels had halved to around one in ten having given a bribe, but then increased again to reach a maximum of three out of ten in 2014. *State Capture Unplugged*, p. 11-12.

<sup>197</sup> SWD(2012) 232, p. 22-26.

<sup>198</sup> *National Strategy for Prevention and Combating corruption in the Republic of Bulgaria 2015-2020*, April 2015, p. 11-13 (English version).

general reorganisation of the ministry and reform of its statutes.<sup>199</sup> These efforts within the Ministry of Interior were continued into 2016 and appeared to have a real impact.

Public procurement is generally recognised as being prone to corruption risks, and Bulgaria is no exception. In 2015, nearly 60 per cent of businesses in Bulgaria (the highest percentage in any Member State) considered that corruption had prevented them from winning a public tender within the last three years.<sup>200</sup> There was only one bidder in 27 % of public procurement procedures.<sup>201</sup> Past CVM reports have also highlighted the challenges faced by Bulgaria in this area.<sup>202</sup> As part of its accession conditions, Bulgaria transposed the European legislation in the public procurement area with a major overhaul of the law in 2006, but in the following years the legislation remained subject to numerous and frequent amendments. The resulting lack of stability and transparency of the legal framework constituted a barrier to efficient procurement procedures and was further compounded by a lack of administrative capacity among contracting authorities. The lack of administrative capacity became increasingly problematic as the previously rather centralised system of public procurement in Bulgaria moved in the direction of further decentralisation, with municipalities playing a greater role for example in the implementation of EU funded projects. The legal uncertainty created by the complex and ever changing legislation also led to a tendency of frequent appeals which delayed procedures, with negative financial and policy consequences.<sup>203</sup>

Over the years Bulgaria has gradually strengthened its policy framework on public procurement.<sup>204</sup> In addition to the introduction of *ex post* checks carried out by the State Financial Inspections Agency (SFIA) and the National Audit Office (NAO), the Public Procurement Agency (PPA) was mandated to carry out *ex ante* control of EU fund procedures and this was later extended to all standard procurement procedures.<sup>205</sup> In 2014 Bulgaria adopted a comprehensive strategy for the development of the public procurement sector. The strategy includes a range of measures with concrete deadlines to address the problems faced, including simplified and codified legislation and centralised guidelines which aim at the correct transposition of the new EU public procurement directives; enhanced administrative capacity at the various levels of the public administration; comprehensive and non-formalistic *ex ante* controls combined with rationalised *ex post* controls; and greater transparency via gradual introduction of electronic procurement and more efficient review procedures.<sup>206</sup> The 2015 Anti-Corruption Strategy also mentions strengthening the control of public procurement procedures.<sup>207</sup>

## 6.2. Developments since the last CVM report of January 2016

In its 2016 CVM report the Commission recommended that Bulgaria provide the Public Procurement Agency with the legal authority and organisational capacity to perform risk-based, in-depth checks on public procurement procedures, to continue the efforts to address low-level corruption in the Ministry of Interior, and to launch similar efforts in other risk sectors within the public administration.

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<sup>199</sup> SWD(2016) 15, p. 22-23.

<sup>200</sup> *Businesses' attitudes towards corruption in the EU: Summary*, Flash Eurobarometer 428, 2015, p. 26.

<sup>201</sup> Single Market Scoreboard:

[http://ec.europa.eu/internal\\_market/scoreboard/performance\\_per\\_policy\\_area/public\\_procurement/index\\_en.htm](http://ec.europa.eu/internal_market/scoreboard/performance_per_policy_area/public_procurement/index_en.htm)

<sup>202</sup> COM(2012) 411, p. 19; COM(2015) 36, p. 11; COM(2016) 40, p. 12.

<sup>203</sup> Such delays created significant problems in connection with the implementation of EU funded programmes and are also a barrier to the effective implementation of public policy decisions in many instances.

<sup>204</sup> SWD(2012) 232, p. 27-29; SWD(2015) 9, p. 23-24.

<sup>205</sup> Until recently the checks have however been of a rather superficial format, focusing on the legal compliance rather than deeper analysis of the technical specifications set out in the calls. The coexistence of *ex ante* and *ex post* controls by different bodies in turn created problems of inconsistency, probably also reflecting the complex and changing legal environment which created opportunities for divergent interpretations.

<sup>206</sup> *National Strategy for the Development of the Public Procurement Sector in Bulgaria for the period 2014-2020*, Government of Bulgaria, June 2014.

<sup>207</sup> *National Strategy for Prevention and Combating corruption*, p. 7 (English version).

## Public procurement

In the public procurement area there have been important developments in 2016. In January, the National Assembly adopted amendments to the legislation with a view to transposing two out of the three recently adopted European public procurement directives.<sup>208</sup> Among other changes, new provisions were introduced to strengthen the *ex ante* checks of tender procedures performed by the Public Procurement Agency (PPA).<sup>209</sup> While previously such checks covered all procedures and were of a rather general character, the new rules envisage a risk-based and more in-depth check on a sample of procedures, notably including also a check of the technical specifications for the tender. The checks will be performed in two steps, both at the initial preparation of the tender and at the time of the publication of the call. The PPA's recommendations are published. Where the PPA considers that there is a considerable risk of irregularities, it may appoint observers (belonging to the PPA staff) to participate in the evaluation committee set for the tender concerned. While the recommendations of the PPA are therefore not binding upon the contracting authorities, it can exert considerable pressure on authorities which choose to disregard its advice. Ultimately, it is also foreseen that the PPA can notify *ex post* control bodies (the SFIA and NAO) about concrete procedures, for example on the basis of reports produced by the observers that it sends to evaluation boards.

The new model for *ex ante* control of public procurement procedures appears to be an important step forward. If properly implemented, it could bring the double advantage to increase ownership from contracting authorities while allowing the PPA to dedicate more time and resources to improve the quality of its controls. However, the real impact will have to be seen in practice and may need further development in light of experience.<sup>210</sup> An important issue concerns the degree of scrutiny that will be applied in practice in the context of the new checks performed by the PPA.

To be truly effective, these checks need to cover an assessment of the technical specifications for tenders, a task which can be highly demanding and requiring the PPA to employ technical expertise in a number of areas. Another essential issue concerns the reliability of the sampling method for the selection of procedures subject to the random *ex-ante* checks and its adaptability to evolving risks. Such methods should ensure that controls remain unpredictable from the point of view of individual contracting authorities, focused on sectors at risk while keeping all contracting authorities under the threat of a potential control regardless of the financial volume of their procedures. The follow-up on concrete cases where suspicions appear of conflicts of interest or other undue influence on tendering procedures is also crucial. As the PPA does not have any sanctioning powers and does not carry out checks on the outcome after the fact, the cooperation with *ex post* control bodies will be essential in this respect.<sup>211</sup> In addition, *ex post* controls of public procurement procedures need to be undertaken in such a manner as to allow meeting the legally stipulated deadlines for imposing sanctions for any unveiled irregularities.

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<sup>208</sup> Although the Classical directive 2014/24/EU and the Utilities directive 2014/25/EU were thus transposed in a timely manner, the Concessions directive 2014/23/EU was not part of the package and still needs to be transposed.

<sup>209</sup> According to the Public Procurement Act the Public Procurement Agency performs risk-based random controls and systemic controls (over negotiated procedures without prior notice, certain exemptions from the scope of the law, control in case of amendment of a contract for public procurement). An additional "market monitoring" control function was also entrusted to the PPA on the basis of relevant secondary law provisions.

<sup>210</sup> Concrete implementation only started in September 2016. To ensure capacity to carry out the additional control, it is planned to assign in 2017 additional personnel to the PPA. The level of salaries within the Agency has recently been increased. Also, the PPA has been moved under the Ministry of Finance. Previously it was under the remit of the Ministry for Economic Affairs.

<sup>211</sup> As mentioned above, such cooperation has been an issue in the past where different interpretations of the public procurement rules led to divergences between approaches. To address such issues in the future, a Methodology Council has recently been established to work on harmonised approaches to various methodological issues. This council can play an important role in unifying practices, law interpretation and guidance, which requires a systematic approach, including the adoption of an annual work programme and/or performance indicators to regularly assess the progress achieved.

The strengthened control by the PPA should also be seen in the context of the broader implementation of the National Public Procurement Strategy 2014-2020, where a number of planned measures will have a positive impact in terms of limiting corruption risks. These include among others the introduction of a unified guidance document, standards templates for tendering documents, standardised contract clauses, centralised purchasing platforms, increased professionalisation of contracting authorities, improved remedies and the eventual extension of e-procurement to all stages of the procedures.<sup>212</sup> The successful implementation of this reform agenda will depend to a great extent on the PPA's organisational capacity and ability to adapt, as it is faced with new, still more demanding tasks in relation to the overall public procurement system. Overall, the National Public Procurement Strategy seems to start bearing some fruit and procurement procedures tend to be clearer and more streamlined. Notwithstanding this, public procurement still presents significant problems, often related to weaknesses in institutions and in the public administration. A trend towards irregularities becoming more complex over time is likely to further increase the challenges for control authorities.

Improvements in the procurement system also need to go hand in hand with efforts to address conflicts of interest and corruption risks more broadly, especially at the local level. A particularly sensitive issue in this regard concerns the use by contracting authorities of ad hoc experts in the preparation of technical specifications for tenders, as well as on evaluation committees charged with the assessment of bids by potential contractors. This is an obvious area of risk for conflicts of interest, and, while these external experts are required by law to submit conflicts of interest declarations, they are not covered by the CPACI's remit of competence, which means that the assessment of compliance with the law falls on the contracting authorities themselves and that no sanctions can be applied for violations under the conflicts of interest law.<sup>213</sup> CPACI has carried out a number of preventive activities in 2016 with regard to conflicts of interest at the local level. These activities have included a series of training events for mayors, chairs of municipal councils, and members of local conflicts of interest committees, which was organised in cooperation with the Bulgarian National Association of Municipalities. CPACI also carried out a campaign to verify compliance of the municipal registries on conflict of interest declarations, as well as a campaign of systematic checks on the timely submission of compatibility and conflicts of interest declarations by the newly elected mayors and municipal councillors following local elections in October 2015.<sup>214</sup>

#### *Sectorial anti-corruption measures in the Ministry of Interior and other sectors*

As part of a long-term concept for the combatting of corruption in the Ministry of Interior until 2020, the ministry adopted annual anti-corruption plans for 2015 and 2016. The plans contain a range of practical and organisational measures to target corruption risks in all parts of the ministry's activities, including training and prevention as well as law enforcement measures. An important element is the introduction of new technology. In July 2016 a portal for electronic services to citizens and businesses became functional which provides more than 30 electronic services, for example in relation to the payment of traffic fines, issuance of ID documents, and obtaining licences to enter private security services, as well as permits related to firearms. Software is in the process of being introduced to monitor internal systems and databases against unauthorised access.<sup>215</sup> A plan is being implemented for the furnishing of traffic control vehicles with remote access workstations<sup>216</sup>, which allow for central monitoring including through video recording of activities. Traffic police officers are also

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<sup>212</sup> Bulgaria has an extensive registry of procurement procedures online with public access, but all phases of the e-procurement are not yet implemented.

<sup>213</sup> Meeting with CPACI, December 2016.

<sup>214</sup> The latter checks led to 113 administrative proceedings for late declaration. CPACI points out that this is a vast improvement in comparison with the results of the similar exercise in 2011 which revealed that 3000 local councillors had not submitted their compatibility declarations on time.

<sup>215</sup> Reportedly, the privileged access of staff to Ministry of Interior databases has created a market for petty corruption.

<sup>216</sup> 250 have been supplied so far.

rotated on a regular basis and are subject to regular inspections. A pilot on body worn cameras has been launched. In combination with the new system of electronic payment of fines, these and other measures are reported to have dramatically reduced the risk of bribery in this sector.<sup>217</sup>

In the area of border control, officers working in corruption risk zones are rotated regularly. A risk register is maintained on personnel and regular police operations are carried out by mobile control and monitoring groups with participation of relevant law enforcement services.<sup>218</sup> An email and telephone hotline has been made available to citizens who experience irregularities at the border. Video surveillance has been introduced at the border which, aside from controlling movements over the border, should also limit the opportunities for corrupt activities. With regard to training and human resource management, measures were taken to incorporate anti-corruption content in all courses of the MoI Academy. An integrity test procedure was developed for use in the initial selection of staff for appointment at the Ministry of Interior. In October 2016, the National Assembly adopted amendments to the Ministry of Interior Law which will provide the legal basis for the introduction of inspections of integrity and for the assessment of personal property declarations of ministry personnel based on information from public registries.<sup>219</sup> The anti-corruption plan of the Ministry of Interior is implemented in the context of a broader reform of the ministry and appears to be a serious and determined effort to stamp out low-level corruption in one of the sectors most notorious for it.

A concrete example of similar efforts in another related area is the customs office, which has adopted a sectorial anti-corruption plan for 2016, under which workshops have been carried out on the prevention of corruption. A methodology for corruption risk assessment has been approved by the customs service in March 2016, based on the methodology recommended by the General Inspectorate with the Council of Ministers. A system of secondment of customs offices to other districts is in place, so as to address the risk of corrupt cultures developing in individual offices. Inspections of customs stations are regularly performed, both planned and on the basis of signals received from citizens.<sup>220</sup> A number of inspections and raids by law enforcement in recent years have resulted in disciplinary proceedings, dismissals, and in some cases judicial follow-up. As mentioned, the 2014 anti-corruption strategy envisaged such plans to be implemented in high-risk sectors across government. Other risk sectors where such plans are reportedly under way include sectors providing control functions for the state, such as the tax authorities<sup>221</sup>, sectors handling large contracts or EU funds, such as energy or agriculture, as well as sectors providing services directly to citizens or businesses, such as healthcare, education or transport. But the general picture appears to be that these efforts are still much less advanced than in the Ministry of Interior.

## 7. ORGANISED CRIME

*Benchmark 6: Implement a strategy to fight organised crime, focussing on serious crime, money laundering as well as on the systematic confiscation of assets of criminals. Report on new and ongoing investigations in these areas.*

Organised crime was identified at the time of accession as a serious problem in Bulgaria. Although its visible presence has diminished since an apparent peak in the 1990s and the early years of this century,

<sup>217</sup> There has reportedly also been a dramatic exodus of officers from service in the traffic police, mostly on a voluntary basis and sometimes through reassignment to other parts of the ministry, but in some cases also due to actual or potential disciplinary or criminal follow-up to transgressions.

<sup>218</sup> The national police, customs and the organised crime directorate of the Ministry of Interior are involved. The objective in these operations is two-fold: both to minimise corruption risks and to strengthen the response to smuggling and contraband.

<sup>219</sup> This system is to cover managerial staff. The Ministry of Interior has made an agreement for the use of a version of the methodology applied by the NAO for high level officials (see chapter 5 above).

<sup>220</sup> These include 'road-stop' controls behind the borders by mobile customs groups to verify the work of the customs at the border.

<sup>221</sup> In the National Revenue Agency such measures form part of broader efforts against tax evasion.

organised crime has continued to constitute a significant threat to Bulgarian society and the economy during the years following Bulgaria's accession to the EU. The challenge is partly a reflection of the geographic location of Bulgaria on some of the most important trafficking routes for illicit goods between Europe and the Orient, including the most important route for heroin trafficking running from Central Asia to Europe. According to an UNODC<sup>222</sup> analysis based on estimates for the years 2009-2012, heroin trafficking alone through Bulgaria produced annual revenues for organised crime equivalent to around 1.22 per cent of Bulgaria's GDP on average.<sup>223</sup> A recent study of illicit markets in Europe estimated the illicit revenues from a selection of other criminal activities – in particular illicit tobacco, VAT fraud, and counterfeiting – to around 1.6 per cent of Bulgaria's GDP.<sup>224</sup> The 2012 CVM technical report cites an overall estimate of organised criminal activities of close to 5 per cent of GDP.<sup>225</sup>

While these estimates are naturally subject to great uncertainty, such figures can give a general idea of the importance that organised crime has played in the Bulgarian economy in recent years. Furthermore, as noted in the July 2012 CVM report, an important additional factor has been the violence connected with organised crime in Bulgaria, including frequent contract killings to which little judicial and law enforcement follow-up could be reported.

The general background for the sixth benchmark under the CVM was the assessment that organised crime played a unique role in Bulgarian society, with organised criminal groups exerting considerable influence over economic activities in the country as well as potentially the political system and state institutions.<sup>226</sup>

## 7.1. Overview of developments under the CVM

This section focuses on the changes that have taken place since Bulgaria's accession to the EU in respect to organised crime as well as the Bulgarian law enforcement and judicial response to it.

### *Evolution in organised crime*

Bulgarian authorities report that over the past ten years there has been a significant change in the nature of organised crime in the country. While organised criminal activity still exists, according to the Bulgarian authorities the picture described in the introduction, with large and hierarchically organised criminal organisations having a strongly felt presence (and notably resorting to open use of violence) throughout significant parts of the territory, is no longer the reality. Today's organised crime landscape is much more comparable to the situation in other Member States in the sense that it is more fragmented, with smaller groups or individuals linked through flexible networks. Many of the criminals of the earlier era – if they have not been killed in inter-gang rivalries – have been reported to have left the country or retired from high-risk criminal activities, having previously laundered and redirected their illegally-earned assets into the legal economy. The result, according to the Bulgarian

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<sup>222</sup> United Nations Office for Drugs and Crime.

<sup>223</sup> Next after Afghanistan, Albania and Iran, Bulgaria had the highest ratio to GDP of illicit revenues from heroin trafficking on the entire Balkan route (defined as including the production countries as well as the main consumer countries in Europe). *Drug Money: the illicit proceeds of opiates trafficked on the Balkan route*, UNODC 2015, p. 47.

<sup>224</sup> *From Illegal Markets to Legitimate Businesses: the portfolio of organised crime in Europe*, Organised Crime Portfolio, 2015, p. 35-37. The figure does not cover revenues from significant areas of organised criminal activity such as trafficking in human beings, extortion, usury, and cybercrime. Neither does it cover the heroin trafficking revenues cited earlier.

<sup>225</sup> SWD(2012) 232, p. 29 (footnote 127).

<sup>226</sup> COM(2012) 411, p. 13-14; SWD(2012) 232, p. 29-30.

law enforcement authorities, is a less malign – less violent – organised crime picture in today's Bulgaria, than was the case in the past.<sup>227</sup>

The image of a more fragmented situation with regard to organised crime appears to have some validity in as far as the imprint of organised crime on everyday life has become relatively less visible in recent years. The level of violence, although it cannot be said to have disappeared entirely<sup>228</sup>, also seems to have abated compared to the early years of the CVM.<sup>229</sup> Bulgarian authorities do not claim this development is only (or even mostly) due to effective law enforcement efforts on their part. However, even if Bulgarian law enforcement arguably failed to tackle the serious organised crime problems that were present in the country at the time of accession to the EU<sup>230</sup>, this does not mean that there has not in the meantime been a change in the overall crime picture. On the surface at least, such a change does indeed seem to have taken place. Neither does it mean that organised crime has disappeared, even in its traditional form, active in diverse trafficking activities, in drugs, cigarettes and – more recently – migrants, as well as trafficking in human beings.<sup>231</sup> However, the overall picture is now less dominated by the traditional organised criminal gangs, and has been replaced by a more diverse scenario, in which smaller groups of the traditional kind co-exist with more sophisticated criminal networks, active for example in cybercrime or fraud to non-cash means of payments, some with a closer link to the legitimate economy and altogether focusing on less risky and less visible types of criminal activity.<sup>232</sup>

### *Institutional developments in response to organised crime*

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<sup>227</sup> In terms of concrete criminal markets, Bulgarian authorities report a number of changes since the years around the EU accession. Violence has diminished with less reliance on extortion as a criminal activity. The former hierarchical groups have been split up in smaller, local entities. Trans-border crime has become more prevalent with more involvement of foreign groups, using local criminals in subcontracting roles. Organised criminals are increasingly penetrating the legitimate economy and becoming more flexible, using modern technology. The international trend towards multi-crime groups, with organised crime focusing opportunistically on different markets, is also present in Bulgaria. Drug trafficking remains a major issue. Amphetamines and methamphetamines and cannabis production has taken over from other markets. There has been a reduction in domestic heroin consumption and the production of synthetic drugs has increasingly moved to the Middle East. Designer drugs constitute an increasing problem. However, drugs dealing is no longer nationally organised but fragmented in local markets. Trafficking in women used to be a major activity for Bulgarian organised crime and very often associated with violence. This is still the case, but on a smaller scale. There has been a dramatic reduction in contraband illicit cigarettes, which was also one of the main organised crime group activities. Growing areas of concern on the other hand include trafficking in cultural artefacts, cybercrime, as well as tax fraud where more complex schemes have developed since accession to the EU. There are continued signs of collusion between organised crime and magistrates, law enforcement officials and politicians, including at local level. (Source: Meetings with Bulgarian law enforcement authorities, December 2016.)

<sup>228</sup> Incidents noted in recent reports include a shooting of a witness in a high-level organised crime case in 2014 and a grenade fired on an armoured vehicle in central Sofia in 2015. In June 2016 a large scale shooting incident involving two competing local gangs momentarily broke the holiday atmosphere at a popular vacation spot on the Bulgarian Black Sea coast.

<sup>229</sup> GDBOB reports that the number of murders and kidnappings has diminished in recent years. Kidnappings remained a major issue in the first years after accession to the EU.

<sup>230</sup> Most of the emblematic cases followed under the CVM did not come to a successful conclusion, with final enforced convictions. Some of the most notorious crime bosses have absconded, probably abroad. Some have suffered a violent death. Others have reinvested their assets in the legitimate economy. In any case, they have effectively evaded any legal consequences.

<sup>231</sup> The traditional gangs still exist, but are more local in character, according to Bulgarian law enforcement authorities.

<sup>232</sup> Indeed, the changes described are in line with tendencies identified internationally, away from hierarchically organised criminal gangs and towards looser networks. This trend is often associated with the development of the "crime as a service" model and enabled by new technologies and the internet.

As mentioned, at the time when Bulgaria joined the EU, its law enforcement institutions appeared incapable of tackling the organised crime challenge which had emerged in the 1990s following the transition. Since then there have been a number of institutional developments. The most important institutions for the fight against organised crime are the specialised directorate (GDBOB) within the Ministry of Interior<sup>233</sup> and the Specialised Court and Prosecutor's Office for organised crime established in 2012. The third institution with a direct bearing on organised crime investigations is the Commission for Illegal Asset Forfeiture (CIAF).

The Specialised Court and Prosecutor's Office for organised crime were established in 2012 in the context of a broader reform of the criminal procedure code.<sup>234</sup> The original idea was to create specialised institutions to handle high-level cases of serious organised crime and corruption. The final outcome of the legislative process was a more limited model covering organised crime<sup>235</sup>, and some other specific types of cases, such as offences involving officials at the Ministry of Interior or security firms.<sup>236</sup> The specialised court and prosecution provided a possibility for a stronger approach to organised crime, not least due to the fact that the new institutions' mandate covered the entire country, which was key in a situation where local law enforcement and judicial institutions were seen as vulnerable to pressure from organised criminal groups.

The new specialised institutions needed some time to become established. During the first years, their work was hampered by a lack of capacity<sup>237</sup> as well as a high number of relatively minor cases being referred to them, due to what turned out to be a rather broad interpretation of their jurisdiction.<sup>238</sup> Other transitional issues also led to delays during the first years.<sup>239</sup> These various issues were gradually cleared away through legislative or organisational action. For example, legislative amendments to the criminal procedure code in 2015 reduced somewhat the scope of the court's jurisdiction by repealing some specific types of offences from its remit, in order to allow it to better focus on more significant organised crime cases, and a specialised tax crimes unit was set up within the Specialised Prosecutor's Office to enhance its capacity in this type of cases.<sup>240</sup>

The Bulgarian authorities report that the recent years have seen a gradual improvement in the track record in terms of bringing serious organised crime cases to finalisation in court, in several cases resulting in significant prison sentences for crimes such as drug dealing. It should be noted, however, that a significant number of cases also continue to be finalised through plea bargaining agreements, which results in rather less severe sentences.<sup>241</sup> Such agreements are essentially pursued because they

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<sup>233</sup> This service has existed for many years but has been reorganised many times.

<sup>234</sup> See also chapter 3 above.

<sup>235</sup> SWD(2012) 232, p. 32.

<sup>236</sup> The latter reflected the peculiar situation in Bulgaria where, as a result of the legacy of very strong security services under communism combined with the way reforms were undertaken in the early 1990s, links continued to exist between organised crime and elements within the police and private security agencies.

<sup>237</sup> The new institutions were not initially seen as very attractive workplaces. Apart from the complex and arguably dangerous subject matters they were to deal with, some observers have pointed out that the challenge of recruiting experienced staff was also compounded by a political environment where the opposition had cast them as a pet project of the government in power at the time, creating uncertainty about long-term continuity.

<sup>238</sup> The penal code defines an organised criminal group as "the permanent structured association of three or more individuals intended for the agreed perpetration ... of a crime punishable by imprisonment of more than three years" (Article 93). The substantive provisions on organised crime also refer to "anyone who agrees with one or more individuals to commit" such crimes (Article 321). In practice, the jurisdiction of the court turned out to cover many relatively minor cases.

<sup>239</sup> For example when ongoing organised crime cases were referred back to lower courts or to the prosecutor's office, this created uncertainty as to which court or prosecutor's office should handle the follow-up. An interpretative ruling of the Supreme Court of Cassation was necessary to clarify which courts were competent, which led to the reassignment of a number of cases.

<sup>240</sup> SWD(2016) 15, p. 26-27.

<sup>241</sup> Many cases end up in suspended sentences. *Op cit*, p 24 and p. 27.

can ensure a swift conclusion of the case with a final sentence, something which is otherwise difficult to achieve in the Bulgarian system. Nevertheless, the Prosecutor's office has argued that the provisions can be too lenient and could in some cases allow serious offenders to obtain relatively minor sentences.<sup>242</sup>

In spite of the advances made by the Specialised Court and Prosecutor's Office over the recent years, Bulgaria still faces challenges in ensuring that these institutions reach their full potential. In December 2016 the Supreme Court of Cassation published an analysis made by four working groups of judges from the court on the work of the two instances of the Specialised Court on organised crime for the period 2012-2015.<sup>243</sup> The report concludes that the competences given by the legislator are 'non-precise and arbitrary' and that the specialised structures were created without a vision for the type of specialisation and the subject of its competency.<sup>244</sup> Consequently, the court is effectively not functioning as the specialised structure to fight organised crime it was meant to be. Because of the legal vagueness, the court is overloaded with penal cases of a private character in the pre-trial phase, of which only a small part lead to fully-fledged penal cases. Only around 10 percent of the cases processed by the court concern penal cases against organised criminal groups, according to the analysis. The analysis also notes excessive formalism at the appeal level. Furthermore, the report finds that the court and its magistrates have a relatively low workload<sup>245</sup> and that a relatively high number of terminated cases and cases that are returned for further investigation raise questions about the efficient functioning of the court. Workload is unevenly distributed amongst the judges. As for the track record during the first four years of its existence (2012-2015), the analysis shows that the Specialised Court has processed 636 organised crime cases in total, of which 19 per cent have resulted in a conviction and 31 per cent have been concluded through plea-bargaining. Approximately half of the cases have been terminated for one reason or another. Overall, the analysis shows that challenges still exist in respect of the effective functioning of the Specialised Court, although the conclusions should also be seen in the context of a four year period. It should be noted that past CVM reports have noted that the specialised structures appeared charged with a heavy caseload, in particular the Specialised Prosecutor's Office.<sup>246</sup>

If the Specialised Court and Prosecutor's Office have needed time to settle in their roles and begin to produce results, in other cases, political decisions have hampered the effective functioning of long-established institutions. One example of this was the decision in 2013 to transfer the functions of the organised crime directorate (GDBOB) from the Ministry of Interior to the State Agency for National Security (SANS), which led to several months of disruption in the investigation of organised crime.<sup>247</sup> The new entity was a hybrid between a criminal law enforcement authority and an intelligence agency,

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<sup>242</sup> Article 58a of the criminal code specifies a mandatory 1/3 reduction of the sentence under the plea bargaining procedure (based on the charges to which the defendant has confessed), which can be regarded as unjustified in some cases where serious offenders have not helped in the investigation but merely confessed to (parts of) the charges. On this background, the Prosecutor's Office has proposed that the degree of leniency could instead be adapted to each case by the court. See annual report of the prosecutor's office for 2015, p. 17 (English translation).

<sup>243</sup> The report is available online: [http://www.vks.bg/Docs/analiz\\_spec\\_sud\\_2012-2015.pdf](http://www.vks.bg/Docs/analiz_spec_sud_2012-2015.pdf)

<sup>244</sup> P. 81

<sup>245</sup> Here it should be noted that in a meeting with the Commission the leadership of the court said it disagreed with some of the findings of the analysis regarding low workload in the court, which they did not find took adequate account of the high level of complexity of the cases concerned, and it had sent comments to the Supreme Court of Cassation.

<sup>246</sup> SWD(2014) 36, p. 28. As mentioned above, legislative amendments in 2015 have partly addressed this issue. On the other hand, possible plans to transfer complex high-level corruption cases to the Specialised Prosecution and Court could further add to the demands placed on these structures. It is notable that the SRSS-supported technical assistance project referred to in chapter 4 above also comes to the conclusion that the Specialised Prosecutor's Office is overburdened and need additional resources (see above).

<sup>247</sup> Moreover, as also mentioned in chapter 5 above, the new strengthened SANS was from the beginning tainted by the decision of the then government to appoint a controversial member of parliament as its director, a decision which was quickly reversed amidst massive public protests in the streets of Sofia.

with functions both in terms of covert intelligence operations and in formal criminal investigations under the criminal procedure code.<sup>248</sup> This double character, together with the purely practical challenges linked to changes in personnel and files, led to concerns over international cooperation and the effectiveness of criminal investigations.<sup>249</sup> Eventually, under a new government in 2015, it was decided to move the functions back to the Ministry of Interior. This time care was taken to avoid excessive disruption, by moving the files with the personnel into the new organisation. Nevertheless, the transfers of GDBOB to SANS and back had a negative impact in the short term on the investigation of organised crime cases.<sup>250</sup> GDBOB also came out of the changes as a greatly diminished structure, having lost a large part of its personnel.<sup>251</sup> Furthermore, in 2015 the GDBOB faced a number of challenges linked to the delimitation of its competences relative to other police departments as set out in the Ministry of Interior Act.<sup>252</sup>

The Commission for Illegal Asset Forfeiture (CIAF) constitutes the third core element in the system to fight organised crime in Bulgaria. The current organisation was formally set up in 2012 but was based on a pre-existing institution, established several years before Bulgaria's EU accession. The new legal framework that entered into force in 2012 was notable for the introduction of a procedure for non-conviction based confiscation of illicit assets. The law was controversial at the time of its adoption in the National Assembly, and the eventual outcome included several last-minute changes compared to the original draft.<sup>253</sup> Some of the changes have been recognised early on as producing challenges for the effective functioning of the seizure and confiscation of illegal assets.<sup>254</sup> This was the case for example with the monetary threshold for the initiation of proceedings, which is very high for Bulgarian standards.<sup>255</sup> Others have more recently been identified, such as the changes which were introduced in regard to the basis for launching proceedings: where the original draft was clear that proceedings could be launched independently of any criminal procedure, the final outcome included a more complex formula according to which the launch of proceedings was in some cases linked to the launch of a criminal procedure. This led courts in some instances to conclude that if the original criminal charges upon which the proceedings were based were to be dropped, this would also lead to the suspension of the confiscation proceedings.<sup>256</sup> In 2015 the CIAF produced a set of concrete

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<sup>248</sup> The new SANS had access both to covert means of intelligence gathering and staff with criminal investigatory powers.

<sup>249</sup> A possible advantage on the other hand was to shorten the lines of communication between criminal intelligence and law enforcement activities, now situated within one and the same agency.

<sup>250</sup> According to data received from GDBOB, the number of pre-trial investigations under Article 321 of the penal code (organised crime) fell from 44 in 2012 to 16 in 2013 after which it increased to 29 in 2014 and further to 63 in 2015. However, the figures should be interpreted with caution. Towards the end of 2015 the Prosecutor's Office complained that most of the cases it received related to low-level criminal activities. This has reportedly improved in 2016 where there has also been a further significant increase in the number of pre-trial proceedings (124 until November). Source: Meeting with GDBOB in December 2016.

<sup>251</sup> Also, the change brought out some of the advantages that had come with the merger with SANS, chief among them the higher salaries that went with belonging to the national security agency. The Ministry of Interior reported concerns over staff turnover and lower motivation after the change.

<sup>252</sup> SWD(2016) 15, p. 29. These challenges were addressed through legislative changes in 2016, see below.

<sup>253</sup> The original draft had been developed in line with recommendations of GRECO.

<sup>254</sup> SWD(2012) 232, p. 34-35.

<sup>255</sup> CIAF shall launch proceedings where a reasonable presumption exists that assets have been acquired unlawfully, which is the case when there is a lack of correspondence between the assets and the net income of a person over the period under examination of more than BGN 250,000 (Article 22 in conjunction with supplementary provision §1(7) of the law on illegal asset forfeiture). (BGN 1.0 equals EUR 0.5).

<sup>256</sup> CIAF has challenged this interpretation in a case which is currently before the Supreme Court of Cassation for an interpretative ruling, and appears to be confident that it will be successful. However, should it lose this case, there would be serious consequences in a number of similar cases, which reportedly make up about 20 per cent of all cases under the CIAF. These are currently awaiting the ruling of the Supreme Court.

legislative amendments which would provide it with a more effective legal framework under which to perform its functions, which it presented for the consideration of the National Assembly.<sup>257</sup>

## **7.2. Developments since the last CVM report of January 2016**

The January 2016 CVM report recommended Bulgaria to monitor the progress of criminal cases involving serious organised crime, to address the legal problems identified in regard to the competence and functioning of the organised crime directorate within the Ministry of Interior while providing the directorate with organisational stability to carry out its work, and amend the law on asset forfeiture to allow the asset forfeiture commission to work effectively.

### *Progress on track record*

As stated above, Bulgaria is beginning to build a track record with regard to organised crime. The number of cases delivered by the main organised crime agencies (GDBOB/SANS) saw a dip following the reform in 2013 but this negative impact has recently been reversed and replaced by a more positive trend. Data from the Prosecutor's Office show a steady increase in the number of newly initiated pre-trial proceedings on organised crime, a trend which has however not yet resulted in a similar increase in the number of convictions.<sup>258</sup> As noted above though, a large number of cases at the Specialised Court are settled through plea-bargaining, which is not reflected in these figures. In addition, the simple numbers are not necessarily representative in terms of the seriousness of the offences concerned or the finality of sentences.<sup>259</sup> Overall, the picture that emerges is that there is now a number of final convictions also leading to long prison sentences, and more cases appear to be in the pipeline, many of which concern serious offences.<sup>260</sup> At the same time, there have also been some surprising failures.<sup>261</sup> In terms of operational work, as noted above, GDBOB continues to make progress in increasing the number of investigations into organised crime. The directorate appears to be improving its capacity for analysis as well as operational work. Cooperation with other Member States and within Europol in fighting organised crime groups for example engaged in drugs and cigarette smuggling is also considered satisfactory.

When it comes to confiscation of illicit assets, CIAF has continued reporting significant successes in the seizure and confiscation of assets.<sup>262</sup> While on the surface, this would appear to counter concerns that the new legal framework would weaken the effectiveness of CIAF, it is however important to note the temporary dip in the amounts confiscated in 2015, as well as the fact that a large amount in 2016 is linked to a single case. In addition, some uncertainty remains as to the outcome of the pending

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<sup>257</sup> SWD(2016) 15, p. 31.

<sup>258</sup> The number of newly initiated pre-trial investigations has been rising gradually from 40 in the first half of 2014 to 89 in the first half of 2016, whereas the number of convictions fell from 74 in the first half of 2014 to 23 in the second half of 2015 before increasing again to 44 in the first half of 2016. Over the same period there has been a gradual decline in indictments being filed in court as well as what appears to be a temporary spike both in the number of cases returned by the court and in the number of acquittals in the second half of 2015. (Source: Bulgarian Prosecutor's office, December 2016.)

<sup>259</sup> Just as corruption cases, organised crime cases have in the past been prone to reversals in appeal.

<sup>260</sup> Information provided by the Bulgarian prosecutor's office.

<sup>261</sup> For example a recent much publicised case involving 11 police officers arrested in 2011 for having run an organised extortion scheme on a highway, taking bribes in return for not fining drivers, in which the defendants were acquitted at the Specialised Court in November 2016. The prosecution considered this to be a solid case.

<sup>262</sup> Total amounts confiscated rose steadily from BGN 7.5 million in 2010, over 9.4 million in 2011 and 12.4 million in 2012, to 13 million in both 2013 and 2014. In 2015 the amounts fell to around BGN 6.4 million, but in 2016 the figure is likely to reach around 20 million. The latter is partly related to one single major case where the CIAF has filed claims for the forfeiture of a record BGN 2.2 billion. Source: Information provided by CIAF. (One BGN is equal to 0.5 euro.)

interpretative ruling of the Supreme Court of Cassation regarding cases where the criminal case used as the basis for initiation of proceedings is dropped.<sup>263</sup>

### *Institutional developments*

In October 2016 legislative amendments were adopted to the Ministry of Interior law to address a number of challenges identified in 2015 in connection to the legal framework, notably by clarifying the competences of GDBOB in relation to corruption, cybercrime and migrant smuggling, in line with the recommendations of the 2016 CVM report. On a more organisational level, the reduction in staff numbers and lack of equipment remain important challenges for GDBOB. However, the Ministry has had some success with project funding for training, equipment and vehicles.<sup>264</sup> Also, additional staff has recently been assigned both at headquarters and in regional units along the borders. In regard to combatting contraband, a specialised centre has been established to strengthen cooperation with Turkey and Greece.

Draft amendments to the law on asset forfeiture have been submitted to the National Assembly where they have completed the second reading process in the legal affairs committee and are now awaiting the plenary vote. The draft changes would significantly improve the work of CIAF, reducing the threshold for investigations from BGN 250,000 to BGN 150,000 and introducing a *de minimis* threshold which would reduce the number of small cases reported by the Prosecutor's Office, the initial verification of which is currently drawing scarce resources away from more important cases. The draft amendments would also endow CIAF with competence to take evidence from private individuals, allowing it to work independently of the prosecutor's office.<sup>265</sup> CIAF reports that it has well-functioning cooperation agreements with all counterparts which leave almost no gaps in terms of access to necessary information.<sup>266</sup> The draft amendments will furthermore allow it to use information received from the tax authorities directly as evidence in its investigations. Finally, the draft provides for 30 per cent of revenues from confiscated assets to be allocated to social purposes. Due to the changes in the parliamentary situation at the end of 2016 the final outcome with regard to these draft amendments remains uncertain.

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<sup>263</sup> Proceedings are still ongoing.

<sup>264</sup> The projects are supposed to address needs such as cars for operative work, equipment to analyse data from mobile phones, as well as IT and communications equipment, and amount to several million euro.

<sup>265</sup> Currently it relies on joint teams for such interrogations, but the new law would allow more independence for CIAF. The draft amendments will however stop short of granting it more intrusive investigatory powers such as search and seizure.

<sup>266</sup> One of the more recent developments will be the setting up of a centralised register of bank accounts at the Bulgarian National Bank to which CIAF will have direct access, which is expected to greatly facilitate the process of gaining access to bank account data in connection with investigations.