



REPUBLIC OF SLOVENIA
PRIME MINISTER

STATE PROSECUTOR'S COUNCIL

Tamara Gregorčič, President of the State Prosecutor's Council
Trg OF 13
1000 Ljubljana

Number: 701-3/2020/4

Date: 7 July 2020

Dear President and Members of the State Prosecutor's Council,

Together with the representatives of other branches, I became acquainted with your position Dts 157/2020 of 2 July 2020 regarding my letter no. 701-3/2020 of 19 June 2020, in which I asked the State Prosecutor General, Mr Drago Šketa, to take action in accordance with his powers relating to the suspicion of committing criminal offences of Public Incitement to Hatred, Violence or Intolerance as per Article 297 of the Criminal Code (KZ-1), Incitement to Violent Change of the Constitutional Order as per Article 359 of the KZ-1, Violence Against the Highest Representatives of the State as per Article 353 of the KZ-1 and Attack on an Official Exercising Security Tasks as per Article 300 of the KZ-1.

As the Prime Minister, I was informed about the commitment of the relevant criminal offences for which the perpetrator is prosecuted *ex officio* and I was obliged to report these criminal offences and provide evidence known to me (paragraph one and two of Article 145 of the Criminal Procedure Act (ZKP)). I am thus surprised by the fact that the State Prosecutor General merely referred the evidence, in the form of links to websites which I assessed contained publications of evident violations of the Constitution and the law by known perpetrators, to be resolved by the competent state prosecutor's office. With regard to my reporting the commitment of the criminal offence of public incitement to hatred as per Article 297 of the KZ-1, he failed to act in accordance with all his legal powers.

Specifically, as the State Prosecutor General, he is competent to convene expanded boards of the Supreme State Prosecutor's Office (paragraph four of Article 63 of the State Prosecutor's Order) where he can propose the adoption of principled legal opinions (indent one of paragraph three of Article 133 of the State Prosecution Service Act (ZDT-1) in relation to paragraph one of Article 63 of the State Prosecutor's Order) regarding issues important for a uniform application of law. He is furthermore responsible for the adoption of amendments in the prosecution policy (paragraph one of Article 145 of the ZDT-1) wherein, among other things, framework guidelines for dismissing criminal complaints (paragraph two of Article 145 of the ZDT-1) are defined while observing the development and changes to case law (paragraph three of Article 145 of the ZDT-1).

In connection with the criminal offence of public incitement to hatred, violence or intolerance, the State Prosecutor General should know that the existing principled legal opinion no. Ktr 2/13-6/HJ-TL/vg of 27 February 2013 on the prosecution of the criminal offence of Public

Incitement to Hatred, Violence or Intolerance as per Article 297 of the KZ-1 is based on obsolete case law of higher courts in the section referring to the elements of a criminal offence, and in the section referring to the injured party's situation, it is based on the annulled criminal offence of Inciting Hatred, Strife or Intolerance Based on Violation of the Principle of Equality as per Article 300 of the Penal Code (KZ).

Referencing the principled legal opinion from the obsolete case law involved, namely judgment no. I Ips 65803/2012 of 4 July 2019, by means of which the Supreme Court amended the current case law of higher courts according to which a criminal offence was only considered an offence which, relating to concrete circumstances, endangered or disturbed the peace or public order. Thus, according to the previous opinion of higher courts, concrete endangerment had to occur which poses an immediate danger, interference with the physical or mental integrity of individuals, hindrance of the exercise of rights or duties of people, state authorities, authorities of self-governing local communities and holders of public authority in public places. If the offence involved threats, abusive language or insults, the higher courts believed that such a form of offence had already involved concrete endangerment or disturbances to peace and public order that could only be prevented by suitable external intervention. The Supreme Court ruled that the described opinion was incorrect since the incitement and spreading of hatred, violence or intolerance based on a certain personal circumstance of an individual denotes a realisation of legal elements of this criminal offence already according to the manner of its execution. Assuming that the provision is intended to prevent discrimination against underprivileged, vulnerable social groups which is particularly based on prejudice, the Supreme Court explained that the use of threats, abusive language or insults is as per its intensity equal to the legal element of potential threat to peace and public order if these are expressed publicly to promote or incite hatred, violence or intolerance. In this section, the legislative text must be interpreted in such a way that the two additional conditions are set alternatively and not cumulatively.

The principled legal opinion regarding the annulled criminal offence as per Article 300 of the KZ pertains to the concrete opinion derived from the judgment of the Supreme Court of the Republic of Slovenia, ref. no. I Ips 359/2005 of 13 April 2006, stating that "an individual as a member of a certain community cannot be considered an injured party since their personality rights were not violated with the criminal offence when hate speech was directed towards the entire community and not specifically against that individual." The principled legal opinion states that "there is also no reason for this opinion not to apply after the adoption of the KZ-1 and the KZ-1B", whereby it fails to clarify the key difference between Article 300 of the KZ, in which society as a whole is considered an injured party, and Article 297 of the KZ-1, in which a specific direct subject (subject of the offence against whom the criminal offence is executed) is defined as a group of persons or an individual as part of the group based on a certain personal circumstance (including political or other belief), which is the target of hatred, violence or intolerance. The opinion of Supreme State Prosecutor Hinko Jenull, who, at the 34th emergency session of the Committee on the Interior, Public Administration and Local Self-Government chaired by the current Minister of Justice mag. Lilijana Kozlovič on 16 February 2016, stated that the expert positions adopted in 2013, which were based on the previously applicable KZ, also comply with the current conditions and needs, is pointing to the fact that the state prosecution professionals (still) fail to recognise the obvious difference between the criminal offence as per Article 300 of the KZ and the criminal offence as per Article 297 of the KZ-1.

As per the foregoing, I expected that the State Prosecutor General would at my request examine and draft a new principled legal opinion relating to the prosecution of the criminal offence as per Article 297 of the KZ-1, which would be harmonised with the case law of the Supreme Court and the currently applicable KZ-1, and convene an expanded board of the Supreme State Prosecutor's Office to discuss the proposal of a new legal opinion. Since members of the expanded board of the Supreme State Prosecutor's Office are also heads of

district state prosecutor's offices (paragraph one of Article 133 of the ZDT-1) who must in addition to the State Prosecutor General examine the need to issue general instructions (paragraph four of Article 133 of the ZDT-1) on the basis of the adopted principled opinions or legal opinions, I expected that he would inform the head of the District State Prosecutor's Office in Ljubljana of the case law of the Supreme Court and the new KZ-1, which according to press releases had still not adjusted its proceedings to the latest criminal legislation and case law.

When the State Prosecutor General decided to seek help from the State Prosecutor's Council despite the described legal powers, I thought that was because you would submit to him for consideration your proposal for amending the prosecution policy with regard to the discrepancies described above and not because of safeguarding autonomy when implementing the public prosecution service (paragraph two of Article 18 of the ZDT-1).

Since you referred to the judgment of the Constitutional Court no. U-I-42/12 of 7 February 2013 in your opinion, I expected again that you would explain to the State Prosecutor General the scope of the principle of functional autonomy of state prosecutors relating to filing and presenting criminal charges as per paragraph one of Article 135 of the Constitution. As stated by the Constitutional Court, it would be non-compliant with paragraph one of Article 135 of the Constitution only if "unacceptable influence or inadmissible pressure is used over the state prosecutor to act in a certain way in an individual matter." Directly before the quoted sentence summarised in your opinion, the Constitutional Court stated that the principle of functional autonomy of state prosecutors "does not mean that a state prosecutor is not obliged to observe general instructions on the criminal prosecution policy formed by the competent authority in accordance with the legal regulation." or that "internal supervision of the state prosecutor's work would not be admissible in order to ensure uniformity of criminal prosecution, and professional regularity and efficiency of executing the state prosecution service."

Instead you added to the unfounded reference to the violation of the constitutional principle of autonomy an even less founded violation of the principle of independence of state prosecutors, which the Constitution "does not afford to state prosecutors to the extent afforded to judges regarding the constitutional content of this function." The Constitution specifically and explicitly highlights the independence of judges in Article 125 and ensures it in paragraph one of Article 23 as a crucial element of an individual's right to judicial protection. The state prosecutors' request for independence may only be justified on the basis of the principle of the separation of powers, but only in its relation to legislative and judicial branches since state prosecution falls within the framework of the executive branch of power. In relation to other authorities within the executive branch, the Constitutional Court assessed that it does not concern their independence, which would arise from the principle of the separation of powers, but their autonomy that has its constitutional foundation in paragraph one of Article 135 of the Constitution.

Regarding my statement that you will be directly responsible for every possible victim of organised death threats, I clarify in the conclusion that whoever, knowing of preparations to be undertaken for the commission of a criminal offence for which the punishment of more than three years' imprisonment is prescribed by statute, fails to inform the competent authorities thereof early enough for the committing of the offence in question to be prevented, and if the perpetration of such an offence is subsequently attempted or accomplished, shall be sentenced to imprisonment for not more than one year (paragraph one of Article 280 of the KZ-1). As per paragraph three of Article 280 of the KZ-1, the perpetrator's linear relative shall not be punished.

When conducting their state prosecution service, a state prosecutor shall act impartially, protect constitutionality and legality, the principles of the rule of law, human rights and

fundamental freedoms, and shall perform their state prosecution service lawfully, professionally correctly and in a timely manner, and protect its reputation (paragraph two and three of Article 7 of the ZDT-1). A disciplinary sanction shall be imposed on a state prosecutor who violates state prosecution obligations prescribed by law and the State Prosecutor's Order intentionally or out of negligence (paragraph one of Article 80 of the ZDT-1). Actions denoting a violation of the state prosecution obligation *inter alia* include failure or refusal to fulfil the state prosecution obligation for no lawful reason, and careless, late, unsuitable or negligent execution of the state prosecution service (point 2 and 3 of paragraph two of Article 80 of the ZDT-1). As per paragraph four of Article 92 of the ZDT-1, the request to commence a disciplinary procedure may also be issued by the State Prosecutor's Council and the Minister of Justice.

Relating to the described omissions of due conduct and while observing that the position of the Supreme State Prosecutor's Office "that no public call for the death of anyone" can be permitted under the laws regarding freedom of speech is emphasised on page 212 of the Joint report on the work of the state prosecution service in 2019 as the success of the Supreme State Prosecutor's Office, and that in its initial clarification, the prosecution policy particularly highlights priority discussion of the criminal offence of public incitement to hatred, violence and intolerance, I will leave it to you to assess professionally if the conduct of the State Prosecutor General, and especially the head of the Ljubljana prosecution service, was compliant with state prosecution obligations. Furthermore, I also inform you that, in supporting wrongful conduct, you will share the responsibility for all possible consequences of unsanctioned and realised public violence and death threats.

Yours sincerely,

Janez Janša
Prime Minister of the Republic of Slovenia

For the attention of:

- Mr Borut Pahor, President of the Republic of Slovenia
- Mr Igor Zorčič, President of the National Assembly of the Republic of Slovenia
- Mr Alojz Kovšca, President of the National Council of the Republic of Slovenia
- Dr Aleksandra Pivec, Deputy Prime Minister of the Government of the Republic of Slovenia
- Mr Zdravko Počivalšek, Deputy Prime Minister of the Government of the Republic of Slovenia
- mag. Matej Tonin, Deputy Prime Minister of the Government of the Republic of Slovenia
- mag. Lilijana Kozlovič, Minister of Justice
- Mr Aleš Hojs, resigning Minister of the Interior
- Mr Andrej Jurič, Director General of the Police
- Mr Drago Šketa, State Prosecutor General