

Nine years after the Strasbourg Court's *Kolevi* judgment, still no progress with guaranteeing independence of investigations against the Chief Prosecutor in Bulgaria

What does the Strasbourg Court say in its *Kolevi* judgment?

On 28 December 2002, Mr Nikolay Kolev, a high-ranking prosecutor, was shot dead in front of his home in Sofia. This happened after Mr Kolev had repeatedly expressed fears about his life and safety because of a serious conflict between him and the Chief Prosecutor, following Mr Kolev's criticism of the Chief Prosecutor's authoritarian style.

Despite the allegations of the possible involvement of the Chief Prosecutor in the killing and evidence that he might have approved a series of unlawful acts against Mr Kolev (unlawful arrest, dismissal, bringing of unfounded charges), the investigation remained under the control of the Chief Prosecutor and his office. The assailants were never identified. The European Court of Human Rights [found](#) that the investigations were not sufficiently effective and independent.

What does the Strasbourg Court require in terms of independence of investigations against the Chief Prosecutor?

For an investigation against the Chief Prosecutor to meet the requirements of the Strasbourg Court's case-law, the persons conducting and supervising it should enjoy institutional, hierarchical and practical (including personal) independence from the Chief Prosecutor¹. These requirements apply from the early stages of the investigation, including the preliminary inquiry².

Where does Bulgaria stand with the implementation of the *Kolevi* judgment?

The implementation of the *Kolevi* judgment is supervised by representatives of all the 47 governments of the member states of the Council of Europe, including Bulgaria ("the Committee of Ministers"). The Committee of Ministers is advised by the experts working in the Council of Europe's Department for the Execution of Judgments of the European Court of Human Rights.

In its most recent [analysis](#), the Department identified a number of problems and arrangements in the current system which, taken together, could compromise the independence of an investigation against the Chief Prosecutor:

(i) the fact that only the prosecution service can decide whether to bring a prosecution;

(ii) the fact that the Chief Prosecutor and his/her deputies can annul any decision taken by another prosecutor which has not been reviewed by a judge;

(iii) the lack of any possibility for victims to challenge in court a decision by the prosecution not to start an investigation or bring charges;

(iv) the impossibility to suspend the Chief Prosecutor from office;

(v) the potential for the Chief Prosecutor to influence the Supreme Judicial Council ("SJC") and its Prosecutorial Chamber, which have competence to take decisions concerning the career of prosecutors and the appointment of senior prosecutors (who could be involved in an investigation against the Chief Prosecutor) and the dismissal of a Chief Prosecutor .

¹ See *Kolevi v. Bulgaria*, no. 1108/02, § 193, 5 November 2009, with further references.

² See *mutatis mutandis Boris Kostadinov v. Bulgaria*, no. 61701/11, § 61, 21 January 2016, as well as *Ramsahai and Others v. the Netherlands* ([GC], no. [52391/99](#), §§ 324-25 and §§ 335-341, ECHR 2007-II).

In its [latest decision](#) on the execution of the judgment adopted in March 2019³, the Committee of Ministers noted with concern that, nine years after the *Kolevi* judgment, there was still no progress with the preparation of measures to guarantee the independence of investigations against the Chief Prosecutor, including the independence of the authorities responsible for each stage of the investigation. It urged the Bulgarian government to provide concrete and comprehensive proposals on this before 1 October 2019.

The Committee did not ask for reform of the procedure for dismissal (or investigation) of the presidents of the highest Bulgarian courts, as such measures are not required by the *Kolevi* judgment.

What did the Venice Commission say on the dismissal procedures concerning a Chief Prosecutor?

The European Commission for Democracy through Law (“Venice Commission”) is the Council of Europe’s advisory body on constitutional matters.

In October 2017 it adopted an [opinion](#) focusing on the balance between independence and accountability of the Bulgarian judicial system.

The Venice Commission found that the Chief Prosecutor was “essentially immune from criminal prosecution”, taking into account also the current institutional arrangements which allow him or her to exercise influence over the SJC.⁴

The Venice Commission also referred to other issues outside the scope of the *Kolevi* judgment, such as certain lack of clarity of the procedure for the dismissal of the Chief Prosecutor for a non-criminal breach of duty or unethical behaviour.⁵ Apparently, the same procedure applies in respect of the two top judges in Bulgaria. However, the Venice Commission underlined that while the procedures of voting in the SJC and investigation of a non-criminal breach of duty related to the Chief Prosecutor should be reformed, it is not necessary to ease the procedures related to the dismissal of the two chief judges⁶.

What does the European Union monitoring exercise say about the Kolevi judgment?

The European Commission has also referred to the *Kolevi* case in its Cooperation and Verification Mechanism monitoring exercise concerning Bulgaria. The relevant reports clearly acknowledge that the Strasbourg Court’s judgment concerns only the lack of independence of investigations against the Chief Prosecutor, and that the broadening of the scope of the reforms to also cover the top two judges is an initiative of the Bulgarian authorities, not required by the Strasbourg Court⁷.

³ In the same decision, the Committee invited Bulgaria to strengthen the guarantees for opening the pre-trial investigation and to adopt amendments allowing the Judicial Chamber of the Supreme Judicial Council to assess the soundness of a Chief Prosecutor’s request for suspension of a judge charged with an intentional criminal offence.

⁴ See “Opinion on the Judicial System Act” of Bulgaria, CDL-AD(2017)018, adopted by the Venice Commission during its 1112th plenary session, 6 and 7 October 2017, § 37 and footnote 28.

⁵ *Idem*, § 36 and footnote 27. The lack of clarity concerned: the body competent to trigger the procedure and collect evidence; the participation in the vote of members of the Supreme Judicial Council who initiated the procedure, etc. This ground for dismissal concerning a non-criminal breach of duty is foreseen in Article 129 § 3 p. 5 of the Bulgarian Constitution.

⁶ *Idem*, §§ 38 – 40.

⁷ See the 2018 Progress Report on Bulgaria under the EU CVM Mechanism, footnote 19. See also the 2018 Technical Report on Bulgaria under the EU CVM Mechanism, page 9 *in fine* and footnote 44.